Neutral Citation Number: [2013] IEHC 394

THE HIGH COURT

IN THE MATTER OF THE JUDICIAL SEPARATION AND

FAMILY LAW REFORM ACT 1989 AND IN THE

MATTER OF THE FAMILY LAW ACT 1995

[2013 No. 76CAF]

BETWEEN

B.B.

APPLICANT/RESPONDENT

AND

A.A.

RESPONDENT/APPLICANT

JUDGMENT of Mr. Justice Hogan delivered on the 21st day of August, 2013

1. Where two parents cannot agree a choice of school for their twelve year old son, what, if any, is the role of this Court in the resolution of this dispute? This is the difficult and troubling question on which there is little, if any, contemporary judicial authority. This, however, is the question which is nonetheless presented by this appeal from the decision of the Circuit Court (Her Honour Judge Heneghan) delivered on 25th July, 2013. In that ruling she directed that Conor should be enrolled at a secondary school which I will term School A.

2. The applicant ("Mr. B.") and respondent ("Ms. A.") are husband and wife who have now separated and are living apart. They have two children, one of whom, Ciara, is fourteen years of age. It appears that she suffers from a disability and that she is likely to be financially dependent on her parents for some time to come. The other child, who I shall term Conor, is aged twelve years of age and is just about to enter secondary school. The present dispute concerns the choice of school for this young boy and it has arisen in the course of judicial separation proceedings which are pending in the Circuit Court. The parents are joint guardians of this child and while Conor lives with his mother, he has frequent access to his father. Both parents are dedicated to his welfare and seek the very best for him.

3. I should pause at this point to indicate that I have ascribed a fictitious name to the two children in order to protect their anonymity. Nor do I propose in this judgment to identify the location of the places where the parents reside or the identity of the two schools in question which are the subject matter of the dispute.

4. The parties are agreed that Conor is a young boy with very considerable talents. Aptitude tests which have been conducted show that he is ranked in the very highest percentile of scholastic achievements for a child of his age in respect of both reading comprehension and mathematics. Following completion of primary school in June, 2013, Conor had been offered a place in School A. It is common case that this is a perfectly good school with a high level of academic and other achievements. Many of his friends will be attending this school and the public transport links between his home and that school are excellent.

5. The present dispute arose by reason of the fact that shortly after this Conor was also offered a place in School B. School B has an outstanding reputation and is, by common consent, one of the leading schools in the country. Places at this school are highly coveted and are greatly in demand. Unlike School A, School B is, however, a private school and the school fees are considerable. There are also excellent public transport links between School B and Conor's home. One or two of Conor's friends are also taking up places at School B.

6. Mr. B. wishes his son to attend School A. He maintains that this is a perfectly good school and he insists that such are the precarious state of the family finances that the family cannot simply afford private education. He is also concerned that if Conor were to attend School B he would of necessity be assorting with children from wealthier backgrounds and that he might feel socially isolated as a result.

7. For her part Ms. A is most anxious that Conor be given the very best opportunity in life and that for this reason the family should not pass up this opportunity. Since the order was first made by the Circuit Court on 25th July last, it seems that School B have indicated that they would be prepared to give the family a 50% discount in respect of the school fees. It also seems that Ms. A.'s parents – who are reasonably well circumstanced – have now indicated that they would be prepared to pay the balance of the school fees. Mr. B counters by noting that these commitments – such as they are – are vague and indefinite and he, furthermore, has an objection in principle to his son's educational costs being discharged by other family members.

8. It should also be said that, fortunately, the family home is owned outright by the couple. Up to recently Mr. B earned a net salary of some €4,500 per month, but he is now required to pay rent of some €1,100 per month. For her part Ms. A had a monthly income of some €700. Unfortunately, however, Mr. B. has lost his job within the last few weeks, although it seems that his prospects of regaining employment are good.

9. Two other sources of capital should also be mentioned. A few years ago Mr. B.'s brother made a very generous contribution of €30,000 in respect of both Ciara and Conor. These monies are held in trust for their future welfare. A savings fund containing some €16,000 is also due to mature in the next two to three years which will also be available. While Ms. A. has suggested that some of these monies should be made available to discharge Conor's school fees at School B, Mr. B. objects strongly to the use of this precious capital for this purpose.

10. There is, furthermore, an urgency to this case since the new school term is looming. The appeal was heard before me on 19th August, the original deadline for acceptance of the offer from School B. Given the difficulties inherent in this appeal and the relatively novel issues thereby presented, School B. agreed to extend the time for acceptance until Thursday, August 22nd to enable the preparation of this judgment.

The jurisdiction of the Court

11. The formal jurisdiction of the Court to resolve matters of this kind derives from s. 11(1) of the Guardianship of Infants Act 1964 ("the 1964 Act") (as amended) which provides that any guardian "may apply to the court for its direction on any question affecting the welfare of the child and the court may make such order as it thinks proper." Section 3(1) of the 1964 Act then provides that in the resolution of any such question of guardianship, the court "shall regard the welfare of the child as the first and paramount consideration".

12. How, then, should the Court approach this question and what principles are there to guide it? The first thing to recall is that both Article 41 and Article 42 of the Constitution presuppose a marriage of equals with both parents having an equal claim in respect of the upbringing of their children. Where, as here, both parents have taken a responsible and conscientious attitude to the welfare of their children, both are entitled to have their views weighed fairly and equally by the courts.

13. This was not always so and prior to the adoption of the Constitution in 1937 the common law had always upheld the ultimate right of the father to determine the education of his children in cases of dispute. As Lord O'Hagan L.C. put the matter in *In re Meades* (1871) L.R. 5 Eq. 98, 103:

> "The authority of a father to guide and govern the education of his child is a very sacred thing, bestowed by the Almighty, and to be sustained to the uttermost by human law."

14. The fact that the rule of paternal supremacy in relation to education and upbringing was considered by an earlier generation of judges to be of divine origin appears, however, to have left the drafters of the Constitution somewhat underwhelmed for they drafted a new constitutional provision which plainly repudiated such thinking in favour of the equality of decision making as between mother and father alike. Article 42.1 of the Constitution accordingly provides:

> "The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children."

15. The common law rule as to paternal supremacy was, in any event, held to be unconstitutional by the Supreme Court in *Re Tilson* [1951] I.R. 1. Having set out the terms of Article 42.1, Murnaghan J. then stated ([1951] I.R. 1, 32):

> "Where the father and mother of children are alive this article recognises a joint right and duty in them to provide for the religious education of their children. The word 'parents' is in the plural and, naturally, should include both father and mother. Common sense and reason lead to the view that the mother is under the duty of educating the children as well as the father; and both must do so according to their means."

16. It is clear, therefore, that Article 42.1 envisages that both parents would be the joint decision-makers in respect of their children. As I have already indicated, in the present case both parents are deeply committed to the welfare of their children. Both have advanced powerful reasons to justify the diverging conclusions they have reached in respect of their son's education and their respective reasons are entitled to respect, appreciation and understanding from this Court.

17. Ms. A. contended that her choice of school venue for her son was one of the "inalienable and imprescriptible" rights protected by Article 42.1. She further submitted that the Circuit Court order violated the substance of this right by prescribing that Conor be educated at School A. As it happens, the curial part of the order simply provides for an order that Conor "be enrolled" at School A. I think it implicit in this wording – which, after all, simply referred to *enrolment* at School A - that the order providing for Conor's education at School A was not final and that matters could be revisited as occasion might suitably require.

18. That, in any event, is what the Constitution requires in matters of this kind. This was made clear by the Supreme Court in *The State (Doyle) v. Minister for Education* (December 1955)(this case is very belatedly reported at [1989] ILRM 277). In this case the applicant's wife had deserted him and he was made unemployed. Being quite destitute and unable to look after his daughter, he consented to the District Court making an order under s. 10 of the Children Act 1941 committed the child to an industrial school. However, as soon as the father's circumstances improved, he applied to have his daughter restored to his custody. The Minister refused to give his assent to this course of action.

19. The Supreme Court held that s. 10 of the 1941 Act was plainly unconstitutional. As Maguire C.J. explained ([1989] ILRM 277, 280) Article 42:

> "appears to us expressly to secure to parents the right to choose the nature of education to be given to their children and the schools at which such education shall be provided and this right must be a continuing right. Parents must be entitled to change and substitute schools as in their judgment they think proper and to hold that a choice once is binding for a period of a child's education would be to deny such a right."

20. The Court has, accordingly, no jurisdiction to make a final and indefinite order in respect of Conor's education in the same manner as happened in *Doyle*. In order to reflect the express nature of the rights secured by Article 42, any such order must accordingly allow for a change in circumstances and, indeed, a change of heart on the part of one or other parents.

21. Nevertheless, I cannot accept Ms. A.'s contention that this Court is *bound* by her conscientious choice of School B for the very simple reason that it must also respect the choice of Mr. B. who favours School A. Rather, the Court is placed in the unwelcome position of resolving this dispute simply by reason of the fact that there is an unbridgeable conflict of opinion between conscientious parents.

22. While this is not at all a case where the parents have "failed" in their duty towards their child, nevertheless it seems to me that as this is a case where the judicial branch of the State is obliged to resolve the dispute, then the principles contained in Article 42.5 can nonetheless be applied, if only by analogy:

> "...the State as guardian of the common good by appropriate means shall endeavour to supply the place of the

parents, but always with due regard to the natural and imprescriptible rights of the child."

23. In other words, in making this decision, I find myself endeavouring to supply the place of the parents but doing so in a fashion which is proportionate, which intrudes as little as possible into the family decision-making ("...by appropriate means..."), and which is guided by the objective of advancing Conor's welfare ("...but always with due regard to the natural and imprescriptible rights of the child...."). As Article 42.5 itself acknowledges, decision-making by the State – rather than by parents - in matters of this kind is nearly always unsatisfactory. This is especially so in the present appeal: I do not know the child or his family and have but an imperfect knowledge of their family circumstances. In ideal world a decision maker would endeavour to consult with wider family members and friends and speak to Conor's former and prospective teachers before arriving at a decision. But if only for reasons of time, this simply has not been possible.

24. I should also say – if by only by way of a coda to the foregoing discussion - that while I am naturally conscious of the result of the referendum last November, the outcome of that process is presently under challenge by referendum petition to this Court and no constitutional change has – to date, at least – been actually effected. In these circumstances I am applying the existing constitutional provisions.

The relevant factors

25. What, then, are the relevant factors? First, there are the views of Conor himself, as he is anxious to attend School B. These are views which must carry considerable weight, even if his views could not in the end be in any sense dispositive.

26. At the hearing of the appeal I inquired of the parties whether I should not interview Conor myself, but neither parent wished me to do so. They both felt that this would have an unsettling effect on him and – for very understandable reasons – they did not wish to have Conor involved in the panapoly of the judicial process. Given that in this respect both parents expressed this wish, this is a view which must be respected by the judicial branch unless it was a case coming within Article 42.5 which would entitle me to interfere with that parental decision. This is obviously not one such case.

27. Second, there is the question of the family's means. Here I find myself obliged to agree with Mr. B. that as things stand the family simply cannot afford to pay the school fees associated with School B. If Conor is to attend School B, it cannot be at the expense of the family's otherwise hard-pressed and slender resources.

28. Third, it is difficult to avoid the conclusion that School B. would be the more appropriate school for a boy of Conor's aptitude, even if he would also do well at School A. He is a bright boy who would be likely to thrive in the more academic environment of School B.

29. It must here be emphasised that this is not to endorse School B at the expense of School A, still less to suggest that private education is in some way more desirable than education in the public system. There are, of course, many – not least educationalists and social reformers – who decry the ranking of schools and the emergence of a small coterie of "elite" schools. Perhaps in an ideal world all schools would (and should) be ranked equally. But in considering what is best for Conor, I have to take the world as I find it and not perhaps as one might wish it to be. Given especially his scholastic aptitude it seems appropriate that he should go to a school that would seem best suited for his talents.

30. Fourth, while I understand and respect Mr. B.'s objections to the suggestion that the school fees should not be discharged by other persons – such as Ms. A.'s parents – given that I am required to consider this matter from the standpoint of the welfare of Conor, this cannot be regarded as an objection which carries considerable weight.

31. Fifth, it is also true that Conor will be mingling with boys from a more privileged and affluent background in School B. One cannot, therefore, exclude the possibility that he may feel (or, more accurately, may be made to feel) to some degree isolated from his peers as a result. This is a matter which has troubled Mr. B. and is one of the reasons that he has voiced concern regarding School B.But I cannot think that this could be a weighty reason for refusing this offer. The school will presumably be aware of these risks – such as they are - and will doubtless seek to counteract them by including him to the greatest possible extent in the life of the school. In any event, Conor's motivation and evident desire to make the best of his abilities will also doubtless stand him in good stead in this regard.

Conclusions

32. Weighing all these factors I find myself driven to the conclusion that the appeal should be allowed. I will therefore allow Ms. A. to enrol Conor at School B.

33. This, however, is subject to a number of conditions. Specifically, it is expressly predicated on the assumption that School B will waive 50% of its fees and that the balance of these fees will be discharged by Ms. A's parents. Under no circumstances could Mr. B. be expected to contribute to any additional costs associated with Conor's attendance at School B. If, moreover, this financial support were not to materialise, then the matter would have to be re-visited.

34. While any disruption of Conor's education must be avoided if at all possible, this order is not – and cannot be – in the nature of a final order. For all the reasons mentioned by the Supreme Court in *Doyle*, both parents have the right to apply, within reason, to have the order varied in the light of changing circumstances. I would, however, venture to suggest that it would be very desirable that disputes of this kind might be resolved through mediation rather than the acrimony which is inevitably generated through the judicial process.

35. Nevertheless, coerced as I am to make a decision and to resolve the issue, I must find that Conor's educational welfare will be best served by attending School B.