

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

Grace (a pseudonym) (Relocation application)

STEPHENS J

Introduction

[1] This case concerns a 13 year old girl, whom I shall call Grace, though that is not her real name. Her brother is 16 and I shall call him Thomas though again that is not his real name. Their mother is 44 and their father is 45. Thomas and Grace's stepfather is 38. Thomas and Grace reside with their mother and step father. As will become apparent in broad terms Thomas has had no contact with his father for approximately 2 years. Grace stays with her father every other weekend together with Wednesday and Thursday afternoons with an overnight on Wednesday or Thursday night.

[2] The mother brings this application to relocate with Thomas and Grace to Australia and seeks a specific issue order under Article 13 of the Children (Northern Ireland) Order 1995. The father does not oppose Thomas relocating to Australia but he opposes the application in so far as it relates to Grace.

[3] At the conclusion of the hearing I ruled that the mother should have leave to relocate to Australia and indicated that I would give my reasons at a later date. I now give those reasons.

[4] As I have indicated I have anonymised this judgment. The names are not the real names of the children. Nothing should be published which would identify the children or any member of their extended family. Any report of this judgment should make it known that the names used are pseudonyms. Prior to publication of this judgment on the Court Service website I afford the parties the opportunity of considering the pseudonyms and if they consider them inappropriate to either suggest alternatives or to

request anonymisation by use of initials. If any party wishes to avail of this opportunity then the Office of Care and Protection should be informed in writing within one week. If the Office is not so informed then the present pseudonyms will remain.

[5] 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the Office of Care and Protection in writing within one week as to whether there is any reason why the judgment should not be published on the Court Service website or as to whether it requires any further anonymisation prior to publication.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.

Legal principles

[6] In determining the application I seek to apply the course which is in the best interests of Grace whose welfare is the court's paramount consideration. I have particular regard to the matters set out in Article 3(3) of the Children (Northern Ireland) Order 1995. The application of the welfare test requires the court to consider the individual circumstances of the case including recognising and supporting the function of the primary carer see *Poel v Poel* [1970] 1 WLR 1469 as further considered in *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1052. In the latter case Thorpe LJ stated at paragraph 26:

“[26] In summary a review of the decisions of this court over the course of the last thirty years demonstrates that relocation cases have been consistently decided upon the application of the following two propositions:

(a) the welfare of the child is the paramount consideration; and

(b) refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.”

And at paragraph [32]:

“Thus in most relocation cases the most crucial assessment and finding for the judge is likely to be the

effect of the refusal of the application on the mother's future psychological and emotional stability.”

Thorpe LJ then set out the following discipline at paragraphs [40] – [41]:

“[40] However there is a danger that if the regard which the court pays to the reasonable proposals of the primary carer were elevated into a legal presumption then there would be an obvious risk of the breach of the respondent's rights not only under Article 8 but also his rights under Article 6 to a fair trial. To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare I would suggest the following discipline as a prelude to conclusion:

(a) Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life. Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.

(b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?

(c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?

(d) 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 checklist insofar as appropriate.

[41] In suggesting such a discipline I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor. “

[7] In the same case Dame Elizabeth Butler-Sloss said the following:-

“Summary

[85] In summary I would suggest that the following considerations should be in the forefront of the mind of a judge trying one of these difficult cases. They are not and could not be exclusive of the other important matters which arise in the individual case to be decided. All the relevant factors need to be considered, including the points I make below, so far as they are relevant, and weighed in the balance. The points I make are obvious but in view of the arguments presented to us in this case, it may be worthwhile to repeat them.

- (a) The welfare of the child is always paramount.
- (b) There is no presumption created by s 13(1)(b) in favour of the applicant parent.
- (c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.
- (d) Consequently the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.
- (e) The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.
- (f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.

(g) The opportunity for continuing contact between the child and the parent left behind may be very significant.”

[8] As I have stated those are the principles that I seek to apply. However I also note recent debate as to the decision in *Payne v Payne* for which see the declaration that emerged from an International Judicial Conference held in Washington in March 2010 under the aegis of (inter alia) the Hague Conference, the decision of Mostyn J in *AR (a child: relocation)* [2010] EWHC 1346, and a conference in July 2010 in London, the principal organiser of which was Professor Marilyn Freeman of the Centre for Family Law and Practice in London together with the speech of Wall LJ entitled “Is the family justice system in need of review?” published 24 September 2010.

[9] I make it clear that the decision that I arrive at in this case would be the same whether I applied the legal principles suggested by Mostyn J in *AR (a child: relocation)* [2010] EWHC 1346 or the principles which I derive from *Payne v Payne*.

[10] The Article 8 rights of all the family members are engaged. Any interference has to be a necessary and proportionate response to the interference with the right to respect for family life

[11] In relation to the wishes and feelings of Grace I gratefully adopt the analysis of Gillen J in *Re E* [2005] NI Fam 12 at paragraph [24] (iii). I add that in determining the question as to what is in the child’s welfare the court is enjoined to consider the welfare checklist in Article 3(3) including ascertaining the wishes and feelings of the child and to give due weight to them “having regard to his age and understanding”. The child’s views and preferences are not determinative. There are other factors in the welfare checklist but as children get older, their views should hold greater weight. Madame Justice Abella in Canada said

“It is not only an option for the court to treat the child’s views as an increasingly determinative factor as his or her maturity increases, it is, by definition, in a child’s best interests to respect and promote his or her autonomy to the extent that his or her maturity dictates.”

Whilst recognising the increasing importance of the child’s views with increasing maturity it should also be recognised that the child’s views should not be elevated above his welfare and best interests. It is not for nothing that welfare is described as paramount.

Factual background

[12] The mother was born in Northern Ireland and has lived here all her life except for a period of some 2 ½ years in or about 1990 when she lived and worked in a different city in Australia than the one to which she now wishes to relocate. As a result of that stay she has had a long held ambition to live and work in Australia. The plan that has been formulated is as a result of a long held wish to live in Australia as opposed to being an attempt to exclude the father from Grace's life. The plan is not a passing whim or fancy. In 1992 the mother married the father who also was born in Northern Ireland and has lived here all his life. After the marriage they lived and worked in Northern Ireland. Thomas was born in 1993 and Grace in 1997. The mother and the father separated in April 2000. The mother commenced a relationship in or about then with the step father who is now her husband. He is Australian.

[13] On 25 September 2001 a joint residence order was made in respect of both children.

[14] On 7 April 2006 a Decree Absolute was granted in divorce proceedings between the mother and the father.

[15] On 5 May 2006 the mother and the step father married.

The personal background and circumstances of the mother

[16] The mother is presently employed and earns £1,100 nett per month. She has over 20 years of employment experience.

[17] Both of the mother's parents live in Northern Ireland. Her father and the children's maternal grandfather, carries on business from his home. He is in his 60's. Her brother also works in that business. Her father is financially able to and also willing to provide assistance to the mother to facilitate the move to Australia.

[18] The stepfather is employed and earns £1,500 nett per month. Whilst carrying on his employment he also undertook an Open University course. He recently obtained a BSc (Hons).

[19] As I have indicated the stepfather is Australian. His sister is married and she and her husband reside in the city in Australia to which the mother wishes to relocate. I have seen photographs of their house. It provides spacious well appointed accommodation. The step father's sister has a well paid and responsible job. Her income is Australian \$115,000. She has 23 years experience. Her husband also has a good employment record and is retraining as an electrician and will soon complete his second year as an electrical apprentice. His current annual salary is Australian \$80,000.

[20] I assess the mother as a truthful honest witness. I do so not only on the basis of her demeanour in the witness box but also on the basis of the consistency of her evidence.

[21] I should also say something here about Thomas and specifically as to the role played by the mother in caring for him. Thomas has done extremely well. He is progressing well at school and in sports. His development is due to his own temperament and characteristics but also I find it is due to the excellent nurturing environment provided by the mother.

Impact on the mother if she did not go to Australia

[22] I had the opportunity of seeing the mother's reaction in the witness box to the question as to what the impact would be if she was not able to go to Australia. She not only stated that she would be devastated but also her distress at that concept was palpable and genuine. It was not a rehearsed response or a manufactured physical reaction but was a true insight into her emotional response. I have no doubt that she would be greatly emotionally distressed if there was a refusal of the application to relocate and that this would not be temporary. That it would impact adversely on Grace. As I have indicated I come to those conclusions not only on what I heard but also on the basis of what I saw.

Grace

[23] Grace is a friendly open child. She is mature for her age. She is adaptable and makes friends easily. She is doing well at and has friends at her school. She loves both of her parents dearly but the dominant attachment is to her mother as evidenced by her desire to move with her mother to Australia and as a result of the close bond arising from the day to day care provided for Grace by her mother. She has an open relationship with her mother and is able to discuss matters of concern. Subject to a qualification relating to activities she enjoys her contact with her father. She would gain more from her contact with her father if it involved age appropriate activities. There is another qualification and that is that she would gain more from contact if the atmosphere between the father and the mother and stepfather but in particular Thomas was civil.

[24] Grace wishes to move to Australia. No doubt she has been influenced to a degree by her mother's enthusiasm but she does not have a distorted and idealistic view of Australia. She has not been manipulated by her mother. She knows how far away she is going to be from Northern Ireland and that it will impact on her contact with her father both in relation to its frequency and its quality. I find that her wishes and feelings are genuine. They are not

determinative of this application. They are a factor and a factor of some importance to be taken into account.

The plan

[25] The timing of the move to Australia is informed by a number of factors. Thomas has finished his GCSEs at his school in Northern Ireland. A move from one school to another would therefore coincide with his move from one level of schooling to another. The school year starts in Australia in January and Thomas would be able to start a new school year in Australia in January 2011. Grace is 13 and therefore there would not be disruption to preparation for any important exams. The stepfather has just graduated and accordingly he wishes to secure employment with the benefit of his new qualification. He does not wish to secure temporary employment in Northern Ireland and then move on to some more permanent position in Australia with the consequential disruption this would cause to the development of a career.

[26] The mother and stepfather plan to stay with the stepfather's sister and brother in law. They have the offer of accommodation with them and they are free to stay there as long as they wish. They of course plan to find their own house in the same area and no question arises as to the availability of suitable accommodation to be rented by them. They have researched schools for both Thomas and Grace to attend. They have the offer of financial support from the mother's father to tide them over in Australia while they seek accommodation and jobs for them both.

[27] The cost of moving from Northern Ireland to Australia in terms of flights, transport, accommodation, food, entertainment, etc have all been calculated by the mother and the stepfather. A question arose during the course of the hearing as to the accuracy of the calculations. The scrutiny that these proceedings brought to the calculations did show some flaws in the planning process but I hold only of a nature and to a degree to be expected when plans of this sort are exposed to forensic analysis. I am satisfied that the plans have been properly formulated and costed and also that sufficient finance is available from the mother's father.

[28] I also conclude that both the mother and the stepfather have excellent prospects of employment within a reasonable timescale in Australia. Their plan is to move to Australia and then look for employment. In doing that they have the advantage of qualifications and in particular the mother has experience. They also have the advantage of existing family ties in Australia so that they have a ready source of information as to how to set about obtaining employment. I also consider that the jobs that they can obtain will bring in sufficient financial rewards to finance the mother, the stepfather, Thomas and Grace.

[29] It was suggested to the mother that she has an idealised and unrealistic view of Australia and that she has passed on those views to both of her children. That the reality will be different and the realisation of this for the children will have a negative impact on them. I reject that suggestion. There is no doubt that the mother yearns to go to Australia and that she wishes to immerse herself in Australian culture. However I consider that she is realistic and knows and appreciates that there are and will be difficulties in Australia just as in any other country. I do not consider that she has an idealised view or that such a view has been passed on to either of the children.

[30] The mother states that she will maintain contact for Grace with her father by the expedient of Skype, telephone, letters and by direct contact both in Australia and in Northern Ireland. The parties have formulated contact plans for Grace if in the event I gave leave to relocate. The agreement was as follows

- (a) Grace shall travel to Northern Ireland for a period of not less than two weeks at some stage during the months of December or January each year. During that time Grace will reside with her father.
- (b) Grace's father shall be at liberty to travel to Australia and shall have contact with Grace for a period of not less than two weeks at some stage during the months of July and August each year. During this period in Australia Grace shall reside with her father if he is able to obtain suitable accommodation. Otherwise he shall have extensive daily contact as agreed.
- (c) Grace shall have unlimited indirect contact with her father by means of telephone calls, letters and Skype and any other form of indirect communication as agreed.
- (d) The mother has agreed that she will do all she can to facilitate the father's visits to Australia and shall do all she can to assist with arranging suitable accommodation for the father.
- (e) The mother shall be responsible for the cost of the return flights for Grace each year to Northern Ireland.
- (f) The parties agree that the father shall cease paying child maintenance to the mother for the support of Grace, and that the maintenance shall be saved by the father to defray the costs associated with his travel to Australia.

- (g) The mother agrees that she shall write or email the father on a monthly basis with a general report on Grace's welfare, including her progress at school, health and hobbies and after school activities.
- (h) The mother agrees to pay an annual sum of £750 to the father, until and including the year 2015. The first payment will be made three months following the departure of Grace to Australia and shall be made on that same date every year.
- (i) The father agrees that in any year in which he decides not to travel to Australia he will repay the £750 to the mother.
- (j) The mother undertakes to file in the Office of Care and Protection, and shall serve copies on the father and the Official Solicitor, proof that she has on deposit the sum of £8000 to fund the costs of relocation to Australia. This shall be filed four weeks prior to the relocation to Australia taking place.
- (k) The parties undertake to use their best endeavours to engage in the process of mediation with an appropriate mediation service.

[31] I should explain how the parties arrived at the figure of £750 per annum to be paid by the mother to the father to fund his trips to Australia. The father is not a high income earner. A calculation was undertaken as to how much it would cost for him to travel to Australia each year to see Grace. The total annual cost was said by the father to be £2,473.33. There was some dispute as to whether the father would incur accommodation costs and the amount of those costs but I indicated that I would take the figure suggested by the father. The mother has agreed to forgo child maintenance for Grace of £960 and the father can put this towards the annual costs. In addition there was a saving to the father of some £15 - £25 per week in relation to the costs of the days or weekends when Grace stays with him. I indicated that I would take the lower figure as the saving. Accordingly I indicated to the parties that the figure that needs to be paid to the father to maintain Grace's contact with him was £750. The payment of this sum should not be dependent on the proof of payment for airline tickets but rather should be paid annually. Attempts can be made to recover it if the father does not travel.

[32] Parenthood has costs. For instance the ability of one or other or both parents to develop a career may be affected and there is or may be less leisure time. There are financial costs. Implicitly these are all costs which both parents agree to share. However I consider that where a court permits relocation that ordinarily it is preferable not to impose on the parent who stays behind the additional costs of maintaining contact with his or her child. I say ordinarily because the paramount consideration is the welfare of the child. The focus is on the child and ultimately finances should be available to

maintain the child's contact with the parent who stays behind from whatever source.

[33] I am satisfied on the evidence that there is sufficient financial support available to ensure that these contacts will occur. I accept the mother's evidence that she will support contact. The mother has also agreed that a mirror order should be made in Australia so that contact can be enforced in that jurisdiction.

The father

[34] I make it clear immediately that the father is passionately attached to Grace. He loves her deeply and would wish to do everything possible for her though this desire is unfortunately affected by his character and temperament. At present some of his contacts with Grace are not quite as positive as could be achieved in that she is at an age when consideration should be given to more age appropriate activities. Grace is somewhat frustrated by the lack of activity. This is the sort of issue which could ordinarily be resolved by some gentle and discreet advice to the father but the question arises as to his response to such advice. Certainly the advice would have to come from a source other than the mother.

[35] Unfortunately the assessment that I have formed of the father is that he is a difficult, demanding and awkward individual who even when given time for reflection holds to a view and to a course of action even if it causes harm. He is unable or unwilling to bring critical analysis and self assessment to his own actions. He is unable to prioritise the needs of Thomas over his own feelings of anger and hostility to the mother. His characteristics have impacted particularly adversely on Thomas but the repercussions are there for the entire family including Grace. His losses of temper, accompanied by shouting, abuse and striking objects, mean that for entirely justifiable reasons he has been requested not to come to the door of the mother and stepfather's house. The need for such an injunction obviously sends a message to his children that their father's temper cannot be trusted. Such a message undermines the regard of his children for him but it is a message which he is prepared to continue rather than apologising and keeping his emotions under control.

[36] An illustration of the father's approach is the occasion on 23 January 2008 during the course of which he threatened to have nothing more to do with Thomas and then did exactly that for a period of approximately 2 years until November 2009. Thereafter his contact with Thomas was prompted by and motivated by this present application rather than by any desire to heal the rift with his son. The occasion developed in the following way. Thomas explained to his mother a desire not to attend contact with his father which was due to take place on a Wednesday. His mother attempted to persuade

him to attend. The father was there to collect Thomas. He became verbally abusive, shouting and screaming at Thomas to get into his car right now. He hit the back door of the mother and stepfather's house. He warned Thomas that if he didn't come he would have nothing more to do with him. All this was witnessed by Grace. Thomas decided not to go and I accept the assessment of the mother that he was frightened by the events. The father explained that he was considerably emotionally upset and cross at the time but strikingly stated that over 2 years later as he gave evidence he had still not calmed down.

[37] Thomas was due to go on holiday shortly after this occurred and he rang his father to obtain his passport. Again he was told by his father that he was going to have nothing more to do with him.

[38] The mother has sent numerous texts to the father urging him not to give up on his son. This had no effect. Indeed graphically on one occasion he just let Thomas walk past him without acknowledgement as he sat in his car and when challenged as to this laughed rather than immediately attempting to make good the further harm that he had caused.

[39] The father for a year had no contact with Thomas either direct or indirect. He ignored Thomas's birthday and Christmas. Also Thomas's extended paternal family had no contact with Thomas either direct or by sending birthday and Christmas cards and presents. Rather than enlisting the support of his extended family to help heal the rift with his son he in effect secured that Thomas was cut off not only from him but from his extended paternal family. None of this was Thomas's fault but he is the person deprived of contact with his father and his father's family. All that of course has an effect on Grace as well as on Thomas.

[40] The first occasion during which the father sought Thomas's company was when the father was informed of the application to relocate to Australia. He then went to where Thomas was playing sport and grabbed him by the shoulder to tell him that he was going nowhere.

[41] I accept the evidence of the mother in relation to this incident and in particular that she attempted specifically on this occasion and as a general proposition to promote and maintain contact between the children and the father. The mother was emotionally affected by giving this evidence and it was quite clear that she wished to and still wishes to repair the breach between Thomas and his father. I have no doubt that the father believes that the breakdown in his relationship with Thomas has been engineered by and is the fault of the mother. I hold that such a belief is wrong. I consider that the father has considerable difficulties in coming to terms with the break up in his relationship with his wife and is unable to see beyond his own emotional upset to Thomas's physical and emotional needs.

Discussion

[42] I turn to Thorpe LJ's discipline:

(a) Is the mothers' application genuine in the sense that it is not motivated by some selfish desire to exclude the father from Grace's life? Is the mothers' application realistic, founded on practical proposals both well researched and investigated? I do not think that the mother's application is selfish or malevolent. It is motivated by a desire to live in Australia a country in which she has had a long held ambition to live. It is also motivated by the stepfather's nationality and the presence of his extended family. I hold that she wishes to promote and maintain the existence of contact between Grace and her father and to restore contact between Thomas and his father. I accept the plans that have been formulated to ensure continuing contact after relocation and I consider that there is a good opportunity to maintain contact. Some lack of precision in the plans of the mother were exposed by the forensic analysis of these proceedings but those were of a nature and extent to be expected when the plans were subjected to scrutiny and the defects have been cured.

(b) Is the fathers' opposition motivated by genuine concern for the future of Grace's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with Grace were the application granted? To what extent would that be offset by extension of Grace's relationships with the maternal family and homeland? I have no doubt that the father dearly loves Grace and accordingly the primary opposition to the plans is motivated by his desire to maintain the best contact that he can with her. However I also consider that a part of his opposition is motivated by an obstructive tendency and that this colours his own perceptions as to Grace's welfare. He raised what I find to be totally unwarranted fears that if Grace went to Australia she could be put out on the street by her mother and stepfather. He raised these fears despite acknowledging that the mother was a "good mother" and the clear evidence of her excellent achievements with the care of both Thomas and Grace. I consider that he was putting forward obstacles which he knew had no substance. I consider that there will be a detrimental impact on the quality and extent of the contact between Grace and the father if Grace moved to Australia. However there are good practical arrangements in place to diminish the detrimental impact and there is a good secure base for maintaining contact. Grace wishes to continue contact. The mother supports contact taking place. I consider that Grace who makes friends easily will also benefit from knowing her step father's family in Australia and from being immersed in the culture of his homeland.

(c) What would be the impact on the mother of a refusal of her realistic proposal? As I have stated above I believe that the mother would be

devastated by an adverse decision. She would be emotionally distraught and there would be a considerable period during which she would struggle to come to terms with the decision. I consider that this is likely to impact detrimentally on the welfare of Grace. I consider that the present difficulties in relation to co parenting Grace if she remained in Northern Ireland would increase if relocation was not permitted. I have made it clear that those difficulties arise out of the character of the father.

[43] I now turn to Thorpe LJ's fourth discipline that is an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist.

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding). Grace wishes to relocate to Australia. She is 13. As I have indicated I place weight on her wishes and feelings.

(b) Her physical, emotional and educational needs; Grace's physical and educational needs would be equally well met in Northern Ireland or Australia. She has an emotional need to have meaningful contact with her father. There would be an adverse effect on the quality and frequency of contact by a move to Australia. However I consider that she has a strong emotional need to be supported by a primary carer whose genuine plans are not frustrated and that need in this case is greater.

(c) the likely effect on him of any change in his circumstances; Grace has the ability to gain from the experience of relocating to Australia, making friends there but knowing that she can keep contact with her father in Northern Ireland.

(d) his age, sex, background and any characteristics of his which the court considers relevant; I have set out her age sex and background. She is a mature 13 year old who has the ability to thrive and to adapt. She is intent on maintaining contact with her father.

(e) any harm which he has suffered or is at risk of suffering; Some harm will be caused by the disruption to contact with her father but this is diminished by the sensible and practical plans for maintaining that contact. More harm would be caused by a failure to relocate.

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; In practice the mother has performed the major role as primary carer

for Grace and Thomas. She is best able to continue that role enabling Grace to develop physically and emotionally.

(g) the range of powers available to the court under this Act in the proceedings in question. I make a contact order.

[44] Having reached these conclusions I step back and ask the overall question as to what would be in Grace's best interests. I have concluded that they would be best served by her relocating to Australia.

Conclusion

[45] The mother's application for permission to relocate is granted.