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Comparative study on enforcement
procedures of family rights

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Alice Diver, Lecturer, School of Law (Magee),
University of Ulster, Northern Ireland

Report On The Enforcement Of Family Law Judgments in Northern Ireland

Northern Ireland Reporter – Alice Diver
Lecturer, School of Law (Magee),
University of Ulster, Northern Ireland

Introduction

This report is intended to supplement the report of Professor Kay (University of Chester) on England and Wales by providing an overview of the enforcement of family law judgements within Northern Ireland; it may also hold relevance for the neighbouring jurisdiction of the Republic of Ireland. (The interviews will follow shortly)

1. The legal system of Northern Ireland

Northern Ireland is a common law jurisdiction, with a legal system broadly mirroring that of England and Wales; there is a degree commonality with that of the Republic of Ireland, for example in relation to principles of property law. As a separate jurisdiction however, (currently subject to Direct Rule from Westminster) primary legislation in the area of family law includes Acts¹ or (more frequently) Orders in Council² supplemented by a body of delegated legislation which includes statutory rules and regulations³. The Children (Northern Ireland) Order 1995 (as amended) is largely based upon the Children Act 1989 and, in conjunction with the Family Homes and Domestic Violence (NI) Order 1998 and Family Law (NI) Act 2001 it provides the main legislative framework for matters involving children and family life. Judicial discourse on the Children Act 1989 remains highly persuasive and is frequently referred to in Northern Ireland dicta⁴. The Children and Adoption Act 2006 will extend in part to Northern Ireland (namely sections 9 to 11, 12(1) to (5) and (7) covering adoptions 'with a foreign element' and sections 16 to 17). Consultation is currently underway in relation to the reform of adoption legislation within the jurisdiction of Northern Ireland; this is likely to bring the jurisdiction more into line with that of rest of the United Kingdom⁵.

¹ See, for example The Family Law (NI) Act 2001, or The Child Support, Pensions and Social Security Act (Northern Ireland) 2001 both enacted by the NI Assembly prior to its suspension; or The Civil Partnership Act 2004 (in force December 2005) enacted at Westminster but which extends to NI.

² See for example The Family Law (NI) Order 1993, or The Matrimonial and Family Proceedings (NI) Order 1989

³ See for example The Children (Allocation of Proceedings) Order (NI) 1996

⁴ Such as Re D (Shared Residence Order) [2001] 1 FLR 495 CA; Re W (an infant) [1971] 2 All ER 49; Re H and Re W (adoption: parental agreement) (1983) 4 FLR 614; Re H (1981) 3 FLR 386

⁵ See 'Adopting The Future' at http://www.dhsspsni.gov.uk/adopting_the_future_16-6-06pdf.pdf accessed 08.07.06. One key difference remains in relation to Adoption cases; Northern Ireland has retained the 'Freeing Order' as a means to effecting enforced adoptions, where consent has been 'unreasonably withheld' by birth parents. See for example Down Lisburn Health and Social Services v H [2006] UKHL 36

As in the rest of the United Kingdom, social services workers play a key role in relation to the enforcement of judicial decisions on family matters. The statutory framework surrounding social work in Northern Ireland differs from the rest of the United Kingdom with the Department of Health, Social Services and Public Safety ('The Department' or the DHSSPS) having responsibility for implementing key aspects of The Children (NI) Order⁶.

Devolution of certain legislative functions to the Northern Ireland Assembly (in suspension since 2002) under the Northern Ireland Act 1998 (following the 'Good Friday/Belfast' Agreement) is also a significant factor; when (or indeed if) it is fully restored, the Northern Ireland Assembly will again have the power to enact primary legislation dealing with 'transferred' legislative matters i.e. those which are classed neither as 'excepted' matters, (e.g. International law issues) as outlined in schedule 2 to the 1998 Act, nor as 'reserved' matters (e.g. surrogate parenthood) as outlined in schedule 3. Transferred matters effectively include such 'domestic' family law issues as child protection, matrimonial dissolution, 'equality' rights and adoption law, policy and practice⁷. Under s.6 of the Northern Ireland Act 1998, Acts passed which exceed the Assembly's legislative remit are void; compatibility with the principles of the European Convention on Human Rights (ECHR) must also be achieved, in relation to the interpretation of legislative provisions and also to the manner in which public bodies apply those provisions⁸. This '*mainstreaming of human rights principles in public policymaking and implementation*⁹' has impacted upon family law policies within social work practice and upon judicial discourse¹⁰; the aims underlying the Children's Convention ('UNCRC') have also gradually begun to inform thinking in this area, especially in relation to the child welfare 'paramountcy' principle and in relation to the 'participation rights' of the child¹¹.

⁶ See The Health and Social Services Trusts (Dissolution) Order (Northern Ireland) 2006 coming into operation 1st April 2007.

⁷ See Northern Ireland Act s. 4(1), s.8(b). Under s. 4(2) The Secretary of State for Northern Ireland has the power to alter the Assembly's legislative role by re-designating, where appropriate, transferred matters as reserved matters and vice versa. See however, the Parliamentary debate of 25th July 2006 on the proposed amendment to The Northern Ireland (Miscellaneous Provisions) Bill 2006, which suggests a clear desire to remove legislative competence should the Assembly fail to be revived i.e. '*We will also ensure that, whenever possible, we legislate for Northern Ireland through primary legislation.*' Per David Hanson, MP

⁸ Since the enactment of the Human Rights Act 1998 (in force since October 2000) the main provisions of the ECHR have been incorporated into NI law, with the rights enshrined in articles such as 8, 12 and 6 now subject to fuller discussion in judicial discourses on family law; the enactment of s.75 of the Northern Ireland Act 1998 has also led to increased awareness of the legal concept of 'equality' issues, with public bodies now required to actively promote clear policies of 'equality of opportunity' between diverse groups and individuals e.g. on the basis of gender, carer commitments, religious and/or political belief, racial group, marital status, age and sexual orientation.

⁹ White, C '*Northern Ireland Social Work Law*' (2004) Butterworths pg 24

¹⁰ See HCHSST v SN [2005] NICA 14 (15 March 2005)

¹¹ See for example Re C and B [2006] NIFam 1 (10 January 2006) at 42; Re S, N and C (Non-Hague Convention Abduction: Habitual Residence: Child's Views) (unreported) GILF5201; See also CRC/C/83/Add.3 2002 on the use of the child protection register.

Court Structures

The Northern Ireland court system largely parallels that of England & Wales; The Children (NI) Order 1995 (as amended) provided for the setting up of Family Proceedings Courts with a view to promoting child welfare by attempting to alleviate the delay and lack of privacy frequently encountered during family law hearings¹². 'Family Proceedings' thus includes those private law aspects of The Children (NI) Order 1995 (Residence, Contact, Specific Issues and Prohibited Steps); matters relevant to relationship breakdown (such as domestic violence¹³ or financial maintenance¹⁴ and the key public law provisions on child protection interventions (Emergency Protection, Child Assessment, Care and Supervision Orders).

Youth Courts sitting for the purpose of exercising jurisdiction over family law matters constitute the 'Family Proceedings Courts'¹⁵. Presided over by a Resident Magistrate sitting with two lay panellists, there are seven such venues (one in each County Court division); proceedings may be moved to the County Court ('Care Centres') if they are exceptionally '*grave, important or complex*'¹⁶. Gillen J has recently outlined the criteria for the transfer of cases to the Family Division of the Northern Ireland High Court (under article 10 of 1996 Order) as including cases which possess one or more of the following features;

- a) voluminous and/or complex issues of law
- b) unusual complex psychological or emotional issues
- c) considerable expenditure of public monies
- d) particularly vulnerable parties and/or unusually unco-operative litigants
- e) unusually long defended cases¹⁷.

¹² See article 11 Children (NI) Order 1995 which requires the drawing up a clear timetable for proceedings by the relevant Court.

¹³ See The Family Homes and Domestic Violence (NI) Order 1998 (as amended)

¹⁴ See Article 8(3) Children (NI) Order 1995 and Article 3 Children (Allocation of Proceedings) Order (NI) 1996; Responsibility for the enforcement of child maintenance arrangements has, since 5 April 1993, largely been assumed by the Child Support Agency, which may determine periodic payments by non-residential parents under The Child Support (Northern Ireland) Order 1991. Parents in receipt of social security benefits must apply to this agency to have the amount of child support determined, unless identification of this parent would lead to a risk of significant harm or undue distress. See also art 9(2) of the 1991 Order. The Court retains some jurisdiction over child maintenance e.g. where enforcement is sought against a non-UK resident or 'non-biological' parent; See articles 41(1) and art 2(2). The Court has retained jurisdiction to make Property Adjustment and Lump Sum Orders under art 15 and schedule 1 Children (NI) Order 1995.

¹⁵ article 164(4) of the 1995 Order

¹⁶ See McKeown, A., *Children's Rights*, C.18 in 'Civil Liberties in Northern Ireland', (2003) CAJ Handbook at pg 375

¹⁷ Re T and others (Children: Allocation of Proceedings) Order (NI) 1996 GILC3926 (21 May 2003) at 5

Where a Family Proceedings Court has refused to make an Order under the Children (NI) Order, there is a right of appeal to the County Court ('Care Centre'¹⁸) which sits without lay assessors. High Court Masters (of which there are eight) deal with related legal issues and matters of procedure which may arise out of Family Proceedings. The jurisdiction of The Master (Care and Protection) covers guardianship of children, wardship, adoption, abduction and any other Children Order matters not being dealt with already under matrimonial proceedings¹⁹; The Master (Probate and Matrimonial) covers all other Family division matters such as residence or contact disputes following relationship breakdown²⁰. The highest court in Northern Ireland is the Northern Ireland Court of Appeal, which adjudicates upon points of law; appeals from here go to the House of Lords in London.

Legal Representation of Children

Under article 3 (3) (i) of the 1995 Order, the Court must consider the wishes and feelings of children in contested proceedings. In most public law cases, children are therefore represented by a Guardian ad Litem, who will have been appointed by the Court and drawn from a panel of experienced social workers, who must act to safeguard the child's welfare. The role of the Guardian may include investigation (examination of the Trust's care plan for the child and other relevant records for example) consultation with appropriate parties (including parents, where appropriate) reporting findings to the Court, appointing a Solicitor for the child where necessary and making recommendations. The Court may also order the appointment of a Solicitor if the child's best interests so demand²¹ or where the child so wishes, provided the child has shown 'sufficient understanding' of the nature of the proceedings²². In private law matters, the Official Solicitor occasionally represents children, where, for example, there are issues of particular legal significance, or where the child in question lacks a legal representative²³. Although The High Court and the County Courts are able to appoint a Guardian ad Litem in private proceedings²⁴ the Family Proceedings Courts lack this power. There are currently calls for the separate representation of children in private law cases to be made mandatory however²⁵.

The views of the child

'Gillick' principles apply to the child's right to participate in proceedings. Gillen J has repeatedly stressed (citing article 12 of the Children's Convention) that '*a child's fundamental rights, including the right to be heard, must be*

¹⁸ Children (Allocation of Proceedings) Order (NI) 1996 art 3(2) – (5)

¹⁹ Rules of the Supreme Court (NI) 1980 O1, rule 17

²⁰ Rules of the Supreme Court (NI) 1980 O1, rule 16

²¹ Article 60 Children (NI) Order 1995

²² There is no definition of '*sufficient understanding*' in the legislation; 'Gillick' principles apply however, as is the case in the rest of the United Kingdom.

²³ See The Children Order Advisory Committee 'Best Practice Guidance' July 2003, s.11

²⁴ Rule 6.6 Family Proceedings Rules (NI) 1996

²⁵ See McGaughey G, '*To Protect and Serve- The Separate Representation of Children in Private Law Proceedings*' (2005) Children Order Advisory Committee

*respected in all forums*²⁶. He has also noted that a child's ability to give informed views will necessarily vary according to the individual intelligence and maturity of the child concerned and the circumstances of the case; accordingly there is no set method for ascertaining those views²⁷. Thus, where a child does not wish to have contact with a non-resident parent, the court will not seek to enforce visitation; as Gillen J recently stressed, '*the making of an Article 8 contact order by its very nature did not require a child to be forced to attend contact against his will*'²⁸. However this does not permit '*one spouse to frustrate contact on the pretext that a child is reluctant to attend*. If refusal becomes regular, the court should consider '*appropriate remedies*²⁹'.

2. 'Parental Responsibility'

The Children (NI) Order 1995 is underpinned by

*'the principle of non-intervention by the courts and an expectation that parents will exercise their parental responsibility in a manner which promotes the welfare of their children'*³⁰.

Parental Responsibility, under article 6 of the 1995 Order, includes "*all the rights, duties, powers and responsibility and authority which by law a parent of a child has in relation to the child and his property*"³¹. Parental responsibility thus arises automatically in respect of mothers and married fathers; it may be terminated only by court order³². The Family Law (NI) Act 2001 amended the Children (NI) Order 1995 enabling unmarried fathers to acquire parental responsibility in certain circumstances³³. The 2001 Act also allows step-parents to apply to the Court to gain parental responsibility; they are forbidden however from consenting to the subsequent adoption of the child. An Article 8 Residence Order gives automatic parental responsibility to the person or persons to whom it is granted. Adoptive parents gain parental responsibility of the child upon the making of the Adoption Order; Trusts will gain parental responsibility under a Care Order and (temporarily) under an Emergency protection Order.

²⁶ Re E [2005] NIFam 12 (07 November 2005) at 24(iii)

²⁷ See also Re S, N and C (Non-Hague Convention Abduction: Habitual Residence: Child's Views) (unreported) GILF5201

²⁸ Ibid Re C and B [2006] NIFam 1 (10 January 2006) at para 2

²⁹ Ibid

³⁰ Ibid at pg 4

³¹ This definition does not reflect the wide range of decisions that may be taken in law by a person or authority holding parental responsibility for a child, such as the right to determine where a child's education will occur or to make decisions on their general welfare. Under S.2 Family Law (NI) Act 2001 a man married to a child's mother between the period of conception and birth is presumed in law to be the father of that child.

³² See also "*Parental Responsibility for Unmarried Fathers and Court Procedures for Determining Paternity*" (1999) Office of Law Reform (NI)

³³ i.e. by jointly registering the birth of the child with the child's mother See S.1(1) 2001 Act

3. Public law matters

This area of the law is mainly concerned with the protection of 'at risk' children; social workers (employed by the Trust or by the NSPCC) may apply to the Court to have a child assessed³⁴ or, (if the court is satisfied that there are reasonable grounds to believe that the child is '*likely to suffer significant harm*') placed under an Emergency Protection Order³⁵. This Order grants parental responsibility to the applicant for as long as it is in force (usually 8-15 days); if an exclusion requirement is attached to the Order, an alleged abuser may be removed from the family home, enabling the child to remain there instead. 'Reasonable contact' with parents, or indeed any other party having parental responsibility, remains a priority for the social workers concerned, unless the Court otherwise directs³⁶. Although Residence and Contact Orders may not be granted in favour of Trusts, the other private law, 'article 8' orders are available. 'Specific Issues' or 'Prohibited Steps' Orders may be obtained in respect of 'looked after' children (those subject to a care order) to enable or prevent certain courses of action e.g. provision of medical treatment, or restriction of the child's activities.

Care and Supervision Orders

Under a Care Order, the Trust will obtain parental responsibility for the 'looked after' child; the Order lasts until the child reaches the age of 16, whereas a Supervision Order (to '*advise, assist and befriend*'³⁷) lasts for a year, with the possibility of extending it to a maximum of three years. Where social workers have applied to the Court for either one of these orders³⁸, the Court may grant the other, provided that it is satisfied that the 'significant harm' threshold has been reached, or that the child in question is 'beyond parental control'³⁹. If a Care Order has been applied for, the Court must consider the Trust's plans for the maintenance of familial contact⁴⁰; the child in question and those with parental responsibility are entitled to see the decision in writing, if contact has been prohibited⁴¹. A child under a Care Order may (but not necessarily) be removed from their home and placed with foster carers or in Trust accommodation. Although parents retain parental responsibility in theory, the Trust has the power to determine the extent to which parents might exercise it. There remains a clear onus upon the Trust to facilitate familial contact in cases where this would benefit the child.

There is further scope for overlap between the areas of public and private law; under article 10(1) of the 1995 Order the Family Proceedings Court may (on an 'own motion') make any of the private law ('Article 8') orders, irrespective of the nature of the case being adjudicated upon. For example, in a Freeing Order case (to dispense with 'unreasonably withheld' parental consent to

³⁴ Art. 62 1995 Order

³⁵ Art.63 1995 Order

³⁶ Art 63 (3) and (6) 1995 Order

³⁷ Art 54 1995 Order; under art 55, an Education Supervision Order may also be granted. This is not subject to the threshold criteria.

³⁸ Art 10 (1) 1995 Order

³⁹ Art 50 1995 Order

⁴⁰ Art 53 (11) 1995 Order

⁴¹ See Contact with Children's Cases Regulations (NI) 1996 reg 2, 3.

adoption)⁴² the court may exercise its discretion to make a Contact order to ensure that some links are maintained e.g. between birth siblings⁴³. The use of Freeing Orders remains peculiar to Northern Ireland following the introduction of the Adoption and Children Act 2002 in December 2005 in England and Wales⁴⁴.

Recovery Order

Under article 69 of the 1995 Order, the court may order the return of any child who has gone missing or who has been taken away from the person responsible for their care under a Care or Emergency Protection Order or where a child is under the protection of the police. In theory, there is clear potential within this provision for the enforcement of family law judgements, at least in relation to securing the return of a child who has been unlawfully 'removed' within the jurisdiction; given Northern Ireland's particular geography however this course of action may prove futile.

4. Private Law matters

As outlined above, the 'Article 8 Orders' comprise Residence and Contact Specific Issues and Prohibited Steps. They are based upon the 'Section 8' Orders of the Children Act 1989. Courts must have regard to the European Convention, the child welfare 'paramountcy' principles of the UNCRC and to the 'welfare checklist'⁴⁵ when hearing any 'Article 8' application; such orders may be granted to the parents of the child or to any other party (such as a foster parent or step-parent). In exceptional circumstances, an order may be made in relation to a child aged over 16⁴⁶. Under the Family Homes and Domestic Violence (NI) Order 1998, a number of Orders also exist which overlap with private law aspects of family hearings, such as property division; these include Non-molestation orders⁴⁷, Occupation orders⁴⁸, (which are also available to co-habitees⁴⁹) and Matrimonial Home Rights Orders⁵⁰.

Wardship and the Inherent Jurisdiction of the High Court

Despite the introduction of the Children (NI) Order 1995, The High Court has the power to protect a child by making it a ward of court; under wardship the permission of the court must be obtained before any decision may be made about the child e.g. leaving the jurisdiction. In essence this gives the Court parental responsibility for the child. Trusts may not apply however if an

⁴² Art 18 Adoption (NI) Order 1987

⁴³ This is more likely to be by way of judicial recommendation and the 'make no order' principle. See for example *Re Z and T (Freeing Order Application)* [2005] NIFam 6 (23 June 2005)

⁴⁴ See *Down Lisburn Health and Social Services Trust v H (Northern Ireland)* [2006] UKHL 36, on appeal from NI Court of Appeal NICA 47 [2005]

⁴⁵ Article 3 C(NI) O 95

⁴⁶ Art 9(6), (7) Children (NI) Order 1995

⁴⁷ Art. 20 Family Homes and Domestic Violence (NI) Order 1998; these aim to prohibit the 'molesting' of a child or another person 'associated with' the respondent.

⁴⁸ Art. 11 Family Homes and Domestic Violence (NI) Order 1998 Order; these aim to prohibit the respondent from entering the family home or a prescribed area around it.

⁴⁹ Art 3 Family Homes and Domestic Violence (NI) Order 1998 Order

⁵⁰ Art 4 Family Homes and Domestic Violence (NI) Order 1998 Order; these aim to prevent the eviction of a 'non-owner' or 'non-tenant' spouse from the family home.

alternative order is available under the legislation and they must firstly seek the leave of the court to apply⁵¹. Similarly, under its inherent jurisdiction, the principle of child paramountcy remains key. Given the wide range of powers available under the 1995 Order, few matters are dealt with under these jurisdictions, other than, for example, cases involving emergency medical treatment⁵². Where a child has been made a ward of the High Court, this imposes an automatic prohibition on taking the child out of the United Kingdom. Orders may be made *ex parte*.

Residence Order

This Order determines arrangements over where the child will live and grants parental responsibility to the holder(s) of the order⁵³; it does not extinguish the parental responsibility which may exist in respect of any other parties however. Shared (or Joint) residence may be ordered, whereby a child may reside jointly with either parent. The Family Homes and Domestic Violence (NI) Order 1998 amended the 1995 Order to the extent that a Residence Order may be granted to two or more persons who are not residing together at the time⁵⁴; the court must take into consideration whether the child in question has suffered or is at risk of suffering harm by seeing or hearing the ill-treatment of another person. The surname of the child may not be changed without the court's leave or permission of any other party holding parental responsibility, nor may the child be taken outside the jurisdiction for more than one month⁵⁵.

Shared Residence Orders

The Northern Ireland High Court has recently reiterated the principle that '*Family Court proceedings are not to be conducted in the traditional adversarial sense*⁵⁶'; there appears to be increasing willingness to grant these orders where the welfare of the child so requires, even where parents are unable to co-operate⁵⁷. Under such an order, parental responsibility will be shared, though the time spent by the child in residing with either parent may not necessarily be equal. Concern has been expressed over the cost of duplicated services which can occur in such a situation e.g. the child may be registered with two doctors or both parents may claim eligibility for social housing on the basis that they require a sufficiently large family home suitable for the exercise of their right to family life⁵⁸.

The court may refuse to grant such an order if it feels that to do so would '*serve to entrench further acrimony*', or that it would fail to reflect either the reality of the child's life or the child's wishes on the matter⁵⁹. Significantly, the High Court has recently stressed that though the order is not statutorily intended to deal with issues of parental status, the need to reflect the fact that

⁵¹ Article 173 Children (NI) Order 1995

⁵² See *Re (a minor) (Wardship: Medical Treatment)* [1997] 1 All ER 906; *Re A (Children)*

⁵³ Article 12 Children (NI) Order 1995

⁵⁴ Art 11 (4) Children (NI) Order 1995

⁵⁵ Art 13(1) and (2) Children (NI) Order 1995

⁵⁶ Per Gillen J *Re C and B* [2006] NIFam 1 (10 January 2006) at 5

⁵⁷ *Ibid* at 39

⁵⁸ *Ibid* at 24

⁵⁹ *Ibid* at 25 and 26

both parents are equal in the eyes of law (with equal duties and responsibilities towards their children) may be a key concern in considering whether to make the order⁶⁰. As in other proceedings involving children the 'welfare checklist' must be applied in accordance with article 3(3) of the Children (NI) Order 1995 together with a 'proper appraisal' of the rights of all concerned to respect for family life under article 8 of the European Convention⁶¹.

Specific Issues Order and Prohibited Steps Order

These orders allow disputes over narrow issues of day-to-day parenting matters to be settled. For example, in *Re C and B* (2006) a protracted argument over the prescription of Ritalin for a child with Asperger's syndrome was brought to the attention of the Court (though eventually settled via parental agreement); in the same case, the contentious posting of the children's photographs on the internet by the non-residential parent was also dealt with in this manner⁶²; disputes over surnames may be similarly settled.

Contact Order

This order requires the person with whom the child is residing to permit the child to visit or stay with the person named in the order, or to otherwise have contact with them. The presumption underlying the making of the order is that familial contact is largely beneficial⁶³; as the welfare of the child is paramount however, contact may be suspended, refused or maintained via indirect means (such as letters or telephone calls). Enforcement of such orders has proven difficult in practice (as the case law in section 5 will illustrate).

Post-Adoption Contact

Applications for Residence or Contact Orders by birth relatives such as grandparents may arise during adoption proceedings, demonstrating the overlaps between private and public law in this area⁶⁴. The Adoption (NI) Order 1987 requires the Court to make the child's welfare the 'paramount consideration' throughout the adoption process⁶⁵; where a birth parent is opposed to the adoption, for example in child protection cases, the Court must consider whether their consent is being 'unreasonably withheld'⁶⁶. If so, a Freeing Order will almost invariably be granted, enabling the child to be released for adoption, and ending the birth parent's parental responsibility. In such cases, Trusts frequently consolidate proceedings by seeking a Care Order at the same time as the Freeing Order; where this occurs the Care Order must be addressed before Freeing can be considered, to avoid any

⁶⁰ *Ibid* at 41, citing English authority *A v A* (Shared Residence) (2004) 1 FLR 1195 at 124

⁶¹ See *Re O and S* (Residence Order: Contact: Implacable Hostility) [2005] NIFam 4 (04 May 2005) per Gillen J at 16

⁶² *Re C and B* [2006] NIFam 1 (10 January 2006)

⁶³ *Re P* (Contact: Supervision) [1996] 2 FLR 314

⁶⁴ *Re C* (No Contact Order) [2004] NIFam 5 (6 February 2004); *Re NS & Ors* [2002] NIFam 20 (5 July 2002)

⁶⁵ Article here

⁶⁶ Article 16 (2) (b) Adoption (NI) Order 1987; see also *Re F* (Adoption: Freeing Order) 2000 2 FLR 505

subsequent '*compromise (of) the application of the paramountcy principle*⁶⁷'. The Freeing Order has the effect of discharging the Care Order, and allows for the making of a Contact Order. Indeed, prior to making the Care Order, the court *must* look at the issue of familial contact. The usual outcome however, is that the principle of '*make no order*' is followed, which allows for flexibility but almost invariably maintains the status quo in relation to contact or prevents birth relatives (such as grandparents or siblings) from maintaining or forming relationships with the child⁶⁸. In some cases, the matter may be left entirely to the discretion of the Trust⁶⁹ or to that of the prospective adopters⁷⁰. The prevailing judicial opinion seems, unfortunately, to be that '*post-adoption contact of any kind may have a limited value*⁷¹', even where birth siblings are involved⁷². This contrasts sharply with the stance taken in private law proceedings where the maintenance of contact is regarded as '*desirable for both the child and the parent*⁷³ so that even a history of domestic violence '*of itself cannot constitute a bar to contact*⁷⁴'.

5. Enforcement of Family Law Judgments

Contact orders

Enforcement of contact orders remains difficult; mediation is frequently suggested (though not always availed of by the parties or indeed successful in outcome) to secure private agreement between the parties and alleviate the need for litigation. Gillen J sums the situation up succinctly in Re O and S [2005] where he stated that currently, '*remedies available to judges or magistrates in intractable contact disputes are very limited*⁷⁵. Courts may deem the party who has breached the order to be 'in contempt' and therefore liable to a fine or imprisonment. As the child often resides with the 'offending' parent, this method of enforcement is less than practical, and is therefore regarded as '*a measure of last resort*⁷⁶ or indeed as '*a blunt instrument which is likely to cause damage to family life without necessarily achieving the desired objective of re-instating contact*⁷⁷'. Criminal sanctions are applied on occasion however i.e. attachment of a penal notice to the Contact Order or via conditional discharge⁷⁸. The court may advise the non-residential parent to abandon contact, though, as Gillen J has noted frankly, this '*is liable to bring*

⁶⁷ Per Gillen J in Re A [2001] NI Fam 23 (24 October 2001) at 8

⁶⁸ Re K [2002] NIFam 13; see also Re CBCHSST v JKF [2000] NIFam 57

⁶⁹ Re C (Freeing for Adoption) [2002] NIFam 1 (12 January 2002)

⁷⁰ See for example Re R1 (Care Order: Freeing without Parental Consent) [2002] NI Fam 25

⁷¹ Per Gillen J in Re A [2001] NIFam 23

⁷² Re NI and NS [2001] NIFam 7 (24 March 2001); see however Re C and B (Children) (Care Order: Future Harm) 2001 1 FLR 611

⁷³ per Gillen J in Re C (No Contact Order) [2002] NIFam 14 (17 May 2002) at 14

⁷⁴ Per Gillen J *ibid* at 3

⁷⁵ See Re O and S (Residence Order: Contact: Implacable Hostility) [2005] NIFam 4 (4 May 2005) at 11(ii). The background to this case also saw a referral to the office of The Director of Public Prosecutions over breach of the order; it was directed that no prosecution should occur.

⁷⁶ White C 'Northern Ireland Social Work Law' (2004) pg 370

⁷⁷ Re O and S (Residence Order: Contact: Implacable Hostility) [2005] NIFam 4 *ibid* at 11(ii)

⁷⁸ *IBID* See Re O and S (Residence Order: Contact: Implacable Hostility) [2005] NIFam 4 (4 May 2005) at 1

*the law into disrepute (and) is an admission of failure and inability to protect significant damage accruing to children*⁷⁹.

Transfer of Residence to Non-residential parent

A third option is to transfer residence to the other parent; the English High Court recently exercised this option by recommending that the Trust seek an assessment of the child (Article 56 Investigation Order) followed by an Interim Care Order and, ultimately, a Residence Order in favour of the father (who had been consistently prevented from exercising his rights under a Contact Order by the child's mother)⁸⁰. This approach brings with it however the risk of further delay and greater protraction of proceedings; it may also cause trauma on the part of the child, if the public law avenues of Care or Supervision Proceedings (with their 'significant harm' thresholds) are initiated to effect the transfer of Residence. In a recent Northern Ireland High Court case, the expert witness (a child psychologist) recommended not only full transfer of residence to the non-residential father but the temporary cessation of contact with the mother to encourage compliance with the Contact Order; this course of action was rejected by the Court but a stern warning was issued to the mother together with an order granting the father more frequent contact visits⁸¹.

Another useful course of action demonstrated by the High Court has been to encourage parties to draw up an agreed schedule in relation to the exercise of their joint parental responsibility⁸² as occurred in the English authority *A v A (Shared Residence)* (2004)⁸³. The role of social services in providing support to vulnerable families (for example via a Family Assistance Order or in the provision of a coherent care plan to secure an interim Care order) has also been highlighted as key to ensuring that contact is maintained or rekindled, or that a transfer of residence effected with a minimum of trauma for the children concerned⁸⁴.

Article 179(14) Order

The Court has wide discretion to order that no further applications are to be brought before it without leave, for a set time if necessary, in relation to Children Order issues; this is to allow '*long running and acrimonious cases*⁸⁵, to settle and to prevent instances of protracted litigation which are almost invariably '*funded by public finances*⁸⁶'. This option was availed of recently in

⁷⁹ *IBID* at 11(ii)

⁸⁰ *Re M* (intractable contact dispute: interim care order) [2003] EWHC 1024 (Fam), [2003] 2 FLR 636

⁸¹ See *Re O and S* (Residence Order: Contact: Implacable Hostility) [2005] NIFam 4 (4 May 2005) at 18 per Gillen J

⁸² *Re C and B* [2006] NIFam 1 (10 January 2006) at 32

⁸³ 1 FLR 1195

⁸⁴ See *Re O and S* (Residence Order: Contact: Implacable Hostility) [2005] NIFam 4 (4 May 2005) at 8 (iv) per Gillen J

⁸⁵ *Re C and B* (Joint Residence Order) [2006] NIFam 1 (10 January 2006) at 3 per Gillen J

⁸⁶ Per Bracewell J in *V v V* (Contact: Implacable Hostility) [2004] 2 FLR 851, cited by Gillen J in *Re O and S* (Residence Order: Contact: Implacable Hostility) [2005] *Ibid*

preference to the making of a Shared Residence order, in a bid to satisfy both the welfare and the wishes of the children in question⁸⁷.

Transfer of Proceedings within the United Kingdom

The Family Law Act 1986 has been amended by The European Communities (Jurisdiction and Judgment in Matrimonial and Parental Responsibility Matters) Regulations 2005 so that where children are habitually resident in Northern Ireland, the court has the power to make a fresh 'Part 1' Order if appropriate (i.e. an 'Article 8' Order) but not to vary or discharge an existing order made by a court elsewhere in the United Kingdom. This point was clarified recently in *Re C and C* [2005], although it was noted that the *'passage of time may well dilute that retention of jurisdiction'*⁸⁸.

Child abduction - 'Convention' cases

The Child Abduction and Custody Act 1985 gave effect to the Hague and European Conventions; the Child Abduction (Northern Ireland) Order 1985 made it a criminal offence for a person to take or send a child out of the United Kingdom without appropriate consent⁸⁹. The Lord Chancellor acts as the Central Authority for England and Wales and for Northern Ireland, though the Northern Ireland Court Service discharges the functions of the Central Authority in Northern Ireland. Although there is no specified form for making an application to a Central Authority under the Hague or European Conventions, in cases where a child has been abducted from Northern Ireland ('outgoing cases') applicants should however fill in an application questionnaire and are provided with written guidance on this. The Northern Ireland Court Service then sends out an application based upon the model suggested by the Hague Convention, and ultimately request the return of the child from the relevant Central Authority. The case will be monitored with a view to ensuring that progress is made.

Where it is believed that a child has been abducted to Northern Ireland from another country, ('incoming cases'; articles 3 and 8 of the Hague Convention) applications are accepted in any format, if sufficient information has been provided. When the Northern Ireland Court Service receives an application from another Central Authority for the return of a child, an independent solicitor will be appointed to represent the applicant. A number of *ex parte* orders are available e.g to secure the surrender of passports or prohibit removal of the child from the jurisdiction. Such cases are heard by the High

⁸⁷ *Re C and B* (Joint Residence Order) [2006] NIFam 1 (10 January 2006) at 3 per Gillen J

⁸⁸ NIFam 3 (04 May 2005) per Gillen J at 12 (ii)

⁸⁹ Persons 'connected with a child' include those holding a residence order, guardians, parents, (including putative fathers). 'Appropriate consent' means the consent of each person who holds parental responsibility ie the mother, father (including unmarried or stepfather provided he has parental responsibility), guardians or anyone holding a residence order, or the court itself. Anyone holding a residence order may send or take the child out of the United Kingdom without appropriate consent for up to a month.

Court in Belfast as a matter of urgency; adjournments are subject to a maximum time limit of 21 days.

If the application is for enforcement of custody rights and return of the child, the child must be under 16 and must have been resident in a Convention country immediately before any breach of custody rights. In addition to this, the child must have been removed to another Convention country after 1 August 1986. This removal must have been 'wrongful' (i.e. in breach of rights of custody which were being exercised when the child was removed). Where the application is to enforcement contact rights the child must similarly have been under 16, have been resident in a Convention country immediately before any breach, and now be resident in a Convention country.

The operation of the European Convention concerns both recognition and enforcement of orders. Applications for the return of abducted children under this Convention require that a court order has been made, rather than on any concept of the infringement of parental rights. Although orders made in Convention countries will be recognised, they must be registered before being enforced. Enforcement does not necessarily immediately follow registration. Applicants do not have to specify which Convention rights they wish to rely upon; in relation to cases involving contact, the European Convention brings the power to enforce existing orders, unlike the Hague Convention. It follows that where an applicant seeks the return of a child under the European Convention, it will be necessary to obtain a contact or residence order if one does not already exist.

Non-Convention Cases

The Northern Ireland Court Service provides limited assistance in such cases; The Foreign and Commonwealth Office may provide lists of lawyers in foreign countries, offer unofficial support or try to obtain child welfare reports. Failure to comply with an order for return is contempt of court, and an abducting parent can also be charged with the common law offence of kidnapping; this is obviously of little practical value or consequence where an international abduction has occurred.

Prevention of abduction

The Family Law Act 1986 enables the court to order that a child's whereabouts be disclosed or to order the recovery of a child; it has the power to restrict the removal of a child from the United Kingdom and to demand the surrender of any passport. In addition to this, the Passport Agency may be asked not to issue passports and the police are able to operate a "Port Stop" system to prevent children being taken out of the country through the principal ports and airports. Contact orders may be varied to provide for supervision of contact to prevent abduction of a child, where a residential parent becomes fearful of this outcome. Alternatively, where a child has been made a ward of the High Court, this imposes an automatic prohibition on taking the child out of the United Kingdom. Orders may, if necessary, be made *ex parte* (without notice to the other side). As has been noted in the Report on the United Kingdom, removal of a child from Northern Ireland to England or Wales (and vice versa) does not constitute removal to outside the *juris diction* for the

purposes of either the Child Abduction (Northern Ireland) Order 1985 or the Child Abduction Act 1984.

Law Reform proposals

As The Children Order Advisory Committee recently noted,

'The 'Making Contact Work' report may be the first serious attempt by Government to look comprehensively at ways of remedying a system that is acknowledged to be failing parents and children. While similar dilemmas prevail in Northern Ireland, we also have different structures, policies and levels of support services to deal with'⁹⁰.

As has been outlined, social workers in Northern Ireland carry considerable responsibility for coercing compliance with family law judgments, especially in relation to family contact. In spite of the range of reforms set in motion by the Good Friday/Belfast Agreement in 1998 (such as the setting up of The Human Rights Commission and the appointment of the Children's Commissioner) there are a number of areas within Northern Ireland where local history and politics continue to conspire against family law practitioners and family support workers. A unique set of conditions applies to this jurisdiction; political and religious divisions remain a key factor, with a proportion of the population regarding 'social services' providers or child protection workers as somehow linked to the Police Service of Northern Ireland ('PSNI') or viewing members of the judiciary as representative of a 'foreign' British government. The hostility faced by social workers within this jurisdiction generally may therefore frequently have an added political dimension; similarly, the potential to involve local police in relation to breaches of family law orders (such as Non-Molestation Orders) may be limited by reluctance on the part of the public to engage.

Other difficulties, such as our geography, are more apparent; as part of the United Kingdom, a child may be swiftly and easily taken 'overseas' to Scotland, England or Wales without actually having left the jurisdiction⁹¹; sharing an 'unmanned' border with the Republic of Ireland means that there is further scope for parents to quickly and quietly 'abscond' (and disappear) with their children to another jurisdiction, albeit one that is within the EU.

Interviews

It is proposed to interview a local family law practitioner, the director of Women's Aid locally, who has been directly involved in matters of child abduction/contact matters and also a member of the judiciary e.g. High Court Master.

⁹⁰ COAC 6th Report October 2005 – available at http://www.courtsni.gov.uk/NR/rdonlyres/95432BA7-DB76-4A59-B9C7-4C3E2F25AF18/0/p_flc_coac_6th_Report.pdf accessed 01.07.06.

⁹¹ In relation to Care Orders a gap in the legislation which means that an Order made in Northern Ireland may fail to be recognised upon transfer of proceedings in England and Wales; the Children Order Advisory Committee highlighted this in its 2nd Report.