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Judgment: approved by the Court for handing down | *Delivered:* **6/02/09**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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08/029055

OFFICE OF CARE AND PROTECTION

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RE: R (SHARED RESIDENCE APPLICATION) (No 2)

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STEPHENS J

Anonymity

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

Introduction

[2] The applicant in this case is A who is the father of R, now 11 (dob 22 January 1998). G is mother of R. A seeks to obtain a Shared Residence Order in respect of R pursuant to Article 8 of the Childrens Order (Northern Ireland) 1995.

Previous proceedings for a Shared Residence Order

[3] This is the second application by A for a Shared Residence Order in respect of R. The first application was heard and determined by Gillen J who delivered judgment on 24 October 2002 [2002] *NI Fam 22*. At the time of that application R was living with G. Gillen J came to the conclusion that to make a Shared Residence Order would not be best for R and accordingly declined

to make such an Order. He did make a Contact Order in respect of A's contact with R.

[4] G alleged in the previous application that historically A had been a very controlling, domineering and determined individual who had initiated a series of Contact Order applications culminating in the previous Residence Order application as part of his overall attempt to control her and R. Gillen J had no doubt that neither A nor G were without flaw but that G genuinely felt that A was attempting to control her life. That her insecurity was borne of a history during the marriage and had been fed by many of the actions of her husband, A. Gillen J illustrated his reasoning with three specific instances of A's controlling behaviour and of his determination to take control of the family situation without catering at all for the sensitivities or appropriate concerns of G, his wife. That in the process A did not afford to G dignity and equality but rather steamrollered her views simply because he did not agree with them. Accordingly Gillen J concluded that there was more than a measure of justification in G's disquiet about A's behaviour and attitude towards her. That A's actions smacked of an attempt on his part to dominate and control her irrespective of the upset he occasioned her. Gillen J held that the acrimony between A and G would feed into R's insecurity. That a Shared Residence Order would feed into G's sense of insecurity and lack of trust and in turn her anguish and concern could affect her care for R which was his paramount concern. That A would avail of a Shared Residence Order to exercise more control over his wife G, and their child R.

[5] Gillen J also concluded that disharmony between A and G carried the risk of grave emotional damage to R. In making the Contact Order Gillen J warned that if contact was abused by either parent and used as a means of disquieting the other then the court would not hesitate to act to ensure that R was adequately protected. He reminded the parties of the court's powers under Article 179(14) of the Children (Northern Ireland) Order 1995 to order that neither party shall issue further proceedings in respect of the child without prior leave of the court. Finally he directed that any further proceedings touching upon R should be referred to him for hearing.

[6] Neither party to this second application for a Shared Residence Order applied that Gillen J should hear it. He has indicated that he no longer considers that it is appropriate for him to hear the application bearing in mind that he is no longer in the Family Division. Accordingly and with the parties express agreement I will hear this application.

History of these proceedings

[7] The second application for a Shared Residence Order was commenced on form C1 on 28 August 2008. A's reason for applying was stated as his belief:-

> "That it is in the best interests of the child that there be joint residence in favour of his mother and me and the child himself has frequently expressed that that is his wish."

[8] A does not give any particulars as to how and when R expressed his wishes to him. For instance there are no details as to how the conversations between A and R came about, whether A prompted them, or how A reacted to them.

[9] It is apparent from A's solicitor's letter enclosing form C1 that the divorce petition between A and G was listed for hearing on 9 September 2008 and that there were ancillary relief proceedings either being heard before Master Redpath or about to be commenced. Those ancillary relief proceedings have not as yet been concluded and affidavits are still being filed. A decree nisi was granted in early September 2008.

[10] The Shared Residence application was first listed before Master Wells on 17 September 2008. R was due to sit his 11 plus examination in November 2008. Against the background of divorce and ancillary relief proceedings and in view of the exam which R was to sit, the Master adjourned the Shared Residence application to 26 November 2008 but gave an indication that at the adjourned hearing directions would be given to A that he should file a statement as to what circumstances had changed since Gillen J delivered his judgment in October 2002.

[11] On 26 November 2008 A advised that he wished the Official Solicitor to interview R "to ascertain his wishes and feelings as to how he wants to split his time residing with each parent". The Master granted an adjournment to 8 December 2008 to enable counsel for G to take instructions in respect of this proposal.

[12] On 8 December 2008 G by her counsel indicated that she did not agree to the Official Solicitor speaking with R. She was afforded an opportunity to file a statement of evidence. The application was adjourned to 9 January 2009. The Official Solicitor was not appointed but rather the court put her on notice so that she was at liberty to attend the adjourned hearing as "a watching brief".

[13] On 7 January 2009 G filed her statement of evidence in which she stated that she believed and was very deeply concerned that R was being manipulated by A to a particular view. That she believes that this is within the capacity of A as he is a man who without fail wishes to exert control over every situation. She went on to state that she believes that R has been spoken to by his father about A's desires and that A is now attempting to use R in a very concerning way to undermine the effect of Gillen J's Order and to change it to

get what A has always wanted which is joint residence. She also believed that the motivation for the application "was entirely connected to the monetary aspect of our divorce and the pending ancillary relief application". G stated that R has returned from contact with A saying that:-

> "Dad says he wants me half and half. Half with him and half with you."

[14] She gave illustrations of the way in which she says A dominates R.

[15] On 9 January 2009 G opposed A's application that R be interviewed by the Official Solicitor on the basis that it would lead to emotional harm and upset to him. That the court should first determine whether there was going to be emotional harm and upset to R before deciding to direct that his wishes and feelings be ascertained. If the court concluded that there was an appreciable risk of such harm to R then that would be a material factor to be taken into account in considering whether or not to ascertain the wishes and feelings of R. A on the other hand stated that if R expressed a wish not to have a Shared Residence Order or did not wish to express any wish one way or the other then that he would withdraw his application.

[16] On 9 January 2009 Master Wells directed that the case be heard by the High Court on 5 February 2009 and she appointed the Official Solicitor to represent R.

[17] The application came before me on 5 February 2009.

The preliminary issue as to the wishes and feelings of R

[18] Article 3(1) of the Children (Northern Ireland) Order 1995 provides that in determining the shared residence application R's welfare is the paramount consideration. Article 3(3) provides that in considering whether to make a Shared Residence Order the court is to have regard in particular to the ascertainable wishes and feelings of R (considered in the light of his age and understanding) and also, inter alia, to his emotional needs. A wishes the Official Solicitor to ascertain R's wishes and feelings before the substantive hearing of the shared residence application. G wishes the court first to determine whether ascertaining R's wishes and feelings would in the circumstances of this case cause him emotional harm. That this should be ascertained after hearing evidence but before concluding the application for a Shared Residence Order.

[19] Ms Ramsey, who appeared for A, accepted that R should not be interviewed by the Official Solicitor if there was an appreciable risk of emotional harm to him. I consider that she was correct to make that concession on the facts of this case but would qualify the extent of the concession in that

the nature and extent of harm are relevant factors to be taken into account. Ms Ramsey contended that G's statement did not establish a risk of emotional harm to R. I enquired as to whether if I concluded that G's statement did establish a risk of emotional harm her client wished to file a statement and give evidence in response to G's statement before I came to a final decision as to whether to direct the Official Solicitor to ascertain R's wishes and feelings. I rose for a short time for her to obtain instructions from her client. She informed the court that in those circumstances A did wish to file a statement and give evidence.

Conclusion

[20] I consider that G's statement on its own and also seen in the context of the findings made by Gillen J, does give rise to concerns that R has been dominated and manipulated by A. If for instance and depending on the circumstances, A did say to R that he wanted R half and half. Half with A and half with G then that might be an undermining of the security of the arrangements that were put in place by Gillen J. I express no concluded or decided view on that matter or indeed any of the matters contained within G's statement. I emphasise that at present I have an entirely open mind as to the evidence. There is however the risk of emotional harm to R for instance if he has been manipulated by A into taking a particular view and he then expressed that view and perceived that it was decisive. A dawning realisation of what had occurred would substantially affect him emotionally. It would be the very antithesis of a stable and settled environment with A and G collaborating in his interests. I do not consider that it is appropriate at this stage to direct the Official Solicitor to ascertain the wishes and feelings of R. I defer that decision until I am afforded an opportunity of deciding on the evidence whether there is substance in the allegations made by G contained within her statement and in the light of any findings I make the consequence as to the existence of any emotional impact on R and if there is such an impact the degree and nature of it.

Directions and mediation

[21] I direct that A file a statement of evidence within 7 days. I was minded to direct a hearing on Thursday 19 February 2009 but A and G upon being informed as to the decision in relation to this matter have today indicated to me their desire to enter into mediation. I will allow a period of time to elapse to facilitate mediation.

[22] I adopt the approach of Morgan J as to the court's role when directing or facilitating mediation. In a paper delivered to the Four Jurisdictions Family Law Conference held in Belfast on 31 January 2009 he stated –

"In cases involving children the obligation of the court under article 3 (1) of the Children (Northern Ireland) Order 1995 is to consider the child's welfare as its paramount consideration. This is a non-delegable duty and the process of mediation, however achieved, can only be an aid towards securing that end. Of course the court is not directly involved in the carrying out of the mediation and its role must, therefore, be supervisory but I have considerable difficulty with any suggestion that mediation is a stand-alone activity which sits outside the judicial process and merely feeds in at the start with a referral and at the end with a result. The making of agreements, the achievement of compromises and the reduction of conflict are properly matters to which mediation should be directed but they also bear heavily on the court's consideration of the welfare of the child. In this jurisdiction the court will, therefore, expect to be told about the extent to which agreement was reached, compromises achieved and conflicts reduced within the mediation and the reasons for that. The determination by a court of the welfare of the child is not a matter of private agreement but an issue of public interest and concern. The process leading to that determination ought to enable the court to carry out its supervisory function in a manner which properly respects its obligation to secure open justice in matters of public interest and that is all the more so in cases where for a variety of good reasons the details leading to the decision may not be published.

This is a view which has not achieved universal support among those providing mediation services. There are those who argue that mediation is best achieved in circumstances where there is a relationship of confidence upon which the mediator can establish the trust of the mediating parties. I also recognise that it is open to parties to engage in mediation outside the court process and indeed the without prejudice discussions that take place between lawyers prior to the court's involvement might be seen as an aspect of that. Where, however, the dispute continues to the point where the court must involve itself in its resolution any direction to mediate must be seen as part of the entire court process and

> cannot be seen in isolation. Lastly on this I just want to make it clear that reporting to the court does not mean that the court requires a record of who said what and when. The role of the court is, as I have indicated, supervisory and the disclosure required is that which enables the court to properly carry out its function."

[23] A and G have agreed that the mediator should be Family Coaching Consultancy and that a report to the court will be provided by the mediator. I have authorised the release of some of the papers in relation to this case to the mediator. In view of my decision in relation to the potential for emotional harm to R and before I have heard evidence from A and G then at this stage the mediation process should not involve the mediator contacting R either directly or indirectly to ascertain his wishes and feelings. That does not remove the obligation on the mediator to have regard in particular to the ascertainable wishes and feelings of R considered in the light of his age and understanding. It removes at this stage one method of a way of ensuring that R is heard. That direction to the mediator that he or she must not contact R either directly or indirectly reinforces the need to ensure that the court is adequately informed of the events within the mediation by the mediator reporting to the court to ensure that R's independent voice be heard. For instance the result of the mediation may lead to a different attitude by G to an approach to R by the Official Solicitor. Alternatively it may lead to A deciding not to proceed with the application for a shared residence order. In either case the court must be fully informed and must be involved in the decision making process. As Morgan J stated "the determination by a court of the welfare of the child is not a matter of private agreement but an issue of public interest and concern."

[24] The mediator will report to the court by Monday 23 March 2009. I will review the case on 30 March 2009. If despite mediation the matter has to proceed to a hearing then in advance of the review hearing the parties are to have exchanged a written list of the issues upon which they wish to obtain directions and they should be prepared for a hearing during the course of that week. In that respect I am provisionally listing the case for Thursday 2 April 2009. The parties are to be in a position to exchange any further evidence in advance of that hearing date. If in the meantime mediation proves to be unsuccessful then I expect to be informed immediately so that I can bring forward the date of the hearing.