

HIGH COURT

CIRCUIT APPEAL

[2016 NO. 14 CAF]

DUBLIN CIRCUIT COUNTY OF THE CITY OF DUBLIN

BETWEEN

H.O.R.

APPLICANT

AND

M.R.

RESPONDENT

JUDGMENT of Mr. Justice Abbott delivered on the 22nd day of July, 2016

1. This judgment relates to an appeal by the respondent father of an order made in the Circuit Court on 18th April, 2016 ("the appealed order").

2. The husband and wife were lawfully married to one another on 6th October, 2007. Child O was born on 26th December, 2008, when the parties resided in the city. The applicant wife (after judicial separation) purchased a home in a town in the south west of the outer commuter belt of the city (hereinafter referred to as "D"). In her affidavit, she claimed that the husband did not object to this move, and at the initial stages, he cooperated with parent teacher meeting procedures in the school at D. The child O did, in fact, attend the school at D, but subsequently and as a result of applications in the Circuit Court, O attended a school in the city again, and the wife came to reside in the city sharing accommodation with some others there, but retaining her home in D.

The Appealed Order

3. The appealed order provides that the wife be permitted to relocate to D with the child O and such relocation should take place at the termination of the school year. The order makes further detailed provisions for access, Christmas holidays, public holidays and an order that each parent should make a telephone call to O on any day that he does not see him for the whole day. The thrust of the husband's case is that O should continue to attend his school in the city and that a relocation to D is not in his best interests, especially as access arrangements are cumbersome and the economics of the wife commuting from D to her work in the city is burdensome to the extent that the husband appellant suggested that if the current arrangements were to continue, he would contribute a certain sum to alleviate the cost of rent accrued by the wife for her secondary accommodation in the city so as to avoid a round trip of over 170 km for O midweek, when evening access was permitted by existing arrangements.

The Appeal Hearing

4. The court heard evidence of both parties and considered their affidavits together with the reports of Prof. Sheehan.

Consideration of the Case

5. The court is directed by s. 45 of the Children and Family Relationships Act, 2015, to decide the relocation of O to the school in D, having regard to his best interests. The court is further directed by statute in s. 63 of the Guardianship of Infants Act 1964, as substituted by s. 31 of the Children and Family Relationships Act, 2015, as to how the Court is to determine the best interests of the child. Section 31(2) of the Act of 2015 provides a guide to the factors and circumstances of s. 31(1) of the Act of 2015, which provides as follows;

"In determining for the purpose of this Act what is in the best interests of the child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family."

6. I propose in this judgment to examine such factors set out in paras. (a) to (k) of s. 31 (2) of the Act of 2015, as follows:-

"(a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships"

7. This is a very broad factor to be taken into consideration, and given that the legislation is new, and has not often been considered by the courts, it is important to set out the understanding of the court of the term "meaningful relationship". It is not defined in the Act, and its interpretation on the plain meaning of words certainly means that the relationship should not be trivial, but earnest and sincere throughout the range of positive description of that term, up to the optimum range. In seeking to interpret the "meaningful relationship" in this way a great degree of circularity creeps into the process. On the interpretation as it is applied in the context of s. 31 (2) of the Children and Family Relationship Act, 2015 and the general circumstances with young children, it is clear that the circularity definition or interpretation may be extended further by the realisation that in some families (which are on the cusp of a breakdown of relationship), the courts should continue to strive for the barest minimum relationship by contact through letter, phone or some other basic route, so that the potential for improvement of contact is preserved, and that total loss of contact, with all the disastrous psychological consequences, is avoided. Having regard to the decision making process to which s. 31(2) of the Act of 2015 invites the court, I am of the view that a functional interpretation of "meaningful relationship" should be taken to further define the literal (and possibly circular) interpretation, by taking it to involve the process of optimisation of relationships within the parameters of the factors and circumstances to which the court should have regard pursuant to s. 31(2) of the Act of 2015. In many cases, this process may involve an attempt by the court to salvage the relationship for the child with one of his parents, where the child has become alienated.

8. In this case, by any definition, there is a meaningful relationship between O and each of his parents. Both of his parents love him dearly notwithstanding the unresolved differences between them. The function of the court in this appeal is therefore to optimise this meaningful relationship and the making of an order that ensures to the greatest extent the endurance of such a relationship for the child O, continuing into adulthood. Clearly all the evidence from the parties and expert evidence attests to the benefit pursuant to s. 31(2)(a) of this relationship.

"(b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise"

9. O has spoken to Prof. Sheehan and has expressed a preference for going to school in D, with O citing the fact that he would like to be close to his maternal grandmother in so doing, but also more importantly that overall he would like to be "in peace". This means that his view is that he would like to be in school in D but also would dearly and strongly wish to see the end of the multiple court applications and disputes, not to mention the relentless change of school he has experienced over the course of his short life. While the husband appellant argues in this case and also with Prof. Sheehan that the views expressed by D were for the purpose of pleasing mother I am satisfied that Prof. Sheehan thought that for a child over seven years, he had sufficient awareness, maturity and understanding, to express a view, and that his wish was he wanted to be in peace should be given considerable weight, in the context of ascertaining the objectivity of his wish to attend school in D.

"(c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances"

10. These needs are to be supplied by two dedicated parents working under the strain of employment and long journeys involving access. However, this situation (on the basis of Prof. Sheehan's report) could be seriously challenged by a continuation of disputes between the parties leading to court applications and a possible tendency on the part of the husband appellant, in the words of Prof. Sheehan, to "catastrophise the outcome".

"(d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships"

11. The child O has had quite a normal upbringing with respect to contact with relatives on both sides of his family, which has been significantly upset by the disruption of marital disharmony and court applications. Notwithstanding all this he survives. He has contact and relationships with his maternal grandmother and paternal grandparents. One of the complaints of the husband appellant is that access arrangements from D leave it impossible to have worthwhile contact at the weekend by travelling from D to a far flung end of a provincial country, and that the paternal grandparents are not good travellers so as to allow them to travel to D to make up for this deficiency. However, while the paternal grandparents are part of the child O's social capital, I am not satisfied that this should be defined, in the words of s. 31 (2)(a) of the Act of 2015 above, as persons "who are involved in the child's upbringing". I take the same view in relation to various uncles and aunts and cousins who are part of the social capital of child O., and may have a more intense involvement during emergencies in the event of mother being away and when assistance may be required with school, but the activities of such persons are random and casual and should not be taken as such to the formal status of "other relatives" envisaged in s. 31(2)(a) of the Act of 2015 above.

"(e) the child's religious, spiritual, cultural and linguistic upbringing and needs"

12. No change envisaged here.

"(f) the child's social, intellectual and educational upbringing and needs"

13. No change envisaged here, except that father has complained that O will loose contact with his playmates in the city. As a very sporting child, he will loose contact with those who he may ultimately play on a team of soccer or Gaelic, or both, in the city. This concern can be met by the father taking part in similar activities in D and becoming involved in whatever club or association invites facilities for young children in D. Indeed, it should be a comfort for him that the wife (applicant) has informed the court that on the occasions where he may not have formal access arrangements he may bring child O to his practices and participate as a mentor whether by being involved in the club/association or otherwise.

"(g) the child's age and any special characteristics"

14. The child has no special characteristics. As a child under eight, he still needs certainty described in his own words as "peace", and the conclusion of these proceedings by affirmation of the order made in the Circuit Court allowing relocation to D is highly desirable at his age.

"(h) any harm which the child has suffered or is at risk of suffering including harm as a result of household violence, and the protection of the child's safety and psychological wellbeing."

15. There was no household violence in this case, but there was a lot of argument and at one stage a protection order was obtained against the appellant husband which was resolved at return stage by an undertaking not to interfere with the wife's occupation of the new home at D. From the wishes of the child and the parallel reporting of Prof. Sheehan, I am satisfied that there must be an end to litigation now: otherwise the psychological wellbeing of the child may be affected. Even if the child could look forward to having the normal periods of access envisioned under the order together with the odd spontaneous appearance of the father at his sports training sessions or games outside of the formal access arrangements, then I can see the child progressing and his psychological wellbeing assured. I mentioned this aspect because Prof. Sheehan has warned against the appellant husband "catastrophizing" the relocation, by his observance of the appellant husband indicating some tendencies in this regard. I note too, Prof. Sheehan's account of the appellant husband interviewing the child in relation to his responses to Prof. Sheehan's questions. This type of interference with the child is entirely unfair, and places him in a position where he feels bound to adjudicate between the parents or is to blame for the continued differences and acrimony between them. A further adverse effect of this activity by the husband appellant is that when the child is interfered with in this way regarding his accounts to the investigating psychologist, he may be very reluctant to cooperate again with a psychological inquiry and will prefer to remain silent, thereby depriving the court of very valuable evidence in the event of any further inquiries being made on behalf of the court. This type of interference is akin to the offence of contempt in the face of the court by interference with witnesses.

"(i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing such proposals and cooperating with each other in relation to them."

16. The appellant husband made proposals to the court that the applicant wife would let her house to a tenant and take an apartment in the city thereby facilitating a less fraught system of access that involves considerably less travel and expense with consequent strain on the child O. If such a proposal were feasible in terms of the combined budget of the parties, then on balance I would favour such an arrangement, however I cannot see the applicant wife agreeing to such a proposal or the court imposing it as

an order, as the wife convinced me in her evidence that if the house were let there would (as likely as not) be a tax wedge, and that in any event it might be difficult to let the house. In addition she stated that she would use the backup of extended family and friends in D to cater for the child's school needs when she was absent due to work. I do consider that the move or relocation by the applicant wife to D in the first instance was one that in all likelihood would not have been approved by the court as it would have been viewed at that stage as not being in the interest of the child O or father insofar as it placed the obvious strain on access arrangements and cut off options that would be preserved for the child if both parents were remaining in the city close to their employment. However, the respondent husband did not object or seek a court order in relation to the proposed relocation when the applicant wife first proposed to purchase the house in the vicinity of D. The ownership of the house in D is now a major constraint in the case and for the husband to be making his proposals now is very much closing the door after the horse has gone.

"(j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent and to maintain and foster relationships between the child and his or her relatives".

17. It should be noted that the term "continuing relationship" is used here and relatives are mentioned simpliciter, not relatives "who are involved in the child's upbringing" as envisaged by s. 31(2)(a) of the Children and Family Relationship Act, 2015. The difference in wording is to be presumed as not accidental.

18. The lack of willingness and ability on the part of one parent to facilitate and encourage the relationship envisaged by para. (j) could pose a risk to that parent of having custody transferred away from them to the other parent, or access arrangements severely curtailed. Each of the parties in this case score well under this paragraph, and both seem to avoid denigrating the other parent or the relatives.

"(k) the capacity of each person in respect of whom an application is made under the act -

(i) to care for and meet the needs of the children

(ii) to communicate and cooperate on issues relating to the child and

(iii) to exercise the relevant powers, responsibilities and entitlement to which the application relates.

19. Both parents meet these criteria, subject to my comments above in relation to the appellant husband failing to put the child's interest first by seeking to interview him in relation to his talks with Prof. Sheehan, and also a slight tendency towards "catastrophizing" any outcome in relation to custody and access.

Subsection (3)

20. Issues on para. (k)(iii) of the Act of 2015 arising from any alleged household violence do not arise in this case.

21. Lest it is not clear in the foregoing, it should be stated that a major factor in reaching the courts conclusion is the fact that an applicant wife already has purchased a house in the vicinity of D and for a time allowed the child O. to attend school there. It was not desirable that she would have preempted the decision making power of the court and the appellant husband in that way. However it is a new constraint now which influences the event.

Conclusion

22. Having regard to the foregoing I affirm the order of the Circuit Court and await submissions of Counsel in relation to the costs arising.

Signed Henry Abbott