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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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IN THE MATTER OF L AND L1 (ARTICLE 179(14) OF THE CHILDREN (NORTHERN IRELAND) ORDER 1995)

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GILLEN J

[1] This judgment 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 children and the adult members of the family must be strictly preserved

[2] This matter arises out an appeal against a decision made by the Care Centre judge sitting at the Family Care Centre at Craigavon on 9 May 2003. The appeal is confined to one matter. The judge had made an order permitting the father of the children L and L1 (now aged 9 and 12) unsupervised contact each Saturday from 11.00 am to 2.00 pm and such other contact as could be agreed between the parties. That was not the subject of appeal. However in addition the judge made a further order in the following terms:

> "Order granted under Article 179(14) of the Children (Northern Ireland) Order 1995. No further applications to be made within 12 months without leave of the court."

This is the subject of the appeal now before me.

Background

[3] The essential background to this case has been helpfully set out by the judge in the course of a written judgment. Accordingly I will quote in extenso from that judgment:

> "This unfortunately is another case where, with the breakdown in the relationship between the applicant and the respondent, Mr and Mrs [H] the children, unfortunately, have been emotionally abused as it were by the acrimony between the parties in the recent past. This matter has been going on for upwards of two years now with alternating supervised and unsupervised contact.
>
> The respondent, Mr [H] at one stage had contact which involved overnight contact, but again there was a breakdown in communication between the parties and as a result that contact has changed. There have been a number of allegations made about his behaviour, some of which have been advanced by (L1) and some by Mrs (H), the applicant. Mr (H) refers to these as false allegations and has indicated that the children are always happy and enjoy every contact they have with him. I am also aware of the report from the social worker in this case (CQ) and also her evidence in the witness box, which is to the effect that the contact has been fractious, but at the moment from March of this year, contact on the basis of three hours a week, I think on Sundays, which is activity based, has proved to be acceptable to the children. (L1) has been canvassed about this matter. She indicated originally no contact or supervised contact but at present seems to accept the three hour contact on a Saturday, as does (L). This contact has been activity based and has been successful."

The judge went on to relate:

> "This contact that has been present from March has been conducted in a courteous and conventional fashion and I would wish that that would continue. I draw comfort from the evidence of Mrs (H) in her expression of flexibility in relation to the contact and her support for the idea of contact. Ideally contact grows from communication between the parents and when that communication breaks down the contact suffers, acrimony develops and has an emotionally abusive effect on the children. I would be concerned about any further court involvement of these children

> in the immediate future which I think would be emotionally abusive.
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> ….
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> This case has been going on back and forward since April 2001. It is time for an element of finality to creep into this case. This should be seen as a final order in the case."

[4] Subsequently the judge, in the course of an exchange with counsel, dealt with an application under article 179(14) of the Children Order (NI)1995 by Miss McConnell who is acting on behalf of the mother in the case. The judge concluded:

> "I think, however, that there should be a period now of quiet ongoing contact if possible agreeably conducted with an element of flexibility such as Mrs (H) indicated and that no further application should be brought in this case for at least a period of one year. I will make an order under Article 179(14) that no application be made within 12 months without leave of the court."

Legal principles

[5] The principles governing applications under the comparable legislation in England, which is section 91(14) of the Children's Act 1989 have been set out in Re P (Section 91(14) Guidelines) (Residence and Religious Heritage) 1999 2 FLR 573. Butler Sloss LJ (as she then was) set out a number of guidelines at page 592H as follows:

> "Guidelines
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> (1) Section 91(14) should be read in conjunction with section 1(1) which makes the welfare of the child the paramount consideration.
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> (2) The power to restrict applications to the court is discretionary and in the exercise of its discretion the court must weigh in the balance all the relevant circumstances.

(3) An important consideration is that to impose a restriction is a statutory intrusion in to the right of a party to bring proceedings before the court and to be heard in matters affecting his/her child.

(4) The power is therefore to be used with great care and sparingly, the exception and not the rule.

(5) It is generally to be seen as a useful weapon of last resort in cases of repeated and unreasonable applications.

(6) In suitable circumstances (and on clear evidence), a court may impose the leave restriction in cases where the welfare of the child requires it, although there is no pass history of making unreasonable applications.

(7) In cases under para (6) above, the court will need to be satisfied first that the facts go beyond the commonly encountered need for a time to settle to a regime ordered by the court and the all too common situation where there is animosity between the adults in dispute or between the local authority and the family and secondly that there is a serious risk that, without the imposition of the restriction the child or the primary carers will be subject to unacceptable strain.

(8) A court may impose the restriction on making applications in the absence of a request from any of the parties, subject, of course, to the rules of natural justice such as an opportunity for the parties to be heard on the point.

(9) A restriction may be imposed with or without limitation of time.

(10) The degree of restriction should be proportionate to the harm is it intended to avoid. Therefore the court imposing the restriction should carefully consider the extent of the restriction to be imposed and specify, where appropriate, the type of application to be restrained and the duration of the order.

> (11) It would be undesirable in other than the most exceptional cases to make the order ex parte."

[6] The judge went on to deal with the human rights aspects of such an order at page 593H as follows:

> "It was suggested to us that s. 91(14) may infringe the Human Rights Act 1998 and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 6(1), by depriving a litigant of the right to a fair trial. I do not consider that submission to be correct. The applicant is not denied access to the court. It is a partial restriction in that it does not allow the right to an immediate inter partes hearing. It thereby protects the other parties and the child from being drawn into the proposed proceedings unless or until a court has ruled that the application should be allowed to proceed. On an application for leave, the applicant must persuade the judge that he has an arguable case with some chance of success. That is not a formidable hurdle to surmount. If the application is hopeless and refused the other parties and the child will have been protected from unnecessary involvement in the proposed proceedings and unwarranted investigations into the presence circumstances of the child."

The application of the guidelines to the appeal

[7] This is clearly not a case where the father has made repeated and unreasonable applications. Nonetheless it is case where the judge has clearly indicated that the matter has been going on now for a very substantial period of time and where there have been frequent references of difficulties about contact to the court. Miss O'Hagan, who appeared on behalf of the appellant, provided the court with a closely argued skeleton argument admirably augmented with oral submissions before me. In essence her argument was as follows:

(1) There had been no history of unreasonable applications in this case. Accordingly, following the principles set out in Re P, the court in this instance would need to be satisfied that the facts went beyond the commonly

encountered need for a time to settle to a regime ordered by the court and the all too common situation where there is animosity between the adults in dispute. Secondly there would have to a serious risk that without the imposition of the restriction the child will be subject to unacceptable strain. Miss O'Hagan argues that there is no evidence of that in this instance. She drew my attention to Re C (Contact: no order for contact) (2000) 2 FLR 723. This case underlined the need to find exceptional circumstances where there is no history of unreasonable applications in the past and where the father was not subjecting the child to unacceptable strain.

(2) Miss O'Hagan argued that the judge had made a fairly peremptory order in very wide terms without defining the kind of application that was to be barred. In other words the order did not confine the effect to contact applications. Moreover the judge had not indicated in the course of his judgment that he had applied the rigorous test which is clearly set out in Re P(supra) and adumbrated again in Re C(supra).

[8] In essence Miss O'Hagan argued that the judge had taken a wrong approach to Article 179 particularly in the context of contact proceedings which are open to change and variation as circumstances dictate.

[9] Miss McConnell, who appeared on behalf of the respondent, and who furnished me with an equally well prepared and persuasive skeleton argument and oral submission, made the following points:

(1) She drew attention to the fact that the judge had highlighted that the children had been "emotionally abused as it were" as a result of the acrimony between the parties. He laid emphasis upon the length of the proceedings (for over two years) and the impact that this ongoing issue was having upon the children. She reminded me that the judge had heard from the social worker involved in the case CQ who had, since August 2001, prepared six reports in the course of the proceedings. That social worker had communicated on numerous occasions with the children and given evidence in this matter on a number of occasions. At page 5/6 of her report dated 16 December 2002 she recorded:

> "It is social work opinion that the longer this continues, the greater the emotional impact this will have upon these children."

Whilst admittedly this situation has not been assessed by a child psychiatrist, nonetheless this is an experienced social worker who has had a great deal of contact with these children throughout the entirety of these proceedings. Counsel reminded the court that this has been a protracted case going through the Family Proceedings Court where there had been a number of interim orders and three contests and then transferred to the Family Care

Centre in March 2003 because resolution was intractable. It was her argument that this is a case that did go beyond the common case scenario by virtue of these matters and that there was a serious risk, outlined by the social worker, that without the imposition of this restriction the children and the primary carer would be subjected to unacceptable strain. In particular she highlighted the unusual length of these proceedings and the extent of the social work involvement.

(2)Counsel submitted that history would suggest a strong likelihood that the appellant would bring further applications within a relatively short period of time to seek further contact beyond that which the court had accorded to him. She drew my attention to the welfare report dated 16 December 2003 which noted that the appellant had told the social worker that his rights were being denied, that he was being sexually discriminated against, that he hoped the court would make a final order so that he could appeal the same and bring it to the High Court followed by the European Court of Human Rights. All of this she argued points to an exceptional circumstance where, without the court interceding at this stage with an order pursuant to Article 179, these proceedings will simply continue interminably

Conclusions

[10] This appeal is being heard in light of the decision I have given already in MCG v MCC (unreported) GILC3688 23 April 2002). Accordingly if I consider that the decision of this very experienced Family Care Court judge does not exceed the generous ambit of discretion vested in that court in family matters it is inappropriate for this court to interfere not having had the advantages of that judge who saw and heard all the witnesses. Equally so I have to be satisfied that the learned judge took into account all the relevant matters and did not take into account irrelevant matters in the balancing exercisewhich he carried out. One must bear in mind that this jurisdiction often presents cases of great difficulty as every judge who has exercised powers in the Family Division must be aware. It is not enough for counsel to point out that there is merit in various aspects of an alternative solution. She has to satisfy the court that the solution preferred by the judge was plainly or blatantly wrong. (See Ackner LJ in May v May (1986) 1 FLR 325 at 330E). This judge had the benefit of reading all the social work reports as well as hearing the evidence of the social worker Miss Quinn. He also had the advantage of knowing the case intimately and having experience of both appellant and respondent over a period of time. I am not persuaded that he went outside the generous ambit of discretion vested in him and within which reasonable disagreement is possible. I consider that there was clear evidence upon which he was entitled to come to the conclusion that this was one of those exceptional instances where the facts did go beyond the commonly

encountered need for a time to settle to a regime ordered by the court or the common situation where there is animosity between the adults in dispute and where there was a serious risk that without the restriction the children would be subject to unacceptable strain.

[11] There is no doubt that it would have been preferable if specific reference had been made to the guidelines set out in Re P. Orders of this kind must only be made sparingly and it is helpful to reassure the parties that the appropriate consideration has been given to the legal principles by such reference However I am mindful of the views expressed by Lord Hoffman in Piglowski v Piglowski (1999) 2 FLR 273 at page 784(F) when he said:

> "The exigencies of daily courtroom life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true in an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes such as was given by the District Judge. These reasons should be read on the assumption that, unless he has demonstrated to the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in Section 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

[12] This matter was heard by an experienced judge immersed in the case who had the unique opportunity, denied me as an appellate court, of seeing and hearing the witnesses and getting the feel of the case over a protracted period. I have no doubt that this judge was aware of the guidelines that govern such applications and that he is no stranger to such applications being raised in his court. I see nothing in this judgment which demonstrates to me that he was unaware of the appropriate principles to be applied or that he has failed to apply them.

[13] Whilst I am mindful that the order does not specifically refer to the operation of the prohibition being confined to contact cases, counsel present at the hearing indicated to me that there was no doubt that this was the context in which the order was made and that everyone understood this to be the case. That is the view that I have formed. Accordingly whilst I will amend the terms of that part of the order to read "no further applications to be made with reference to contact within the next 12 months without the

leave of the court", I do this purely by way of clarification rather than to indicate any substantive defect in the order itself.

[14] In all the circumstances therefore I have come to the conclusion that this appeal must be refused.