

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

ALWYN (Non molestation proceedings by a child)

STEPHENS J

Introduction

[1] This judgment deals with a number of jurisdictional and procedural points in relation to an application dated 18 August 2009 under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 for a non-molestation order and an occupation order. The application was brought by Alwyn, who is 12 years old, by his father and next friend, Evan against his mother, Cate. Evan and Cate are married.

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the Office of Care and Protection in writing within one week as to whether there is any reason why the judgment should not be published on the Court Service website or as to whether it requires any further anonymisation prior to publication.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

Nature of the application for a non molestation order.

[3] When problems arise in close family relationships, the strength of emotions involved can cause unique reactions which may at times be irrational or obsessive. While these reactions may most commonly arise between spouses and cohabitants, they can also occur in many other close relationships which give rise to similar stresses and strains and in which the people concerned will often continue to be involved with one another. In addition concern and responsibility for a child's welfare can give rise to strong emotions and unreasonable behaviour. Accordingly it has come to be recognised that in the context of family proceedings that violence and

molestation within family relationships needs to be treated as a special case and hence the provisions of the Family Homes and Domestic Violence (Northern Ireland) Order 1998.

[4] Molestation is an umbrella term which covers a wide range of behaviour. There is no statutory definition of molestation. The absence of a statutory definition reflects the concern that the court should have the broadest discretion to interpret its meaning in the light of contemporary experience, see *Re Glennon's application for judicial review* [2002] NI 327. The concept of molestation is well established and recognised by the courts. Molestation includes, but is wider than violence. It encompasses any form of serious pestering or harassment and applies to any conduct which could properly be regarded as such a degree of harassment as to call for the intervention of the court. To obtain a non molestation order, there has to be some evidence of molestation. In *Davis v. Johnson* [1979] AC 264 at 334 per Viscount Dilhorne stated that:

“Violence is a form of molestation but molestation may take place without the threat or use of violence and still be serious and inimical to mental or physical health.”

In *C v C (Non-molestation order: Jurisdiction)* [1998] 1 FLR 554 at page 556H, Sir Stephen Brown, President of the Family Division stated that:

“. . . there is no legal definition of 'molestation'. Indeed, that is quite clear from the various cases which have been cited. It is a matter which has to be considered in relation to the particular facts of particular cases. It implies some quite deliberate conduct which is aimed at a high degree of harassment of the other party, so as to justify the intervention of the court.”

The standard definition of molestation upon which that draws is that of Ormerod LJ in *Horner v Horner* [1983] 4 FLR 50 at page 51G:

“. . . I have no doubt that the word 'molesting' . . . does not imply necessarily either violence or threats of violence. It applies to any conduct which can properly be regarded as such a degree of harassment as to call for the intervention of the court.”

See also *Vaughan v. Vaughan* [1973] 1 Weekly Law Reports 1159 at 1162, *Johnson v. Walton* [1990] 1 FLR 350 and *Spindlow v. Spindlow* [1979] Fam 52.

Factual background to this case

[5] The application dated 18 August 2009 was signed by Alwyn as was his statement of the same date. Alwyn's statement contains a number of allegations including that his mother hits him, kicks him, pulls his hair and has threatened to kill him. Alwyn does not allege that Cate has harmed Evan. Furthermore Evan did not witness any of the incidents involving Alwyn. If Alwyn's statement is correct then Cate is an irrational and dangerous individual inflicting physical and emotional harm on him.

[6] Alwyn has special educational needs.

[7] Cate has a full scale IQ of 66 which is in the first centile.

[8] At the time that the application was launched Alwyn and his parents, Evan and Cate, all lived in the same house which was jointly owned by his parents ("the matrimonial home"). As I have indicated in addition to applying for a non molestation order Alwyn applied for an occupation order.

[9] The application form and statement dated 18 August 2009 were lodged in the Office of Care and Protection on Friday 21 August 2009. On Saturday 22 August 2009 Cate found out about the application when she opened a letter from the Legal Services Commission to confirm that legal aid had been granted to take the proceedings. Evan recounts that Cate then said that if she found out who had done this she would blow their brains out or stick a knife in them. Alwyn and Evan then left the matrimonial home and have not returned. They presently reside some miles away and all contact between Alwyn and Cate is supervised.

Article 21 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998

[10] At the time that the proceedings were commenced there was no evidence as to Alwyn's understanding. Such evidence is required for which see Article 21 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998, *Re Arthur (Non-molestation Proceedings by a Child)* [2009] NI Fam. 19, and *R H and Others v IH* [2009] NI Fam. 17. Subsequent to the issue of proceedings and in an e-mail it was asserted that a solicitor in the firm representing Alwyn had met him and deemed him competent to take these proceedings. In the same e-mail it was stated that the applicant's instructions were very clear. There was no statement from the solicitor setting out details as to his or her assessment of Alwyn's understanding nor was there information provided to the court of a type necessary for the court to exercise discretion as to whether to grant leave to commence these proceedings. Absent such evidence or its equivalent then except in the most exceptional

circumstances leave to commence proceedings should not be granted. For instance, ordinarily, there should be evidence as to whether active consideration had been given to Evan commencing proceedings in the Family Proceedings Court at the same time as commencing other family proceedings or alternatively commencing proceedings in a Domestic Proceedings Court and in those proceedings seeking a non molestation order to protect Alwyn. There was no such evidence in this case.

Next friend

[11] On 24 August 2009 the documents required to be filed in respect of Evan acting as Alwyn's next friend were filed pursuant to Rule 6 of the Family Proceedings Rules (Northern Ireland) 1996. Those documents ought to have been filed at the start of the proceedings. It is most unusual for one parent to act as the next friend of his or her child bringing proceedings against another parent. The official solicitor should ordinarily be the next friend. If the official solicitor had been approached in this case then an opportunity would have been given to her to consider whether Evan should have been commencing proceedings in the Family Proceedings Court seeking an order protecting Alwyn.

Sequence of events in relation to the applications.

[12] On 24 August 2009 a child protection investigation was commenced by the relevant Trust.

[13] On 25 August 2009 the proceedings were served on Cate. In addition Alwyn was interviewed by the police.

[14] On 28 August 2009 the Master directed the relevant Trust to file an Article 4 report under the Children (Northern Ireland) Order 1995 on or before 30 September 2009. Directions were also given to obtain a report from a child psychiatrist as to Alwyn's understanding given his age and the fact that he has special educational needs. The solicitors for Cate also expressed concerns as to her competence. Leave was granted for Cate to file a report from a psychologist as to her competence.

[15] It was not until 22 September 2009 that the file was allocated to a social worker in the Trust in relation to the Article 4 report. On 23 September 2009 the social worker wrote to the Office of Care and Protection indicating that she would only be able to submit her report on or before 30 October 2009.

Whether non molestation proceedings could have been commenced in the Family Proceedings Court

[16] A question has arisen as to whether Evan could have commenced proceedings in the Family Proceedings Court or in the Domestic Proceedings Court in his own name seeking a non molestation order to protect Alwyn.

[17] On behalf of the Alwyn it was submitted that Evan had:-

“no grounds for making ... an application in relation to himself, that is to say he does not allege that he suffered harassment, molestation, pestering or intimidation at the hands of the mother and as such would not be granted an order under the 1998 Order. In effect therefore as his application would have been dismissed, the relevant child in this case Alwyn, would not have been able to obtain the protection of any order and the exercise would have been futile.”

[18] I disagree. Under Article 20(2)(a) of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 the court may make a non-molestation order if an application for an order has been made ... by a person who is associated with the respondent. The requirement in Article 20(2)(a) of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 is that the applicant for the order is associated with the respondent. It is not a requirement that the applicant himself or herself is entitled to a non molestation order. Cate and Evan are married and therefore included in the definition of associated persons. Evan satisfies the requirement under Article 20(2)(a) of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 that he is associated with Cate, the respondent.

[19] Article 20(5) of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 provides that in deciding whether to (grant a non-molestation order), and if so, in what manner, the court shall have regard to *all the circumstances* (emphasis added) including the need to secure the health, safety and well-being -

- (a) of the applicant ... and
- (b) of any relevant child.

Accordingly in deciding whether to make an order and if so the precise order to be made, the court is enjoined to consider all relevant circumstances and specifically to consider the need to secure both the health, safety and well-being of the applicant and of any relevant child. If in this case the applicant was Evan, the father, the court would be obliged to consider the need to

secure his health, safety and well-being. On the initial statement it was not being suggested that there was any need to secure his health, safety and well-being. Accordingly on the evidence as it then stood no order would have been made to protect him. However the court is also enjoined to consider the need to secure the health, safety and well-being of Alwyn who is a relevant child. If an order is required in relation to Alwyn a relevant child then the court has jurisdiction to and will make that order quite irrespective as to whether an order is made in respect of the applicant. It is clear from Article 20(1) of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 that the order of the court can protect either the applicant or any relevant child or any of them.

[20] Accordingly an associated person can commence proceedings for a non-molestation order seeking an order to protect a relevant child in circumstances where no order is sought to protect the applicant. Any other statutory interpretation would produce the surprising result that a relevant child, who did not have sufficient understanding to commence his or her own proceedings under Article 21 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998, would be deprived of the protection of an order if by chance the applicant was not himself or herself being molested. There is no requirement that the applicant himself or herself is being molested before an order can be made to protect a relevant child.

Whether conditions can be attached to a residence order preventing molestation.

[21] An application is being made by Evan in the Family Proceedings Court for a residence order settling the arrangements to be made as to the person with whom Alwyn is to live. That application is under Article 8 of the Children (Northern Ireland) Order 1995. The court if minded to grant an order providing that Alwyn resides with Evan may impose conditions under Article 11(7) of the Children (Northern Ireland) Order 1995 with which there must be compliance by for instance a parent of the child or a person with whom the child is living. A question arises as to whether Evan could have applied for a residence order in respect of Alwyn and at the same time sought conditions under Article 11(7) of the Children (Northern Ireland) Order 1995 ousting Cate from the matrimonial home and restraining molestation. I consider that conditions imposed under Article 11(7) of the Children (Northern Ireland) Order 1995 should not be used to oust a parent from his or her home nor should such conditions be used to provide protection from molestation. The better course is to apply for such an order under the Family Homes and Domestic Violence (Northern Ireland) Order 1998, see *Nottinghamshire County Court v. P* [1993] 2 FLR 134 at 144c, *Pearson v. Franklin* [1994] 1 WLR 370 and *Re D (Residence: Imposition of Conditions)* [1996] 2 FLR 281.

Alwyn's application for an occupation order.

[22] An applicant for a *non molestation order* has to be associated with the respondent. An applicant for an *occupation order* has to come within the terms of Articles 11, 13, 14, 15 or 16 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998. Under these Articles a potential applicant for an occupation order falls into two main categories: an applicant who is entitled to occupy the home by virtue of a legal or beneficial estate or interest or a contractual or statutory right ("entitled applicant") and an applicant who is not ("non entitled applicant"). Alwyn is not an entitled applicant. He also does not fall within any category of non entitled applicant. He cannot apply for an occupation order. I dismiss that application.

[23] Evan, an entitled applicant, could have applied for an occupation order in the Family Proceedings Court or the Domestic Proceedings Court seeking an order under Article 11 (2) (g) of the Family Homes and Domestic Violence (NI) Order 1998 requiring Cate to leave the matrimonial home. In deciding whether to make such an order the court is enjoined by Article 11 (5) of the Family Homes and Domestic Violence (NI) Order 1998 to have regard to all the circumstances including the housing needs and housing resources of ... any relevant child. The court is also enjoined to have regard to the health, safety or well-being of ... any relevant child. Alwyn is a relevant child. If the aim of the proceedings was to oust Cate from the matrimonial home to protect Alwyn then proceedings should have been brought by Evan in the Family Proceedings Court or in the Domestic Proceedings Court. This reinforces the need for careful consideration to be given prior to a child commencing proceedings in the High Court against a parent as to whether it is more appropriate for the proceedings to be commenced not by the child but by the other parent in a Family Proceedings Court or a Domestic Proceedings Court.

Transfer from High Court to either the Family Proceedings Court or the Family Care Centre

[24] Subsequent to clarification that the non molestation application could have been commenced by Evan in the Family Proceedings Court Alwyn sought the leave of the court to withdraw the proceedings in the High Court on the basis that Evan would commence further proceedings in the same Family Proceedings court as was seized of the application for a residence order.

[25] If Alwyn had not agreed to discontinue the non molestation proceedings then I would have dismissed them on the basis that there was insufficient evidence as to his understanding and on the basis that there was inadequate information available to the court to exercise discretion as to whether to grant leave to Alwyn to commence proceedings under Article 21 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998. Is the question

as to whether proceedings should be more appropriately commenced by a child's parent in the Family Proceedings Court or a Domestic Proceedings Court an aspect of the child's understanding or a factor to be taken into account in the exercise of discretion? For my part I consider it to be an aspect of the child having sufficient understanding because the decision as to whether to make the proposed application is effected by whether his parent can make an application to protect him without involving him in direct litigation with his other parent. In any event whether as an aspect of understanding or a factor in relation to discretion it should be taken into account.

[26] If I had not dismissed the proceedings I would have transferred them to a different judicial tier. Paragraph 4(4) of the Family Homes and Domestic Violence (Allocation of Proceedings) Order (Northern Ireland) 1999 requires that proceedings brought by an applicant who is under the age of 18 shall be *commenced* in the High Court. However paragraph 12 permits the High Court to transfer proceedings to a court of summary jurisdiction where it considers that it would be appropriate for those proceedings to be heard together with other family proceedings which are pending in that court. I would have considered it appropriate for the non molestation proceedings to be heard together with Evan's application for a residence order and I would have transferred them to that court. It would then have been a matter for the District Judge to consider transfer to the Family Care Centre. Alternatively Article 13 of the Family Homes and Domestic Violence (Allocation of Proceedings) Order (Northern Ireland) 1999 permits the High Court:

- (a) To transfer proceedings under the 1998 Order to a County Court where it considers that it would be appropriate for those proceedings to be heard together with other family proceedings which are pending in that court;
- (b) Transfer proceedings under the 1998 Order to a Family Care Centre where:-
 - (i) the proceedings are appropriate for determination in such court; or
 - (ii) it is appropriate for an application made by a child under the age of 18 to be heard in such court.

Cate's competence

[27] On 27 September 2009 a chartered psychologist reported as to the competence of Cate. He found a full scale IQ of 66 which is in the extremely low range (first centile). He stated that Cate had very limited intellectual or cognitive ability and that she has significant difficulties in taking in

information from written text or documentation. He advised that information should be presented to her in relatively small chunks. Having set out her limitations he did not advise as to whether she was disabled within the meaning of rule 6.1 of the Family Proceedings Rules (Northern Ireland) 1996.

[28] Disability is defined in Rule 6.1 of the Family Proceedings Rules (Northern Ireland) 1996 as including:

“A person who by reason of *mental disorder* within the meaning of the Mental Health (Northern Ireland) Order 1986 is incapable of managing and administering his property and affairs.” (emphasis added)

[29] Article 3 of the Mental Health (Northern Ireland) Order 1986 defines *mental disorder* as meaning:

“mental illness, mental handicap and any other disorder or disability of mind”.

Mental handicap means:

“a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning”.

Excluded from the definition of mental disorder are personality disorders, promiscuity or other immoral contact, sexual deviancy or dependence on alcohol or drugs. In *W v L* [1974] QB 711 at 719 Lawton LJ observed that the words “mental illness” are ordinary words of the English language: they have no particular medical or legal significance. The court should construe them he stated, in accordance with the advice of Lord Reid in *Brutus v Cozens* [1973] AC 854 at 861, namely, that ordinary words of the English language should be construed in the way that ordinary sensible people would construe them.

[30] A decision will have to be taken in relation to the residence order application in the Family Proceedings Court as to whether Cate is under a disability given her significant impairment of intelligence and social functioning and her mental handicap.

Conclusion.

[31] I dismiss Alwyn’s application for an occupation order. I give Alwyn leave to withdraw the application for a non molestation order.