

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 11/10/05

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
FAMILY DIVISION

H

Applicant;

and

C

Respondent.

McLAUGHLIN J

[1] In order to protect the welfare of the child who is the subject of these proceedings I have anonymised the identities of the parties and principal persons involved in the hearing. Accordingly, they shall be referred to as follows:

- E - the child who is the subject matter of the proceedings.
- H - her father.
- C - her mother.
- R - her father's partner.
- Ra - the child of her father's partner.
- D - her stepfather.

[2] The applicant and respondent to these proceedings are the parents of E and each seeks a Residence Order in his/her favour. It is important that I should emphasise at the very outset of my judgment that neither of these parties will win this case. As has been said repeatedly this is a court designed to protect and promote the welfare of children and is not about winners and losers: it is important that the parties both move away from that perception as soon as possible. Ultimately the person to benefit most from these proceedings should be E securing her physical and emotional development to the greatest degree possible resulting from my deciding where she should live on a day-to-day basis.

The applicants' backgrounds

[3] H and C met in New York City in 1991. He was born in Dublin and was working and living there on a semi-permanent basis. C comes from New England and resides in one of the states of that region. She was married to P and has three children by him. That marriage has broken down and she has since married D by whom she had her fifth child in 2003. E was her fourth child.

[4] H left New York in 2003 and since then has resided in Northern Ireland with his partner, and now fiancée, R. She has a 14 year old child (Ra). Although living in Northern Ireland he commutes to Dublin where he works on a part-time basis.

[5] After they had known each other for some time H and C happened to be in Europe at the same time, he in Dublin and she in England. They arranged to meet in Dublin and E was conceived at that time. They have never cohabited and their relationship was never a deep emotional one. E was born on 14 November 1998 and resided with C and her first three children (now aged 15, 11 and 8), in New England until she was sent to Northern Ireland to live with her father on 1 June 2003.

[6] It is common case that immediately following E's birth on 14 November 1998 C ensured there was extensive contact between father and daughter, limited of course by the fact of their being separate by a considerable distance in the United States. He attended the hospital on the day following her birth, having driven for about 10 hours to do so, and, in the period prior to her departure to Ireland in June 2003, he spent significant periods with her, the longest being in the summer of 2001 when they spent the entire summer in New York City together. By then he had met R and in 2002 H, R and Ra visited New England and stayed at C's home in order to enable contact to take place in the most natural surroundings available.

[7] Although the parties did not have a significant emotional relationship they maintained contact after the birth of E. In the course of their various meetings H disclosed that he intended to return to live in Northern Ireland with his new partner R. This led to discussions about the future of E and they increasingly came to discuss the possibility that she would move to Northern Ireland to live with H and be educated here. Both parties agree there was a desire that she might ultimately attend Trinity College Dublin, even though that must have seemed a distant prospect since E was little more than four and a half at that time. This led ultimately to an Agreement being drafted between them which I shall attach to this judgment as Schedule 1.

[8] The Agreement was drafted by R, who advised C to obtain independent legal advice before signing it. C did not obtain advice from a lawyer in ordinary practice but did consult one attached to a voluntary programme. I was witnessed by D on her behalf and by R on behalf of H. There was some considerable debate about the precise effect and interpretation of this agreement which resulted in E moving to Northern Ireland with her father. The timing was apparently of particular importance because she had to be resident in Northern Ireland by 1 June 2003 in order to qualify for enrolment at the local primary school for the September term. It appears that had she stayed in the United States she could not have commenced primary school until Autumn 2004 as she was born after the due date for enrolment there.

E's arrival in Northern Ireland

[9] When E left for Ireland the original understanding had been that she would live with H and R. In fact H returned to New York City in order to close down his business affairs and appears to have remained there for the summer months. This had the result that E, who had just been uprooted from her mother and half siblings, was living in a foreign country with someone who was not her parent or blood relation. That this was done without any apparent emotional chaos on the part of E is, I think, a considerable tribute to R, and possibly to the emotional security which had been built up through contacts during earlier periods in the United States.

[10] The early summer of 2003 appears also to have been the high point of the relationship between H and C. Once problems began to emerge later in the year, particularly from the Christmas period onwards, relationships have deteriorated and the proceedings before me have been characterised by a considerable degree of animosity and pettiness which has been very regrettable and unpleasant to witness.

[11] E enrolled in primary school in September and she settled rapidly, developed close friendships in school and with neighbouring children. She has glowing progress reports from her teachers and appears to be a contented and well brought up child. The only cloud on her horizon has been the existence of these proceedings of which she is well aware, and the fact that she has to live with the continuing tensions between her mother and father and uncertainty about where she is to live.

[12] The parties agreed that a contact visit should take place during the Christmas holidays of 2003 when E was due to return to New England but it did not take place. On 8 December C gave birth to her fifth child. I have no doubt this acted as a distraction from her focus on E and it may help explain in part why the expected one month visit did not occur. It is impossible for me now to analyse how or why it happened, but it is clear that H did not

make the necessary arrangements and explained that a visit would take place at some point after Boxing Day. What is of greater concern is that no telephone contact took place on either Christmas or Boxing Day and no exchange occurred until January 2004. Since school term had already started the visit was reduced to about 8-10 days, depending on whether travelling time is included.

[13] Matters started going significantly off plan when E returned to Ireland in mid January 2004. C appears not to have been in contact with her much in the days following her return and I am sure that R is correct when she says that E was missing her mother and that she spoke to C asking that she should phone more often. R's view was that a little contact often was better than infrequent protracted phone calls and in that respect she may well be correct. What is also clear is that around the time of this conversation C phoned E and during that conversation E broke down causing C to realise that their separation was much more significant than she had anticipated. It is important to remind oneself that during this period it was just 6-8 weeks after the birth C's of her fifth child and she had her own domestic responsibilities in New England looking after her other children. Whilst she said to me that she felt that she should not contact E too often after her return to Northern Ireland in order "to allow her to settle down again", I consider that other commitments contributed to this situation. I am also satisfied that following the conversation during which E broke down and cried that C began to think she had made a great mistake in allowing E to be parted from her and from that point onwards she grew increasingly of the opinion that she should arrange for her return. Unfortunately by that time H and R had formed significant bonds with E, I am sure that they began to sense C's regrets and that she wanted E to come home. They in turn became increasingly defensive and perhaps suspicious of C's actions.

[14] During the spring and early summer of 2004 thoughts turned to the anticipated visit of E to the United States for the summer. There is a very considerable amount of correspondence, and there was much debate, about the arrangements that did not come about for that visit. At the root of it is the fact that H was determined that E should not go to the United States until proper arrangements were in place for her return to Ireland. This focused on the simple expedient of booking a return travel ticket. There was much dancing around the issue by C, and many explanations were given as to why a return ticket was not booked. Ultimately H was able to establish that whereas a ticket had been booked on a one way basis for \$700, a return ticket was available for \$756. His suspicions, not unnaturally, became more acute. In the event E did not travel because C did not make any arrangement for flights that could have reassured H that their daughter would be returned to Northern Ireland at the end of the summer.

[15] Events took a more serious turn however in mid July 2004 when, without any prior warning, C, D, their newborn child and C's father arrived literally on the doorstep at the home of H and R. H was in Dublin working at the time and so R found herself in a very vulnerable position. She is firmly convinced that it was C's intention to take E across the border to Dublin with a view to getting her a passport at the U.S. Embassy and taking her home to America. Again C has various explanations why this happened. I believe she was becoming increasingly concerned about the fact that no contact arrangements had been made for the summer and this compounded her anxieties about the correctness of the decision which she had made to allow E to come to Northern Ireland. Nevertheless, to arrive unannounced with such a large group was wholly inappropriate and if her intentions have been misinterpreted then she can hardly fault H or R for having done so. Her clumsy actions, having caused such upset to R, led to H having to travel home immediately from Dublin and for the police to be asked to intervene. Fortunately C realised that it would have been damaging to E to continue the stand off which developed and a cooling down then occurred.

[16] It was now more than 13 months since E had left the United States and during that time the only face to face contact between mother and daughter had been for the period of little more than a week in January 2004. There had of course been indirect contact in the form of telephone calls and much correspondence although there is no documentary record showing any contact between mother and daughter in March/April 2004. Whatever the rights and wrongs about the behaviour of the parties towards each other during this period it is self-evident that this was an entirely unacceptable situation and contrary to the best interests of E.

[17] Relationships deteriorated significantly after the confrontation and on 15 July the Master of the Family Division made a Wardship Order declaring E a Ward of Court upon the application of H.

[18] It is clear from that point onwards that any lingering doubts that C may have had about her decision in June 2003 were dispelled. In giving her evidence before me she said that she was clear from then that she had made a "terrible mistake". With E now a Ward of Court legal proceedings became almost inevitable and events were then set in train resulting in the hearing before me in September 2005.

[19] An indication of the degree to which their relationship deteriorated is found in the simple fact that on 15 September 2004 H changed his telephone number without informing C. This could have been done by the basic expedient of an email but was not. How either he or R could possibly have thought that was consistent with the welfare of E defeats me. During the autumn some correspondence was exchanged by lawyers which is of a fairly preliminary kind and no real action was taken. It may be that C was inhibited

by the distance involved and by anxieties about the costs and no significant step was taken to rectify the situation legally until February 2005 when C came to Northern Ireland and the matter appeared in my list for the first time. By that stage no contact of any kind had taken place for approximately four months. Despite the explanations proffered to me I consider that it is beyond argument that the situation which developed throughout the autumn and winter of 2004/5 was entirely reprehensible. The period without face to face contact was thereby extended from June 2003 until March 2005, save for the period of her visit to her mother in January 2004. When cross-examined about this H retreated and sought cover in the suggestion that he was waiting for some more positive legal development to be instigated by C but ultimately he was forced to the point where he said that in retrospect he wished it had not happened and that he did "accept my responsibility" for the situation which developed. During the course of cross-examination of R by counsel for C she was even more forthright and stated that they realised they "made a great mistake" in not ensuring contact took place during the months of October 2004-February 2005.

[20] I should also make clear that at the early stages of these proceedings there were difficulties in arranging agreed contact when it was so obvious that it was essential in the best interests of E that immediate face to face contact should be reinstated. H must bear responsibility for this situation.

[21] Since February 2005 until the present date, with the exception of the summer months (part of which time E was with her in New England) C has lived in Northern Ireland in rented accommodation. This must have caused enormous disruption to her own family life and the lives of the children in New England and it has clearly been a very significant economic burden. The upside of the period of time she has spent here however is that a great deal has been done towards repairing the damage to her relationship with E caused by her being sent to Northern Ireland and the long periods without face to face contact.

[22] As a result of the court order E spent approximately four weeks in America in June-July 2005 during which time she had a short visit from her father. At that stage I was entitled to assume that matters had settled down into a more equitable pattern and the importance of significant contact was recognised so that it would happen with the blessing of both parties. Unfortunately that was not the case and there have been some difficulties in recent weeks. H and R explained that they considered the arrangements in place prior to the summer, which I had assumed the parties understood should continue until the case was disposed of, were too disruptive of E's school days. Obviously it was always going to be difficult for her to move back and forward between two households but it was clearly necessary to achieve the greater object of meaningful face to face contact with both parents. Instead of accepting the situation that prevailed before the summer holidays,

and seeking clarification from the court, or further order if required, argument and objections to those arrangements were put forward by H and R. Matters have again settled down but only after a clear direction from the court and the intervention of social workers.

[23] It is very sad that the parents of E are unable to agree what is in her best interests as to where she should reside for the future. A court is clearly a place of last resort in such circumstances and I am now placed in the invidious position of having to decide for them. That is a difficult choice when it concerns two parents living within the same town or city but when it involves a child being torn between parents living on two continents it is a matter which causes acute anxiety. Having had the benefit of dealing with them at various preliminary hearings over a number of months I have been able to form an impression of both parents. One need only look at the huge time and resources which have been spent on this case to produce the amount of documentation before me to realise how important it is to both of them. It also demonstrates sadly how so many times they have lost sight of the real object of these proceedings. There has been so much petty-mindedness and point scoring that it cannot pass without adverse comment. Those are the negatives however.

[24] When proceedings commenced I stated that it was my clear view that both parents were good people who had the best interests of E at heart, even if it was from their own individual perspective. This is not a case of child abuse or neglect and I am satisfied that E will thrive in either household. Clearly she is a strong child physically and has survived this emotionally draining experience with surprising resilience and fortitude. The expression “good enough parenting” is the ordinary test used by this court to determine whether or not someone is capable of properly looking after a child. It may seem a little uncomplimentary in its unexplained context. In this case, in common with the rest of humanity, neither parent can provide perfect parenting and given that the parenting will be less than perfect it is described by the term “good enough”. There is no doubt in my mind that whichever place of residence I chose for E she will have a happy home. Before explaining the basis of my decision and the factors which have influenced me I shall set out briefly the legal parameters.

The Legal Authorities and Guiding Principles

[25] The applications of each party for a residence order fall to be determined in accordance with the Children (NI) Order 1995. Jurisdiction to make such an order is found in Article 8 and such proceedings are subject to overall consideration of the child’s welfare. Article 3 requires the court when determining any question with respect to the upbringing of a child to have regard to the principle that the child’s welfare “shall be the court’s paramount consideration”. The classic dictum of Lord MacDermott in the case of J v C

[1969] 1 All ER 788 at 820-821 remain of continuing relevance and importance even in the light of the many radical changes brought about by the 1995 Order. In that case he stated that the requirement to treat the child's interests as paramount "connotes a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of child's welfare as that term is now understood. That is the first consideration because it is of first importance and the paramount consideration because it rules on and determines the course to be followed".

[26] Further by Article 3(3) and (4) the court is directed, when considering whether to make an Article 8 Order, to have regard in particular to certain factors. These factors are now referred to as the welfare check list and are in the following terms:

- (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 change 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 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.

These issues must be considered in every case and the importance of each will vary from case to case. I do not consider it necessary to go through each of the elements of the checklist seriatim, instead, having considered this matter, I believe I must find, inter alia, the answers to the following critical questions:

- a. What are the true wishes and feelings of E about where she should live?
- b. How much weight should I give to her wishes and feelings having regard to her age and understanding?

- c. How important is it that she should grow up in the same household as her half siblings rather than maintain contact with them through periodic visits and other methods.
- d. Acknowledging the importance of contact with the absent parent, who will best promote such contact during her childhood?
- e. What would be the consequences of moving her and would such a move bring sufficient benefits to justify disturbing the status quo?

The child's wishes and feelings

[27] The most important evidence about this comes from Ms Lavelle Harte who is the social worker from the health trust assigned to report to the court in these proceedings. She was subject to considerable criticism by H and R which called into question her independence and impartiality. This view appears to have stemmed from her perceived reaction to disclosures by H about a previous conviction for a sex offence which was associated with a period in a psychiatric hospital. There had been such a conviction but it was ultimately quashed on appeal; although a retrial was directed, ultimately a nolle prosequi was entered and so no conviction resulted. In a report to the court Ms Harte described his time in psychiatric hospital as being a period "in a hospital for the criminally insane". All of this related to events which had occurred more than 20 years earlier. It was said by H and R that when he made such disclosure that there was a immediate and discernible change in attitude towards him on the part of Ms Harte and that she had later cast up these events to him when he in turn had asked if matters relating a conviction on the part of D were also to be investigated. I am satisfied that this disclosure by him did cause some difficulties in the relationship between Ms Harte and H but they are based on the fact that she instinctively reacted, as she was trained to do, by making it known that there were serious matters to be considered and investigated before she could be reassured about the future role of H in the upbringing of E. It led, for example, to a direction that he should not be with E alone and should be supervised by R. This give rise to an extremely artificial situation where the child was living in Northern Ireland with her father and his partner but he could not have contact with her without supervision by his unmarried partner.

[28] Having heard evidence from each of the three persons I am satisfied that Ms Harte has conducted herself in an entirely professional manner, her work has been subject to audit by her superiors in the Trust and that she has acted in good faith consistent with her duties to the court and E. A failure on the part of H to realise the potentially powerful significance of his disclosures, even if ultimately they were irrelevant, compounded the sense of hurt and injustice which he experienced. When reporting on the wishes of E however I

do not consider that these background circumstances have influenced her approach or interpretation of her discussions with E.

[29] Ms Harte prepared a number of reports but helpfully brought them together in an updated report set out at pages 59-69 of Bundle 8. An addendum signed by her and Miss Sage, Assistant Principal Social Worker, dated 30 August 2005 is in the same bundle at page 70-140. When considering E's wishes and feelings she divided her analysis into different sections based on various phases of the development of the case. She has noted in phase 1, the early interviews, that E was sad because she could not see her "real mummy" and that she "couldn't figure out who she would like to stay with". Not surprisingly E expressed the view that she would like to see everyone and although she advised she would not like to go and stay in America she suggested she would if her friends, school, step-mum and dad could move there.

[30] At an interview on 8 March 2005, when her mother had come to Northern Ireland to pursue these proceedings, she elicited that E was not aware that her parents were in dispute and was told by her that C "is going to stay as long as she needs to, but she will have to go back to (US) to look after my brothers and sisters". By 31 March 2005, described as phase 3, E was aware that her parents were in dispute but was able to relate that she did not have to choose regarding residence as the grown ups would do this for her. She did however express concern and was "worried because I thought I was going to have to tell you where I wanted to live". She also stated on that occasion "why can't we all live in the one place", a cry not infrequently heard from children caught in this kind of situation. E said that her wishes were "kinda in the middle". During the course of the interview E also advised that her daddy had told her he would never go to America, that he had no house to stay in in America and that R and H had told her that she would be staying here ie. Northern Ireland.

[31] These comments were interpreted by Miss Harte as indicators that pressure was being applied to E by her father. She noted later that E had stated that "Her father talks to her in a sad voice, telling her how she is his daughter and how he does not want her to leave". Her reaction was to hug her father to make him feel better. It was also suggested that the parents had acted in a manner which could be said to be coaching E. These suggestions were all denied by H and R and the latter in particular was adamant that she had only ever encouraged E to speak up for herself so that her wishes were clearly understood and did not wish to influence her one way or the other. Obviously a child can be influenced in subtle ways. It is very unlikely that H and R, had they been minded to do so, would have exercised overt pressure on E to express the preference that she should stay with them. Children often react in the reverse manner in such circumstances and can usually find a way of conveying the fact of such pressure to a skilled interviewer. Subtle

pressures can however be highly effective, as this court knows from its experience in such matters. If her father talked to her in a sad voice, and told her that he does not want her to leave then the subliminal message will be: if you leave you will make me sad. A child who loves her parent will not want to cause that in most instances.

[32] It must be very difficult for a child like E to be placed in a position where she has been asked would she prefer to live with H or C? One would have thought the answer might depend more on which parent asked the question than any deep analysis on her part, particularly given her age. I reject the suggestion that positive coaching took place or overt pressure was applied to E to make her say she wanted to stay in Northern Ireland. Equally, however, I am satisfied there were emotional pressures exerted upon her simply because H and R cannot face the prospect of losing her.

[33] I accept however that, insofar as she has expressed her wishes and feelings, E has expressed a preference for remaining in Northern Ireland. It is also noteworthy that she does not appear to have said at any time, at least not very positively, that she wished to go back to the US to live. I consider that I must give some weight to that, particularly as I am required by statute to do so. Nevertheless I should always set such expressions in their proper context which is the age and experience of the child concerned. Obviously a child of six is not sufficiently experienced in the ways of the world, or in longer term issues of its welfare and upbringing, to be able to make a definitive choice. A similar expression on the part of a child of 11 or 12 would naturally carry a much greater impact.

[34] In the circumstances I conclude that she has expressed her wish to remain in Northern Ireland, but has done so in the context of divided loyalties and where she is fully aware of the impact such a choice would have on both parents but her father in particular. She has also done so in the context where her father has, perhaps understandably, imparted to her his own strong desire that she should remain with him. If on the other hand she was unhappy in Northern Ireland then I believe that would manifest itself in other ways, such as, for example, some emotional disturbance or problems at school. The absence of any such problems satisfies me that she is content in Northern Ireland. I am equally satisfied however that when she was in United States that she was settled and happy there and that if she was returned she would settle quickly and enjoy equally meaningful friendships and relationships with her new school friends, siblings and extended family. The impact of her removal from the United States for such an extended period, and the compounding effects of proper contact being denied to her for a significant part of that time, cannot be ignored. It is hardly surprising that she might say she prefers Northern Ireland if that is what is more familiar to her now.

The importance of her half siblings

[35] It is drawn to the attention of this court frequently that sibling relationships have an enduring role to play in the life of each of us. After our parents leave us our blood ties with our siblings may be the most important left to us. It is important therefore to promote such contacts whenever possible. In C v C (minors: custody) [1988] 2 FLR 291 a young brother and sister of divorcing parents had been brought up separately for a period at first instance and the learned Recorder had confirmed those arrangements. The Court of Appeal intervened however and Purchas LJ emphasised the importance of mutual support for each other that young children can provide where they live together. He stated:

“If there had been a relationship between the two children which was diminishing, the chance of that state of affairs being allowed to continue is an argument for ceasing that state of affairs, and if indeed it did not exist, it is time that the relationship should be encouraged and fostered. It is really beyond argument that unless there are strong features indicating a contrary arrangement that brothers and sisters should, wherever possible, be brought up together, so that they are an emotional support to each other in the stormy waters of the destruction of their family.”

Although the present case is not being decided in the context of a divorce or break up where a child has lived with cohabiting parents in the past, it is plain that where their parents live apart on a permanent basis, particularly where they are separated by such a distance, that any support and comfort they can find in the company of siblings should be encouraged. I consider therefore that there are powerful arguments for saying both, in the short term and in the long term, that significant benefits accrue where children can be brought up together and I am satisfied that these considerations can apply equally whether between half siblings or whole siblings. During her first four and a half years E lived full time with her three half siblings but she has had minimal opportunity of living with her youngest sibling who was born in December 2003. She had obvious bonds with each of them which have been significantly disrupted by virtue of her move to Northern Ireland. Obviously contact arrangements, particularly if generous, could help repair some of that damage. I am satisfied, however, that this would not be the best outcome for E and that sibling relationships would be best fostered and developed if she lives with them.

Who will best promote contact?

[36] I consider that the evidence shows quite clearly that, prior to coming to Ireland, E developed very meaningful attachments to her father because of the willingness of her mother to facilitate contact. Indeed it went much further because I am satisfied she actively promoted, perhaps even insisted upon, significant contact between father and daughter. The fact that she facilitated a visit by H and his new partner and her child to New England by allowing them to live in her house and also by allowing E, when very young, to go to New York City for a large part of the summer, establishes her credentials in this respect.

[37] When H's record of promoting contact is examined there are a number of matters giving rise for concern and anxiety. The first test came at Christmas 2003. Whatever difficulties there may have been about arranging a transfer across the Atlantic for the Christmas period, and they were probably not insubstantial, the fact is that no contact arrangements were put in place as expected. At that point E had not seen her mother for almost six months. She was just over five years old that Christmas. Given the difficulties that existed, and even if they genuinely brought about a situation where a visit could not be arranged for the Christmas period, there appears to me to be no rational explanation for the complete failure to ensure meaningful telephone contact on Christmas and/or Boxing Day. H said that it was difficult to do so because he had gone with R and Ra to meet up with his own family in Dublin and, because they were moving around, practical difficulties prevented the contact occurring. I must reject that explanation. H was perfectly aware that there a face to face visit was possible, E had been absent for almost six months from her mother's home and there was a heavy onus of responsibility upon him to make arrangements for her to at least speak to her mother by telephone for Christmas. I cannot envisage any satisfactory explanation for him being with E at, say, 2-4 o'clock on Christmas Day, when the excitement of opening Christmas presents was over, and when it was 9-11 am in New England, that he could allow the moment to pass. He could give no acceptable explanation in cross-examination or to me. I am driven to the conclusion that at that stage he was already on the defensive about the position of E and that he demonstrated, albeit subconsciously perhaps, a desire to minimise C's role in E's life. Thus when a visit was arranged in January it was already school term time and the visit was for little more than a week. I consider he did not act in E's best interests during this phase.

[38] There were considerable arguments surrounding the events of July 2004 which I have already outlined. It is easy to see how in the emotionally charged atmosphere which existed at that time that an instinctive reaction might have been to keep C away from E, particularly where he was fearful

that she would be taken off to America. Nevertheless, it should have been possible to make some arrangements for her to see her mother, particularly when she had crossed the Atlantic to do so. By changing his telephone number in September, without informing C, and by acting in a manner which both he and R accept was wrong through to February 2005, I consider that again he put his own wishes and feelings before the best interests of E.

[39] I do not neglect that there was a period of about two months in March/April 2004 when C appears not have made efforts to contact E and again I can find no ready explanation for this. I also consider that her behaviour over the purchase of the airline ticket for the proposed summer trip in 2004 was unsatisfactory and ambiguous. Clearly she was living with an increasing sense of regret at what she had done, she may well have suffered some emotional turmoil and confusion and she was struggling with the natural responsibilities of her family, including a new born baby, in the United States. We should not underestimate these difficulties. Whatever about these problems however they do not impact on her willingness to promote contact which is the issue I am concerned to analyse at the moment.

[40] Finally the continuing lack of co-operation, and at times unwillingness to facilitate C, when she returned from the United States in August 2005, indicates a continuing source of anxiety as to how events would unfold in future years. Clearly if E was to remain in Northern Ireland, and difficulties over contact emerged, the matter could be brought back before me in this court. Hopefully that would be a means of removing any difficulties. The concern of this court however is to find a solution that will prevent such difficulties arising at all and to avoid more court proceedings. Further, whilst it will be easy to set down dates and times when exchange visits are to take place, it is vitally important that they take place in the right atmosphere. It is also critical that the other forms of contact, be it by telephone, web cam, e-mail or letter are encouraged and take place with the full co-operation and encouragement of the resident parent. It is most important that I should achieve the better solution to that issue so that E's life can be as free as possible from any stress or strain surrounding the critical matter of contact in all its forms.

The agreement dated May 23 2003

[41] This agreement was drafted by R, who is a practising lawyer and was witnessed by her on his behalf. In turn it was signed by C and witnessed by D and it is dated, in the American style, 05/23/03. It provided that E should reside with her father and that she "will have such reasonable contact with her mother ... as can be agreed between the parties." It then provided for child support payments, health care expenses and responsibility for the provision of education.

[42] H stated that he viewed the agreement as a permanent arrangement to last for as long as she was in full-time education. He was adamant that he would not have agreed to a short term arrangement, eg. 1-2 years, as he would have had difficulty in perceiving any benefit to E in such an arrangement. R supported this interpretation and, as she put it, considered E was coming “to grow up here and be educated here for her school years”. She said she would absolutely not be prepared to agree to such an arrangement for one year or so as that would be wholly inappropriate. She also expressed her difficulty in understanding why the family of E in the United States did not regard the proposal as a major change carrying with it potential problems. As she perceived it they seemed to think it was going to be a good experience for E. Contact was not defined in the agreement and, although she had advised C to obtain independent legal advice, was surprised that C did not insist upon something more definite.

[43] C on the other hand insisted that her understanding was that E was moving to Northern Ireland on a trial basis and that if it did not work out she would return to the United States. On the other hand she did agree that there had been talk of her attending Trinity College, Dublin and was open to the idea of it being a permanent arrangement.

[44] I have little doubt that when E left the United States the parties understood in general terms that it was to be at least a long lasting arrangement. Equally, however, I reject the suggestion that C ever agreed to this being a permanent transfer come what may. Although I have difficulty in understanding how she ever came to the conclusion that it was in E’s best interests to transfer her at such a young age away from the only family she knew, I am clear that she was sufficiently aware of the need to protect E’s long term interests to realise that an agreement could not be permanent even if circumstances changed. In the light of the evidence which I have heard from the three witnesses I am satisfied that when E came to Northern Ireland, it was hoped that it would be a permanent arrangement but there was a clearly implied understanding or agreement that if there were difficulties it was open to the parties to reverse the agreement and return E to the United States.

[45] I am satisfied further, that any such agreement must in all circumstances be interpreted by the courts to ensure that it attains the best interests of the child. It is not open to a court to enforce an agreement such as this if the effect would be for it to act in a way inimical to the best interests of the child as that would be contrary to the statutory direction in the 1995 Order.

Summary

[46] If E is to move back to America there is little doubt that she will suffer some initial disturbance. The immediate consequences will be loss of daily contact with her father, R, Ra, her school friends and her wider Irish family circle. I have already pointed out the magnitude of the difficulties caused by parental separation by the fact that they live on separate continents. E is blessed with having two parents who love her but will have to cope with the permanent difficulty that they will never live together. She must be separated from one of them. Had her parents lived together in Northern Ireland and decided to emigrate to the United States then all of the problems of separation from extended family, friends and loss of her school arrangements, would follow. This is often a concomitant of family life and loving parents do their best to ensure that children cope as best as possible with that. It is not an insuperable task and it is not something which will necessarily cause lasting anxiety or emotional disturbance. There is certainly no reason to think that E should cope less well with that than any other child of similar strength of character and fortitude.

[47] I have concluded that the best outcome for E is that she should return to America to live with her mother, siblings and wider American family. I believe that she will enjoy contact with her father on a regular basis which will be encouraged and which is meaningful. I fear that if she remains in Northern Ireland anxieties and difficulties about contact will continue. Further, I do not consider that contact, even if regular and extensive, can substitute adequately for growing up with her half siblings on a day to day basis. I consider those relationships will be best promoted by her living in the same home as them. I consider her wishes and feelings which I have already outlined, will be a problem for her and will have to be handled sensitively both before and after her return to New England. Nevertheless I am satisfied that once she settles in the United States she will be content with her new arrangement and she will then be able to return to Northern Ireland on a regular basis for contact with her father, R, Ra, her friends and Irish family. In deciding to act contrary to her own expression of her wishes I do so in the belief that there has been some subliminal pressure on her and I am reassured by the recommendation of Ms Harte who knows her well.

[48] I should like to emphasize that I have not sought to put into force any perceived policy of the courts that favours a child being brought up by its mother. Whilst there are dicta to that effect, indicating that as a general principle a very young child should be brought up by its mother, it is not a relevant guiding principle in this case since both parents, as I have emphasised from the outset, are capable of looking after E properly. Ultimately I have put the issues of satisfactory parental contact and sibling

contact to the forefront and placed their importance ahead of the disruption inherent in a move back to America and the expressed wishes and feelings of E. I have also considered it proper to set aside the written agreement of the parties as I consider its provision in relation to residence is not in the best interests of E.

[49] Finally I refer to the injunction contained in Article 3(5) to the effect that the court shall not make the order sought “unless it considers that doing so would be better for the child than making no order at all”. I have concluded that an Order ought to be made in this case to bring finality and certainty to the arrangements for the future upbringing of E. I consider that brings the best opportunity of reducing friction between the parents and of enabling E to be clear about where she shall spend particular parts of the year as she continues through childhood. A Residence Order in favour of her mother gives the best opportunity to achieve that. It is also implicit in the fact that I have decided to make an Order in her favour that she will have permission from the court to remove her from this jurisdiction, subject to court approved arrangements being put in place.

[50] I express the hope that these arrangements a relatively short time scale but subject always to the advice and assistance of social services. Both parents must co-operate fully with the Trust and its team of child care workers. I shall be happy to discuss further the contact arrangements that should be put in place once she returns to America but the template which was set out by H appeared to find general favour before me in the course of the hearing. It should now form the basis of a firm agreement.

[51] Mr Donaldson QC, on behalf of the applicant, suggested that I might avail of the opportunity of speaking to E. Discussions of this matter is to be found in Hershman and McFarland at paras. B208-210. I consider that it would be inappropriate for me to speak to E in the present circumstances. I do not have any professional skills in interviewing young children with a view to assessing their true wishes and feelings and certainly do not think that I could extract a more meaningful expression of her wishes than Miss Harte has done. Her work has been validated by her principal social worker and I am satisfied that I could not be expected to take it any further. There is also the risk that such arrangements would simply impose further stress upon E, particularly if her views were to be made known to her parents. The idea that a Judge could sit down in a room on one occasion with a six year old child and find the answer to such an important question in a better way than a social worker who has seen the child on several occasions and who has training, experience and skills, which a Judge does not possess, is mistaken in my view. I therefore decline the invitation in the circumstances, particularly as I have accepted that she has only expressed one view on all occasions, except in the first phase of Ms Harte’s interviews.