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Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:*	**12/08/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

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Between:

A FATHER

Applicant

-v-

A MOTHER

Respondent

IN THE MATTER OF NI (A MALE CHILD AGED 10 YEARS) (No. 2)

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The Father appeared as a Litigant in Person

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McFARLAND J

Introduction

[1] On 9 March 2022 the court made an 'Article 179(14) order' (see [7] below) for a period of three years and the father now applies for leave to issue a residence order application whereby he seeks an order that NI reside under a shared care arrangement although primarily with him in England. This ruling has been anonymised to protect the identity of the child. I have used the cipher NI for the name of the child. These are not his initials. This cipher has been used by me in previous judgments. Nothing can be published that will identify NI.

[2] I have dealt with this matter on the basis of the application which consisted of a C2. (This bears the date of 29 January 2021 but I consider this to have been an error by the father who appears to have used a previous leave application as a template and neglected to change the date.) I have also considered the father's covering letter of 6 June 2022, the form C1A also dated 6 June 2022 and a statement/skeleton argument filed by the father which comprises 15 pages. I sought further clarification

from the father on two issues (whether the father had availed of contact since the order in March 2022 and whether or not there had been any change of circumstances since March 2022) and he replied to the court office by an email on 1 July 2022.

[3] A hearing was convened on 2 August 2022 under Rule 4.4(3)(b) of the Family Proceedings Rules 1996 at which the father made oral submissions. These submissions focussed on much of the ground that had been aired in the written documentation and at previous hearings. The only submissions relating to the position since March 2022 related to the indirect contact by video call which the father said had occurred about four or five times and which he described as "terrible". The father said that NI appeared to be very withdrawn and did not say much which the father attributed to the mother being very controlling.

Background

[4] The child is now approximately 10½ years old and has been the subject to legal proceedings for much of his life. The first proceedings were issued in England on 14 December 2012 when he was 11 months old. There has been extensive litigation on both sides of the Irish Sea.

[5] In the judgment delivered on 9 March 2022 (*Re NI* [2022] NIFam 10) I set out some detail about the Northern Ireland litigation. I do not propose to repeat what was set out in the judgment, but the headline details of the recent litigation are as follows:

a) The Family Care Centre on the 23 June 2016 re-affirmed residence of NI to the mother, with a detailed and extensive order setting out contact arrangements in favour of the father. An Article 179(14) order was put in place for three years.

b) The father appealed that order, and the High Court on 17 December 2019 dismissed the appeal in substance, adjusted the contact arrangements and made a further Article 179(14) order for three years.

c) The High Court on 4 January 2021 made a recovery order requiring the father to return NI to his mother's care. This followed an over-holding after Christmas contact.

d) In February 2021 the father issued a leave application to commence a residence order application. The mother also issued a leave application to amend the contact arrangements.

e) On 23 July 2021 the High Court made an interim contact order in respect of contact during the summer of 2021. The father appealed this decision and the appeal was dismissed by the Court of Appeal on 10 August 2021.

f) On 7 September 2021 the High Court made case management decisions which

included a refusal to conduct a fact-finding hearing in respect of some historic allegations made by the mother against the father and a refusal to grant leave to the father to instruct an expert. The father appealed this ruling and the Court of Appeal dismissed the appeal on 22 November 2021.

g) By an email of 22 November 2021 the father confirmed that he wished to withdraw his application for leave to apply for a residence order, and by order later that day the court administratively granted him leave to withdraw.

h) The mother's application in respect of contact was dealt with by the order of 9 March 2022. This order was not appealed by the father.

[6] The order of 9 March 2022 reaffirmed the residence order in favour of the mother and set out an extensive contact regime in favour of the father. It largely followed the pattern of the previous contact orders. It included direct contact with the father in England over the Christmas/new year period alternating each year (Christmas with mother and new year with the father in 2022, with the reverse in 2023 and so on), one week at Easter, four weeks over summer, half a week at Halloween, and the weekend nearest to the child's birthday. Weekend contact in Northern Ireland was also directed if the father wished to avail of it. There was also to be indirect contact by video call every Friday at 6 pm. Certain conditions were put in place to manage contact arrangements and a penal notice was attached to ensure compliance by the father of these conditions. The Article 179(14) order was put in place for three years.

Article 179(14) orders

[7] Article 179(14) of the Children (NI) Order 1995 provides as follows:

> "On disposing of any application for an order under this Order, the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Order of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court."

This mirrors the provision in section 91(14) of the Children Act 1989 in England, although the recent amendment which inserted a new section 91A to the 1989 Act does not apply in Northern Ireland. Section 91A does not add anything of substance.

[8] The law in respect of the Article 179(14) order and any leave application under it, is very well established (see the judgment of Butler-Sloss LJ in *Re P* [1999] 2 FLR 573). King LJ in *Re A* [2021] EWCA Civ 1749 reaffirmed the principles set out in *Re P* (see [50]), made some comments on the modern approach to be taken given the increased use of social media and electronic communication, and considered the amendment with the new section 91A.

[9] The principle matters for consideration in any leave application are the history of the case, the risk of potential harm to the child, and whether there has been a material change of circumstances since the last time the case was before the court that would warrant the making of the order sought.

[10] As with any leave application an applicant will also have to show that he or she has an arguable case that would have a realistic prospect of success.

Consideration

[11] NI was been the subject of a residence order in favour of the mother since an order of the English court in 2013. The father has attempted on repeated occasions since then to replace this order with one in his favour. He has failed on each occasion. In more recent times courts in Northern Ireland have re-affirmed that order. In [22] and [23] of my judgment of 9 March 2022 I stated:

> "[22] Mr Justice O'Hara's judgment contains a full analysis of the background to the case and to the situation between the parents. At [30] he came to the firm opinion that it was not in NI's best interests that he should reside with the father:
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> > 'On no analysis of [NI's] interest is [residing with the father] likely to be better for him. In my judgment the father is incapable without help of moving on from his core belief that he has been terribly wronged. It is not remotely likely that he could or would facilitate contact with the mother if [NI] lived with him.'
>
> [23] Nothing has changed in the intervening period of 2 years, or indeed, since August 2013 when His Honour Judge Curl made his decision."

[12] I have set out the history of the litigation since 2016, but of particular relevance is the fact that although the father issued a leave application in February 2021 with an intention to seek a residence order which was case-managed towards a hearing, he chose to withdraw that application in late November 2021 and it was therefore dismissed.

[13] The father's application for leave, together with the supporting documents and email as supplemented by his oral submissions, does not set out any material change of circumstances since 9 March 2022. The father did not appeal the 9 March 2022 order. This application focuses on the issues that have been raised persistently by him. The issues include the failure of previous courts to conduct a fact-finding

hearing on the mother's allegations and the failure to grant leave to him to instruct an expert. These issues were specifically dealt with by this court in September 2021 and by the Court of Appeal in November 2021.

[14] Other issues include historic complaints about the mother having committed perjury and about comments made to the father by the mother's counsel in 2015.

[15] The only evidence presented by the father concerning events after the 9 March 2022 judgment relates to two matters. The first is that despite the provisions of the order he has not availed of the opportunity to have direct contact with his son in England this summer (this being the first opportunity for direct contact since the making of the order). He states that the reason for this is that he will not, or cannot, comply with the conditions attached to the contact and in particular the hand-over arrangements.

[16] The second relates to the indirect contact on Friday afternoons. The father provided some evidence about these. He stated that the video calls "could not happen on Fridays" as his other children (NI's half-siblings) have a club on Friday evenings but also stated that some video calls did occur on Fridays (once in March, twice in April, twice in May and once in June). The father does make some complaints about the quality of the video contact, including a reference to harm caused to a half-sibling through having to hear certain matters.

[17] There has therefore been no material change of circumstances. There is no change at all in respect of matters relating to any residence order application. The other evidence relates to the contact order, which, in any event, the father does not seek leave to change. The failure on the part of the father to avail of direct contact is certainly not a change in circumstances as he has been resistant for some time now to court imposed conditions on this contact, and the evidence about the indirect contact is modest in nature and could not be considered as material in the context of a proposed residence order application.

[18] Although the continuing conflict between his parents has the potential to expose NI to potential harm, I do not consider that this application by itself, and the granting of leave, is likely to cause any further harm over and above what he has suffered to date. My comments in the 9 March 2022 judgment concerning the impact on NI require repetition at this stage:

> "[31] Each of the problems that the Mother raises flows from the Father's inability to prioritise his son's welfare over his own obsession about the Mother and to this case. He has become blinded to his son's well-being because of his focus on the feud with the Mother. He appears to be unable to step back and see the damage that he is doing to his relationship with his son and does not seem able to seek advice from others about how to develop that

> relationship and the relationship with the Mother, who is after all the person who has full-time caring responsibilities for his son.
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> [32] The current situation is a disaster for the child. Everyone has recognised that contact would be beneficial for the child and the court has been striving to facilitate this. The court has put in place an extensive programme of contact, which because of its intensity is quite a logistical burden for all concerned. But that burden has been regarded as necessary because of the need to promote contact."

[19] The final issue for consideration is whether the father has an arguable case for the making of a residence order in his favour and whether there is a realistic prospect of success. A residence order in favour of the mother has been in place for many years. The courts have made rulings on residence on a repeated basis and on each occasion have rejected the father's application. The most recent ruling was four months ago. The father withdrew his last application for a residence order in late 2021. The father has presented no new evidence that was not before the courts during the earlier hearings. The only potentially new evidence relates to the father not availing of direct contact in England as he is unable or unwilling to comply with court imposed conditions, and modest difficulties concerning the weekly indirect contact by video call. Taking this new evidence at its height, and approaching the question in as favourably a light as possible for the father, it could not be said that he has an arguable case that has a realistic prospect of success.

Conclusion

[20] In all the circumstances and for the reasons I have set out about I refuse to grant the father leave to issue a residence order application in respect of his son.