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THE HIGH COURT

2007 26 M

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964, IN THE MATTER OF THE FAMILY LAW ACT 1995, IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDER ACT 1991 AND IN THE MATTER OF H.L., AN INFANT

BETWEEN

J. McD.

APPLICANT

AND

P.L. AND B.M.

RESPONDENTS

Judgment of Mr. Justice Hedigan delivered on the 27th day of April, 2010.

Decision on access

1. This matter comes back before the Court for the purposes of dealing with the issue of access by the applicant to his son, H.L.

2. The respondents submit that the Supreme Court order herein, perfected on the 25th January, 2010 provides that the High Court should "determine the issue of access to the child by the applicant". Ms. O'Toole S.C., on behalf of the respondents, submits that this means that it is open to the Court to delay direct access for another approximately two years until the child is six years old. She has referred to the four judgments of the Supreme Court arguing that the decision of the Supreme Court was that while the decision was that there should be access, the nature and details thereof were a matter for the High Court. This, in her submission, gives the Court the option of delaying direct access.

3. I have some difficulty with this interpretation of the Supreme Court's decision in the light of the judgments thereof. I note that the Chief Justice, in his judgment, which largely addresses Convention issues, agrees with the judgment of Denham, Geoghegan and Fennelly JJ., on the issue of access. In her judgment, Denham J. states at page 11:

> *"47. For the reasons given in this judgment I would grant the appeal and would order access to the child by the father as described. I would not make an order of guardianship.*
>
> *48. It is in the best interests of the child that he remain in the custody of his mother. There was no contest on this issue, the father did not seek custody. Essentially the father has at all times sought access to the child, and I am satisfied that it is in the best interests of the child that the father be granted access rights."*

Later, at page 25, she continued at (vi) to refer to the benefit of the child's having "*the society of his father"*.

Later, on the same page at (ix) she continues:

> *"The parties did enter into an agreement, which is not enforceable. However, the agreement provided for contact between the father and the child, which is a matter in the best interests of the child. Insofar as that agreement is in the best interests of the child I attach some weight to its components."*

And further on page 26 at (xvi) she continued:

> *"Applying the test to all the circumstances of the case, I would make an order enabling access by the father to the child. This is in the best interests of the child. I would envisage this contact at*

> *stated times during the year. It may be on one day a month, it may vary according to circumstances. It may vary as times goes by and the child grows up. …"*

It is, in my view, plain from the above that Denham J. contemplated direct access to the child in some form to be determined by the High Court. She referred to the society of his father and in dealing with the frequency clearly contemplated that this would involve direct meetings.

4. Geoghegan J., in his judgment, laid some stress upon the agreement originally entered into. The terms of that agreement, he noted, were an important factor to be considered by a Judge hearing an application for access. In that regard he noted that under the heading "*contact arrangements*", the agreement referred to visits by the applicant to the child. He noted that direct contact, in the first place in hospital, then at home and subsequently at various meeting places did in fact occur. It is clear that when he referred to access, although he did note the possibility of communication electronically should the respondents emigrate to Australia, he was otherwise contemplating the kind of access that had already occurred and which was provided for in the agreement. In short, direct access by way of a meeting.

5. Fennelly J., in his judgment, at paragraph 116, referred to the possibility of orders permitting contact or access between the father and the child. He stated that he would make an order in the terms suggested by Denham J. He referred to the dispute between the psychiatrists being a narrow one limited to:-

> *"The time at which the child should be introduced to and have contact with the father."*

Hardiman J. agreed with the judgment of Fennelly J.

6. It seems to me there is at least a majority of the Supreme Court, consisting of the Chief Justice, Geoghegan and Denham JJ., who have decided that there should be access and in the context of this case that means that the father is to have personal contact with the child and the child is to have the society of the father. Whilst Fennelly J. did seem to distinguish access and contact, nonetheless he decided at paragraph 117 that he would allow the appeal in relation to access and make an order in terms suggested by Denham J.

In my judgment the access that the Supreme Court has ordered includes, where possible, direct contact. That possibility now exists within the context of a considerably changed scenario. The respondents have relocated to Australia and have declared their intention of staying there. The applicant has indicated his desire to make contact with the child initially through presents and cards, then via e-mail through the respondents and in the longer term, Skype. It is anticipated by him that this process will continue over an extended period and will be allowed to evolve naturally from one stage to the next. This aspect of possible access does not involve much dispute. He would, however, like the opportunity of travelling to Australia and meeting with H.L. This is the aspect of access that is in dispute between the parties.

7. I have read the affidavits herein, notably those of the respondents, P.L. and B.M. I have also had the benefit of the evidence of the applicant in Court. In his

evidence the applicant has stated the following:

> (a) He wishes to establish and develop a relationship with H.L. He is prepared to adopt for the present the role of favourite uncle as originally contemplated. He accepts to be referred to as "John". He contemplates a time when his true relationship will be revealed to H.L. He is prepared to defer to the respondents as to when that should be. If asked by the child he would sidestep the question.
>
> (b) He wishes to make contact with H.L. through letters, greeting cards, e-mail and Skype. He accepts this is a process that must evolve gradually. Initially, he wishes to have e-mail contact through the respondents. The child's involvement can emerge as he grows older.
>
> (c) The applicant wishes to have regular reports (quarterly) of H.L.'s progress together with photos.
>
> (d) The applicant wishes to meet H.L. and proposes travelling to Australia to do this. He envisages travelling around the end of June/July of this year. He hopes for three meetings with H.L. during this time. He accepts H.L. should be in the company of either or both the respondents. He foresees the meetings would last initially for half an hour, one hour and one and a half hours. He agrees the meeting should be a calm low-key affair. He accepts that the child, who does not know him, may not even talk to him. He hopes that a relationship will develop between them. He would like to take photos of H.L. He would like to have a third party present. He suggests a friend.
>
> (e) Should the respondents travel to Europe again he would like to be notified so he can arrange a meeting with H.L. He is prepared to travel anywhere to do that.
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> (f) The applicant does not seek any parenting role. He will abide by the Court's order herein.

8. The respondents do not wish the applicant to have any direct contact with H.L. They are prepared to furnish him with reports of his progress, including photos. They feel threatened by the applicant. They fear he will reveal to H.L. the reality of their relationship and cause great insecurity and emotional upset. They fear for the integrity of their family unit. The lack of trust between them and the applicant is such they believe as will make very difficult any meeting between the applicant, H.L. and themselves. They think this should occur only after a lot of preparation. The respondents asked for leave to submit an expert psychiatric report and were granted orders allowing certain documents to be furnished to that expert. They decided, however, not to submit any such medical report. The applicant does not seek to proffer any psychiatric reports either.

In the event the Court does order direct access, the respondents have indicated

on affidavit that they would like to have a third party present.

9. In the light of the Supreme Court finding that there should be access, I consider there is no further need for a psychiatric report. Arrangements for the contact between the applicant, the respondents and H.L. may be made herein with all appropriate consideration for the difficulties expressed by both sides. I accept these difficulties as genuine concerns that need to be addressed.

10. I would order the following arrangements for access:-

> (a) Solicitors for the respondents should forthwith furnish to the applicant the e-mail address of the respondents. On the day of May, 2010, the applicant should open e-mail communication with the respondents. He should inform them of his proposed dates of travel to Australia. This visit should occur at some time between the last week of June and the last week of August 2010.
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> (b) The applicant is to have access to H.L. by meeting with him in the company of either or both of the respondents and another independent third party. The third party should be a social worker located in the area where the respondents and H.L. reside. The respondents should choose such person and should ensure the person chosen is clearly an independent person. The respondents should provide the name of this social worker to the applicant in advance and provide to the applicant details of that person's e-mail address. The details of time and meeting point for each meeting should be finalised between the applicant, the respondents and this third party at least two weeks prior to the applicant's departure.
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> (c) During the period of his visit to Australia, the applicant should meet three times with H.L. These visits should be spaced as evenly as possible. If necessary, H.L. should be taken out of school for the afternoon to accommodate an even spread of these meetings. The first meeting should last for at least a half an hour, the second for at least one hour and the third for at least one and a half hours.
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> (d) These three meetings should take place in a child-friendly environment of a public nature such as a zoo, an aquarium or a children's museum. The applicant will be introduced to H.L. as "John". The applicant may bring a gift for H.L. With the permission of the respondents, he may take photos. The meeting should be conducted in a calm, low-key fashion.
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> (e) Starting two weeks before his departure for his first visit to Australia, the respondents will furnish a brief report together with photographs of H.L.'s ongoing activities and wellbeing. Such reports and photographs should be furnished to the applicant thereafter on a quarterly basis. These reports should be by e-mail. The applicant may send direct to H.L a present and greeting card

on the occasion of H.L's birthday, at Christmas, at Halloween, on Saint Patrick's day and at Easter.

(f) The above arrangements will apply in respect of any future visits to Australia by the applicant save that, after this 2010 visit, all the meetings with H.L. should last for at least one hour.

(g) In the event the respondents decide to travel to Europe with H.L. they should notify the applicant at least one month in advance to enable him meet at least once with H.L. during such visit.

(h) The respondents, at a time they consider appropriate, will encourage H.L. to communicate via e-mail with the applicant. At a further time they consider appropriate, the respondents will encourage H.L. to communicate with the applicant via Skype or some similar electronic video link.

(i) The respondents will encourage H.L. to develop friendly relations with the applicant on the basis of "a favourite uncle" type of relationship. At their discretion, when they consider it age appropriate, they will reveal to H.L. that the applicant is his biological father.

11. The above arrangements for access are conditional upon the applicant giving to the Court the following undertakings:-

(a) He accepts to play the role of "favourite uncle" until the true nature of his relationship is revealed to H.L. He will not reveal to H.L. his biological paternity and agrees to defer to the respondents in their choice of timing to make that revelation.

(b) He seeks no parental role in H.L.'s upbringing.

(c) He acknowledges and will respect the familial integrity of the respondents and H.L.