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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

ICOS No: 21/049184

Delivered: 10/12/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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Between:

A HEALTH AND SOCIAL CARE TRUST

Applicant

and

A MOTHER, A FATHER

Respondents

IN THE MATTER OF TWO CHILDREN E AND F  
(CARE PROCEEDINGS: ALLOCATION OF PROCEEDINGS)

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Ms Suzanne Simpson QC with Ms Lindsay (instructed by DLS Solicitors) for the  
applicant Trust

Ms Leanne Kelly (instructed by McGeady & Molloy Solicitors) for the respondent mother

Mr Paul Foster (instructed by MacDermott & McGurk Solicitors) for the respondent  
father

Ms Caroline McCloskey (instructed by Quigley, Grant & Kyle Solicitors) for the  
Guardian ad Litem

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**KEEGAN LCJ**

**Introduction**

**This case has been anonymised as it involves children. Nothing must be published which would identify the children or their family.**

[1] I heard this matter sitting in the Family Division. The case relates to two young children who are now aged 2 and 1 years respectively. The case was listed for a contested Interim Care Order hearing, however, that ultimately resolved on the basis of a voluntary care arrangement. In effect the mother has contracted to live with her family in a safe setting and the father does not live with the children. However an issue arose as to whether the proceedings were properly transferred to

the High Court. All counsel have assisted the court in relation to that by filing written submissions which I have considered. This has involved an examination of the Children (Allocation of Proceedings) Order (Northern Ireland) 1996 (“the Order”).

## **Background**

[2] As I have said these are care proceedings. The mother is a vulnerable person. The father has a history of involvement with social services. Concerns arose around the parents’ relationship given several historical allegations of sexual assault made against the father which have not been proven alongside allegations of domestic violence against the father spanning a number of different relationships. In the course of her pregnancy with the youngest child concerns were raised that the mother was not being open and honest regarding domestic violence. The Trust therefore applied by way of C1 Application for a Care Order before Londonderry Family Proceedings Court. This application is dated 1 July 2021. A C2 for transfer of proceedings on behalf of the father was lodged and this came before the court on 9 July 2021. No counsel appeared at this hearing however I was told that the transfer was made by consent and the District Judge transferred the case to the High Court. The order records “complexity” and “point of law” as the basis for transfer. No further definition is provided on the face of the order.

## **The Law**

[3] The provision for transfer from the Family Proceedings Court to a higher court is set out in the Order in a number of articles. First, Article 5 reads as follows:

### **“Transfer from a family proceedings court to a family care centre**

5. – (1) Subject to paragraph (2) and to Articles 6 and 7 a family proceedings court shall, upon application by a party or of its own motion, transfer to a family care centre proceedings of a kind mentioned in Article 3(1) where it considers that the proceedings are exceptionally grave, important or complex in particular –

- (a) because of complicated or conflicting evidence about the child’s physical or moral well-being or about other matters relating to the child’s welfare;
- (b) because of the number of parties;
- (c) because of a conflict of law with another jurisdiction;
- (d) because of some novel or difficult point of law; or

(e) because of some question of general public interest.

(2) The court shall only transfer proceedings in accordance with paragraph (1) where, having had regard to the principle set out in Article 3(2) of the 1995 Order, it considers it in the interests of the child to do so."

[4] If a case is transferred to a Family Care Centre it can be transferred to the High Court under Article 10 which provides:

**"Transfer from a family care centre to the High Court**

10. Where proceedings have been transferred to a family care centre under Article 5 or 8 the court shall transfer the proceedings to the High Court where, having had regard to the principle set out in Article 3(2) of the 1995 Order, it considers that the proceedings are appropriate for determination in the High Court and that such determination would be in the interests of the child."

[5] The other provisions which are relevant in this case are Article 6 which allows for transfer from a Family Proceedings Court to the High Court or a County Court:

**"Transfer from a family proceedings court to the High Court or a County Court**

6. – (1) Notwithstanding Article 5 but subject to paragraph (2) and Article 7 a family proceedings court shall, upon application by a party or of its own motion, transfer to the High Court or County Court proceedings of a kind mentioned in Article 3(1) where there are pending in such court any other proceedings which may affect or are connected with the child in respect of whom the proceedings are to be transferred and where it considers that it would be appropriate for the proceedings to be heard together.

(2) The court shall only transfer proceedings in accordance with paragraph (1) where, having had regard to the principle set out in Article 3(2) of the 1995 Order, it considers it in the interests of the child to do so."

[6] Article 3 is relevant which sets out where proceedings are to be commenced. Article 3(1)(f) includes Article 50 Care Order and Supervision Order proceedings and Article 3(5) states:

“(5) Notwithstanding paragraphs (1), (3) and (4) proceedings of a kind specified in sub-paragraphs (c), (e) to (n) or (s) shall be commenced in a court in which there are pending any other proceedings under the 1995 Order in relation to the same child and which are also of a kind set out in those sub-paragraphs.”

[7] There is provision in Article 13 of the Order for transfer from the High Court to the Family Proceedings Court as follows:

**“Transfer from High Court to Family Proceedings Court**

13. The High Court shall transfer to a family proceedings court, before trial, proceedings which were transferred by that court under Article 6 where, having had regard to the principle set out in Article 3(2) of the 1995 Order, and the interests of the child, it considers that the criterion for transfer no longer applies because the proceedings with which the transferred proceedings were to be heard have been determined.”

[8] There is also provision in Article 14 for transfer from the High Court to the Family Care Centre as follows:

**“Transfer from the High Court to a Family Care Centre**

14. The High Court shall transfer to a family care centre, before trial, proceedings which were transferred by that court under Article 9(2)(b) or 10 where, having had regard to the principle set out in Article 3(2) of the 1995 Order, it considers that the proceedings are appropriate for determination in that court and that such determination would be in the interests of the child.”

[9] The final provision I reference is Article 16 which deals with contravention of this Order in the following way:

**“Contravention of this Order**

16. Where proceedings are commenced or transferred in contravention of a provision of this Order, the contravention shall not have the effect of making the proceedings invalid; and no appeal shall lie against the determination of proceedings on the basis of such contravention alone.”

## Discussion

[10] It is accepted by all parties that these proceedings were transferred to the High Court in contravention of the provisions of the Order. The District Judge does not have power to transfer directly to the High Court unless there are pending proceedings and there are no pending proceedings in this case. Clearly, there was an error which highlights the fact that practitioners need to be reminded of the terms of the Order. This court enquired whether the case could be transferred to a lower court given the fact that the matter is proceeding by way of voluntary arrangement. Upon examination, such a course is not open to the court under Order. Also, it is clear that this court can only retain jurisdiction by virtue of the application of Article 16.

[11] The case law in this area is now of some vintage. There are two cases that were determined by Gillen J which have been highlighted by counsel. The first is a case of *T, C, P, M & B (The Children (Allocation of Proceedings) Order (Northern Ireland) 1996)* reported at [2003] NI Fam 9. The second case is *B & N (Children (Allocation of Proceedings) Order (Northern Ireland) 1996)* reported at [2002] NI Fam 6.

[12] In the first decision I have mentioned Gillen J set out the criteria for transfer which is stated within the Order. At paragraph 6 he also gave the following guide:

“Whilst the category of cases appropriate for determination in the High Court is never closed examples of appropriate criteria will include cases which possess one or more of the following features:

- (a) Voluminous and/or complex issues of law.
- (b) Unusually complex psychological or emotional issues.
- (c) Considerable expenditure of public monies.
- (d) Particularly vulnerable parties and/or unusually uncooperative litigants.
- (e) An unusually long defended case.”

[13] In *B & N* there is an examination of Article 16 of the Order. At paragraph 4 Gillen J stated that:

“The saving clause is clearly to cater for judicial or legal oversights. It would be quite inconsistent with a

purposive construction of this Article to permit it to embrace a deliberate defiance of the statutory intention.”

[14] Although not quoted in the arguments, I am aware that the Children Order Advisory Committee Guidance (“COAC”) last updated in 2010 also refers to transfer and is regularly quoted in applications. The C2 issued by the father is before the court and it refers to these decisions and the COAC Best Practice Guidance. It also refers to the fact that the COAC Best Practice Guidance indicates that the appropriate venue for a case should be addressed at a very early stage. Late transfers after months adrift can be a serious problem in occasioning delays. Family Proceedings Courts and Family Care Centres have a statutory definition governing the exercise of their discretion whether to transfer cases. The COAC Guidance also specifically points out at Appendix 1 Part 2(3) and (14) that certain cases should be transferred if difficult points of law, issues of public policy or complex or sensitive issues arise. In this regard two areas were highlighted:

- “(g) Particularly serious injuries to a child; and
- (h) Particularly serious injuries of physical or emotional abuse of a child.”

[15] I commend the solicitor for the quality of the C2 application that was put before the court. However, the Order does not allow for a transfer directly to the High Court unless there are pending proceedings. I can see that there are some complexities in this case, however those would need to be spelt out on the face of any transfer order in this and any other case. It is not apparent to me that there is a point of law to be determined. Rather this case comes down to complexity of issues and vulnerability of the parties. That would, it seems to me, viably have led to a consideration of transfer to the Family Care Centre. It is then for the Family Care Centre to determine whether or not the case should have onward transfer to the High Court.

[16] At this point I pause to observe that the Family Care Centre is a highly specialist court comprised of experienced judges who deal with complex cases in both the family and criminal arena and who are well equipped to deal with cases of this nature. Practice has developed since the decisions of Gillen J which were some time ago. In all cases judges and parties need to bear in mind the fact that it is only cases which meet the statutory tests that should be before the High Court. I agree with Gillen J that the list is not determinative but there needs to be a clear understanding that only the most complex cases should be transferred which include those with the features mentioned at [12] above, cases with a clear point of law, cases with an international element or cases involving the inherent jurisdiction of the High Court.

[17] It is vitally important that transfer orders clearly set out the reasons for transfer in a number of sentences rather than just record the headings. That way

there is less room for ambiguity or dispute about whether or not a transfer order should have been made. Practitioners should also be aware that at each level of court they can expect to be asked about why a case was transferred and in certain circumstances cases will be transferred back to a lower court tier.

[18] Further issues can arise due to the fact that ancillary and subsequent applications are brought to the court where proceedings commenced and concluded. In practice, this has led the High Court having to consider many cases particularly those regarding contact which are not complex. In addition to the time and expense associated with this there is the added issue of parties having to attend the High Court when they should be able to avail of adjudication in their local Family Proceedings Court which are administered by highly experienced and dedicated family judges.

[19] I am sure that the bulk of transfer decisions are correct. However, this case provides a timely opportunity to highlight the statutory provisions governing transfer. In this case I do not consider that there was a deliberate attempt to circumvent the statutory provisions. I am surprised by the error that was made but I will put it down to oversight on this occasion. I do not have statutory power to transfer proceedings to another court. The inherent jurisdiction was mentioned in passing by Mr Foster in his argument however this was not the subject of any substantial argument. Rather, the majority of counsel referred to Article 16 as the answer to the problem. I agree with that analysis. This is a case where I accept that there is some complexity involved and so it merited consideration of transfer at an early stage. That should have been to the Family Care Centre which can then decide whether onward transfer is necessary. It is unfortunate that this process, which to my knowledge works very well, was not observed. I am also conscious of the no delay principle contained with Article 3(2) of the Children Order and the overriding objective contained in Order 1 Rule 1A of the Rules of the Court of Judicature (Northern Ireland) 1980. Therefore, in this instance, the proceedings can remain and be determined in the High Court utilising the saving provisions in Article 16.

[20] Finally, I would like to thank the Family Bar for the characteristically helpful submissions that have been made in this case. I hope that this decision will inform good practice going forward.