

THE HIGH COURT

FAMILY LAW

[2023] IEHC 601

Record No. 2023 37 CAF

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964 AS

AMENDED,

IN THE MATTER OF THE FAMILY LAW MAINTENANCE OF SPOUSES

AND CHILDREN ACT 1976 AS AMENDED, AND

IN THE MATTER OF THE FAMILY LAW ACT 1995 AS AMENDED

Between:

P.

Applicant/Respondent

-AND-

N.

Respondent/Appellant

EX TEMPORE JUDGMENT of Mr. Justice Jordan delivered on the 20th July

2023

1. This matter comes before the Court pursuant to a motion which is dated 12 July 2023 and which seeks a stay on the Order made in the Circuit Court on 23 June 2023.
2. The first application is an application to extend the time or enlarge the time to seek a stay on that Court Order and as I have already said I am extending or enlarging the time to today's date to seek the stay and proceeding to deal with the matter on its merits.

3. Thereafter, the application is for a stay on the entire Order and in effect a stay on the transfer Order following a four-day hearing which resulted in the young child at the heart of these proceedings being transferred to live with his father and his father's current family (he is in a new relationship) in the United Kingdom. The position in that regard is that the Circuit Court Judge did not grant any stay on the Court Order and the result of that is that H. was transferred and is currently living with his father and his father's current family in the United Kingdom.

4. It is important to say at the outset that this Court is not deciding on the appeal, this Court is deciding whether or not it is appropriate to grant a stay on the Order made in the Circuit Court. The effect of the grant of such a stay would be that H. would have to be returned to Ireland pending a hearing of the appeal.

5. There are many matters which require to be considered in the context of this application before the Court. The legal position in terms of the considerations which this Court must take on board in deciding on the application are well settled and are set out in the *Charles* case which is reported at [2016] IESC 48, the judgment of Clarke J. delivered in July 2016. Those considerations were also dealt with in the *Emerald* case [1993] 2 IR 443. Ultimately the Court is concerned with a balancing exercise in order to minimise the risk of an injustice to either party.

6. However, there are additional considerations in any case involving a child in circumstances where welfare issues are the foremost consideration of the Court in deciding issues impacting upon a child and the child's welfare.

7. The situation here is that the Circuit Court Judge decided to make the Order which she made after four days of hearing and against the backdrop of protracted litigation between the parties concerning custody and access - flagged if needs be by the record number of the proceedings, the record number of the proceedings bears a

2018 date. The issues are long standing issues of high conflict between the parents of H. concerning his parenting and his welfare. His welfare is a very significant if not the most significant consideration in terms of the decision the Court has to make.

8. The Court must also take on board the s.31 considerations, which are welfare considerations - listed welfare considerations - in the context of the parameters, not outside parameters but parameters, impacting upon welfare issues involving children.

9. The Court below was clearly influenced by the evidence of the experts before it. It is the position that Professor J. prepared a number of reports and it is the position that Ms M. prepared a report and gave evidence to the Court. It is the position that Professor J. in his most recent report which is a report dated 12 April 2023 says: -

“A central problem in the current arrangements is that N., that’s the mother, does not agree with the current court order directing that H’s access with father should take place in father’s home (which was to be her home at one point) in the United Kingdom. She has made it very clear that she will not be facilitating this access (which is currently court ordered) should the court reaffirm such access arrangements and she believes that the only access that should take place for H. should be in Ireland with P. coming to see H. here at the weekend and following him in his activities. She believes her position is warranted because her son says he does not want to go to the UK and has shown significant distress on different occasions about going to the UK to spend time with his dad and his other family. Despite her son’s distress it is notable that she was able to successfully transfer H. to his father’s care for a nine day period in the UK in October when she was on her way to Spain for a holiday of her own.”

On the next page and before giving recommendations, which clearly impacted upon the court’s deliberations and decision, Professor J. says: -

“Currently H’s relationship with his father is at an impasse with the orders for both direct access and Skype contact being complied with in no more than a hit and miss kind of way. As this report is written he has not had any direct access with his father for several months. Hence, it is important that this impasse not be allowed to drag on any longer than necessary. Mother’s attitude towards compliance with existing or possible future access orders in addition to her refusal to engage with the assistance proposed by the court means that she is unlikely to be able to fulfil the role of a responsible custodian in the context of her son’s unique set of life circumstances. By contrast, I believe father will be both able and willing to ensure the child’s access with his mother for whatever time period the Court may order in the future. I believe he will be a more responsible guardian of the child’s opportunities to have an uninterrupted relationship with both his parents into the future.”

10. There was a lot of evidence given in the Circuit Court and there are points touched upon by Senior Counsel for Ms. N. in relation to the assessment of Professor J. and indeed in respect of Ms M.’s opinion, points made which were ventilated at the hearing and which no doubt the court considered, and perhaps not all of them were ventilated, but they are not new if they were not.

11. The situation in relation to the Order made which is under appeal and in respect of which a stay is sought is that there is a form of case management of the situation incorporated into the Court Order. The matter is to return to the Circuit Court for further review and has been adjourned by the order of 23 June to 20 November next at 10.00am.

12. So, balancing the justice, the situation here is that unfortunately - and I have read all of the papers, I haven’t heard all of the evidence, and aspects of what is contained in the papers are likely to differ somewhat from the evidence given in the

Circuit Court, but the reports are the reports - the allegations and cross-allegations are what both sides say and give a flavour of the hostility and lack of agreement and high conflict between both sides when it comes to contact between H. and his father. I can therefore understand how the Judge in the Circuit Court made the Order which she made having had four days of evidence and knowledge of no doubt the protracted history in the case. This was perhaps the nuclear option in terms of the type of Orders Courts make in these situations but it is understandable how the Circuit Court Judge arrived at the decision she arrived at and made the Order she did make. Whether or not the appeal Judge reaches the same conclusion remains to be seen.

13. In terms of the point made concerning H's voice not being heard, it is apparent what H's expressed view was and it is contained in the report of Professor J. Whether or not that was his authentic view is another matter, and I suspect something that the Circuit Court Judge looked at. Whether or not significant weight should be attached to a view of a child of H's age is another consideration. But it does not appear to me to be open to argument that transferring H. back from the United Kingdom to Dublin at this stage pending the outcome of the appeal would be to his detriment. It seems to me that that must follow as night follows day and ultimately might well result in him going back to the United Kingdom following the decision on the appeal or following whatever decisions are made when the matter is ultimately reviewed in the Circuit Court.

14. What has not been mentioned by either counsel in their submissions is the concept of parental alienation and it's maybe just as well. However, it is clear that a consideration of the experts and presumably the Judge was the likelihood that H's relationship with his father would be completely and utterly sundered and sabotaged if something radical was not done as a matter of urgency - and that the situation had come to that it seems to me is the doing of H's mother. H's mother was at the time the Order

was made the primary carer and calling all of the shots in terms of the relationship and the contact between father and son - and in an extremely strong position to make contact easy or make it hard. The fact that she chose the latter and the fact that she chose to set her face against Court ordered access means that the consequences of those actions are her own doing - they are not the doing of anybody else. A transfer of residence Order is a significant Order in any situation - but it is an understandable Order in this case. It is not in my view in the interests of the welfare of H. that a stay be granted on the Order - and I am not going to grant a stay on the Order.

15. It seems to me that in situations like this one may speak of the balance of justice, avoiding a risk of injustice - all of those matters - but applications for stays in family law cases come before this Court frequently and not infrequently applications for an enlargement of time because many people don't realise that you have only four days under the rules to bring an appeal against a refusal of a stay of a Circuit Court Order - and in nine out of ten cases this Court grants the stay for the asking because it is obvious to the Court that it would be unjust to the party appealing not to do so. But the contrary is the position here - it would in my view be inimical to the interests of H. to grant a stay on the Order.

16. In my view the balance of justice requires that I refuse to grant the stay. I will do so, I will direct that the appeal be listed in the list to fix dates on 23 October next, the parties can remind me of the case and I will endeavour to give the case priority so that the appeal can be dealt with. I do wonder, and it is something that the parties should consider, about the wisdom of proceeding with the appeal before the review date but it seems to me that is where we are because the entire Order has been appealed. I will hear submissions from the parties in due course but it seems to me that an effort will have to be made to deal with the appeal so that the matter can reappear before the Circuit Court

judge on 20 November if the Order is upheld - but in this latter respect I am thinking out loud and that just occurs to me looking at it. It might be that the parties will have different views in that regard or it might be that I am missing something.

17. In any event I am refusing the application for a stay and I am reserving the costs of this application. I am tempted, notwithstanding the fact that Ms N. is legally aided, I am tempted to grant costs against her because I am concerned that part of the strategy being adopted here in terms of the obstacles that are being placed in the way of contact between father and son, are legal strategies on her instructions to protract and delay matters in circumstances where she is legally aided, it's costing her little or nothing and the father of the child Mr P. has to pay for his representation. I won't make that Order at this point in time, it is probably best to leave that over until a decision is made on the appeal and until the Court hears submissions in that regard. I appreciate that it might be considered unusual to even consider granting costs against somebody who is legally aided, but I am reserving the costs for the reasons I have outlined.