THE HIGH COURT

FAMILY LAW

CIRCUIT COURT APPEAL

Record No. 2015/69CAF

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY REFORM ACT, 1989 AND IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

M. G.

APPLICANT

AND

F. R.

RESPONDENT

JUDGMENT of Ms. Justice Bronagh O'Hanlon dated the 13th day of November, 2015

1. This case came before the High Court on Friday 23rd October, 2015 by Notice of Motion dated 9th October, 2015 seeking to set aside the order of the Circuit Court of her honour Judge McDonnell dated 26th day of August, 2015, by which order the Circuit Court refused the application of the respondent to dispense with the consent of the applicant to the dependent child attending pre-school at NL. A notice of appeal in this case is dated 3rd September, 2015 and a notice of motion seeks that the respondent's appeal be allowed from the order of 26th August, 2015 and the matter struck out or, an order setting aside the decision and order of the aforesaid date as well as such further and other relief.

2. This Court has considered the affidavit evidence in this case in detail and in addition has heard brief oral evidence from the parties. The respondent/appellant in his evidence set out, as he had done on affidavit, that he was very concerned given his age, (fifty-five years) and that he would be retired by the time his daughter A, born on 15th February, 2012, reached second level education. He also pointed out that the applicant/respondent would be fifty-five years of age at that point.

3. His evidence was to the effect that neither party could afford private education fees and that both parties had been agreed on that point, and that an application on foot of an attendance at an information meeting at that school had been signed by the respondent/appellant in relation to her daughter applying for enrolment in the said school on 12th June, 2012. The respondent/appellant's evidence was to the fact that according to his plan if the child were allowed to attend the pre-school for Scoil L., that would give her automatic entry into an all-Irish school Scoil I. for second level which would otherwise be impossible to achieve. He stressed the fact that this was non-fee paying education at its best. The school league tables were submitted as exhibited. They show that Scoil L. came third in the entire country but more than that, the respondent/appellant felt that, on his plan, there would be continuity and surety.

4. In addition the respondent/appellant stressed an agreement between the parties as recently as 10th December, 2014 in terms of settlement, giving the parties joint custody of the infant A with primary care set out to the applicant/respondent and access including increasing access terms set out to be enjoyed by the infant A with the respondent/appellant.

5. The respondent/appellant stressed that the agreement between the parties was dated as recently as 10th December, 2014 and that the applicant/respondent only told him the weekend before 12th August, 2015, that she was not in agreement with the infant attending his proposal for pre-school. It is alleged by the applicant/respondent against him that he was controlling and bullying her and she complained about him delivering a letter to her late in the evening in relation to the issue between them which she said caused her upset and anxiety.

6. The respondent/appellant gave evidence and stressed that he had been speaking in Irish to the child for most of her life in order to prepare her so that she would be deemed to come from an Irish speaking family and thereby gain entry to the all-Irish system which he proposed.

7. The respondent/appellant gave evidence that, while the applicant/respondent had chosen a school just one minute from her house, his evidence was that for the child to get into a non-fee paying school in the area, the child would have to be in the parish for a particular primary school. He is offering to collect the child to obviate any anxiety or stress for the applicant/respondent who has a heart condition and for whom stress is deemed very dangerous in terms of her health.

8. The applicant/respondent contends that there was never an agreement between the parties on the issue and alternatively, that if there was she has changed her mind. She contends that she has contacts and she feels that she will be able to get the child into a particular non-fee paying secondary school even though she acknowledges they are living in B and not in D which is the feeder area for that school.

9. She denies that the respondent/appellant speaks to the child in Irish all the time and she contends that he is bullying and controlling and was very abusive physically, mentally and emotionally towards her.

10. The dispute between the parties which the Court must now resolve is not one where the Court can decide that any one school is a better school compared to the other second school proposed. That is not the role of the Court nor would it be appropriate of the Court to do so. What strikes this Court from the evidence, both on affidavit and the oral evidence of the parties is that, even though

the child in this case is only three and half years old, there is an exceptionally poor relationship between the parties in terms of their agreement to jointly parent this child. The parents under the Constitution of our country have imprescriptable and inalienable rights in terms of the education of a child. What is very striking about this case is that the parties have signed terms which they deem to be in full and final settlement, covering joint custody and maintenance provisions and other matters resolving any financial ties they may have had. It is clear from para. 9 of the agreement between them signed as recently as 10th December, 2014, that overnight access shall commence on 24th January, 2015 and shall be every fourth weekend thereafter and then every second weekend commencing on 11th April, 2015 and every second weekend thereafter. Therefore what was envisaged by the parties was a graduating increase in access.

11. Paragraph 12 provides that the terms were not to be construed as acknowledging the validity of the marriage between the parties and that this clause shall not affect the legally binding nature of the agreement and that the agreement is not an approbation of the marriage of Ms. G. In that regard, this Court notes that the respondent/appellant issued nullity proceedings in October, 2015. When the parties entered into these terms of settlement on 10th December, 2014, the child, the subject matter of this application, was two years and ten months old at that time. This coupled with the application for entry into Scoil L. dated 12th June, 2012 when the child was only four months old, seems to this Court to indicate a clear intention of the parties to make what one would consider to be a very early application to Scoil L., signed by the respondent/appellant. On 7th August, 2015 the Naíonra/pre-school concerned offered a place to the infant for September, 2015. The respondent/appellant says on affidavit that there was no reasonable explanation for the applicant/respondent's change of mind. In para. G of the agreement between the parties, the parties agreed a term as follows:

> "the said arrangement shall be reviewed by the parties in one years time and in the event of a failure to agree matters the issue of access should be referred to mediation. The access shall continue during mediation."

When this Court suggested to the applicant/respondent that she might undertake counselling with the respondent/appellant so that they could improve the quality of their co-parenting of this child, she made it clear that she would not be willing to undergo counselling with him and did not see it as a possibility. It was put to her under cross-examination that while she contended that the proceedings brought by the respondent/appellant were stressful, she herself had instituted nullity proceedings and she had not found that stressful for her.

12. Correspondence dated 14th August, 2015 sent by her solicitor to the respondent/appellant's solicitor at para. p. 1:

> "turning to the substance of the letter, the reality quite simply as your client well knows, is that there has never been an agreement between the parties that 'A' would attend a gaelscoil"

and in the second paragraph of the second page of that letter sets out that it is the applicant/respondent's wish that A remain in the Montessori school part of the crèche she is in until commencing national school in September, 2016 and that it is her mother's wish that A attend either of the National Schools that she has proposed.

13. The argument is made that this will unsettle a child who, when she moved crèche in January 2014, was unsettled for a period of time.

14. With reference to *BB v. AA* [2013] IEHC 394 at p. 780 in relation to a dispute between parents about schooling where the dispute centred on a private school as opposed to a non private school. In that case it was held that Article 42.1 of the Constitution envisaged that both parents would be joint decision makers in respect of their children. In making its decision the court found itself endeavouring to supply the place of the parents but doing so in a fashion which was proportionate, which intruded as little as possible into the family decision making, and which was guided by the objective of advancing the child's welfare. The court also heard that the child's educational welfare would be best served by attending school B (which happened in this case to be the private school sought by one parent) and the Judge's reasoning was that he was a bright child who would be likely to thrive in the more academic environment of school B.

15. The court in that case took into account the view of the child himself that he was anxious to attend that school and they were views which carried considerable weight even if his views could not in the end be in any sense dispositive. The court in that case found that it was implicit in the wording of the Circuit Court order which referred to enrolment at school A that the order providing for the child's education at school A was not final and that matters could be revisited as occasion might require. The court had no jurisdiction to make a final and indefinite order in respect of a child's education. In order to reflect the express nature of the right secured by Article 42 any such order must accordingly allow for a change in circumstances *The State (Doyle) v. Minister for Education* [1989] ILRM 277 applied. In that 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 committing 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. The Supreme Court held that s. 10 of the Act of 1941 was plainly unconstitutional. As Maguire C.J. explained at p. 280, Article 42

> "…appears to us expressly to secure two parents the right to choose the nature of the 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 made is binding for the period of a child's education would be to deny such right".

Hogan J. therefore found that the court had no jurisdiction to make a final and indefinite order in respect of that child's education in the same manner as happened in *State (Doyle) v. the Minister for Education* [1989] ILRM 277. He felt that in order to reflect the express nature of the right secured in 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 parent. In that case he rejected the contention of the mother that the court was bound by her conscientious choice of a particular school simply by virtue of the fact that the court was placed in a position of resolving the dispute where there was an unbridgeable conflict of opinion between conscientious parents. In that case the judge found himself endeavouring to supply the place of the parents but felt that he was doing so in a fashion which was proportionate, which intruded as little as possible into the family decision making. He felt that this complied with the phrase in the Constitution "by appropriate means" and which was guided by the objective of advancing the child's welfare (but always "with due regard for the natural and imprescriptable rights of the child").

16. In the instant case before this Court the Court considers that it is in the best interests of this child that she be given an opportunity to attend the Naíonra suggested. This is with a view to gaining entrance to Scoil L. but it has to be subject to conditions which ease the situation in terms of practical arrangements so that the mother does not become stressed by having to rush in the mornings. The father of this child has indicated that he would take care of the morning arrangements and put arrangements in place

to have the child cared for while she awaits her mother's return from work in the early afternoon. This would become less of a problem when the child is in first class in primary school when the academic day will be longer in any event. It seems to this Court that the appropriate finding gives due regard to the welfare of this child as being the paramount consideration in this case. This Court considers therefore that the appeal should be allowed in this case and the court makes an order in terms of para. 1 of the notice of motion setting aside the judgment of the learned Circuit Court judge of 26th of August 2015 and a further order setting aside the said decision and order of 26th of August 2015 and this court grants an order directing that the infant A be placed in Naíonra L and that if she is offered a place in Scoil L primary school, dispensing the consent of the applicant/respondent to her taking up the said place.

17. This Court takes the view that there is good logic to the respondent/appellant's plan in that he has a comprehensive plan for free, non-fee paying education for his child which he views important in the context of his advancing years and of his wife's advancing years.

18. The Court considers the applicant/respondent not to have worked out what she wants yet either in terms of primary or indeed of second level education. The father has indicated to the Court that, in terms of second level school the mother believes that she can get the child into a into a non fee paying school by virtue of her contacts. She points to the fact that her son of a previous marriage got over 600 points and has begun studying medicine in TCD. No doubt from her evidence that she is a committed mother and is very interested in education. However, it is the view of this court that it is in the best interest and welfare of this child that the court accedes to her father's desire to put in place a plan which has short term, medium term and potentially long term benefits in education for this child. It is not a value judgement of one school over the other. It is a recognition that both parties accept that whatever education they offer their child based on their respective incomes, it is most likely to be non fee paying. This Court takes the view that because of the applicant/respondent's ill health it is all the more important that the father in this case have a significant parenting role even though the mother remains the primary carer for this child. He does have joint custody rights, he is attempting here to exercise them. I do not accept for one minute that this man has been anything other than polite, reasonable, logical and measured in his evidence to this court. Because of the poor health of the applicant/respondent, he may be well called upon in the future to carry out an even greater role as this child grows older.

19. It is imperative therefore that he be allowed take on the extra responsibility for getting the child to school and for ensuring that proper facilities are put in place to have her minded between the time when she finishes the Naíonra and/or school later on and her mother being able to collect her at 2.30 p.m. each afternoon four days a week when she works.