

THE HIGH COURT**FAMILY LAW****2010 22 M****IN THE MATTER OF THE GUARDIAN OF INFANTS ACT 1964****BETWEEN****W. D.****APPLICANT****AND****S. D.****RESPONDENT****JUDGMENT of Mr. Justice Abbott delivered on the 1st day of March, 2011.**

1. The applicant (wife) was married to the respondent (husband) on the 25th May, 1996, within this jurisdiction. The initials are changed to enforce the in camera rule. There are six children of the marriage, the eldest born on the 25th March, 1997, and the youngest on the 16th April, 2005. Neither the husband nor wife is an Irish citizen. The parties met in 1990. At that time the husband had become a tax exile and had established a business in a non-European jurisdiction. When the parties married in 1996, they resided in Ireland moving their home three times to its present location. However, they remained a mobile family, and moved frequently between their home in Ireland, a home in the non-European jurisdiction and, more or less the same summer holiday hotel in France.

2. By special summons dated the 4th June, 2008, the wife sought judicial separation from the husband. The jurisdiction of this Court and the entitlement of the wife to a judicial separation were contested by the husband in the first preliminary issue and I delivered judgment on this issue on the 27th July, 2009([2009] IEHC 579). In relation to the issue of the jurisdiction of the Court, I found as a matter of law and of fact that the habitual residence of the family, and each member of the family, was Ireland and that the Court could proceed on that basis to accept jurisdiction of such proceedings as to which Brussels II related on that basis, insofar as indents 1 and 3 of Article 3(1) (a) of Brussels II *bis* were satisfied. I found that both parties were ordinarily resident within the meaning of the Judicial Separation and Family Law Reform Act 1989, (the 1989 Act) in Ireland throughout the year prior to the proceedings being initiated, and notwithstanding that this criterion could also be met in relation to the non European jurisdiction that the court had jurisdiction (if jurisdiction was needed in this case) to deal with such residual matters as were necessary to enable the full exercise of the powers to make provision under the 1989 Act.

3. In relation to the entitlement to a judicial separation I found that the behavior of the respondent was such that the respondent had behaved in such a way that the applicant could not reasonably be expected to live with the respondent, thereby satisfying the requirement of section 2(1)(b) of the 1989 Act. While I found that the requisite period of one year had not been met I found that the applicant could rely on section 4, subs. (2) of the 1989 Act which deals with the situation such as occurred in this case where the parties continued to cohabit for a period of less than six months after the triggering unreasonable event occurred. I found that under section 4, subs. (2), such cohabitation did not disentitle the applicant from relying on s . 2(1)(b).

4. There was also a second issue relating to the question as to whether the pending divorce proceedings in the non European jurisdiction should be stayed. The Court ordered that they should not, and that effectively what is usually termed "a race to jurisdiction" be allowed, depending on the disposal of a decision in either jurisdiction. In the events that transpired the non European jurisdiction divorce proceedings were settled. On the 26th March 2010, a Consent Order was ruled in the non-European jurisdiction whereby it was agreed between the parties that the parties would apply for the judicial separation proceedings commenced in Ireland to be dismissed and that all issues of child welfare (other than child maintenance) would be adjudicated on in Ireland (by me, if available). The divorce and ancillary relief proceedings would continue in the Court of the non-European jurisdiction. The parties were to hold mediation in relation to both financial and child issues under the guidance of a former High Court Judge of the Family Division in England and Wales.

5. On the 23rd April 2010, the respondent applied for an Order of this Court, with the consent of the applicant, seeking the dismissal of the judicial separation proceedings and an Order vacating all findings of fact and all Orders made in the proceedings. The Order was granted and the divorce proceedings commenced between the parties in the non-European jurisdiction continued. The parties agreed that any outstanding financial issues between them would be dealt with in the divorce proceedings in the non-European jurisdiction and that the only matter which should be dealt with by the Irish Courts was the custody and care arrangements for the children, who are primarily resident in Ireland.

6. The husband submitted a proposal entitled "Custody, Care & Control of the Children" in November 2010. In summary, he proposed first that the children were to have two equal home bases and secondly the children were to spend alternate weeks (Monday – Monday) with each parent throughout the year subject to adjustment for holidays of longer duration agreed between the parties. The wife's proposal of December 9th 2010 was that the children were to have one home base residing with their mother, their father to have access on alternate weekends and 1/2 nights during alternate weeks, and the holidays were to be divided 50/50. Because of the parties failure to reach an agreement over custody on December 10th 2010 the Court instructed Dr. Gerard Byrne, a Consultant Child Psychiatrist, to be appointed to carry out a Section 47 report on the welfare of the children under the Guardianship of Infants Act 1964.

7. Dr. Byrne interviewed both the applicant and the respondent. He also interviewed each of the six children separately. Dr. Byrne recommended, in his report dated the 27th January, 2011, that during the school term all of the children, except one (child A), should live with the wife from Monday after school until Friday, that the husband should collect them after school on Friday, that they spend

the weekend with him and then be taken to school by him on Monday morning. In Dr. Byrne's opinion, this should happen three out of every four weekends. He was of the opinion that the children needed one identified home base. He recommended, among other recommendations, that all the children, except child A should be kept together when they are with each parent. He thought that the primary attachment of the children was likely to be to the wife because she had been the principal caretaker of the children, particularly to those children who were born before the husband retired. He thought that the wife showed greater empathy for the needs of the younger children especially. Dr. Byrne was of the opinion that it was likely that two of the children needed immediate attention from an expert. He recommended that during summer holidays the children should spend alternate weeks with each parent and that Christmas and Easter holidays and mid-term breaks should be split between the parents. Dr. Byrne also recommended that each parent could take the children on a holiday for a two week period but no longer and that Christmas Day, Easter Sunday and birthdays should alternate between the parents. It is important to note that Dr. Byrne noted, that to a large extent, the husband and the wife had been able to avoid overt hostility in front of the children and this is to be commended. However, he did state that it would be better if both parents could live separately as all the research shows that ongoing marital disharmony affects the quality of parenting of both parents and that it is likely to worsen as time goes on in such a stressful situation. Two of the children were already showing distress. In order to alleviate the disadvantages of continuing to live together in the family home, Dr. Byrne thought it would be helpful if a date were given when both parents would be required to live separately, stating that a time of two months hence would be tolerable. It would also be helpful, in Dr. Byrne's opinion, if the parents were not present in the home at the same times if possible.

8. Both parties had issues with the report of Dr. Byrne, in particular the custody arrangements recommended by him. The husband submitted that the children have made it clear that they do not want to have one identified home base. According to him, they want two home bases, their time divided equally between the two home bases. The husband submitted that the children have had eight homes in five different countries. He alleged that they are accustomed to not having one home base. Dr. Byrne, the husband alleged, admitted that it would be disturbing and upsetting for the children to move their home base from S to a new home. The husband submitted that it would be even more disturbing and upsetting for them because they can see what they consider their family home clearly from their school playground and from the school gates when they go to and home from school. The husband contended that Dr. Byrne admitted that there was very little research on the issue of spending time with each parent or shared parenting arrangements and that no research was actually produced so that it could have been further examined. According to the husband, his children would be atypical of children forming part of a research study being unusually well travelled, well used to living in different homes, having had countless nannies and housekeepers throughout their lives, a father who works from home and is retired and being six in number which, (as acknowledged by Dr. Byrne), provides its own support group. He further stated that Dr. Byrne did not find that the children's primary attachment was to the wife, he said only that it was "likely to" be to the wife. Dr. Byrne produced no evidence, according to the husband, that the children's primary attachment was to the wife and the children's view expressed to him that they wish to spend their time 50/50 with each parent on a week on / week off basis indicated that they do not have a primary attachment to one parent but rather have equal attachments. The husband also pointed to the fact that the wife has always had a succession of up to 3 nannies and 2 housekeepers since child A was born; that the husband has been retired for the past 7 years and works from home – these points would all be strong reasons why there is no evidence that the wife has been the primary caregiver or is regarded by the children as the primary caregiver. He further contended that there was no indication that he did not have empathy for the needs of the children.

9. In her submissions of the 22nd February 2011, the wife contended that a week on/week off arrangement with the children would not give them the stability and consistency during term time that they need. She contended that while the children may be resilient and may have traveled a lot, they are not immune to the highly stressful situation they are in, and need the consistency of one home base during school terms. On practical terms, she believed it would be a logistical nightmare organizing belongings, equipment and whatever else the children need during term time. In her opinion, the transition alone would be stressful enough for everyone without adding to its complexity.

10. On the 31st of January 2011, this Court ordered that Dr. Byrne attend in Court to give evidence on a number of issues arising from his report, mainly to give evidence on the proposal as to 50/50 split in access arrangements as opposed to the proposals in his report and his general advice in relation to the particular needs of the children. This was in line with the practice of the Court in restricting an "at large cross-examination" of such a valuable expert insofar as this is consistent with a fair trial of all outstanding relevant issues.

11. The wife, in submissions dated the 31st January, 2011 also seeks payment of all monies due so far under the terms and conditions of the agreement in the non-European jurisdiction. According to the wife this is so she can buy a house for the children, buy a car for transporting the children and negotiate settlement with former lawyers. She also wishes for the husband to vacate the family home until she is in a position to be able to move out. In this regard it is important to note that the settlement reached in the non-European jurisdiction, while reasonably substantial, involves installments and lump sum payments to be made in the future and is conditional on the custody issues being resolved. The settlement is not without difficulties because of its installment nature and costs which may attach to the wife before she will be able to buy a house. It is not of the concern of this Court to deal with ancillary relief but the Court would proceed on the basis that the husband would be in possession of the family home and the wife would be in a position to rent or buy a house within two months of the date of judgment. This judgment should be made available to the Court of the non-European jurisdiction to assist in any further matters regarding ancillary relief, without, (needless to say), this Court in any way interfering with the jurisdiction of the Court in the non- European jurisdiction.

12. On the 16th February 2011, Dr. Byrne gave evidence to the Court. Dr. Byrne explained that he had recommended that during the school term the children would spend three or four weekends with their father and the rest of the weekend with their mother because it is better for children to have an ongoing relationship with one important adult in their lives whom they have an attachment to, and in this case, as the primary caretaker, it is the wife to whom they should have that continuing relationship. In Dr. Byrne's opinion, changing the custody week on week will affect the continuity and affect the children's ability to form satisfactory relationships of depth and meaning. In cross examining Dr. Byrne, the husband questioned the recommendation and quoted the Clanwilliam Institute (Dublin) which states in its guidelines to separating parents and children that "From the child's point of view the most desirable arrangement is one in which both parents continue their role as parents from the time of separation and share the responsibility as equally as possible. This is the most effective way of dealing with a child's sense of rejection; it decreases feelings that separation happened because he or she is a bad child and reduces fear that a parent may disappear from his or her life." Dr. Byrne did not agree with the proposition that children should spend an equal amount of time with both parents as in his opinion parents have different roles. The husband voiced his concerns that conversations he had with the children did not reflect the recommendations made by Dr. Byrne, and that they did not want the 70/30 split but wanted to be with their father more. Dr. Byrne stated that while of course it is important to listen to the voice of the child, there is also an adult role with regard to what is in children's interests and that children can be swayed by all kinds of factors, in particular, not wishing to upset their parents. The husband questioned Dr. Byrne in relation to his report where he stated that the children "need one identified home base", and pointed to the fact that his children are quite unusual, in that they have had eight different homes in five different countries. The husband pointed to the fact that the wife is a

50:50 shareholder in a business "LR", and showed, from a document, exhibit 2, that one of the wife's stated goals is to be a huge success in business. On this document, which lists the wife's goals, there is no mention of her wanting to be good mother; the only reference to the children is to find help for them. The wife left this handwritten list on the kitchen table. The husband claimed that the wife was working from 8 o'clock in the morning to 11 o'clock at night. This was denied by the wife. The husband also pointed to a letter written by the wife to him in 1994, exhibit 6, where she says that she understands why someone would want to harm a child, and understanding why pervers pounce on small children and harm them. Dr. Byrne stated he had no concerns with what the wife wrote as she hadn't married or had children at that stage and is of the opinion that the wife certainly does not pose a risk to children.

13. The wife made it clear to the Court that she did not think a 50/50 split was in the best interests of the children. She questioned Dr. Byrne on his recommendation that one child live with his father when not in boarding school abroad. Dr. Byrne replied that the 13 year old was very definitive in his views and work needs to be done with his relationship with his mother, without forcing the situation.

14. Section 25 of the Guardianship of Infants Act states that the Court shall "as it thinks appropriate and practicable, having regard to the age and understanding of the child, take into account the child's wishes in this matter." Brussels II *bis* regulation lays down an imperative for the voice of the child to be heard. For the most part, the solution of Dr. Byrne would be the one which is to be preferred as the Court is satisfied that he listened to the voice of the child and made his recommendations accordingly. There was inappropriate consulting of the husband with the children which resulted in the children probably having some expectation of a 50/50 split which would carry a grave risk of destabilising critical arrangements suggested by Dr. Byrne. There is also a lack of conviction of the Court that the husband would be able to stop this referendum style approach with the children which could lead to serious difficulties in establishing a good routine from the outset. These difficulties were likely to be all the more pronounced by reason of the fact that the location and standard of the wife's accommodation for the children, together with timing of the transitional arrangements are very uncertain such as to provide rich opportunities for the husband to foment disputation among the children, (if not possible alienation), arising from time share arrangements. Parents should not tell the truth to children in a detailed and age-inappropriate way such as to be of the adverse interests of the child or putting adverse pressure either directly or indirectly on the children in relation to them sustaining a good relationship with both parents after the divorce. Dr. Byrne has correctly noted the damage to child A in relation to his mother and I am apprehensive that further damage may have been done to the other children as well. Therefore, the husband's suggestion that the custody arrangements be revisited after six months cannot be entertained as this would be too destabilising resulting in inappropriate canvassing of children by the husband. In relation to the letter of 1994, this Court will not put much weight on that as the wife had no children at that stage and had more to do with the relationship between the husband and wife. It is a comfort that Dr. Byrne dismissed its importance for other reasons and, in any event, it is quite extraordinary that the husband, having been in possession of this letter from 1994, proceeded to father six children with his wife. Indeed, this paradoxical conclusion suggested by the husband is the type of reaction which, together with his tendency to canvass the views of the children inappropriately, is a major factor which has led me to accept the 50:50 arrangement as a "solution of the second best" which nevertheless accepts the paramountcy of the interests of the children. With regard to the document with the wife's goals written on it, the wife's obvious involvement with her children, albeit with nannies, means that it is clear that she is first and foremost the mother she always was for these children.

15. Finally, it must be noted that the wife has had trouble with cars and looks to the husband to provide well running car transport. There is a need for the wife to establish transport independence for the future.

14. Order

- A) The children to spend alternate weeks (Monday – Monday) with each parent throughout the year.
- B) The remainder of Dr. Byrne's recommendations (from paras 3.6 to 4.2 of his report) to be adopted subject to holidays.
- C) A two week holiday in the non-European jurisdiction for the husband or in Ireland for either party. The parties do have liberty to negotiate as to whether the wife can go to the non-European jurisdiction territory for a further two week holiday. The parties do have liberty to negotiate as to whether a two week holiday is permissible for either of them with the children in other destinations.
- D) Parties are to co-operate in relation to having shared sports equipment and clothes as between two households.
- E) Both parents are to co-operate fully in relation to the educational needs of their children, in particular to those children who require the immediate attention of an expert as identified in the report of Dr. Byrne, and in developing good sibling relationships.
- F) The wife is to provide herself with adequate means of transport to avoid breakdowns falling back to the husband and is required to have adequate garage back-up and AA membership.
- G) Parties agree to attend religious ceremonies such as communion and confirmation, school prizegivings and concerts, and their partners (if any) should only attend by agreement of the other party.
- H) The wife should be provided, by agreement, with an opportunity to visit child A during boarding school so as to pursue their relationship and child A should be encouraged to visit his mother when on holidays.
- I) The wife and children should vacate the family home at the latest two calendar months from the date of this judgment and for that purpose shall have liberty to apply to this Court to enforce such parts of the ancillary provision of the non-European jurisdiction in this Court on an urgent basis.