

Neutral Citation No. [2013] NIMaster 8

Ref:	2013NIMaster8
------	---------------

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

Delivered:	12/04/2013
------------	------------

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**FAMILY DIVISION**

**OFFICE OF CARE AND PROTECION**

-----

**IN THE MATTER OF ~X~, a child**

**BETWEEN:**

- Y -

**Applicant**

and

- X -

**Respondent**

-----

**MASTER KH WELLS**

**Anonymity**

1. This judgment has been anonymised to protect the identity of the child concerned. Nothing may be published concerning this matter that would lead directly or indirectly to the identification of the child or her parents.

**The Applications**

2. This case concerns an 8 year old girl called ~X~. Her father, ~Y~, is a native of this jurisdiction; he is from Londonderry, where he resides. He brings this application under Article 8 of the Children (Northern Ireland) Order 1995 (hereinafter called 'the Order') for a Residence Order as he wants his daughter, ~X~, to live with him in Londonderry. He also seeks a Prohibited Steps Order under Article 8 of the Order to prohibit the Respondent, ~Z~ from removing ~X~ from this jurisdiction. This application is opposed by the Respondent.

3. The Respondent states in her first statement that she was born in Colorado, though since on or about 1976 she grew up in Nashville. The subject child currently resides with her mother in Belfast. The Respondent is also seeking a Residence Order pursuant to Article 8 of the Order to allow ~X~ to reside with her, together with an Article 8 Specific Issue Order to allow her to remove ~X~ from this jurisdiction and relocate to her family home in Nashville, Tennessee, USA, to reside with her mother. This application is opposed by the Applicant.

4. Ms Fiona McNulty BL appears on behalf of ~Y~; Ms Mary Connolly BL appears on behalf of ~Z~, and the subject child's ascertainable wishes and feelings, with the consent of both parties legal representatives, have been provided to the Court by Ciara McGowan, Senior Practitioner of the Belfast Health and Social Care Trust, represented by Ms Moira Smyth BL. Ms McGowan has spoken to ~X~ on a number of occasions to find out her age related views in respect of the issues in this case. I acknowledge with gratitude the assistance that I received from counsel who ensured that the relevant issues were presented in a helpful and thoroughly professional manner.

## **Background**

5. The parties met in Pittsburgh, USA on or about 2003 and married in 2004, four months before the birth of ~X~ who was born in Allegheny, Pittsburgh, Pennsylvania. Both parents names appear on ~X's~ certificate of birth. Difficulties emerged with the parties relationship at an early stage. In Ms McGowan's first Article 4 Welfare Report dated 20<sup>th</sup> March 2012, page 2, she reports that ~Z~ had concerns during the early years of the relationship in respect of ~Y's~ alcohol use and his mental health.

6. By 2006 if not earlier the parties recognised that their relationship was over. Despite this they decided to move back to Ireland with ~X~. In his oral evidence ~Y~ informed the court that his work visa expired that year so he had to leave America, and he thought that ~Z~ would prefer to reside in Ireland with help and support to bring up ~X~ rather than her remaining in America with ~X~ on her own. The Court noted this comment with interest, as he must have given some consideration, at the time when the relationship started to deteriorate, that when his visa expired there was a possibility of him living apart from ~X~ - in fact on the other side of the Atlantic. In Ms McGowan's first report it is recorded that ~Z~ was of the view at that time that ~X~ would have access to better education and health care in Ireland and she agreed to the move to Ireland. ~Z~ obtained a visa to live and work in the Republic of Ireland; this visa was from 2006 until November 2013. ~Z~ does not have a visa to live and work in Northern Ireland.

7. By the time the parties were departing from America they were estranged, despite living in the same accommodation. ~Y~ was fully aware that ~Z~ had met a male through the internet and she had arranged to meet him in Dublin immediately upon their return to Ireland. This is accepted by ~Z~.

8. Upon arrival in Ireland on or about February 2006 ~X~ went to live with her father in Londonderry. They resided with ~Y's~ mother for the first two months. The Applicant was very critical of the Respondent's life choices at that time, in particular, for putting her relationship with a new male she had just met via the internet before her daughter's needs.

9. The Respondent gave evidence that having arrived in Ireland with the Applicant and ~X~, she spent a number of weeks in Dublin before returning to Pittsburgh for some three to four months to tidy up her affairs in America and to pack up and ship her personal effects. By that stage her relationship with the male she had met on the internet had ended. There is conflicting factual evidence as to how often ~Z~ phoned to speak to ~X~ or to enquire about her during those months - ~Y~ suggested that very little contact had been made, and ~Z~ informed the court that she made frequent/weekly telephone calls to ~X~.

10. When ~Z~ returned to Ireland she went to live and work in Dublin; she said she had weekend contact with ~X~ every two weeks in Letterkenny. ~Y~ informed the court that ~Z's~ contact was much more infrequent. ~Z~ said she desperately missed ~X~ and she had concerns in respect of ~Y's~ alcohol consumption. In 2008 ~Z~ moved to live in Letterkenny so she could have contact with ~X~ every weekend. She set up a restaurant business. A problem arose with her business - and again the parties differed in their evidence as to the exact nature of the problem - a threat from the IRA, a criminal gang, thugs, those who sought revenge after ~Z~ reported an alleged drug dealer to the Gardaí, or just bad business management. Whatever the nature of the problem in September 2011 ~Z~ left Letterkenny with very little money and came to live temporarily with ~Y~ in his house in Londonderry.

11. In one of the Respondent's statements dated 30<sup>th</sup> August 2012 at paragraph 11 she sets out her version of a serious domestic violence incident that occurred between the parties; ~X~ was in the bath at the time of the incident. I have read the Applicant's police statement dated 27<sup>th</sup> November 2011.

12. ~Z~ made a complaint to the police in respect of the domestic violence incident in the course of which she sustained a black eye, marks on her neck and mild concussion. As a result of this incident ~Z~ moved to Women's Aid accommodation in Belfast, taking ~X~ with her. Initially ~Y~ defended the charge, claiming it was self-defence but subsequently he pleaded guilty to assault and was given a conditional discharge.

### **Proceedings before Londonderry Family Proceedings Court**

13. ~Y~ commenced proceedings in Londonderry Family Proceedings Court and on 20<sup>th</sup> February 2009 a Joint Residence Order was granted to both parents in respect of ~X~.

14. A further application was made to Londonderry Family Proceedings Court and on 25<sup>th</sup> November 2010 the Court affirmed the Joint Residence Order but directed the sharing arrangements for ~X~ between her parents.

15. On 13<sup>th</sup> September 2011 ~Y~ sought an ex-parte Prohibited Steps Order because he was concerned that ~Z~ had expressed an intention to return to live in America, and to take ~X~ with her, in contravention of the Joint Residence Order. The ex-parte order was refused, but at an inter-parte hearing on 16<sup>th</sup> September 2011 an Interim Prohibited Steps Order was granted, forbidding ~Z~ from removing ~X~ from Northern Ireland; this Order expired on 28<sup>th</sup> October 2011, and was renewed on 28<sup>th</sup> October 2011 and 2<sup>nd</sup> December 2011 when the Interim Prohibited Steps Order was granted until further order. On that date the case was transferred to the High Court due to complexity. This is one of the applications now being determined by the court in this judgment.

16. On 21<sup>st</sup> November 2011 ~Y~ filed a further application for an Emergency Residence Order in respect of ~X~, thus seeking to discharge the Joint Residence Order. The address given for ~Z~ on the application was that she and ~X~ were living in a Women's Aid Centre in Belfast. At 6A of the application form, where information in respect of domestic violence is requested, ~Y~ ticked 'No', yet in his supporting statement he did set out details of ~Z~ making referrals to the police on 18<sup>th</sup> and 19<sup>th</sup> November 2011 alleging that he had abused and physically assaulted her. On 2<sup>nd</sup> December 2011 this application was also transferred to the High Court due to complexity, and this is the second of ~Y's~ applications now being determined by the court in this judgment. No Emergency Residence Order was granted to ~Y~ on 2<sup>nd</sup> December 2011.

### **High Court (Office of Care and Protection)**

17. The case was first listed for directions before the Master (Office of Care and Protection) on 2<sup>nd</sup> February 2012, when the court continued the Interim Prohibited Steps Order until further order; granted an Interim Contact Order to allow ~Y~ to have contact with ~X~ every Saturday in Belfast Contact Centre, and directions were made. No stay was placed on the Joint Residence Order.

18. On 2<sup>nd</sup> February 2012 ~Z~ filed her Core Issues, draft directions and draft final order sought, wherein she indicated that she was seeking a Residence Order plus leave to remove ~X~ from the jurisdiction to USA, and that a Contact Order should be granted to ~Y~, though no proposals for cross-Atlantic contact were made, or proposals for paying for such contact, and proposed relocation arrangements were not filed.

19. The case was listed for Review before The Master on 27<sup>th</sup> March 2012, but the court received a letter from the Respondent's legal representatives, who were not in attendance, stating that they were still awaiting legal aid and were not in a position to proceed at that stage.

20. On 28<sup>th</sup> June 2012 an application was filed on behalf of ~Z~ to seek leave to remove ~X~ from the jurisdiction and for a Residence Order to be granted to her. This application is now being determined by the court in this judgment.

21. At a Review Hearing before The Master on 7<sup>th</sup> September 2012 directions were made and the case was listed for final hearing before The Master on 15<sup>th</sup> October 2012. On 11<sup>th</sup> October 2012 the hearing was vacated by consent of counsel for both parties.

22. The Office of Care and Protection (Children's Section) received a letter from ~Z~ dated 19<sup>th</sup> October 2012 indicating that she was no longer represented by her former firm of solicitors, and sought court assistance with appointing new legal representation on her behalf.

23. On 5<sup>th</sup> December 2012 the case was listed for Review and ~Z~ had appointed new legal representation; directions were made in respect of ~X's ~ interim contact with ~Y~. At a Review on 18<sup>th</sup> December 2012 the father was permitted to take ~X~ out of the Contact Centre without supervision for half of the two hour weekly Saturday contact session, and a date was directed for trial directions to be filed. Trial Directions were made on 5<sup>th</sup> February 2013 and the case was listed for Final Hearing before The Master on 13<sup>th</sup> March 2013; the Final Hearing took place on 13<sup>th</sup> March and 3<sup>rd</sup> April 2013 and is listed for judgment today.

#### **Article 4 Welfare Reports**

24. Ms Ciara McGowan is a Senior Practitioner in Belfast Health and Social Care Trust. In response to directions from the court she prepared and filed three Reports, plus a letter dated 12<sup>th</sup> December 2012 in respect of the Respondent's failure to participate in work at Whiterock Family Centre. The court is extremely grateful to Ms McGowan for her thorough investigations and her detailed Reports which include a significant amount of information extracted by her from social services records held by the Western Health and Social Care Trust (WHSCCT). The parties did not file any discoverable documents from WHSCCT and no-one from that Trust was called to give evidence or to challenge in respect of the records.

25. In Ms McGowan's first Report dated 20<sup>th</sup> March 2012 she records details of an incident reported on 17<sup>th</sup> February 2012 by Women's Aid Hostel to social services. Apparently ~X~ informed staff in the hostel that her mummy had hit her with a brush. A joint protocol interview took place that afternoon, but ~X~ made no complaints and said the incident occurred two years ago. Further, ~X~ made comments that her daddy was bad - she had not been asked anything about her father.

26. Four days later social services received a further call from the Women's Aid Hostel who reported that ~Z~ had not been out of her room for 2 days, and that ~X~

was in the room with her. Staff at the Hostel stated that ~Z~ had been talking about nationalist plots, and had asked the religion of the Hostel Manager. Staff then reported that ~Z~ was leaving the Hostel that night. ~Z~ did leave that evening with ~X~ and stayed in a hotel until week beginning 5<sup>th</sup> March 2012 when she secured private accommodation.

27. In this first Welfare Report Ms McGowan reported that ~X~ said she did not like going to contact and that her daddy was 'bad' and 'an alcoholic', and that her mummy did all wonderful things for her. Ms McGowan commented that ~X~ was heavily influenced by her mother. Further, she expressed a view that she was not convinced that ~Z~ would promote paternal contact. Ms McGowan recommended that the Joint Residence Order remain in place at that time of the assessment process.

28. In Ms McGowan's second Article 4 Welfare Report dated 8<sup>th</sup> October 2012 she reported a number of concerning parenting issues recorded in the files of Western Heath and Social Care Trust during the period when ~X~ resided with her father from 2006 until December 2009. The details are extremely relevant to the issues to be determined by the court and I have recited the information set out in pages 8 to 11 of the Report:

"October 2006 - The health visitor referred ~X~ to Cloone Family Centre for a crèche placement. ~Y~ was caring for ~X~ as a single carer and appeared to be socially isolated. It was noted his sister and mother lived nearby but may not offer much support. Around this time, it was noted ~X~ was quite delayed in her speech and she did not interact with other children. She had been observed sitting on the sofa rocking back and forth chanting to herself. A family support worker was put in place to assist ~Y~ with toilet training, but within four weeks there was little progress. ~X~ had head lice in crèche, and when she came back she had most of her hair cut off. Concerns noted around this time about ~Y's~ alcohol consumption - although he reported he would never drink in front of ~X~. Concerns about ~X~ coming to crèche with no nappy on and ~X~ had completely wet herself. Crèche tried to put ~X~ on the potty and she looked completely petrified. During professional visits, ~Y~ admitted he did not play with ~X~ and she had little contact with other children. Limited age appropriate toys within the home, concerns about ~X~ being in-appropriately dressed for the weather. The health visitor made a referral for a play worker to call and support ~Y~.

In January 2007, there was a report from Clooney family centre who were involved due to a referral from the health visitor requesting a place for ~X~ at crèche. This was to allow ~X~ the opportunity to mix and integrate with young peers in

a safe, stimulating environment and to afford ~X's~ father some respite from his duties as a single carer. At the review, it was noted ~X's~ immunisations were up to date and her hearing and vision were normal. Her physical health presented as adequate at that time. Crèche staff observed ~X~ not always being clean and concerns in relation to her hygiene. On a number of occasions ~X~ presented as being unkempt and with a stale smell of urine. ~X~ had not been successfully toilet trained. ~X~ presented with a strong appetite in the morning, and it was noted during break time she would take toast from other children's plate, and seek to eat this. Crèche staff were unsure if it was hunger or learned behaviour, as often in the mornings - ~X~ was observed on the bus eating a piece of toast. The area of education was a cause for concern, as she presented as delayed in areas of her development. She presented as delayed in her ability to communicate with others through speech and language skills. She had limited ability to use a range of vocabulary. ~X~ had progressed in the area of mixing and integrating with peers and she had gained greater social confidence. At this time, Crèche staff were concerned about ~X~ continuing to display a rocking behaviour where she would physically rock her body and hum a tune simultaneously. It was noted the behaviour could happen at random times however crèche staff reported ~X~ was rocking on the bus journey to crèche following the two week break over the Christmas period. There is reference to observations of positive interactions between ~X~ and ~Y~, and ~X~ having a strong bond to her father. It was apparent they spend a great deal of time in each other's company.

Around September 2007 a referral was made to Social Services. The UNOCINI assessment identified various concerns regarding ~Y~. It was acknowledged there had been a good level of involvement from health visiting and community based services, but there had been no improvement with ~X's~ development. There is reference to ~Y~ being described as an unmotivated parent that has limited parenting capacity. Observations provided some indication ~Y~ was 'emotionally unavailable' to his daughter and did not provide enough opportunities for play and development. Observations of ~X~ provided an indicator of a sad child. At that juncture, it was recorded that the family would require a high level of support, as it was feared the situation would deteriorate further. There was reference to neither parent feeling there was any significant issue with

~X~ 'rocking' and they did not think it was concerning. ~X~ had missed three paediatric appointments.

It was viewed as a family support case with the potential, if the situation deteriorated, to be viewed as a child in need of protection. Around June 2009, it is recorded in the family support UNOCINI that ~Z~ was to keep social services updated of her involvement with ~X~ through telephone/written correspondence, however, this did not seem to occur.

In 2008 ~X~ commenced L Nursery School. Around May 2008, family services were visiting and their objectives were to assist with potty training, budgeting and maintaining a clean house. On 03.07.08, the family support worker called to the home, and ~Y~ said he had a bad headache. ~Y~ asked for the worker to call back, and would not let ~X~ out to the front door to speak. There was a smell of alcohol from ~Y~. Work was on-going with ~Y~, and during her time in the nursery - it was noted at a family support review, dated 07.10.08, that ~X~ complains of having dirty underwear and they provide clean pants. Nursery reported perhaps pants were not changed on a daily basis. There is also reference to her being well presented on occasions. It is noted ~Z~ resided in Dublin and visits - ~X~ spent two weeks with her mother in the summer. There is reference to ~Z~ having ~X~ at weekends and she was working in an American diner at that time. ~Y~ had arranged for ~X~ to attend Rainbows without social work input, but concern still remained about ~Y's~ mood and motivation. Under the parental capacity section it is noted that 'a recent gap in social work involvement illustrated that when left unchecked ~Y~ tended to revert to old ways'. It also stated '~Y~ loves ~X~ but lacks the skills to parent effectively'. In April 2009 there appeared to be an improvement in ~Y's~ mental health, and the home conditions had improved. Around June 2009 it was felt if improvements continued the case could have been closed.

In July 2009 there had been a pre-arranged visit with ~Y~ on 29.07.09. ~X~ came to the locked front door saying "daddy can't get up" "daddy won't get up". ~X~ proceeded up the stairs to try and wake her father, but to no avail. ~X~ became upset upon returning downstairs, and sat on a bean bag crying at the front door. The social worker tried to reassure ~X~ through the letter box. ~X~ almost had her shoulder out the door. The social worker rang the paternal grandmother who said she did not have a key. As the social worker was



about to phone the police, ~Y~ came to the door. Upon entering the home it was stuffy and the windows were shut. The kitchen had dishes and rubbish littering the surfaces, there was not a clear spot. The kitchen table was surrounded by clothes piles and strewn on chairs. There were plastic bags on the floor and an empty box of harp (alcohol). On 28.07.09 the social worker had noted ~Y's~ mood was flat. At no time on 29.07.09 did ~Y~ present as reactive, he remained flat, staring out to the garden. ~Y~ did not understand the cause for concern believing things were not that bad. Mrs ~Y~ (paternal grandmother) stated she was not aware how bad things were and was annoyed ~Y~ had previously turned down a family group conference.

The concerns highlighted at this visit were

- Poor supervision of ~X~.
- Sleeping soundly at 14.30 pm with a child in the house, unattended with matches, lighters, plastic bags, access to knives/plates on the worktops which was dangerous. Had ~X~ hurt herself and cried out he would not have awoken as the doorbell nor ~X's~ attempts could awake him at the time.
- Poor home hygiene.
- Poor hygiene of ~Y~.
- Lack of concern on ~Y's~ behalf.
- Lack of supervision of ~X~.
- No motivation.
- No stimulation for ~X~ - indoors in front of television.
- Yes to everything but nothing followed through.
- DNA at appointments.
- Huge steps backwards.
- Double booked appointments and ~X~ missed speech and language appointment.

~Z~ had been informed and stated, if requested by Social Services, she would take ~X~. It was noted that this reaction was strange. ~X~ was not permitted to stay alone with her

father. An emergency meeting was convened on 03.08.09, and it was agreed ~X~ was to remain in the paternal grandmother's care until the weekend when she would go to ~Z~ in Letterkenny. The meeting on 03.08.09 reported this was not an isolated incident and there had been 2 years of concerns with lack of supervision, health and hygiene issues. It was reported that whilst there are periods where things seem better - this is followed by a decline. It was felt at that time this was attributed to ~Y's~ mental health, however ~Y~ did not agree and he did not see the need to visit his GP. It was agreed a family group conference would formalise support for ~Y~. Prior to ~Y's~ breakdown the family reported they did not realise how bad things were.

A family group conference occurred on 13.11.09 and the purpose of the meeting was to devise a consistent plan of support to help ~Y~ parent ~X~ and to identify someone to look after ~X~ in Derry so that her life is not disrupted should ~Y~ be unable to care for her. The family plan was as follows:

- Friday evening to Monday morning ~X~ will spend the weekend with ~Z~. ~Y~ will bring ~X~ to the bus station to meet ~Z~. ~Z~ will then bring ~X~ to school on Monday mornings.
- On Monday the paternal grandmother will call to ~Y's~ home to ensure all is well.
- On Tuesday ~Y~ will leave ~X~ to his sister's house for a few hours where she can play with her cousins. The paternal aunt had agreed to organise an activity for ~X~.
- On Wednesday N (not clear who this was) will take ~X~ to Rainbows. Whilst ~X~ is at Rainbows N will take ~Y~ shopping/visiting.
- On Thursday evenings ~Y~ and ~X~ will go to the paternal grandmother's home for dinner. She had agreed to collect ~Y~ and ~X~.
- Social services were to look into afterschool's. It was acknowledged ~Y~ can manage at times but when his mood is low things tend to slip. The family had agreed to be vigilant at those times. ~Z~ had agreed to provide £10 per week on the oil card. ~Z~ had agreed to maintain the arrangements for school fees/expenses.

It would seem that at the Christmas period of 2009, ~X~ went to ~Z~ and she did not return to ~Y's~ care (the parents report of events thereafter are outlined in the Trust's initial report dated 20<sup>th</sup> March 2012). There was a joint residence order granted in Derry Court in 2010 with contact arrangements agreed between the parties. In September 2011, ~Z~ and ~X~ moved back to ~Y's~ home and she was enrolled in L Primary School. They remained there until the domestic violent incident in November 2011 whereby they moved to Belfast".

29. In discussion with the Senior Social Worker from WHSCT who had been involved with ~Y~ when ~X~ was in his care, the SSW said ~Y~ did not seem to be coping with ~X~ at the time, and that ~Y~ would have been depressed and used alcohol. In discussion with Ms McGowan and in his evidence to the court ~Y~ indicated that he did not think the concerns noted in WHSCT records were that bad. This clearly demonstrated his complete lack of insight, and this greatly concerned the court.

30. The SSW from WHSCT said that ~Z~ was kept informed of ~X's~ situation, and that ~Z's~ response would have been that she was setting up a business, and that ~Y~ was in receipt of benefits. Ms McGowan would question ~Z's~ response, or lack of response, during this period.

31. In addition to checking WHSCT social services records Ms McGowan also checked ~Y's~ GP medical notes and records. The practice documented in 2008 that ~Y~ had a history of alcohol consumption of 140 units per week; the practice had little involvement with ~Y~ since 2008 but noted at the time he was drinking heavily. The Applicant did not challenge the content of his GP records. It is of great concern to the court that at this time ~X~ was living with her father.

32. The Report also set out a number of concerns in respect of ~Y~ not turning up for a very significant number of the weekly contact visits – in fact at one stage last year he missed up to five months of weekly contact visits in succession. ~Y~ would normally not inform ~Z~ that he would not be attending for contact. On numerous occasions ~X~ would be brought to the Contact Centre and her father would simply not turn up. This must have been very hurtful and damaging for ~X~, and no doubt had a negative impact on her relationship and attachment with her father.

33. Ms McGowan reported that on 26<sup>th</sup> September 2012 her Trust spoke to the maternal grandmother who said she was concerned about her daughter's situation, and that she would like ~Z~ and ~X~ to return to America. She said she would be available to look after ~X~ and take her to school, and that there was room in her house to accommodate them.

34. In the second Welfare Report ~X~ reported that she would like to live in America. She said she speaks to her maternal granny on the phone and she misses her. ~X~ described contact with her father as OK but she was not really sure what

she thought of it. ~X~ said she liked her paternal granny, a paternal aunt and one of her paternal cousins; she would like them to attend the contact with her father.

35. Having considered the historical information Ms McGowan said in her Report that she was not convinced ~Y~ would be able to consistently meet ~X's~ needs as he significantly struggled to do so when he was her primary carer between 2006 and 2009, with his mental health and alcohol intake being of concern. Ms McGowan said that a Residence Order would reflect the current care arrangements for ~X~ with her mother as primary carer, and if relocation was to be permitted, a strict contact order would be required. Ms McGowan seems to recommend relocation in her second Report, whilst appreciating many of the implications this would have upon ~X~ and her father.

36. In Ms McGowan's final Report dated 8<sup>th</sup> March 2013 ~X~ again said she would like to live in America. Of concern, she made negative comments about her father, and openly admitted that she had heard her mother make these comments about ~Y~. Ms McGowan said the work offered to ~Z~ at Whiterock Family Centre to promote paternal contact may have been helpful to ~Z~ but was not essential. Ms McGowan believes that ~Z~ would wish ~X~ to retain a sense of her paternal identity.

#### The Father's Evidence

37. The Father has filed a number of Statements of evidence and as two applications to be determined by the court. I do not intend to recite the contents of his Statements, and it is clear from same that he will be extremely upset if ~X~ is permitted to reside in America.

#### The Mother's Evidence

38. The Mother has filed a number of Statements of evidence and has one application to be determined by the court. Again, I do not intend to recite the contents of her Statements, and it is clear from same that she will be 'lost' if ~X~ is not permitted to reside in America with her. ~Z~ has informed the court that the UK Border Agency has refused her application for a visa to reside in the United Kingdom.

39. On 23<sup>rd</sup> November 2011, just a few days after the alleged incidents on 18<sup>th</sup> and 19<sup>th</sup> November 2011, ~Z~ attended with the US Consul in Belfast to make an application for renewal of ~X's~ expired US passport. In a letter dated 5<sup>th</sup> March 2012 from the Consulate General Of The USA , the Consul indicated that it held ~X's~ expired US Passport, and as per the court order, would not release this until further court order. The Consul also set out in the letter what would be required by ~Z~ to renew ~X's~ US passport.

40. I wish to make particular mention regarding the father's failure to avail of

contact with his daughter, despite a contact order allowing him to see ~X~, and despite the fact that during the 18 months that ~X~ has resided in Belfast and when he has not been availing of significant contact visits, he has had an application for a Residence Order and an application to prohibit relocation pending in the Family Court. This is difficult to reconcile. The father must have appreciated the damage he was causing both to his daughter and to his applications by failing to turn up or to give notice of his non- attendance, or be lacking in insight as to the implications.

## **The Law**

41. Both Counsel submitted detailed and helpful Skeleton Arguments setting out the case law, and both agree that the test this court must consider in determining all Article 8 applications in this case, to include the relocation application, is the 'best interests of the child' test, as contained within Article 3 of The Children (NI) Order 1995. Article 3 of the 1995 Order requires the Court, when determining any question with respect to the upbringing of a child, to have regard to the principle that the child's welfare "shall be the court's paramount consideration". I entirely agree with counsel on the relevant law.

42. Both counsel helpfully set out the considerations contained within the case of Payne -v- Payne (2001) EWCA Civ 166 which should be at the forefront of the mind of the court in deciding relocation issues, namely:

1. The Welfare of the child is always paramount.
2. There is no presumption created by section 13(1)(b) in favour of the applicant parent.
3. The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.
4. There must be a genuine motivation for the move.
5. There must not be the motivation to bring contact between the child and the other parent to an end.
6. The move must be reasonable and practical.
7. The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.
8. The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.
9. The opportunity for continuing contact between the child and the parent left behind may be very significant.

43. These guidelines are not however to be taken as having the rule of law, as stated in the case of MK -v- CK (2011)3 FCR 111. Furthermore, as emphasised by Weir J in his recent decision of SL -v- RG (2012) NI Fam, he did not feel bound to follow Payne -v- Payne.

“There have been several attempts in the past, chiefly in the English Court of Appeal, to lay down what are sometimes described as the “principles” and sometimes now as the “guidance” to be followed by Courts in relocation cases. The high water of those endeavours was Payne v Payne [2001] 1 FCR 425 the overly-prescriptive nature of which successive English Courts have sought to row back from or circumvent in the years that have followed. Fortunately I am not bound by decisions of the English Court of Appeal although by custom our courts accord them, when appropriate, due deference. The most recent decision of the English Courts seeking to grapple with the problems created by the very detailed principles (or guidance) to be derived from Payne is that of MK v CK [2011] 3 FCR 111. For my own part I am content to embrace, as my guiding approach to relocation cases, the proposition contained in the judgment of Black LJ in that case that:

‘The only authentic principle that runs through the entire line of relocation authorities is that the welfare of the child is the court’s paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child” Ibid at [141]’.

44. Both Counsel accept the authority of SL -v- RG, and that the court must be guided by the welfare checklist set out in Article 3 of the Order in determining what is in the child's best interests. At Article 3(3) and (4) of the 1995 Order the Court is directed, when considering whether to make an Article 8 Order, to have regard in particular to certain factors. The factors are referred to as the welfare checklist:

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;

- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question to be relevant;
- (g) the range of powers available to the court under this Order in the proceedings in question.

45. In the case of SL -v- RG, an appeal case from the Care Centre, the court refused leave for the children to relocate to live in Dublin with their mother due to the inevitable reduction in the level and quality of contact.

46. In a further case of SH-v- RD and RH (2012) NI Fam 2 heard at first instance by Weir J he confirmed his approach of the earlier case but on the facts of the case allowed the mother to relocate to Australia with the child. This case was the subject of an appeal to our Court of Appeal who in an Order dated 20th March 2012 confirmed Weir J's approach and dismissed the appeal.

47. In a later unreported case decided by Weir J on 18th October 2012, relocation was granted to allow two children to relocate with their mother to USA.

48. In the case of Grace (2010) NI Fam 15 Stephens J allowed a 13 year old girl to relocate to Australia with her mother and older brother.

49. In the case of NT -v- AT (2012) NICty 2 Her Hon Judge Smyth allowed a 4 year old child to relocate to Australia with her mother in full appreciation that this would lead to a dramatic reduction in the father's direct contact with his daughter, but the Judge felt the impact of this could be ameliorated by a clearly structured and defined contact order.

## **Conclusion**

50. The parties in this case have an extremely difficult and acrimonious relationship. ~X~ is caught up in the middle of parents who cannot agree on her care arrangements and she is aware of these court proceedings.

51. ~X~ has been in her mother's full time care for over three years, during which period her basic needs have been met to an adequate standard, unlike the previous three years when ~X~ was in her father's care and there were numerous and sustained concerns about neglect.

52. ~Y~ failed to avail of numerous contact visits, at one stage he failed to avail of contact for five months, and mostly he failed to inform ~Z~ that he would not be attending. His explanations are simply inadequate. As Ms McGowan commented in her second Report, one of the reasons for maintaining ~X~ in this country is to promote paternal contact, but last year that unfortunately did not occur for a period of almost five months. Is this a beneficial situation for ~X~? If the court directed that ~X~ must remain in this jurisdiction one can only speculate as to ~Y's~ commitment to contact.

53. I am also concerned in respect of the contents of the father's GP records which highlight the level of his drinking in 2008, at a time when ~X~ resided in his full time care. His lack of appreciation of the medical and other concerns associated with such high alcohol consumption, to include the safety and well - being of a child, is very worrying.

54. I am satisfied on the facts that the Mother's application to relocate to America with the child is not motivated by any improper desire to deprive the father of contact with the child. The mother has no visa to live or work in this jurisdiction or the United Kingdom which affects even her ability to claim benefits or to work. Her visa in the Republic of Ireland expires in November. She must leave this jurisdiction. She has wanted to do so for a long time, and certainly since the horrendous incident of domestic violence that occurred in November 2011 which did involve a verbal and physical exchange between both parents. The mother has no ties or connections or family in this jurisdiction or in Ireland. She is an American citizen with American attitudes, culture and outlook. She is forthright and direct, and she has sent very inappropriate communications to both the Applicant and his Solicitor during the course of these proceedings. She has also given false information in custody pleadings submitted to a court in Pennsylvania in September last year at a time when she was without legal representation in these proceedings, and was very frustrated with the length of time to determine the various applications in this application. Her frustrations are no excuse for these actions, as the father has also endured the longevity and toll of advancing his various applications.

55. Nevertheless ~X~ has now lived with her mother since December 2009, and in the last year, despite contact orders to promote contact between ~X~ and her father, he has failed to avail of much of the contact time with his daughter that he could have enjoyed. He has also found it difficult to cope with sole residence of ~X~ and I am not persuaded at all that he should be granted sole residence of his daughter again, in light of the significant problems he encountered with this in the past.



56. ~X~ is acutely aware of the planned relocation, and these court proceedings. I believe this 8 year old child who is living currently in a transitional arrangement, will be very upset indeed if she is now informed that she is not allowed to go, and even if she were told that this was the court's decision, I have no doubt that she would blame her father for the decision. ~X~ has had a number of moves in her young life - the first occurring when she was just 2 years of age when she moved from America where she was born and is a citizen, to Northern Ireland to live firstly with her father. She has had a number of moves already, and whether the court finds in favour of either parent's application, she will face another move - either back to Londonderry or to Nashville. I am strongly of the view that the next move should be the last move for a considerable time. ~X~ requires stability - both in her home life, her education, in her friendships and in her contact with her non-resident parent. I am confident that ~X~ will settle quickly into a new life in America, and meet new friends and classmates. This is a good age for her to make the transition.

57. Faced with the choices presented by the parents to this court, I am of the view that a Residence Order in favour of her mother is in ~X's~ best interests, and to relocate to America. This should take place after the end of the school year in late June 2013.

58. It is evident that the mother has researched her relocation proposals to include accommodation and education arrangements for ~X~. She has good employment prospects.

59. I am also of the view that the Applicant should have reasonable opportunities to have contact with his daughter, direct and indirect, as it is very important that ~X~ retains connections with her father and paternal family.

60. There is no doubt that relocation shall have a dramatic reduction in the father's ability to have direct contact with his daughter. In terms of the detriment to him and his future relationship with ~X~ I am satisfied that that can be ameliorated by a clearly structured and defined indirect contact order, supported by direct contact. The recommendations set out in paragraphs 2.2 and 2.3 in Ms McGowan's final Welfare Report find favour with the court. It is noted and recorded by the court that the Respondent has consented to bring ~X~ to Ireland every two years at her expense to see her father and paternal family and this shall form the cornerstone of the direct contact order.

61. I am satisfied that the impact on the mother of a decision to refuse relocation would be catastrophic. Whilst it is clear from the authorities that it is the welfare of the child which must guide the court, the impact on the mother is clearly relevant to this child's welfare, and hence her best interests. The mother has been the child's primary carer for over three years and I am satisfied that a decision which prevents her returning to her native country and the opportunity to work and have family and friend networks would have a detrimental psychological impact upon her.

62. Taking into account the welfare checklist, I am satisfied that it is in this child's best interests that she is permitted to relocate to America with her mother. The parties shall now be afforded an opportunity to agree upon the terms of a defined contact order and any other orders that the court should make.