

ROYAL COURT
(Samedi Division) . 161.

25th October, 1990

Before: The Deputy Bailiff, and
Jurats Le Boutillier & Le Ruez

Between:

F

Plaintiff

And:

G

Defendant

Application by defendant (a) to raise interim injunction restraining her from removing child from care and control of father and (b) for an order that interim care and control be vested in her pending resolution of the substantive issues between the parties.

Advocate A.P. Roscouet for the Plaintiff
Advocate S. Slater for the Defendant Applicant.

JUDGMENT

DEPUTY BAILLIFF: The Court is going to discharge the interim injunction. Adopting the words used by the Court in Hunt -v- Hunt (née Pallister) (7th July, 1988) Jersey Unreported, the Court is conscious that in making the Order which it is going to make, it is going to cause

distress to the Plaintiff. But equally we hope that it is not going to cause jubilation in the heart of the Defendant.

We think that both parties should be thoroughly ashamed that it is necessary for the Court to be called in to decide the future of a 12 year old Downs Syndrome child and that their lack of compassion and conciliation should place the child in a tug-of-war situation.

On the question of the injunction we have had regard to the paramount factor, which is the best interests of the child.

Here we face an unusual situation - the parties are not agreed as to the status quo which is sought to be preserved by the injunction. So far as the Defendant is concerned, the status quo is the fact that she and the two children have lived as a family unit since the respective births of the children, a status quo which it was agreed by the Plaintiff should continue after the separation and which subsisted until her departure for a holiday in Spain, accompanied only by the younger child. So far as the Plaintiff is concerned, the status quo is that which has subsisted since Sunday, 6th October, when the Defendant delivered the child to the Plaintiff in the knowledge that he would be in the care and control of the Plaintiff throughout the holiday - a status quo sought to be preserved by the interim injunction.

On balance, we have to find in favour of the Defendant on that point. She had no notice that the injunction proceedings would be brought. Had she had notice she might have decided not to travel. She left believing that the child would be returned to her. That, we think, was the status quo before the Plaintiff decided to act unilaterally in her absence.

Turning to the best interests of the child, in our judgment, the untried and strongly contested evidence is of insufficient gravity to justify a change to the status quo which existed at the start of the holiday.

It is not for this Court to try the detailed evidence of complaint and counter-complaint of disturbance to and behaviour of the child, of

hearsay from him and his brother, of the ability of the Defendant to cope, of possible neglect of the child's medical condition and of the Defendant's behaviour towards the child. Those are all matters for the substantive trial.

The principal factors to which we have regard are: 1) the long standing arrangement whereby de facto the child was in the care and control of his mother; 2) the agreement evidenced by the letter of 17th August, 1989, of the proposals of the draft separation agreement for custody, care and control (I might interpose here that the Court is amazed that the letter should have been produced late this afternoon, Mr. Slater having relied this morning on a necessary implication or assumption that there was agreement); 3) the lack of evidence on the part of the Plaintiff making it a case of emergency that there should be a change to the agreed arrangements; 4) the accommodation and sleeping arrangements available to the child in the respective homes; and 5) the desirability for the child to be with his brother as well as his mother.

Turning now to the situation which will ensue, the Court is satisfied that the common law of Jersey is that the custody, care and control of the child vests in the father (*la garde et le soin*).

Whilst the common law may evolve gradually to meet the needs of society the Court is not satisfied that that principle of the common law has changed. The need for specific provision in the Matrimonial Causes (Jersey) Law, 1949, in the Separation and Maintenance Orders (Jersey) Law, 1953, and in the Children (Jersey) Law, 1969, was a recognition of the common law and the need of statutory provision to change it.

The cases cited to us do not persuade the Court otherwise. Whilst the Court agrees that the welfare of the child is of paramount importance it is difficult to regard *Robinson -v- Robinson* (1965) JJ 515 as authority for displacing the common law principle. In that case the parties were agreed as to custody and control and as to access. The only matter in dispute was a holiday outside the jurisdiction. The judgment was made "having regard to the agreement reached between the

husband and the wife". In Thomas -v- O'Shea, (23rd September, 1988) Jersey Unreported, the Court was dealing with rights over an illegitimate child. The cases cited by Advocate Roscouet from the Tables des Decisions are of greater persuasive authority.

For these reasons the Court is not prepared to make an Order in the terms of the second paragraph of the summons. Nor is the Court prepared to grant an adjournment of the present proceedings. It is the Defendant and her advisers who chose the present method of proceeding. She has been, so to speak, in the "driving seat" in the present application. In the interests of justice it must be disposed of. It will be for her and her advisers to consider whether proceedings are available to her in the Matrimonial Causes Division. However, the Court expresses the hope that the Plaintiff will acknowledge the spirit of the Court's decision and will return the child to the care and control of the Defendant.

Therefore the Court decides as follows:

- 1) The interim injunction imposed in the Order of Justice of the 17th October, 1990, is discharged.
- 2) There will be no order as to care and control of the child pending resolution of the substantive issue.
- 3) If the child is returned to the care and control of the Defendant the Plaintiff shall have access to him as heretofore.
- 4) The Children's Office is hereby requested to prepare a full report as to the child's future welfare, including custody, care and control, as soon as possible in order that the substantive issue between the parties may be heard and determined within the shortest possible delay.

Authorities cited:

Cases

Hunt -v- Pallister (7th July, 1988) Jersey Unreported.

Robinson -v- Robinson (1965) JJ 515.

Thomas -v- O'Shea & anor (22nd September, 1988) Jersey Unreported.

Cases reported in the Tables des Decisions

Kerr -v- Cox et uxor (1960) 253 Ex 36.

Lebâcle -v- Le Marinel (1945) 242 Ex 149.

P.G. -v- Tilley (1907) 25 PC 480.

Turner, femme etc -v- Gallichan (1943) 242 Ex 46.

Laws

Children (Jersey) Law, 1969 Article 52.

Loi (1862) réglant les devoirs et la comptabilité des Tuteurs:
Article 1.

Separation and Maintenance Orders (Jersey) Law, 1953, 1953:
Article 6A.

Texts

Rayden on Divorce 11th Ed'n p.p. 891-894 para. 28: Principle on which
custody is to be decided: general considerations (the position under
the Guardianship of Infants Act, 1925).

Report of the Commissioners appointed to inquire into the Civil,
Municipal and Ecclesiastical Law of the Island of Jersey (Comment
Papers, First Series, No. 2725) (1860).

Report at Pt. VIII - The Law relating to persons under a disability:
p. xxix.

