Neutral Citation Number: [2011] IEHC 519

THE HIGH COURT

2008 158 CA

U. V.

APPLICANT

AND

V. U.

RESPONDENT

JUDGMENT of Mr. Justice John MacMenamin delivered on the 15th day of April, 2011

1. This decision in a Family Law Circuit Court appeal was delivered on 15th April, 2011. However, the case remained pending, and there were a number of subsequent interlocutory applications. The case is now almost finalised. The decision deals with the question of 'relocation', that is, where a custodial parent applies to the Court to bring children in their care to live permanently in a different country.

2. Counsel have requested the judgment should be made more generally available and publicly pronounced, as it seeks to identify principles which might arise in other cases. The judgment has been redacted to protect the parties' anonymity.

3. The applicant is the mother of two boys, M. now aged twelve years, and T. now aged six years. She is a native of Spain but commenced living in Ireland at the time of her marriage to the respondent in 1999. The parties separated in 2007; they obtained a decree of judicial separation the following year. The parties are joint guardians of the children and they have a joint custody order. The father enjoys significant access; every second weekend the two boys go to the father on Friday at 6.00 p.m. until Sunday at 6.00 p.m. This, therefore, includes two overnights, Friday and Saturday. On the weekend when he does not have access, the father sees the children on Tuesdays and Thursdays from 3.00 p.m. to 7.00 p.m. The mother's application is that she be permitted to live in Spain and bring the children to live there with her; the father is unwilling to consent to this.

4. As will be explained, the outcome of this case is to be determined on a range of criteria established in case law. The mother wants to go back to Spain with the children. The father's conduct to the mother has been far below the standards any wife and mother has a right to expect. He is not in work. He is not paying maintenance. The mother and father have no working relationship. The father's hostility has been a significant contributory factor to the bad relations between the parties. Yet, the children are very close to both parents and both parents play a real role in their lives. It is difficult to exaggerate the extent of the human predicament in which the parties to this case now find themselves. The primary consideration, however, is the welfare of the children.

5. The decision as to relocation is to be arrived at by a process of identification and balancing of constitutional and legal rights and applying them to the factual situation. A number of earlier decisions in the neighbouring jurisdiction point out that this is very difficult. This case is no exception.

6. One starts with a consideration of the legal principles. The first point of reference must be the Constitution. This is not a case where there is a conflict between the rights of the State on the one hand, and the parents, on the other; but rather, one where the Court must endeavour to identify and balance the rights of individual family members who remain a family, despite the decree of judicial separation. In *The State (Bouzagou) v. Station Sergeant, Fitzgibbon St.* [1985] 1 I.R. 426 at p. 433, Barrington J. pointed out that in a situation of marital breakdown, one does not look to the rights of a 'family' *simpliciter*, or even to those of the parents as against the outside world; instead, one must seek to reconcile "the rights of individual members of the family, when the family itself is divided". I do not read that decision, or any other, as allowing for the proposition that in a relocation proposal, the rights of any parent, even a custodial parent, would enjoy any form of legal presumption in their favour.

The Rights of Children to have Custody Decisions made, having regard to their Welfare

7. As will be explained, children, as members of the family unit, enjoy personal unspecified rights pursuant to Articles 40.1, 40.3, and rights under Articles 41 and 42 of the Constitution. I return to Article 40.3 rights below.

8. The main focus here is the balance to be struck between Articles 40.3 and 41 of the Constitution looking first to the family, pursuant to Article 41 of the Constitution, the State recognises the family as being the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law. By virtue of the same Article, the State guarantees to protect the family in its constitution and authority as being the necessary basis of social order and as indispensable to the welfare of the nation and the State. By virtue of Article 41.2.1, the State recognises that, by her life within the home, a woman gives to the State support without which the common good cannot be achieved. Pursuant to Article 41.3.1, the State pledges itself to guard with special care the institution of marriage, on which the family is founded and to protect it against attack. This is, of course, to be read in the context of Article 41.3.2, which permits the dissolution of marriage in certain clearly identified circumstances. In general, the father and mother of the children of a marriage enjoy joint rights of guardianship: s.6 Guardianship of Infants Act 1964.

9. I turn, then, to unspecified rights under Article 40.3 of the Constitution. In the case of *F.N. and E.B. v. C.O. and Others* [2004] 4 I.R. 311, Finlay Geoghegan J. had to consider a situation where children had been born in Belgium to a father, the first respondent, and the mother, who had since died. Prior to her death, the mother, who had separated from the father, had sole custody of the children. On her death, the mother did not appoint any guardian over the children. The children had not lived with the father for some years, and for a period of years they lived with the applicants who were their maternal grandparents. The Court held that, in exercising its discretion to make an order appointing a guardian or guardians, it should have regard to the welfare of the children and, as appropriate and practicable, having regard to the age and understanding of the children, to take into account the children's wishes in that matter. The Court found that the right of the child to have decisions in relation to guardianship and custody taken in the interests of his or her welfare was a personal right of the child within the meaning of Article 40.3 of the Constitution.

10. Finlay Geoghegan J. (at p. 322) expressed the point as follows:-

> "It is also well established that an individual in respect of whom a decision of importance is being taken, such as those taken by the courts to which s. 3 of the [Guardianship of Infants] Act of 1964 applies, has a personal right within the meaning of Article 40.3 of the Constitution to have such decision taken in accordance with the principles of constitutional

justice. Such principles of constitutional justice appear to me to include the right of a child, whose age and understanding is such that a court considers it appropriate to take into account his/her wishes, to have such wishes taken into account by a court in taking a decision to which s. 3 of the Act of 1964 applies."

11. Later, in the same decision, at p. 323, the judge considered the decision of the Supreme Court in *The Adoption (No. 2) Bill, 1987* [1989] I.R. 656. In that decision Finlay C.J. pointed out (at p. 662) that:-

> "The rights of a child who is a member of a family are not confined to those identified in Articles 41 and 42 but are also rights referred to in Articles 40, 43 and 44."

12. Having referred to a passage in the *Adoption (No. 2) Bill* decision, which addressed limitations to any action by the State to vindicate the personal rights of children, Finlay Geoghegan J. in *F.N,* went on to state, at p. 327, that:-

> "Even if, as I have concluded earlier in this judgment, the personal rights of a child referred to in Article 40.3 include the right to have a decision in relation to his/her custody taken in the interests of his/her welfare, [those rights require a] court in considering the child's welfare to have due regard for the natural and imprescriptible rights of the child including the right to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education."

13. In *North Western Health Board v. H.W.* [2001] 3 I.R. 622, the Supreme Court, while recognising that the family was the natural primary and fundamental unit group of society, also recognised that a child has constitutional rights, both as part of the unit of the family and as an individual. The Court held that there was a constitutional presumption that the welfare of the child (religious, moral, intellectual, physical and social) was found within the family, as recognised by the legislature.

14. In *North Western Health Board*, the primary issue was the balance of rights between the State, on the one hand, and the family unit, on the other. But the Court also considered the individual rights of children. Speaking of the constitutional principles engaged, Denham J. observed (at p. 718):-

> "The constitutional principles applicable are those to be found in Articles 40.1, 41 and 42.5. These should be construed harmoniously. Thus, the child has personal rights: Article 40.1. The State has a duty to respect, and, as far as practicable, by its laws to defend and vindicate these rights. The State has a duty to vindicate the life and person of the child. Thus, the Guardianship of Infants Act, 1964 and the Child Care Act, 1991, advanced the concept of the welfare of the child as the first and paramount consideration."

15. Decisions with regard to children's welfare are given statutory expression by the provisions of s. 3 of the Guardianship of Infants Act 1964. These provide that in any proceedings concerning custody, guardianship or upbringing:-

> "The court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration."

16. 'Welfare' is defined in s. 2 of the same Act as comprising:

> "The religious and moral, intellectual, physical and social welfare of the infant."

17. These observations are of particular importance when it comes to the question as to the weight that should be given to the interests, or rights, of parents in a context such as this. It bears repetition that this is not a situation where there is any contest between the rights of the State and the rights of the family. Here, the issue is the identification of the balance of rights between the individual parents who are in contention, and the rights of the children. In such a situation the rights of the children are, as a matter of constitutional law, to be the paramount consideration.

18. These constitutional considerations are of some relevance when it comes to the decided case law. Over the last forty years, there has been considerable judicial discussion in the neighbouring jurisdiction as to whether or not there exists a *presumption* that a court should give effect to the views of a custodial parent in applications such as these. There appears to be uncertainty as to how certain judgments should be understood. To anticipate; insofar as this is an issue, I take the view that very great weight should be attached to the views of the custodial parent, but there can be no actual *presumption* that the views of that parent should hold sway with a court. The children's welfare is paramount. *A fortiori*, this observation applies in circumstances where (as here) the parents have joint custody. This is very far from determining that the children's welfare is the <u>only</u> consideration. However, the rights of all parties must be weighed in accordance with the fact that the welfare principle is the overarching one. But a *presumption* raises issues of equality. All citizens are entitled to equal status before the law.

19. I turn now to the decided case law. The most recent relocation decision in this jurisdiction was that of *K.B. v. L.O'R.* [2009] IEHC 247, (Unreported, High Court, Murphy J., 15th May, 2009). However, almost twenty years earlier, some of the considerations which arise in cases such as these were assessed by Flood J. in *E.M. v. A.M.,* [1990] No. 587 Sp (Unreported, High Court, Flood J., 16th June, 1992) (see generally Shannon, *Child Law,* (Dublin: Round Hall, 2nd Ed., 2010), at pp. 759 to 760). In that case, Flood J. set out factors to which the court should have regard in a 'leave to remove' application. These factors arose in a situation where there had been considerable friction between the parents, and where, on one occasion, the mother had removed the child from this jurisdiction and brought him to her home country, the United States. Proceedings were initiated in the United States, where the court ordered the return of the child to Ireland. An order was made granting sole custody to the father. The mother then applied to the Irish courts for leave to reside in the United States with the child. Flood J. identified the following criteria (at p. 7):-

> "(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."

20. *E.M.* is noteworthy in that, there, the *father* had been granted sole custody of the child. But Flood J. concluded that the interests of the child required that he should be placed in the care of the *mother* who intended to relocate to the United States. It may be seen, therefore, that this was very far from giving expression to any presumption in favour of the then custodial parent.

21. In *K.B. v. L.O'R.,* cited above, Murphy J. had to consider a situation where a mother sought leave to bring her children to England with a new partner with whom she had formed a long-term stable relationship. The arrangements for schooling and access to the child's natural father were, apparently, well identified to the Court.

22. I infer that the father, although involved with the children, was not an active day-to-day participant in their lives. The Court considered that the mother, who had established a new relationship with a man residing in England, should be permitted to relocate there with the children.

23. There are a number of noteworthy features about this decision. The first is that the parties were never married and therefore did not constitute a constitutional family; second, the access arrangements do not appear to have been as fully realised as in the instant case involving, as they do here, significant overnight and weekend access; third, the level of engagement of the father in the children's lives appears to be have been at a significantly lower level than in this case. Finally, and very importantly, the judge in that case had the opportunity of meeting the eldest child by agreement of the parties, and thus to take his wishes into account.

24. Murphy J. took the opportunity of referring to a number of important persuasive authorities. I will refer to them now.

Do the Persuasive Authorities give rise to a Presumption in favour of the Custodial Parent?

25. The seminal decision is that of the English Court of Appeal in *Poel v. Poel* [1970] 1 W.L.R. 1469. There, both Sachs and Winn L.JJ. emphasised the importance of recognising and supporting the function of the primary carer. The observations still carry much force. Sachs L.J. observed (at p. 1473):-

> "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…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*." [Emphasis added]

26. It is difficult to avoid the inference that the effect of such judicial views, if applied, might be to give rise to a *de facto presumption* in favour of custodial parents.

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.

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.

29. Thorpe L.J. specifically disavowed any question of a presumption in favour of the custodial parent. However, he nevertheless summarised a detailed review of the decisions of the English Court of Appeal over the course of the previous thirty years (including *Poel*) in this way (at p. 483):-

> "… a review of the decisions of this court… demonstrates that relocation cases have been consistently decided upon the application of the following two propositions: (a) the welfare of the child is the paramount consideration; and (b) refusing the primary carer's 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." [Emphasis added]

30. I do not, in fact, read this summary as giving rise to a presumption in favour of the primary carer. It will be noted that Thorpe L.J. specifically stated that any application to relocate would be granted *unless* the court concluded that it was incompatible with the children's welfare. The judge was discussing the potential outcome, not the principle upon which the decision is based. But this was not the only judgment in the case. The judgment of Butler-Sloss P. expresses what should be the same criteria, but perhaps in a different way.

31. For context, I preface what follows with the precise text of Article 8 of the E.C.H.R. which provides:-

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

32. In her concurring judgment in *Payne*, Butler-Sloss P. specifically drew attention to the rights of each of the mother, the father and the child under Article 8(1) of the E.C.H.R. She emphasised that as a matter of Convention law, the issue of greatest significance was "the welfare of the child" which, according to European jurisprudence, including *Johansen v. Norway (*1997) 23 E.H.R.R. 33, was the overriding consideration.

33. The facts of *Johansen* require a little consideration, however. In that case, the E.Ct.H.R. held (at p. 72) that, in undertaking the necessary *balancing* exercise under Article 8(2), "the Court will attach particular importance to the best interests of the child, which .

. . may override those of the parent". However, it has been pointed out that the passage in *Johansen v. Norway,* when given its full context, is to the effect that:-

> "… a fair balance has to be struck between the interests of the child in remaining in *public care* and 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*." [Emphasis added]

34. *Johansen v. Norway* concerned a different situation that between a parent and the alternative of public care, a scenario quite different from that of a private family law dispute as to relocation which, arguably, might demand a quite different kind of balancing exercise. Elsewhere, however, the E.Ct.H.R. has referred to the welfare of the child as being of "crucial importance", and, in another context, has referred to the fact that the interests of the child "must always prevail". (See *Scott v. United Kingdom* [2000] 2 F.C.R. 560 at 572; *L. v. Finland* [2000] 2 F.L.R. 118 at para. 118; and see generally, Kilkelly *Children's Rights in Ireland*, (Dublin: Tottel Publishing, 2008), at pp. 128 to 129).

35. In *Payne*, Butler-Sloss P. observed (at p. 499) that the judgment of Thorpe J. (as he then was) in *M.H. v. G.P. (Child: Emigration*) [1995] 2 F.L.R. 106:-

> "was the first time to my knowledge that the word "presumption" had been used in the reported cases, and I would respectfully suggest that it overemphasised one element of the approach in the earlier cases."

36. Butler-Sloss P. then identified (at p. 500) the following helpful criteria as being relevant in a relocation decision as follows:-

> "The strength of the relationship with the other parent, usually the father, and the paternal family will be a highly relevant factor . . . The ability of the other parent to continue contact with the child and the financial implications need to be explored. There may well be other relevant factors to weigh in the balance, such as, with the elder child, his/her views, the importance of schooling or other ties to the current home area. The state of health of the child and availability of specialist medical expertise or other special needs may be another factor. There are of course many other factors which may arise in an individual case. I stress that there is no presumption in favour of the applicant, but reasonable proposals made by the applicant parent, the refusal of which would have adverse consequences upon the stability of the new family and therefore an adverse effect upon the welfare of the child, continue to be a factor of great weight."

37. She added:-

> "As in every case in which the court has to exercise its discretion, the reasonableness of the proposals, the effect upon the applicant and upon the child of refusal of the application, the effect of a reduction or cessation of contact with the other parent upon the child, the effect of removal of the child from his/her current environment are all factors, among others which I have not enumerated, which have to be given appropriate weight in each individual case and weighed in the balance . . . "

38. The judge then summarised the tests in this way:-

> "(a) The welfare of the child is always paramount.
>
> (b) There is no presumption…in favour of the applicant parent.
>
> (c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.
>
> (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."

39. The third judge in the case agreed with both judgments without addressing the presumption issue.

40. In light of the authorities, it seems to me that a decision of this nature is one in which a balancing exercise is involved. Having regard to the criteria just identified and enumerated by Butler-Sloss P. that balancing exercise must have regard to the constitutional rights of children to have issues of custody or upbringing taken in the interest of their welfare. Such interests include the rights of children, subject to their welfare, to have access to or contact with their *parents* as part of a family unit, even where there is marital breakdown (see *M.D. v. G.D.* (Unreported, High Court, Carroll J., 30th July, 1992) and also *E.G. v. D.D.* [2004] IEHC 265, (Unreported, High Court, Peart J., 9th July, 2004)). But this is in no sense to disregard the rights of each parent individually to have each of the factors weighed. The court must assess all the factors together.

41. This Court must also have regard to the decision of the Court of Justice of the European Union of 5th October, 2010, in *J. McB. v. L.E., Case C-400/10 PPU,* where, referring to Article 7 of the Charter of Fundamental Rights (respect for private and family life, home and communications), that Court observed at para.60 of the judgment, that the Article must be read in such a manner so as to respect the obligation to take into consideration the child's best interest, and the fundamental right of the child to "maintain on a regular basis personal relationships and direct contact with both of his or her parents, stated in Article 24(3) (see, to that effect, Case C-540/03 *Parliament v. Council* [2006] ECR I-5769, paragraph 58)".

42. In the balancing of rights, it seems to me that a court may also appropriately have regard to the factors identified by Flood J. in *M. v. M.,* cited above, although such factors will often overlap with the criteria I have identified.

43. I do not think that the rights of children, which must be at the forefront of such considerations, can allow for a presumption in favour of a custodial parent, therefore, although the views of such parent are entitled to great weight. The children's rights include

the protection of their rights to access or contact with *each* parent, where practicable, and appropriate, having regard to their welfare.

44. In Re *D. (Children)* [2010] EWCA Civ. 50, Wall L.J. observed that, in his view, the best summary of the approach is that contained in the judgment of Butler-Sloss P. in *Payne*. I think this is to be read as an endorsement of the "no presumption" principle.

45. The judgment of Wilson L.J. in the matter of *H. (A Child)* [2010] EWCA Civ. 915 is also of note. Interestingly, that judgment adverts to the Washington Declaration on International Family Relocation made between 23rd and 25th March, 2010, where the many participant judges at the International Judicial Conference on Cross-Border Family Relocation specifically avowed the principle that the best interests of the child should be the paramount or primary consideration, and that the determination in relocation cases should be made without any presumptions for, or against, relocation. The declarations also emphasised the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis and in a manner consistent with the child's development, save if such contact is contrary of the child's best interests; and the necessity of obtaining the views of the child having regard to the child's age and maturity. I should add that I do not interpret any of these important observations as in any way negating relocation where necessary, but rather as conditions which should apply to such an order.

The Evidence in this Case
46. I now turn to a consideration of the evidence, having regard to the criteria which have been identified. This judgment seeks to apply the relevant criteria insofar as possible. The evidence does not always fall into neat categories, and there may sometimes be overlap as between the different criteria.

The Welfare of the Children
47. The elder son, M., was born in 2001; the younger, T., was born in 2004. One fact must be borne in mind throughout this judgment; the evidence showed that the boys are as close to their father as to their mother. The access arrangement, identified earlier, is unsupervised. The mother takes the children to their paternal grandmother's house and collects them there. She has no ongoing contact with the father's family. I should add that both the mother and the boys have previously travelled to Spain in summer and at Christmas time with the permission of the courts.

48. M. has been diagnosed with a pervasive developmental disorder (autistic spectrum) and Attention Deficit Disorder by a Prof. F. He has been referred to a clinic for treatment for this. That treatment appears to have been quite successful. He is currently in third class in national school and is progressing well. He requires a special needs assistant. According to Mr. A.C., a consultant psychologist, he is an intelligent and caring boy, deeply attached to both his parents and his brother, T.

49. T., the younger brother, was born in 2004. His development has been normal. He is currently in junior infant's class in national school and is progressing well.

Expert Evidence
50. When seen first by Mr. A.C. in June 2010, both boys were cheerful. They were well cared for, pleasant and friendly. They related well to each other. M., the elder, stated that he wished to be a scientist and study animal mutation. T., the younger, said that he might like to be a bus driver. The boys spoke warmly of both their parents.

51. M. told Mr. A.C. that the parents were separated, and they did not like each other anymore. T. whispered to M. in the interview that he thought his Dad still liked his Mum. The boys expressed a great love for each parent. They love both parents equally and expressed no favouritism.

52. A matter of great significance is that when Mr. A.C. spoke first to the boys in June 2010, he raised the question of a *possible* move to Spain. At that point, L. wondered whether they could live in Spain for half the time, and Dublin for half the time. He said that it would be very good if his father could move to Spain as well. He proposed that perhaps one of the brothers could live with each parent. However, he went on to say he would not like this to occur. M. clearly had the capacity to consider these issues. This is important in light of what happened later, where the mother declined to give permission for me to interview the boys.

53. Mr. A.C. reported that M. is an insightful and articulate boy who engages in a range of activities with both parents. He sees himself as being a lucky boy, as he receives presents both from his mother and father. He can speak Spanish. He is intelligent, functioning in the high average range. He reads to a level two years above his age, although his spelling is less good. However, his diagnosis of Autism and A.D.D. must be a matter of continuing concern. He requires a special needs assistant at school, and will also require resource hours for his spelling difficulty.

54. T. related well to Mr. A.C. He, too, expressed much affection for both his parents and stated that he enjoyed his time with his father. He is of normal intelligence and normal reading ability.

55. There is a close and affectionate bond between the boys and both their parents. Insofar as I appear to lay an emphasis on the bond with the father, it is because it has a particular relevance in the context of this case. It is in no way to minimise the very close bond which the children have with their mother.

56. Mr. A.C. said that when he saw the boys with the father they were "thrilled and delighted to see him"; they were "all over him", although M. was a little more reserved than T. He described the interaction between each of the parents and their children as both positive and warm. The mother is described as being intelligent, insightful and caring.

57. I must now turn to the very profound impasse between the husband and wife which render the task of deciding considerably more difficult.

58. When the matter first came to court, Mr. A.C.'s view was that he could see no reason why the mother's wish to relocate to Spain should be refused. This viewpoint probably precipitated an application by counsel for the father to have another expert psychologist appointed. I do not think there was any basis for such an application.

The Mother's Proposal
59. Mr. A.C. recommended that, in the event that relocation is permitted by the Court that (i) the mother should have joint custody and primary care of the children on a day to day basis; (ii) the children should have weekend access to their father, Friday 6 p.m. to Sunday 6 p.m., twice monthly, once in Spain and once in Ireland; (iii) the children should return to Ireland once per month and the father should travel to Spain once per month for the purpose of availing of contact or access; (iv) the children's father should have contact with his sons for 30 minutes *via* skype on Wednesday and Saturday on the week that he does not have weekend access; (v)

on the week that the father has weekend access, he should have skype access for 30 minutes on the Wednesday evening.

60. Mr. A.C. observed that it was essential that the father should attend parent-teacher meetings, school plays and relevant community activities. He said that during the holidays, the children should spend one day with their father over the Christmas period, including every second Christmas Day. He suggested that the children should enjoy one week at Easter in the company of the father, and two weeks during the summer vacation. He proposed the mother make arrangements to keep the father informed as to the children's personal development in health and all other issues.

61. I accept that, all things being equal, such arrangements might well be hypothetically appropriate. But this hinges on the practicalities.

62. The Court heard evidence from a Spanish social worker from the city in question. This established that in Spain the care and educational facilities for children generally (including children with special needs) are certainly at least equal to those available here. There is free medical and health care up to the age of fourteen years. In the city where the mother comes from there are a number of bilingual schools which teach children through Spanish and English. A school has been identified where the children could be taught bilingually. It has a wide range of facilities for children with special needs including a speech therapist and counsellors.

63. There is also a family conciliation centre which assists children of separated parents. The city council dispenses financial support and assistance and provides back-up in that centre. It appears that the mother would have little difficulty in obtaining subsidised housing. The social worker testified that she was sure there would be facilities for children falling within L.'s autistic category, although she was unable to be specific on this point.

The Relationship between the Father and the Mother
64. It is an unfortunate facet of this case that the relationship between the father and the mother is almost non-existent. It is necessary that I set out the background briefly.

65. When the parties first met, the father was working as a non-formally qualified professional in the construction industry. He had a good practice. The relationship between the parties began to deteriorate in 2007. The father's practice reduced to almost nothing. He became involved in a number of disputes with third parties. He threatened litigation against a former employer and with a builder who constructed a new house for the family in the garden of the previous family home.

The Father's Conduct
66. The father's conduct has been erratic. He was verbally threatening to the mother. She obtained a protection order in the District Court on 1st October, 2007, and a safety order later that same month. The mother says the father breached the order on two occasions when the matter was referred to the gardaí. The father was arrested and charged in the District Court. He was convicted and sentenced to a term of imprisonment for breach of the orders. He appealed this decision. The appeal was pending at the time of the hearing.

67. The father feels a profound sense of grievance arising from the many legal proceedings which have taken place. On his own admission the case has been before various courts 51 times. The father placed scurrilous material on the internet concerning his perceived mistreatment by his wife. He wrongly alleged she was neglecting the children. He complained about the unfair manner in which the court system had dealt with him. He sees himself as part of a "cause". He seems not to realise the extent to which his own actions have contributed to the situation. A person who espouses a cause must remember that the provisions of the Constitution outlining rights come with duties. The rights of fathers, or mothers, identified in the Constitution are accompanied by concomitant of duties as family members, and, specifically, as parents, The things the husband said about his wife on the Internet were entirely without justification. He undertook, in this Court, to remove this material. He should never have placed it there.

68. Three years after the separation, the father remained tense and highly-strung. In Court, this tension was discernible, although contained. He did not appear to have perspective as to his situation. Mr. A.C. suggested to him that he should ask his general practitioner to refer him for counselling. The father chose not to do so.

69. The father owes substantial arrears of maintenance. He has little income. I have the impression that in many ways, he is living for his two sons, and that the entire process of this dispute has borne in on him to an inordinate degree. The father believes (entirely wrongly) that the mother has been seeking to alienate the children from him. There is no evidence of that.

The Mother's Motivation
70. The mother struck me as being an entirely sensible and caring woman, concerned as to her children. She considers that she has little future in Ireland. She is living in rented accommodation. During the course of this hearing, financial orders were made on consent between the parties which resulted in her receiving the proceeds of sale from the family property of approximately €35,000. The mother consented to the father being paid a sum of approximately €6,000 to pay off debts. Other financial claims which he made were without any basis.

71. The mother is effectively living off the proceeds of sale. She and the boys are living in a rented home. Their continued ability to do so is contingent on there being some form of income so that rent can be paid. The father sought an opportunity to see whether he could earn additional money, if not in Ireland then in England. This was unsuccessful. The mother has lost the relatively modest income which she previously enjoyed as a part-time administrator. I found that the mother's proposal to return to Spain was not motivated by a desire to cut off contact between the boys and their father; the situation is more complex than that. Indeed, the mother herself fairly accepted that, from the point of view of the boys, the benefits of the proposal to relocate are "arguable".

72. I turn now to a consideration in more detail of certain of the factors identified earlier.

The *M. v. M.* Criterion of 'Stability'
73. The *present* situation provides a considerable degree of stability in the lifestyle of the boys. The custody and access arrangements which previously were a source of great friction appear now to be relatively secure. But the difficulty is that the current position is entirely dependent on the mother living off her capital, the children's allowance and lone parent's allowance. Can this continue into the medium term?

The Effect of Acceding to or Rejecting the Proposal
74. The professional advice tendered by Mr. A.C. favours relocation to Spain. There is, however, a particular problem here. When the psychologist first testified, the parents had not spoken to each other for a period of some three years. His evidence was that a *joint* parenting plan would be essential for any relocation move. In order to allow for a plan to be formulated, I adjourned the case.

Unfortunately, the parents remained at loggerheads. The father strongly believed that the removal of the children to Spain would have the effect of alienating them from him. He thought he would never see the children again. This is not logical in that the children have been in Spain before on holidays and have returned to Ireland.

Continuing Contact with the Father if Relocation is Granted
75. But if relocation were granted, the question of access or contact raises real practical difficulties. It seems to me that there are gaps in the evidence. How would Mr. A.C.'s proposals actually be implemented? Contact between *both* parents is fundamental for the children: it is their right even in the event of a relocation.

76. The evidence disclosed that there are daily flights from Madrid to Ireland and *vice versa*. There are commuter flights from the mother's native city to Madrid. However, there was no evidence as to the time these commuter flights departed in the morning, or whether they connected satisfactorily to any onward Dublin flights.

77. There are flights from a different airport two hours distance from the mother's native city from a 'Ryanair' airport. Unfortunately, Ryanair does not permit unaccompanied minors to fly.

78. To give effect to the proposed access arrangements, there are two options, neither without difficulty. The first option would be that the children would travel to an airport two hours away from the mother's native city to the 'Ryanair' airport. There was no evidence as to who would accompany the children, or how such travel would be managed.

79. Alternatively, the children could commute through Madrid; but yet again, this option raises potential problems. The Court has not been given details as to whether, for example, it would be necessary for the children to actually begin travelling from Spain on Thursday evening in order to be available to fly from Madrid to Dublin on a Friday. Similar questions arise to their ability to be back in Spain in order to go to school on Monday mornings. Air travel and connecting flights can be stressful for adults; we are dealing here with relatively young boys, aged twelve and six years. The aspiration of relocation must have regard to its logistics.

Financial Implications
80. A further aspect is cost. While I am certain that the mother's family would assist in the children's travel arrangements, there is no evidence as to how the father would be able to travel to Spain on a regular basis. He is in receipt of little income, save social welfare. The effect of making the order sought would be to create a situation where, at a minimum, he would be presented with very significant difficulties in paying for travel and lodgings, and availing of the access arrangements in the Spanish city.

The Children's Views
81. But there are more profound problems. These come back to the welfare *rights* of the children. The children's own views should be highly relevant. Mr. A.C. stated that there would be no difficulty in the children expressing their views. The father consented to my meeting the boys, but the mother was not disposed to do so. I am sure that her motivation was that she did not wish to put the boys in the invidious situation where they might have to choose between one parent and the other. However, there was clear evidence that M. would be in a position to assist the Court and perhaps T. also. In my view, one of the rights of the children in this case, having regard to their age and their maturity, is that their voices should be heard in a real way. I do not think either parent can exercise a veto on this right. Faced with this situation, and absent any strong countervailing factor, a court should adopt the precautionary principle of doing 'least harm'. I did not feel it appropriate to force the issue. I should reemphasize, however, that were welfare considerations to require it, a judge could not and must not be precluded from interviewing children when they are of an appropriate age. Nor does such a situation prevent a judge from drawing reasonable inferences from the evidence.

Schooling and Healthcare
82. I turn next to M.'s educational needs. Prof. F.'s report describes the boy's condition as being very complicated. In 2008, he was described as being a "loner" in school. He disliked big crowds and was not confident. He had been diagnosed as suffering from pervasive developmental disorder, a formal diagnosis which involves an inability to engage with others, especially children. I infer from Mr. A.C.'s reports that these complaints must have improved somewhat, but this must still be a continuing concern. There would need to be a very clear risk assessment as to how M.'s symptoms could be addressed in the event of a relocation. There has been no evidence as to how his educational needs would be copper-fastened.

An Overall Appraisal
83. The Court has sought to place in the balance all of the relevant factors. These include the strength of the relationship with the father. The evidence as to the ability of the other parent to continue contact with the child and the financial implications of a relocation have been explored. The absence of evidence in relation to the views of the elder child has been dealt with. There is insufficient evidence as to the availability of specialist medical expertise to address M.'s special needs.

84. The proposals for relocation to Spain are, in many ways, reasonable. I think they are motivated by the mother's desire to start a new life with her sons in Spain in circumstances where she would have support from other family members, and a far higher probability of obtaining employment to support her children. I do not think the proposal is motivated by any desire to diminish the relationship between the boys and their father. Regrettably, however, I would be deeply apprehensive that as matters stand this would be the *effect* of such a proposal. I am simply not convinced that the relationship between the boys and their father can be protected, in their interest.

Effect of Proposal
85. I have no doubt that the refusal of this application will have a significant effect on the mother. I am not convinced, however, that at present, it will necessarily impact on the children. I must balance that with the important consideration of the effect on the boys of an effective and probable reduction of contact with their father, and also the effect of their removal from a current setup where, remarkably, they appear happy and satisfied despite the many problems which they face. Therefore, I am apprehensive as to the effect of a removal on the children's contact with their father, although, undoubtedly, there would be much to be said in favour of relocation from the material point of view.

No Joint Parenting Plan
86. Mr. A.C. saw a joint parenting plan as a *sine qua non* to relocation. Insofar as the father may be responsible for an impasse, I emphasise that neither parent may impose an ongoing veto either on a court's duty to see where the children's welfare lies, or may lie in the future. No party may prevent a relocation proposal by action, or inaction, or a policy of non-cooperation.

87. Turning to the mother's situation, I recognise there are strong social and economic arguments which favour a return to Spain. I bear in mind her continuing apprehensions with regard to her husband, based on his previous conduct. She has a strong family network in Spain, and at least a possibility of employment. Her present financial situation is very insecure. There is no evidence as to

whether she has sought employment here. The medium term prospects of her obtaining work, or any maintenance from her husband, are doubtful. Her ability to continue paying rent on the home is open to question. One might well ask what options are open to her. There seems little chance of the position being alleviated by the husband obtaining work in light of the fact that he already owes considerable arrears of maintenance.

88. The present application is unsatisfactory in that no adequate expression has been given to the views of the children. In the event of there being any future application (and this is not inviting one) it will be necessary to weigh *all* the relevant factors in the balance. But the fulcrum of that balance will always be the welfare of the children. As I have indicated, I do not think the precise details necessary in order to give effect to an order of this type have been thought through. Importantly, also, I note that no proposals for mirror orders have been put in place in Spain, nor is there evidence as to whether such could be obtained, although doubtless they could.

Decision

89. The fundamental constitutional and legal principle applicable here is the children's right to have decisions taken as to their welfare with that welfare being the prime concern. The same principle is embodied in the case law which has been cited. Having weighed the factors, I do not think that relocation should take place now. There are many strong reasons which might favour such a course; but to my mind, the rights and welfare of the children must and will determine the outcome. They enjoy close relations with *both* parents, not one. Their material circumstances are, for the moment, tolerable. I think the consequence of making the order sought runs a substantial risk of very substantially reducing the contact which the boys have with one parent, in this case, the father. The risk is that they would become *de facto* a one-parent family, where now, they have two parents in their lives. In my mind, this outweighs the many other apparent advantages of relocation. Even the misconduct of one party towards the other must be weighed against the children's welfare principle.

90. I should not leave this matter without making some further observations. First, the decision should not be misunderstood as a "vindication" of the position of one parent over the other. Still less should it be understood as a victory for a "cause" or the rights of one group of parents over another. It is simply the application of legal principles in a finely balanced case where the primary consideration was welfare. The relationship of the children with *both* parents is a very strong consideration in this case; it may not be in many others. Second, one could readily envisage that the outcome of this case might be portrayed as a reward for misconduct, obduracy and even irrational behaviour. The result, must be seen, however, in the broader context of the balancing of all the rights engaged in this sad family dispute: the rights (and wrongs) of the parents' dispute are not the only issues in what must be seen in the broader context of the family, parents; and children. It is these "individual" rights which must be assessed (*The State (Bouzagou)* as stated above). Third, decisions of this type are never final. They are always subject to changes in circumstances, especially when they impact upon children.

91. In *B. v. B.* [1975] I.R. 54, Walsh J. observed at p. 62 of the report:-

> "I agree with the Chief Justice when he says that the provisions of s. 11 [of the Guardianship of Infants Act 1964] also underline that any order as to the custody of an infant, or any other order it may make affecting the welfare of the infant under that section, is necessarily only interlocutory in character because circumstances may change from time to time. The change of circumstances may be due to the current position of the parent or parents or the growing up of the child and the changes with the passage of time may bring about, not merely in the relationship of the parents to one another but in their relationship to the child…"

In a case such as this, a court will always have a continuing, supervisory role. I would not wish it to be inferred that this Court is inviting any further application. The passage which has been quoted merely identifies the fundamental truth which is in the nature of all these applications.

92. For the reasons which have been identified in this judgment, however, this application must be declined.