THE HIGH COURT

[2020] IEHC 524

[2020 No. 38 CAF]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989 AND IN THE MATTER OF THE FAMILY LAW ACT 1995 AND IN THE MATTER OF AN APPEAL TO THE HIGH COURT…[WORDS DELIBERATELY OMITTED] FROM AN ORDER OF…[WORDS DELIBERATELY OMITTED] [THE] CIRCUIT COURT OF THE 4TH DAY OF SEPTEMBER 2020

BETWEEN

Q

APPELLANT (FORMERLY RESPONDENT)

– AND –

P

RESPONDENT (FORMERLY APPLICANT)

JUDGMENT of Mr Justice Max Barrett delivered on 21st October 2020.

I

Introduction

1. This is an appeal against a refusal by the Circuit Court to grant a stay on a particular order made by it in family law proceedings pending an appeal against that order. This appeal against the refusal of the stay has been brought to the High Court out of time but the court proceeded in any event to hear the appeal for the reasons set out below. The appellant has failed in the within appeal*, i.e.* the court decided not to interfere with the decision of the learned Circuit Court judge to refuse a stay on his order.

II

Out-of-Time Dimension of Appeal

2. A summary chronology of the events applicable to the out-of-time dimension of the bringing of the within appeal follows:

04.09.2020	Circuit Court Order made. Appellant thereafter instructs that within appeal be brought.
08.09.2020	Appellant's solicitor sends papers to Dublin agent to file the within appeal. High Court Central Office declines to open file in absence of Circuit Court Order.
22.09.2020	Perfected Circuit Court Order Issues.

3. The court gratefully notes that Ms P helpfully took no position on the *Éire Continental* dimension of the proceedings.

4. When it comes to the extension of time for bringing an appeal to the High Court, the decision of the Supreme Court in *Éire Continental Trading Co. Ltd v. Clonmel Foods Ltd* [1955] I.R. 170. In his judgment, Lavery J. pointed to the following being proper matters for the consideration of the court in deciding whether time should be extended:

   – *a bona fide intention to appeal within the permitted timeframe.*

Court Response: it appears from the evidence that no issue presents as regards this factor.

– *the existence of something like mistake with mistake as to procedure (with the mistake of counsel or a solicitor as to the meaning of a relevant rule not being sufficient).*

Court Response: what presents here is not a mistake but rather an impossibility. It appears to be an administrative requirement of the High Court Central Office that an authenticated copy of the Circuit Court order is a prerequisite to the filing of appeal papers (and one can see good sense to such a requirement*; inter alia*, it precludes the filing of appeals against non-existent Circuit Court orders). Here the perfected order did not issue until after the time for bringing an appeal. And it is not alleged that there was any undue tardiness on the part of the appellant in this regard. An appellant cannot be exposed to adverse consequence for the length of time that it takes the perfected version of a Circuit Court order in circumstances where it is not alleged that there has been any undue tardiness on the part of the appellant in procuring that order.

– *the appellant must establish that an arguable ground of appeal exists.*

Court Response: given that a Circuit Court appeal in fact involves a full re-hearing of the case, one might reasonably ask whether this factor adds much. Presumably if the Circuit Court case was not even arguable, a remarkably low threshold (almost anything is arguable), the case would have failed before the Circuit Court on that basis. Here it seems to the court that there is more than enough at play as regards the custody/location of the children for there to be an arguable appeal that the Circuit Court judge, *inter alia*, erred in the view taken as to where the best interests of the children of Ms P and Mr Q lie (and the court has no idea which way the appeal will go; its views are confined solely to the issue of arguability).

5. The foregoing being so, the court has proceeded to hear the within application. However, the court would note in passing that *Éire Continental* was decided in the non-family law context. The within application falls to be decided within the penumbra of s.3(1) of the Guardianship of Infants Act 1964 (as substituted by s.45 of the Children and Family Relationships Act 2015) which provides as follows:

"(1) Where, in any proceedings before any court, the – (a) guardianship, custody or upbringing of, or access to a child, or (b) administration of any property belonging to or held on trust for a child or the application of the income thereof, is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration.

(2) In proceedings to which subsection (1) applies, the court shall determine the best interests of the child concerned in accordance with Part V."

6. In the adoption context (this is not an adoption case) similar provision is made in s.19(1) of the Adoption Act 2010.

7. Paramount means paramount; the Oireachtas, twice since the turn of the century, via s.3 of the Act of 1964 (as substituted by the Act of 2015) and s.19 of the Act of 2010, has made expressly clear what it requires of the court in the context of guardianship, custody, *etc*. proceedings (pursuant to the said s.3) and adoption proceedings (pursuant to the said s.19). Statute ranks higher in the legal norms hierarchy than even Supreme Court precedent. So, regardless of outcome under the *Éire Continental* test, if the best interests of the child require that an appeal be heard, then it is difficult to see circumstances in which that appeal would not be heard. In this context, it seems to the court that the outcome to which an application of the *Éire Continental* test points in this regard is a consideration (and, given that one is treating with Supreme Court precedent, a notable consideration) but not the paramount consideration. The paramount consideration, as statute directs, is the best interests of the child, and here it is in the best interests of the children that the within appeal should now be heard.

III

Background to Appeal

8. A summary chronology of the events applicable to the bringing of the within appeal follows:

16.05.2019	Ms P and Mr Q, a judicially separated couple, are granted joint custody of Child A and Child B with Ms P as the primary carer.
30.06.2020	Ms P's stand-alone motion to remove children permanently from the relevant Circuit Court circuit (consequent upon an intended employment-related move of Ms P from Place X to Place Y within Ireland) comes on before the Circuit Court. The matter is eventually heard on 30.06.2020, 03.07.2020, 31.07.2020 and 04.09.2020.
04.09.2020	Counsel for Mr Q applies to have the matter adjourned as Mr Q was absent for a necessary Covid test (and there is no doubt but that he was). Adjournment refused by Circuit Court judge who proceeds to make an interim order allowing Ms P to move to Place Y with further orders as to access, with the matter being listed for review in three months' time from the date of the order. The Circuit Court judge expressly indicated that any final decision he would make would be contingent on how access works between September 2020 and the intended further hearing in December 2020. The Circuit Court judge refused the application for a stay pending the bringing of an appeal against his order. This is an appeal against that refusal of a stay.
14.10.2020	Appeal against refusal of stay heard by this Court.

9. Both Ms P and Mr Q have been represented throughout these proceedings (including this appeal) by solicitors and counsel.

IV

Points Made for Mr Q Concerning this Appeal

10. Counsel indicated that:

(i) Mr Q's absence from court on 4 September was legitimate (the court accepts that this was so);

(ii) the issue of access of the children to their father should be very much at the centre of the court's deliberations;

(iii) the father had access mid-week prior to the move and had access every second weekend;

(iv) although he continues to have weekend access, he has concerns regarding the relationship with Child A which, at times in the past, has been challenging, but which was 'getting back on track' before the Circuit Court sanctioned the move from Place X to Place Y;

(v) Mr Q is concerned that the relationship with Child A will again deteriorate if Child A remains in Place Y;

(vi) Mr Q believes there to be a history of alienation in this case *vis-à-vis* Child A;

(vii) Child B is a sports enthusiast and there is a belief on the part of Mr Q that Ms P did not encourage Child B in attending sports training with Mr Q;

(viii) Mr Q has found Child B to be very upset on leaving Mr Q (to return from Place X to Place Y) on each Sunday evening when Mr Q has had access; Child B has also made repeated phone calls to Mr Q indicating that he is upset about the move from Place X to Place Y;

(ix) Child A, following the removal from Place X to Place Y, commenced at School 1, appears not to have been happy there, moved to School 2, where she appears more content, but is only a recent arrival at School 2, so there is no permanency there yet;

(x) although Ms P claims to be financially better off as a result of the move from Place X to Place Y, Mr Q queries whether this is in fact so, not least though not only as both Child A and Child B are now being educated privately in Place Y whereas they had attended state schools in Place X;

(xi) at the judicial separation hearings, Ms P was expressly asked if she intended to return from Place X to Place Y (from where she originally hails) and she indicated that she did not intend to make that move; it later emerged that 10 months

previous to the judicial separation hearings, Ms P had made an application to School 1 in respect of Child A;

(xii) Mr Q also believes that there was a deliberate undervaluation of the family home at the judicial separation hearings in order that Ms P could get her hands on same, sell it at an appropriate (higher) price and use the proceeds to move from Place X to Place Y;

(xiii) Ms P at this time is working from home one day a week and thus could spend roughly half the week in Place X instead of all the week in Place Y;

(xiv) previously, the children have lived in Place X all their lives, they have extended family in Place X, they have circles of friends and extra-curricular activities in Place X and given the fact of the separation, the move to Place Y represents a further upheaval in the lives of the children;

(xv) pending the hearing that will be undertaken by the Circuit Court next December it will greatly prejudice Mr Q if the children remain in Place Y; this is because as the children settle into school and a way of life in Place Y it will become increasingly difficult to move them back to Place X.

V

Points Made for Ms P Concerning this Appeal

11. Counsel indicated that:

(i) Mr Q currently enjoys access to the children for three weekends out of four;

(ii) as regards the allegation of alienation, this is denied, it has never been made out and there has never been a judgment against Ms P in this regard;

(iii) in relation to school, both children started at the start of the academic year; according to the instructions that counsel has received, Child B has settled in well and is doing well, Child A did spend two weeks in School 1 which was not a "*good fit*", however, Child A is now in School 2 and is delighted with same and doing well there;

(iv) as to income, there has been an increase in salary as a result of Ms P's employment-related move from Place X to Place Y; however, another feature of the move is the expectation that it will yield more consultancy work, thus enhancing Ms P's income further;

(v) as to the children's attending private school, Ms P is happy to choose to 'tighten her own belt' in order to facilitate the children in so doing;

(vi) there was no intention at the time of the separation hearing to move from Place X to Place Y but Ms P did list Child A at School 1 just to keep her options open in case there ever should be a move;

(vii) although Ms P does work from home one day a week, there is an aspect to her employment, which does not need to be gone into in this judgment, which makes that day off, to some extent, more apparent than real;

(viii) as regards the genesis of the Circuit Court judge's decision, on Day 1 Mr Q gave evidence and was cross-examined, on Day 2 Ms P gave evidence and was subjected to cross-examination, Days 3 and 4 were what counsel for Ms P styled as "*wait and see days*", i.e. there was no need for evidence and hence the absence of Mr Q on Day 4 was of no consequence as everything on the last two days was by way of submissions from counsel; the judge then decided that on balance the stark refusal of the application would not do anything to advance further relations between Mr Q and Child A (after having given essentially the school summer holiday period to see how matters worked out between father and daughter); so he made the order he made and provided for a review in December in the view that this would not embed the children permanently in Place Y but would give an opportunity to see how matters were progressing, with access to Mr Q on three weekends out of four. So the learned Circuit judge took a reasoned and careful approach to the order he made and his reasons for same. The within appeal came on for hearing roughly half-way through the review period and even the existence of a motion and having to come into the High Court has had a destabilising effect in terms of 'bedding' matters down. There was also delay in bringing the within application;

(ix) if the High Court was to grant a stay that would be "*temporarily determinative*" of the appeal;

(x) if the High Court was to grant a stay both of the children would have to be taken out of their schools and return to Place X, counsel observing as follows, in this respect:

> *"In that regard I have to press the position of the welfare of the children….[F]irstly, [Child B]…will have left…school in [Place X]…will have gone to [a]…new…school in [Place Y] and would have to go back to…school [in Place X] for a period of six weeks until [the Circuit Court judge]…re-examines all of the issues, and there is a chance that at that stage…after six weeks, if [the Circuit Court judge]…continued to go with my client, that there would have to be a further relocation. And it's more acute for [Child A]…in the sense that [Child A]…started in [School 1]…moved to [School 2]…would then have a new school again…if [Child A] went…to [Place X], for six weeks, with a view to potentially, if [the Circuit Court judge]…decided in favour of my client, going back to [Place Y]…at that stage".*

(xi) although not a paramount consideration, from the point of view of Ms P, there is every chance that moving could destabilise her position at her place of new employment;

(xii) all in all, it would be detrimental to the best interests of the children if the court was to accede to the within application.

VI

Determination of the Best Interests of the Children

12. Pursuant to s.3 of the Act of 1964, the court turns now to assess the best interests of the children in accordance with Part V of that Act, in particular s.31 of same. Section 31 provides*, inter alia*, as follows:

31.(1) *In determining for the purposes of this Act what is in the best interests of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family*.

[Court Response: the court has so proceeded.]

(2) *The factors and circumstances referred to in subsection (1) include*:

(a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships;

[Court Response: The Circuit Court judge has undertaken a careful analysis in arriving at his decision concerning the relocation, including his scheduling of a thorough review of matters at the start of December. Mindful of that pending review and that it is now but six weeks or so away, the court respectfully does not see that six more weeks or so of the current arrangements pending that review will be detrimental to the prospects of a meaningful relationship.]

(b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise);

[Court Response: Though informally related via counsel it was not contested that both children are settling in well to their current schools in Place Y. The court respectfully does not consider that the children can offer a meaningful view as to which school they should each attend for the next six weeks pending the thorough review that is pending in December (roughly at the end of Term 1 of their schooling, with the vacation period providing a convenient time in which any, if any, changes to be made by the Circuit Court judge may be made); indeed to interact with them in this regard would not, the court considers, be in their best interests, as it could only be even more unsettling for them in the relatively short period which remains of what the Circuit Court judge clearly intends to be a trial of the new arrangements.]

(c) *the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances;*

[Court Response: The Circuit Court judge has undertaken a careful analysis in arriving at his decision concerning the relocation, including scheduling a thorough review of matters at the start of December. The court does not see that in the relatively short period which remains of what the learned Circuit Court judge clearly intends to be a trial period, it would assist the physical, psychological or emotional needs of either Child A or Child B to see them moved still further between schools in the manner described in the above-quoted submissions from counsel for Ms P.]

(d) *the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;*

[Court Response: see response to (a).]

(e) *the child's religious, spiritual, cultural and linguistic upbringing and needs;*

[Court Response: the court does not see any of these to be an issue.]

(f) *the child's social, intellectual and educational upbringing and needs;*

[Court Response: see response to (c).]

(g) *the child's age and any special characteristics;*

[Court Response: No special characteristics present. Both children are of school-going age and the court does not see that in the relatively short period which remains of what the learned Circuit Court judge clearly intends to be a trial period, it would be of benefit to still-young children to move still further between schools in the manner described in the above-quoted submissions from counsel for Ms P].

(h) *any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being;*

[Court Response: No such harm or need for protection has been identified or contended for.]

(i) *where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them;*

[Court Response: see response to (a).]

(j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;

[Court Response: This is a key aspect of the substantive matter. Both parents are clearly doing what they each think, in their respective views, to be in the best interests of their children.]

(k) the capacity of each person in respect of whom an application is made under this Act—

(i) to care for and meet the needs of the child,
(ii) to communicate and co-operate on issues relating to the child, and
(iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates.

[Court Response: no issues have been identified to the court in this regard.]

(5) In any proceedings to which section 3(1)(a) applies, the court shall have regard to the general principle that unreasonable delay in determining the proceedings may be contrary to the best interests of the child."

[Court Response: There was delay in bringing the within application. The court does not see that the delay presenting yields any concern as regards its now determining the within application.]

VII

Decision

13. Having regard to the best interests of the children, the court, for the various reasons outlined above, respectfully declines to grant the relief sought. Three factors had a significant impact on the court's thinking in coming to a view on where the children's best interests lie. The court identifies these factors hereafter in no particular order.

14. First, the Circuit Court judge took a reasoned and careful approach, allowing the relocation to proceed but subject to a thorough review in early-December. So the relocation as a matter of history has now taken place and Ms P and the children are now living in Place Y. The court has to treat with matters as it finds them, not as they might have been; here the move has taken place and this Court's decision on appeal has to take place within that changed context and not by reference to how things used to be before the Circuit Court intervened. It would upset the process carefully devised by the learned Circuit Court judge if this Court now rewinds things to the way they were pending the appeal.

15. Second, the review date is now only six weeks or so away, with this appeal falling at the half-way point. That is a relatively short timeframe and the court does not consider that it is in the best interests of the children at this time to tamper with matters as the Circuit Court judge has left them.

16. Third, the court is particularly concerned that it would be positively detrimental to the best interests of the children to start moving them again between schools mid-term, with a possible further move then to follow based on whatever the learned Circuit Court judge decides at his review in December.

17. The court notes that had it granted the relief sought this could have impacted negatively on Ms P's new employment. (She appears still to be in the early and/or probationary period when one wants especially to impress an employer). However, in truth, the court considered that the best interests of the children at this time point so clearly in one direction, *i.e*. to refuse the relief sought, that it did not need to factor in this consideration. That said the court notes in passing that it is a consideration that it could have factored in. The best interests of the children are, per s.3(1) of the Act of 1964 "*the paramount consideration*" but that does not mean that other non-paramount considerations cannot be factored into the court's deliberations when and as appropriate.

18. In passing, the court notes that this application took about 45 minutes in total. By contrast, the Circuit Court judge saw the parties in the witness box over a two-day period, thereafter had lengthy submissions from counsel, and clearly brought a great deal of attention and thinking to the case. It seems to this Court that the High Court should always be careful to proceed with the utmost care in an application such as this when it is the Circuit Court judge who has had a chance to see the parties, question the parties, get a sense of them as people, and ask them questions directly.

19. Finally, one point that was not raised in this appeal and which the court cannot therefore decide but which does seem to present is whether the Circuit Court could, in light of s.3 of the Act of 1964, properly have granted a stay in circumstances where it had been decided by the Circuit Court that the best interests of the children lay in one direction and to grant a stay would have involved the Circuit Court allowing matters to proceed for a time at least in the opposite direction.

TO THE APPELLANT/RESPONDENT:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?

Dear Appellant/Respondent,

I have dealt in the preceding pages with various issues presenting in this application. Much of what I have written might seem like jargon. In this section, I identify briefly <u>some</u> key elements of my judgment and what it means for each of you. ***This summary is not a substitute for what is stated in the preceding pages. It is meant merely to help you understand some key elements of what I have stated.***

TO THE APPELLANT: *The Circuit Court judge, in his decision of 4th September 2020, allowed the relocation of your separated wife and children to take place. You are appealing that decision. I can see why you would be concerned at the course matters have taken* vis-à-vis *the distance at which your children now live from you and how that will affect your future relationship with them.*

In this appeal, you indicated a preference for things to stay as they used to be pending your fuller appeal. You are aggrieved that the Circuit Court judge did not 'press the Pause button' and leave things as they used to be until your appeal is heard. However, I have to deal with matters as I now find them, not as they might have been, and I am presented with a situation where the move <u>has</u> *taken place and where I am not being asked to 'pause' things as they are but to 'rewind' them to how they used to be. Though I appreciate that you were entirely well-*

motivated in bringing this appeal, I, respectfully, do not consider that it would be in the best interests of your children at this time for me to do as you have asked. I had three main reasons for this:

(1) the Circuit Court judge, to my mind, took a reasoned and careful approach, allowing the relocation to proceed but subject to a thorough review in early-December. The relocation as a matter of history has now taken place and your separated wife and your children are now living in their new place of residence. To my mind, it would upset the process carefully devised by the Circuit Court judge as being in the best interests of the children if, pending the appeal, I were now to rewind things to the way they were.

(2) the review date is now only six weeks or so away. I appreciate that may seem a long time to you, but, to my mind, it is a relatively short period and I do not consider that at this time it would be in the best interests of your children to tamper with matters as the Circuit Court judge has left them.

(3) I am concerned that it would be positively detrimental to the best interests of your children to start moving them again between schools mid-term, with a possible further move then to follow based on whatever the learned Circuit Court judge decides at his review in December.

Please note that my decision in this application does not in any way impact on whatever decision the Circuit Court judge may reach following his review in December.

TO THE RESPONDENT: *Please see my above explanation to your separated husband as to why I have decided this application as I have. Please note that my decision in this application does not in any way impact on whatever decision the Circuit Court judge may reach following his review in December.*

Yours faithfully,

Max Barrett (Judge)