Neutral Citation: [2013] IEHC 634

THE HIGH COURT

FAMILY LAW CIRCUIT COURT APPEAL

[2012 No.814 CAF]

[2010 No. 568 Circuit Court]

DUBLIN CIRCUIT

COUNTY OF THE CITY OF DUBLIN

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964

AND IN THE MATTER OF THE STATUS OF CHILDREN ACT 1987

AND IN THE MATTER OF J.P., A MINOR

BETWEEN

S. P.

APPLICANT

AND

J. E.

RESPONDENT

JUDGMENT of Mr. Justice Michael White delivered on the 21st day of March, 2013

1. This is an appeal from an order of the Circuit Court of 31st July, 2012, made after a four day hearing, when permission was granted to the applicant to relocate the child of the parties, J, to England, with access in favour of the respondent both in Ireland and England.

2. The Circuit Court granted a stay on the order for a period of fourteen days, pending any application to the High Court. An application for a stay was made to the High Court on 8th August, 2012, when the Court refused a stay, but directed liberal access pending the full appeal. As a result of those directions it was agreed by the parties that the applicant with J would reside in England from 31st August, 2012, but would return with him fortnightly to facilitate access with the respondent.

History of the Relationship

3. The parties are not married to each other. They had a relationship of less than two years which commenced in August 2006. The exact nature of the breakdown between the parties is in some dispute. The applicant who is now 28 years of age stated that the respondent had talked her into moving in with him. In the latter stages of her pregnancy when she was about 7-8 months pregnant, the respondent told her that the relationship was not working out and that he did not love her. She begged him to make the relationship work. The respondent stated it was a mutual decision by both parties to separate. J, a son, was born in April, 2008. They both accept their relationship ended when J was a few months old and the applicant moved out of the respondent's family home to an apartment in D.

4. From July 2008, access arrangements were made so that the respondent could see J. The original agreement was access on Sundays from 10a.m. - 4p.m.. At that time the applicant was a breastfeeding mother. Agreement was also reached for Tuesday and Thursday evening access.

5. Some difficulties emerged between the parties around access.

6. The subsequent interaction between the parties and their difficulties is very helpfully set out in the judgment of the English High Court of 26th March, 2010 Record No. FD09P00728, by Mr. Stephen Cobb QC sitting as a deputy High Court judge at paras. 9 - 23 of the judgment.

The Move to England and the English High Court Decision

7. The applicant moved to England in or around 14th February, 2009 with J to live with her grandparents. Her grandfather was terminally ill at that time. Originating proceedings pursuant to the Hague Convention were commenced by the respondent in England on 6th April, 2009.

8. There is a conflict between the parties as to the intention of the applicant at that time.

9. This Court is in agreement with the judgment of the English High Court in the matter, which found that J's habitual residence was Ireland in February 2009.

10. Whatever the applicant's intention she made a conscious decision not to communicate any relevant information to the respondent as to her whereabouts and the respondent had difficulty locating her. It was not until 9th December, 2009, that the English High Court was able to progress the Hague Convention proceedings. Those proceedings ultimately led to an order of return of the child to Ireland with the applicant, who returned on 10th April, 2010.

11. The applicant took up residence in the home of a family friend in W. The access order of 6th October, 2008, supervised access for two hours every Wednesday and Sunday, was recommenced with supervision by Mr. S. P., the father of the applicant. From 2nd June, 2010 access hours were extended from 11 a.m. to 6 p.m. on a Sunday.

12. On 23rd of July, 2010, an application to relocate to England was refused by the Circuit Court. Revised access orders were made as follows:-

- Two weeks holiday with mother in England in August.
- One week with father in Ireland to include overnights.
- Current access arrangements to continue with an overnight by the respondent to be included. Access to be twice weekly to father with two overnights.
- Both sides were to facilitate travel arrangements for availing of access on an equal basis with time of access to suit public transport for the mother.
- The Court granted the applicant liberty to review the application to relocate but not prior to October 2011.

13. The Circuit Court made further access orders on 27th October 2010, 7th December 2010, 26th January 2010, 26th January 2012, and 23rd February 2012.

14. Between May 2011 and December 2011 the parties engaged in a mediation process under the auspices of Professor J.S. in a programme called "therapeutically assisting families in transition".

15. The applicant renewed her application to relocate which was heard over a period of four days from 6th July to 12th July, 2012 before Her Honour Judge Stewart. Judgment was reserved and delivered on 31st July, 2012 and that order is the subject matter of this appeal.

16. Prior to the order of 31st July, 2012 the respondent had access to J three weekends out of five. In the interim the applicant had permission to return to England with the child during the period of time the respondent did not have access.

17. J, since 31st August, 2012, has been living fulltime in England with the applicant at the residence of her parents. He is attending Montessori school in England at a school run by the applicant's parents.

18. The applicant returns fortnightly with J when the respondent exercises weekend access.

Legal Principles

19. The legal principles applying to applications to relocate have modified over a period of time.

20. The principles in Ireland were recently reviewed by MacMenamin J. in the judgment of *U.V. v. V.U.* [2011] IEHC 519 delivered on 15th April, 2011,. He considered two previous Irish decisions on relocation, *E.M v. A.M* [1990] No. 587 SP (Unreported, High Court, Flood J., 16th June, 1992) and *K.B. v. L.O'R.* [2009] IEHC 247 (Unreported, High Court, Murphy J., 15th May, 2009).

21. The Court also considered the English judgment of *Payne v. Payne* (CA) [2001] Fam 473.

22. In *U.V. v. V.U.* the learned judge stated at paras. 27 and 28:-

> "27. In *K.B. v. L'O'R*, the judge saw the decision of the English Court of Appeal in *Payne v. Payne* [2001] Fam. 473 as an important persuasive authority also. There, the court had to consider whether or not there was a *presumption* in favour of a custodial parent and the manner in which such presumption (if it existed) might be reconciled with Article 8 of the E.C.H.R. which protects family life.
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> 28. The decisions clearly show that the welfare principle was identified as being the paramount consideration. The intent of the judgment would appear to be that there should be no presumption in favour of the views of the custodial parent. As subsequent English decisions illustrate, however, the question has arisen as to whether, rightly or wrongly, the effect, or application of the Payne principles is that in certain circumstances it might result in giving rise to a presumption in favour of the views of the custodial parent."

23. The learned judge went on to reject any suggestion that there is a presumption in Irish law in favour of the custodial parent.

24. Part of his judgment does not apply to this case as he was dealing with a married family with different constitutional protection.

25. The essence of his judgment is that there is no presumption in Irish law in favour of the custodial parent, but there should be a balancing exercise which must have regard to the constitutional rights of children to have issues of custody or upbringing taken in the interests of their welfare.

26. He accepted that the best interests of the child should include consideration of the impact of relocation on each parent.

27. In conducting the balancing exercise he approved the considerations enumerated by Butler Scloss P. in *Payne v. Payne* at para. 85, p.500 as follows:-

> "In summary I would suggest that the following considerations should be in the forefront of the mind of a judge trying one of these difficult cases. They are not and could not be exclusive of the other important matters which arise in the individual case to be decided. All the relevant factors need to be considered, including the points I make below, so far as they are relevant, and weighed in the balance. The points I make are obvious but in view of the arguments presented to us in this case, it may be worthwhile to repeat them.
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> (a) The welfare of the child is always paramount.
>
> (b) There is no presumption created by section 13(1)(b) in favour of the applicant parent.

(c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weigh

(d) Consequently the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.

(e) The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.

(f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.

(g) The opportunity for continuing contact between the child and the parent left behind may be very significant."

28. MacMenamin J. also in the balancing of rights had regard at para. 19 to the factors identified by Flood J. at p. 7 in *E.M v. A.M*, which are as follows:

"(1) Which of the two [hypothetical outcomes] will provide the greater stability of lifestyle for [the child].

(2) The contribution to such stability that will be provided by the environment in which [the child] will reside, with particular regard to the influence of his extended family.

(3) The professional advice tendered....

(4) The capacity for, and frequency of, access by the non-custodial parent.

(5) The past record of each parent, in their relationship with [the child] insofar as it impinges on the welfare of [the child].

(6) The respect, in terms of the future, of the parties, to orders and directions of this Court."

29. This Court acknowledges the failure of the applicant to take positive steps to contact the respondent about her decision to stay in the United Kingdom, and to notify him of her whereabouts, and to offer contact in the United Kingdom was not in the interests of the child J.

30. However, this is not a matter which should ultimately have a bearing on the Court's decision, despite the strong views of the respondent. At this time, some four years after the original removal and three years subsequent to the English High Court decision to return the child to Ireland, other considerations must apply.

31. The important balancing factors are:-

(i) The present welfare of the child;

(ii) The possible disruption to the child if relocation is not granted and the impact on his welfare;

(iii) The impact on the access rights of the respondent if relocation is granted; and

(iv) Can contact be maintained with the non custodial parent if relocation is granted?

32. The applicant is a caring and responsible parent and J is very well looked after. She has been the predominant influence on his life since birth. She has been the primary carer, and the parent who has spent most time with the child.

33. While she was brought up in D. and her parents resided there, major changes have taken place within her family of origin. The applicant's parents and siblings have decided to take up permanent residence in England. The applicant's father, S. P., is an English man whose own parents had moved to Yorkshire and lived there for some years. I am satisfied that the decision of the applicant's family of origin to relocate to England has nothing to do with the present custody dispute between these parties but was made for economic and family reasons. That has left a situation where the applicant has some connections with D. where two aunts and an uncle live. The applicant has little contact with her uncle but certainly has had some contact with her two aunts. When she returned to Ireland in April 2010 she did not return to reside with either of her aunts. The respondent is suspicious that this was done deliberately by the applicant to make his access rights more difficult. On balance, I am of the view that the applicant felt uncomfortable taking up residence again with either of her aunts and was not motivated by spite to make the respondent's access rights more difficult.

34. The housing and employment prospects of the applicant in Ireland are tenuous. Her contact with her family of origin and siblings would be more difficult.

35. If the Circuit Court order is affirmed, the contact between the respondent and J would not be of the same quality. The respondent has an excellent relationship with his son and is a very responsible parent who wishes to foster an increasing level of contact which would be facilitated by both parties living in the same city.

36. I am satisfied despite the respondent's pessimism that contact can be maintained between him and J if the relocation order is made. I accept that will require strenuous efforts on the part of both parties.

37. I am satisfied at this point in time that the applicant has learned from the lessons of the past and is in no doubt that unless the access and contact orders, as directed by the Court, are complied with either the Irish courts or the English courts would take a hostile view of her behaviour.

38. The respondent has expressed major concern to the Court about his ability to enforce the order of this Court if a relocation order was made.

39. I am satisfied because of the provisions of the Hague Convention, the jurisdiction to issue a certificate pursuant to Article 41 of Council Regulation (EC) No. 2201/2003, and the existence of liaison judges between the Republic of Ireland and England and Wales,

that the order of the Court will be enforceable in both jurisdictions.

40. While I accept that Professor J.S. has been most helpful in trying to arrange a mediated settlement between the parties, this Court considers it inappropriate to consider recommendations made by a programme which was originally considered to be a form of mediation.

41. This Court is also satisfied that the applicant has furnished a lot of information to the respondent about J's ongoing welfare and education.

42. The respondent has been obstructive and hostile about contact in England and he could make a much greater effort. The Court accepts the relationship between the respondent and the applicant's father S.P. is not constructive. Mr. P. has been hostile to him, but he has expressed a commitment to this Court under oath that he wishes to try and develop a constructive relationship with the respondent, and the Court accepts his bona fides but will be disappointed if it is not followed through.

43. On balance while it is a difficult decision, this Court believes the best interests of the child or the paramount welfare of the child dictates that the Circuit Court order should be affirmed.

44. As the access order in favour of the respondent is unacceptable to him, there should be some discussion between the parties and their respective legal advisors before the Court makes final orders, in order to facilitate the respondent as far as possible.

45. The return of J to this jurisdiction every fortnight is not in his interests, it is far too frequent. The optimum number of visits J should make to Ireland is eight per year, six of which should be funded by the applicant and two of which should be funded by the respondent. The balance of the access should take place in England, apart from holidays.

46. There should be provision for a substantial block of holiday time for the respondent with J.

47. I will finalise the access orders in favour of the respondent at a future date to be agreed between the parties or nominated by the Court, and will put in place interim arrangements for the purposes of allowing those discussions to take place over a period of time.

48. It would not be in the best interests of J to attend the Montessori school run by his grandparents. A different school should be agreed between the parties or in default to be fixed by this Court.

49. The Court is satisfied the applicant has been responsible in monitoring the ongoing health requirements of J in particular his speech development. The Court will direct the preparation of an expert report on his speech development, the cost of which is to be borne equally by the parties. An appropriate expert should be sourced in England and the Court can finalise the details when finalising the access order.

50. The respondent's parents E.N. and J.E. are responsible people who have an interest in J's welfare and this Court has no objection to their ongoing contact with him when in the custody of the respondent.

51. The Court will also be granting a certificate pursuant to Article 41 of Council Regulation (EC) No. 2201/2003, which will enable the provisions of this order to be enforced in England and Wales.

52. A copy of the judgment and order will be furnished through the liaison judge for the Republic of Ireland to the liaison judge for England and Wales