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

ICOS No: 16/92358

Delivered: 29/04/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF AN APPEAL

IN THE MATTER OF A CHILD TODD (No.2)

**Ms McGreenera QC with Ms McGurk (instructed by Donnelly & Wall Solicitors) for the
Appellant Mother**

**Ms Suzanne Simpson QC with Ms Brady (instructed by Larkin Cassidy Solicitors) for the
Respondent Father**

**Ms Smyth QC with Ms O'Flaherty (instructed by the Official Solicitor) on behalf of the
Child**

KEEGAN J

Nothing must be published which would identify the child or his family. The name I have given to the child is not his real name.

Introduction

[1] This is my judgment in the continuation of an appeal case brought by the mother in relation to the Family Care Centre decision to refuse relocation to England. I allowed the appeal for the reasons given in my first ruling which is reported at [2020] NIFam 14 however I did not finalise the case at that stage. I declined to make any order at that time as I wanted an update on the issues in the case and a fresh welfare report. I also suggested mediation which the parties engaged in without success.

[2] I am now able to provide a final decision. I proceeded on the basis of updated evidence from the parties, the Court Children's Officer ("CCO") and the Official Solicitor. By agreement the parties also wished me to hear oral evidence from the mother's husband and the CCO. Other than that the parties made submissions through counsel about their respective positions.

[3] I will not recite the background history again as I set it out in my first judgment. The child is now 10 years of age, he has one half sibling who is 2 and the mother expects another child in July. It is clear from the papers that both parties are anxious for a decision to be made.

[4] Counsel have helpfully stated that the legal tests are not disputed and these are also set out in my original judgment from paras 12 to 14 as follows:

“[12] The parties agreed that no point of law arises in this appeal. That is unsurprising given the fact that the learned judge meticulously recounts the law in this area in her judgment. The judge starts with the decision in *Payne and Payne* [2001] EWCA Civ 166 where Thorpe LJ reviewed the approach of the courts in relocation cases. That case attracted some controversy because of a suggested presumption in favour of a relocating parent (usually a mother). A clarification was made in subsequent jurisprudence that the guidelines in *Payne* were only guidelines and in that the true test in relation to a relocation as the welfare principle. Black LJ in *MK v CK* [2012] Fam 134 reiterated this and directed practitioners to the common sense approach that the *Payne* guidance must be heeded, but not as a rigid principle or so as to dictate a particular outcome in a sphere of law where the facts of individual cases are so infinitely variable. There was no presumption that the reasonable relocation plans of the carer will be facilitated unless there is some compelling reason to the contrary.

[13] In this jurisdiction the Court of Appeal has dealt with a number of relocation cases including *SH v RD* [2013] NICA 44. In that case the Lord Chief Justice highlighted the point that *Payne* is not of course binding in this jurisdiction, although of strong persuasive authority. He also said:

“There is no dispute about the fact that the welfare of the child is paramount in both applications before the court and that the welfare checklist applies directly in relation to the shared residence application and as a matter of good practice in relation to the relocation application.”

[14] I posed the question whether there was any difference between external and internal relocation and

counsel agreed that flowing from a number of decisions including the case of *Re C (A Child)* [2015] EWCA Civ 1305 that there is no such distinction. In that case Mr Justice Bodey set out a summary of the position as follows:

- “(a) There is no difference in basic approach as between external relocation and internal relocation. The decision in either type of case hinges ultimately on the welfare of the child.
- (b) The wishes, feelings and interests of the parents and the likely impact of the decision on each of them are of great importance, but in the context of evaluating and determining the welfare of the child.”

The Evidence

[5] The CCO prepared two reports of 10 February 2021 and 10 March 2021. In her final report the CCO recommends relocation. She records the views of both parents. She records that she met Todd on two occasions and that when asked about his wishes he said he would “probably rather stay but if he was told to go it would be ok.” The CCO acknowledged the good relationship between father and son and that Todd described this as 10/10. In her evaluation the CCO sets out the welfare checklist. In relation to Todd’s wishes and feelings she was of the view that he simply wants the court to decide.

[6] The CCO was of the view that a changing contact plan does not automatically diminish the father/son relationship given the proposals made by the mother. She also thought that Todd could readjust to any change. Overall, she thought that relocation offered Todd greater opportunity to experience a fuller enriched family life whilst maintaining a relationship with his father. In answer to questions the CCO agreed that Todd was doing well at present and that he had good relationships with his parents/step-parent, wider family, friends and his half sibling. The CCO told me that Todd was excited about the new baby. She also thought that arrangements could be managed notwithstanding the Covid 19 situation.

[7] The other witness who gave evidence was the mother’s husband. He explained that his work was based in England and that he could not undertake this by way of remote means. He described a downturn in business during the first lockdown. The witness also said that he could not relocate his business to Northern Ireland given its base in England. He said that whilst ordering is online he has to be in England to meet distributors and wholesalers and oversee the operation. He said that he wanted to commit to having a full family life for Todd and the other children and that is why the family were pursuing this application. He said that he was committed to providing contact for the father as part and parcel of maintaining Todd’s relationship with him.

This man also told me about the strain of current arrangements whereby he travels to England on a Sunday or very early Monday morning and returns to Northern Ireland on a Friday.

[8] In addition to this oral evidence I have considered the report of the Official Solicitor. In this the Official Solicitor provides an opinion that the child should not relocate to England due to the relationship with his father. The Official Solicitor records her meeting with Todd and says that that he was able to tell her about all his family relationships and he also said to her “your job is to speak on my behalf, put yourself in my shoes. Pretty much tell the judge what you think is best.”

[9] In her conclusion the Official Solicitor’s records that she does not doubt the motivation of either parent. She says that this particular relocation is somewhat unusual in that it would involve Todd moving away from both the maternal and paternal extended families in Northern Ireland. She said that when she met Todd on 23 March 2021, he presented as a typical 10 year old boy. “He was lovely, bright, confident which is a credit to both his parents and extended families.” The Official Solicitor records that he is clearly very clever and she would imagine that he will do well in life regardless of where he attends school in the future. She records that he is acutely aware that he spoke to the CCO about the matter before the court back in 2018 and again last month. The Official Solicitor also states that Todd feels torn between his parents to a certain extent and that: “He clearly loves both of his parents dearly. As in 2018 he understandably does not want the burden of this decision to be placed on his shoulders and he wants someone else to make the decision.”

[10] At para 39 the Official Solicitor records as follows:

“39. Todd appears to be a resilient child and I am confident that he will do well wherever he lives. The difficult question for the court will be to decide what is in his best interests as this is the paramount concern. This is a finely balanced case in my opinion. As his legal representative and Guardian ad Litem, I feel that the balance lies in favour of Todd remaining in Northern Ireland. By working in preparation for the transfer test and aspiring to attend a grammar school like his mother and uncle that Todd himself seems to see his future in Northern Ireland. Todd appears to be a happy child as he is.”

[11] The Official Solicitor also thought that if a permanent move to England is to take place that it might be prudent to let Todd see through his primary years where he is first. She states that the timing would also provide an opportunity, hopefully for there to be more certainly in relation to how Covid will affect daily lives going forward to include impact on activities, travel and accommodation. This would mean that any relocation would be in 2022.

[12] The parents' updated statements both set out their current positions which I summarise. The mother points to the stress these proceedings have caused her in her life. She remains of the view that relocation is best for Todd and she would like a decision to be made. She explains that at the moment her husband is away most of the week and she has found that a stress in coping with the children. She states that she has also suffered from anxiety and other difficulties and she has provided a medical report to support that. The mother states that she was committed to maintaining the contact for the father and, in fact, that there had been additional contact during lockdown.

[13] The father's statement is quite clear that he would be devastated if there were a relocation because he feels that his relationship with his son would not be the same due to a reduction in contact. The father also points out that he has been furloughed during Covid and that he would have some difficulties travelling to England. He is currently living with his parents. The father makes the case that the mother's husband could either make his business move to Northern Ireland or make it a business via remote working. The father also refers to the effects of Covid which he says have been underestimated in this case and which militate against a relocation.

Consideration

[14] At the outset I repeat my view that these are two well motivated parents. Notwithstanding their personal difficulties the child has been shielded as much as possible and maintains a good relationship with both of his parents. I believe that they have also managed to communicate a little bit better although I agree that information sharing about the school choices in England could have been handled better.

[15] I have listened carefully to the CCO who gave evidence over two days. Notwithstanding the robust questioning of her position I consider that her report is full and balanced. I do not consider that it is flawed as the father suggests. I am satisfied that the CCO was aware of Covid restrictions and she accepted that this was an ongoing issue. I was impressed with this witness and her attention to all of the issues in this case.

[16] I was also very impressed by the evidence given by the mother's husband. He struck me as a hard-working man who has built up a good business. I entirely accept his position that he needs to be in England to keep this going and that relocation to Northern Ireland is not appropriate and that remote working is not an option. He also seems to have a very good relationship with Todd and wants to build a better life for his family. I also accept that he is committed to promoting Todd's relationship with his father.

[17] I appreciate that both parents hold opposite positions which are clearly expressed in their statements. I have considered these as part of my overall assessment, however, the welfare of the child is my paramount consideration. I look

at the welfare checklist to assist me in reaching a determination which accords with the welfare of this child. As I have already said this is a difficult decision, however, in my view it is important that a decision should be made as soon as possible.

[18] I have considered the welfare checklist as follows:

(a) **The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding).**

Todd is now 10 and he is clearly a clever child who is able to articulate his view. I get the impression that this child is burdened by this decision and has a good relationship with both parents so he really feels in the middle. I do not consider that the child's expressed wishes and feelings show a preference one way or the other. It seems to me that he can see both sides of the argument and he really wants the judge to decide. As such I consider that the young boy is equally able to adapt through his wishes and feelings to either situation.

(b) **His physical, emotional and educational needs.**

It is clear that the physical needs of this child are being met very well by his mother and also by his father. His mother has the ability to set up home either in Northern Ireland or in England. His father is living with his parents.

His emotional needs are clearly being met although it is clear that there are elements of anxiety in this child probably due to the uncertainty of where he is going to live.

His educational needs are being met in Northern Ireland where he is currently in primary school. If he stays here he has another year to go at primary school. If he moves he would move to a school in England which is a private school that has been sourced. Either way it looks like good educational provision can be provided to this child.

(c) **His age, sex, background and any characteristics of which the court considers relevant.**

There are no particular issues it seems here. One point that is raised is that the child was born in Northern Ireland and that this might pose a difficulty for living in England. It seems to me that this works both ways in that the child is clearly going to have a relationship with England because his mother's husband is English and so this should not be determinative.

(d) **Any harm which he has suffered or is at risk of suffering.**

I have no particular issues in relation to harm. Whilst the mother has mental health issues these have not impacted on the child so far as I can see. If there is continued acrimony between the parents there is a risk of emotional harm, however, I do not consider that this is at any sort of problematic level given the responsible way the parents have undertaken the separation.

(e) **How capable of meeting his needs is each of the parents and any person in relation to whom the court considers the question to be relevant.**

It is clear that both the mother and father are committed parents who love the child. Both parents commented that each was a good mother and father and I do not believe there is any issue about their ability to look after the child. It also seems to me that the child has a good relationship with his stepfather.

(f) **The range of powers available to the court under this order and proceedings in question.**

This is an Article 8 application and so the court can make an Article 8 order whether that be for residence, contact, specific issue or prohibited steps.

[19] I also received a very helpful joint note from the parties in relation to Covid-19 restrictions. This sets out the issue of travel within the common travel area. It seems to me clear that whilst there are some issues with the exact terms of the guidance, contact by virtue of a court order would be something that would be part and parcel of essential travel. I cannot see this issue as an absolute impediment to contact taking place. In any event, by June the projection is that restrictions will be lifted or at least further relaxed. It is impossible to predict the future but in my view this issue cannot of itself place a freeze on family life.

Conclusion

[20] Having weighed up all of the factors and conducted a holistic evaluation of this child's situation, with welfare as my paramount consideration, I conclude that there should be a specific issue order made in favour of the mother to facilitate a relocation to England. Whilst this is a finely balanced case it seems to me that it is tipped in favour of the child being able to relocate at the end of June to live in England with his mother, step father, his half-sibling and the new baby that is to come. I am very clear that the stepfather cannot properly conduct his successful business without living in England and I am very clear that this child would benefit from having a more stable family life with his mother supported in the home on a more regular basis. I understand that the child is doing well in Northern Ireland and that is a strong factor however I believe that he can adapt to a change which is best for him. He can also keep his connection to Northern Ireland.

[21] I am very impressed by the young boy at the heart of this case and I think there is a good template for this arrangement to work. It is principally because he has such

a strong relationship with his father that I believe his relationship can be maintained through extensive direct and indirect contact. I am absolutely certain that the mother and stepfather will promote this. On this basis, I disagree with the Official Solicitor's view and I prefer the evidence of the CCO that this new arrangement can work and maintain all of the important relationships in this child's life. I consider that contact with the extended family in Northern Ireland can be facilitated as there will be extensive contact in this jurisdiction.

[22] I have considered Covid arrangements. These cannot be a freeze on this type of application as I have said, and I believe that travel is workable particularly having heard evidence from the stepfather who is currently travelling back and forth between England and Northern Ireland.

[23] I have considered the Official Solicitor's suggestion that this decision should be postponed but I do not see any merit in doing that. It seems to me that the case has now come to a point where decisions have to be made. This should really take place at the end of this school term round about the end of June.

[24] This decision is prefaced by the fact that there must be a comprehensive contact order. I note that the father has not as yet been able to make proposals in relation to contact. I understand that was difficult from an emotional point of view. The mother's proposals appear to me to be generous. However, I will allow the father to consider these before finalising that order. It seems to me that there is merit in thinking that most of the contact should take place in Northern Ireland rather than in England because it will be more difficult for the father to travel to England and I do accept his point that it could be demeaning for him to be put up by the mother in B&B or Airbnb accommodation and not as good for Todd. The mother and her husband will have to bear the brunt of the financial cost of travel. I also think that the father should be afforded a number of trips in England to take the child to Manchester United and if he cannot attend for all of the contact as suggested he should have longer periods of extended stays during holiday times in Northern Ireland. I will allow the parties two weeks to work out a contact order now that I have decided on the principle of relocation in default of which I will determine it.

[25] Finally, as this child gets older contact will hopefully become more natural and he can make choices himself. I hope both parents will now work forward to make the best of this situation, particularly the father who will no doubt be disappointed by my decision.