

In The Family Care Centre Sitting in Belfast

Re C

Her Honour Judge P Smyth

Introduction

1. This is an appeal from the majority decision of learned Deputy District Judge King sitting with two Lay Magistrates refusing the mother permission to remove the child, C, from Northern Ireland and relocate with him to Dublin. C is now 7 years old and lives in a village in County Down. Nothing must be reported which might identify C or his family.

Background

2. The parents separated in January 2008 when C was 16 months old. It is clear that despite the breakdown of their relationship, both parents have always demonstrated a commitment to their son and have worked cooperatively together in his best interests. There is no question that they love him dearly. It is also clear from the very helpful report by Ms Carson, the Court Children's Officer that C has a strong and equal bond with both parents and their new partners. These parents have managed to ensure that C is happy and secure and that his emotional wellbeing has not been adversely affected by their separation.

3. Concerns were raised when C was in nursery school that his behaviour revealed traits of Autistic Spectrum Disorder. The court was provided with a report dated the 5th March 2013 which confirmed that on 21st June 2011, the expert opinion based on developmental history, individual assessment, information from the Educational Psychologist and play group observation, was that 'C's difficulties' could best be explained by an Autism Spectrum Disorder.
4. The mother accepts that she did not agree with this diagnosis and insists that this was also the father's position. The father disputed this assertion, and pointed out that he was not present at the final meeting of the professionals when the diagnosis was confirmed and the mother's disagreement was recorded. I prefer the mother's evidence because at her request the report was not sent to C's G.P. and he was discharged from the relevant services on the basis that a re-referral could be made at any stage. If the father had not been in agreement with that course, I am satisfied that he would have made that known to the professionals and progressed the matter. Furthermore, I am satisfied that the reason the father sought to distance himself from the mother on this issue is because he wanted to rely on C's diagnosis as a ground of objection to relocation. The court was provided with C's recent school report, which happily confirmed that he is in fact coping extremely well with mainstream schooling and there are currently no concerns that he is demonstrating autistic traits. The headmaster also provided a letter confirming that he saw no reason why C would not cope equally well in another mainstream school.
5. Whilst the parents had forged a positive relationship since their separation in C's best interests, I am sorry to say that the mother's desire to relocate to Dublin has caused friction. An altercation in July 2013 resulted in the involvement of police and the P.P.S have only recently confirmed its decision that there should be no prosecution. I am satisfied that each parent has sought to use every tactical advantage to persuade the Court of their

respective positions. The father secretly recorded a telephone conversation with the mother in an attempt to entrap her into making admissions about the arrangements which had been in existence for some years. It appears that this was prompted by a conversation between them which caused the father to fear that the mother would deny the regular overnight contact that he had enjoyed for a number of years. The transcript confirms that the mother had no intention of denying the "general rule" that the father had overnight contact two nights per week and one night at the weekend and that the misunderstanding had arisen because of words that were spoken by both of them, no doubt, in the heat of the moment.

6. The mother, for her part, was clearly anxious to demonstrate the extent of time C spent in her care and I am satisfied that this was the reason she wished to change a longstanding arrangement whereby C was collected from school by the paternal grandmother on Tuesdays, which was one of the overnight contact days. Whilst I accept that the mother was working at home on Tuesdays, this had been the case for some time. It is clear from the transcript that the father was anxious not to change this arrangement. I am satisfied that this was because he did not want the mother to gain an advantage and also because he hoped to argue that the afternoon spent with his mother should be considered as part of his share of time spent with C.
7. The mother claimed that she has always been C's primary carer whilst the father insisted that they had shared care. It is not disputed that the father left the family home following the separation or that he lived with his parents for a period before moving into rented accommodation in Belfast. He has lived with his new partner, who is now his wife within a few miles of the mother's home for some time. Initially, overnight contact took place at the paternal grandparents' home, even when the father moved to Belfast and then latterly at his new home. The father generally cares for C two overnights per week and one overnight at the weekend. Both parents have been flexible in the past to allow for work commitments and personal plans.

8. The mother's point is that her home has always been constant for C and that she is the parent who has had most contact with his school and attended every appointment for him. She maintains that she chose C's school and the father agreed with the decision while the father insists it was a joint decision. She alleges that the father has only increased his involvement with the school because of her application to relocate which the father denies.
9. I am satisfied that both parents share C's care. The time C spends with each parent is not significantly different and there is no doubt that both parents share the responsibility for important decisions in his life. I accept the mother's evidence that she is the first point of contact with the school and that she is the one who takes most responsibility for school projects, attending dental and medical appointments etc. However, this arrangement is often the case even where parents are happily married or living together as a family unit with their child. It is not necessarily an indication of the care afforded to the child or of the responsibility each parent bears for the child's life. If I had been in any doubt about this, it is clear from the report of the Court Children's Officer that a shared care arrangement is certainly C's perception. When asked who he lives with, C's response was 'I live with my mum and my dad, but not in the same house'. In particular, he said that he spends four nights each week with his mum and three nights each week with his dad. Interestingly, C was able to differentiate between short periods of time spent with his parents during week days and longer periods at weekends. The Court Children's officer concluded that C was keen to divide his time equally between his parents.
10. C described to the Court Children's officer, the happy home environments he enjoys with both parents. He also described his excitement that the father and his new wife are expecting a new baby. In fact, C now has twin half siblings which were born before these proceedings were concluded.

11. C was asked about his wishes and feelings concerning a proposed relocation to Dublin. He talked about his new friends in Dublin, C and S, and said that he thought that he could move to Dublin and make new friends there. C showed no clear preference as to whether he wanted to move or remain living in Northern Ireland. He was however very clear that he would want to see his father at weekends and at school holidays if he were to move to Dublin with the mother.

The Mother's Position

12. The Mother's position is simple. She has been in a new relationship for some time and wishes to marry and have more children. Her partner lives and works in Dublin where he is employed as a financial analyst. The mother provided the court with a copy of a letter from the leading firm in which her partner is employed which confirmed that there are no opportunities for this type of work in Northern Ireland. The father has moved on with his life and she wishes to move on with hers. The father has married and now has two more children and she wishes to do the same. The mother points out that travel to and from Dublin is now a much simpler matter than it was previously and that regular contact can be maintained. She says that it is not realistic to expect her partner to commute to Dublin each day and they wish to make their home in Dublin. I am satisfied that her motivation is genuine and that there is no question of any desire on her part to damage the bond between C and his father.

13. She has researched schools in the Dublin area to which she wishes to relocate and has provided confirmation that C will be offered a place at the school of her choice. She accepts that this is a much larger school, than the small country school which C currently attends, but she points out that in terms of class size the numbers are similar because C is currently taught in a classroom with two year groups. She also accepts that C will be required to learn Irish

and that he currently has no knowledge of the language. However, she says that children of C's school age have learnt only very basic Irish and in any event, her partner's mother is prepared to help him in that regard. The mother refutes any suggestion that C may not cope because of difficulties in his behaviour at nursery school, which were attributed to Autism Spectrum Disorder. As stated previously, she has never accepted that diagnosis and C's recent school report provides some justification for that stance.

14. The Mother has been employed by the same company for many years, which promotes homeworking amongst its employees. Whilst she has not formally requested that she be permitted to work online for most of the week from Dublin, she has provided confirmation of the company policy and that she will have her line manager's support. She has been reluctant to make a formal application until she receives leave of the court to relocate. In the event that her employer refuses to allow her to work from Dublin, she has provided evidence that she is likely to be offered employment by a friend in an administrative position. She has also provided confirmation of her partner's salary which has increased significantly, in order to demonstrate financial security.

15. The mother and her partner intend to live initially with her partner's parents who have ample room to accommodate all three. Her partner's father is a retired Garda and she refutes any suggestion that the area in which she intends to live and in which the proposed school is situated, is in any way unsuitable.

The Father's Position

16. The Father's position is also simple. He does not wish contact with his son to be reduced in any way. He says that he deliberately bought a home within a few miles of the mother in order to avail of mid-week, as well as weekend overnight contact. He believes that the small school environment which C currently enjoys meets his needs much better than a larger school

environment in Dublin. In particular, he raises concerns about C's ability to cope in light of the fact that C had a diagnosis of Autism Spectrum Disorder in 2011. Whilst he accepts that there are no current concerns and that the headmaster of C's school has confirmed that he sees no reason why C would not continue to do well in a new school in Dublin, he says that he remains anxious that C may not cope as well as expected.

17. The father also objects to relocation on the grounds that he says the area in Dublin to which the mother intends to relocate is known to have a high crime rate, and major social problems with drugs. He dismisses the mother's assertion that her partner's parents are very respectable people and would not live in an area that would be unsuitable for C.
18. The father also points out that C has a close extended family in County Down. He has grandparents, cousins and other family members on both his paternal and maternal sides. In particular, he now has twin half siblings. He contends that it is inevitable that C will lose those extended family bonds because any time spent in Northern Ireland will be spent with him and his immediate family.

The Law

19. Counsel on behalf of both parents submitted detailed skeleton arguments. I am indebted to them for their careful analysis of the law.
20. The binding judgment on this court is SL v RG [2012] NIFam1. At paragraph 11, Mr Justice Weir states the relevant issues for consideration as follows:

" [11] There have been several attempts in the past, chiefly in the English Court of Appeal, to lay down what are sometimes described as the "principles" and sometimes now as the "guidance" to be followed by Courts in relocation cases. The high water mark of those endeavours was Payne v Payne [2001] 1 FCR 425 the overly-prescriptive nature of which successive English Courts have sought to row back from or circumvent in the years that have followed.

Fortunately I am not bound by decisions of the English Court of Appeal although by custom our courts accord them, when appropriate, due deference. The most recent decision of the English Courts seeking to grapple with the problems created by the very detailed principles (or guidance) to be derived from Payne is that of MK v CK [2011] 3 FCR 111. For my own part I am content to embrace as my guiding approach to relocation cases the proposition contained in the judgement of Black LJ in that case that;

“The only authentic principle that runs through the entire line of relocation authorities is that the welfare of the child is the court’s paramount consideration, everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child”. Ibid at [141].

The circumstances of each child, each family, and the dynamics surrounding both are so variable that I also adopt with gratitude the further formulation of Black LJ:

“When a relocation application falls to be determined, all of the facts need to be considered.” Ibid at [145].

Subsequently in SH v RD and RH [2012] NI Fam 2 Mr Justice Weir repeated the statement of law cited above and an appeal to the Court of Appeal was dismissed.

21. It should be noted that in MK v CK the Court of Appeal in England and Wales drew an important distinction between cases where one parent is the primary carer and the other has contact and cases where parents share the care of their child. In Payne considerable emphasis was placed on the effect on the primary carer of a refusal to allow her or him to relocate where the proposal was reasonable and not motivated by any improper considerations. That approach was deemed not appropriate in shared care situations. The Court of Appeal confirmed that in *all* cases the welfare of the child was the paramount consideration regardless of all other considerations however

powerful and reasonable they may be. The Court is required to conduct a proper balancing exercise of all of the competing factors taking into account the welfare checklist. In shared care cases, “the no order principle/status quo argument carries significant weight”.

Conclusion

22. The circumstances in which decisions have to be made about relocation are infinitely varied and ultimately a judgment has to be made about what is best for C in these particular circumstances. He is a very happy child who has two happy homes and now has two new born half siblings with whom he has a great deal of contact. He is also a child who displayed some behavioural difficulties in earlier years and is now thriving in his small school environment. The question is whether the benefits of relocating to Dublin, where his mother wishes him to be part of a new family unit, outweigh the benefits of the status quo.
23. The father proposes that if the mother wishes to relocate, C should spend most of his time with him and his new family unit and the mother can travel to and from Northern Ireland. The mother says that she will not relocate without C. Applying the welfare checklist, it is clear from the evidence that both parents are able to provide for C’s physical, emotional and educational needs very well. In terms of C’s wishes and feelings, what is beyond doubt is that he wants to continue to share his life equally between his parents. That is not to say that he is opposed to the prospect of moving to Dublin. The detailed report from the Court Children’s Officer has examined C’s experience of Dublin and the new friends that he has already made there as well as his positive experience of his mother’s partner and his family. I am satisfied however, that given C’s age he is unlikely to be able to grasp the reduction in contact with his father and in particular his new half-siblings that relocation will inevitably bring.

24. In considering this matter I am conscious that relocating to Dublin is no further than relocating to some parts of Northern Ireland and that the difficulties maintaining parental bonds can in no way be compared, for example, to relocations abroad. I am also conscious that the mother has a right to rebuild her own life and form a new family unit where she chooses and that C will benefit from being cared for by a mother who is happy and fulfilled. This is a very important factor, albeit that it must not be allowed to assume a significance which overshadows all other considerations.

25. I am satisfied that the mother's partner is unlikely to be able to find employment in his chosen field in Northern Ireland and that this factor will cause inconvenience if the mother is refused leave to relocate with C to Dublin. However, I am not satisfied that this factor will prevent the mother from marrying and forming a new family unit, hopefully with more children. There is no reason why the mother's partner cannot commute to Dublin from County Down and if necessary stay with his parents in Dublin one or two nights per week. No doubt many people have to travel similar distances for work and make similar arrangements. In my view, the decision for the court is essentially whether C should have to travel to and from Dublin, or whether the mother's partner should be required to do so. As the mother points out, travel to and from Dublin is now much quicker than it used to be. That is a relevant factor which has to be weighed in the balance and which may or may not support an application to relocate depending on other factors.

26. I have to balance the inconvenience that commuting will cause to the mother and her partner and the fact that setting up home in Northern Ireland is not their choice, against the likely effect of the change in circumstances that the proposed relocation will have on C. He will have to cope with the upheaval from a small quiet country school to a large inner city school in Dublin. I doubt that C will be at any material disadvantage because his new peers will have had the benefit of Irish language teaching and in any event C will be helped by the partner's mother and the school. However, he will also have to

cope with the loss of the regular contact with his father and the benefits of that family unit including his new half-siblings and extended family contact. C's social and academic performance at school has been reassuring since he started mainstream school. However, the diagnosis of Autism Spectrum Disorder in 2011, whilst it may ultimately prove to be mistaken, should sound a note of caution when the Court is considering such fundamental changes in his life.

27. The Court is also mindful that currently the mother has a secure, well paid job in Northern Ireland. Whilst she is hopeful that she may be able to retain that employment in the event of relocation there is no certainty that she will be able to do so since no formal application has been made to her employer. The mother has provided confirmation of a likely job offer in the event that she cannot continue in her current employment and her partner is in receipt of a secure income. In terms of C's welfare however, it appears that his mother's current secure employment is a significant factor against relocation.
28. I wish to make it clear that I do not accept any of the points that the father makes regarding the suitability of the area in Dublin in which the mother wishes to make her new home. Clearly, one does not have to travel far in Northern Ireland to encounter a culture of drugs and crime generally. I have no reason to doubt that the mother's partner and his family are entirely respectable people who will no doubt play a very important role in C's life in the future.
29. Taking all of the relevant considerations into account, I am satisfied that it is in C's best interests that the status quo should remain and that the mother should be refused leave to relocate with him to Dublin. The relatively easy access to Dublin supports the conclusion that the mother's partner should travel to and from Northern Ireland rather than C.
30. Although the mother has proposed contact with the father every other weekend and was prepared to offer contact every weekend, I am satisfied that

such an arrangement would be unrealistic in the long term. C would inevitably develop a new social network as he grows older and the consequence would be a very significant reduction in contact with the father and his other family members, particularly his new half-siblings, in Northern Ireland. In addition, the upheaval to C in terms of his school environment in circumstances where there were previous concerns raised about his social interaction and communication skills persuades me that the mother's appeal against the decision to refuse leave to relocate with C should be dismissed and the decision of the learned Deputy District Judge affirmed.

31. I would exhort both parents to set aside the acrimony that has developed as a consequence of these proceedings and to rebuild the trust that is necessary if C is to continue to be a happy and secure little boy.