Master 29

03/06/2005

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

PROBATE AND MATRIMONIAL OFFICE

HC/PBM/32/04

Re J

MASTER REDPATH

This is an application under Article 15 of the Children (NI) Order 1995 for financial provision for a child over the age of 18. I am not aware that any such application based on special circumstances has come before this Court before. I have been asked to decide a number of preliminary points in relation to jurisdiction.

Article 15 (1) of the 1995 Order states:

"Schedule 2 (which makes provision in relation to financial relief for children) shall have effect."

Article 15 (3) of the order states:

"Schedule 1 of the Order makes reference to applications in relation to persons over the age of 18. At paragraph 3(1) it states:

If on application by a person who has reached the age of 18, it appears to the Court….

(b) that there are special circumstances which justify the making of an order under this paragraph, the court may make one or both of the orders mentioned in sub-paragraph 2

(2) the orders are -

(a) an order requiring either or both of the applicants parents to pay the applicant such periodical payments, for such terms as may be specified in the order;

(b) an order requiring either or both of the applicant's parents to pay to the applicant such lump sum as may be so specified.

In this case the applicant, the mother of the child makes the case that the child of the marriage J, suffers from learning difficulties to the extent that his case falls within the interpretation of special circumstances mentioned in paragraph 3(1)(b) of Schedule 1 to the 1995 Order.

J is now 25 years of age and the Ancillary Relief in his parent's case was settled on 2 May 2002. At that stage J was 22 and his requirements formed no part of the matrimonial settlement.

I have had the benefit of excellent skeleton arguments from Miss Walkingshaw and Miss Martin which have been of considerable assistance. Four points arise at this stage for decision:

(i) who should be the applicant in this case?

(ii) does the Court's have jurisdiction to entertain this application?

(iii) should the application be made pursuant to the Child Support (NI) Order 1991? and

(iv) is the High Court the appropriate forum?

I am not at this stage of the case deciding whether or not J does suffer from a disability that would being him within the definition of "special circumstances".

Miss Martin on behalf of the applicant argued:

(i) The Child Support (NI) Order 1991 has no application to the case as J is over 19.

(ii) Article 15 and Schedule 1 of the Children (NI) Order 1995 explicitly provide for this type of application.

(iii) "Special circumstances" clearly includes physical disability or other handicap.

(iv) Paragraph 3 (7) of Schedule 1 to the 1995 Order provide that the court's powers are exercisable at any time.

(v) Whilst it was conceded that the application should have been made in J's name that failure to do this should not be fatal to that claim.

(vi) Rule 4.20 (1) of the Family Proceedings (NI) Rules 1996 provide for leave being given to amend form C7 to amend the identity of the parties. This might simply mean amending the proceedings to allow J to proceed by a next friend.

(vii) Article 3 of the Children (Allocation of Proceedings) (NI) Order 1996 which lists the proceedings that must be commenced in the Family Proceedings Court makes no mention of applications under article 15 of the 1995 Order.

(viii) Article 4 of the Children (Allocation of Proceedings) Order 1996 provides that any application which has the effect of varying a High Court Order must be brought in the High Court.

Miss Walkingshaw on the other hand argued:

(i) That the application should have been made in J's name.

(ii) That the application could only be entertained if there was a pre-existing order under the Child Support (NI) Order 1991.

(iii) That the application should have commenced in the Family Proceedings Court and that the applicant cannot reactivate the powers granted to the

Court by the Matrimonial Causes Order after the conclusion of the Ancillary Relief.

It is clear from Paragraph 3 (1) of Schedule 1 to the 1995 Order that the applicant in this case should have been J. However I bear in mind that I am bound by Order 1 Rule 1(b) of the Rules of the Supreme Court which provides that in exercising my jurisdiction I must have regard to the overriding objective which includes ensuring that cases are dealt with expeditiously and fairly. It would serve no purpose if these proceedings had to be recommenced because of a technical irregularity. The issues remain precisely the same despite the fact that the proceedings have been commenced in the wrong name.

Miss Martin referred to Order 20 Rule 8(1) of the Rules of the Supreme Court which provides:

> "for the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in the proceedings, the court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just…."

The days of technical objections to defects in proceedings which cause no prejudice to either of the parties are over and in this particular case I would have no particular difficulty in amending the proceedings (subject to medical evidence proving the incapacity of J) to reflect that the application is made by the applicant as next friend for J.

In C v F (Disabled Child: Maintenance Orders) [1998] 2 FLR1 the English Court of Appeal decided that an unmarried father was liable to pay maintenance beyond the period of time when a child of the relationship was in full time education because of his severe disability. The Court of Appeal held that a jurisdiction existed which allowed the Court to make a free standing application under the Children Act

1989 in a case where the child suffered from such a disability. The Court also held that any age restriction under the Child Support Act 1991 did not apply.

Butler Sloss LJ continues at page 5:-

> It is to be noted that there is no power in the Child Support Act to make Maintenance Orders. Orders in cases falling within the Section 8 exemptions are made under the provisions of other statutes listed in Section 8 (11). The exemptions are expressed in terms of Section 8 shall not prevent a Court from exercising any power which it has to make a Maintenance Order. It would be odd, in my view, if the Child Support Act nonetheless restricted the duration of such Orders to the limitations imposed by Section 55 on the process of assessment. Such a limitation would fly in the face of the powers of a Court to provide, inter alia, for the cost of tertiary education, and for adult children under a disability. For instance, a Maintenance Agreement incorporated into an Order under the Matrimonial Causes Act 1973 or the Children Act might well include a requirement that the absent parent should pay periodical payments to an *adult child* until he has completed full-time education. If such an Order to be unenforceable beyond the first year of university? further, unless the child complied with Section 55(1)(b) or (c) the Maintenance Agreement would not be enforceable beyond the age of sixteen. Such a restriction upon the use of Maintenance Agreements made into Orders seems unlikely to have been intended in circumstances where the agreements are specifically exempted through the operation of Section 8(3). Another example is to be found in Section 8(7) which covers education and does not exclude *adult education*, which is however excluded in Section 55(1)(b). One purpose of the Child Support Act appears to be to limit the obligation of the absent parent to pay under a Maintenance Assessment to the child's nineteenth birthday. In contrast to Section 8(7) appears to be recognising that young people will be educated and need financial support beyond the cut-off date of the Child Support Act.
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> If, both under Section 8(5) and (7) it is recognised that Orders may be made under the Act specified in Section 8(11) beyond the age of nineteen, the same argument would apply to those under a disability in Section 8(8). The relevant wording, "a Maintenance Order in relation to a child", is identical in each sub-section. If contrary

> to my view, the definition of child in Section 55 were applied to the Section 8(8) exemption, one might have a child of sixteen under a disability, living at home without attending full-time education and unable to receive financial assistance from the absent parent beyond his sixteenth birthday. I do not believe that that can have been the intention when the Section 8 exemptions were enacted.
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> Although it is by no means easy to reconcile the Child Support Act with the Children Act and the Matrimonial Causes Act, the regimen of Maintenance Assessment replacing Maintenance Orders clearly is intended not to apply to the exemptions set out in Section 8(5) to (8) and the Court is not precluded from making Orders under the provisions of other specified family statutes. In the case of Maintenance Agreements, Education and Disability, I am satisfied that the only way for the Child Support Act to work effectively with the Acts set out in Section 8(11) is by exercising the jurisdiction given to the Courts under that legislation to extend Orders beyond the age of sixteen or the age of nineteen."

As the Child Support Act applies directly in Northern Ireland and the Children Act as regards this particular provision is the same as the Children (Northern Ireland) Order 1995 I have no doubt that these comments apply to the position in Northern Ireland. Accordingly I am of the view that in answer to the questions I posed at page 2 of this judgment that the Court does have jurisdiction to entertain this application and that the application should not have been made pursuant to the Child Support (Northern Ireland) Order 1991.

The final question for consideration is whether or not the High Court is the appropriate forum for this application. Article 3 paragraph (1) of the Children (Allocation of Proceedings) Order (NI) 1996 lists the proceedings that must be commenced in the Family Proceedings Court. Proceedings under Article 15 are not included in this list. Furthermore it is not apparent from the Allocation of Proceedings Rules that such proceedings should commence in the High Court. The general scheme of the Children (NI) Order 1995 is that proceedings should, with two

main exceptions, commence in the Family Proceedings Court and I would take the view that there is nothing to prevent the Family Proceedings Court taking on an application such as this. Furthermore it seems to me that the scheme for allocation of proceedings would tend to suggest that such an application as this should commence in the Family Proceedings Court. The exceptions are contained in Rule 3(2) which deals with proceedings which are linked to other family proceedings in a Court where they have already been commenced and Article 4 which deals with proceedings which have the effect of extending, varying or discharging an Order that has already been made in another Court.

An attempt was made in this case to argue that this application was in fact a variation of the final order made in the ancillary relief proceedings which were concluded two years ago. I feel that this argument must fail as no application was made on those proceedings for any ongoing maintenance for J and the Order quite clearly reflects this.

Accordingly I am of the view that unless there are concurrent High Court proceedings, which in this case there are not, or the application has the effect of varying or discharging an Order made in the High Court, the application should commence in the Family Proceedings Court.

That said the Court has to have regard to Article 3(2) of the 1995 Order which deals with the no delay principle in Children Order proceedings. It is very important that the no delay principle is adhered to. Furthermore Article 16 of the allocation of Proceedings (Northern Ireland) Order 1996 provides:-

> "Where proceedings are commenced or transferred in contravention of a provision of this Order, the contravention shall not have the effect of making the proceedings invalid; and no appeal shall lie against the determination of proceedings on the basis of such contravention alone".

Accordingly taking the no delay principle into account and having regard to Article 16, whilst of the view that the proceedings should have commenced in the Family Proceedings Court, I will hear these proceedings without further delay. Accordingly I intend to give directions in the case today and will list the substantive case for hearing before the end of term.