

THE HIGH COURT

2009 78 CA

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964, AS AMENDED

IN THE MATTER OF J.B., H. B. AND H. B. (MINORS)

BETWEEN/

K. B.

APPLICANT

AND

L. O'R.

RESPONDENT

JUDGMENT of Mr. Justice Roderick Murphy delivered 15th day of May, 2009

1. Appeal

This appeal was heard initially on 16th and 17th February, 2009, at Naas.

By agreement of the parties I met the eldest child on Friday 27th February, 2009.

The matter resumed on 1st April in Dublin.

The Circuit Family Court (Judge Michael White) delivered a detailed judgment on 27th November, 2008, having heard evidence over four days late in October. The order of the Circuit Court made on that date appointed the father as joint guardian having joint custody of the three children with primary care and control to the children's mother. Before that the mother was the guardian and the father's applications in that regard to become guardian had not been successful.

The court further ordered that the children take up residence with their mother in Yorkshire within a radius of 20 miles from Harrogate not before July, 2009. The order was to be ruled in the English Court prior to the children being moved.

A detailed order was made in relation to custody and access.

The mother was to choose the primary school for H. and H. in Yorkshire. In the absence of agreement the court would approve a secondary school for the eldest child which would include Irish day or boarding schools.

Other orders followed in relation to communications.

It was ordered that the father pay:-

(a) A weekly sum of €342.00 for the maintenance of the children to be paid weekly by direct debit subject to annual CPI increases, and

(b) An annual sum of €3,000.00 to assist in defraying additional expenses payable in the sum of €1,500.00 twice yearly with separate arrangements for the eldest child to attend school in Ireland.

By notice of appeal, undated, the applicant appealed part of the judgment in relation to the relocation of the three dependent children.

Both parties are in separate relationships. They were never married to one another.

The court has considered the affidavits sworn in the Circuit Court proceedings. The affidavit of the father of 29th May, 2008, and the replying affidavit of the mother of 3rd July, 2008, were considered together with the evidence of the parties in the appeal hearing and the submissions of counsel.

The central issue was the secondary schooling of the eldest child, J. B.. A secondary issue was a draft agreement dated 4th December, 2008, between the parties which was drafted by the father to be signed by the parties and also by the eldest child regarding the possibility of him returning to Ireland if he did not settle in England and if he wished to return. The father agreed to look after the children should the mother be unable to do so on any occasion.

2. Pleadings

On 7th September, 2005, a notice of appeal against the District Court order of 6th September, 2005, refusing the guardianship application was served.

On 1st April, 2008, an equity law civil bill claiming sole custody of the children to the father was delivered with provision for access by the mother. An order was also sought restraining the removal of the children from the jurisdiction and an application was made for a section 47 report.

On 29th April, 2008, an order was made that a section 47 report be made and, on 6th May, 2008, the order appointed Dr. Brian Houlihan as the author of that report.

On 31st July, 2008, an order was made restraining the mother from removing the children from the jurisdiction and granting joint custody under s. 11 of the Guardianship of Infants Act.

On 27th November, 2008, the judgment, already referred to of the learned District Court judge gave primary care to the mother and deemed the welfare of the eldest child a "more difficult issue". The judge held that the eldest child had not been unduly influenced by the father.

3. Legal precedent

The law in relation to custody and access where the defendant brought the children to this jurisdiction without informing the plaintiff was the subject of *W.P.P. v. S.R.W.* [2001] 1 I.L.R.M. 371.

Keane C.J. held at 381 as follows:-

"The exercise of the right to determine a child's place of residence may, of course, be restricted by order of the court awarding custody to one parent by prohibiting the removal of the child from the jurisdiction of the court without the further leave of the court or the consent of the other parent. In such a case, as already indicated, the removal of the child, without such leave and without the consent of the other parent may constitute a breach of the right of custody vested in the court. In this case, however, we are concerned with an order which gave the plaintiff rights of access only. It is clear, in my view, that the appropriate machinery for enforcing such rights is article 21 of the Convention. To order the return of children and their custodial parent to the jurisdiction in which they were formerly habitually resident merely so as to entitle the non-custodial parent to exercise his rights of access is not warranted by the terms of the Convention."

In *A.M.S. v A.I.F.* [1999] F.L.C. 92-852, the question of relocation to another State in Australia was considered. The court, in granting leave to relocate held that it was necessary to devise a regime which adequately fulfilled the child's right to regular contact with the remaining parent.

In *Friscioni v. Friscioni* [2009] FAM C A 45, the court granted leave for the child to relocate with her mother in the Czech Republic subject to spending six weeks each summer with her father. At page 70-71, para. 2-100 in *The Child Law* (2005), Geoffrey Shannon summarises the principles which have emerged in Australian jurisprudence:-

"...A test appears to be for the Court to focus on what is best for the child. It determines what benefits the child will have, what detriments the child will suffer in a move, and the consequences that will follow from an order restricting movements. In determining such cases, the courts in Australia have evolved the following principles:-

The welfare and best interests of the child remains of paramount importance but is not the sole consideration;

The court cannot require the applicant for the child's relocation to demonstrate 'compelling reasons,' for the relocation. Similarly, the party opposing relocation will not be required to show 'compelling reasons' for opposing it. Neither party bears such an onus."

It is necessary for this Court to evaluate each of the proposals advanced by the parties.

A court cannot proceed to determine the issue in a way which separates the issue of relocation from that of residence and the best interests of the child. There can be no division of the case into discreet issues such as primary issues as to who should have residence and a further issue or separate issues as to whether the relocation should be permitted.

The evaluation of the competing proposals must weigh the evidence in submissions as to how each proposal would hold advantages and disadvantages for the child's best interests.

The statutory criteria must be considered.

The issue of freedom of movement must be weighed.

When granting leave to relocate the court must, if necessary, devise a regime which adequately fulfils the child's right to regular contact with the parent no longer living permanently in close physical proximity.

In *Johansen v. Norway*, European Court of Human Rights Report in 1996 – III in considering the violation of Article 8 where the applicant's child had been taken into care the court held at pp. 25 and 29 that:-

"...a fair balance has to be struck between the interests of the child in remaining in public care with those of the parent in being reunited with the child...in carrying out this balancing exercise, the court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent. In particular, as suggested by the Government, the parent cannot be entitled under the Convention (art. 8) to have such measures taken as would harm the child's health and development."

In the present case the applicant had been deprived of her parental rights and access in the context of a permanent placement of her daughter in a foster home with a view to adoption by the foster parents...These measures were particularly far-reaching in that they totally deprived the applicant of her family life with the child and were inconsistent with the aim of reuniting them. Such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests..."

In *Payne v. Payne* [2001] FAM 473, the English Court of Appeal dismissed the father's appeal on the question of the presumption that the custodial parent had infringed his right to family life under Article 8.

The court held that in relocation cases, as in all cases affecting the future of children, welfare of the child is paramount; that neither domestic case law nor section 13(1)(b) of the 1989 Act created any presumption in favour of the applicant parent; that, while the rights of all parties had to be balanced under Article 8 and any interference had to be both justified and proportionate, the implications of the convention did not affect the principles of domestic law to be applied in such cases; that, although all relevant factors, including the reasonable proposals and motivations for a parent wishing to relocate, and the effect on the child of seriously interfering with the life of a custodial parent and the denial of contact with the absent parent, had to be considered and weighed in the balance, the welfare of the child remaining the paramount consideration; and that, since the judge had clearly balanced all those factors and made the child's welfare the paramount consideration, there were no grounds in which to set aside his orders.

Lord Justice Thorpe added that an order for return will not infrequently lead to an application to relocate issued in the jurisdiction to which the child has been returned. The judge in the second application must be free to carry out a fully independent function unfettered by the earlier conclusions of the judge in the other jurisdiction. The functions of the judge are distinctly different and will require assessments of the adults as they are rather than as they were.

The modern law follows the decision of the Court of Appeal in *Poel v. Poel* [1970] 1 W.L.R. 1469 where both Sachs and Winn L.J. emphasised the importance of recognising and supporting the function of the primary carer.

At 1473 Sachs L.J. said:-

"When a marriage breaks up, a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as my Lord has pointed out, produce considerable strains which would not only be unfair to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results."

Lord Justice Thorpe in *Payne v. Payne*, referred to above, summarised a review of the decisions of the Court of Appeal over the course of the previous 30 years and stated that:-

"That review demonstrates that relocation cases had been consistently decided upon the application of the following two propositions:-

(a) The welfare of the child is of paramount consideration; and

(b) Refusing the primary carers reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children."

Counsel for the father stated that the father was a guardian since late 2008. He submitted that the law was wholly undeveloped in this jurisdiction regarding relocation. What was important in this jurisdiction was s. 3 of the Guardianship of Infants Act 1964, regarding the custody, guardianship and upbringing of any infant. He submitted that the test referred to in pp. 481 and 483 of *Payne v. Payne* referred to above should not be applied in this jurisdiction.

He distinguished between *Johansen v. Norway* which was a care case and the *Northwestern Health Board v. H.W. and C.W.* [2001] 3 I.R. 622 at 725 – 726, where Ms. Justice Denham, in relation to the plaintiff's application for an order permitting it to carry out a PKU screening test on the infant child of the defendants said:-

"The principle behind excluding the State from decision making in relation to the child where parents are exercising their responsibilities and duties is a constitutional principle. It is one of the fundamental principles of the Constitution. The Constitution describes a society which aspires to a community of families. Families are to be protected. This means that State interventions are limited.

In relation to the child, the fundamental principle is the welfare of the child. The welfare of the child includes religious, moral, intellectual, physical and social welfare. These elements must be analysed in light of the facts relating to the child and family in issue. The court has a constitutional duty to protect the life or health of the child from serious threat and the court has a constitutional duty to protect the family. A just and constitutional balance has to be sought."

In that case the Supreme Court (Denham, Murphy, Murray and Hamilton J.J.: Keane C.J. dissenting) in dismissing the appeal held that it had not been established that it was an exceptional case, requiring State intervention to vindicate the child's constitutional rights where the parents had failed for physical or moral reasons, in their duty to the child. The court also held that the State recognised the family as the natural primary and fundamental unit in society as a distinct moral institution possessing rights superior and anterior to positive law and guaranteed to protect its Constitution and authority pursuant to Article 41 of the Constitution.

The Supreme Court, in its majority decision, also held that a child had the constitutional rights both as part of the unit of the family and as an individual. There was a constitutional presumption that the welfare of the child (religious, moral, intellectual, physical and social) was found within the family; this had been recognised by the legislature. Thus, the parents of children had the primary responsibility for their upbringing and welfare. The Constitution regulated the State to a subordinate and subsidiary role.

Article 42.5 envisaged that in exceptional circumstances, in the interests of the common good or where parents for physical or moral

reasons failed in their duty, the State would endeavour to supply the place of the parents.

The appellant relied on the opinion of Dr. Houlihan and on *F.L. v. C.L.* [2006] IEHC 66 in relation to the weight attached to the opinion of the expert.

4. Report and evidence of Dr. Houlihan

Dr. Brian Houlihan M.R.C. Psych., consultant child and adolescent psychiatrist, made the section 47 report on 17th July, 2008, over nine months before the hearing of this appeal. The report was taken into account by the learned Circuit Court judge. Dr. Houlihan also gave evidence to this court.

The court summarised the respective positions of each of the parents.

The father believed that according to the eldest son, the children did not wish to live away. Should that son choose to move to England then the father would not contest his decision and would cease legal proceedings. The father told Dr. Houlihan that otherwise he would fight to have him remain to continue his school, football and social activities in this jurisdiction.

Dr. Houlihan noted that both had previous long term relationships when the mother first became pregnant by the father. He said that he had since established a new relationship with P.L. who had two adolescent children and with whom he was living.

He believed himself to be a good father and believed that, up to the time he left that the respondent was a good mother.

The mother told Dr. Houlihan that she wished to move to England with the three children to be with A.D. She told the court that she hoped to marry A.D. She intended establishing a business there in addition to her business in Dublin. The mother understood that the eldest child wished to remain because of his friends in school. She was not convinced that his father had not influenced him.

The children were seen together by Dr. Houlihan and interacted extremely well as a unit. They supported one another.

Dr. Houlihan described the eldest child as relating with excellent eye contact, honesty, sensitivity and freedom, yet ill at ease around the move and sensitive to the issue of his parents inability to get on. He portrayed a reasonable acceptance with the present arrangement. He repeatedly claimed that he wanted to remain in Ireland and had no desire to move to England. He would miss his school, friends and rugby club. Dr. Houlihan referred to his interviews with P.L. and A.D. He also considered the school reports. He had also met with the two younger children.

He made a home visit to the applicant, the father and P.L. after taking into account the relationship with the children's paternal grandfather.

Dr. Houlihan also visited the mother's home. No reference was made to either the father or A.D. The children appeared relaxed, secure and happy. They had very good interaction with their mother.

Dr. Houlihan also met with A.D. who was single with no children. Because of his business interests he had not planned to move to Ireland. His longest period with the children was one week. His visit to Dublin coincided with the times when the children were with the father.

5. Dr. Houlihan's oral evidence

In his evidence to this Court on 2nd April, 2009, Dr. Houlihan referred to the section 47 Report.

He described the father as being upset with the move to the United Kingdom and was annoyed that the arrangement regarding two alternative week-ends was changed. He believed that the second child had been manipulated. However he had said that if the eldest child wanted to go to the United Kingdom he would not have objected. Dr. Houlihan found this surprising.

Dr. Houlihan said he spoke with the paternal grandfather by phone who said that he knew and loved the children and was not shy. Dr. Houlihan described him as an important figure in their lives. He was secure with the children and there was mutual love.

The father had estimated that he had looked after the children for fourteen weeks as a result of the mother's commitments. She had suited herself and her lifestyle.

Dr. Houlihan said that the mother believed that as the father had not been a guardian he didn't have a say in where the children lived. It was her intention to move to the United Kingdom where she believed the children would have a better standard of living.

Dr. Houlihan described the children as having a good relationship with one another. They were delightful. He questioned if it would reveal anything of significance were he to speak to each of them. He believed that the formula was working for them. They loved both their parents and both parents loved them. Their spokesman was the eldest child. He depicted their family in drawings. The eldest child repeatedly claimed that he wanted to remain living in Ireland. Dr. Houlihan believed there were divided loyalties in him saying that and that he was protecting both parents. It was uncomfortable for him to declare that in front of both parents.

Dr. Houlihan had met A.D. He felt that A.D. should have established more of a relationship with the children's father in order to understand the boy's position. It was an opportunity lost. His exposure was more of a fun and holiday occasion. Such a life change event should have been better thought out. He did not believe that the proposal for the secondary school for J. was completed but understood that school was to start in September of 2008.

He thought that A.D. had not given access much consideration. He found that he had not referred to specific aspects of J.'s interest in sports.

His opinion was that it was a difficult case where there were children. There was no high conflict. A degree of trust and emotional stability existed. He believed that the proposed change lacked preparation and that there was a risk attached to relocation a

significant distance away. There was no fix all for all cases. There was a need for a buffer zone of protection and social and emotional stability of the children.

He referred to research findings with regard to the importance of fathers, particularly with boys where availability and commitment was important. It was difficult to understand that the moving of the children to a different country would facilitate access. Children could adapt though this did not happen in all cases. Much related to the prior preparation for the move.

He believed that the paternal grandfather had an interest and a role for the children.

He understood the move to the United Kingdom to be in summer and that the mother would take six months to settle in before she engaged in new business in Harrowgate. He was aware that she intended to marry A.D. and to have children. He believed that this would be another life event. He believed that it was good to take six months out as each life event could be stressful. Remarriage also required the preparation of the children. Research showed that one third of children who relocated found the redefinition of marriage more stressful than divorce. While he believed that the mother and A.D. were committed he had a concern about what he described as "another emotional assault" on the children. It was not possible to predict the outcome in any case. It could be that marriage would facilitate in a positive way.

Stability and good parental relationship, social security, academic achievement were all critical.

In the light of these considerations he was of the same opinion as in his report.

He regarded the motivation for the plan as an attempt to achieve radical change.

The research from late 1999-2000 moved away from parents deciding on children fitting in. Secure attachment to the parent was important. If there were high conflict then relocation should be considered. He believed the children could weather the shifts in life events and distance could be beneficial if there was a toxic relationship.

He believed that involvement with the issues of children visiting their doctor, parent/teacher meetings, homework and other routine children's activities were important. Where a parent was only involved in fun, sport, and recreation that work would fall on the other parent.

If children were to move then access should be as frequent and as close to the present arrangement as possible.

In cross examination Dr. Houlihan agreed that he had said in the Circuit Court that he did not get on well with the mother. He said he ruffled both parents.

Dr. Houlihan understood that the eldest child had gone to secondary school and that his future school placement was now secure. He had met with the court and had plans progressed. He did not have a copy of Judge White's judgment.

He said that the father had a role in the children's life and did not accept that that could not be accommodated. He needed not just quality time but a safe and secure environment to meet the children. He believed that if both parents were flexible it would be beneficial for the children. Consistency was important.

Dr. Houlihan was not saying that the move could not happen but that there were other variables that are not controllable and that may not be as beneficial to the children. Dr. Houlihan accepted that the respondent was a good mother.

In respect of the weight to which he was attaching to J.'s view, Dr. Houlihan believed that it was not a question of weight as J. was able to express his own opinion. He had emphasised the importance of his friends, school and rugby activities. Dr. Houlihan could not recall if he included his concern for his father. However the children were aware of their mother going and their father not wanting them to go. They were concerned about the move. He was aware that the father had said that if he, the eldest child, was happy with the move he wouldn't appeal the matter.

Dr. Houlihan was concerned about what would happen if matters did not work out. It did not surprise him that J. had settled well at secondary school.

Dr. Houlihan accepted that the mother wanted the boys to enjoy a family unit. H. had never lived with the father as he had left the mother during her pregnancy.

He said that while he accepted that the mother wanted the boys to enjoy a family unit he was not as convinced that she had thought it through thoroughly. He agreed that she had a good relationship with the children. He accepted that she was their primary carer and her emotional security has had effect.

Where a mother is emotionally secure, is supported, safe and happy it has a knock on effect on the children. Her intended marriage would be welcomed as consolidating her arrangement with A.D. though he expressed a concern about the children. He noted that the mother intended keeping a house here in case things did not work out. She had no concern about the boys settling. He said that A.D. had proposed to be there with the three children but he said that in interviewing him in July 2008 this was not manifest. He didn't appear to know the importance of the boy's interests or their relationship with their father or planning the welfare of the children. He accepted that A.D. had come to the Communion celebration of the children when the father did not.

Dr. Houlihan said that the children needed stability and predictability. They had grown up with "good enough relationships" up to now. He accepted that L. O'R. wanted to move to have stability.

He said that if the formula proposed was greater than the stability and availability to the children at present it was to be recommended. What was critical is that more preparation and further consideration needed to be given to the move.

He accepted that to be difficult for the mother whose happiness, financial support and security were important. Dr. Houlihan had difficulty in accepting that the essential ingredients could only be delivered by the move. He was concerned that if something were to happen with the plan he would be concerned about the three children. The children growing into adulthood placed an onus on parents to protect and secure their future. Maturity and child awareness were needed.

He regarded as important the effect of the decision of the court on the wellbeing of the mother. If the primary custodian is so

unhappy so as to compromise her emotional welfare that will, in turn, compromise the welfare of the children.

6. Father's submissions

The written submissions made on the applicant father's behalf referred to the balancing of the rights of each member in the light of the paramount consideration of the welfare of the parties' children. Reference was made to *W. v. R.* [2006] 35 Fam LR 608 where the mother's emotional and psychological well being should be one of the factors taken into the reckoning but should not be given a *a priori* benefit at the expense of a continuing relationship and regular contact of the children with both parents.

7. Mother's submissions

The respondent mother submitted that apart from brief periods of limited support by the applicant, she had solely reared three boys and had willingly borne the financial responsibility for their upbringing. The respondent left in November, 2003 and access was dictated by the applicant. He was then not prepared to properly support and maintain the boys and yet wished to prevent them from being properly provided for by the respondent and A.D. The boys were well cared for and adjusted happy boys. The applicant showed very little interest in the boys schooling after the issue was raised in 2008.

Counsel for the mother referred to *Poel v. Poel* which was the beginning of a strong line of authorities from the United Kingdom which were of assistance. At 1473 Sachs L.J. held:-

"Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given...the way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter..."

Moreover, it was submitted that where the children's mother proposes to care for the child within a new family, her attachment and commitment to a man whose employment requires him to live in another jurisdiction might be decisive in determining an application to relocate outside the jurisdiction.

8. Decision of the court

The court is of a view that the welfare of the children and of their mother, who have constituted a unit since 2003 is of paramount importance.

It is clear from the jurisdiction of the Irish and the English courts that the welfare of the children is paramount.

It seems to this court that the evidence given by Dr. Houlihan in relation to the mother's happiness and well being is also of importance for the wellbeing of the children whom she has cared for and financially supported since 2003.

The court acknowledges the strong judgments of the Supreme Court regarding the constitutional provisions regarding the family as referred to in the decision of Denham J. in *Northwestern Health Board v. H.W. and C.W.* [2001] 3 I.R. 622 at 725/6.

This does not seem to the court to be incompatible with the principles as stated by Sachs L.J. in *Poel v. Poel* [1970] 1 W.L.R. 1473.

In this case as in *Poel* the position has arisen where the custody is working well. This court likewise should not lightly interfere with such a reasonable way of life as is selected by the respondent, the mother, to whom custody and primary care had been given.

This court believes that the welfare of the children is best served with all three remaining with the mother, their primary carer. The court also considers that, notwithstanding the concerns expressed by Dr. Houlihan that their welfare is best served by them accompanying their mother. The court confirms the order made by the Circuit Court regarding the children moving to Harrowgate.

The mother and A.D. should have regard to the concerns expressed by Dr. Houlihan regarding the planning and preparedness of the children with the changes involved in the move. The summer period and the postponement in the mother engaging in work are both factors that will allow that readjustment.

I agree that the way in which the parent having primary care may choose in a reasonable manner to order her way of life is one of those things which the parent who has not been given custody or, in this case primary care, may well have to bear. The rights of the father as, indeed, he has maintained since 2003 albeit in an unstructured way, are best regulated by reasonable access.

I am of the view that the arrangements for access and contact with their father as expressed in the judgment of the Circuit Court are appropriate. I would dismiss the appeal and affirm the order of that court.