

## THE HIGH COURT

## CIRCUIT COURT APPEAL

[RECORD NO. 2015/80 CAF]

EASTERN CIRCUIT COURT, COUNTY OF WICKLOW

[RECORD NO. 145/15FL]

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

AND

IN THE MATTER OF THE FAMILY LAW, 1995

BETWEEN

C. N.

APPLICANT

AND

Q. G.

RESPONDENT

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

1. This judgment relates to the hearing of an appeal from the Circuit Court in relation to access to the child E of the marriage between the parties, born on 22nd January 2014 (hereinafter referred to as the appealed order).

2. Without setting out the detail of the appealed order, the main feature thereof was a direction that the respondent father would have overnight access for the child for one night at approximately monthly intervals in the respondent's house, which is available to the respondent, not too far from where the applicant lives with the child E. This overnight access has not taken place as a stay was granted on same, subject to agreed day access. The applicant mother appealed the order on the grounds that overnight access is not feasible, having regard to the need to continue breastfeeding the child until at least November 2016, and the consequent inconvenience and distress to mother and child through cessation of breastfeeding and the separation and loss of attachment would be seriously detrimental to the interests of the child E.

**Background of the Case**

3. Having been married on 30th July, 2010, the parties lived in the south of Ireland in the family home and, (on the respondent husband's account) the applicant mother departed the family home to a new accommodation in the east of Ireland on the 7th June, 2014, where she has remained living with the child E. The parties now live more than 200km apart, and this presents its own problems. However mere distance apart is not the principal problem causing difficulties and differences between the parties. The principal problem is the view taken by mother that she must continue to breastfeed the child E until November, 2016, and that to facilitate overnight access would involve disruption of the obvious attachment which the child E has to mother, especially when being settled down to sleep at night, and that personal arrangements to ensure a sufficient quantity of expressed milk to cater for an overnight or weekend stay would be oppressive to, if not almost impossible for her. It is further argued to a lesser extent that child E would seriously miss and be harmed by the loss of the dietary benefit of breast milk for the foreseeable future. In seeking a stay on the appealed order the mother averred that she had no objection to overnight access, but said that it was not feasible once she was breastfeeding, and that it should only occur when child E was weaned. She also had secondary concerns with un-vetted lodgers staying in the family home while the child E was having overnight access with father. (This latter problem has been resolved since by the absence of lodgers).

**The Hearing**

4. The applicant mother gave evidence upon notice to cross examiner on her affidavit. From the outset, her counsel sought to introduce the report of a lactation consultant as an expert. Counsel for the respondent husband objected from the outset, and stated that same was not admitted in evidence in the Circuit Court as it did not have the status or quality required of an expert report. I allowed the production by the applicant mother of the report for the reasons as follows:

(1) I accept and have long accepted the general proposition that breastfeeding is a preferable means of nourishing newborn infants both from the point of view of provision of initial immune system building from the initial colostrum type milk, and the continued balanced nutritional value, and the psychological and emotional value for mother and child in terms of attachment. I can also take judicial notice of the fact that this view is held and promoted by hospitals and health authorities throughout the country.

(2) In an ideal world, the benefit for both mother and child could continue until the child self weans up to the age of roughly 3½ to 4 years old.

(3) To hear the appeal without reading the report would deny the court the opportunity of understanding the applicant mothers point of view on the issue and would possibly jeopardise future mediation towards any solution that might be offered during the course of discussion of the case, the hearing or thereafter.

5. I read the said report of the lactation consultant and I agree with the submissions of the Counsel for the respondent husband that it lacks the independence and objectivity such as would be required of an expert report to be used in court. It sets out at some length the views (with which I agree *ceteris paribus*), but in a propagandising fashion, without significantly (or at all) inviting any countervailing view or balancing factors that might come into consideration when making decisions on breastfeeding. However, reading the report assisted me significantly in understanding the applicant mother's attitude from the outset, and the influences which have come to bear on her behaviour to date.

6. The applicant mother insisted (in evidence) that she wished to continue breastfeeding until November 2016 and that overnight/weekend access was greatly inconvenient, if not impossible, by reason of the need to have a sufficient quantity of

expressed milk. She agreed that the child had at an early stage of life taken formula milk as a supplement by reason of blood sugar considerations, and that the child is now a voracious eater of solid, non-milk foods. She expressed deep concern about the respondent father's ability to settle the child E if weaned "all of a sudden" or sent for overnight access without a supply of mothers milk and without access to mother. She stated that if ordered by the court to do so, she would deliver the child E for access overnight, but that she found it very difficult to envisage complying with the type of order made in the Circuit Court, which was an order without any transitional provisions or safety mechanisms. She gave evidence of the extent to which she had endeavoured to assist with access by providing expressed breast milk even at the cost of regularly disrupted sleep to accumulate the supply for longer access periods. She also said that she had cooperated with the access even by travelling the long journey to the south, and that if she were to do this by train or meet the respondent father halfway at a train stop her train fare would have to be paid by the respondent father. She also complained of the inflexibility of "Skype" calls. I have dealt with this by adding "WhatsApp" as an option.

7. In cross-examination it was suggested to mother that she was prolonging breastfeeding to prevent proper access between child and father; she denied this. It was further suggested to her that her dictation to father as to what foods he should give child E while on access with him, by preparing all food to be consumed by child while on access with father and placing it in travel bag, indicated that she was undermining the authority and influence of the father with child E and thereby diminishing his quality of access. Mother denied this also and agreed that if ordered to do so she would attend in the south near where child E was having her first overnight access and possibly a second occasion thereafter, at the respondent father's expense, to be close at hand, lest any unexpected problems arose with the father getting child E to sleep in the new and changed circumstances where the comfort of breast milk would aid settling child E to sleep at night.

8. The respondent father gave evidence in which he expressed his disappointment that he was not afforded access and could have a normal relationship with child E by providing for her needs and security during a full 24-hour period. He stated that he felt undermined when mother interfered too much, such as dictating the type of foods which child E should eat while on access and packing it up in a travel bag prior to departing for access with father. He stated that he would cover any additional expense for mother travelling to the south, and that he would have his mother and other relatives close at hand to be of support in the initial periods of overnight access, to aid with any difficulties or challenges in settling child E. He confirmed to the court that this process could be very challenging, and that he might have to endure long periods of sleeplessness, worry and anxiety during the transition period. He stated that he was prepared for the challenge and that he would endeavour to avail of any support available, including that of the mother, to reduce the problems and help to achieve his target of having a fulfilled relationship with child E, on an ongoing basis. He stated that it had been possible to agree the detail of access (without overnights) leading up to the hearing. He had cooperated with the success of same by travelling the long journey east and renting overnight accommodation to facilitate his presence for access close to the applicant mother's home.

### **Consideration of the Case**

9. The court is directed by s. 45 of the Children and Family Law Relationships Act, 2015, to decide the issues relating to child E having regard to her best interests. The court is further directed by statute in s. 63 of the Guardianship of Infants Act 1964 has substituted by s. 31 of the Children and Family Law Relationships Act, 2015, to have regard to all the factors or circumstances that it regards as relevant to the child and her family. Section 31(2) of the Act of 2015 provides a guide to the factors and circumstances referred to in s. 31(1) of same, and I propose in this judgment to examine such factors set out in s. 31(2) paras. (a) to (k) as follows:

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

10. I am of the view that a functional interpretation of "meaningful relationship" should be taken to further define the literal (and possibly circular) interpretation, by taking it to involve the process of optimisation of relationships within the parameters of the factors and circumstances to which the court should have regard pursuant to s. 31 above. A very helpful and positive aspect of this case is that both parents accept that the child E should have a meaningful relationship with them both. How the trade-off between the benefits of continued breastfeeding must be made against the admitted benefit of establishment of overnight access for child E with father so as to optimise the meaningful relationship is something which both parents have strong views on, and the father and his legal team have become somewhat suspicious that mother is using her resistance to a change in breastfeeding routine to frustrate overnight access, for the purpose of eliminating child E's contact with father, a suggestion strongly denied by mother. Without necessarily having to resolve this particular conflict there is no gainsaying that as child E approaches three years of age it is high time that the obvious benefits of continued breastfeeding would have to give way to some extent, (at least at weekends) to the imperative of affording overnight access for child E to father, with a view of strengthening the bond and preventing child E from regarding the father as a distant figure or even becoming alienated from him in psychological terms. This is especially foreseeable, due to continued periods of tension between mother and father arising from the fact that their judicial separation proceedings have yet to be resolved, and also the great distance mother has placed between father and child. I accept that achieving the implementation of this trade-off in favour of periodical overnight access of child E with father will be challenging, worrying and painful, but of necessity it must be carried out. I agree with the approach of Judge Griffin in the Circuit Court in relation to this decision. Had I heard the case at first instance, I would have made the same decision, but perhaps have allowed for greater facilities of transition as I propose to do in the order of this appeal. I am fortified in this view by the recent consideration in an obiter in the judgment of Hogan J. in the case *M.M v. G.M* [2015] IECA 29 of the benefits of overnight access in establishing a more meaningful relationship between child and parent and to avoid distancing such relationships through lack of access. I accept that in the early stages of breastfeeding overnight access might be difficult, but certainly by the stage of six months, the transition should be ready to take place. This view is consistent with the general average standard amongst nursing mothers to start thinking about weaning the child, having regard to the pressure to return to work and the availability of paid or unpaid maternity leave

*"(b) The views of the child concerned that ascertainable (whether in accordance with s. 32 were otherwise);"*

11. Child E, although talking and a voracious eater of ordinary food is much too young and immature to have her voice heard in relation to the serious and difficult decisions to be made in this appeal.

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

12. I have taken these factors into consideration in the foregoing discussion and acknowledge that at this stage at the very least there must be a balance between the benefit of continued breastfeeding, as child E approaches three years of age, and the psychological and emotional benefit of having close contact with father, facilitated by overnight access with him.

*"(d) The history of the child's upbringing and care, including the nature of the relationship with between child and each of his or her*

parents and other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships”

13. The history of the upbringing of child E points to the planned commencement of overnight access for same with father (even on mother’s admission, at the latest November 2016), but it points even more urgently to an earlier commencement of such access as directed by the order made in this appeal. The involvement of the fathers mother, by providing support to him, and also mother’s sister and family, are very valuable resources, not just emotionally, but also economically, by reducing the resource challenges in this case, which are made particularly testing by reason of the physical separation of the parties.

*“(e) The child’s religious, spiritual, cultural and linguistic upbringing and needs;”*

14. No change is envisaged here, except that, indirectly, the improvement in the social capital of the child by the implementation of overnight access will be helped by this measure.

*“(g) The child’s age and any special characteristics”*

15. At this stage, the child on approaching three years of age has had the benefit of emotional attachment to mother aided by commitment to breastfeeding. There is now need to ensure the development of emotional attachment with father and to optimise a meaningful relationship with him.

*“(h) Any harm which the child has suffered or is at risk of suffering including harm a result of household violence, and the protection of the child’s safety and psychological well-being”*

16. There is no risk of child E falling victim to household violence, and the parties are conscious of their duties to protect child E’s safety. The protection of the child E’s psychological well-being is now best served by establishing overnight access with father.

*“(i) Where applicable, proposals made for the child’s custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing such proposals and cooperating with each other in relation to them”*

17. In making the order herein this Court affirms the thrust and principle of the appealed order directing immediate establishment of over night access for the child with father. However, the court has been assiduous in adding additional provisions to ensure that the obvious willingness and ability of each of the parties to facilitate and encourage a close and continuing relationship between the child and father, and to maintain and foster relationships between child E and her other relatives, something they generously exhibited to this court on the appeal (subject to the strongly held views on certain issues) is for the benefit of the child, and provides a helpful guide to the court of the particular circumstances of this case..

*“(k) The capacity of each person in respect of whom an application is made under the act:*

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

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

*(iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates”.*

18. Clearly, in relation s. 31(2)(k)(i) of the Children and Family Relationship Act, 2015, the parties hereto have various degrees of trepidation about the capacity of father to meet the challenge of early overnight access. Equally, a parallel challenge is posed to mother, testing her courage, patience, and forbearance in the transitional phases. The order of the court provides an imperative and encouragement to both parties to face up to these challenges in the best interests of the child.

19. I am satisfied that when the order of this court is made the parties will communicate and cooperate on issues relating to the child as required by s. 3(2)(k)(ii) of the Children and Family Relationship Act, 2015, as is evidenced by their ability to engage in mediation to resolve the difficulty posed, and also to agree temporary access arrangements when the timescale of the appeal order has expired.

20. I am also satisfied that both parents have the capacity to exercise the relevant powers, responsibilities and entitlements to which the application relates, pursuant to s. 31(2)(k)(iii) of the Act of 2015.

### **Other Issues**

21. Issues arising under s. 31(2)(h) of the Children and Family Relationship Act, 2015, from alleged household violence happily are not relevant to this case.

### **Conclusion**

22. The court affirms the order of the Circuit Court in principle, but in view of the expiration of the timescale involved the court varies same by making a new order as follows:

(1) overnight access to the respondent father from the first Saturday in August (not agreed to be a holiday period for applicant mother) in August 2016 at 10:15am after a swimming lesson to Sunday thereafter at 4:00pm and each fourth Saturday night thereafter;

(2) the first two overnight accesses shall take place in the family home engage in the south and the respondent father, should pay the expenses of applicant mother to stay overnight in terms of transport and accommodation to facilitate being close by in case of necessity for consultation or emergencies should the respondent father fail to settle the child, even with the assistance of his mother.

(3) daytime access other than overnight access as set out above shall be as hitherto agreed (*mutatis mutandis*);

(4) arrangements for Skype calls shall be limited to every second day and in lieu, the parties shall set up a closed “WhatsApp” group between the parties, two grandmothers and child, suitably encrypting the process and thereby limiting entrants from the outside and limiting offerings from each participant to an optional photograph and one line of text appropriate to the photograph with the party with whom child is having access facilitating the opening of such communications to the child on the days when Skype is not workable. This will facilitate flexibility with the child’s

timetable as communications via "WhatsApp" are not required to be simultaneous in the same way as is required for Skype;

(5) the parties shall constructively consult each other about the diet of the child so that upsets are avoided, provided however that the applicant mother does not prepare food in advance of departure for access and, allows father choose and prepare food during access;

(6) the parties shall prepare a schedule of access on the basis of the foregoing order providing for holidays and Christmas access up to the overnight access in February 2017, when access arrangements should be reviewed by the parties by agreement or mediation or application to the Circuit Court;

(7) the matter is adjourned for final perfection of the order, hearing and approval of access schedule as directed in para. (6) above on Friday 29th July;

(8) all further applications should be made to the Circuit Court, provided however, that the Circuit Court in dealing with the judicial separation is at liberty to make such adjustments to this order as are appropriate, having regard to the provision which may be made by the Circuit Court in the pending judicial separation proceedings.