Mac B. - Mac B

1981 No 1112 sp / 39

THE HIGH COURT

BETWEEN:

A . . . MacB.

Plaintiff

and

A G MacB.

Defendant

JUDGMENT of Barron, J., delivered the 6th day of June 1984.

The parties in this case were married on the 2nd October 1971 in London. They have three children, C born on the 9th January 1973; H , born on the 25th April 1974; and P , born on the 25th April 1977. Following their marriage the parties appear to have lived in Ireland, at first in Monaghan and then in County Wicklow. The marriage broke down in the year 1981. The wife now lives with the three children of the marriage in the home of her uncle and aunt at Prehen House, Derry. The husband now lives at Crannagh Castle, County Tipperary, with a woman to whom he is not married and by whom he has had one child who was born on the 12th July 1983.

The parties separated on the 10th March 1981. The wife brought with her her two younger children and went to live with her uncle and aunt.

The eldest child remained with her father. No proceedings were issued until the 17th December 1981 when the wife commenced proceedings seeking orders pursuant to section 11 of the Guardainship of Infants Act, 1964; pursuant to section 12 of the Married Women's Status Act 1957; and pursuant to section 4 of the Family Home Protection Act 1976. These proceedings came on for hearing on the 1st July 1982 before Keane J. and were at hearing on that day, the following day and on the 13th July 1982. On the third day of the hearing the matters in dispute were settled and a settlement was ruled on the 14th July 1982. This consent provided for the custody of the three children to be granted to the wife and provided for access for the husband in the Summer of 1982 and at Christmas of that year. Subsequent access was to be as agreed by the parties or as ordered by the Court. The consent also dealt with property matters and included a term that a separation agreement would be executed by the parties to incorporate the terms of the consent. This formal document has never been either prepare or executed.

Access took place as arranged in the Summer of 1982 and at Christmas 1982. It appears to have been agreed to for a week at Easter 1983. No agreement was forthcoming for the Summer 1983 and an application was brought by the husband in May 1983. This was heard on the 30th June 1983

also by Keane, J. He granted access to the husband in respect of all three children to be exercised at the husband's home during the Summer holidays. An issue in relation to the education, including the religious education, of the children was heard by Keane, J., on the 12th July 1983. No order was made on this application other than an order for costs in favour of the wife. The costs of the hearing as to access were by the same order, awarded to the husband.

The order of the 30th June 1983 adjourned the question of further access until the 3rd October 1983. The matter was not heard on that date due to a genuine misunderstanding on the part of the husband's advisers and no further date was arranged for such a hearing. As no agreement could be reached for access during the Christmas holidays an application was brought by the husband for an order of the Court to obtain such access. This matter came before me on the 16th December 1983 and after hearing oral evidence I made an order for access for a period of seven days commencing on the 26th December 1983 to be availed of at the husband's home. The matter again came before me in March of this year when I was informed that the parties had been unable to agree the terms of access for the Easter holidays. At that stage I was informed, for the first time, that divorce proceedings had been issued in Northern Ireland

and that the question of access had been brought before the Courts of that jurisdiction. No hearing took place before me but the husband undertook that if access was allowed to him he would return the children to Northern Ireland. This undertaking was given against a background of an agreement that such access would be provided provided the undertaking was given. On this occasion I indicated to the parties that the history of applications to the Court for access showed that there was no reason why the parties could not agree access without always having to come to Court and that, in respect of future applications, whichever party was being intransigent would be required to pay the costs of such applications. No agreement appears to have been reached in relation to the Summer 1984 and the husband has, again, brought an application for access. This was heard by me on the 23rd May when I had the benefit of further oral evidence.

At this hearing the wife sought to deny her husband access in Tipperary. She gave evidence to the effect that when P. returned from his last visit to his father his hair was quite badly singed. Though asked by me as to thd area and extent of the singing she was quite unable to answer either of these questions other than to say it was on the top of his head. The evidence which I accept in relation to this matter is that P was asked by his father to burn rubbish in a haggard. The

rubbish consisted mainly of newspapers and old tin cans. No accelerant of any sort was used other than a match. P 's father was not present and no one is actually aware of what happened. The singing was noticed subsequently at lunch-time. This was the only fresh allegation made against the husband on that date. This allegation is made by the wife in the context of allegations by her that on two separate occasions the husband was guilty of malicious damage to property. The first of these occasions was in 1974 when it is alleged that he set fire to a house which he had either just sold, or was just about to sell. The second relates to the damage to a jeep in the year 1981. Both these allegations were made in the course of the hearing last December and also before Keane J. in June 1983. At this hearing evidence in relation to the 1974 incident was given by Garda L who is attached to the Templemore Station in County Tipperary. The premises concerned were known as Laragh House and had either been sold or were about to be sold to a Mr. McD . Garda L 's involvement occurred in October 1983. Apparently, a complaint was made to him by the husband to the effect that the McD 's were seeking to blackmail the husband in relation to the incident. He was called, by the husband, to the husband's home, where he met the husband, the lady with whom he now lives and Mr. and Mrs. McD . The husband made allegations against

the McD and the McD made allegations against the husband. In the course of his investigation of the matter Garda L obtained a statement from the husband, dated the 27th October 1983, in which the husband admitted causing a fire at Laragh House in the month of March 1974 As the husband had indicated as much in December 1983, this did not materially alter the evidence in relation to this allegation. The second incident of which the wife complains took place in March 1981. It was one of many incidents which took place between the 24th February 1981 and the 10th March 1981 when the parties separated. There is no point in going into these matters. They have not been dealt with in evidence before me and I am aware of them only from a perusal of the affidavits. The husband admits that he damaged a jeep and that his reason for so doing was his annoyance with his wife and two of her relatives and that his purpose was to prevent them from leaving the family home. This reason was similar to that put forward in relation to the 1974 incident in that it was caused by an irrational dislike of Mr. and Mrs. McD In the course of the present hearing it was also put to the husband as it had been put to him in the course of the hearing in December last that he had threatened, if he was prosecuted for the malicious burning in 1974, that he would kill his children. The wife also again alleged that the husband had allowed

P to fall off a bicycle during one of the holiday periods and that he had cut his knee as a result. A further complaint which she made was that she objected to the children being brought in contact with a Professor S and evidence was given that, on the 14th March 1979, this gentleman had been charged with possessing a cannabis derivative contrary to section 78 of the Health Act 1970 and had been given the benefit of the Probation Act. The evidence did not indicate whether or not the children had in fact been brought into such contact.

The wife gave evidence shortly on 28th May. She made two further complaints which had not been made on 23rd May but had been made in December to the effect that H had returned home once with a cough and once with a burnt finger. She also admitted being an in-patient in a psychiatric hospital for two weeks in 1980 and taking medication at that stage for such condition.

In addition to the evidence which I have indicated, evidence was also given by a Dr. L B ., a consultant psychologist, practising in Belfast. This witness had assessed the three children in the presence of their mother. She had, unfortunately, made no assessment of, nor had she been in a position, to make any assessment of the father or of his relationship with his children. By agreement a report on H was handed into the Court. The position of H is somewhat different from that of the other two children in that in his earlier

years there was a suggestion of autism. Whether or not this was an accurate diagnosis at the time, it is clear that H no longer suffers from any such complaint. In addition H is being educated in a preparatory school in Winchester whereas his brother and his sister are being educated at a local school in Derry. The tenor of this witness's evidence was that H was a gentle, sensitive little boy, very much at ease with his mother but who through this timidity was fearful of his father. She suggested that his father should be encouraged to come to the North to see him on a daily basis where H would have the emotional security of knowing that his mother was not too far away. Dr. B said in relation to C that she was also apprehensive and afraid of her father, but less so than H. She was satisfied that she loved her father. In relation to P, she said that he saw himself as being his father's friend and would accept access on any terms. She said that C found her father moody and that he became angry in situations which C was unable to control. So far as H was concerned his attitude appears to be that his father is generally cross and that he can do nothing to avoid his father's displeasure and that this has the effect of frightening him. Dr. B 's view was that all three children should have access together.

It was suggested in the course of this hearing that papers had been sent to the Director of Public Prosecutions relating to the 1974 fire and that the parties were waiting for a decision. This was patently incorrect. It may well be that the papers were sent to the Director of Public Prosecutions following the obtaining of the statement in October 1983. If so, no steps have been taken and with a lapse of seven months since that statement was made it seems unlikely that the Director is going to take any steps at this stage. It was also suggested by the wife that the threat to kill his children was made known to her in April of this year. She may again have heard such allegation, but as it was a matter raised in December, it was nothing new. The allegation against Professor S is based upon the wife's personal dislike of this individual. The evidence shows that the two families including the wife saw much of each other while they both lived in Dunlavin. If the children were being introduced to drugs this would be a very serious matter. But there is no such allegation. If there is evidence that the husband is bringing the children into contact with persons who are undersirable, this is a matter which the Court must then consider. It does not arise at present. The allegations in respect of harm which has befallen P and H are matters which, of course, must be taken into consideration. I think it unwise that a child o

seven should be allowed to handle matches. I think it even more unwise that a child of seven should be allowed to handle matches and to set fire to newspapers on his own without supervision. However, I do not think that this, of its own, justifies any suggestion that the father is unfit to have sleeping access with his children.

I have formed a view as to the relative merits of the cases being put forward by the husband and the wife respectively. Both parties have a history of psychiatric illness. In the case of the husband this has manifested itself in one incident, several years prior to his marriage, and by his acts in relation to Laragh House in 1974 and the jeep in 1981. The significant feature of these latter two incidents is that on both occasions the husband vented his anger against a material thing and on both occasions to deprive those against whom he was venting his anger. On neither occasion is there any suggestion that he sought to, or made any attempt to, vent his anger against any person, whether his wife, his children, his wife's relatives or anyone else. It seems to me that if he was ever going to show violence towards individuals that the circumstances leading up to the incident in 1981 would have been such circumstances. At the hearing last December, evidence was given on behalf of the husband by P · S , a local solicitor, who said that he did not know the

husband, whom he found to be a withdrawn sort of person, very well but that he had known the lady with whom the husband was now living all her life. He gave evidence that he had gone with his wife and two children, aged eight and six, for lunch on one occasion. He said that the three children of the parties to these proceedings were present, that they were well behaved and that they played happily with his children. I was quite satisfied, on that occasion, that the husband was a suitable person to be allowed sleeping access with his children. I see no reason from any of the evidence which I have heard on this occasion, most of which has been repeated, to consider altering my view on that aspect of the matter.

The wife's history of psychiatric disturbances commenced with two separate incidents prior to her marriage. Since her marriage she had a recurrence of her illness in January 1980 as a result of which she became an in-patient in a psychiatric hospital in Dublin for a period of approximately two weeks. Following her return home, after this period in hospital, her health improved and was completely recovered by September 1980. It was, by virtue of her husband's belief, that her health was again deteriorating in the month of February 1981 that he asked her relatives for assistance. I am unable to assess on any evidence which I have heard whether or not there was any recurrence at that stage of the

wife's illness.

In her evidence Dr. P gave her assessment of the wife as being gentle, timid and apprehensive and as a person who is not assertive and found it difficult to verbalise (sic). At the hearing in December last I found the wife clear in her evidence. However, at the hearing, on this occasion, I found her unable to express herself, slow to answer questions almost to the point of being unable to do so. She appeared to be under a considerable stress and seemed to me to be unwell.

It is undoubtedly a difficult situation for both the father and the mother and the children. The father and mother are living in different parts of the country and, obviously, the children can only see the other parent at relatively long intervals of time and then only for relatively short periods. It seems to me that it would be unwise to curtail such periods of access more than is absolutely necessary for the welfare of the children themselves. The husband is a withdrawn personality. He seems to be serious-minded and humourless. I fully accept the allegation made against him by Dr. B that his two older children might find him unpredictable and bad tempered. However, it must be taken into account that young children who are timid, gentle and sensitive are likely to find a person of the character of their father as being bad tempered. The

suggested access by Dr. B is that he should see them only for several hours during each day of the access period. The way that the wife puts it is this. She says he is their father; "I don't deny him access but I don't want it to be in Tipperary. I have never denied him access in Northern Ireland with a social worker present and in a place where the social worker can survey them." There are cases where, as a result of the history of the family break-up and as a result of the history of marital discord which has seriously affected the children, that it is necessary to rehabilitate the children towards the parent with whom they are not then residing. Such circumstances do not exist in the present case. When the parties split up in March 1981 C remained with her father from then until the hearing in Court in June and July 1982. So far as H , and P are concerned there has been regular access to their father in Tipperary. There is no cause for the father to be rehabilitated in the eyes of his children or any of them. There is no suggestion that either is being harmed by the form of access. It seems to me that to seek to force access in the North of Ireland on a day time basis only would be to put a deliberate barrier between the children and their father. It is essential that the children know that they have a father and it is essential that their father is able to take the place of a father in their lives. The

father's character cannot be changed and I do not consider, for a moment, that the sort of access suggested would, or could, possibly lead to any better relationship between the father and his children. It could only exacerbate the matter. I get the distinct impression that the reason for the opposition to access to the father is a desire to protect the wife. The present situation is, by no means, ideal. The wife has a history of mental illness. She resides in the home of her uncle and aunt with her three children. The home circumstances of the three children are virtually akin to living with their grand-parents. I appreciate that these latter are doing everything that they can to protect their niece and her children as they see it and I do not suggest that they are motivated in any way by acts of malice towards the husband rather, they are activated by a protective feeling towards their niece and, if the consequences of that protective feeling result in shutting out the children's father, then they regard this as a consequence which cannot be avoided.

Prior to the commencement of the present hearing Counsel on behalf of the wife objected to the exercise of jurisdiction by this Court on the basis that the children were now living out of the jurisdiction of the Court and that the question of access was now the subject matter of legal proceedings in that other jurisdiction. The matter of access had already

been heard and determined by me last December. It had already been dealt with by Mr. Justice Keane in June 1983. The proceedings in Northern Ireland were commenced on the 15th November 1983 and no objection was taken at the hearing on the 16th December 1983 that it was more appropriate that the matters in dispute between the parties should be litigated in the jurisdiction where the children were presently residing. It seems to me that, having regard to the past history of these proceedings and the submission to the jurisdiction of this Court by the wife, it is appropriate that this Court should continue to deal with the applications which are brought before it. Nevertheless, in so dealing with the matter this Court does not intend or wish the Court in Northern Ireland to be in anyway fettered in its jurisdiction.

I take the view that it is in the best interests of these children that they should have regular access to their father and that that access should be in their father's home. I also take the view that the access should, unless circumstances make it difficult, be enjoyed by all three children at the same time. Unfortunately, H has school holidays which do not coincide with those of his brother and sister. For that reason, it may not always be possible for the access of all three children to take place at the same time.

The order which I propose to make is that access should be granted for six weeks in each year of which at least one week should be in the Christmas holidays, one week in the Easter holidays and two weeks in the Summer holidays. I leave it to the parties to work out the actual dates, which must be agreed not less than four weeks prior to the commencement of each school holiday.

6/6/84

Henry Barnon