

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

BETWEEN:

FERGUS

Applicant;

and

MARCAIL

Respondent.

McBRIDE J

Anonymisation

[1] This judgment has been anonymised. The names used are not the real names of any of the individuals. Nothing should be reported which would identify any of the parties to this applicant or the child the subject of these proceedings. In this judgment I refer to the applicant father as Fergus, the respondent mother as Marcail and the child the subject of these proceedings as Elliot. This is in line with the form of anonymisation used in previous judgments made in respect of these parties.

Applications

[2] There are two applications before the court:-

- (a) An application brought by the applicant seeking contact with his son Elliot.
- (b) An application by the respondent, seeking extension of the existing Residence Order made in respect of Elliot on 1 June 2010 until he is aged 18 years.

[3] The applicant father was a litigant in person. The respondent was represented by Ms Devlin BL. The Official Solicitor was appointed to act on behalf of Elliot and Ms Murphy appeared on behalf of the Official Solicitor.

Contact application

[4] The application in respect of contact commenced and the applicant gave evidence in support of his application. At the invitation of the court, the parties entered into negotiations and with the assistance of the Official Solicitor agreement was reached in respect of the application for contact. The terms of the Contact Order are set out at Schedule 1 of this judgment. The parties further agreed that the Contact Order should continue until Elliot attained his 18th birthday.

[5] I would like to commend the parties in reaching agreement in respect of contact. Such a course is always preferable to a court imposed solution. I believe that the agreement made between the parties builds the best foundation upon which Elliot and the respondent can rebuild their relationship.

[6] The parties however were unable to reach agreement with regard to the respondent's application to extend the existing Residence Order dated 1 June 2010 until Elliot attains his 18th birthday.

[7] The hearing in respect of this application proceeded on the basis of submissions by each of the parties.

Legal Framework

[8] Article 9(6) of the Children (Northern Ireland) Order 1995 provides:-

“No court shall make any Article 8 Order which is to have effect for a period which will end after the child has reached the age of 16 unless it is satisfied that the circumstances of the case are exceptional.”

Similarly Article 9(7) of the 1995 Order provides:-

“No court shall make any Article 8 Order, other than one varying or discharging such an Order, with respect to a child who has reached the age of 16 unless it is satisfied that the circumstances of the case are exceptional.”

[9] Article 3(1) provides:-

“Where a court determines any question with respect to:-

(a) The upbringing of a child ...

The child's welfare shall be the court's paramount consideration.”

[10] Article 3 (4) provides that when a court is considering whether to make, vary or discharge an Article 8 Order and this is opposed by any party to the proceedings, the court shall have regard to the welfare checklist as set out in Article 3(3).

[11] Article 3(3) provides that the court shall have regard in particular to:-

- (a) The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) His physical, emotional and educational needs;
- (c) The likely effect on him of any changes in his circumstances;
- (d) His age, sex, background and any characteristics of his which the court considers relevant;
- (e) Any harm which he has suffered or is at risk of suffering;
- (f) How capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question to be relevant;
- (g) The range of powers available to the court under this order in the proceedings in question."

[12] Thus, before extending a Residence Order until a child attains his 18th birthday, the court must be satisfied the circumstances are "exceptional". If so the court must then consider whether it is in the child's best interests for the Residence Order to be so extended having regard to the welfare checklist.

Submissions by the Respondent Mother

[13] Ms Devlin submitted that this case was exceptional and the extension of the Residence Order would be in the child's best interests having regard to the welfare checklist. She submitted that the test of exceptionality and best interest was established on a number of grounds.

[14] She referred to the historical findings made by Stephens J in 2001 when he made the Residence Order in favour of the respondent mother and made a No Contact Order. In particular in a judgment given in respect of a fact-finding in care proceedings, neutral citation [2010] NI Fam 1 Stephens J held at paragraphs 25-27 as follows:-

"My assessment of Fergus is that he is a domineering individual both physically and mentally. Physically through his size and presence ... mentally through his

intelligence, his manipulation, his use of the pressure of uninterrupted speech ... I consider that Fergus' overriding objectives are to exclude Marcail from the lives of all three children and to have them in his sole care."

[15] Stephens J further found that Fergus had negatively influenced all three children against their mother and at paragraph 122 he found that he had "disrupted contacts" and used contacts between him and the children to undermine their placements.

[16] Ms Devlin submitted the case was exceptional as this was one of the clearest cases of parental alienation as evidenced by the findings made by Stephen's J about the father and in particular his ability to manipulate the children and undermine their placements and as evidenced by the making of a No Contact Order.

[17] Ms Devlin referred to a number of other grounds including:-

- (a) Elliot's wishes and feelings as expressed to the Official Solicitor and the Social Worker.
- (b) Elliot's inability to assert himself against his father's wishes and therefore his felt need for the protection of the Residence Order.
- (c) The effect on Elliot if his primary placement changed. Ms Devlin submitted that if the Residence Order ended when Elliot was 16 there was a significant risk that he would suffer physical and emotional harm and his educational needs would be adversely affected because of the manipulation the father may exhibit and the risk of the placement being undermined.
- (d) Concern that the father may abduct Elliot and take him out of the jurisdiction.

Submissions by the Applicant Father

[18] Fergus submitted that this case was not exceptional. He indicated that this court should disregard the findings of Stephens J as Stephens J had later ordered that his two daughters should live with him and therefore must have altered his initial views about him. He further submitted that given Elliot's age and physical size and the absence of contact for a period of 8 years, he had no ability to exercise undue influence over Elliot.

[19] Fergus denied that he could remove Elliot against his wishes from the jurisdiction given Elliot's age and physical size.

[20] He further submitted that the making of a Residence Order until Elliot was aged 18 was not in his best interest as the respondent mother could use the existence of the Residence Order to remove Elliot from the jurisdiction. He further denied that Elliot wanted a Residence Order in place until he was 18 years old and disputed that Elliot had informed the Official Solicitor that he wanted the Residence Order to be so extended.

[21] In addition Fergus submitted that it was unnecessary to extend the order as Elliot had informed the Social Worker and Official Solicitor that he intended to remain living with his mother in any event.

Submissions on Behalf of the Official Solicitor

[22] Ms Murphy on behalf of the Official Solicitor submitted that Elliot was aware of the family circumstances and in particular the fractured relationships which existed. She submitted that he was a vulnerable young man who through the comments made to the Social Worker and Official Solicitor indicated that he required assurance that his primary residence would not change. She further referred to his wishes and feelings as set out in the Official Solicitor's report and submitted that these should be given weight given his age and level of understanding and the fact that he had a sound basis for his expressed wishes and feelings. She further reminded the court that the Residence Order would contain the usual warning about the inability to remove a child subject to the order from the jurisdiction without the consent of the other party or leave of the court.

Consideration

[23] The Children (Northern Ireland) Order 1995 does not define the concept of "exceptional circumstances". I find that its ordinary meaning applies and therefore exceptional circumstances refer to a case which is unusual or deviates from the norm.

[24] I find that this is an exceptional case for a number of reasons. First, the contact order was made until Elliot attained his 18th birthday. Under Article 9(6) such an order can only be made if the circumstances of the case are "exceptional". The parties all agreed to the making of this order until Elliot's 18th birthday and therefore all must have agreed to this on the basis that this was an exceptional case. Elliot required such an order to be in place to regulate the contact and to afford him certain safeguards and protections. I therefore find that the exceptional hurdle was met in respect of the Contact Order. Contact and Residence in this case are closely interlinked and I therefore find exceptionality is established in respect of the making of the residence order for the same reasons as it was required for the contact order.

[25] Secondly, I find that this is a family case with a long history of fractured relationships. Elliot is aware of the background from his existing contact with family members. Without deciding whether I am bound by or accept the findings of

Stephens J in respect of Fergus, I find that the circumstances relating to the family were exceptional as demonstrated by the making of a No Contact Order. Further I find that Elliot's perception and strongly held belief is that his father is a forceful, assertive and domineering individual who has the capacity to undermine his placement with his mother. Elliot informed the Official Solicitor that he is conscious of his own limitations in asserting himself against the will of his father and he indicated that he would not be comfortable in challenging his father.

[26] The reports of the Official Solicitor and Social Worker all paint a picture of a vulnerable young man who feels "ill-equipped to deal with the stressed created by challenging his father". In this "David and Goliath" type scenario Elliot needs the protection of a Residence Order to address the power imbalance. With such an order in place Elliot has the security of knowing his primary placement will not change no matter what pressure is brought to bear upon him by his father.

[27] Elliot is now aged 15 years. He is described as an intelligent young man who gives reflective and well-reasoned responses. He told the Official Solicitor that he saw merit in the extension of the Residence Order and was mindful of the protection that would be afforded by extending the Order until he was an adult. This is in line with the theme which runs through the Social Worker and Official Solicitor's reports that the timeframe within which Elliot wishes to speak directly to his father is when he has finished his exams, left school and is an adult. It is therefore Elliot's clearly expressed wish to have the Residence Order extended until his 18th birthday.

[28] For all these reasons I find that this is an exceptional case.

Best Interests Test

[29] I further find that it is in Elliot's best interest to reside with his mother until he is 18 and that the Residence Order should be extended until he is 18 so that these living arrangements are settled. I find that this is necessary to create the security he needs to ensure his physical emotional and educational needs are met. I also find that it will establish the best foundation upon which he can build a future relationship with his father.

[30] In coming to this decision I have had regard to the welfare checklist. I note that Elliot is now aged 15. He is described as a bright and intuitive young man who is well-equipped to express his views. Elliot has made it clear to the Official Solicitor and the Social Worker that he wants the Residence Order extended until his 18th birthday and has expressed reasons for his view. In light of his age and level of understanding I give great weight to his wishes and feelings.

[31] If the Residence Order was to end when Elliot is aged 16 I find that it is highly likely he would be at risk of suffering emotional and physical harm and that his education would be adversely affected. This is because Elliot is a vulnerable young man who needs the stability and security that a Residence Order brings. If it was not

extended he would feel vulnerable and has indicated that he would be unable to cope with any pressure his father would place upon him. Elliott has already expressed to the professionals that he does not at this time feel well enough armed to deal with the pressures and challenges his father's behaviour might bring.

Conclusion

[32] I therefore find that this is an exceptional case and that an extension of the Residence Order until Elliot attains his 18th birthday is in his best interests, in light of his clearly expressed wishes and the risk of harm to him if there was a change in his present living arrangements.

[33] I make no order as to costs.

Schedule 1

[See Order attached].

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

Between:

FERGUS

Applicant

and

MARCAIL

Respondent

And in the matter of:

ELLIOTT (Child)

DRAFT ORDER

BY CONSENT:

1. The following indirect contact can take place between the father and the child:
 - a. E-mails from the father to the child once per week, to which the child is at liberty to respond if he so wishes. If the child responds and invites a response from his father, the father is at liberty to respond by further e-mail. To facilitate this an appropriate e-mail address for the child shall be provided to the father by the Solicitor on behalf of the mother on or before 8th March 2017;
 - b. The father is at liberty to provide appropriate gifts and cards to the child on his birthday and at Christmas, to which the child is at liberty to respond. Delivery of such gifts and cards shall be by way of postal services or through the child's sisters;
 - c. The father shall be provided with copies of school reports by the school;
 - d. The child is at liberty to notify his father of any awards or achievements in relation to academic, sporting or musical interests if he wishes;
 - e. The father is at liberty to include photographs of himself and information on his work and interests as he may choose in the e-mails referred to at paragraph (a);
 - f. The child is at liberty to provide photographs or video recordings of himself as and when he wishes.
2. The indirect contact shall be subject to the following conditions:
 - a. The father shall not discuss or address the following issues with the child: the financial settlement reached between the parties; the mother.

3. There shall be such other contact, whether indirect or direct, as the child may wish to initiate;
4. The father, shall not initiate, pursue or suggest direct contact with the child, whether himself or through any third party. Direct contact shall only take place should the child invite same.