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(subject to editorial corrections)\*

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

DONA (a pseudonym) (No. 8)  
(Applications to live outside Northern Ireland, to discharge care order and for a residence order)

STEPHENS J

**Anonymity and restriction on publication**

[1] All the names of the family members in this judgment have been anonymised by the use of pseudonyms. Nothing should be published which would identify the children or any member of their extended family.

**Introduction**

[2] The Trust brings three applications; the first is dated 6 October 2011 for an order to permit the applicant to arrange, or assist in arranging for Dona, a child in the care of the Applicant, to live outside Northern Ireland in Country A. The second and the third applications are dated 22 December 2011, and they are an application to discharge a care order which I made on the 16 September 2010 in respect of Dona, and an application for a residence order under Article 8 of the Children (Northern Ireland) Order 1995, settling that Dona should reside with her maternal grandparents in Country A.

[3] I have set out the factual background to the family in a number of judgments including:

- (i) *Caitrin, Dona and Elliot (Care Proceedings: Fact Finding)* [2010] NI Fam 1.
- (ii) *Caitrin, Dona, and Elliot (pseudonyms) No 3 (Applications to vary a No-Contact Order)* [2010] NI Fam 3
- (iii) *Caitrin, Dona and Elliot (pseudonyms) No 4 (Care Proceedings Final Hearing)* STE7847

- (iv) *Caitrin, Dona and Elliot (pseudonyms) No 5 (Care Proceedings: Remitted Hearing [2010] NI Family 24 and*
- (v) *Dona (pseudonym) No 7 (Application to Discharge a Care Order)*

I will not rehearse the details as to the factual background which can be found in full in those judgments.

[4] A sequence in relation to the proceedings is that private law proceedings in relation to Dona and her siblings commenced on 3 February 2009. Public Law proceedings commenced on 11 September 2009. I granted an interim care order on 28 September 2009. On 8 January 2010 under citation [2010] NI Fam 1 I gave judgment in relation to the threshold criteria. On 26 May 2010 under reference STE 7847 I gave judgment in relation to what, if any order I should make in relation to the care proceedings. In relation to Elliot I made a supervision order together with a residence order settling that he should live with Marcail, his mother. I decided not to make care orders in respect of Caitrin and Dona.

[5] The Trust and Marcail appealed my decision not to make care orders in respect of Caitrin and Dona. On 21 June 2010 the Court of Appeal was informed that there had been developments since I had concluded the evidence. The case was remitted to me to hear evidence as to those developments and to determine whether in the light of that evidence and any further factual findings I would make any different order in respect of any of the children, and if so what orders.

[6] On 16 September 2010 I gave judgment in relation to the remitted hearing and made care orders in respect of Caitrin and Dona on the basis of a care plan that they should remain in residential care in Northern Ireland.

[7] The decision to make a care order in respect of both Caitrin and Dona was appealed by Fergus, the father. Dona appealed the decision to make a care order in respect of her. The Court of Appeal having heard the appeal ruled on 25 November 2010 that the appeal should be dismissed. The orders which I had made were affirmed.

[8] By application dated 3 March 2011 Dona applied to discharge the care order. I dismissed that application and gave my reasons in my judgment entitled '*Dona (pseudonym) No 7 (Application to discharge Care Order)*'. I also made an order under Article 179 (14) of the Children (Northern Ireland) Order 1995 that Fergus may not make an application without the leave of the court within the next twelve months: (1) for the discharge or variation of the care, supervision or residence orders which have been made in respect of Caitrin, Dona or Elliot, or (2) for any order in relation to the residence of Caitrin, Dona or Elliot, or (3) for any order which relates to contact with of Caitrin, Dona or Elliot.

### **Representation and a lack of participation in these proceedings**

[9] The representation in relation to those who participated in these proceedings before me was the same as in previous cases.

[10] In the past Fergus has been a personal litigant. Fergus was on notice of the applications made by the Trust but decided to play no part in the proceedings. He did not submit any evidence, he did not attend any of the hearings and he did not engage with the Trust or any of the other parties to inform them as to his attitude towards any of the applications, and what, if anything, he would do if Dona was returned to Country A to reside with her maternal grandparents.

### **A sequence in relation to the Trusts three applications**

[11] There were a number of review hearings dealing with matters such as obtaining evidence as to the legal protection that could be put in place in Country A to safeguard Dona if the Trust's applications were successful. The Trusts representatives had spoken to Dona's maternal grandparents by telephone on three occasions. The first was on the 5 October 2011, one day before the Trust launched the first application. There were further telephone conversations on the 23 November 2011 and the 2 December 2011. It was obvious that it was inadequate to speak only by telephone to the maternal grandparents in launching such an important application. Time was allowed to enable the Trust's representatives to have direct contact with the maternal Grandparent. This occurred with a visit to their home on the 6 December 2011 in Country A.

[12] The Trust's applications first came on for hearing before me on the 9 January 2012 and 10 January 2012.

[13] In opening the case on behalf of the Trust Mr. Toner QC stated that one of the issues which the court would have to address was the level of risk of Dona moving to live with her father if she went to Country A under a plan that she would reside with her maternal grandparents. I suggested and Mr. Toner agreed that to assess the level of that risk there were three essential components; namely an assessment of what Dona would do, an assessment of what Fergus would do and an assessment of what legal protection was available in Country A to safeguard residence with the maternal grandparents. Mr. Toner whilst being respectful towards and recognizing the difference between the legal systems, informed me in summary that the laws of Country A were different from the laws in this jurisdiction. He succinctly summarized by saying that there were no legal protections available in Country A on the basis of any order made in Northern Ireland. That Country A would not recognize or enforce a residence order made in this country in favour of the maternal grandparents. In short, if Dona, once in Country A wished to move or was persuaded to move to live with her father, then there was nothing legally that could be done to prevent that occurring.

[14] Mr Toner submitted however that the risk of Dona moving residence once she was in Country A to that of her father or to some other member of her paternal family was modest. He based this on an assessment of Dona and her developing and

good relationship with her maternal grandparents. He also contended that Fergus had no inclination to leave Northern Ireland. In conclusion he stated that if in reality a move to Country A was a return to the care of Fergus or a placement with any other member of the paternal family it would be the Trust's contention that upon a consideration of the welfare checklist that that would be inappropriate. The Trust are opposed to Dona returning to the care of Fergus or being placed with any member of the extended paternal family.

[15] I permitted an adjournment on 10 January 2012. The circumstances giving rise to the adjournment were that on 9 January 2012 evidence had been given by a social worker called by the Trust that it was highly probable that Dona would reside with her father if she was permitted to go to Country A. In view of the fact that the Trust considered such an outcome would be inappropriate, they wished to provide Dona with an opportunity to demonstrate increasing maturity and reliability by having contact in Northern Ireland with her sister and her mother. As indicated the assessment of risk of whether a move to Country A was in fact a move to reside with Fergus or some other person of Fergus' choice depended upon an assessment of a number of factors including an assessment of what Dona would do.

[16] The application to adjourn was a valuable opportunity for Dona to demonstrate increased maturity and reliability. I acceded to the application, it having been explained to me by Senior Counsel on behalf of Dona, that she, Junior Counsel and solicitor would have a number of consultations with Dona, explaining the reasons for the adjournment and emphasizing that Dona's attitude would not be conclusive but rather would be a factor to be taken into account by the court in the determination of the Trust's application. Unfortunately in the event Dona did not respond positively.

[17] The matter was relisted before me on the 27th February 2012 and I concluded the hearing on that date and I now give this judgment.

### **The evidence on behalf of the Trust**

[18] On 9th January 2012 the Trust called the social worker who has been responsible for both Caitrin and Dona since May 2011. She stated that Dona was a very polite, intelligent young girl, but that she was very unhappy. She described how Dona was not engaging with the Trust, that there were very few people with whom she engaged, she was not pursuing any education, that she wished primarily to be cared for by her father, and if not by him then to go to County A to be cared for by her maternal grandparents. The social worker stated there was an ongoing risk of flight and this presented serious consequential risks for Dona. The social worker stated that the care plan was not working, it provided shelter and food but not much else. Dona was residing in one of the Trust's residential homes from which she had absconded, travelling to the Republic of Ireland on a number of occasions. On the last occasion proceedings were commenced by the Trust in the Republic of Ireland to secure Dona's return. Dona's purpose in travelling to the Republic of Ireland was to travel on to Country A. The evidence of the social worker was that in order to do so

she needed assistance. For instance, she was carrying a memory stick on which there was a digital copy of Fergus' passport. It is suggested that only Fergus could have provided her with a digital copy of his passport. That no explanation had been forthcoming from Fergus. In addition Dona had been on the internet site of Country A's embassy. The evidence of the social worker, which evidence I accept, was that to master the links on that website Dona would have had to understand one of the languages of Country A which she does not speak. I accept the social worker's evidence that Dona would have needed assistance.

[19] The social worker stated that the maternal grandparents had had no contact with Dona for some three years, and on that occasion the contact had been for one afternoon. She gave evidence that both of the maternal grandparents are very concerned and they have recently had good quality contact with Dona by telephone. The maternal grandparents gave the social worker an extremely warm welcome when she visited their home.

[20] The social worker then accepted in cross-examination that Dona had not been open and by her conduct had not been truthful about her intentions while she was in Northern Ireland. That it was highly probable that if she went to Country A she would just go to her father. The question was repeated again in a different form so that she was asked to accept that it was highly probable that Dona and her father would be reunited once the courts in Northern Ireland ceased to have any influence on Dona's life. The social worker replied unequivocally "yes".

[21] I have given careful consideration to that evidence from the social worker. On occasion witnesses under pressure may make inappropriate and unjustified concessions. However I do not consider that the witness was under pressure or that the concession was unjustified.

[22] I look in turn at the three essential components which I have identified in assessing the level of risk of Dona moving to a placement with her father in Country A or to a placement of his choice in that country. Those three essential components relate to Fergus, Dona and the protection available in Country A. I first give consideration to Fergus.

[23] I have set out in detail Fergus's overriding objectives in a number of previous judgments. Those objectives include excluding Marcail from the life of all three children and leaving them in his sole care. I repeat what I indicated in an earlier judgment, that I do not assume that what occurred in the past necessarily remains the same in the present or will remain the same in the future. I have always encouraged and again encourage Fergus to participate openly and honestly with the Trust and in these proceedings. I remain willing to change my assessment of Fergus.

[24] However in this case there has been no evidence from Fergus. There is nothing of any value to indicate that he has changed. I find that he still has as one of his overriding objectives to have Dona in his sole care, and that if Dona moves to Country A, he will immediately set about securing that she resides with him, or

some member of his paternal family, or indeed some other person of his choice. By not engaging in this case Fergus has again demonstrated a disregard for the welfare of his child, Dona. I consider that Dona is under Fergus' control. For the purposes of this case I consider that Fergus assisted Dona in absconding.

[25] I do not consider that Dona has sufficient maturity to exercise actions independent of Fergus.

[26] The laws of country A are different from the laws of this jurisdiction and they are to be, and are, respected. Under those laws there is no legal protection afforded to residence with the maternal grandparents by a residence order made in this jurisdiction.

[27] I accept the concession made by the social worker and find that on the balance of probabilities that a move by Dona to country A is in effect a move to reside with Fergus, or with a member or Fergus' extended family or with someone else of Fergus's choice. At an earlier stage in these proceedings Fergus stated that he had exceptional abilities in the assessment of character. I consider that Fergus would arrange, or could arrange some other residence for Dona in Country A if a member of his extended family were not willing to assist.

[28] This application is being brought by the Trust on the basis that Dona would reside with her maternal grandparents. I have found that that will not occur on the balance of probabilities. If the Trust wish Dona to reside with Fergus, that should be articulated and properly explored.

### **Discussion and Welfare Checklist**

[29] The Trust's application is on the basis of a placement with the maternal grandparents. The evidence is, and I find, that this will probably not occur if Dona travels to Country A. In those circumstances it is accepted by the Trust that the application should be dismissed. I agree. In arriving at that conclusion I have of course applied the 'Welfare Checklist', and I set out, in summary form, my conclusions in relation to each aspect of that checklist.

[30] *The ascertainable wishes of Dona considered in light of her age and understanding.* Dona yearns to live in Country A. She is now of increasing age. Her wishes and feelings are potentially most important, though not necessarily determinative. I consider that her dominant wish is however to live with Fergus. I wish that Fergus was capable of working openly and honestly so that effect could be given, either totally or in some form, to Dona's wishes and feelings. Everyone in this case has encouraged him to do so but he remains intransigent. On the last occasion I found he remains dishonest and manipulative. I consider that Dona remains under the control of Fergus. I consider she has insight into the destruction of, for instance, her education, but she does this for Fergus. She is naive in her assessments and continues to have an idealized view of Country A and those who live in it. I am unable to give any significant weight to Dona's wishes and feelings.

[31] *Dona's physical, emotional and educational needs.* I have set these out in previous judgments.

[32] *The likely effect on Dona of a change of her circumstances.* In effect it would be a placement with Fergus if Dona went to Country A. She would on the balance of probabilities move to reside with Fergus or a member of the extended paternal family or another individual at the instigation of Fergus. I consider that she would be subjected in these circumstances to ongoing abuse and this would have both a significant short and long term effect on her. There would be positives in that she would undertake education, but I consider that the balance comes down firmly against exposing her to abuse in a placement with Fergus in circumstances where as here he refuses and persistently has refused to cooperate openly and honestly with the child protection authorities or with the court or with any of the parties or indeed with his own children.

[33] *Dona's age, sex, background and any characteristics of hers which the court finds relevant.* Again I have set these out in all my previous judgments.

[34] *Any harm which Dona has suffered or is at risk of suffering.* I have set out the harm which Dona has suffered in previous judgments. She has suffered, is still suffering and will suffer harm by the actions of Fergus. She is suffering harm in the care of the Trust but it is substantially less than the harm in the care of Fergus or in a placement in Country A which is in reality a placement with Fergus or at Fergus' instigation.

[35] *How capable each of Dona's parents and any other person in relation to who the court considers the question to be relevant is in meeting her needs?* The maternal grandparents are not capable of looking after Dona as she would move to reside, on the balance of probabilities with Fergus if she moved to Country A.

[36] I repeat my previous assessments in relation to the parents.

[37] Having reached these conclusions I step back and ask the overall question – what would be in Dona's best interests? I conclude that they would be best served by dismissing all of the Trust's applications.

## **Conclusion**

[38] I dismiss all of the Trust's applications.