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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

_____

BETWEEN:

RH and others

Applicants

v

IH

Respondent

_____

STEPHENS J

Introduction

[1] This judgment deals with four applications, all dated 7 July 2008 under the Family Homes and Domestic Violence (Northern Ireland) Order 1998. The applications were brought by:-

(a) RH against her husband, IH.

(b) JH then aged 8 by his or her mother and next friend RH, against his or her father IH.

(c) DH, then aged 6 years and 6 months by his or her mother and next friend RH, against his or her father IH.

(d) LH, then aged 3 years and 5 months, by his or her mother and next friend RH, against his or her father IH.

Each of the applicants sought exactly the same orders namely a Non Molestation Order and an Occupation Order against the husband and father, IH. The same statement from the wife and mother, RH was attached to and grounded each application. None of the children made any statement. Legal Aid had been granted to all four applicants. IH, the respondent to all four applications, did not have Legal Aid.

[2] In addition to the applications under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 IH, the father, has brought an

application dated 28 July 2008 against the mother for a defined Contact Order under Article 8 of the Children (Northern Ireland) Order 1995 in respect of the three children JH, DH and LH.

[3] In relation to the four applications under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 Ms McDermott appeared on behalf of RH, the mother in relation to her own application and also on behalf of all three children, JH, DH and LH acting by their mother and next friend RH. Ms Walkingshaw appeared on behalf of the father IH. In effect the mother RH had conduct of the proceedings which had been brought by the children.

[4] In relation to the father's application for a defined Contact Order the appearances were in part the same as in respect of the four applications under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 in that Ms McDermott appeared on behalf of the wife and mother, RH and Ms Walkingshaw appeared on behalf of the husband and father IH. However in addition Ms Murphy appeared on behalf of the Official Solicitor who had been appointed by Order of the Master dated 7 October 2008 to represent the children JH, DH and LH. Accordingly in respect of the application for a defined contact order the mother did not have conduct of the proceedings in so far as they related to the children.

[5] I have anonymised this judgment including the gender of the children. The initials used are not the real initials of any of the individuals involved. Nothing should be reported which would identify the children or any member of their extended family. The parties are requested to consider the terms of this judgment and to inform the Office of Care and Protection in writing within one week as to whether there is any reason why the judgment should not be published on the Court Service website or as to whether it requires any further anonymisation prior to publication. If the Office is not so informed within that timescale then it will be submitted to the Library for publication in its present form.

Family background

[6] RH and IH are married. They have three children, JH, DH and LH. Their eldest child JH suffers from ill health.

[7] RH alleges that IH is violent and aggressive towards the children and that they have on occasions sustained bruising as a result of assaults. The gist of the allegation is that in particular IH was cruel and physically violent to JH for instance on one occasion hitting JH with a mallet when they were camping. In addition that IH is continually abusive towards RH. That he shouts and yells at her. That he constantly criticizes her. That he is very controlling. IH denies that he engaged in any or constant aggression or bullying towards the children or RH. He states that like all families there

were ups and downs and fallouts. In essence there is a conflict of evidence between RH and IH as to whether physical or emotional violence was used on RH or any of the children, JH, DH or LH.

History of the proceedings

[8] On 30 April 2008 RH sought legal advice from her solicitors as "what to do if IH lifted his hand again to any of the children". She did not tell IH that she had obtained legal advice but she states that she did make it clear to IH that if he ever hurt any of the children again or continued being controlling or emotionally abusive to her she would be applying for a separation.

[9] The mother, RH alleges that on 3 July 2008 the father, IH punched DH in the stomach because he or she would not go to sleep. That DH then went to RH's bedroom. That LH then shouted at his or her father, IH for hitting his or her sibling. That IH then shoved the side of JH's head and caused him or her to fall to the floor. RH then told IH that she now wanted a separation. IH responded by shouting at RH, calling her names, storming off downstairs and slamming doors.

[10] On Friday 4 July 2008 RH rang her solicitors "to advise them to make arrangements to go ahead with the Non Molestation and Occupancy Orders". RH and the children were due to go on a one week annual holiday to a different part of Northern Ireland without IH. She and the children as part of that arrangement spent the night with her parents and then went to the holiday destination some considerable distance from their home and therefore some considerable distance from IH.

[11] On Monday 7 July 2008 RH travelled back for the day from the holiday destination to complete and sign a statement which supported all four applications under the Family Homes and Domestic Violence (Northern Ireland) Order 1998.

[12] On the same day Monday 7 July 2008 ex parte applications were made to the Master. During the course of that hearing RH was required to and did swear that her statement which grounded all four applications was true. The Master granted orders in relation to the 3 children. The Master declined to make an order in relation to the mother on the basis that her proceedings should have been commenced in a domestic proceedings court. The mother then renewed her application in a domestic proceedings court. Those proceedings were then transferred by the district judge to the High Court to be joined with the children's cases.

[13] Until May 2009 the Master case managed all four applications under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 and also case managed the father's application for a defined contact order. I

expressly make clear my sympathy for the tasks with which the Master was presented in this case particularly given the context of a heavy case load. As will become apparent the Master was not presented with a full and complete picture on the hearing of the applications for ex parte orders. Thereafter the Master, through pro active case management, has given invaluable assistance to the parties in defining the real issues in dispute.

[14] The four applications under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 and the father's application for a defined contact order were first listed before me for review on Monday 18 May 2009.

[15] On that date, Ms Murphy, who appeared on behalf of the children in relation to the father's application for a defined contact order but did not represent them in relation to the applications under the Family Homes and Domestic Violence (Northern Ireland) Order 1998, raised concerns, in reality on their behalf, in respect of the requirements of Article 21 of the 1998 Order. Article 21 provides:-

> "(1) A child under the age of 16 may not apply for an occupation order or a non-molestation order except with the leave of the court.
>
> (2) The court may grant leave for the purposes of paragraph (1) only if it is satisfied that the child has sufficient understanding to make the proposed application for the occupation order or non-molestation order."

Ms Murphy submitted that, for instance, it was hard to see how the court could have been satisfied in respect of a child aged 3 years and 3 months that he or she had sufficient understanding to make the proposed applications for occupancy and non molestation orders. Also I raised concerns as to the representation of the children in respect of the applications under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 in that they were represented by counsel who also represented the mother, see *LA v UJ and RJ* [2009] NI Fam 8. I gave directions for the proper preparation of documents and directed a further review on Friday 22 May 2009 to address those issues and to set a timetable for the future conduct of the applications. In anticipation that I would appoint the Official Solicitor to represent the children in respect of the applications under the 1998 Order I requested the Official Solicitor to be prepared to make substantive submissions in relation to those applications on 22 May 2009.

[16] On 22 May 2009 I appointed the Official Solicitor to represent the three children in relation to the applications under the Family Homes and Domestic Violence (Northern Ireland) Order 1998. I heard submissions from counsel on

behalf of the Official Solicitor. I dismissed the children's applications not making any order for legal aid taxation in relation to those applications. I indicated that I would give reasons for dismissing those applications at a later date.

The court in which proceedings under the 1998 Order should be commenced

[17] Article 4(1) of the Family Homes and Domestic Violence (Allocation of Proceedings) Order (Northern Ireland) 1999 provides that proceedings under the 1998 Order shall be commenced in a domestic proceedings court being a court of summary jurisdiction sitting to hear domestic proceedings in accordance with Article 89 of the Magistrates Court (Northern Ireland) Order 1981. Proceedings may be commenced in a family proceedings court if there are other family proceedings in that court. There are exceptions to the requirement that proceedings be commenced in a domestic proceedings court. One such exception is contained in Article 4(4) of the Family Homes and Domestic Violence (Allocation of Proceedings) Order (Northern Ireland) 1999 which provides that an application under the 1998 Order (including an application for leave) brought by an applicant who is under the age of 18 shall be commenced in the High Court.

[18] Accordingly the applications by the children under the 1998 Order had to be commenced in the High Court, though, as I have indicated, under Article 21 of that Order, where as here, the children were under 16 their applications could only be commenced with the leave of the High Court.

The court's jurisdiction to make orders prohibiting the respondent from molesting a relevant child

[19] A non molestation order is a remedy which an adult may seek, against another adult with whom he or she is associated, not only for his or her own sake but also for the sake of a relevant child. The mother, RH and the father, IH are associated persons within the statutory definition contained in Article 3 (3) of the Family Homes and Domestic Violence (Northern Ireland) Order 1998. The children are all relevant children within the statutory definition contained in Article 3 (2) of the 1998 Order. Accordingly in the proceedings brought by the mother it is clear that a non molestation order was available to be made at her instigation against the father for the protection of their children, see Article 20 (1) (b) of the Family Homes and Domestic Violence (Northern Ireland) Order 1998.

[20] In addition to the jurisdiction of the court to make a non molestation order for the benefit of the children in proceedings under the 1998 Order brought by the mother, the court has jurisdiction to make a non molestation order for the benefit of any relevant child in any family proceedings even though no application has been made to the court for such an order under the 1998 Order, see Article 20 (2) (b) of the Order. For instance in this case if the

mother had brought an application for a no contact order against the father under Article 8 of the Children (Northern Ireland) Order 1995 the court would have had jurisdiction to make a non molestation order either in addition to or instead of any order under the Children (Northern Ireland) Order 1995.

[21] It can be seen that a child does not have to bring an application for a non molestation order to gain the benefit of such an order. The scheme of the legislation is that if a child under the age of 16 does wish to bring his or her own application then he or she needs the leave of the court. The leave application is assigned to the High Court. Any subsequent proceedings upon leave being granted and any proceedings brought by a child between the ages of 16 and 18 are assigned to the High Court. All applications by persons under the age of 18 have to be begun and prosecuted by a next friend, see rule 6.2 of the Family Proceedings Rules NI 1996 except for those minors falling within the provisions of rule 6.3.

Whether leave to commence proceedings under the 1998 Order was or should be granted to the children

[22] The three children being under the age of 16 their applications for Occupancy Orders and Non Molestation Orders could not be made except with leave of the court. Rule 3.16 of the Family Proceedings Rules NI 1996 specifies that where the leave of the court is required to bring proceedings under the Order of 1998 the person seeking leave shall file in the Office of Care and Protection a draft of the application for the making of which leave is sought. The drafts are of Form F2 and a supporting statement which is signed by the applicant and sworn to be true. In relation to an ex parte application these documents need not be filed and indeed the application may be made orally, see rule 3.17 (1) and (2). The circumstances in which ex parte applications are justified are limited, see Article 23 of the 1998 Order and the case law considered at paragraph [30] of this judgment. In this case, despite the fact that the applications were initially ex parte documents purported to be filed complying with rule 3.16. It is apparent from those documents that:-

(i) none of the applicant children signed any supporting statements,
(ii) none of the applicant children swore that the statements were true,

I did not hear submissions in relation to the provisions of Article 169(1) of the Children (Northern Ireland) Order 1995. That article relates to evidence given by, or with respect to, children. Furthermore the Lord Chancellor in exercise of the powers conferred on him under Article 169 (5) has made the Children (Admissibility of Hearsay Evidence) Order (Northern Ireland) 1996. That Order was considered by the Court of Appeal in the *Matter of an Appeal No. 2000/11* [2001] NICA 36**.** However if it is considered that a child has sufficient

understanding within Article 21 of the Family Homes and Domestic Violence (NI) Order 1998 to bring proceedings then he or she should have sufficient understanding to make a statement and at least understand that it is his or her duty to speak the truth and sufficient understanding to justify his or her evidence being heard. I see no reason why a child applying for leave to bring proceedings should not sign the supporting statement required by rule 3.16 of the Family Proceedings Rules NI 1996. Accordingly as there were no statements from any of the children in this case the documents applying for leave to bring proceedings under the 1998 Order were deficient. I do not propose in this judgment to consider the requirement under the rules that the child's statement should be sworn to be true as I did not hear submissions as to the situation that would apply where a child does not understand the nature of an oath, see *Sean Graham (a minor) by Anne Graham his mother and next friend v Ulsterbus Limited* [1993] 3 NIJB 102, but where the child's evidence can nevertheless be heard under Article 169 (4) of the Children (Northern Ireland) Order 1995. Nor did I hear submissions as to the effect of the Children (Admissibility of Hearsay Evidence) Order (Northern Ireland) 1996.

[23] Rule 3.16 of the Family Proceedings Rules NI 1996 also provides that on considering a request for leave to bring proceedings by a child under the age of 16 the court shall-

> "(a) grant the request, whereupon the proper officer shall inform the person making the request of the decision, or
> (b) direct that a date be fixed for the hearing of the request, whereupon the proper officer shall fix such a date and give such notice as the court directs to the person making the request and to such other persons as the court requires to be notified of the date so fixed."

It can be seen that the court does not have to deal with the leave application on the papers and has the ability to require notice to be given to other persons. This could for instance in this case have included the father.

[24] There appears to have been a lack of appreciation on behalf of the children's legal advisors that there were two distinct applications for leave in this case. The first was an application for leave under Article 21 of the 1998 Order by the children to bring the proceedings. The second was an application for leave under rule 3.17 (1) of the Family Proceedings Rules NI 1996 to make the applications on an ex parte basis. In order to bring any application for leave the children's legal advisors had to give informed consideration as to who should be the next friend of the children. That is whether the Official Solicitor should be their next friend or whether the next friend should be some other person such as the children's mother. If some

other person then under rule 6.2(6) of the Family Proceedings Rules NI 1996 certain documents are required to be filed. I enter the qualification that in relation to an ex parte application where circumstances do not permit for the documents to be filed then undertakings can be given to the court that they will be filed. In this case the children's mother purported to be their next friend but none of the documents required by the rules were filed and no such undertakings were given to the court. No informed consideration was given as to the identity of the children's next friend.

[25] The two distinct applications for leave were to be brought by the children and as they are minors they are "Persons under disability" within the terms of rule 6.1 of the Family Proceedings Rules NI 1996. Rule 6.2 under the heading "Person under disability must sue by next friend etc" provides that a person under a disability may begin and prosecute any family proceedings by his next friend. Rule 6.2 (2) in effect creates a presumption that the next friend should be the official solicitor unless certain documents are filed in court. Those documents are –

> (a) a written consent to act by the proposed next friend or guardian ad litem;
> (b) a certificate by the solicitor acting for the person under disability-
>
> > (i) that he knows or believes that the person to whom the certificate relates is a person under disability stating the grounds of his knowledge or belief, and
> > (ii) that the person named in the certificate as next friend or guardian ad litem has no interest in the cause or matter in question adverse to that of the person under disability and is a proper person to be next friend or guardian.

None of these documents were filed. Put concisely, if the father is correct in his denials then the children's interests are adverse to the mother's interests. It would not have been possible for the solicitor for the children to provide a certificate to the effect that the mother had no interest in the cause or matter in question adverse to her children's or that she was a proper person to be their next friend. The application for leave by the mother as next friend should not have proceeded absent those documents or absent an undertaking that such documents would be filed. On the facts of this case it would not have been possible to have complied with any such undertaking.

[26] Article 21 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 prohibits a court from granting leave to a child under the

age of 16 to apply for an occupation order or a non-molestation order unless the court is satisfied that the child has *sufficient understanding* to make the proposed application. The concept of sufficient understanding, in a slightly different context, has been considered by the Court of Appeal in England and Wales in *Mabon v Mabon* [2005] EWCA Civ 634. In that case consideration was given not only to the meaning of sufficient understanding but also to three commonly encountered situations in which understanding could have been distorted, namely the disturbed child, a child whose views are influenced or manipulated by adult family members and a child subject to litigation disturbance.

[27] It does not follow that if a child has sufficient understanding that leave will be granted. Welfare has a place as do the rights of the child as a separate and distinct human being who is acknowledged to be an expert in, or to have an expertise in, his own life. It would be wrong in this case to list out the factors to be taken into account when exercising the judicial discretion to grant leave if the child has sufficient understanding because on the facts of this case there was simply no evidence at all as to the sufficiency of the understanding of any of the children. The issue was simply not addressed. Leave in those circumstances should not have been granted and indeed by virtue of the lack of appreciation on behalf of the children's legal advisors no application was brought and no order granting such leave was in fact ever made. However subject to the qualification that it is inappropriate to list out the factors to be taken into account, I would observe that drawing a child into the forensic arena may well bring the child into conflict with and potentially inappropriately empower him or her against a close family member and this in turn might forever damage long term family relationships. In addition in this case the benefit of an occupation order and a non molestation order could have been obtained on foot of the mother's application without the need for the children bringing their own applications. On the mothers application arrangements could have been made to have regard to the wishes and feelings of the children. In exercising the discretion whether to grant leave factors such as these would have to be weighed carefully against for instance the factor that children should not just be seen as passive victims of family breakdown but as active participants and actors in the family justice process.

Ex parte application

[28] There are two fundamental points which should be made in relation to the decision in this case to apply ex parte for occupation and non molestation orders. The first is that on any ex parte application the applicant must proceed "with the highest good faith", see *Schmitten v Faulkes* [1893] W.N. 64 per Chitty J. The fact that the court is asked to grant relief without the person against whom the relief is sought having the opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of all material facts otherwise the order may be set aside without regard to the

merits, see *Boyce v Gill* (1891) 64 L.T. 824 and *Baly & another v Barrett & others* [1988] NI 368 at page 417 letters D to H.

[29] In this case on 7 July 2008, the date upon which the ex parte applications were made, the mother and the children were some considerable distance away from the father. Given the distances involved it is difficult to comprehend why it was contemplated by the applicants' legal advisors that this was a case which would have justified the application being brought on an ex parte basis. The fact that the mother and the children had left the matrimonial home and were some considerable distance away was not revealed in the RH's statement grounding all four ex parte applications. I consider that this information should have been disclosed to the court. It is clear that if it had been disclosed the Master would not have made ex parte orders.

[30] The second point is that Hoffmann LJ described the proper practice in generalised terms in relation to ex parte applications for non molestation orders in *Loseby v Newman* [1995] 2 FLR 754 as follows –

> "An ex parte order should be made only when either there is no time to give the defendant notice to appear, or when there is reason to believe that the defendant, if given notice, would take action which would defeat the purpose of the order."

I emphasise the importance of and the need for the practical application of those generalised terms. Higgins J made similar observations in *Re Sloan* [2001] NIQB 23. I also emphasise what Carswell LCJ stated at paragraph [7] of the judgment of the Court of Appeal in *Wallace v Kennedy* [2003] NICA 25, which was as follows:-

> "[7] We agree with the opinion expressed in *Emergency Remedies in the Family Courts,* 3rd ed, para 15.93 that orders without notice should be *the exception rather than the rule* (emphasis added). The reasons given by the editors are in our view valid:
>
> > "An order granted without notice inherently carries a risk of inflaming the situation, whereas at a hearing on notice the respondent frequently accepts that the applicant needs protection and is willing to submit to an injunction or give a binding undertaking. Most respondents do not know that an order without notice is only

> provisional and subject to early review as if nothing had been proved. Upon receiving service of an order without notice, it is likely that it will appear to most respondents that the court has assumed that the allegations made against him were accepted as true by the court without question.
>
> A hearing on notice is an opportunity to address outstanding issues. For example, allegations of molestation are often answered by a respondent claiming that the applicant has frustrated contact with a child: if the first hearing is held urgently and on notice, mutually acceptable arrangements for contact with a child may be achieved and the problem defused. Orders which interfere with civil liberties ought not to be made without notice unless they are clearly warranted; audi alteram partem is a fundamental legal principle of great importance."

In short ex parte orders should be the exception rather than the rule.

[31] In this case the only reference in the statement of RH as to the need for an ex parte order was as follows:-

> "I am making this application ex parte because the children and I require immediate protection. I am also fearful of the response of the Respondent should a Summons be served upon him with the protection of an Interim Order" (sic)

Generalised assertions such as this without any details or particulars are insufficient to justify bringing applications on an ex parte basis. In this case the statement should have set out the reasons to believe that IH would take action which would defeat the purpose of the order rather than merely asserting a fear that he would do so. The applications should not have been made on an ex parte basis.

Conclusion

[32] Ordinarily proceedings under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 should be commenced in a domestic proceedings court. In this case there is no evidence that any of the children

had sufficient understanding to make the proposed applications for an occupancy order and/or a non molestation order. Leave was not granted to the children to bring the proceedings. For the reasons I have set out I do not consider it appropriate to give leave. I dismiss their applications.

[33] As the case has unfolded it has become clear that in essence it involves a dispute as to contact. The mother should have commenced proceedings seeking a no contact order under Article 8 of the Children (Northern Ireland) Order 1995 and an occupation order and a non molestation order for her own benefit and for the benefit of the children. The proceedings should have been commenced in the family proceedings court. There was no basis for an ex parte order. The hearing on notice would have been an opportunity for the parties to address outstanding issues such as who should reside in the matrimonial home and as to contact arrangements with the children. On the facts of this case if the first hearing had been held urgently and on notice, the parties with the assistance of their legal advisers could have started to make arrangements by agreement. The real outstanding issues could have been identified and reports and evidence directed in relation to them ready for determination by the court. An indication that the enduring issue between the parties is confined to the question of contact is that the mother has now withdrawn her applications for occupation and non molestation orders.

[34] In relation to costs I am not minded to order legal aid taxation in relation to the children's applications. There appears to have been no reason why one set of proceedings could not have been brought by the mother in the family proceedings court seeking orders in favour of her and the children. To bring four sets of proceedings instead is a waste of costs and could have had a serious adverse financial effect on the non legally aided father, with implications not only for him but also for the finances available for the children and thus for their welfare. However I will not make a final determination in relation to whether to order legal aid taxation of the children's costs so that their legal advisers can have an opportunity to address me in relation to this issue. In that respect I give them liberty to apply.

[35] On the mother withdrawing her application under the 1998 Order I ordered legal aid taxation in relation to her costs. In future I will give consideration to restricting any such taxation to the costs applicable in the Family Proceedings Court.