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Judgment: approved by the Court for handing down | *Delivered:* **04.05.05**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

RE C AND C

(FAMILY LAW ACT 1986 AND THE EUROPEAN COMMUNITIES (JURISDICTION AND JUDGMENT IN MATRIMONIAL AND PARENTAL RESPONSIBILITY MATTERS) REGULATIONS 2005: JURISDICTION WITHIN THE UNITED KINGDOM)

GILLEN J

[1] Nothing must be published or reported in this case in Northern Ireland which would serve to identify the children or the family involved.

[2] In this matter an application by the mother ("A") of two children (C currently aged 11 and C currently aged 8) was made on 7 December 2004 at a Family Proceedings Court in Northern Ireland to vary the terms of a final order made at Milton Keynes County Court on 22 September 2004 and in addition for a prohibited steps order preventing the father of the children ("R") from recording telephone conversations with the children. On 21 January 2005 the matter was transferred to a Family Care Centre in Northern Ireland with a recommendation that the case be referred to the High Court. The reason given was "jurisdiction". This is not one of the grounds under the Children (Allocation of Proceedings) Order (Northern Ireland) 1996 ("the Allocation Order") but I assume the intention was to refer the matter on one of the grounds listed in Article 3(1) eg because of conflict of law with another jurisdiction or because of a difficult point of law. On 26 June 2005 the proceedings were transferred to the High Court by the Family Care Centre "to determine if the Care Centre has jurisdiction to deal with this matter or whether any change should be governed by Milton Keynes County Court" pursuant to the Allocation Order. Accordingly the only matter to be determined by this court is as to which

court has jurisdiction to deal with these applications and no substantive determination is to be made on any other issue.

Background

[3] The relevant salient background facts in this care are few but the legal issue is different. The background facts are;

(a) A and R were married on 27 February 1988. The children were born in 1993 and 1996 respectively. In April 1994, when the parties were living in Scotland, A moved to the USA with the children. She obtained ex parte residence, prohibited steps, non-molestation and ouster orders in Scotland on 21 April 1997. Thereafter she returned to her family home in Milton Keynes and issued divorce proceedings in April 1997. A decree nisi was obtained in Milton Keynes in November 1998.

(b) At the end of August 2003 A moved to Northern Ireland with the children and has resided here ever since. R issued proceedings in Milton Keynes County Court seeking a residence order on 22 December 2003 and a specific issue order on 11 February 2004 on the grounds that A was refusing contact. The matter proceeded to final hearing on 12 July 2004 and the final order was made by His Honour District Judge Mostyn on 22 September 2004 providing a residence order in favour of the mother A and a defined contact order in favour of the father R. Further proceedings were issued by R in Milton Keynes on 13 December 2004 seeking a specific issue order with reference to Christmas contact and on 16 December 2004 His Honour District Judge Mostyn acceded to R's application, making in addition a costs order against A in the sum of £1,000.

(c) On 7 December 2004 A issued an application before a Family Proceedings Court in Northern Ireland to vary the terms of the order made at Milton Keynes County Court on 22 September 2004 and also sought a prohibited steps order preventing R from recording telephone conversations with the children. Subsequentially on 18 March 2005, A issued an application for a "defined contact order in favour of R" before the High Court in Northern Ireland.

(d) The children have therefore been living in Northern Ireland with A in excess of a year, being at school here. R continues to reside in England.

I pause to observe that I consider it beyond plausible dispute that the children are now habitually resident in Northern Ireland. During the course of the hearing I was informed that R issued an application before Milton Keynes County Court on 7 April 2005 through his English solicitors seeking a residence order. I understand that matter is to be determined on 11 May 2005.

Relevant legislation and principles to be applied

(i) The Family Law Act 1986 as amended by statutory instrument 2005 No. 265 the European Communities (Jurisdiction and Judgment in Matrimonial and Parental Responsibility Matters) Regulation 2005 ("1986 Act" and the "2005 Regulations" respectively).

(ii) The amending regulations came into force on 1 March 2005 and therefore are applicable in this instance. Section 19 of the 1986 Act where relevant reads as follows;

> "19(1) A court in Northern Ireland shall not have jurisdiction to make a Section 1(1)(c) Order with respect to a child in or in connection with matrimonial proceedings in Northern Ireland unless -
>
> (a) the child concerned is a child of both parties to the matrimonial proceedings and the court has jurisdiction to entertain those proceedings by virtue of the Council's Regulations; or
>
> (b))[1] the condition in Section 19(a) of this Act is satisfied.
>
> (2) A court in Northern Ireland shall not have jurisdiction to make a Section 1(1)(c) Order in a non-matrimonial case (that is to say, where the condition in Section 19(a) is not satisfied) unless the condition in Section 20 of this Act is satisfied.
>
> 19(a)(1) the condition referred to in Section 19(1) of this Act is that the matrimonial proceedings are proceedings in respect of the marriage of the parents of the child concerned and -
>
> (a) proceedings –
>
> (i) are proceedings for divorce or nullity of marriage; and (ii) are continuing ….

[1] *Sub-section 19(1)(a) inserted by European Communities (Matrimonial Jurisdiction and Judgments) (Northern Ireland) Regulations 2001 (SI 2001/660).*

[3] It is significant at this stage to draw attention also to the wording of Section 1(1), (1)(a) and (1)(c) which where relevant read as follows;

> "(1) Subject to the following provisions of this Section, in this part ("Part 1 Order") means -
>
> ((a) a Section 8 Order made by a court in England and Wales under the Children Act 1989 other than an order varying or discharging such an order;)…
>
> ((c) An Article 8 Order made by a court in Northern Ireland Order under the Children (Northern Ireland) Order 1995, other than an order varying or discharging such an order ;)[2]

Two other references in the 1986 Act are relevant;

> "20(1) the condition referred to in Section 19(2) of this act is that on the relevant date the child concerned -
>
> (a) is habitually resident in Northern Ireland; or
>
> (b) is present in Northern Ireland and is not habitually resident in any part of the United Kingdom, and, in either case, the jurisdiction of the court is not excluded by sub-section (2) below.
>
> (2) For the purposes of sub-section (1) above, the jurisdiction of the court is excluded if, on the relevant date, matrimonial proceedings are continuing in a country in England and Wales or Scotland in respect of the marriage of the parents of the child concerned.

[4] The European Communities Regulations 2005 amended Section 19 of the 1986 Act at Regulation 12 as follows;

> "12 – (1) amend Section 19 (Northern Ireland; Jurisdiction in cases other than Divorce etc) as follows;
>
> (2) for sub-sections (1) and (2) substitute -
>
> (1) a court in Northern Ireland shall not make a Section (1)(c) Order with respect to a child unless -
>
> (a) it has jurisdiction under the Council's Regulation or

[2] *Children (Northern Ireland Consequential Amendments) Order 1995 (SI 1995/756)*

(b) the Council Regulation does not apply but –

(i) the question of making the Order arises in or in connection with matrimonial proceedings and the condition in Section 19(a) of this Act is satisfied, or
(ii) the condition in Section 20 of this Act is satisfied.

[5] Section 6 of the 1986 Act, where relevant, states as follows;

"Duration and variation of custody orders.

6 - (1) if a custody order made by a court in Scotland or Northern Ireland (or a variation of such an order) comes into force with respect to a child at a time when a custody order made by a court in England and Wales has effect with respect to him, the latter order shall cease to have effect so far as it makes provision or any matter for which the same or different provision is made by (or by variation of) the order made by the court in Scotland or Northern Ireland."

[6] Section 6 is of course relevant to the fresh application for defined contact made by A to this court dated 18 March 2005.

[7] Section 22 of the 1986 Act as amended, where relevant, reads as follows;

"Power of court to refuse application or stay proceedings

22(1) A court in Northern Ireland which has jurisdiction to make a Part 1 Order may refuse an application for the order in any case where the matter in question has already been determined in proceedings outside Northern Ireland.

(2) Where, at any stage, of the proceedings on an application made to a court in Northern Ireland for (a Part 1 Order) or for the variation of (a Part 1 Order) (other than proceedings governed by Council Regulation), it appears to the court -

(a) that proceedings with respect to the matters to which the application relates or continues outside Northern Ireland; or
(b) that it would be more appropriate for those matters to be determined in proceedings to be taken outside Northern Ireland,

the court may stay the proceedings on the application.

(3) The court may remove a stay granted in accordance with sub-section (2) above if it appears to the court that there has been unreasonable delay in the taking or prosecution of the other proceedings referred to in that sub-section or that those proceedings are stayed, sisted or concluded.

(4) Nothing in this sub-section shall affect any power exercisable apart from this section to refuse an application or to grant or remove a stay."

Conclusions

[8] I commence by expressing my gratitude to counsel, Mr Long QC who along with Ms McHugh appeared on behalf of the applicant A and Ms Elliott who appeared on behalf of the respondent R. Counsel in this matter have presented clear and compelling oral submissions augmented by careful and skilful skeleton arguments in writing. Secondly, I am conscious that proceedings in Milton Keynes County Court have been conducted with conspicuous care and skill by His Honour District Judge Mostyn.

My conclusions are as follows;

(i) I am satisfied that these children are habitually resident in Northern Ireland at the time the proceedings in Northern Ireland were issued.

(ii) I am satisfied that the current proceedings are not connected with matrimonial proceedings as defined in Section 19(a) of the 1986 Act and that the Council Regulation does not empower either the court in Northern Ireland or in England.

(iii) Accordingly in respect of most matters relating to Part 1 Orders Northern Ireland would have jurisdiction to hear the case because the children are habitually resident in Northern Ireland.

(iv) However the reality is that Parliament has intended a court to retain jurisdiction in respect of continuing orders the terms of which require variation or discharge (see Section 1(1)(a) and (c) of the 1986 Act). In other words it is absolutely plain that if an application is made to vary or discharge the order made in Milton Keynes County Court such an

application must be made in Milton Keynes and the Northern Ireland Court does not have the jurisdiction to make such an order of variation or discharge.

(v) Mr Long QC, recognising this difficulty, argues that the application which was made before this court (and not before the Family Care Centre in Northern Ireland) dated 18 March 2005 seeking a defined contact order in favour of the respondent is a free standing application which should be looked at in its own right as a fresh application and which, if granted, would trump the order in Milton Keynes by virtue of Section 23 of the 1996 Order. In summary he sought to persuade me that at some stage the fact of the habitual residence in Northern Ireland must become a reality in terms of court proceedings and the Northern Ireland courts take over a determination of issues involving these children. He drew my attention to the spirit of Article 9 of Council Regulation AC No. 2201/2003 (now colloquially referred to as "Brussels II Revised") which came into force on 1 March 2005 and which lays down that once a child is moved lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three month period following the move for the purpose of modifying a judgment on access rights issued in the Member State before the child moved. Whilst Mr Long acknowledges that Brussels II Revised has absolutely no application to the present proceedings, this being an intra-UK case per Article 28(2), nonetheless he vigorously argued that the spirit of new Brussels II Revised should influence the interpretation of the 1986 Act so as to ensure that there is some consistency of interpretation between the Council Regulation and the 1986 Act. Ms Elliott equally vigorously countered that this was no more than a back-door application to vary and a naked attempt to circumvent the clear intent of Parliament. In short it was her submission that this was an application to vary. She invoked by way of analogy Re S (Residence Order; Forum Conveniens) 1995 1 FLR 314. Where Thorpe J, as he then was, said at p. 321 para. g;

> "…the next question to be considered is whether the father's alternative application for the definition of contact dates in accordance with para. 4(ii) of the Order is an application for a variation or discharge in respect of which jurisdiction is retained. Ms Cook suggests that it is not on the grounds that it is in reality an application to enforce rather than an application to vary or discharge. I cannot accept that argument. The reality is that Parliament has intended this court to retain jurisdiction in respect of continuing orders the terms of which require variation or discharge. If jurisdiction to vary those terms remains, a fortiori remains the jurisdiction to further specify or define those terms without variation."

[9] In my view although the application by Mr Long purports to be a free standing application for contact, I have determined that in reality this is simply an application to vary the terms of a contact order made by Milton Keynes County Court by District Judge Mostyn on 22 September 2004. It is no more than a different form of the terms of the application originally set before the Family Proceedings Court dated 1 December 2004 which specifically described the order being sought as "to vary the terms of the order 22 September 2004". I believe it is no different in substance whatsoever from the fresh application made before this court on 18 March 2005 which whilst couching the application in terms of a request for a "defined contact order" is in substance the same application to vary.

[10] I am therefore satisfied that insofar as the application of 1 December 2004 to vary the terms of the order 22 September 2004 is concerned, this court has no jurisdiction to hear that matter since it is not an application for a Part 1 Order within the meaning of Article 1(1) of the 1986 Act. So far as the application of 18 March 2005 is concerned, I am also of the view that this court does not have jurisdiction to deal with that application because in substance it is an application to vary the September 2004 order of Milton Keynes.

[11] On the other hand the application for a prohibitive steps order does come within the ambit of a Part 1(1) Order under the 1986 Act and this court would have jurisdiction to entertain that application on the grounds that the child is habitually resident in Northern Ireland.

[12] In the event that I am wrong about my conclusion that the application of March 2005 is in fact an application to vary, I shall now turn to consider whether or not even if it was a free standing application for contact, this court should exercise its discretion under Section 22 of the 1986 Act to refuse the application or stay proceedings. I shall also consider whether or not, although I am satisfied that the court has jurisdiction in respect of the application for a prohibitive steps order, the court again should refuse the application or stay the proceedings under Section 22 of the 1986 Act. I have come to the conclusion that the prohibitive steps order brought by the mother in this jurisdiction dated 1 September 2004 should be stayed in Northern Ireland, the proper forum for determination of that matter being the court in Milton Keynes. Secondly, if I am wrong in holding that the court has no jurisdiction to hear either the application to vary the terms of the order of 22 September 2004 brought in the Family Proceedings Court in this jurisdiction or the application of 18 March 2005 before this court seeking a defined contact order then I would have exercised my discretion under Section 22 of the 1986 Act to stay those proceedings and to conclude that the proper form for determination of

those matters was for the Milton Keynes County Court. I have come to these conclusions for the following reasons;

(i) In exercising my power to stay proceedings under Section 22 of the 1986 Act the court is entitled to have regard to the habitual residence which the child has by then established as a relevant factor and in many cases it may prove to be a decisive one, but that factor need not displace other factors in the child's interests which might otherwise be predominant (see Re K (Adoption; Consent) [1995 2 FLR 211). In terms therefore habitual residence of a child is a very important factor but not necessarily a conclusive one.

(ii) Where a court in another part of the United Kingdom has exercised jurisdiction comparatively recently, that is an important balancing factor albeit retention of jurisdiction is not something that applies in perpetuity. (See Re D (Stay of Children Act Proceedings) [2003] 2 FLR 1159 in the context of international jurisdictions but which I believe carries a resonance for cases of competing jurisdictions within the United Kingdom. Circumstances change as times elapses. The spirit of Brussels II Revised to which Mr Long adverted encapsulated that principle. However in this instance, as recently as September 2004, there was a very full hearing of all the issues in front of District Judge Mostyn who clearly gave careful consideration to the making of an order. Even more recently in December 2004, both parties submitted to the jurisdiction in Milton Keynes when dealing with a specific issue order again with reference to contact. At this time virtually all of the residential issues which now obtain were in place both in Northern Ireland and in England. I believe that when exercising my discretion under Section 22 of the 1986 Act, I should give great weight to which court has a substantial amount of background information already available to it and determined by it particularly when such determinations have been made comparatively recently. I consider that will serve to expedite proceedings and ensure a consistency in approach. Nothing of any great significance has happened, certainly since December 2004, and very little since September 2004 save that the mother now wishes to vary the order made. Having read the nature of the contact order now sought, I do not believe it will provide any difficulty to the court in Milton Keynes to review contact in light of the fact that the child lives in Northern Ireland and goes to school here. Whilst Mr Long argued that the presence of the children and mother here, and the expense of travelling to England should tilt the balance in favour of Northern Ireland, I must weigh on the other hand the experience of Milton Keynes County Court in dealing with this case, the fact that the children regularly visit for contact in England when they could be interviewed if necessary, and the fact that this approach seemed to have work seamlessly in December 2004 before the English court. It is important that differing jurisdictions within the United Kingdom who make orders should recognise that those orders will be adhered to by courts

in other parts of the United Kingdom and that there is no basis to deter courts from agreeing to relocations within the United Kingdom. There is no doubt that the passage of time may well dilute that retention of jurisdiction and clearly Section 6 of the 1986 Act envisages that. I believe it is too early for that transition to have occurred given the circumstances of the application now sought and the proximity of the original order in the Milton Keynes Court. That will not remain the position in perpetuity and I envisage circumstances, some substantial time ahead, if circumstances remain as they are, where a court may exercise its discretion differently in Northern Ireland if applications are brought in this jurisdiction.

[13] In the event therefore I have determined that all of the proceedings now before me should be stayed so that other proceedings may be taken and determined in Milton Keynes County Court.