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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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RE: X AND Y (TEMPORARY RELOCATION WITHIN THE UNITED KINGDOM: APPEAL FROM MASTER; INTERIM MAINTENANCE)

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GILLEN J

[1] The judgment in this matter is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and any other person identified by name in the judgment itself) may be identified by name or location and in particular the anonymity of the children and the adult members of their family must be strictly preserved.

[2] This matter comes before the court by way of an appeal from the Master of the Probate and Family Division. The Orders appealed against are as follows:-

(i) An order refusing an application by the mother (A) of two children X and Y to vary an existing residence and contact order under article 8 of the Children (Northern Ireland) Order 1995.

(ii) An order that the respondent father pay interim maintenance to A of £750 per month in addition to child support, children's school fees, creche fees and swimming lessons.

Background

(i) A was born on 4 February 1971 and is aged 34 years of age. She is currently employed as a customer sales advisor by a leading banking institution. She has agreed a career break from her employment commencing 1 July 2005 until 1 October 2006. The respondent B is aged 36 years of age,

born on 25 September 1968. He is a medical consultant engaged in a hospital which I do not propose to name.

(ii) The parties were married on 5 April 1995. There are two children in the family namely X a boy of 8 years of age and Y a girl of 4 years of age.

(iii) Unhappy differences emerged between the parties and A and B separated in May 2003. Eventually a decree nisi was granted on the grounds that the parties had lived separate and apart for a continuous period of at least two years preceding the presentation of the petition.

(iv) Since 2003 there have been approximately ten applications before various courts dealing largely with issues of residence and contact with the children.

[3] Issues have arisen between the parties as a result of their failure to agree holiday arrangements on various occasions and variations of contact to meet the kind of exigencies that will always arise when parties are separate. The judgment of Master Redpath lays out six of these and the initial four which were mentioned to me are of the same genre. I came to the conclusion that the antagonism between the mother and father was such that they have found it impossible to engage in the normal give and take which was so fundamental to a realistic appraisal of family life in the wake of family break-up. Rancorous dispute exists even over such mundane family matters as telephone calls being answered or pick up times being agreed. Enormous costs have been incurred in the course of this battle and I was not satisfied that either party had seen the necessity to put the interests of the children before their ongoing disagreement and readiness to resort to court proceedings on virtually any occasion when problems arose.

[4] The factual and legal position is that the children reside with A pursuant to a Residence Order make in her favour on 26 November 2003 and contact is afforded to the father B on the foot of the same order as varied on various occasions. The children reside in a prominent town in the province attending a preparatory school there. Y is due to commence formal schooling at the same school as X in September of this year. B has contact with the children each Wednesday afternoon and upon alternate Wednesdays the children stay overnight with him. In addition upon alternate weekends the children stay overnight with him from Friday until Sunday. Generally speaking holiday periods are shared between the parties but even this has been the subject of dispute since they cannot agree what periods should constitute the appropriate sharing period.

The current situation

[5] The current issue before the court really arises out of the desire on the part of A to undertake a Development Management degree course at the London School of Economics (LSE) commencing in October 2005 and terminating probably in or about June 2006 although she may be obliged to complete a dissertation which could involve her studies being extended until August 2006. To enable her to attend this course, it will be necessary for her to relocate to London and she has identified Chelmsford in Essex as a suitable location. She therefore wishes to relocate with the children of the family for this period in order to complete this degree course.

[6] A originally was a national from India although she has taken British nationality in 2004. She has a degree in Psychology from a prestigious university in India and subsequently obtained a Master's Degree in Tourism. She explained to me that her degrees have occasioned certain problems in Northern Ireland. In the first place her degree in Tourism does not carry the weight that it merits academically because she lacks experience in tourism. When she came to Northern Ireland after her marriage she had worked in a major travel agency but had given that job up in 1999 when she had gone with her husband and family to Melbourne in order to further his career. When she returned approximately one year later she was then pregnant with Y, tourism was somewhat in recession, and the part time hours that the firm were then offering her were inadequate to meet her family commitments. She thereafter obtained a job with a leading banking institution working initially 12 hours part time and now approximately 16 hours. She told me in the course of her evidence that the firm recognised that she was not really exploiting her potential, that her present job was somewhat less challenging than her degrees would have merited and they were prepared to afford her a career break in order to further her academic qualifications. Her evidence before me was to the effect that she had made efforts to avail of post-graduate courses at Queen's University Belfast (a management and business administration course) but essentially it requires 3/4 years managerial experience which she simply does not have. In addition she had canvassed the possibility of working within the bank but at a higher level but found that she did not have the aptitude for such a career. Teaching proved not to be available to her as an option she said because her degrees from India did not comply with the national curriculum which she asserted was a sine qua non for obtaining a post graduate course of education certificate. Nothing else was available to her in the Republic of Ireland or Northern Ireland for similar reasons. However she had been accepted for a one year course for an MSc Development Management at the prestigious LSE. She claimed that it had been impossible to carry this course out by correspondence or through the Open University. In essence in order to further her career prospects and achieve her intellectual goals, this was what she considered to be a golden

opportunity. When pressed by Ms Walsh QC on behalf of B as to what career prospects would accrue as a result of this post graduate course, she produced a list of examples of jobs entered into by students of such a course within six months of graduation. They largely included jobs with an international bent but she was adamant that development methods were relevant to jobs in Northern Ireland held out by Barnardo's/Oxfam/the voluntary sector in general/civil service etc.

[7] So far as preparations for the course were concerned, it was her evidence that she had specifically chosen Chelmsford to live as being relatively proximate to LSE. She had ascertained an appropriate fee paying school for the children to attend, the fees being costed at £9,570 for the two children per year. She had identified a three bedroomed house which could be rented at a cost of £10,800. At the moment the fees for the children at the school in the province amount to £5,016 with creche and annual rental of £6,600. Her case was that essentially the creche fees would now be dismissed because the school which the children attend would be in a position to look after the children until she picked them up at the end of her various tutorials/lectures at LSE.

[8] It was her case that so far as X is concerned, he now is about to go into P5 and would not be performing the transfer tests used in Northern Ireland until P7. He is a very bright boy and since the school which she intends to send him to is one of academic excellence, she anticipates no problem in him picking up his academic progress when he returns to P6 in Northern Ireland at the end of her academic year. It is her avowed intention to return to Northern Ireland although as yet she is not in a position to identify any job that she will specifically receive in Northern Ireland.

[9] I have appended to the back of this judgment a list of the outgoings that she claims she will incur together with the various contributions made by B. The shortfall evidence from those figures of several thousand pounds would be made up by £12,000 from her family relatives in England (a loan of £12,000 in total) and her parents, who have assisted her in the past and will continue to do so.

[10] It was the evidence of A that the alternative suggestion by B that the children could stay with him and his parents in Northern Ireland while she was in England was unacceptable. In particular she referred to an incident that had occurred shortly before this hearing where one of the grandparents had allegedly struck X because he had informed his mother about being bitten by a dog and that when X had remonstrated with her, B had then struck him across the face also. B firmly denied this allegation an claimed it was simply a fabricated story brought up shortly before the hearing in order to damage his case. He also asserted that shortly before the hearing before Master Redpath, Y had been reluctant to avail of contact with him which he felt was a situation

engendered by his wife. A's response to this allegation was that on this occasion the child was feeling insecure because B had told her that the mother might be going to England without her or that if she went to Chelmsford she did not love him. I confess I find neither of these incidents particularly helpful in arriving at a decision in this case and I formed the clear impression that each party was attempting to maximise, perhaps unwittingly, a manifestation of deep insecurity and concern on the part of these children that their parents were unable to resolve unhappy differences between them. The events described were indicative of the inability of these parents to put their personal antagonism aside when dealing with the children.

[11] The mother indicated to that she was deeply upset at the decision of the Master which she interpreted as a refusal to let her further her education and empower herself to improve. She described her feelings as those of devastation, a blow to her self esteem, self respect and well being. She claimed that without the ability to improve her financial and occupational standing, she felt like a prisoner in Northern Ireland forced to live on money from her parents without the ability to better herself. She was adamant that the shortness of the period would not jeopardise contact. On the contrary she outlined what she considered to be generous proposals. These included;

(a) Summer holidays would be divided between the parties with B having the children for a total of four weeks divided into two separate two week periods.

(b) The Easter break for the children from school was between 31 March 2006 and 26 April 2006 and B would have contact with the children between 9 April 2006 and 23 April 2006.

(c) Over the forthcoming Christmas, the holidays of the children were between 13 December 2005 and 5 January 2006 and she would agree to the children spending the period between 19 December 2005 and 2 January 2006 with him.

(d) So far as half term periods were concerned, there would be three of these at the English school and of the total of eight nights six of them could be spent with the father.

(e) In addition she was perfectly happy for him to come to England to spend the weekend with the children once per month.

(f) E-mails, letters, cards and telephone calls were also within her contemplation in terms of encouraging contact.

[12] She made the point that in the course of the 27 months since her separation, B had made 42 trips within the United Kingdom and abroad.

Eighty percent of his contact had been obtained over weekends and holidays and 34% of his contact with the children had taken place outside Northern Ireland when he had taken them to various locations. Accordingly she argued that he should have no difficulty for the limited period mentioned engaging in a full contact with the children. She had taken the steps of investigating areas in Chelmsford where he could stay relatively cheaply.

[13] B contested closely her case. He said that he was very much involved in the children's' lives, education, social and extra curricular activities. He felt this was very much to their benefit and that they would lose out on this if they moved to England. He asserted that relocation could not in any way replicate what the children now benefited from. He asserted the children are well settled in their present location with friends and associations there. They have grandparents living relatively near by. In so far as A asserted that the wishes of the children should be reflected, counsel urged that the deputy solicitor's report which I had seen reflected a totally unrealistic view of X as to how a relocation to England would impact upon contact. The child at one stage had mentioned to her that there could be contact four times per month which of course is unrealistic in the practical setting of employment commitments.

[14] It was B's case that the qualification from LSE was but one step towards a permanent relocation outside Northern Ireland and indeed outside the United Kingdom.

[15] He strongly asserted that if she did wish to attend LSE, then he should have a residence order for a year with A having contact. He strongly denied the allegation that his parents had ever mistreated X and stoutly asserted that they would help him in every material way.

[16] I have also appended to this judgment (but not for publication) some very helpful calculations by Ms Walsh QC which purported to suggest that B simply could not afford the £750 award by the Master in addition to the other financial commitments he was obliged to make to the children. The figures suggested, inter alia, that his outgoings would exceed his income if he had to finance the LSE project. I have in addition appended the figures presented by Ms Creigton on behalf of A (again, not to be published).

Legal principles

[17] The legal principles which govern applications such as these are as follows:

(i) Contrary to the principles which govern appeals from Family Care Centres to the High Court, I consider that appeals from a Master are still governed by the principles set down in Neill v Corbett [1992] NI 251. In essence therefore there should be a re-hearing of such cases whilst at the same time the court will give due weight to the previous decision of the Master albeit not being bound by it. I therefore permitted a full rehearing in this matter.

(ii) Every endeavour should be given in the courts to prioritise cases involving the re-location of children. (See Re: A (Temporary Removal from Jurisdiction) [2005] 1 FLR 639.) Accordingly I heard this case as an emergency application during the vacation.

(iii) It is important to appreciate that this is not an application for re-location in the strict sense because it involves moving within the United Kingdom. Consequently the application is simply to vary the contact rights to accommodate a move to England. More importantly, it must also be borne in mind that this application has been presented to me on the basis of a temporary move to England. In the course of her evidence A gave an undertaking to me that she will return the children to Northern Ireland at the end of her LSE course although this will not preclude her mounting a further and separate application thereafter. It is therefore imperative that cases of this kind involving a temporary removal are not to be governed on the same principles as cases where there is a permanent removal of a child from a jurisdiction. The leading case on the latter is of course Payne v Payne [2001] 2 WLR 1826. Indeed even temporary removals from the jurisdiction entirely are not to be governed by Payne v Payne principles. In Re: A (Temporary Removal from Jurisdiction) [2005] 1 FLR 639 Thorpe LJ said at para. 13;

> "The more temporary the removal the less regard should be paid to the principles stated in Payne v Payne."

It is important to appreciate that any diminution or loss of contact in this case will be temporary and only for a matter of months. Accordingly the focus on this case must be on the longer terms consequences, beneficial and detrimental, for the mother and X and Y moving or not moving temporarily to London particularly in relation to the career options that may be opened for the mother and the benefits of those for X and Y coupled with the consequences of refusal of leave on the mother's future employment prospects. At the same time close attention must be given to the rights of the

father and to the ways in which contact can be arranged for a temporary period to overcome any loss of the important day to day relationship between father and children recognising that this is more feasible in a temporary arrangement than where the removal is permanent.

(iv) The court is still required to consider the reasons behind the proposed alteration to the contact occasioned by this relocation. Those reasons should be genuine and reasonable (see Tyler v Tyler-Knight [1989] 2 FLR 158). I believe it is in this context that the circumstances of the proposed home, the proposed living conditions and the financial implications of any proposed move should be looked at.

(v) For the removal of doubt therefore, I consider that the test to be applied in the case of internal relocation in a case such as this may well be less stringent than that for cases of external relocation. In Re: H (Children Residence Order; Condition) [2001] EWCA Civ. 1338, relied on by Master Redpath, Thorpe LJ said at para. 20;

> "What then is the rationalisation for fear of movement of the primary carer in the United Kingdom. It seems to me to be obvious. Within the same sovereignty there will be the same systems of law with the same rights of the citizen, rights for instance to education, health care and statutory benefits… what is the rationalisation for a different test to be applied for an application to relocate to Belfast, as opposed to an application to relocate from Gloucester to Dublin? All that the court can do is remember that in each and every case the decision must rest on the paramount principle of child welfare."

(vi) This case serves to underline the key issue in this case namely that since it is an application dealing with contact under Article 8 of the 1995 Order, the paramount principle of the child's welfare must prevail.

(vii) The court should look for clear evidence from the applicant as to what will be the emotional consequence of refusal in permanent relocation cases. Whilst as I have indicated above different options do apply in cases such as this, nonetheless it is a factor which should be taken into account to some degree. I have no doubt that there is no need to establish that the consequence of refusal will be psychiatric damage. It is enough to be relevant that there would be an impact on her sense of well being and that that would be transmitted to the children. (See Re: G (Removal from Jurisdiction) [2005] EWCA Civ. 710). The court must give consideration to the impact a refusal of a realistic proposal would have on the mother. Her explanation for temporary relocation is at the core of such a case as this and has to be assessed

in the context of the emotional and psychological well being of the primary carer. In any evaluation of the welfare of the child as paramount consideration, great weight has to be given to that factor (see Re: B (Leave to Remove: Impact of Refusal) [2004] EWCA Civ. 956).

{viii) As in all cases to be considered under the 1995 Order, the court must take into account the European Convention on Human Rights and Fundamental Freedoms 1950 ("the Convention"). In particular under Article 8 the right to family life must be protected. In his judgment Master Redpath properly cited the recent Court of Appeal case in Northern Ireland of AR v The Homefirst Trust [2005] NICA 8. In that case, inter alia, the court drew attention to the fundamental element of family life that there be mutual enjoyment by a parent and a child of each other's company. Interference of that fundamental element of family life constitutes a violation of Article 8 unless it is in accordance with the law, pursue an aim or aims that are legitimate under article 8 (2) and can be regarded as necessary in a democratic society. Such an interference must be proportionate. At para. 95 the Lord Chief Justice said;

> "Although the court must treat the child's welfare as paramount, this does not mean that it should exclude from its consideration other factors such as the article 8 right to the parents. While these cannot prevail over the welfare of the child, they must be taken into account."

It is important therefore that the right to family life of all parties – father, mother and children – be considered carefully in all such cases.

Conclusions

[18] I have determined in this case that I must reverse the decision of the Master and make an article 8 Order for contact with the father of the child so as to enable the mother to reside in Chelmsford, Essex with the children between September 2005 and 1 July 2006 (or the end of the school term). I have come to that conclusion for the following reasons;

(i) Whilst I have taken into account the careful and considered judgment of the Master, in my view greater emphasis needed to be given to the temporary nature of the relocation within the United Kingdom in this instance. I wish to make it absolutely clear that I am approaching this case on this basis that the move is temporary and the alteration in the current contact arrangements are thus only to apply for a very limited period. Whilst any future court must look at the matter dispassionately and in light of any changed circumstances, nonetheless I consider it likely that any attempt on the part of the mother to resile from her avowed intention to return to

Northern Ireland at the end of her course will be scrutinised very carefully if she confronts a court with a further application. For that reason I intend to vary the outstanding arrangements only until 1 July 2006 or the end of the school term (whichever is the later) and thereafter the current contact arrangements will operate.

(ii) I was persuaded by the evidence of this mother that success is of great value to her in her current ambitions to study at LSE. I believe the children will benefit from the mother's success which will engender in her an increase in her self esteem, self confidence and career prospects. I am also satisfied that the increased earning capacity which this will give her will lend itself to an improvement in the relationship between herself and B. I am satisfied that by attending such a prestigious centre of excellence as LSE and obtaining success in this course, it will provide her with a much wider basis for career success. I was persuaded that there are a number of jobs in Northern Ireland that would welcome such a qualification both in the narrow field of development management and in wider areas where employers will be impressed by her academic success.

(iii) I believe that there would be a very significant impact if I was to refuse her this opportunity given that it is only intended to last for some months. I watched her carefully during the course of her evidence and I was satisfied that she was sincere and genuine in the exasperation and frustration which she adumbrated at the prospect of refusal. I believe this woman would harbour a sense of simmering injustice if this court were to refuse her the opportunity to take this course with her children beside her in Essex. It is my view that the result would constitute more than just the disappointment referred to by Master Redpath but could have a lasting effect upon her and her relationship with B. This is a relationship that, despite the divorce, needs to have a basis which is without rancour or lasting bitterness. These children have the enormous advantage of having two highly intelligent and loving parents. What matters for the future is the relationship the children continue to have with both parents and any polarisation of their attitudes towards each other will inevitably impact adversely upon them. I am satisfied that the sense of bitterness which a refusal of A's request would generate is not in the long term interests of these children.

(iv) Whilst I appreciate it will not be possible for the father to enjoy the same level of contact over the forthcoming months, I am satisfied that the contact that I am now going to afford him will provide a worthy substitute given the circumstances and I see no reason why, when the academic year is over, the father should not resume a full relationship with both his children. Accordingly I have taken into account his Article 8 rights but I consider that it is a proportionate response to alter his present contact arrangements so as to enable A to undertake the course I have outlined. I have balanced his right to

a family life against the rights of A and the children to an harmonious family life in arriving at my decision.

(v) Contrary to the conclusion of Master Redpath, I have decided that A has carefully thought out the future arrangements for this period. I was impressed that she has not only found a suitable school and taken steps to have the children enrolled, but also has found a suitable house with appropriate accommodation. She has carefully analysised her financial obligations and disbursements and I believe her when she indicates that she will receive appropriate financial assistance from family and friends to see her through this academic period. Moreover I share her view that the increased career prospects which this qualification will give her will reduce the financial impact on B long term and I believe may provide a basis for him in the future seeking a reduction of the financial order that I now intend to make. I believe that there has been a problem with both of these parties in the past dealing with contact, but I am satisfied that the arrangements which I will now put into force will contribute towards an improvement in this aspect of their relationship. The court of course will not tolerate the upset which these regular court applications clearly bring to these children and I make it clear that if, contrary to my expectation, these parties continue to visit the court to resolve at great expense the minutiae of the contact issues, I will not hesitate to take appropriate steps to reduce that risk to the children.

(vi) These are very young children but particularly in the case of the elder child X, their views must be taken into account. I have no doubt that both of these parents may have taken steps to influence these children to accept their particular mode of thinking on this issue. Nonetheless the fact of the matter is that A is the primary carer and I readily accept that the likelihood is that their wishes at the moment are such that they would wish to be with their mother rather than to reside with their father and be cared for, to perhaps a substantial extent, by their grandparents.

(vii) These children, especially the boy X, are much travelled. I have no doubt that they are bright intelligent children who will easily adapt to the changed circumstances for the period of months envisaged. Moreover much of the contact with their father has involved travelling to England and elsewhere and so the fact that he will now be coming on alternate weekends to England will not radically alter the nature of their contact with him. Accordingly I order that pursuant to Article 8 of the Children Order (Northern Ireland) 1995 between the date when A arrives in Chelmsford in September 1995 with the children to commence her course at LSC and 1 July 2006 (or the end of the school term, whichever is the later) she shall permit the children to visit or stay with the father as follows;

(1) During the Easter school break between 9 April and 23 April 2006.

(2) Over the forthcoming Christmas holiday between 19 December 2005 and 2 January 2006.
(3) All of the half term school breaks.
(4) Alternate weekends ie two weekends per month between Friday at 5.00 pm or thereabouts until Sunday at 7.00 pm or thereabouts (the said times may vary depending on the flight arrangements of the father).
(5) In addition the school summer holiday shall be split equally between the father and mother. In the absence of agreement between the father and mother (which shall only be effective if made in writing and signed by both) the children will visit or stay with the father during the first 4 weeks of the holiday and the remainder with the mother.

Other than as stated in 5 above, the arrangements that currently operate for contact shall be suspended from the date when the mother and children take up residence in Chelmsford and thereafter, in the absence of a further court order, shall resume on 1 July 2006 (or at the end of the school term whichever is the later).

I caution that contact by e-mail, letters and telephone calls between each parent and child should be permitted in a reasonable fashion during all periods and that any further recourse to court proceedings by either parent will be carefully scrutinised so as to ensure that the best interests of the children are being observed by both parents.

(viii) So far as the interim maintenance is concerned, I see no reason to alter the views of the Master notwithstanding that I am permitting relocation from Northern Ireland to Chelmsford, Essex. I have carefully reviewed the figures put before me and which I have appended to this judgment. Whilst I recognise that both parties may struggle financially during this period, I emphasise that I believe it is a short term aspect and will regularise contributions on a more structured level than has hitherto been the case. I am satisfied that the figure which B will be contributing to his family will be in or about 50% of his income. The sum of £750 per month by way of interim maintenance, child support, school fees and other sums on the children, is an appropriate sum given his responsibilities to his family. I emphasise that it may be possible to review this matter once A has taken up further employment in the future. I therefore affirm that aspect of the Master's decision. It may be that both parties will have to look at various aspects of their disbursements in order to reduce expenditure but this is a worthwhile short term sacrifice to care for these children.

(xi) In relation to B's residence order application, I affirm the decision to dismiss that application.

(x) I will now hear arguments as to costs.