Neutral Citation [2012] IEHC 619

THE HIGH COURT

FAMILY LAW

[2011 No. 7 CAF]

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

AND IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

T.K.

APPLICANT

AND

F.R.

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 24th day of May, 2012.

1. The applicant, who shall hereinafter be referred to as the father, and the respondent, who shall hereinafter be referred to as the mother, were married to each other on the 9th August, 2001. They had one child who was born on the 16th March, 2005, and they were separated in this jurisdiction by order of the Circuit Court dated the 2nd February, 2011.

2. This appeal has been brought by the mother and primarily relates to where the child shall attend school and with which parent she will reside while attending that same school in the context of what may ordinarily be described as a general co-parenting regime.

3. I shall deal with the technical description of the order's appeal later in this judgment.

Factual Background

4. When the mother and father were married in 2001, the father was commencing his professional career and the mother was completing her studies and residing in, what shall be referred to as, the first city. From the outset the parties had to take care and engage in considerable planning and discussion in relation to how the professional development and earning capacity of the two parties could be facilitated. The mother became pregnant in 2004 and from the date of the birth of the child, on the 16th March, 2005, the mother took care of the child; however, a central aspect of this case is that the father became progressively more involved with her care. As the parties accumulated qualifications and progressed their respective careers they moved to the second city from which the father operated from his centre of business. The mother obtained some employment therein but it was of a temporary nature and the nature of her chosen profession indicated that she should go abroad to broaden her experience and qualifications to employment in England.

5. The mother accepted employment in England on a one year contract on the 4th August, 2008. Her stay in England was marked at the end thereof by proceedings by the father to have the child returned by order of the court in the jurisdiction of England and Wales under the Hague Convention. The summary chronology of events prepared for the brief relating to the Hague proceedings illustrates, in shorthand form, an outline of the events which followed which form the factual basis from which the disputes in this appeal emerge:-

04.04.08	The mother accepts one year contract in England.
21.09.08	The child moves (the father claims temporarily) to England with the mother.
01.11.08 – 09.11.08	The child returns to Ireland for a visit.
07.12.08 – 16.01.09	The child returns to Ireland for a visit.
18.02.09	The mother emails to confirm the child's return to June 2009 (the father claims).
03.09	(The father claims) express agreement that the child will return to Ireland on 21st June, 2009.
24.04.09 – 26.04.09	The child returns to Ireland for a visit.
06.05.09 – 13.05.09	The child returns to Ireland for a visit.
04.06.09 – 07.06.09	The child returns to Ireland for a visit.
12.06.09	The mother issues Private Law Children Act application to the English court for residence and contact in the English County Court.

17.06.09	The mother telephoned the father to say that the marriage was over, that the child will not return to Ireland and, for the time being, that the child will stay with her in England.
18.06.09	The father telephoned the mother to confirm that he does not agree to the child remaining in England and informed the mother that he would institute Hague Convention proceedings.
19.06.09	A letter was sent by the mother's English solicitors serving Children Act papers on the father (in England).
19.06.09	The father applies to Irish Central Authority for the child's return.
25.06.09	London Central Authority allocate to panel solicitor.
26.06.09	Hague Convention *ex-parte* order.

6. The child was returned to Ireland on a consent order made before the court in the jurisdiction of England and Wales. While the husband has always referred to the failure of the mother to return the child as an abduction, she has claimed that her consent to the order was without any admission of abduction. The father has relied on the statements of the judge in the jurisdiction of England and Wales subsequent to the ruling of the settlement, that he would have found, in any event, that the child was in fact abducted. This Court places no reliance on the claimed statement of the English judge in relation to that aspect as it was made without any forensic examination of the subject; however, on the basis of evidence given by an independent witness called by the father, who was familiar with the arrangements for return of the child to the second city in Ireland, this Court finds that there was a failure by the mother to return the child and that, there was an abduction of the child. Notwithstanding such, many years after the event it is not helpful to the continued co-parenting of the child for the husband to be continuously revisiting this incident in any triumphalist fashion. Upon return of the child from London the parties lived with their child in the family home which by then was in the second city and this residence was brought to an abrupt end by a tragic altercation between the father and the mother which was captured by an audio recording by the mother and made available, on consent, for hearing by this Court for the first time in any proceedings. This incident (hereinafter referred to as the incident) occurred on the 30th August, 2009, and the court was furnished with a transcript of the audio recording of same which, subject to a few omissions, is an acceptable written record of the sounds that were to be heard on the occasion which regrettably included very frightened crying by the child. The incident and the written and audio recordings and the accounts thereof by the parties form a significant part of the evidence upon which the court may find facts relevant to the determination of this appeal. Prior to the incident the mother had applied to the Circuit Court by notice of motion dated the 13th August, 2009, and returnable for the 26th August, 2009, for an order (*inter alia*) for liberty to remove the child from Ireland to the jurisdiction of England and Wales. This notice of motion was grounded on an affidavit sworn on the 12th August, 2009, before the date of the incident, but it is noteworthy that the mother filed a supplemental affidavit dated the 28th September, 2009, after the incident yet making no mention at all of the incident, although she had recorded same and relied on same during the hearing on this appeal. In fact the first time when the incident was mentioned by her in any of the records of the proceedings was when she spoke to Dr. Gerard Byrne, who was the s. 47 assessor appointed by the court in Summer 2010. At no time during the many subsequent court hearings in relation to custody matters was the husband or his legal representatives told of the existence of the audio recording of the incident, nor was the audio recording produced to the court until it was produced to this High Court hearing the present appeal.

7. As a prelude to the motion seeking permission to remove the child to the jurisdiction of England and Wales, the mother appears to have applied to Hunt J. to restrain the enrolment of the child in B. College. Nolan J. refused such application on the basis that, in granting same the child would be denied the opportunity of going to school and, of course, it seems that the mother had agreed with the father that the child would go to B. College and had engaged in preparations such as purchasing or choosing uniforms for same. In the further interlocutory application the mother altered her application to allow the child to go to school in her new place of residence at M., twenty miles outside the second City in a good provincial town instead of B. College in the second City. This application was refused also. These interim arrangements regarding the schooling of the child in B. College living with the father during the week, subject to Wednesday access to the mother, and with the mother having the child reside with her from Friday evening till Monday morning, with generous living arrangements for holidays and school breaks so that the father can claim, with justification, that the total time of residence of child with mother is over half the time. Matters continued not without difficulty, part of which will be referred to subsequently during the course of this judgment, until the judicial separation proceedings came on for hearing before Henehan J. initially in December, 2010 and concluding after a further hearing on the 2nd February, 2011. It should be noted that the father had claimed, in the judicial proceedings, for joint custody of the child. The relevant parts of the order for judicial separation of the 2nd Feburary, 2011, of Henehan J. at para. 1 are as follows:-

> '1. An order granting the parties herein joint custody of the dependent child…with her primary place of residence to be with the applicant and the existing arrangements with regard to access by the respondent to continue unless further or otherwise agreed between the parties.
>
> 2. An order that (child) shall continue to attend B. College and directs that the applicant (father) to keep the respondent (mother) fully informed at all times in relation to the child's schooling and further, to secure that mother is fully involved in the decision making process. And further the court directs the mother to get in contact with the school to improve her relationship for the benefit of the child.'

Para. 15 of the order directed that the child's passport be released to the father. The notice of appeal, dated 8th February, 2011, served herein stated that the mother appealed from the whole of the judgment of the Circuit Court given on the 2nd February, 2011. This blanket nature of the appeal was limited later.

8. This case commenced before this Court on the 11th July, 2011, and was heard over several days. As Mr. John Rogers S.C. was coming to the end of the opening of his case, this Court queried whether there was an issue in relation to the sole custody or joint custody of the child. Mr. Rogers drew the attention of the court to a letter from the mother's solicitors prior to the appeal hearing indicating that the appeal would be limited only to orders 1, 2 and 15 of the Circuit Court order, and, following questions to Mr. Maurice Gaffney S.C. appearing on behalf of the mother, Mr. Gaffney confirmed that disregarding other matters, the outcome of the appeal in this case should be that both parents would have joint custody of the child. It is worth quoting Mr. Gaffney's stated

intentions as follows:-

> "Judge, we certainly do not want to deprive the father of the proper rights that he should have. We recognise it is of great importance to the child that the relationship with the father be maintained as it should be as though everything was okay."

9. After such a forthright indication by Mr. Gaffney it came as some surprise to this Court during the course of the hearing that much of the evidence led on behalf of mother, and cross examination pursued by Mr. Gaffney, might go towards disqualifying the father from having any custody at all and seeking to indicate that he was not qualified for such a role by hauling up many events which, in unexplained form, could inculcate a moral panic in the most sanguine of mothers. This apprehension was allayed by continuing assurances given by Mr. Gaffney to the contrary effect when specifically challenged on the issue and finally, by the very extensive and detailed submission presented by Mr. Gaffney to the court after the hearing where it is clarified under Chapter A, para. 3 that the mother is seeking in this appeal, on behalf of and, as necessary, in the best interest of, the child and her welfare an order in or including the following terms:-

> (i) The primary place of residence should be with mother in M.
>
> (ii) The child should go to school in the district where her mother lives in and from which she makes her living.
>
> (iii) The child's father should be given access rights that support the child's home and school life and her development and welfare generally in such manner as the court may decide.
>
> (iv) The court should attach such conditions as are appropriate to safeguard the child's physical, moral and religious social welfare when in the care of her father.
>
> (v) Full information on the background and contact details of all housekeepers and/or nannies or "Girl's Fridays" to whom the child's care may be delegated by her father from time to time should be given, *ab initio*, to her mother as a matter of course. All such assistance should have instructions to respond directly and without reservation or delay to all inquiries of mother concerning the child.'

10. The following days hearings were taken up in great measure with the cross examination of father and the giving of evidence on behalf of the mother in relation to multiple complaints trawled up over a large number of years by the mother which, for the sake of completeness and without necessarily finding same as facts for the moment, were set out helpfully in submissions submitted on behalf of mother at the end of the case as follows:-

> (i) The injury to the child's teeth and jaw (September, 2008).
>
> (ii) The comparative response to the injury – (child's injury not attended to until the mother returned from exams on the first available flight).
>
> (iii) The dislocation of the child's arm (September, 2010).
>
> (iv) The father's response to the injury (he attended to his own priorities).
>
> (v) Representation regarding the mother's consequential hold over as a breach of court order despite her application to the court for directions.
>
> (vi) The response to the child succumbing to chicken pox in July, 2009 in the United Kingdom.
>
> (vii) The response to the child succumbing to flu in April, 2011.
>
> (viii) The father's failure to respond to communications in that regard (April, 2011).
>
> (ix) His allegation of not being contacted (April, 2011).
>
> (x) His failure to attend school without explanation or his failure to raise any questions about the absence of the child from school if he was not informed (April, 2011).
>
> (xi) His representations in court of this episode is a breach of court order by the appellant (October, 2011).
>
> (xii) His assaults on his wife (particularly in August, 2009 of which there is oral and aural record and the witness of his child to the gardaí and Dr. Byrne).
>
> (xiii) His denial of assault on M. to the gardaí, other than an allegation of a glass of water being thrown at him even after caution.
>
> (xiv) His subsequent discovery – recollection of the alleged vicious assault and his averal of same on the 29th September, 2009, by affidavit to discredit his mother to represent her as unsuitable for custody.
>
> (xv) His response to crisis generally, and in particular:-
>
> a. his abandonment of his pregnant wife in Connemara in 2004, and
>
> b. his abandonment of his child to a child minder when he had dislocated the child's arm in 2010.
>
> (xvi) His failure to accept, even in court, that the child was not responsible for the two serious injuries she suffered while in direct physical contact/interaction contact with him with view of his statement to the effect that:- "I was swinging her around and she let go" and "I was lifting her onto the naughty step and she grabbed the door and pulled out her arm".

(xvii) His attitude for testing for sexual transmitted diseases (STDs). His entertaining of sex workers in the house while he was babysitting.

11. In addition, elsewhere in the submissions the father is accused of alienating behaviour including, referring to the family of the mother as "hog-pogs" and "hill billy's", a prohibition on the child waving her mother goodbye, the erection of a physical barrier to her waving her mother goodbye (the redirection and use by closing of a window shutter) and threatening the child with punishment if she called her mother without permission. Furthermore, under the heading of religious welfare of the child to be considered by the court the submissions on behalf of mother remind the court of the fact that the father produced a C.D., produced by a well known apologist for atheism, to the child in the face of the fact that the child had been brought up and raised as a Roman Catholic as agreed by the parties.

12. This Court hold the following facts for the purpose of determining the issues herein:-

(i) The mother, by failing to return the child as agreed in 2009, was in breach of an informal agreement between the parties and she was guilty of a technical abduction of the child.

(ii) By reason of the fact that the conversation of father, as recorded by the mother in the incident at the end of August, 2009, involving throwing a glass of water and assault followed by calling of the guards, matches the account he gave in evidence of the incident without knowledge of the contents of the recording being available is indicative of his credibility in relation to the glass of water throwing incident, I also find that there was a mutual assault of mother and father after the glass of water throwing incident and that the child was present throughout, even when the gardaí arrived. I hold that the cries of protest of mother were audible on the recording, but also the loudest and most utterly upsetting cries were those of the child. I have no doubt that, from the report of Dr. Gerard Byrne following his first assessment, that the child's dreams or nightmares mirroring these horrific incidents show the deep influence on the child of this horrific incident and that it was probably a major contributory factor to the development of separation anxiety in relation to the mother by the child.

(iii) The failure by the mother to pursue her report of the recorded incident to the gardaí in any meaningful sense by pressing charges and her failure to disclose the same in court when her interest was to obtain an order from court for the removal of the child, indicates that the mother, in order to meet a strategic interest, as in that case the removal of the child, is prepared to engage in tactics such as failure to disclose what she subsequently claimed was an accurate recording putting father in the worst possible light and exposing the child to witness what she claimed was a gratuitous and vicious assault upon her. The Court can only interpret same as an abuse of the process of the court by the mother as her interest at that time was to get removal of the child, subject to the usual reasonable access arrangements for father, in circumstances where the disclosure of the recording or even the occurrence of the incident was most likely to cause the court to think twice about allowing a removal of the child when the situation was so fraught physically, emotionally and psychologically for mother, child and father.

(iv) In respect of the findings of fact, the recounting of the numerous complaints against the father over a long time, one going back to the unfortunate spat between mother and father while mother was pregnant in Connemara in 2004,where, at the end of the day, father is portrayed probably correctly (but not without fault on her part) as having abandoned his pregnant wife and her failure to accept fully that he was not responsible for the two most serious injuries suffered by the child in his care namely, the tooth and arm incidents, notwithstanding that in the case of the arm incident especially, the standards of children first and proper medical examination were fully complied with and should have allayed her feelings of suspicion and moral panic, and indicate that the wife is still not willing to accept the spirit of joint parenting as proposed by the order of Henehan J. and, indeed, as was implied by her counsel's confirmation, that no matter what the outcome of this case was, it would centre around joint custody.

13. As a result of the foregoing conclusions this Court is very apprehensive that, if residential and schooling arrangements are changed mother will, unless her attitude alters considerably, continue to seek to exclude father from joint parenting and having a beneficial interest, influence and contact with child.

14. This Court holds that, notwithstanding father's egregious conduct on some occasions, as exemplified by a latitude for testing for STDs and his admitted entertaining of a sex worker in the house while he was babysitting, (albeit on his account when the relationship had become romantic), coupled with his eccentric behaviour of instructing nannies and assistants not to disclose their identity and phone numbers to wife and his use of the window shutter to prevent waving goodbye on handover, he is an entirely beneficial and essential influence and part of child's life. This Court finds that some of the behaviour of the father was tending towards alienating the child against her mother, as in his reference to mother's people (or neighbours) being "hill billy's" and by the disparagement of the mother, certainly in earlier years, in the face of circumstances where the court may only find, and actually does, that the mother's intellectual and professional standing as well as her day to day care, love and concern for the child when residing with her and outside the theatre of these proceedings, is excellent. This Court is satisfied too that the father's alienating behaviour may be effectively curbed by order of the court as it does not assume to be as insipient or strategic as mother's alienating behaviour in the other direction.

15. The mother has been guilty of continuous, albeit low grade, alienating behaviour by responding in undisciplined fashion by waving excessively to child at the end of handovers necessitating father to engage in the eccentric behaviour of closing shutter, and not engaging verbally with the father in the presence of the child on the simplest of things but only resorting to email and texts as a means of communication. This Court does not hold that she should "look the father in the eye" as he claims throughout the proceedings as this "looking in the eye" has by now been put forward by the father in a somewhat aggressive and domineering fashion and the court would only leave the outcome of the parties looking each other in the eye when it could arise spontaneously and generously after the occurrence of a period of sadly missing formal simple cordiality between father and mother in the presence of their child.

16. This Court holds that, at certain times, the father was the primary carer of the child, although it does not accept that, during her work in the second city, the mother was excluded as much as he claims by her being 'on call' for long hours.

17. This Court further holds that both parents have very busy professional schedules and, notwithstanding the fact that at times father is involved in three different type of professional or quasi professional businesses, he has, by his determination, application and study in relation to these matters, set up a care system through nannies, personal assistants and even secretaries to ensure that he can do as much of his work as possible in the family home in the presence of the child.

18. While in the past the father may have been apprehensive that the mother might remove the child from the jurisdiction, this apprehension has been allayed and mother has now set up in her profession working from M., in such circumstances that, if the court was so minded, she could, with the assistance of nannies or childminders, afford the possibility of the child attending school in M. as she suggests.

19. This Court holds that, while the schooling systems in school proposed at M. and available at B., where the child now attends, are fundamentally different, and in the case of B. not in any strong way obtaining the seal of approval or official recognition of the Department of Education, both are sufficient in their own way for the child's educational needs as she appears to be happily settled in the school at B., is intelligent and is likely to prosper academically regardless of her academic supports as long as there is a basic school discipline which she would obtain in both schooling systems. While the husband claims that her schooling should continue at B., as it is a fully integrated system right up to Leaving Certificate level, these aspirations must, as in the case of all children nowadays, be subject to her wishes when she is 12 or 13 in relation to which school she might attend at the completion of her primary cycle. As appears from the second report of Dr. Byrne, that the child has overcome her separation anxiety, although it may have been flared somewhat after a regrettable incident where the father became angry with her and inappropriately kicked the duvet on the floor after her recent birthday party. She had indicated her wishes to Dr. Byrne to remain at school B., and she has developed friendships around school B. which will be valuable to her as an only child and these will be without prejudice to developing friendships with other children in M., including relations living there.

20. This Court holds that, by getting married in a Roman Catholic Church and having the child baptised as a Catholic, the father and mother have agreed that the child is to be raised as a Roman Catholic. The introduction of a proselytising atheistic video or DVD by the father to the child is inconsistent with such an agreement and also may be age inappropriate in any event.;however, lest it is thought that the father is a crusading apologist for atheistic views, it must be remembered that, on examination of his most interesting instructions for nannies on the care of the child focusing on the various stages from nine months to twelve months and the period twelve to eighteen months (in great detail over a number of pages for all times of the day), he states at the last page in relation to the twelve to eighteen month period:- 'at 19.20 dim lights and sit quietly in chair for 10 minutes – bedtime story plus prayers'. Furthermore, during and adjournment of the proceedings, his solicitor has written an open letter to the mother indicating that he will co-operate (at least passively) at times of First Holy Communion *etc* in relation to the religious calendar. In consequence of father's mediating behaviour, in the circumstances this Court does not consider it appropriate to make any order in relation to religious practice and it considers, having regard to the evidence, that the mother and the mother-in-law are taking an active part in the preparation of child for her religious duties and by reason of the fact that the child is resident on Sunday, a time of particular religious observance, with the mother, that her religious needs are being catered for except to observe that the practice of kindness, courtesy and consideration as required universally by all religions needs to be encouraged, mostly by the mother by showing greater cordiality to the father at meetings such as handovers.

Case Management of the Appeal

21. The case management of the appeal was punctuated by an application by the father to have, who had already reported to the Circuit Court that the child was suffering separation anxiety from the mother and whose interests would best be served with primary residence with the mother, a further report by another psychologist, criticising the methodology of Dr. Byrne, and seeking the appointment of a new s. 47 assessor. The mother countered such proposal by highlighting the influence of the arm breaking incident while the child was in the custody of the mother, although when pressed by the court her counsel indicated that it was not an intentional assault. The court did not accept the submissions on behalf of the father to have another s. 47 report made, but ordered that Dr. Byrne would prepare another report, this time with defined terms of reference, centring mainly on the wishes of the child in relation to residence and the progress or otherwise of the separation anxiety, which was alleged on behalf of the father, had abated.

The Law Relating to the Legal Submissions

22. The mother's submissions centre around the core proposition in Chapter A, para. 4 on p. 2 as follows:-

> "The social life of the child, school centred as it is, continuously throws up problems in situations which, above all in the case of a little girl, require the wisdom, the empathy, and the maternal instincts of a mother properly to resolve and explain…with all due respect it is submitted that the current dispensation does not appear to be founded on any express consideration of the challenges to which it has given rise or may henceforth give rise (if it is not ended) for the welfare of the child in most if not all areas of her welfare with which the law is expressly concerned."

This proposition is expanded upon in the detail of the very fine submissions, principally by reliance of what, in the view of this Court, is an extension of the tender years principle to mothers and daughters for an extended period. It is appropriate to examine the factual basis and commentary on the case law referred to in the submissions presented on behalf of the mother as follows:-

> "Authorities on the Welfare of the Child
>
> *MacD v. MacD* [1979] 114 I.L.T.R. 59:-
>
> The Supreme Court granted custody of a child being reared as a Roman Catholic to his Protestant mother, who was residing with a Protestant man. Despite the mother's and her partner's religious beliefs, the Supreme Court accepted the mother's agreement that she would bring the child up as a Catholic. The father was to have access to the child, during which he could monitor the child's religious formation.
>
> In the context of the case before the Court, it is important to note that it has generally been accepted that where a child is of 'tender years' (generally under the age of seven) the child should reside in the custody of its mother. In *B v. B* [1975] I.R. 54, Budd J. noted that young children are notoriously closer to their mother than their father. In *MacD v. MacD* [1979] 114 I.L.T.R. 59 Henchy J. did indeed express a preference for the mother as follows:-
>
> > 'In the case of very young children…the person *prima facie* entitled to their custody, where the parents are estranged, is the mother, for by reason of her motherhood she will usually be the person primarily and uniquely capable of ministering to their welfare.'
>
> However, as Geoffrey Shannon notes in, Child Law, 2nd Ed., (Dublin, 2010) p. 716 in more recent times this approach has been somewhat more restrained. It is arguable that this principle, besides compounding gender stereotypes, ignores the growing prevalence and acceptance of men who play an enhanced parenting role in their respective families. The courts have indeed made orders of custody relating to young children in favour of their father.

In the submissions of the appellant in this case, she seems to submit that in *D.F.O.S. v. CA,* (Unreported, High Court, McGuinness J., 2nd April, 1999) the learned Judge only stated that she did not accept the tender years principle because of the fact that the mother had severe medical problems. This opinion is, in my view, mistaken. The proceedings concerned the future of a child. R. whose parents were unmarried but who cohabited for a period of some four years. R was born on the 18th October,1994, and was at the time of hearing now 4 1/2 years of age. In his special summons the plaintiff father sought an order pursuant to s. 11 of the Guardianship of Infants Act, 1964, granting him 'sole care, custody and control' of his daughter, together with an order 'determining the extent and nature of the access (if any) to be enjoyed' by the child's mother. In her defence and counterclaim, the mother also sought sole custody of the child, with an order regulating access. McGuinness J. stated as follows:-

> 'This has been a very difficult case to decide as regards R's future custody. As a general rule where there is deep hostility between the parents I am very reluctant to make an order granting joint custody. due to the probable inability of the parents to co-operate in caring for the child. This, however, is not an ordinary case and has special elements of sadness. It seems to me that if I were to chose to grant custody to one parent rather than the other there is a danger of adding to the present bitterness and resentment. There is much good in each of the parents and if they accept the joint responsibility of caring for their daughter and promoting her welfare I hope it will encourage them to put their antagonisms behind them. I do not entirely accept the old 'tender years' principle; modern views and practices of parenting show the virtues of shared parenting and the older principles too often meant the automatic granting of custody to the mother virtually to the exclusion of the father. I will therefore make an order granting joint custody of R. to both parents.'

In *Re Tilson* [1951] I.R. 1:-

T. and B. were married on the 10th December, 1941, in a Roman Catholic Church in Dublin, T. (the husband) being a Protestant, while B. was a Roman Catholic. T. signed an undertaking that any issue of the marriage would be brought up as Roman Catholics. There were four children born of the marriage, all boys, and all were duly baptized as Roman Catholics. Differences having arisen between T. and B., T. removed the three elder children from the home of B's. parents (where T., B., and the children were then residing) and took them to live with his parents; he subsequently removed them to a Protestant institution. B. thereupon obtained a conditional order of *habeas corpus ad subjiciendum*, directed to the respondents, and, on the application to make absolute the conditional order, notwithstanding cause shown. It was held by Gavan Duffy P., that the prospective general welfare of the children required that they should be returned to the mother to live in her home. On appeal it was held by the Supreme Court (Maguire C.J., Murnaghan, O'Byrne and Lavery JJ.; Black J. dissenting):-

> 1. Under the Constitution both parents have a joint power and duty in respect of the religious education of their children and if they together make a decision and put it into practice it is not in the power of either parent to revoke such decision against the will of the other.
>
> 2. An ante-nuptial agreement made by the parties to a marriage, dealing with matters which will arise during the marriage and put into force after the marriage, is effective and of binding force in law.
>
> 3. The former rule that the father has a right to break an ante-nuptial agreement as to the religion in which children of the marriage will be brought up has no place where the power of control over the religious education of the children of the marriage has been exercised; such a power is a joint power and is not revocable by one of the parties alone.

The court accordingly directed that the children should be returned to the mother to be educated by her, if not by both parents, in the manner in which they had been taught pursuant to the ante-nuptial agreement.

E.M. v. A.M., (Unreported, High Court, Flood J., 16th June, 1992)

In that case, the applicant mother, who was an American woman, met and married the respondent father in 1983. They lived in Dublin as a family with the applicant's child from a previous relationship and had another child together in 1986. The marriage broke down, resulting in the respondent father leaving the home in or about July 1987. Arrangements were entered into vis-à-vis parenting. The respondent husband enjoyed regular weekend and midweek access to the child. These arrangements ultimately broke down. The applicant then applied to the court and sought leave to remove the parties' child to America on the basis that she had secure employment there with accommodation provided by her parents, and that she would forward generous access to the respondent husband. The respondent rejected this application and argued that the child was well settled in Ireland and enjoyed a very good relationship with their extended family.

Flood J., in determining whether or not to grant the application, set out a list of factors to which the court 'must' have regard:-

> 1. Which of the two (hypothetical outcomes) would provide the greater stability of lifestyle for the child,
>
> 2. The contribution to such stability that would be provided by the environment in which the child will reside, with particular regard to the influence of (his/ her) 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 the relationship with the child, insofar as it impinges on the welfare of the child, and
>
> 6. The respect in terms of the future of the parties to orders and directions of this court.

Ultimately, it would appear that Flood J. was swayed by expert evidence and concluded that the applicant was in a better position to offer the child stability of environment, and leave to remove the child from the jurisdiction was duly granted on terms.

S. v. S. [1974] 110 ILTR 57:-

The parties were Roman Catholics and were married in July, 1966. There were three children of the marriage aged from six to four years. They lived outside Éire for a short time and returned to live in Cobh in April, 1967. Discord arose between husband and wife, and in April, 1970, the husband left the matrimonial home, taking the three children with him and placing them in the care of his married sister. The wife issued proceedings for the custody of the children, alleging cruelty. He replied with allegations that she had been neglecting the children, and had committed adultery. He also stated that he was issuing proceedings against C. for loss of consortium and criminal conversation. On 27th July, 1970, the wife consented to custody remaining with the husband, and the consent was made a rule of court. Sometime in 1971 the husband obtained employment in Dublin and set up home with Mrs. F., who had obtained a divorce from her English husband. Mrs. F. changed her name by deed poll to Mrs. O. and the new couple had a child in November, 1971. In September of that year the husband had removed the children from his married sister's home and left them in the care of his parents. In April, 1972, without notice to his wife, he brought them to Dublin to live with him and the second Mrs. O. The wife served a notice of re-entry in May, 1972, seeking an order that custody of the three children be transferred to her. Held by Kenny J. that, (1), the example the children would have before them of living with their father would be deplorable and would tend to colour their views on the sanctity of marriage. (2) The moral factor was so much in favour of the wife and mother that it entirely outweighed the other factors which were in favour of giving custody to the husband. (3). The custody of the children should be awarded to the wife. From the above decision the husband appealed to the Supreme Court. Held by the Supreme Court (Henchy and Griffin JJ.; Walsh J. dissenting) that, (1), the irregularity of the relationship between the father and the woman with whom he was living would be less likely to scandalise or deprave the children if they continued to live together in the same household. (2). The situation was no more likely to scandalise and deprave the children than if they lived with the mother and spent a whole day each week with the father at his house. (3). The religious welfare of the children was being properly attended to and so the danger was reduced. (4). In view of the fact that they had lived with their father since April, 1972, and that their intellectual, physical and social welfare would be best served by remaining with their father, the moral factor did not outweigh these advantages and the children should remain with the father. *W. v. W.* 110 I.L.T.R. 45 considered.

(INFANTS), In Re. [1962] 887 1 W.L.R. L.

The mother of two girls, then aged five and three years, left the matrimonial home, having some time previously admitted to the father that she had committed adultery. The father, whose conduct had been blameless, took out a summons in the Chancery Division to make the children wards of court and to have their care and control awarded to him. Plowman J. awarded the care and control of the children to the mother, on the ground that considerations of the conduct of the mother and father must be put on one side and the matter looked at simply from the point of view of what was best for the children. On appeal by the father. It was held, that, although the welfare of the children was of paramount importance, it was not the sole consideration; that it was undesirable that every mother who was otherwise a good mother should be able to break up the matrimonial home on the assumption that she would be allowed to take her children with her; and that the judge, in putting consideration of the mother's conduct on one side, had erred in principle in awarding care and control to her. Accordingly, while the children would remain wards of court, their care and control would be given to the father, with reasonable access for the mother. Decision of Plowman J. reversed.

J.J.W. v. B.M.W. [1976] 110 I.L.T.R. 45:-

The Supreme Court refused to award custody of three children to a woman who had committed adultery. Because of her conduct, the court believed that the father was the party more likely to safeguard the children's welfare than the mother. However, as Shannon states (p712) of late, the courts have tended to veer away from attributing moral unworthiness to parties in second relationships following marriages. In particular, the courts have accepted that custody cannot be seen as a prize for a wholesome and chaste sexual lifestyle. Walsh J stated in *E.M. v. A.M.*, (Unreported, High Court, Flood J., 16th June, 1992) that 'custody is awarded not as a mark of approbation or disapprobation of paternal conduct but solely as a judicial determination of where the welfare of the children lies'.

S. v. S. [1992] I.L.R.M. 732

The plaintiff wife instituted High Court proceedings against the defendant husband seeking a judicial separation and ancillary orders including an order for sole custody of their three children, all girls aged 13, 10 and 7 years. The wife, then aged 25 had married the husband aged 34 in 1973. In August, 1988, the wife left the family home taking the children with her. In the High Court (before Morris J.) oral evidence lasted eight days. Morris J. made certain findings regarding the husband and wife. He held that the wife had left the family home without justification, that she was involved in a relationship with another man and was often with him in the presence of the children, that she left the children on their own at home at night while she was in a public house and that on the evidence she had attempted to make a false and bogus allegation against the husband of improper sexual behaviour. Morris J. found the husband a thrifty, hardworking, responsible, retiring man, a non-drinker, not interested in socialising and who believed strongly in traditional values and in his religion. On the negative side the husband had difficulty relating to the children. Morris J. granted, *inter alia*, an order for judicial separation and concluded that in the light of his finding of facts that the welfare of the children would be best served by awarding custody to the husband with access provisions for the wife not to include overnight access. The plaintiff wife appealed to the Supreme Court where a stay was granted on the High Court order pending the full appeal. Held by the Supreme Court (Finlay C.J., McCarthy, O'Flaherty and Egan JJ.; Hederman J. concurring) in dismissing the appeal on the custody issue and in remitting the matter to the High Court for the purpose of arranging the actual transfer of custody that, (1) the first and paramount consideration of the court in a custody case was the welfare of the children and global consideration must be given to the religious and moral, intellectual, physical and social aspects which comprise the welfare of children. The conduct of the parents was relevant only in so far as it affected the welfare of the children but the conduct is relevant to show where the priorities of the parents lay in relation to the children which was an important factor in relation to their welfare. *O'S. v. O'S.* [1974] 110 I.L.T.R. 57 and *dicta* of Griffin J. in *MacD. v. MacD.* [1979] 114 I.L.T.R. 59, 79 approved and applied. (2) Whereas general principles concerning questions of custody can be gleaned from the decisions of the courts there was little assistance to be gained in resolving any one case of child custody by reference to the facts of others. (3) The court was bound by the primary findings of fact of the trial judge

based upon the oral evidence before him. The inferences drawn by the trial judge and based upon to a large extent his observation of the witnesses giving evidence and his finding of facts, were inferences he was entitled to draw and they were correct and could not be set aside. Therefore having regard to the findings of primary fact and the inferences drawn therefrom the principle that the welfare of the children was paramount was correctly applied by the trial judge in granting custody to the husband. Per O'Flaherty J.: There must be a better solution to cases of this kind than to have protracted High Court proceedings with an appeal to the Supreme Court. As the situation was ongoing the matter should be remitted to the District Court or Circuit Court for the purpose of monitoring progress at an easily accessible, local venue."

23. As Mr. Gaffney strongly submitted to this Court in oral submission and during the course of the hearing and repeated in the written submissions, that the tender years principle was a principle of law decided by the Supreme Court in *MacD v. MacD* [1979] 114 I.L.T.R. 59 and binding on this Court, I have given special consideration to the wording of the judgments of each of the judges in that court, including the dissenting judgment of Griffin J.. It is clear from the judgment of Henchy J. that he held the opinion that in the case of very young children the person *prima facie* entitled to the custody where the parents are estranged, is the mother and that in the same paragraph he stated 'if the case is made that by reason of other factors it is held to be disentitled to the custody, the onus of proof of that disentitlement should be lie on the person making that case'. The proposition was accepted not in the form of a proposal of a presumption followed by an onus of proof to rebut it in the judgment of Griffin J., but in the more general proposition at p. 79 of the report that follows:-

> "I will accept, without question, that all things being equal, when parents are estranged the custody of young children should be given to their mother. But each case must depend on its particular facts and in the weight to be given to the facts heard and determined by the High Court bearing in mind that this Court is bound by the findings of fact made by the High Court Judge who had the advantage of seeing and hearing the witnesses."

24. In the other majority judgment in the case, Kenny J. stated at p. 81:-

> "In every case in which young children are involved, the factors I have mentioned create a strong *prima facie* case for giving them into the custody of their mother. That case may of course be rebutted if it is shown that the mother is an unfit person to have them in her custody."

Further on towards the end of the judgment at p. 82, Kenny J. states:-

> "Since the writing of this judgment I have had the advantage of reading that of Mr. Justice Henchy and I wish to say that I agree with it."

From this last comment, one cannot dismiss the proposition of a presumption in favour of custody of the children of tender years associated with the shifting of the onus of proof to rebut same as a mere isolated *dictum* of one judge in a majority decision, so as not to be binding on the High Court. It has not reversed in explicit terms since that date and it is accepted that it is binding on this Court in dealing with this appeal; however, the decision is of little assistance in the modern context where it has been found in the experience of the family courts of this country that consistent with the Guardianship of Infants Act, 1964, that the best practice in the interest of the children is to encourage joint parenting and not to deal with the care of the children in the stark terms of custody and access, using access in a context where it may be regarded by a quite faultless father as a consolation prize not reflective of their past inputs and capacities in relation to their children and discouraging of their future involvements. In many cases such as the instant case where there has either by custom and practice court order or agreement, an effective building up of joint parenting with associated bonds of love and affection and the emotionally security that brings for children and also in relation to their adult emotional and psychological states, the decision has little relevance to the manner in which the courts should proceed in their inquisitions in relation to the welfare of the child as mandated by the Guardianship of Infants Act, 1964, as amended. Indeed, the procedural mechanism as suggested by the tender years principle is unfortunately exploited by mothers only too anxious to cultivate an alienating atmosphere against fathers to the detriment of the children and society as a whole. The situation arising from the response of society this procedural rule is that, it demonstrates that the family in Ireland is a complex adaptive system which, when presented by a formula developed by erudite and well intentioned minds, may devise systems of action or reaction which can present results which were wholly unintended by those who with the best intentions designed the rule in the first place. Regrettably, the worst unintended consequence arising in recent times is the regrettable consequence of the procedure of what is colloquially (if no scientifically) referred to as alienation. Therefore, in practice the courts while aware of the rule as a rule of law and its binding force, must and are bound to protect the process of court against the marauding of alienating or potentially alienating mothers by allowing the onus of proof concerned to be used as a means of denigrating the co-parenting objective which is at the universally accepted standard.

25. The child in this case is now seven and. by general principles. is outside or approaching the outside of the category of tender years in any event, (although Mr. Gaffney has attempted to extend the tender years principle to daughters well into their teenage years). This proposition has little or no support in precedent or law and is not accepted by this Court.

26. The concept of co-parenting arises from two sources. First, the development of modern psychology and psychiatry and the use of experts practising same in the courts and the results of scientific and academic research in these areas, nationally and internationally, has indicated that it is a most important and vital objective to develop contact with each parent from an early age but also the resulting contacts that the consequentially wider circle of family members and relations together with support systems arising from the two parent contact as against only the one. Secondly, socioeconomic conditions have altered substantially in the years following the decade of the 1970s, insofar as many married women, following the eventual abolition of the residue of the marriage ban in the early 1970s, have taken the trouble of acquiring the education and developing their careers so that they are in a position to occupy the various highest and most skilful occupations, professions and office in the land, and overall have dramatically increased their participation rate in the workforce and in addition to that the cost of providing accommodation and a modern standard of living for the family and the children in that family, practically always depends in the first instance at least on both parents continuing in employment, at least for a number of years after the marriage and during some or all of the 'tender years'.

27. This Court concludes that the tender years principle has no application to this case by reason of the age of the child at the date of hearing and that if she were a younger age, the onus of proof in relation to tender years would not have been applicable by reason of the confirmation from the very outset that no matter what decisions were made on schooling and residence during schooling, that the result would be by agreement of one of joint custody.

28. Having taken this view, the court by no means underrates the obviously warm personality and maternal capacity coupled with understanding displayed by the mother while giving her evidence. In our society still it must be recognised that there remains stereotyping and, above all, socialisation for young girls and women in relation to babies and motherhood which even yet young men

do not experience, although that is changing rapidly. While the father has with great energy, vigour and intellectual skill endeavoured to close the gap of socialisation and motivation which has existed in our society between young men and women as, for instance, his most rigorous instructions to nannies presented in evidence, and his express acknowledgement that in his parents generation there were difficulties in expressing feelings or sorrow, which he is purposely endeavoured to reverse in his relations with the child, he does in attempting to follow the role of the modern male parent show his lack of socialisation by relying too much on intellectually designed concepts to fit into the situation such as his insensitivity in bringing a sex worker into the home or allowing disciplinary matters such as having an orderly handover by closing the shutter on the goodbye waves rather than mediate the situation with child in a gentler and less eccentric fashion. The recognition of this factor by the court is such that it will accede to Mr. Gaffney's request that, in any event, the court puts in place some orders to control or at least voice a judgment on the propriety of the most egregious behaviours of the father, notwithstanding that the court might refuse to overturn or reverse the general structure proposed by the Circuit Court.

29. Accordingly, this Court affirms the orders 1, 2 and 15 of the Circuit Court judge, but vary the same to the extent of the addition of the following orders:-

(i) Full information on the background and contact detail of all housekeepers and/or nannies or Girl Friday's to whom the child's care may be delegated by father from time to time should be given to mother as a matter of course, provided that mother shall be prohibited from using this facility as a database of father's activities or as a method of his inquisition and should only deal with matters as they arise in respect of matters in relation to which the mother as guardian has a right to information.

(ii) The father should only invite and allow appropriate persons, whether male or female, into the residence which he shares with the child and in the event of his developing a relationship with such a person, then the father should behave with such propriety so as to provide age appropriate space for the child to react thereto and develop normally.

(iii) In the event of differences arising in relation to strategic matters relating to the care of the child, these differences should be referred by letter in writing to father's mother as a person indicated by the mother as an acceptable mediator. In the event of the father's mother being unable or willing to act then the matter should be referred to an arbitrator to be agreed in advance to cater for such default by the parties and, in the absence of such agreement to be decided by this Court having considered the proposals of the parties in relation to such nomination (if any) in the first instance.

(iv) The parties should at all times in their dealings with each other work adopt a mediating approach to the resolution of their differences and, for that purpose should continue the helpful practice of contact by text or email but also engage in conversation but avoiding aggressive behaviour such as the father's command that mother is to 'look him in the eye' or such like.

(v) The father and mother should endeavour to arrange occasional and spontaneous occasions wherein they may meet with the child to have a coffee or other light beverage with the child having an equivalent recreational or celebratory item of food as she would reasonably wish so that the parents may have a cordial conversation in an unstrained fashion incorporating the child but not touching contentious matters such as would cause tension and spoil the meeting.

(vi) Within six months of the date of this judgment the father shall cease using the shutter or curtains to control handover waving provided, however, that the mother and father take all appropriate parental steps to ensure the discipline and dignity of the handover.