

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 20/06/2012

IN THE FAMILY CARE CENTRE SITTING AT BELFAST

NT

v

AT

HER HONOUR JUDGE P SMYTH

Anonymity

[1] This judgment has been anonymised to protect the identity of the child concerned. Nothing may be published concerning the matter that would lead directly or indirectly to the identification of the child, its parents or extended family.

Background

[2] A C1 Application was filed by the mother on 12th September 2011, seeking:

- (i) A Specific Issue Order seeking that the child may reside with the applicant mother in Australia.
- (ii) In the event that the application at (i) is successful, an application under Article 8 of the Children (NI) Order 1995 for a defined contact order in favour of the respondent father
- (iii) In the event that the application at (i) is successful, an order under Article 15 and Paragraph 2 (2) of Schedule 1 of the Children (NI) Order 1995 for financial provision for the child from the respondent father.

[3] The mother is 24 years old. The parents married in 2010, and there is one child of the family who was born on 29th September 2007 and who is now 4 years 9 months.

[4] In 2004, the maternal grandmother (now aged 44) emigrated to Australia with her new husband and her younger daughter. The mother's name had also

been on the family visa to emigrate at that time. However, due to her relationship with the respondent father, she decided to remain in Northern Ireland. She was aged 18 at that time.

- [5] The mother was raised primarily by her own maternal grandmother (known as Nanny) because her father was an Air Serviceman and her parents were required to relocate frequently. The mother enjoys a very close relationship with Nanny and she and the subject child currently live with her.
- [6] The maternal grandmother, her husband and younger daughter have now obtained full Australian Citizenship, are in full employment in Australia, and have a comfortable lifestyle. The maternal grandmother and her husband own a four bedroom house and are financially secure.
- [7] Although the mother chose to remain in Northern Ireland when her immediate family emigrated, they continue to enjoy a very close relationship. They are in very regular contact by telephone, and Skype and the maternal grandmother has returned to Northern Ireland on a frequent basis from Australia to see her daughter and other members of her family.
- [8] Nanny lived in Australia between 1960 and 1964 after her own family emigrated. Although her family returned to Northern Ireland, Nanny has always wished to return and has travelled frequently to Australia since her own daughter, the maternal grandmother emigrated. In 2011, Nanny spent nine weeks in Australia and in 2012, she spent four weeks in Australia with the mother and the subject child. Nanny intends to relocate to Australia permanently if the mother is also permitted to relocate with the subject child by the court. However, she has made it clear that she will not relocate unless the mother is given permission to do so. Nanny is aged 67 and has continued to work since passing formal retirement age and she enjoys reasonably good health.
- [9] The mother maintained that she had always made it clear to the father that she wished to relocate to Australia in the future. The father denied that this was the case. The mother produced a letter that she said the father had sent her during their relationship. It states:

“...Come the time off Australia, if you don't want me 2 go that's fine, its your choice but if you do and I want 2 then I will cause I don't ever plan or wanna loose you, u r 2 special to me...”

Whilst the father did not deny sending the letter he was unable to confirm his handwriting. The court found the father's evidence on this issue less than satisfactory and accepts the mother's evidence that the father did send the letter and that it confirms the father's knowledge of the mother's future intention.

- [10] In 2008, the mother and father obtained year-long working visas for Australia. They sold their home beforehand, making a substantial profit. It is accepted that their joint intention was to have a working holiday with a view to exploring the potential for a permanent relocation. The child was four and a half months at that time.
- [11] It is accepted that the father was extremely homesick in Australia and that he wished to return to Northern Ireland within a very short time. There was a dispute between the parties about the assistance which was provided by the maternal grandmother and her husband to enable the father to obtain employment and to become involved in local sporting opportunities. The court heard evidence by Skype from the maternal grandmother who insisted that she and her husband had actively encouraged the father in respect of various employment opportunities and provided him with details of a local football training event. The father insisted that he could not recall having received such assistance. However, in cross examination, the father conceded that he had made no effort to obtain employment or to become involved in the local community.
- [12] The mother agreed to return to Northern Ireland with the father and the child because the father was unhappy in Australia. The court accepts her evidence that this was contrary to her own wish which was to remain in Australia with her mother and her sister. The mother insisted that the father did not rule out relocation in the future.
- [13] Both the mother and the father are in full time employment in Northern Ireland. The mother accepts that her job is reasonably well paid and reasonably secure. She has a lengthy, uninterrupted work history. The mother provided the court with a large number of documents confirming enquiries that she had made regarding employment opportunities in the Australian city to which she hopes to relocate. She explained however, that in the absence of a visa, she is unable to apply for employment and that enquiries that she had made were not taken seriously because of that factor. She did however, provide details of job opportunities in her field and at a comparable level which confirmed a substantially higher rate of pay than that which she currently receives in Northern Ireland. The mother believes that she will have better employment prospects in Australia than in Northern Ireland and that the child will also benefit from opportunities in the future. The maternal grandmother confirmed to the court that she and her husband are in a position to support the mother and the child until the mother obtains employment and that there is no financial pressure.
- [14] The mother also provided the court with details of schools that she had considered, proposals for future medical treatment of the child and activities for the child. The maternal grandmother intends to pay for the visa application for both the mother and the child if they are permitted to re-

locate. The court is satisfied that the mother's application is realistic and that it is well researched and investigated.

[15] The father conceded that he has made no effort to make his own enquiries about the mother's plans for the child and that he does not intend to do so unless and until the court grants permission for re-location.

[16] The father objects to the mother's application that the child should be permitted to relocate to Australia because of the drastic effect it would have on his ability to have direct contact with his daughter. The mother accepts that the father enjoys regular contact with the child and that the parties have been able to regulate the arrangements for contact without the need for court intervention apart from one occasion to which I will refer shortly.

[17] The mother did however assert that since the breakdown of their marriage, the father has prioritized his own activities over contact with the child and has "suited himself" to a large extent. The father maintained that he has sought additional contact on occasions which has been refused by the mother. He described the mother as "inflexible" and he said that he feared that contact might break down if the mother relocated with the child. He was not reassured by the mother's undertaking to register any court order in Australia and said that he did not believe he would have any effective remedy if contact were to break down.

[18] The court was provided with a lengthy exchange of text messages between the parties. The parties accept that up until relatively recently they were attempting to reconcile but there is now no prospect of reconciliation. It is clear from the exchange of text messages that the mother repeatedly encouraged the father to avail of extra contact at holiday times and that the father declined to avail of those opportunities. The exchange also reveals that the father, not infrequently, made arrangements for contact at the last minute, with little regard for the mother.

[19] An example is the exchange that took place during Christmas 2011:

- At 23.09 on 25th December 2011 the father sent the following text:

"what time am I getting (the child) at tomorrow?"

- At 00.11 on 26th December 2001 the mother replied:

"Y have u left it so late to contact me about this wen u have had all day? Ive been in bed and wake up 2 this."

- The father replied

"Sri will you let me know what time?"

- The mother replied:

"10 till 12 I've made plans for us as hadn't heard from you."

[20] On 26th December 2011 at 14.14, after the father had returned the child to her mother, the mother sent a text to the father:

"(the child) wanted u 2 come down and play with some of her santa toys but knew u prob wouldn't have wanted 2??"

- The father replied:

"Maybe later have a few things to sort out"

- The mother replied:

"will you let me no?"

The father did not see the child again that day.

[21] On 29th and 30th of January 2012, just before the mother and child were due to go on holiday to Australia with Nanny, there was an exchange of texts. At 21.08 on 29th of January, the mother sent the following text to the father:

- *"...did you not have (the child) again all morning? She said you were in the gym and that your mum took her to x?? surely the fact that she is going away for 3 weeks would make u want to spend ur time with her? R u wanting 2 c her 2mro evening an if so before or after ur gym running thing?"*

The father did not reply. At 8.04 on 30th January 2012, the mother sent another text:

- *"Can u please not b so rude and answer me as I've a lot of stuff to get done this evening."*

The father then replied at 13.29:

- *"I will pick her up from nursery and leave her back at 6"*

The mother replied:

- *"em no becuz she's getting collected at 3 2day"*

The father replied:

- *"I will collect her from nursery at 3 then"*

The mother replied:

- *"...don't start this, u cannot come to me last minute wen I text u at 8am this morning. Its not fair. Only the fact that we are away"*

tomorrow I wouldn't be agreeing to u demanding as usual. U can collect her at 3 but have her back shortly after 5, fair enough.

- [22] The text exchange also reveals that during the three weeks that the mother and child spent in Australia in early 2012, the mother kept the father regularly informed of all of the child's activities and sent photographs of her to him. The father accepted that when the mother had taken the child for a week's holiday in Malta in 2011, she had also kept him fully informed of the child's activities by text message and photographs. The court also accepts that when the mother and child were on holiday in Australia, the mother would have facilitated contact by way of Skype but the father failed to put the necessary computer arrangements in place.
- [23] The father relied on two occasions when the mother had allegedly stopped contact for a short period to support his contention that the mother was likely to frustrate contact if she relocated with the child to Australia. The first alleged incident occurred in the summer of 2011, when the father said he did not have contact for three weeks. He alleged that the mother had told the child "say goodbye to your daddy as you won't be seeing him again".
- [24] The mother's account was that the father had gone on holiday at the beginning of July 2011 and had not provided her with any information regarding his return date. She maintained that the father unexpectedly announced that he was home and would like to see the child. The mother asked him to come down and speak to her which he did. The father gave the child a gift to take on her holiday with her mother to Malta. The mother said that she had made the father aware of her return date but that no arrangements had been made for resuming contact. Despite the fact that she had sent regular texts and photographs of the child whilst in Malta, she received a solicitor's letter upon her return regarding contact.
- [25] The second difficulty in contact occurred following an incident on New Year's Day 2012, when the mother was physically assaulted by the father's brother and partner. The mother required medical attention and was very upset and angry. It is accepted that the father made it clear that he did not condone his brother's actions. The mother insisted that the father provide reassurance that the brother and partner would not be present during contact. The relevant exchange of text messages is as follows:

The father stated:

- "so what ur saying is I ain't seeing (the child) til it's sorted out in court"

The mother replied:

- “yip won’t have ur brother speak to me or x the way they just did! Thank them for that!! and [when] I grant it, it’ll b without any of them being anywhere near MY daughter”

The parties attended court, the father provided the requested reassurance to the mother and contact resumed. The mother contends that when she sent the texts her emotions were running high and she was deeply upset at the behaviour of the father’s brother and his partner.

[26] Apart from these two occasions, it is clear that contact arrangements have worked well between the parties. It is also evident that the mother has always sought to keep the father informed of the child’s activities whilst on holiday in Australia and elsewhere and that she has actively facilitated contact.

[27] The father also objected to the mother relocating with the child to Australia on the grounds that the child will also lose contact with his extended family and members of the mother’s extended family. The mother maintains that during their relationship the father had very little contact with the paternal grandparents and they had very little contact with the child. The mother accepts that the father has lived with his parents since the breakdown of their marriage. She contends that whilst the child may lose direct contact with these extended family members, she will gain close direct contact with her maternal grandmother and maternal aunt.

[28] The father also relied on the financial cost of travel to Australia and explained that Christmas is the main school holiday period and that it is his busiest time in work as a baker. He contended that it was highly unlikely that he would be able to avail of direct contact during this period. The father did not provide any supporting evidence from his employer for this contention. In addition, Ms Murphy BL on behalf of the official solicitor, pointed out that information from potential schools which the mother had provided to the court confirmed that the vacation period extended until early February.

[29] The maternal grandmother confirmed to the court that the father would be welcome to stay in her home if he came to Australia and in the alternative she had friends who had offered to provide him with accommodation free of charge. The mother also confirmed that she would return to Northern Ireland with the child at least once a year to facilitate direct contact.

The Law

[30] Counsel on behalf of both parents submitted detailed skeleton arguments. In addition the court had the benefit of detailed submissions from Ms Murphy BL on behalf of the official solicitor. I am indebted to all counsel for their careful analysis of the law.

[31] The binding judgment on this court is SL and 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 my 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].

[32] Subsequently in SH v RD and RH [2012] NI Fam 2 Mr Justice Weir repeated the statement of law cited above. The Court of Appeal dismissed an appeal in respect of that decision and written reasons are expected shortly.

Conclusion

[33] I am entirely satisfied on the facts that the mother’s application to relocate to Australia with the child is not motivated by any improper desire to deprive the father of contact with the child. The mother wishes to relocate to be close to her immediate family, none of whom live in Northern Ireland. Whilst she is very close to Nanny, her own grandmother, her mother and sister are her closest relatives. Whilst Nanny is in reasonably good health currently, that may not always be the case. Nanny has stated that she will not relocate unless the mother is granted permission to relocate with the child. However, I am satisfied that if the court does grant permission, Nanny will relocate also.

[34] The mother is young and would have relocated to Australia with her family in 2004 had it not been for her relationship with the father. I am satisfied that

the mother has always wished to relocate and that the father has always been aware of that wish. The only reason the mother agreed to return to Northern Ireland in 2008, after an unsuccessful attempt to build a life in Australia, was to maintain her family unit.

- [35] It is evident that the mother has carefully researched her proposals and that there is a realistic prospect of good employment opportunities for her given her skills and work history. I accept that it is not possible for her to obtain employment in advance of a successful visa application, but she can rely on the financial support of her mother and stepfather whilst she seeks employment.
- [36] In terms of the father's opposition, I do not accept his assertion that contact is likely to break down in the event of relocation. On the contrary, the evidence overwhelmingly supports the conclusion that the mother has actively sought to facilitate contact between father and child using all available means of communication.
- [37] There is no doubt that relocation will lead to a dramatic reduction in the father's ability to have direct contact with his daughter. In terms of the detriment to him and his future relationship with the child I am satisfied that that can be ameliorated by a clearly structured and defined indirect contact order, supported by direct contact. I do not accept that the father's work commitments will prevent him having contact during the main school holiday period and the maternal grandmother has made it clear that she will ensure that the father's expenses are kept to a minimum in Australia. The mother has also agreed that she will return to Northern Ireland on a regular basis with the child.
- [38] The child has not yet started school, and therefore the loss of play mates will be minimal. She is too young to express her wishes and feelings. Whilst it is correct that relocation will mean that the child will lose direct contact with cousins, aunts and uncles, that loss will be balanced by the new relationships with the maternal extended family which to date have been largely nurtured by indirect contact. The family members Skype each other regularly and there is direct contact at least once a year. There is no reason why indirect contact with members of the paternal extended family cannot also serve to nurture those relationships.
- [39] I am satisfied that the impact on the mother of a decision refusing relocation would be catastrophic. Whilst it is clear from the authorities that it is the welfare of the child which must guide the court, the impact on the mother is clearly relevant to the child's welfare. She is the child's primary carer and I am satisfied that a decision which prevents her pursuing what has always been her intention would have a detrimental psychological impact.

[40] Taking into account the welfare checklist, I am satisfied that it is in the best interests of this child that she is permitted to relocate to Australia with her mother. The parties have requested that in the event of this decision, they are permitted an opportunity to agree the terms of a defined contact order and any other orders that the court should make. In those circumstances, I make no order with regard to contact at this stage.