

**IN THE FAMILY CARE CENTRE SITTING IN BELFAST**

**Between**

**SM**

**And**

**PH**

**IN THE MATTER OF K**

**HER HONOUR JUDGE P SMYTH**

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. On 23<sup>rd</sup> of December 2011, the father made an application for a prohibited steps order prohibiting the mother from relocating to Australia with the child of the family (K) who was born on 7<sup>th</sup> August 2004 and is now aged 8 years. Furthermore the father applied for a defined contact order. Both applications were brought pursuant to Article 8 of the Children (NI) Order 1995.
3. In response to the father's application for the said orders, the mother gave an undertaking not to leave the jurisdiction and the father did not proceed with his applications. However, on 11<sup>th</sup> June 2012, the mother applied for a residence order in respect of K and leave to remove the child from the UK pursuant to Article 13(3) of the Order.
4. The issue for determination by the court is whether the mother should be permitted to relocate to Australia with the child for an indefinite period.

## The Facts

5. The parents are not married and have never been married although they co-habited for a short time after K's birth. It is accepted that the mother is the primary carer of K and that the father has consistently availed of regular contact with K throughout her life. The father conceded that there were two occasions when the mother raised issues about his supervision of K during contact visits and that the matters were resolved on the basis of undertakings. There is no dispute in this case that it is in K's best interests to live with her mother and to have contact with her father. Contact arrangements have been agreed between the parties without the necessity of legal proceedings. The current arrangement is that K has contact with her father on a three weekly cycle as follows:
  - Week one: Friday 3.15pm-Saturday 3pm
  - Week two: Saturday 12.30pm-Sunday 5pm
  - Week three: Friday 3.15pm-Sunday 5pm
6. K lives with her mother in a small village in County Antrim. She attends the local school, which has approximately 44 pupils. K is part of a large extended family, on both maternal and paternal sides. In the village, she has many cousins with whom she has a close bond, as well as aunts, uncles and her maternal grandparents.
7. The father has formed a new relationship with Ms A, and they have two children aged 2 and 3. Ms A also has two older children from a previous relationship. K is very fond of her two half siblings and likes Ms A. It is accepted that she has a close bond with her father.
8. The mother has also formed a new relationship with Mr B since 2008, a man whom she has known most of her life. It is clear that Mr B has been very supportive of both the mother and K and that he has provided for them financially.
9. The mother wishes to relocate to Australia because her partner Mr B has obtained employment there and relocated there in June 2012. Mr B lived in Australia for a period of time approximately 20 years ago and he has found work in the construction industry with a friend whom he met during his previous time in Australia. Due to the economic downturn in Northern

Ireland, Mr B has a much greater opportunity of permanent work in Australia.

10. The mother has never been to Australia. She has no friends or family in Australia. Whilst she believes that Mr B's friend and his wife will be supportive to her if she is permitted to relocate with K, she has never met them personally. The mother does not intend to work initially, but does intend to do so in the near future. She has always worked in Northern Ireland, although she has reduced her hours due to certain difficulties arising from the ill health of her father.
11. In her statement of evidence prepared before Mr B relocated in June 2012, the mother stated that Mr B would earn a minimum net income of \$800 per week. He also has properties in Northern Ireland which produce an income of £8,000 a year. He also has \$20,000 dollars which he has saved.
12. Ms McGrath, a solicitor in the office of the official solicitor, interviewed K to ascertain her wishes and feelings in relation to the relocation application. The following extract from Ms McGrath's report illustrates K's views about her family:

*"We discussed K's family. She listed them as follows:*

- *Me*
- *Daddy's name is S*
- *Mummy's name is P*
- *I have two half brothers on my daddy's side- J is coming 3 and H is coming 2- theyre cute".*

*K told me that her half brothers have two brothers called E (9) and J (10). She explained that "they are daddy's fiancée's children". K appeared to be fond of her father's fiancée, saying "she's nice". K reported "daddy has been with her four years I think".*

*K told me about her father: " he's funny". She described him as being "a good daddy". She clearly enjoys and benefits from the time she spends with her father. During contact, typical activities would be to "go swimming or the pictures. Or I go up to my granny's or aunt's or cousins". K listed her paternal grandmother, her aunt's C, D and E "and their kids". i.e K's cousins.*

*With regard to contact with her father, K told me that she sees him every weekend:*

*(1) Go on Friday-come back Saturday*

(2) *Go on Saturday-come back Sunday*

(3) *Go on Friday-come back Sunday*

*K expanded on typical activities during contact: "watch DVDs or go out on bikes or play games". K told me about her father's flat, which he only appears to use when having overnight contact with K. She explained that most of the time, he lives with his fiancée and the children. K reported "sometimes we stay at her house too. Don't stay there anymore because there is no bed for me. I used to sleep in my brother, Jamie's bed. They're getting a bed for me".*

*We went on to discuss K's mother. K reported that "she works in X. She's funny. She tickles me. She's a good Mummy. She's good with me". K clearly enjoys a loving relationship with her mother.*

*We briefly discussed K's parents' respective partners.*

- Her father's fiancée "she's funny. And*
- Her mother's partner "he lives in Australia. He went to Australia-it was this year. He's funny. He laughs all the time. He used to have a water bed-I used to pretend I was surfing. He owns houses. All my family live in houses he owns-mostly my aunts".*

13. Ms McGrath also discussed K's views on relocation to Australia. K reported:

- I know there's a beach called Bondi beach-saw it on TV. Me and mummy watch Bondi rescue. There's 40,000 people on the beach.*
- There's kangaroos and koala and crocodiles and lizards and I think there's chameleons-like lizards but change their colour.*
- It's very hot*
- Most of it is dry ground*
- The sea is very blue.*

*I asked K if she had ever been to Australia, to which she responded "no" or if there were any plans to go. In response, she said "no-my mum and (Mr B) were (i.e. planning on going to Australia). We were all planning on going to live there. October last year-that's when mum told me. My daddy wasn't very happy with it. I forget the rest.."*

*K told me that "Mummy goes on skype with (Mr B) every day. Chat for a long time- half an hour to an hour". K confirmed that she regularly speaks to Mr B via skype too. She volunteered "He's getting on good. He goes to work, fixing glass".*

*K appeared to understand the concept of there being a time difference between Northern Ireland and Australia. "if it's night time here, it's morning over there". Further, she was able to tell me that "it's a day away", referring to a day in an aeroplane.*

*K volunteered "my teacher's going to live there-and her husband and 3 children. She's from Belfast".*

*K was able to tell me that the area Mr B lives in is called "Y" and that, although he has no family out there, he has lived in Australia before. As far as K is aware, Mr B is "going away for 4 years and me and mummy might be going to live there-well if the judge...it's all up to the judge".*

*K confirmed that her mother had told her about the judge and the fact that the judge will decide whether or not they can go to Australia to live.*

*I asked K what she thought possible advantages would be of going to Australia to live. She commented as follows:*

- *" I would go to a really big school with 300 pupils in it*
- *We're going to find out where my teacher is going to teach in Australia and I might go there*
- *Might have BBQs together*
- *She'll be living 10 minutes away from where me, Mummy and Mr B are going to live*
- *Mummy said we could go and feed a kangaroo; and*
- *I could go and hold a baby koala bear".*

*I then asked K if she could think of any possible disadvantages of moving to Australia. She commented as follows:*

- *"I would miss my family a lot-on my daddy's side and my mummy's side*
- *And my friends".*

*I asked K who she would miss most- she said mostly "my daddy" but "my brothers too-and Ms A".*

*I enquired of K what methods of communication she thought could be used to stay in touch with people in Northern Ireland if she moved to Australia. Her response was:*

- *" Skype-go on computer and can see them*
- *Or telephone*
- *Holiday-mummy said we could come back for a month-on birthdays or Christmas. The next year, stay there. Maybe daddy could go out".*

*I asked how K would feel about changing school. She conceded that she would be "a bit scared" but appeared confident that she would "manage okay". Similarly, she conceded that she would miss her friends here in Northern Ireland but that she would be quite good at making new friends.*

*K summarised her wishes and feelings in this relocation application as follows:*

*"I want to go and try it and see what it's like". In relation to time scales, K estimated that she would like to try it for a couple of weeks.*

*Finally, I asked how K would feel if the relocation application was not allowed. Her response was simply "good", which I understood to mean that she would be ok with that outcome as well.*

14. The mother gave evidence that she believed that K would settle in Australia and confirmed that if she did not the family would return to Northern Ireland. She expressed disappointment with the answers K had given to Ms McGrath and said she believed K wanted to go to Australia. In relation to plans for contact with the father if K relocated to Australia, the mother suggested that the sum of £30 per week which the father currently provides for the child could be used to pay for an annual flight to Australia. In addition, whilst the mother had initially suggested bringing the child home annually, she offered to do so three times per year. It was suggested to the mother in the course of cross examination by the Official Solicitor on behalf of the child that this was an unrealistic proposal given the financial information the court had been given about Mr B's likely earnings and the uncertainty

about her future earnings. Furthermore, it was suggested that such travel plans would be onerous for a young child.

15. The father, although in employment, has limited means to travel to Australia given his family commitments. Whilst saving the £30 per week maintenance would pay the cost of the fare for one person, it would not enable him to pay for accommodation or holiday treats with K. Most importantly, the father gave evidence that he would not be able to afford to take K's half siblings or his partner with him to Australia.
16. The mother gave evidence of the likely effect on her of a refusal to permit her to relocate with the child to Australia. She explained that currently she is finding it difficult to cope emotionally and financially without Mr B. They communicate by way of skype on a daily basis. Mr B continues to assist her by paying the tax and insurance on her car, and has provided for heating oil. She said that she did not want an adverse decision to impact on her because K has seen her sad and knows how much her mother misses Mr B.
17. The mother believes that she, K and Mr B will have a better life together in Australia. Their plan is to try it for two years and although she accepts the uncertainties, she considers that the opportunities are worth taking the risk. As far as plans for K are concerned, she has considered appropriate schools although no final decision has been made and medical insurance is required as a condition of the visa.
18. Mr B confirmed the mother's distress since their separation but stated that they have a strong relationship and they would "keep it together". He said that if the court refuses permission to relocate there would be no point in returning to Northern Ireland "to sit on the dole". Contrary to the information which the mother had produced to the court, Mr B denied that his contract could be terminated with two weeks' notice and insisted that he is in fact a 50% shareholder in the company.

### The Law

19. Counsel on behalf of both parents submitted detailed skeleton arguments. In addition the court had the benefit of detailed submissions from Ms Rice BL on behalf of the official solicitor. I am indebted to all counsel for their careful analysis of the law.
20. 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].*

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

21. 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. The mother wishes to relocate to live with her partner and form a new permanent family unit with K. However, it is clear that the future is uncertain because the mother has no experience of life in Australia, and has no family or friends there, and no certainty of employment. The most that can be said is that she wishes to have the opportunity to begin a new life and if it does not work out she and her partner will return home
22. Against that background the court is asked for permission to uproot K from a happy and stable family network. K has always had regular, consistent contact with her father and it is clear from the Official Solicitor's report that K and her father enjoy a close, loving relationship. K has two half siblings and



relocation to Australia will inevitably mean that the opportunity to maintain the sibling bond will be drastically affected.

23. It is apparent from the Official Solicitor's interview with K that she is a very happy child who has benefitted from her close extended family on both her maternal and paternal sides. She has grown up with her cousins in a small village and is part of a small school environment. Whilst she speaks happily of her mother and her partner, she speaks equally happily about her father and his partner.
24. The reality of a relocation to Australia is that K will lose direct contact with family members who have played a pivotal role in her life and who are the bedrock of her security. Indirect contact, even with the most up to date technology, will not provide a meaningful substitute.
25. The mother has suggested that K could return to Northern Ireland three times per year, and that the father could save the money that he currently provides for maintenance to enable him to visit K once per year. I consider these proposals to be unrealistic. On the information provided to the court, the mother and her partner are unlikely to have the financial means to fund three trips home per year, and the ordeal of such extensive travel is also likely to be prohibitive. Whilst the father may be able to save sufficient funds to pay for the air travel to Australia annually, it is apparent from his low income that he could not afford to bring his partner or their children with him, nor is he likely to be able to fund the additional holiday costs inherent in such a trip.
26. The court is mindful that the mother is K's primary carer and that she is entitled to make a new life for herself. It is clear that the mother and Mr B are in a committed relationship and that a decision refusing relocation will be very disappointing for them both. However, there is no evidence that the impact of such a decision will in due course reflect on K's welfare. The mother gave evidence that if K did not settle in Australia she and her partner would return home, and it is clear that the mother recognises that relocation is for a trial period only since she in particular has no experience of life in Australia. Both parties therefore have acknowledged the prospect of a return to Northern Ireland. Mr B continues to maintain rented properties in Northern Ireland and the mother intends to retain her rented accommodation
27. Whilst the mother gave evidence that she is struggling financially since her partner relocated to Australia in June, it is difficult to reconcile that evidence with her account of a totally committed relationship in which it is envisaged

that the mother would be totally dependent on Mr B financially for a period if permission to relocate is granted.

28. The court must also take into account the impact of a decision permitting relocation on the father. The loss of direct contact in circumstances where the father is unlikely to be able to maintain a direct bond due to limited financial means, will involve a considerable sacrifice.
29. The court has considerable sympathy for the position of all of the parties in this case. However, the law requires that the ultimate decision is based on what is in the best interests of K. In considering the welfare checklist, the likely effect of any change in K's circumstances is the factor which weighs most heavily with the court in view of her own account of the family relationships which are central to her life. It is clear to the court that what is in the mother's best interests is not in K's best interests. I am satisfied weighing all the factors in the balance that it is in K's best interests that she remains in Northern Ireland where she has the benefit of her close relationship with her father and half siblings and extended family network as well as her mother. I therefore refuse the mother's application to relocate to Australia.