

G. G

THE HIGH COURT

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964
AND IN THE MATTER OF P.G. INFANT
AND IN THE MATTER OF THE FAMILY LAW (MAINTENANCE OF SPOUSES
AND CHILDREN) ACT, 1976
AND IN THE MATTER OF THE FAMILY LAW (PROTECTION OF SPOUSES
AND CHILDREN) ACT, 1981

BETWEEN :

P.G.

Plaintiff

and

C.G.

Defendant

AND

C.G.

Plaintiff

and

P.G.

Defendant

Judgment delivered on the 12th day of March 1982 by

Finlay P.

These are two actions brought by the husband and wife
respectively, both claiming custody of the only child of the
marriage, P.G. an infant and in the case of the summons



brought by the wife claiming in addition an order for maintenance in respect of both herself and the infant.

I heard both proceedings at the same time and now make an order consolidating them henceforth. The actions were heard on oral evidence and many of the facts relevant to the two issues arising were in dispute. I find the facts to be as follows.

The parties were married on the 21st of February of 1980. The husband was then just short of 20 years of age and the wife was under 18. The wife was pregnant and it is clear that this was the main and dominant reason for the marriage at that time.

The parties went to reside in a privately owned flat in the city and the infant in these proceedings was born on the 2nd of August of 1980. In the month of October 1980 the parties obtained a tenancy in a Corporation flat in the same block of flats as the family of the wife. They resided in that flat up to the middle of August 1981 and have not since lived together.

In the first year of his life, I am satisfied that the

infant probably spent up to three-quarters of his time in the custody of and living in the house of his paternal grandmother and grandfather and during the greater part of those periods was exclusively cared for and looked after by that grandmother.

There was a sharp conflict of evidence as to the reasons for this. The husband asserted that it was the desire of his wife who did not want to have the responsibility or trouble of looking after the child. The wife on the other hand asserted that these arrangements were made at the insistence of her husband who constantly criticised and denigrated her capacity to look after the child.

I have come to the conclusion that the real and fundamental reason was that neither of the two parties were sufficiently mature or caring of this child to accept the responsibility of looking after it and the curtailment of their enjoyment and social activities which that involved. I am further satisfied that although the husband's mother accepted the responsibility of looking after this child for so much of that period and did so with very great care

and much efficiency that she was not in favour of such a course and that she constantly urged the young couple to take the responsibility of caring for the child themselves.

On the 14th of August 1981 at a time when the child was in the care of his paternal grandmother, the wife left the flat late at night, went to a house where a married man, with whom she had undoubtedly been friendly, was living separated from his wife and children, and shortly afterwards followed him to England where they both obtained employment in a holiday camp passing themselves off as a married couple and living together.

The wife asserts that she was forced to leave the house by the constant neglect and ill-treatment of her husband and by his drinking habits. She protested that she did not have at the time of leaving the house the intention of going away with the man with whom she eventually did go away.

I have come to the conclusion that she left the house as part of a pre-arranged plan and had decided to go away with this other man before she did so.

From that time up to the present the infant who is now aged approximately 19 months has continued in the continuous custody and under the care of his grandmother. The whereabouts of the wife in England were unknown to any of the parties until at the end of September 1981 she wrote a letter to her mother-in-law. In that letter she firstly described herself by the name of the man with whom she was then living, expressed considerable gratitude to her mother-in-law for looking after the child and for past kindnesses and made a series of complaints with regard to her husband's conduct during their marriage. She indicated that when she had settled down in England she would come back and collect the child.

About two weeks after the writing of that letter, the wife returned to Ireland and I am satisfied demanded from her husband the return of the child stating her intention to bring it back to England. This was refused and the husband obtained firstly an interim and then an interlocutory order preventing the child from being taken outside the jurisdiction or out of the custody of his grandmother

providing in the interlocutory order for three visits a week by the child to his mother. That has been the situation since December 1981.

The wife has not returned to England but is residing at home with her parents and has not been since her return to Ireland employed. She now seeks custody of the infant upon the basis that it would reside with her and her family in Dublin. The father seeks custody of the infant on the basis that it would continue to reside with his parents and be largely looked after by his mother also in Dublin.

Evidence was given before me not only by the parties to the suit but also by the two grandmothers involved and by the wife's sister who is a married woman living close to the family home.

With regard to the question of maintenance, the evidence before me was that the husband had up to a period of about three weeks ago been employed as a factory worker at something over £100 a week but that he has been made redundant from that employment. He is presently receiving Social Welfare. The wife receives a Supplementary

Allowance of approximately £20.00 per week.

The paternal grandmother does not work and her husband is in constant employment and they reside in a two-bedroomed house with the husband in this case and two brothers aged 23 and 20 respectively who are working, and at present the infant. The wife's family live in a two-bedroomed flat, her father is working and her mother works on an evening shift basis from about 5.00 p.m. to 8.00 p.m. Residing also in the house are one brother who is working and two teenage sisters who are still at school.

On these facts as found by me I have come to the following conclusions on the issues which arise.

Custody

With considerable hesitation I have come to the conclusion that it is at present in the overall interest of the welfare of this infant that he should be put into the custody of his mother subject to stringent conditions.

I have reached this conclusion for the following reasons. Firstly, the sad facts of this case are a classic

example of the principle laid down by the courts that the custody of a child can never be construed in the light of a reward for good conduct or a punishment for bad conduct.

There is no doubt in my mind that the person who has made the major contribution towards real care and affection for this child thus far in his life is his paternal grandmother. I have no real doubt that the child is at present happy, contented and well cared for in her general and continuous custody.

I am driven to the conclusion that neither of the parents of the child, certainly at the time when he was born, were of sufficient maturity or development of personality or character to be capable of looking after a young child. I consider it improbable that apart from the fact that he is a man and I am dealing with the case of an infant who is only 19 months old that the husband has got any continuous capacity to provide a caring custody for his son other than through the activities of his mother. I have found it difficult to come to any firm conclusion as to the reasons why during the first year of this child's

life his maternal grandmother did not take a more active part in his caring and upbringing. Notwithstanding this problem she now strikes me as a person of responsibility who has now seen the problem of the upbringing of this child as one in which she must make a significant contribution.

I have considerable doubt as to whether the wife has yet settled down in her life in Dublin or whether she has any fixed or mature view with regard to her future and that of her child. I believe she now has got a strong affection for the child though in the past she has displayed little enough continuous caring affection for him.

I am satisfied that it is probable having regard to the history of his custody that the child will suffer significantly and immediately from being separated from his paternal grandmother. I am also satisfied however that if I delay that separation and if it is to take place at some future time the injurious effects of it would be greatly increased. Notwithstanding the wife's immaturity

and lack of responsible care for this child in the past, it seems to me that in the overall welfare of the child he must at least be given a chance of being brought up by his own mother. I come to this conclusion notwithstanding the fact that his paternal grandmother is only 46 years of age and in my view would be a woman physically and emotionally capable of giving him appropriate care.

My decision to place him at present in the custody of the wife is largely based on the fact that her mother and her immediate family will provide, what in my view, will be a responsible support group for this child. Were she to cease to reside with her parents or were she to seek to return to England, I would have no doubt that she would not on her own or in less stable conditions than exist in her family home be an appropriate person to have custody of this child. I therefore direct that the child be given into the custody of her mother; that the child and mother should continue to reside with her parents and that the child should not be brought to live in any other place

in Dublin and should not be brought outside the jurisdiction of this court. I further direct that the appropriate officer of the Social Welfare Section of the Department of Justice should regularly visit the infant and his mother at their present residence and should report direct to me on his upbringing and care. In particular, I would require to be informed as to whether the infant requires at any time the services of a Child Guidance Clinic and if he does the mother must cooperate in bringing him to the clinic and abiding by such directions and requests as that clinic shall make.

If as I hope to be the case the paternal grandmother is willing so to do, I would be prepared to provide for staying access on the part of the child to commence not less than four weeks from this date commencing on a Friday evening and concluding on a Sunday evening the child to be collected at an agreed or directed place by his father on a Friday not later than 5.00 o'clock and to be returned to the same place not later than 5.00 o'clock on a Sunday on each fourth weekend.

If, for any reason, the paternal grandmother is unable or unwilling to make use of this access then the father of the child is to have access on each Saturday and Sunday from 11.00 a.m. to 5.00 p.m. collecting and delivering back the child and in any event, to have such access on every weekend when a visiting access does not occur.

Claim for Maintenance

So far as the wife's claim for maintenance was coupled with and conditional upon her claim for custody of the child and consisted of a claim for maintenance towards the upkeep of the child, the husband does not dispute his liability to pay appropriate maintenance for the upkeep of the child during any period when he is in the custody of the wife.

Insofar as the claim for maintenance is a claim made by the wife for maintenance of herself the husband disputes it, firstly, upon the grounds that she is a spouse who has deserted and continues to desert him which is an absolute bar and secondly, on the grounds that she has committed adultery which he has not condoned, connived at or by wilful neglect or misconduct conduced to and that I should

exercise my discretion against granting her maintenance.

I am satisfied as I have indicated in this judgment that these two parties were tragically immature at the time they got married and probably in the development of their personalities quite unfit for marriage. I believe that to be the fundamental and overriding reason why this marriage failed. Notwithstanding the conduct of the wife, the husband in evidence before me expressed a qualified and tentative willingness to attempt a reconciliation.

The wife was quite adamant as to the impossibility of that being successful or of her making any attempt to try it.

On the evidence, there can be no doubt that the wife prima facie deserted the husband in the sense that she left him not at his request or direction and that she continues to refuse to live with him. If she is to be entitled to maintenance having regard to the provisions of the Act of 1976 it could only be as the result of a finding by me on the facts that the conduct of the husband was such as in effect to constitute constructive desertion of his wife and that he had made it impossible for her to remain

living with him. On the evidence, I am not satisfied that this is so. Due largely to his immaturity, I believe he was probably uncaring and insensitive during the marriage. He admitted having assaulted the wife though not in a serious manner on two or three occasions. She made complaints which I do not accept of more serious and more persistent beatings or assault. She also made complaints of continued neglect and of the fact that he spent his entire time either with his friends or drinking and out of her company. This evidence seemed to me to be inconsistent with the evidence which I accepted of the number of occasions when jointly the husband and wife persuaded the paternal grandmother to keep and look after the child so as they could indulge in joint social activities. I, therefore, am satisfied that the defence of desertion is properly made out on behalf of the husband and that the wife is not entitled to the payment of maintenance by him.

It is therefore unnecessary for me to reach any decision with regard to the complaint of adultery and

I consider it wiser not to do so.

As regard to the quantum of the maintenance appropriate now to be paid by the husband towards the upkeep of the infant, evidence given before me at the hearing was unsatisfactory. The husband had not yet actually started to draw his Social Welfare upon the termination of his employment and had received, I think, three weeks' salary when being dismissed. He was furthermore hopeful either of soon or immediately obtaining alternative employment or of the possibility that he would be taken back on into the factory in which he had previously been employed. He was not therefore aware of the precise amount of the Social Welfare Allowance which he would obtain though thought it might be about £50. On the assumption that that figure is correct, I would consider that the appropriate maintenance to be paid in respect of the child who is under 2 years of age would be £12 per week though a somewhat larger sum may become appropriate, certainly when the child is older and possibly when and if the husband's capacity to earn returns

or increases. It would obviously be preferable that this payment should be made, if possible, out of the Social Welfare payments at present being made to the husband but I will hear the parties on the precise nature of the order which I should make.

approved
T.A.F.