

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

CAITRIN, DONA AND ELLIOT (Pseudonyms)
(No 6) (Financial provision for the children)

STEPHENS J

Anonymity and restriction on publication

[1] All the names of the family members in this judgment have been anonymised by the use of pseudonyms. Nothing should be published which would identify the children or any member of their extended family.

[2] The parties are requested to consider the terms of this judgment and to inform the Office of Care and Protection in writing within one week as to whether there is any reason why the judgment should not be published on the Court Service website or as to whether it requires any further anonymisation prior to publication. If the Office is not so informed within that timescale then it will be submitted to the Library for publication in its present form.

Introduction

[3] This is an application brought by a mother, Marcail against a father, Fergus. The application is under Article 15(1) and Schedule 1 of the Children (Northern Ireland) Order 1995 for financial provision to be made by Fergus to Marcail for the support of their son, Elliot. Marcail also applies for an order requiring a settlement to be made by Fergus for the benefit of their daughters Caitrin and Dona.

Legal principles

[4] In respect of Elliot and under paragraph 2 of Schedule 1 of the Children (Northern Ireland) Order 1995 Marcail seeks a periodical payment order for his

benefit, an order to secure to Marcail for his benefit the periodical payments together with a lump sum. In respect of Caitrin and Dona and under paragraph 2 of Schedule 1 of the Children (Northern Ireland) Order 1995 Marcail seeks a lump sum payment to her or alternatively an order requiring Fergus to make a settlement for their benefit.

[5] In deciding whether to make an order under paragraph 2 of Schedule 1 of the Children (Northern Ireland) Order 1995 and if so in what manner I have regard to all the circumstances including the specific matters set out in paragraph 5(1) of Schedule 1. Those specific matters are

- (a) the income, earning capacity, property and other financial resources which Fergus and Marcail have or are likely to have in the foreseeable future,
- (b) the financial needs, obligations and responsibilities which Fergus and Marcail have or are likely to have in the foreseeable future
- (c) the financial needs of Caitrin, Dona and Elliot
- (d) the income, earning capacity (if any), property and other financial resources of Caitrin, Dona and Elliot
- (e) any physical or mental disability of Caitrin, Dona and Elliot
- (f) the manner in which Caitrin, Dona and Elliot were being, or were expected to be, educated or trained.

[6] In relation to a periodical payment order the term may begin with the date of the making of an application for the order, see paragraph 4(1) and shall not in the first instance extend beyond the child's seventeenth birthday unless the court thinks it right in the circumstances of the case to specify a later date and shall not in any event extend beyond the child's eighteenth birthday. However the requirement that the order shall not extend beyond the child's eighteenth birthday does not apply where, as here, it is anticipated that the child will be at university.

[7] There is no provision within Schedule 1 preventing a court from having regard in calculating a lump sum payment to events after a child's eighteenth birthday. I consider that the court is obliged to have regard to such events by virtue of paragraph 5(1)(c) and (f) of Schedule 1. I am required to have regard to the financial needs of the child and the manner in which the child was being, or was expected to be, educated or trained. In this case all of the children were expected to be educated at university.

Background to the application, findings in relation to ownership of the money in Fergus' bank accounts and as to Fergus' intentions in relation to the financial support of his children

[8] The background to this application is set out in a series of 5 judgments:-

(a) *Caitrin, Dona and Elliot (care proceedings: fact finding)* [2010] NIFam 1 delivered on 8 January 2010

(b) *Caitrin, Dona and Elliot (pseudonyms) (No. 2) (Freezing Injunction: Application to discharge or vary)* [2010] NIFam 4 delivered on 25 February 2010

(c) *Caitrin, Dona and Elliot (Pseudonyms) (No. 3) (Application to vary a no contact order)* [2010] NIFam 3 delivered on 2 March 2010

(d) *Caitrin, Dona and Elliot (Pseudonyms) (No 4) (Care proceedings: Final hearing)* [2010] NIFam 8 delivered on 26 May 2010

(e) *Caitrin, Dona and Elliot (Pseudonyms) (No 5) (Care proceedings: Remitted hearing)* STE7923 delivered on 16 September 2010.

That background includes care proceedings brought by a Trust in respect of the children. The conclusion of the care proceedings in respect of Elliot was that I declined to make a care order but rather made a residence order settling that he should reside with his mother Marcail together with a supervision order for a period of 12 months. The conclusion of the care proceedings in respect of Caitrin and Dona was that I made care orders on the basis of care plans dated 25 August 2010 that they should reside in the Trust's residential homes. Those plans include provision for the potential rehabilitation of them to Fergus and/or Marcail.

[9] Accordingly the present position is that Elliot resides with Marcail who provides financial support for him. Caitrin and Dona are in residential homes and their financial needs are presently being met by the Trust. They will however have their own financial needs if they are rehabilitated to one or other of their parents. They should have available to them monies for tertiary education and other incidental matters that will inevitably arise that will not be available at public expense. Fergus, despite an obligation to do so, does not provide financial support for any of his children.

[10] I make it clear so that Fergus does not use any order in these proceedings to undermine Marcail and future attempts to repair her relationship with Caitrin and Dona that the orders that I make are for the benefit of the children. Elliot presently has the financial support of his mother. He is entitled to the financial support of both of his parents and this simple proposition means that he is

entitled to the financial support of his father. A similar position applies in relation to Caitrin and Dona. It is to be hoped that they will be able in the future to live with one or other of their parents and they are entitled to have the security of knowing that there will be financial provision available to them in the future. I have no doubt that left to his own devices Fergus would put all his financial assets beyond the control of anyone apart from himself and that he would not make any financial provision for any of his children unless they resided with him. That this extends to him not seeking or obtaining employment in the United Kingdom so that he has no income with which to pay periodical payments or to provide any other form of financial support.

[11] On 8 January 2010 I gave judgment in *Caitrin, Dona and Elliot (care proceedings: fact finding)* [2010] NIFam 1. At paragraph [17] of that judgment I referred to a discovery order made against Marcail and Fergus in relation to their assets and to a freezing injunction against Fergus to secure his assets pending an application by Marcail for financial provision for the children under the Children (Northern Ireland) Order 1995.

[12] On 25 February 2010 in *Caitrin, Dona and Elliot (pseudonyms) (No. 2) (Freezing Injunction: Application to discharge or vary)* [2010] NIFam 4 I gave judgment in relation to an application by Fergus to vary or discharge the order dated 15 December 2009 granting a freezing injunction restraining him from disposing of his property including monies held in an off shore bank account. At the time that he brought that application Fergus had not revealed the amount in his name in the off shore bank account. He brought that application on two fundamental grounds one of which was that money in one of Fergus' bank accounts belonged to his brother and money in another belonged to his father. Accordingly that the money in these bank accounts should be released to those individuals. Fergus also contended that he owed his father \$22,000 and that he should be allowed to discharge this debt out of the money in the bank account which he accepted belonged to him. In the event I held on the evidence then available to me and for the purposes of interlocutory relief the amounts in the accounts, so far as they were known, belonged to Fergus. Further I declined to hold that Fergus owed \$22,000 or any sum to his father. I refused to discharge or vary the freezing injunction. I make it clear that I come to the same conclusion on the evidence in relation to this application. I hold that all the money in Fergus' bank accounts belongs to him and that he does not owe his father \$22,000 or any sum.

Representation and assessment of Fergus and Marcail

[13] Fergus has always been and remains a litigant in person in relation to the private law proceedings. He applied to adjourn this private law hearing on a number of different grounds including his ill health. I acceded to short adjournments though at that stage he had not been to a doctor and had no intention of going to see a doctor. At the adjourned hearing he made

submissions to the court, cross examined Marcaïl, relied on his written statements most of which were unsworn and also relied on various documents. He did not give oral evidence and accordingly was not subjected to cross examination. His decision not to give evidence was made despite being informed that different weight could be attached to sworn evidence which had been subjected to cross examination as opposed to oral submissions. I previously found that one of his overriding objectives was to leave Marcaïl with nothing financially and emotionally after a 20 year relationship. I maintain that finding. Furthermore it has been my experience throughout this case that Fergus has not paid anything voluntarily and absent a court order capable of enforcement either legally or in practical terms I find that it is certain he would not pay anything to Marcaïl for the support of his son Elliot and that he would not financially support either Caitrin or Dona unless they were living with him. I also consider that Fergus is an evasive and untruthful individual.

[14] Ms McGrenera QC and Ms Niamh Devlin appeared on behalf of Marcaïl.

[15] Marcaïl gave evidence and was cross examined. I find her to be an honest and reliable witness.

Outgoings Marcaïl

[16] Marcaïl has set out her monthly outgoings for rent, electricity, oil, food, etc at £1,355.01 for herself and Elliot. Fergus did not join issue with that figure accepting that it was in the circumstances an appropriate figure for two people. I find that figure to be an appropriate figure bearing in mind that the basic overheads of living are being shared between two rather than five people as was previously the case when the family was together. It is obviously more expensive to keep two houses than to keep one. The standard of living also requires to be better than had previously been experienced by Elliot for which see the findings in my judgment dated 8 January 2010.

[17] I also make it clear that Marcaïl is a person who still has to be careful with finances for herself and Elliot. For instance they do not eat out nor do they take taxis. They have been unable to afford a short break over the summer in Scotland.

[18] Marcaïl is presently renting a property though she would wish to have the greater financial security for herself and Elliot of owning their own home. However even if she was awarded a permanent contract of employment she doubts whether she would be able to afford to purchase a home.

Marcaïl's plans for Elliot

[19] It is Marcaïl's intention that Elliot would go to the same school as is presently being attended by Caitrin. That he will thereafter go on to a university

education. Elliot's progress at his present school indicates that he has excellent prospects of achieving those ambitions.

Fergus' assets and income

[20] There are a number of bank accounts in Fergus' name which I have described at paragraph [14] of my judgment entitled *Caitrin, Dona and Elliot (pseudonyms) (No. 2) (Freezing Injunction: Application to discharge or vary)* delivered on 25 February 2010. The total in those accounts amounts to £65,938.64. Marcaill asserts that some of these monies belong to her representing her income in country ~B~ and from other employment. It is not necessary to, nor do I, determine that question in these proceedings. I am given a discretion to provide suitable financial provision for Elliot and I proceed on the basis that all the monies in those accounts belongs to Fergus.

[21] Fergus owns property in country ~A~ as follows -

- (a) A flat in a city in country ~A~ purchased "in or around 1997". This property is held in Fergus' sole name and he recounts that it was purchased for \$30,000 though to fund that purchase he asserts that he was lent \$27,000 by his father. There are no documents in relation to the contract with the vendor for the purchase of this property and there is no current valuation of it. Fergus states that the property is not tenanted and that he receives no income from it. I have described this property in my judgment dated 26 May 2010 entitled *Caitrin, Dona and Elliot (Pseudonyms) (No 4) (Care proceedings: Final hearing)*. It is apparent that it requires some work to be carried out on it in order for it to be lived in by a family. Fergus describes this work as cosmetic, see paragraph [69] of my judgment dated 26 May 2010. This will be Fergus' home if he returns to country ~A~ or alternatively it could be a source of income for him. In either case it will require the expenditure of some money to repair it in order to bring it up to a suitable standard. I hold that Fergus owns this property. There is no mortgage on it. I do not consider that he purchased it with a loan from his father and accordingly there is no legal or moral obligation on him to pay anything to his father.
- (b) A summer hut also in country ~A~ which was inherited by him from his paternal grandmother and aunt. I have given a description of this property at paragraph [68] of my judgment dated 26 May 2010 entitled *Caitrin, Dona and Elliot (Pseudonyms) (No 4) (Care proceedings: Final hearing)*.

Fergus stated that the property is not tenanted and he does not receive an income from it. There is no valuation of it.

- (c) A single room in a flat in the same city in country ~A~ which was inherited from his maternal grandmother in the early 1980s. The room is not tenanted and Fergus receives no income from it. There is no valuation of this room.

[22] Fergus' employment terminated on 27 May 2010. Up to that date he was in receipt of a net annual income of £25,600. He has a wage earning capacity with offers of employment in Northern Ireland, in country ~A~ and in yet another country. He is employable on a world wide basis. His employment prospects in country ~A~ are set out at paragraph [71] of my judgment dated 26 May 2010. In a statement dated 7 September 2010 Fergus asserts that "the only delay in court proceedings prevents me from obtaining a job . . .". I hold that whereas Fergus has no present income he has been and will be able to obtain employment at the same salary level as previously and this will remain the position in the future. He is and will remain capable of securing employment at his present level of salary adjusted for inflation. I do not accept that he has made any or any determined effort to obtain employment but rather that he is content to rely on job seeker's allowance of £60 per week together with the payments he is entitled to under the freezing injunction. By this method the assets available under the freezing injunction are depleted and he does not add to the funds potentially available to his family.

Marcaïl's assets and income

[23] Fergus asserts that Marcaïl owns "a vast amount of land" in country ~A~. This allegation relates to a property on a farm in a rural location. Marcaïl acknowledges that her parents bought a cottage adjoining which was some 900 square metres of land suitable for planting vegetables and for use in relation to her father's interest in bee keeping. The cottage bought by her parents when she was 18 was put in her name. The cottage was never lived in and she has been there three times. In 1991 the cottage was in such disrepair that it was vandalised and was then demolished. A park for the adjacent kinder garden has been developed over its site by an authority in the area. Marcaïl contends that she has long since lost all rights of ownership in relation to this property. Fergus in cross examination of Marcaïl referred her to a document at 17/219 from the authority in the area stating that the title to the dwelling house had been cancelled as the house was completely destroyed. Fergus sought to establish that this declaration was in breach of Article 1 of the First Protocol to the European Convention on Human Rights and accordingly that Marcaïl could successfully sue in country ~A~ to recover this property. Fergus however gave no indication as to the value of the property, the cost of the litigation, or the laws in country ~A~, if any, as to adverse possession and its effects in relation to property that has been incorporated since 1991 into a park for a kinder garden. Marcaïl states,

and I accept, that in practical terms she has no prospect of any capital or income from this property.

[24] Marcail is presently employed and her salary is £21,400 gross per annum. I have set out her employment history in my judgment dated 8 January 2010 entitled *Caitrin, Dona and Elliot (care proceedings: fact finding)*. She was employed between 21 April 2009 and 31 October 2009. She then changed employment. Her income has been supplemented by some small payments in relation to work as a classroom assistant and for interpretation. In the past her employment record has been fragmented due to her commitments to her children and to Fergus. She has been unable to develop her career to the extent that Fergus has and accordingly she may not find it as easy to obtain employment in the future as Fergus will. However I consider that she has and will retain a wage earning capacity equal to her present earnings adjusted for inflation.

[25] An apartment in a city in country ~A~ is in the name of Marcail. This property was purchased on 6 August 1999. The amount paid is in dispute. The documents show that it was the equivalent of £280. Fergus says that this is the “inventory value” and that government fees are based on this figure. That the amount actually paid was \$16,000 some of which was paid in cash. There is no documentary evidence as to this higher amount. In any event Fergus provided the money for that purchase but the property was put into Marcail’s name. Fergus then let the property until 2008 and received the rental income. Since 2008 it has been let by Marcail with the assistance of her sister who resides in country ~A~. The property is in a poor state of repair and all the rent that is received is spent by Marcail’s sister on heating, installation of water and heat meters, plumbing work and consolidation of the floor. No money has been transferred to Marcail in respect of the rental income. I was not given a present capital value for this property. During the course of the hearing Fergus was asked as to whether he claims that this property belongs to him in view of the fact that he funded the purchase of the property. He repeatedly declined to answer and I consider it probable that in country ~A~ he will seek to have the property declared to be his.

Fergus’ response to the application

[26] Fergus opposes any order being made for Elliot’s support and maintenance whether by way of periodical payments and/or by way of a lump sum. He wished to retain all his capital. He stated that he would pay any periodical payment that was assessed by the Child Support Agency but it then transpired that given his present lack of employment this has meant that the Child Support Agency had made a nil determination though this was subsequently adjusted to £5 per week. In short Fergus does not wish to make any present periodical payments for Elliot. An explanation for this might be that any financial provision to be made would be under the control of Marcail. He did not proffer this as an explanation nor did he suggest any alternative means

by which financial provision could be made by him for the support of Elliot. In any event I make it clear as I have in the past that bypassing Marcail in the provision of financial support was one of the techniques used by Fergus to undermine Marcail in the estimation of all three children.

Fergus' needs, obligations and responsibilities

[27] Fergus states that he is considering entering into a new partnership, that his prospective partner has children and that in addition he hopes to start a new family with her. He contends that this creates financial needs, obligations and responsibilities. However he refused to identify the new partner or to state whether she had income of her own to support her children or any further children. He refused to give evidence and he was not cross examined. I reject his assertions in respect of these needs, obligations and responsibilities.

[28] I have rejected Fergus' evidence as to the debt he states that he owes to his father. His father is undoubtedly in bad health and needs support. I have previously analysed the support available from all other family members for his father and also Fergus' previous assertion to the effect that his father was well off. I do not place any weight on Fergus' obligations and responsibilities in respect of his father.

[29] Fergus has obvious needs in respect of his own living expenses together with provision for his retirement. However he has never had any difficulty in the past in obtaining employment and I have held that he is quite capable of obtaining employment but has chosen not to do so. I do not consider that he should be free to deplete the assets available to his children by living in effect at their expense when he is capable of securing employment. Given his wage earning capacity he will be able to accumulate further capital assets in the future.

[30] Fergus has on-going litigation. He has appealed the public law proceedings to the Court of Appeal. The Court of Appeal has upheld all the orders which had been made in this case. Fergus has access to legal aid in respect of the public law proceedings but he has informed me that the legal aid authorities do not consider that an appeal to the Supreme Court is justified. He still wishes to appeal to the Supreme Court and he is intent on doing so regardless that at present he does not have reasons for the decision of the Court of Appeal and therefore cannot identify any point of law of general public importance. Fergus has informed me that the fee to lodge an appeal to the Supreme Court is £700. I consider that he may have a need to spend that amount of money and that he would not be able to meet that immediate need by obtaining employment. Accordingly I will hold back that amount from any order that I make in this case.

[31] Fergus states, though again he has not given any evidence that he has obligations to repay money that he has recently borrowed in order to meet his living expenses. He has not provided any documentary or other evidence in this respect and he has not persuaded me of the existence of these debts or alternatively whether they are capable of repayment out of an income that he can earn.

[32] Fergus needs to expend monies on his flat in country ~A~. He previously stated that the work that needed to be carried out was cosmetic. I allow an amount in that respect but bear in mind that Fergus has an undoubted earning capacity and this need is not as immediate as the potential need for funds in relation to litigation.

Conclusion

[33] Elliot is the youngest. His financial needs will be for a longer period than those of Caitrin and Dona. His financial needs are immediate whereas Caitrin and Dona's are presently being provided for by the Trust. Elliot's financial needs are both for periodical support and also for a lump sum payment. There are insufficient funds available to provide for all the financial needs of the children. For instance the present tuition fees at university in Belfast are £3,225 per annum. In addition a student at university incurs living expenses and the evidence is that this amounts to £6,250 per annum. The present annual costs at university in Belfast are therefore in the region of £10,000. The tuition fees are set to be increased with a proposed maximum being £9,000 per annum. In addition Elliot requires appropriate accommodation and access to capital for the inevitable expenses of an appropriate education and upbringing.

[34] Caitrin and Dona also require resources for tertiary education and other costs that are clearly likely to be incurred for their benefit which are unavailable at public expense.

[35] Fergus has a very clear wage earning capacity and he has assets in Country ~A~.

[36] I order Fergus to make a periodical payment of £325.00 per month to Marcail for the benefit of Elliot until Elliot is aged approximately 18 that is for a term of 9 years commencing today. Those payments are to be secured by the payment of a capital sum of £30,000. I arrive at that figure by applying a multiplier of 7.5 to the annual sum of £3,900 to give £29,250 and I round that figure up to £30,000.

[37] That leaves an approximate amount of £34,000 available for all three children leaving Fergus with approximately £2,000. Caitrin's prospects of

tertiary education are more immediate than those of Dona and Elliot. I order Fergus to settle £12,000 for the benefit of Caitrin and £11,000 for the benefit of Dona. I order Fergus to pay to Marcail a lump sum of £11,000 for the benefit of Elliot.

[38] I will not discharge the freezing injunction until these amounts have been transferred.