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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

Between:

SK

Applicant

and

DS

Respondent

IN THE MATTER OF TOM (A CHILD) (APPLICATION FOR INTERNATIONAL RELOCATION)

Timothy Ritchie (instructed by Harte Coyle Collins) for the mother  
Sinéad Kyle (instructed by Magennis & Creighton) for the father  
Melanie Rice for the Official Solicitor

HUMPHREYS J

Introduction

Nothing must be published which would identify the child or his family. The name I have given the child is not his real name.

[1] In the case of *S v Z* [2012] EWHC 846 (Fam), Holman J described the decision in a relocation case as giving rise to the "*hardest of dilemmas*." Such cases are amongst the most difficult for judges to determine particularly where, as in this case, both the child's mother and father are well-motivated and loving parents who wish nothing but the best outcome for their child.

[2] These proceedings concern Tom (not his real name), an 11 year old boy. There are two applications before the court, firstly an application for a Joint Residence Order brought by the father and secondly, an application for a Specific

Issue Order permitting the mother to relocate to the USA with Tom. Both applications are brought pursuant to article 8 of the Children (Northern Ireland) Order 1995 ('the 1995 Order'). More accurately, the leave of the court to take a child outside the United Kingdom falls under article 13 of the 1995 Order but this does not affect the substance of the application.

[3] The court conducted a hybrid hearing over 4 days in which it heard evidence from the mother, her husband, the father and his partner as well as from Ms Carson of the Official Solicitor's office and Ms McGirr, the Court Children's Officer ('CCO'). The court is very grateful to the parties, the witnesses and legal representatives for the careful and sensitive manner in which these applications were presented.

### **Background**

[4] The mother and father began a relationship in 2007 and Tom was born in 2009. They split up in 2011 and proceedings ensued by virtue of which a Residence Order was made in favour of the mother and it was agreed the father would have contact from Sunday at 9am to Tuesday at 11am, and on a Thursday evening. The evidence reveals that the Thursday contact did not persist once Tom had started primary school. There was a degree of flexibility around the contact arrangements, including additional overnight stays and some extra-curricular activities.

[5] The mother married an American citizen on 29 May 2019 and gave birth to a son in August 2019. She has expressed the firm view that relocation to the USA will be to Tom's benefit since he will enjoy greater opportunities both in terms of education and lifestyle. The mother also stresses that Tom has always lived with her and she believes he would wish to continue to be part of that family life.

[6] The father has been in a long term relationship with his current partner since 2016 and they had a baby daughter in January 2020. Tom's father is concerned about the potential impact of a move to the USA, including the loss of friendship and family ties as well as the paternal relationship.

### **The Legal Principles**

[7] Article 3 of the 1995 Order requires the court, when considering any application relating to the upbringing of a child, to treat the child's welfare as the paramount consideration. Article 3(3) contains the 'welfare checklist', a list of circumstances to which the court is to have particular regard when considering any application under, inter alia, article 8.

[8] The Court of Appeal reviewed many of the relevant authorities in *SH v RD* [2013] NICA 44. It is clear from this analysis that the only legal principle in play is that of welfare paramountcy.

[9] Distinctions have been drawn in some cases where the applicant for relocation is a primary carer and those where the care of a child had been shared. Such distinctions derive principally from the English authorities of *Payne v Payne* [2001] EWCA Civ 166 and *MK v CK* [2011] EWCA Civ 793. However, Morgan LCJ commented in *SH*:

*"The effect of the guidance should not be overstated even where the case concerned a true primary carer. There was no presumption that the reasonable relocation plans of the carer will be facilitated unless there is some compelling reason to the contrary."*

[10] Having considered the nature of the guidance available from other cases, the court stated:

*"In this jurisdiction we agree with the learned trial judge that in relocation cases the court should focus on the welfare of the child as the paramount consideration."*

[11] I therefore propose to focus on Tom's welfare as the paramount consideration in this case and I will apply the welfare checklist to assist in this regard. I bear in mind the words of Keegan J in *WA v KA* [2019] NIFam 2 where she described the task in hand as "*reaching a holistic overall view*" and that is the approach I intend to take.

### **The Mother's Case**

[12] The mother moved to Northern Ireland in 2007 having commenced a relationship with the father. She became pregnant and Tom was born in July 2009. Unfortunately, the relationship did not last and the mother left the father when Tom was about two years old.

[13] The father commenced proceedings in June 2011 and on foot of those a Residence Order was made in favour of the mother and contact between Tom and his father was defined as being from Sunday at 9am to Tuesday 11am each week and also on a Thursday evening.

[14] The mother painted a picture of a happy, emotional, tactile boy who enjoys football, kickboxing, videogames and his friends. It was particularly clear that Tom enjoys good relationships with members of both his immediate and extended families.

[15] It was the mother's case, as she repeatedly stressed, that she was the primary carer for Tom and this had been the situation since she left the relationship with the father in 2011. She stated that she knows Tom better than anybody and that she was able to ensure that he gets everything he needs.

[16] More recently, the mother met a US citizen in 2018 to whom she became engaged in February 2019 and married in May 2019. In August 2019, they welcomed the birth of a son whom I shall call Joseph.

[17] The mother now wishes to relocate to the USA with her new husband and her two sons. She has made it clear that if the court determines that Tom should not relocate to the USA then she will move there on a permanent basis with her husband and Joseph. The court was told that the mother's husband enjoys significantly better employment opportunities in the USA than he would in Northern Ireland and that a family property is available for them to purchase in the USA.

[18] The mother's case is that a move to the USA would greatly benefit her family and Tom. She emphasises the opportunities that are available in the USA and she has expressed the view that American schools and colleges are superior to those in Northern Ireland. She stresses that Tom is a young boy who enjoys outdoor activities and that the climate and facilities in the USA will permit him to enjoy such activities to the full. Both the mother and Tom have visited the USA on one occasion back in May 2019 whenever the wedding took place. During that time they met many of the husband's family who live in the area and they also enjoyed the use of the property which it is now proposed the family will buy. Both the mother and her husband have identified suitable schools in the area for Tom to attend and also believe that his physical and emotional well-being would be better served by a new life in the USA. It is intended that the mother will stay at home with her children whilst the husband works.

[19] The mother recognises that Tom enjoys a strong relationship with his father but believes that by spending extended periods of time together during school holidays that this will make up for the loss of the contact time which will inevitably occur if relocation is permitted. The mother and her husband have put together a proposed template for contact which would involve Tom travelling back to Northern Ireland during school holidays to see his father but would also facilitate travel by the father to the USA at times when this might suit.

[20] It is the mother's firm view that the USA will allow a better quality of life for Tom and permit him to develop what she describes as a 'global mindset.'

[21] Tom's primary school teachers have identified that he struggles at times to maintain concentration and it was suggested that he may benefit from some further assessment. It would seem that Tom has some of the symptoms of ADHD but no diagnosis has been made. It was part of the mother's case that treatment plans for ADHD are much better in the USA than they would be in Northern Ireland.

[22] In her evidence the mother stated:

*“He has to realise that I am moving to the USA. I still think that Tom does not realise that I’m going. He says that he would feel terrible not seeing Joseph when he goes to America yet there is no hint of this emotion when faced with the idea that I would not be here. I find this strange.”*

This was a theme which recurred throughout the mother’s evidence. In her opinion neither the CCO nor the Official Solicitor had been able to discuss with Tom the impact of his mother relocating to the USA without him. It was said that when faced with questions on this subject Tom avoided answering or diverted to a different subject matter.

[23] Recently there have been disagreements and difficulties between Tom’s mother and father. One such issue concerned the selection of school for Tom to start next year. The parents were not on the same page as the mother expressed a preference for a grammar school option whilst the father chose a secondary school. The mother’s view is that the school which has been chosen for Tom to attend next year in Northern Ireland is not as good as the school which he would go to in the USA. In the event the father completed the online application and chose the secondary school.

[24] In March 2021 the mother took Tom to London for the purpose of their visa applications including an interview at the US embassy and a medical appointment. This caused a difficulty with the existing contact arrangements since not only would Tom be required to isolate for 10 days on his return from London but also the mother decided to withdraw the weekend contact immediately prior to the trip to London. This was compensated for by an extended period of contact between Tom and his father after the period of isolation had ended.

[25] This hearing had previously been adjourned to enable the visa arrangements to be regularised and as a result of the trip to London visas were issued both for the mother and Tom on 25 March 2021. The case was re-listed for hearing commencing on 15 April and it came as no small surprise to the court to discover that the mother, her husband, Tom and Joseph were booked on flights to the USA on 20 April. The mother also revealed that she had sold the sofa in the house in which they currently live, had fully packed up the property and had taken items belonging to Tom to his father’s home. She had also suggested to Tom that he could purchase sweets for his school friends as he would be leaving soon.

[26] All the evidence which I heard indicated that Tom enjoyed a very strong bond with his maternal grandmother, who herself had moved to Northern Ireland after her daughter. It was suggested in evidence that this grandmother would also make a move to the USA in due course. However further probing of this assertion revealed that the grandmother had no visa to enter the USA and it would be at least three years before her daughter could become a naturalised citizen of the USA and

be in the position to petition for her visa status. Furthermore, I did not have the benefit of any evidence from the maternal grandmother on this issue.

[27] In cross-examination the mother accepted that her new husband is her only link to the USA. She has no other family or friends in the country and she had only visited on one previous occasion at the time of the marriage. She accepted that Tom enjoys a strong family network in Northern Ireland which extends not only to his maternal grandmother but to his paternal grandparents, aunts, uncles and cousins.

[28] The mother was also challenged on her reasons for wanting to relocate to the USA. It was suggested to her that the motivation was largely financial in that her husband would enjoy more lucrative employment and she would therefore benefit from enhanced security and a better standard of life. This line of questioning sought to probe whether relocation was in fact in the best interests of Tom or whether it was the mother's own personal interests which were prevalent in the decision-making process. The mother's response was that Tom would be better off with his mother in the USA enjoying all the opportunities which that country would present for him. She stressed that if her husband could not work then they would not have the money to survive in Northern Ireland and he had been unable to identify potential employment which would present to him the same level of income and security that he would have back in his homeland. Effectively the mother states that she has no choice but to move to the USA. Other options were put to her such as staying in Northern Ireland with or without her husband or her husband working in England but none of these found favour with the mother.

[29] She was also cross-examined about why she had booked the flights to the USA in April and had not told Tom's father about this. Her response to that line of questioning was to say *"I didn't tell his father because he would have said I was being presumptuous."*

[30] The mother was challenged about a text message which she sent on 21 December 2020 and which stated:

*"I do not want Tom to get tested I do not believe in Covid. The temperature check affects your third eye and pineal gland."*

Given that Tom's welfare is central to the court's decision making process it was entirely appropriate that the mother's views on matters such as testing, vaccinations and medical treatment were explored as part of the evidence in this case. When asked she confirmed her view, seemingly acquired from the Internet, that the centre of one's brain could be affected by an infrared temperature check.

[31] In January 2021 the mother made an application to this court for an order requiring the father to undergo a hair follicle test for drugs. This application was precipitated by concerns expressed by Tom to his mother that his father had been using drugs. It was suggested that on two occasions the father had been using a

pipe and hiding it from Tom. The father responded to these allegations denying that he had been smoking cannabis or using a pipe whilst in Tom's company. The father did however admit having consumed cannabis in edible form on an infrequent basis often associated with poker evenings when he played cards with friends. He stated that the most recent time he had consumed cannabis was in December 2020 but this did not occur in Tom's presence or whilst Tom was at his property. When faced with the concerns expressed by Tom the mother set about searching for particular devices on the Internet and in particular identified a device called a grinder which is used for taking heroin. The mother also questioned Tom extensively as to his father's drug use. The matter came before the court and led to further evidence being submitted by the parties and consideration by both the CCO and the Official Solicitor. In the event the father did submit to a hair follicle test which proved negative for any of the illegal drugs tested for.

[32] The mother's husband gave evidence that he came to Northern Ireland in February 2018 on a short-term contract and on a visa which permitted him to work until January 2021. He had hoped to be back permanently in the USA on the expiry of this contract but as a result of the court proceedings he took on a role with a company in England commencing in November 2020. In light of the Covid-19 restrictions he was able to carry out those duties from home but stated that his English employer was now asking its employees to return to office based work.

[33] His evidence was that he had a lucrative job offer back in the USA and there was documentary evidence to substantiate this. He was also the owner of a separate company and benefited from dividends paid in respect of those shares. He had looked at employment opportunities in Northern Ireland but given his lack of professional qualification in this jurisdiction his researches revealed that he would sustain a considerable drop in income if he stayed here with his wife and family. It emerged in cross-examination that he had been able to obtain a right to stay in the United Kingdom under the EU Settlement Scheme and therefore if he wished to he could remain in Northern Ireland until at least 2025. His evidence was that the most important thing to him was to ensure financial stability for his family including both his son and stepson. The court entirely accepts this evidence and also recognises his profoundly held belief that life for his family would be better in the USA than it would be in Northern Ireland. He clearly believes that academic and athletic success are more likely to be attained in the USA. He also gave evidence that he will purchase his mother's home in the near future with the help of a mortgage and this will provide a spacious family home with a swimming pool. This type of opportunity was simply not available to him in Northern Ireland. The husband also had significant input into the framework for contact which would be facilitated both in terms of travel by Tom back to Northern Ireland and also trips to the USA which may be undertaken by the father.

## The Father's Case

[34] The father was born in Northern Ireland and has worked in the family business since leaving school. He has been with his partner for some 5 years and in January 2020 she gave birth to a baby daughter whom I shall call Rose.

[35] The father give evidence of the strong bond that exists between him and Tom. He described his son as being understanding, compassionate and tactile. He is bright and mature, albeit that in recent years he has had his struggles at school.

[36] His own parents, his sisters and their children have all played important parts in Tom's life. The father also described the very important and close relationship which Tom has with his maternal grandmother. In describing these familial relationships the father stated that *"more than material things Tom just loves people spending time with him."* He said that kickboxing was Tom's favourite pursuit. Prior to Covid, he regularly attended a gym which was run by the father's uncle. His fellow kickboxers represented his core group of friends and he was looking forward to the resumption of this sporting activity.

[37] In relation to the contact arrangements the evidence given by the father was that there was considerable flexibility prior to 2019 in relation to the time he spent with Tom. Whilst the original court order prescribed contact from Sunday to Tuesday and then on a Thursday evening in reality he was afforded more time than this and there were additional overnight stays on a regular basis. When asked what had led to the application in May 2019 for a Joint Residence Order the father explained that this was brought about by the lack of additional contact. Tom had expressed to him that he wanted to spend extra time with his father in order that there be fairness for both parents. The father believed the only way to achieve this would be through the court process. In the event, agreement was reached that the contact arrangements would be from Sunday to Tuesday in week one and then Sunday to Wednesday in week two.

[38] Aside from the difficulties which had arisen in relation to contact, the father also described communication problems that existed between him and Tom's mother. For instance, he had not been informed of holiday arrangements and had been told on previous occasions that he did not have any parental responsibility for Tom. He also referenced the events of March 2021 when Tom was vaccinated without the father being informed.

[39] The father took particular issue with the assertion that the mother was the primary carer for Tom. He said that the mother did not recognise him as being an equal parent but he believed that the arrangements were more akin to those of shared care. The father has always maintained a close relationship with Tom since his birth and it was his case that the quality of time spent together was more important than a strict mathematical analysis of the number of hours spent with each respective parent.

[40] In relation to the choice of school the father explained that there was a difference of opinion between him and the mother but that both his researches and his discussions with the primary school teachers had led to a preference being expressed for the secondary school to which Tom has now applied. He said that during Primary 6 and Primary 7 Tom's schoolwork had deteriorated to the extent that he was described as a below-average pupil. As a result, the father organised some tutoring, which mainly took place online, but which had improved both the standard of Tom's work and his ability to focus.

[41] As far as the Covid-19 pandemic is concerned, the father stated that the mother does not adhere to the published guidelines and not only had she sent a text message asserting that she did not believe in Covid but she had also told Tom that that was her position.

[42] The father was questioned about the drugs issue and the impact this has had on Tom. He stated that he was both ashamed and disappointed with himself and accepted that the consumption of illegal drugs was not sending the right message to his son. He stated to the court that he would not be consuming cannabis again. He did however stress that he felt that the manner in which Tom's concerns were addressed by his mother was inappropriate. He emphasised that he had never smoked or consumed drugs in Tom's presence.

[43] Ultimately, the father's position was that the best outcome for Tom would be for both his parents and their families to stay in Northern Ireland. In his view either outcome of the relocation application was a poor one for Tom. He had been led to believe that the mother and her husband had no choice but to return to the USA but now having heard the evidence of their rights to remain in the United Kingdom he believed that Tom should be their priority and it was not necessary to leave him.

[44] The father also give evidence about the potential contact arrangements which could be put in place if a decision were made whereby Tom was to remain in Northern Ireland. In his view it was a lot to expect Tom to travel 6 or 8 times across the Atlantic per year and in his view the summer holiday provided the best opportunity to travel. However, he was willing to engage in discussion and be flexible about how things might work best for his son and he recognised that whatever framework was put in place would have to be subject to further consideration and review depending on the particular needs of all the members of the family and Tom in particular.

[45] The father was cross examined about his relationship with Tom and in particular it was put to him that the mother was the primary carer and that his contact with Tom was limited by reason of his work commitments. It was suggested that during his contact time Tom was often left in the care of relatives. He accepted that Tom was undergoing a transition this year between primary and secondary school and therefore if he was to relocate to the USA this may be a good time to make that move. He also agreed that the property in the USA looked like an ideal

place to call home but he asserted that the size of the house and the swimming pool were not going to make up for what Tom would lose.

[46] The father enjoys a modest income from the family business but he also has two investment properties, and the sale of one of these may provide some capital which could be used to finance travel back-and-forth across the Atlantic.

[47] When asked about Tom's feelings when he discusses the potential move to the USA the father said that he becomes physically agitated, does not want to talk about it and he closes down the conversation. When pressed he articulates the view that it is a matter for the adults to decide and that he is 50-50 on the outcome. The father says that if Tom wanted to go he would support him in that decision but his son has never expressed that opinion.

[48] The father stressed that a strong support structure is available in Northern Ireland particularly through his extended family and the maternal grandmother which will help Tom's emotional needs in the event of his mother relocating to the USA without him.

[49] The court also heard evidence from the father's partner. She described her relationship with Tom as being loving and positive and stated that Tom enjoys the time he gets to spend with his young sister Rose. She recognised that whatever the outcome of this application it will result in him spending less time with one or other of his half siblings. She described her feeling of devastation that Tom had been put in a position to choose not only between his parents but also between his siblings. In the event that the court determines that Tom should not relocate to the USA, the father's partner says she will help with the transition for Tom into the care of his father and her.

[50] In relation to the use of cannabis the evidence from the father's partner was that she was aware of his occasional use but this was not habitual and it was something that she firmly disapproved of. She said that she believes the father when he states that he will not be consuming it again.

### **The Other Evidence**

[51] The court had the benefit of three reports prepared by Maureen McGirr the appointed CCO. She had met and interviewed Tom on a number of occasions and expressed her professional opinion to the court that the decision made by the mother to relocate to the USA was predominantly about the mother's needs rather than those of Tom. It was her evidence that she did not realise until the course of the hearing that the mother was definite in her position that she was going to the USA with or without Tom. The CCO's opinion was that the best outcome for Tom was for both his parents to remain in Northern Ireland but she now recognised that this was not an option.

[52] Ms McGirr first interviewed Tom in November 2019 when he was aged 10 years and 4 months. For the purposes of her initial report she also interviewed both parents and liaised with Tom's GP and his class teacher. The contact with the GP and the teacher revealed concerns and worries which Tom had about the prospect of going to America. When she met with Tom himself he clearly expressed the view that he would prefer to stay in Northern Ireland but would visit his mother when he was off school, particularly during the summer holidays. He stated that he would much prefer things to remain as they were but if his mother was to relocate to the USA he would prefer to stay in Northern Ireland. He referenced both his own unhappiness and that of his cousins and friends at the prospect of his move to the USA. Tom talked about the importance of his relationships with his grandparents and his cousins as well as his young siblings.

[53] In her analysis, Ms McGirr concluded that there was no evidence to support the mother's assertions that life would be better in the USA for Tom than it would be in Northern Ireland. She accepted that there would be educational and recreational opportunities in the USA but was not convinced that these would enhance Tom's overall needs. She was perplexed that the mother and her husband had not made more strenuous efforts in exploring the potential of remaining in Northern Ireland as a family unit. In light of Tom's resolute wish to remain in Northern Ireland and on the basis of the interviews which she had with both parents, the CCO believed it was not in Tom's best interests to relocate to the USA.

[54] Ms McGirr conducted a further interview with Tom in February 2021 when he was aged 11 years and 7 months. This interview focused to an extent on the concerns around his father's drug use and the mother's response in relation to those concerns. However, Ms McGirr also took the opportunity to consider further with Tom his wishes and feelings about relocating to the USA. When asked about these Tom responded that he did not know what he wanted and stated *"I'm 50-50 if I want to stay here or go there."* He expressed a preference for seeing both of his parents but in terms of the way forward his conclusion was that it be left up to the adults. His final comment to the CCO was:

*"I just wish nothing would happen...really unfair like I just wish everyone would just stay here."*

[55] The CCO's views in relation to the drug allegations were that the mother should not have instigated these types of conversations with her son and that education around the use and abuse of drugs should be undertaken in an educative forum or other suitable environment rather than against the backdrop of court proceedings.

[56] In her conclusions around the relocation issue Ms McGirr accepted that Tom was a child dearly loved and cherished by both parents. She noted that Tom was presently conflicted in his emotions regarding the matter compared to his previously expressed view in November 2019. This may be due to an increased sensitivity to

his parents' current situation and the desire not to upset either his mother or his father but rather to opt out of discussions on the issue and leave the matter up to the adults. The CCO stressed that the whole of Tom's life experience has been in Northern Ireland where his friends, immediate and extended families all reside. She continued to maintain the view that a relocation to the USA would be contrary to Tom's best interests.

[57] In cross-examination Mr Ritchie challenged Ms McGirr by claiming that she had not properly factored in the loss of Tom's relationship with his mother in her overall conclusions. Ms McGirr's response was that her assessment was based both on his wishes and feelings and on the lack of evidence put forward by the mother that a move to the USA would be more advantageous for Tom. It was apparent that during the course of the interviews Tom did not articulate to the CCO the potential impact of the loss or diminution of his relationship with his mother in the event of her relocation without him. Essentially however this was because Tom chose not to engage on that subject.

[58] When questioned by Ms Kyle, Ms McGirr expressed the opinion that the behaviour of the mother in packing up the house, booking flights and suggesting the purchase of sweets for school friends was not appropriate and only served to put further emotional pressure on Tom. Her overall conclusion remained that the mother was placing her own interests ahead of those of Tom, a matter she found hard to understand.

[59] The court also received two reports from Ms Rosemary Carson of the Official Solicitor's office. These reports were produced following three interviews with Tom in June 2020, July 2020 and March 2021. She also listened to the evidence of the parties given in these proceedings and maintained the view expressed in her reports that a relocation to the USA would not be to Tom's overall benefit.

[60] During the course of her interviews Ms Carson noted that the wish of Tom was to have a shared care arrangement in Northern Ireland but this could not be achieved as his mother had made it clear that she was moving to the USA. Tom's preference for an equal division of time with each parent was said to be demonstrative of the equal weight he attaches to the relationships with each of his parents. Whilst recognising that his mother is a key figure in Tom's life, she formed the view that a relocation to the USA would have a dramatic impact on Tom. Whilst he has only visited the USA on one occasion on holiday, his whole life has been based in Northern Ireland including his school, his activities, his friends and his extended family. She did not believe that the separation of Tom from all of that would be offset by the opportunities which may come to pass in the USA. This was the basis for the conclusion that a move to the USA would not be in his best interests.

[61] At the time of the most recent interview Tom expressed the view that he was 50-50 on the issue and it was a matter for the adults and the judge to decide what happened. When cross-examined about her views on Tom's welfare Ms Carson

stated that both potential outcomes of the relocation application were contrary to Tom's best interests.

[62] At the court's request the legal representatives helpfully produced a joint position paper on the issue of visa and entry requirements into the USA. This showed that the permanent residence process for the mother and Tom had been completed albeit that travel through US customs for both had to occur prior to 15 September 2021. A permanent residence card would be issued to both within six months of their arrival in the USA. These 'green cards' would be valid for a period of two years but prior to 90 days from their expiration the mother and Tom would be able to petition for conditions to be removed and the green cards extended for a further 10 years.

[63] The existing travel arrangements during the Covid pandemic do not permit an individual to travel to the USA with a child unless that child is a permanent resident of the USA. This means that if Tom does not activate his permanent residence card before 15 September 2021 his father would not be entitled to enter the USA with him. It would also mean that the only way in which Tom could enter the USA if he does not take up his lawful permanent resident status before September is as a noncitizen visiting the USA for the purpose of visiting a sibling. The mother and her husband could accompany Tom into the USA even if he does not have permanent residency. It is recognised that the arrangements for travel during the pandemic are likely to change. It is also clear that the mother would be in a position to apply for US citizenship after a period of three years of having permanent residency as she is the spouse of a US citizen.

### **Consideration**

[64] The above represents a summary of the evidence given in this case. The court has listened carefully to all the evidence adduced and considered all the documents relied upon by the parties. If an evidential point has not been specifically mentioned, it will nonetheless have been taken into the overall reckoning by the court.

[65] I have considered this matter both from the perspective of the welfare checklist and also on a holistic welfare basis. I propose first of all to consider the statutory factors:

**(a) The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)**

In the 2019 interview with the CCO, Tom expressed a clear preference to remain in Northern Ireland. By 2020, he was stating that he was '50-50' on the issue and preferred to "*leave the decision to the adults*". It remains the case that at no time has he expressed a preference to relocate to the USA with his mother. It is recognised that Tom is still young but the impression given by

all witnesses is of a bright and mature individual who is more than capable of expressing his wishes and feelings.

**(b) His physical, emotional and educational needs**

This is a key factor in the debate. The mother's case is that his educational needs would be better met in the USA. There was no evidence to sustain this claim but nor can it be suggested that Northern Ireland presents superior educational opportunities. I conclude that Tom's educational needs can and will be met in either location.

Tom's physical needs will also be met either side of the Atlantic. The opportunities to play and participate in sport, for instance, will exist both in this jurisdiction and the USA.

Both Tom's parents and their respective partners will provide a loving and secure environment for him as he develops through his teenage years. However, these needs will be affected by the fracturing of his family following the outcome of this case. The loss of the constant presence of either his mother or his father in his life will have a profound impact on Tom. This will be ameliorated to some extent by indirect contact and visits during school holidays but this will provide a poor substitute for the regular contact he currently enjoys.

Having heard the evidence, I have concluded that the strong family ties which exist in Northern Ireland would provide important and constant support to Tom and thereby ensure that his emotional needs are provided for. If he relocates to the USA, Tom will have the presence of his mother, stepfather and brother but I have not been persuaded that this will compensate adequately for the loss of the other relationships.

**(c) The likely effect on him of any change in his circumstances**

It is evident that, in either case, Tom's life will change markedly. His own preference for shared care in Northern Ireland will not be met. He will spend his teenage years largely distant from one of his parents.

**(d) His age, sex, background and any characteristics of his which the court considers relevant**

Tom's age is relevant in that he is able to articulate his views on the potential relocation and will soon be able to travel across the Atlantic unaccompanied. The other characteristics have been taken into account in the overall analysis of his welfare.

**(e) Any harm which he has suffered or is at risk of suffering;**

I have sought to analyse the emotional harm which will be caused to Tom above. This could be avoided if the mother chose to stay in Northern Ireland but she has made a decision to relocate to the USA and this will have inevitable consequences for Tom.

**(f) How capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question to be relevant**

Having heard both parents and their partners, I have no doubt that each of them is capable of meeting Tom's needs and providing a secure family environment.

**(g) The range of powers available to the court under this Order in the proceedings in question**

In essence, a relocation application involves a binary outcome although the court does have powers under articles 8 and 10 of the 1995 Order to ensure that regular contact with the absent parent occurs.

[66] The court does not consider that the debate as to whether the mother is the primary carer is helpful in determining the outcome of this application. Not only does it hark back to the decision in *Payne* which has now largely been departed from, it does not focus on the key issue of Tom's welfare. There is no doubt that Tom has maintained and cherished strong relationships with both his parents. In this context, I am persuaded that the quality of time spent is more important than the amount.

[67] Considering the issue holistically, I have concluded that Tom's welfare is best served by his remaining in Northern Ireland. This has been a difficult decision to arrive at but I do so for the following principal reasons:

- (1) Neither Tom nor his mother have any established links to the USA. They have visited once on holiday;
- (2) By contrast, Tom has strong family, friendship and cultural links to Northern Ireland. The importance of his relationships with his grandparents, aunts, uncles and cousins was repeatedly emphasised throughout the evidence in this case;
- (3) In this regard, I pay particular attention to Tom's relationship with his maternal grandmother. I disregard the suggestion that she may move to the USA since there was no direct evidence of this and it was accepted that her immigration status is such that it would be years before she could relocate even if she sought to do so;
- (4) I was not persuaded on the evidence that the USA would present such enhanced educational and athletic opportunities as would outweigh those

presented in Northern Ireland or, indeed, that would serve to compensate for the obvious emotional harm which would be caused to Tom by a move to the USA;

- (5) I recognise that Tom will suffer a degree of emotional harm and upset on either outcome to this case but have concluded that this can be better mitigated within the framework of the extended family relationships which he enjoys in Northern Ireland;
- (6) Tom's own wishes and feelings were initially in favouring of remaining here and now are said to be '50-50.' At no time has he expressed a view in favour of moving to the USA. This is a telling feature of this case. Tom himself realises the importance to him of the existing family relationships in Northern Ireland. Of course, it is palpable that his preference is for everyone to stay here and his parents to share his care;
- (7) The court does have concerns about the admission of recreational drug use by Tom's father. However, having heard his evidence I accept his remorse is genuine and he will strive in the future to be a good role model for his son. I have concluded that there is no likelihood of any future harm being caused to Tom in this regard;
- (8) The court was also concerned about the mother's attitude to Covid-19 and her response to the questions raised about the father's use of drugs. Both these actions were inappropriate and misguided but, taken on their own, carry little weight in the overall determination of this case;
- (9) Of more significance is the mother's behaviour in recent weeks prior to the commencement of the hearing. To have booked flights for herself and Tom to leave for the USA on Tuesday 20 April when the case was due to start on Thursday 15 April demonstrates scant regard for the legal process. It was not only presumptuous it was also potentially harmful to Tom who was led to believe he was moving permanently to the USA within a few days;
- (10) The same can be said of the decisions to sell furniture, pack suitcases and discuss buying sweets for Tom's school friends. None of these could have been made with the best interests of Tom in mind. Regrettably, this conduct can only lead the court to conclude that the mother was prepared to place her own interests ahead of those of her son in this relocation process.

## **Conclusion**

[68] For the reasons set out herein, I have concluded that the relocation application should be dismissed. I make a Joint Residence Order under article 8 of the 1995 Order in relation to Tom. That Order will prohibit the removal of Tom from the UK without the permission of both parents or the leave of the court.

[69] In light of the mother's stated intention to move to the USA in the near future, I propose to adjourn the question of contact arrangements for a period of 2 weeks to permit the parties an opportunity to agree a framework for these. I am prepared, if the parties wish, to give an indication as to the type of arrangements which may find favour with the court.

[70] I will also hear the parties on any consequential relief sought.

[71] I am conscious that Tom will need to be informed of this decision and care will have to be taken in that regard. I direct that the parties be guided by the Official Solicitor on this issue.