Neutral Citation No. [2003] NIFam 13 | *Ref:* **GILF4036**

Judgment: approved by the Court for handing down | *Delivered:* **30/10/03**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

FAMILY DIVISION

_____

RE C (ARTICLE 8 ORDER: ARTICLE 10(2): GRANDPARENTS APPLICATION FOR LEAVE)

_____

GILLEN J

[1] The judgment in this matter is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and any other person identified by name in the judgment itself) may be identified by name or location and in particular the anonymity of the child and the adult members of his family must be strictly preserved as such.

[2] In this matter, P, the grandfather of C a child born on the 18 of May 2002, seeks an order from the court pursuant to Article 8 of the Children (NI) Order 1995 ("the 1995 Order") that he may have a contact order in relation to C. Article 10 of the 1995 Order makes a division between those who have an automatic right to apply for an order under Article 8 and those who require the leave of the court to make such an application. A grandparent does not fall within the former category and accordingly in this instance P seeks the leave of the court to make such an application.

[3] Article 10(9) of the 1995 Order, where relevant, states:

> "(9) Where the person applying for leave to make an application for an Article 8 order is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to –
>
> (a) the nature of the proposed application for the Article 8 order;

(b) the applicant's connection with the child;

(c) any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it …"

Principles governing such applications

[4]

(1) In Re M (Care: Contact: Grandmother's application for leave) (1995) 2 FLR 86, the Court of Appeal held that in weighing up the factors the following tests should be applied:

- If the application is frivolous, vexatious or an abuse of process, it must fail;
- If the applicant fails to disclose that there is any eventual real prospect of success, or the prospect is so remote as to make the application unsustainable, the application for leave should be dismissed;
- The applicant must satisfy the court that there is a serious issue to try and must present a good, arguable case.

(2) Subsequent to this case however, Re J (Leave to Issue Applications for a Residence Order) (2003) 1 FLR 114 revisited the approach adopted in Re M. Thorpe LJ said at p. 118 para 18:

> "I am particularly anxious at the development of a practice that seems to substitute the test 'has the applicant satisfied the court that he or she has a good arguable case' for the test that Parliament applied in Section 10(9). That anxiety is heightened in modern times where applicants under S. 10(9) manifestly enjoy Article 6 rights to a fair trial and, in the nature of things, are also likely to enjoy Article 8 rights.
>
> (19) Whilst the decision in Re M … no doubt served a valuable purpose in its day in relation to Section 34(3) applications, it is important that trial judges should recognise the greater appreciation that has developed of the value of what grandparents have to offer, particularly to children of disabled parents. Judges should be careful not to dismiss such opportunities without full enquiry. That seems to me

> to be the minimum essential protection of Arts 6 and 8 rights that Mrs J enjoys …"

(3) In considering such an application, the court is not considering a question with respect to the upbringing of a child, as this is matter which falls to be considered at the substantive hearing. The welfare of the child is not the paramount consideration in such an application, otherwise some of the considerations of Article 10(9) might be otiose eg. para 10(9)(d)(i) if the whole application was subject to the overriding provisions of Article 3(1). Similarly there would have been little point in Parliament providing that it was to have particular regard for the wishes and feelings of the child's parent where the child was being looked after by an authority if the whole decision was to be subject to the overriding (paramount) consideration of the child's welfare.

(4) The principles set out in Re J concerned public law proceedings where a maternal grandmother sought party status in care proceedings in which the local authority was advocating adoption of the grandchild with strangers. In the public law sphere, where there is the risk of a child being permanently removed from the birth family, every consideration must be given to exhaust the potential list of carers for a child before a public body is allowed to intervene. In private law applications, such as the present, the imperative of the state intervention is not there and thus it is all the more imperative that the courts adhere strictly to the terms of Article 10(9) of the 1995 Order and require grandparents in such cases to come within the ambit of the criteria therein set out. Whilst therefore there is a growing awareness of the important role of grandparents in the life of children, particularly young children (see Re W (Contact: Application by Grandparent) (1997) 1 FLR 793), nonetheless the courts cannot determine such applications purely on the basis of the "status" of being a grandparent. Parliament has not conferred such a status and as such the courts must be wary not to be diverted away from judicial impartiality and concern for the objectives of the legislation. In Re W and B; Re S (2002) UKHL10 Lord Nicholls said at paragraph 39:

> "Interpretation of statutes is a matter for the courts; the enactment of statutes and the amendment of statutes are matters for Parliament … for present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This particularly so where the departure has important practical repercussions which the court is not equipped to evaluate."

Accordingly grandparents do have to justify any claim for leave to bring an application under Article 8 on the precise criteria set out in Article 10(9) of the

1995 Order. Like all applicants, they enjoy Article 6 rights to a fair trial and the rights under Article 8 to respect for family life. Doubtless many grandparents will be able to show that they have enjoyed a meaningful and valuable relationship with their grandchildren, but the facts of whether or not they have established a real family life based on more than the blood tie will turn on the facts of each individual case reflecting the requirements in Article 10(9)(b) to consider "the applicant's connection with the child".

Factual background to this application

[5] The background to this case includes the fact that this applicant in February 1999 was found by the late Higgins J to have sexually abused K, the sister of D who is the mother of C. At that time K was six years of age. The court raised the possibility that he had abused two other children. The judge at that time said:

> "Undoubtedly the girls would be at risk from (the applicant), but, if he only has access to them, they can be protected by supervision of access visits. I think that it is in the best interests of all the children that they should visit (the applicant) provided that-
>
> (a) no child will be forced to visit (the applicant);
>
> (b) each visit will be supervised by a social worker; and
>
> (c) visits will take place only once every three months at such time and place as the guardian may decide.
>
> It is in my opinion that these arrangements will provide sufficient protection for the children."

[6] Higgins J at that time said of the applicant that he was a man with little regard for the truth, an unreliable witness and an untrustworthy person. There is also before me a welfare report of a Mr Bernard Connolly of 30 March 2000 in which he describes the applicant as "very threatening, obstinate and extremely difficult to work in partnership with. It has taken a lot of patience to contain his emotions within working parameters." D has indicated that she has had very little meaningful contact with the applicant between 1991 and 2000 despite the discharge of the deemed care order made concerning her in 1991. She has alleged that the applicant has made efforts to harass her and upset her family including an allegation that he had followed her in a local store. The applicant denies these allegations (including the allegations found as proven before Higgins J) and asserts that he simply

wishes to establish some degree of relationship with his grandson whom he has not seen. He asserts in paragraph 29 of his statement of 11 September 2003:

> "My motivation in applying is to build up a rapport with my grandson and have him know that I too am part of his family and identity. I do not want my grandson to grow up unaware of who I am nor to think of me maliciously."

Conclusions

[7] Applying the test set out in Article 10(9) I have determined the following:

(a) The nature of the proposed application for the Article 8 order is a contact order.

(b) The applicant's connection with the child is that of paternal grandfather. He has never met this child but of course the child is only 18 months old or thereabouts.

(c) I am not persuaded at this stage that the proposed application would disrupt the child's life to such an extent that it would be harmed by it. Being so young he is of course totally unaware of the application or indeed probably of the applicant. I recognise that D the mother of this child is vehemently opposed to the application being granted and that even the granting of leave may cause her concern and distress. However it is important to note that the grant of leave does not raise any presumption that the application will succeed, (see Re A (Section 8 Order: Grandparent Application (1995) 2 FLR 153) and being assured of this I do not believe that any concern she would manifest at this stage is likely to be translated into disruption of the child's life to such an extent that he will be harmed by it. In any event the nature of the proposed application for contact is a very wide provenance. Such contact can range from peripheral indirect contact eg. letters or birthday cards without direct contact on the one hand to direct contact on the other. The gathering momentum of the notion of children's rights provoked by the desire to comply with and the creative use of the European Convention for the Protection of Human Rights 1950 and the United Nations Convention on the Rights of the Child 1989 serves to draw attention to the distinction between the twin concepts of protecting children on the one hand and protecting their rights on the other. The right of a child to know the truth of his biological and genetic origins together with the benefit of the child knowing his genetic truth and family relationships are all issues that fall to be considered in applications such as this. I am unpersuaded that consideration of such issues in the context of contact

between grandchild and grandparent in this instance creates any risk of disruption to the child's life to such an extent that he will be harmed by it. On the contrary, I think there is much merit in the view of Thorpe LJ in Re J that trial judges should recognise a greater appreciation that has developed in the law of the value of what grandparents have to offer to a child and the courts should be careful not to dismiss such opportunities without full enquiry particularly where, in the wake of the ECHR this applicant manifestly enjoys both Article 6 and Article 8 rights. In my view a refusal of leave in this case would represent a disproportionate response to the negligible risk of serious disruption to the Article 8 of this child by granting leave.

[8] In all the circumstances therefore, and not without some hesitation, I have come to the conclusion that this is a case which merits the granting of leave to the applicant to bring an application for contact with C pursuant to Article 8 of the 1995 Order.