Master 36

23/12/2005

IN THE HIGH COURT OF JUSTICE NORTHERN IRELAND

FAMILY DIVISION

HM/PBM 10-14355-05

Master Redpath

In this application the applicant, the father of child X aged 9 applies for a Prohibited Steps Order to prevent the Respondent, his former wife, from removing X from this jurisdiction to the South of Ireland. An Order for defined contact was granted on 27 May 2005 in favour of the Applicant with a Residence Order being granted to the Respondent. The Contact Order provided that the Applicant should have contact with X on the first weekend of every month from after school on Friday until 5.30pm on Sunday. The order also provided for such further contact as may be agreed and also permitted the applicant to telephone X every second night.

The Applicant made the case that he was very concerned about how his relationship with his son would be affected if he was removed from the jurisdiction. He made the case that his concern for his son stretched far beyond what was specifically defined in the Contact Order. He made the case that as his son lived locally and went to school locally he had been able to remain active in his life from day to day.

The Respondent has been going to the South of Ireland for some time with X and the applicant made the case when that happened, his telephone contact with him suffered considerably. He gave evidence that the Respondent turned the telephone off

when she realised that it was he who was calling, thus preventing him from speaking to his son.

He was also concerned about how the move would affect X's relationship with this elder siblings. X has two brothers, neither of whom it would appear will communicate directly with the Respondent. The Applicant has also one daughter who is over 18 years old and attending university in Northern Ireland.

Evidence was given that X enjoyed his contact with the Applicant and his brothers and they enjoyed activities such as camping and fishing. The Applicant made the case that X had behavioural difficulties and that his elder brother acted as a role model for him and X benefited greatly from that. The Applicant felt that if X was removed to the South of Ireland the positive effects of his relationship with his brother would be impaired. The Applicant had concerns that X had exhibited behavioural difficulties. His evidence was that the school expressed concern because of X's disobedience with teachers and violent behaviour towards other children. As a result X had been attending with an educational psychologist. The Applicant felt that the disruption of the proposed move to a new home and a new school was not in X's best interest.

The Applicant also made the case that the Respondent's new partner had a history of domestic violence and that in the past he had harmed himself and even attempted suicide. He felt that the move would present a substantial risk for X.

The Respondent in evidence said that one of the reasons for the move was that following the Ancillary Relief proceedings finalised on the 8 June 2005 she was unable to get mortgage approval to have the matrimonial home transferred into her sole name. Under the consent order entered into on 8 June 2005 in that event she was at liberty to sell the matrimonial home.

That failure to secure mortgage approval along with a number of other factors prompted her decision to relocate to the South of Ireland. She had been in a relationship with her partner for 5½ years and they had spent a considerable amount of time travelling up and down to see each other at weekends and holiday times. She gave evidence that they were totally committed to each other and that their relationship had reached the stage that it was impossible to continue travelling backwards and forwards. She said that X was very fond of her new partner and she had a wonderful relationship. She said that her new partner would never attempt to interfere in the relationship that X had with his father.

Her evidence was that following the Contact Order made by consent on 27 May 2005, contact had been progressing relatively well save for the fact that on a number of occasions the Applicant had returned X earlier than scheduled and unannounced without prior notice. This had the potential for causing problems as she was not always at home when X was returned. Her evidence was that she had requested the applicant to phone her in advance but refused to do so. Her evidence was that despite this she continued to actively encourage contact.

In particular she gave evidence that on the 18 and 19 June she allowed the Applicant further contact with X as a gesture of goodwill as her second son was home from London for his birthday and had asked to see X. She said she was also conscious of the fact that it was Father's Day on Sunday 19 June 2005. However her evidence was that on the 18 June 2005 X was returned without prior notice, but fortunately her daughter M was in the house. Her evidence was that X and his father had had a row. In any event her elder son and herself managed to persuade X to go back to his father's house and the elder son came and collected him and took him back.

She gave evidence she and X had spent most of the summer in the South of Ireland and that not only had contact taken place, but she had also facilitated additional contact. She gave further evidence that on occasions contact had created difficulty and incidents had taken place in front of X. In paragraph 15 of her statement she says: -

> "I did not take my decision to relocate lightly. I would like to alert the court to the fact that I have consulted my solicitors in respect of the move and an application for leave was made to Dungannon Family Proceedings Court and this was listed for 11 October 2005. However that application will be withdrawn in view of the fact that the High Court is the most suitable venue for this issue to be adjudicated on. Also given that my daughter M is now due to leave for University I felt this was right time for both X and I to move. I have made all the necessary enquiries in relation to the appropriate schooling for X and I have registered X at [a school in the South of Ireland] in fact X has had a guided tour of the school and is very excited at the prospect of moving school. I have given the school X's school report and X's educational psychology report and X is due to commence school on the 1 September 2005. X is currently achieving all of his academic targets. X does have concentration difficulties and was diagnosed as having ADD but he has benefited from being put on an educational plan. X attended with an educational psychologist for one session and I was assured that whilst X has ADD there was no major concerns and that there was no need for further follow up appointments."

She further gave evidence that she had never been a victim of domestic violence with her new partner and that her partner was a very stable person employed in a very responsible position.

It was clear from her evidence that the new accommodation that she was moving to was very comfortable and that money should not be a problem once the move was made. She herself was going to take up a permanent post at a local school as a pre-school teacher/classroom assistant.

Her evidence was that she had spent the last 5 ½ years travelling to her partner's house and that X had made a lot of friends who lived in the same housing development as her partner.

In relation to inter-sibling contact she made the case that X's sister would be coming down to visit them most weekends; that one of his brothers lived in London and that she would facilitate contact with X's eldest brother without any difficulty.

Finally, the Applicant undertook to submit herself to the jurisdiction of this Court, to facilitate contact and in particular to bring X to Drogheda for collection for contact on the relevant weekends and to collect him from Drogheda on the Sunday evening.

The Court also had the benefit of a report from the Deputy Official Solicitor. It would appear that X felt when he was speaking to the Deputy Official Solicitor that he was moving to Mayo which was not in fact the case. However the thrust of the report remains the same. The Deputy Official Solicitor states in her report: -

> "X confirmed that his father and Y [his eldest brother] are very important to him and that he does not wish in any way to lose his relationship with them. He thought that if he does move to Mayo that it would probably be the case that he might spend more time with his father and Y during school holiday periods. In relation to M, he stated that she will be able to come and stay in Mayo whenever she wishes to and that also himself and his mother would probably visit her in [Z].
>
> We recapped some of the matters which we had discussed and X stated that 'I was a wee bit upset at the start about moving to Mayo, just because of leaving my friends, but I've got used to it and feel happy about the move – there will be new friends near me and I will have more freedom to go out and play myself there'. The only matter which he was not too happy about was the fact the would have to start learning Irish in his new school which would be a new subject for him, and that he would not be learning French."

In concluding her report the Deputy Official Solicitor states: -

> "I find X to be a very friendly and pleasant boy who answered my questions freely and readily. I did not sense that he has been put under any particular pressure or influence. He has had the advantage of already being well acquainted with the proposed new home in Mayo and the local environment and therefore it does not hold any surprises for him. He was able to discuss rationally the possible disadvantages of the move which he acknowledged but did not feel were sufficiently serious enough to put him off going. He is committed to continuing the contact with his father and maintaining his relationship with his father and brother Z."

Having heard the evidence of the Applicant and the Respondent I have to say that I preferred the evidence of the Respondent. No cogent evidence was called to suggest that the Respondent's new partner was either violent or unstable. As with all these cases there is no doubt that X on occasions failed to turn up for contact with the Applicant but for a young child that is not uncommon. On points of detail I found the Applicant's evidence unreliable.

Lowe Everall and Nicholls set out in paragraphs 7.1, 7.2 and 7.3 in their text book 'International Movement of Children', first edition: -

> "7.1 in February 2001, in what is now the leading authority, Payne –v- Payne [2001] EWCA Civ 166, Thorpe LJ pointed out that the applicant in a relocation case is invariably the mother and primary carer, that her motivation for moving generally arises from her remarriage or her urge to return home, and that the father's opposition is commonly founded on a resultant reduction in his contact with, and influence on, the children. He identified the consistent application of two propositions for the last 30 years; the welfare of the child is the paramount consideration; and refusing the primary carers reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependant children. Therefore, a mother's application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.

> 7.2 However, there is no presumption of law that favours the reasonable proposals of a caring parent. To avoid the risk of infringing the Respondent's right to family life and a fair trial, the court should ask itself whether the mother's application is genuine (in a sense that it is not motivated by some selfish desire to exclude the father) and realistic, being founded on well researched and investigated proposals. If it fails either of these tests, it will inevitably be refused. If the mother's application passes those tests, then the father's position should be examined to see if he is motivated by a genuine concern for the children's welfare or some ulterior motive. The Court should then examine the extent of the detriment to the father and his relationship with the children if the application were granted, and the extent to which it would be offset by extension of the child's relationship with the maternal family and homeland, and the impact on the mother either as a single parent or new wife (of refusing her realistic proposals). Then:
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> 'The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory check list so far as appropriate'. (Payne –v- Payne)
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> 7.3 But in carrying into effect this discipline, the importance which the court has consistently attached to the emotional and psychological well-being of the primary carer should not be diminished. In any evaluation of the welfare of the child as the paramount consideration, great weight must be given to this factor, because the most crucial assessment and finding for the judge is likely to be the effect of refusing the application on the mother's future psychological and emotional stability."

I am not dealing in this case with an issue of temporary removal from the jurisdiction but permanent removal. I have to say however, a removal to another jurisdiction within the same island should not be regarded necessarily in the same light as a removal to another jurisdiction within Europe or beyond.

In Re H (Children) (Residence Order; condition) [2001] EWCA CIV1338, the Court of Appeal in England and Wales looked at a situation where a child was to be

removed from the jurisdiction, but within the United Kingdom. In that case the English and Welsh Court of Appeal decided that the test to be applied in the case of internal relocation was less stringent than that for cases for external relocation. Thorpe LJ states at paragraph 20 of the judgment: -

> "What then is the rationalisation for freer movement of the primary carer in the United Kingdom? Seems to me, obvious. Within the same sovereignty there will be the same system of laws with the same rights of the citizen, rights for..……education, healthcare and statutory benefits…What is the rationalisation for a different test to be applied for an application to relocate to Belfast as apposed to an application to relocate from Gloucester to Dublin? All that the Court can do is remember that in each and every case the decision must rest on the paramount principle of child welfare."

It seems to me that in a case where the Respondent has undertaken to submit to the jurisdiction of this Courts the principles involved should be no different for a removal to the South of Ireland than to say Scotland.

I have no doubt that any court to which application had to be made in the South of Ireland in relation to child X would take into account exactly the same principles that this court would take into in deciding issues as to the child's welfare.

It was quite clear from the Respondent's evidence that she was in a stable relationship with her new partner and that this relationship was extremely important to her. It was very difficult to sustain this relationship given the distance between the parties and it was quite clear that the only reason that the Respondent had remained in this jurisdiction was X. Indeed had she been able to fund the ongoing mortgage on the matrimonial home it is not inconceivable that she would have stayed in this jurisdiction for at least some further period of time. Accordingly I have no doubt that a refusal of her application will have a devastating effect upon her.

It Re G (Removal from jurisdiction) [2005] EWCA CIV at 710 Thorpe LJ says at paragraph 20 of his judgment: -

> "Recent appeals to this court have demonstrated that the judge's assessment of this very important factor has been hampered by an absence of clear evidence from the applicant as to what would be the emotional consequence of refusal. I well understand the dilemma for an applicant. To say too little risks that the Judge does not sufficiently concentrate on the point; to say too much is perhaps to forfeit the Judge's sympathy and to lead him to the conclusion that the applicant is over-egging the pudding. However, all that said, I am concerned that that the Judge appears to say, in the passage that I have cited in full, that the mother fails because she is not established that the consequence of refusal would be psychiatric damage. Furthermore, all that he seems to envisage is initial disappoint and leading to distress. Both those reactions could be characterised as transient, particularly since the Judge has assessed the mother on somewhat slender evidence as resilient and has also found that she will adapt to his situation because she has the strength and character to do so. The obvious influence of that finding was that he was anticipating the emotional reaction as short term."

Two other issues stand for consideration in this type of case. Both arise from the rights of the parties, and indeed the children, under the European Convention on Human Rights. Article 2 protocol 4 of the Convention provides:-

> "1) Everyone lawfully within the territory of astate shall within that territory have the right to liberty of movement and freedom to choice of residence.
> 2) Everybody shall be free to leave any country, including his own.
> 3) No restrictions shall be placed on the exercise of these rights other than such as in accordance with law and as are necessary in a democratic society, in the interests of national security or public safety, for the maintenance of public order for the prevention of crime, for the protection of health and morals, or for the protection of the rights and freedoms of others."

Article 8 states: -

> "1) Everyone has the right to respect for his private and family life, his home and his correspondence."

The Northern Irish Court of Appeal on the recent case of AR v Homefirst Trust [2005] NICA 8 considered the situation of the parents' Article 8 rights in the context of a Care Order. At paragraph 77 of the Judgment the Lord Chief Justice states: -

> "It is accepted by all the parties that the removal of J from his mother constitutes interference with her Article 8 right.
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> In KA v Finland 1FLR969, ECTHR held that mutual enjoyment held by a parent and child of each others company constitutes a fundamental element of family life. Interference with that fundamental element of family life would be a violation of Article 8 unless it is in accordance of the law, pursues an aim or aims that are legitimate under Article 8(2) and can be regarded as necessary in a democratic society. The fact that a child can be placed in a more beneficial environment will not alone justify a compulsory measure of removal from the care of the biological parent; there must exist other circumstances pointing to the necessity for such an interference of the parents rights under article 8 of the convention to enjoy a family life with their child."

The Lord Chief Justice continues at paragraph 95 when considering the test of the paramount interests of the child: -

> "Although the Court must treat the child's welfare as paramount. This does not mean that it should exclude from its consideration of other factors such as the Article 8 rights of the parents. Whilst these cannot prevail over the welfare of the child, they must be taken into account."

It is clear therefore that the interests of the child remain paramount, but that the Article 8 rights of the parents cannot be ignored.

As I have already said, having heard the evidence in this case, I preferred the evidence of the Respondent. I am quite happy with the evidence that the Respondent gave concerning the educational facilities available for X and I am also happy that in

the past she had endeavoured to facilitate contact despite the fact that she was spending a good deal of time out of this jurisdiction. She has also given her sworn undertaking that she will submit to the jurisdiction of this Court and that she will facilitate travelling arrangements for X.

It is very important for X to have contact with both parents. It is also very important that he should live in a stable family home and have access to acceptable educational facilities. I have no doubt that he will be afforded both of these things in his new home. I am also quite happy that applying the test in Payne –v- Payne referred to above, that the Respondent is carrying out this move for good reasons and not simply to confound contact with the applicant. I am also satisfied from the evidence that the move is well funded and a lack of funding should not put any undue pressure on X.

Accordingly, given the evidence in the case and the sworn undertakings of the Respondent, I dismiss the Applicant's application for Prohibited Steps Order and will vary the Defined Contact Order based on the undertakings given by the Respondent already referred to.

In order to monitor how contact in the matter is proceeding I will review this matter on the 13 January 2006 at 9.30am.