
[2020 Gib LR 279]

R v. F

SUPREME COURT (Yeats, J.): October 23rd, 2020

Family Law—children—removal from jurisdiction—return with mother to England, after short period living in Gibraltar, in child’s best interests—mother is child’s primary carer and unable to remain in Gibraltar following separation from father without support

The applicant sought a prohibited steps order against the respondent.

The applicant father and the respondent mother had been in an on/off relationship in England since April 2016. They had a child, who was born in England in April 2019. In July 2020 they moved to Gibraltar, intending to establish permanent residence. The father had lived in Gibraltar as a child and his parents and siblings lived here. The father obtained a job as a construction worker and they lived as a family with the parental grandparents in Gibraltar for 2 months and 10 days until there was an incident between the father and mother which resulted in the father being charged with threatening to kill the mother.

The mother sought to return to the United Kingdom with the child. The father sought an order prohibiting her from removing the child from Gibraltar.

The father’s evidence was that the parties’ relationship had been turbulent and that he had been the victim of domestic violence. The mother had threatened to take the child away and deny him contact. The parties had decided to move to Gibraltar to start a new life and they had

decided that living in England was not in the child's interests. The father was able to care for the child and the child should reside with him.

The mother's evidence was that she was in fact the victim of domestic abuse which had occurred throughout the relationship culminating in the incident when the police had been called following threats made by the father. Although the parties had intended to move to Gibraltar permanently if things worked out, due to the nature of their relationship it was quite likely that at some point she would have returned to the United Kingdom. She had no support in Gibraltar and was living in a refuge, where she would be unable to remain after the proceedings were finalized, whereas in England she would live with her aunt until she had her own property. She had been the child's primary carer throughout the child's life.

The father had concerns about the mother's mental health. She accepted that she had attempted to overdose in the past. She was willing to engage with mental health services.

The Care Agency's report provided that the child's basic care from a young age had been provided by the mother, although the father had also provided care for the child and financial support. It appeared that both parents were able to provide for the child's basic needs. The parties' relationship had been turbulent. There were concerns regarding the mother's mental health but no immediate concerns that it affected her parenting capacity. Concerns had been raised about the father being violent but there had not been time for a proper investigation. The mother was not entitled to Government housing or benefits other than £45 a week on a discretionary basis and discretionary free health care. The mother would therefore be more vulnerable in Gibraltar. The report did not make a recommendation as to where the child's needs would be best met.

Held, ruling as follows:

(1) The court could properly exercise jurisdiction. Section 3(1) of the Children Act 2009 provided that, subject to Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, this court had jurisdiction if the applicant, respondent or child to whom the application related resided in Gibraltar. Article 8 of the Regulation provided that the courts where a child was habitually resident had jurisdiction in matters of parental responsibility over the child. Establishing where a child was habitually resident was a question of fact. No particular length of time living in a country was required to establish residence. In the case of a young child, the parents' intention was clearly a factor. Integration of the parents in the social and family environment of the country needed to be assessed. In the present case, the court had no hesitation in finding that the parties' intention was to move to Gibraltar and establish permanent residence here, whether or not there remained the possibility to return to England if things did not work out. The father obtained a job. They lived with family and were looking for their own place to rent. At the time the application was made by the father, the child

was habitually resident in Gibraltar and the court could properly exercise jurisdiction over the child in matters of parental responsibility (paras. 6–9).

(2) Section 25 of the Children Act allowed the court to make orders as to residence and contact. The court could also make a prohibited steps order preventing a child from being taken out of the jurisdiction and a specific issues order, for example granting the mother permission to return to England with the child. Under s.27(1)(b), the court had the power to make a residence order if it considered it should be made notwithstanding that no application for such an order had been made. Turning to the principles in s.4 of the Children Act, the child's best interests were the paramount consideration. When a question of a child's upbringing arose, the court should have regard to the principle that a child's welfare was best promoted by a continuing relationship with both parents. In the present case, the following matters from the checklist in s.4(3) would be borne in mind: (i) the child's physical, emotional and educational needs; (ii) the likely effect on the child of any change in his circumstances; (iii) any harm which the child was at risk of suffering; (iv) how capable each of the child's parents were of meeting his needs; and (v) the range of powers available to the court. Although the present case might technically be a relocation, the child had been in Gibraltar for a period of some three months only, even if the intention might have been to reside here more permanently. The parties had previously lived for years in the place to which the mother wanted to return (paras. 11–14).

(3) The child would be allowed to return to England with the mother. The court first considered the factors from *Payne v. Payne*. (i) The mother's motivation for relocating or returning to the United Kingdom was genuine; it would be near enough impossible for her to remain in Gibraltar. (ii) The mother's proposal was realistic; she was proposing to return to the place where she had lived throughout her life bar the last three months and the child would be returning to where he had lived for most of his life. (iii) The court accepted that the motivation behind the father's opposition was principally his wish to remain in the child's life. Clearly there would be detriment to him in that the child would be living in a different country and contact between them would not be enjoyed in the same way. However, the court could not ignore that the father was English and been living in England for the last six years. (iv) The impact on the mother would not be the same whether her proposal was accepted or refused. She had no connection to Gibraltar and might not be entitled to benefits, healthcare or housing, whereas in England she would initially live with her aunt, receive substantial welfare benefits, be entitled to housing and have a support network. The court then considered the applicable factors from the welfare checklist in s.4(3). In terms of physical and educational needs, the child would be looked after adequately if he returned to England with the mother or if he remained in Gibraltar with the father. The child's needs would not be met if the mother remained in

Gibraltar as his primary carer. As to emotional needs, it was inevitable that the child would miss out on living with one of his parents. The father, who was employed, would be better placed to travel to the United Kingdom to see the child than the mother would be to travel to Gibraltar if the child remained here. The court had no concerns about the child suffering harm if he were to reside with the mother in England. There would be a risk of emotional harm if meaningful contact were not maintained, and it was important that contact was maintained. Subject to any investigation into concerns about the father, both parents were capable of meeting the child's needs. In concluding that it would be in the child's best interests to return to England with the mother, the court considered the above factors and the following overwhelming considerations: (i) the short space of time that the family had been in Gibraltar; (ii) the fact that the mother was the primary carer and it was in the child's best interests that she continued to be his primary carer; and (iii) the mother could not be expected to remain in Gibraltar (paras. 29–37; para. 40; para. 42).

Cases cited:

- (1) *AR v. RN (Scotland)*, [2015] UKSC 35; [2016] 1 A.C. 76; [2015] 2 W.L.R. 1583; [2015] 3 All E.R. 749; 2015 SLT 392; [2015] 2 F.C.R. 570; [2015] 2 FLR 503, applied.
- (2) *Payne v. Payne*, [2001] EWCA Civ 166; [2001] Fam. 473; [2001] 2 W.L.R. 1826; [2001] UKHRR 484; [2001] Crim. L.R. 842; [2001] 1 FLR 1052; [2001] 1 F.C.R. 425; [2001] HRLR 28; [2001] 1 Cr. App. R. 36, applied.

Legislation construed:

Children Act 2009, s.30: The relevant terms of this section are set out at para. 11.

C. Pizzarello for the applicant;

C. Pitto for the respondent.

1 **YEATS, J.:** This case first came before me on October 2nd, 2020 as an urgent application without notice for a prohibited steps order. The applicant father sought an order from the court that the respondent mother be prohibited from removing their son, X, aged 18 months, from Gibraltar.

2 I granted the prohibited steps order and set a return date for October 6th, 2020. On that day, the mother attended court but was unrepresented. She said that she wanted to seek legal representation and so I adjourned the matter further to October 8th, 2020. At that hearing, I raised the question of jurisdiction with counsel then representing the parties. I heard outline submissions the following day. I determined that the father had an arguable case on jurisdiction and set the matter down for a final hearing to yesterday (both on jurisdiction and on whether I should prohibit or allow the mother from leaving Gibraltar with the child) and made orders as to

the filing of further evidence. The Care Agency were also invited to provide a report in relation to residence.

3 Yesterday I heard evidence from the parties and submissions from counsel. I have also had the benefit of a report from Ms. Suru of the Care Agency. She also gave evidence.

Background facts

4 The parties are relatively young. The father is 25 years of age and the mother is 23. They have been in an on/off relationship since April 2016. They are not married. The child was born on April 10th, 2019 in England. At the time, the parties were living together in Halifax. They separated for a period in February 2020 and then resumed cohabitation in May 2020.

5 They moved to Gibraltar in July 2020. The father driving here and arriving on the 19th. The mother flying in on the 20th. The father obtained a job as a self-employed construction worker. They lived as a family unit with the paternal grandparents until September 30th when there was an incident between the parties which ended with the father being charged with threats to kill by the police. In effect, they had lived together in Gibraltar for 2 months 10 days.

Jurisdiction

6 I start with the question of jurisdiction. Section 3(1) of the Children Act provides that, subject to Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, this court shall have jurisdiction if the applicant, the respondent or the child to which the application relates, resides in Gibraltar.

7 Article 8 of the Regulation provides that the courts where a child is habitually resident shall have jurisdiction in matters of parental responsibility over the child.

8 It is clear from the judgment of the UK Supreme Court in *AR v. RN (Scotland)* (1) that establishing where a child is habitually resident is a question of fact. No particular length of time living in a country is required to establish residence. In the case of a young child, the parents' intention is clearly a factor. Integration of the parents in the social and family environment of the country needs to be assessed.

9 In this case, I have no hesitation in finding that the parties' intention was to move to Gibraltar and establish a permanent residence here—whether or not there remained the possibility to return to England if things did not work out. The father obtained a job. They lived with family and were looking for their own place to rent. At the time the application was made by the father, the child was habitually resident in Gibraltar and this

court can quite properly exercise jurisdiction over the child in matters of parental responsibility.

10 What now falls for determination in this case is whether I should allow the mother to return to the United Kingdom with the child or whether I should order that the child continue to reside permanently in Gibraltar. If so, should that be with the mother or the father.

The law

11 Section 25 of the Children Act allows the court to make orders as to residence and contact. The court can also make a prohibited steps order preventing a child from being taken out of the jurisdiction. It can also make a specific issues order, for example granting the mother permission to return to England with the child. Furthermore, s.30 allows the court to grant leave to a person in whose favour a residence order has been made, to remove a child from Gibraltar. The relevant provisions read:

“30.(1) Where a residence order is in force with respect to a child, no person may—

...

(b) remove him from Gibraltar,

without either the written consent of every person who has parental responsibility for the child or the leave of the court.

...

(3) In making a residence order with respect to a child the court may grant the leave required by subsection (1)(b), either generally or for specified purposes.”

12 No residence order has been made in this case and strictly there is no application before me for a residence order. However, pursuant to s.27(1)(b) the court has the power to make a residence order if it considers it should be made notwithstanding the fact that no application has been made.

13 I turn to the principles contained in s.4 of the Children Act. At all times the court must have the child’s best interests as the paramount consideration. When a question of a child’s upbringing arises, the court shall have regard to the principle that a child’s welfare is best promoted by a continuing relationship with both parents. In proceedings where the court is considering making an application under s.25, the following checklist shall be borne in mind (s.4(3)) (I list only the matters which are relevant to this case taking into account the child’s age):

(i) The court must have regard to the child’s physical, emotional and educational needs;

- (ii) The likely effect on him of any change in his circumstances;
- (iii) Any harm which he is at risk of suffering;
- (iv) How capable each of his parents are of meeting his needs;
- (v) The range of powers available to the court.

14 Counsel have referred me to a number of authorities on relocation of a child to another country. Technically, it may be a relocation but we cannot lose sight of the fact that the child has been in Gibraltar for a period of some three months only, even if the intention may have been to reside here more permanently. The fact is that the parties have been here for a short period and previously lived for years in the place where the mother wants to return to. It is not a relocation in the sense of an uprooting from a country where a child has lived for a considerable period or throughout his lifetime to another where he has no or little ties. I will in any event look at the guidance in *Payne v. Payne (2)* as I am being asked by counsel to do. It is guidance and no more. The paramount consideration is what the court considers is in the best interests of the child. Before I do, I will summarize the evidence in the case.

The evidence

15 The father's evidence is that the parties have been in a turbulent relationship throughout and that he has been the victim of domestic violence. That the mother has threatened him with taking the child away and denying him contact. On September 30th, the incident was sparked off when the mother told him that the child was not his.

16 The parties decided to move to Gibraltar to start a new life. The father had lived in Gibraltar as a child and his parents and siblings live here. They both decided that living in England was not in the child's interests. I accept his evidence that moving to Gibraltar permanently was indeed the parties' intention.

17 They moved to his parents' flat here in Gibraltar and were intending to view a flat in La Linea the day after the incident which led to their break-up. He accepts that he threatened to kill the mother in the incident but says that this was an empty threat. He acknowledges that it was a stupid thing to do.

18 The father works as a self-employed construction worker and earns a minimum of £1,100 after tax a month. He complained that the mother had not taken enough steps to find employment in Gibraltar or socialize. He considers that he is able to care for the child and that the child should reside with him. Arrangements as to the child's nursery would be made and paid for by the paternal grandparents.

19 The mother's evidence was that she was in actual fact the victim of the domestic abuse. That this has occurred throughout their relationship culminating in them separating after the incident of September 30th. On that day she was threatened on a number of occasions by the father, resulting in his own mother having to call the police.

20 The mother accepts that they intended to move to Gibraltar permanently—but only if things worked out. As I have said, I accept the father's evidence as to their intention to move permanently but clearly the possibility of returning cannot have been discarded. Due to the nature of their relationship it was quite likely that at some point it would break up. Returning to the UK must have remained as an option—certainly for the mother. The mother says that she has no support in Gibraltar. She is living in the women's refuge and is not entitled to automatic benefits or health care here. She is receiving benefit payments from the UK but these will be stopped if she continues to reside in Gibraltar. The refuge management has provided her with a letter which states that she is not eligible for a place at the refuge but that she can stay there until the court proceedings are finalized. In England, she will reside in her aunt's house until she is given her own property. The child will be entitled to free nursery when he is two years old.

21 The mother says that she has been the child's primary carer throughout his lifetime. The father has often worked away from home and only returned for the weekends. The father accepts that for a period this was the case but says that he too has cared for the child when he has not been at work. I do not reject the father's evidence but it is clear to me that the mother has been and continues to be the child's primary carer. The father indeed accepted so in evidence yesterday.

22 The father has concerns about the mother's mental health. The mother accepts that she has attempted to overdose in the past. Since the child's birth she attempted an overdose on one occasion—in January 2020. This has not re-occurred and the mother has openly stated her willingness to engage with mental health services.

The Care Agency's position

23 A report was filed by Ms. Suru on October 21st, 2020. It was requested by me on October 9th, 2020. I am grateful to the Care Agency for having expedited the preparation of the report. I have found the background and analysis of key issues very helpful. I cannot however lose sight of the fact that certain matters covered in the report may have needed a longer run of time to enable further observations.

24 The report details the parties' backgrounds and family history. It then sets out how the relationship between the parties began and how it developed. Clearly, it was a turbulent relationship both before and after the

child's birth. I will briefly go through some of the issues contained in the report:

(i) *Parenting capacity*: The child's basic care from a young age has been provided by the mother. The father has also taken care of the child whilst not at work and has provided financial support for the family. There were some concerns raised by the father and paternal grandmother as to the type of meals being provided to the child but this does not appear to be an issue. It appears that both parents are able to provide for the child's basic needs. Both clearly love the child. He is happy and comfortable with both his parents.

(ii) *Safety*: The relationship has been turbulent and the child would have been exposed to verbal abuse and possibly physical abuse as between the parents. The mother is open to working with social services. The father did not wish to have help although in evidence yesterday he has now indicated that he is seeing a counsellor. There are concerns regarding the mother's mental health and the fact that she has taken medication overdoses. Ms. Suru's view was that she would benefit from help from mental health services. Such help would be provided both in England and Gibraltar. There are however no immediate concerns as to her mental health issues affecting her parenting capacity. In evidence, Ms. Suru did say that she was concerned that the mother's mental health could deteriorate if she remained in Gibraltar.

There are concerns which have been raised by the father's sisters about him being violent. This has caused the Care Agency to review contact arrangements and include supervision. The allegations have not been properly investigated due to lack of time. A particular violent incident reported by one of his sisters is strenuously denied by the father.

(iii) *Finances and support network*: The mother is not entitled to Government housing as she would need to have lived here for ten years to qualify. She is not entitled to benefits although she can apply on a discretionary basis. Ms. Suru states that, if successful, she would receive the sum of £45 per week. If her application for benefits is successful, she may also then be entitled to free health care, but again that would be discretionary.

(iv) *Analysis of key issues*: Ms. Suru analyses three different scenarios. Child to remain in Gibraltar residing with the mother; child to return to the UK with both parents; and child to return to the UK with the mother alone. All have their pros and cons. At this stage a scenario where the child remains in Gibraltar residing with the father is not being contemplated as possible by the Care Agency.

(v) *Risk factors*: These are identified as being exposure to domestic abuse between parents, the mother's mental health and the father's difficulty in regulating his emotions and unpredictable behaviour.

(vi) *Recommendations*: Ms. Suru is not able to put forward a definite recommendation as to where the child's needs would be best met. She concludes with the following:

“As stated previously both parents will need support to change behaviours in order to provide a stable and secure environment for [the child] and this can happen both in the UK and in Gibraltar. Both parents have ties in different countries, [the mother] in the UK and [the father] in Gibraltar and it is not fair to say that one is more important than the other. However, it is important to consider that [the mother] will be in a more vulnerable position if she remains in Gibraltar due to the limited financial and emotional support she will have access to. Although [the father] has family in the UK and he has previously lived and worked there for the last 5 years, by returning to the UK [the father] would also lose the support from his parents and siblings and also his current employment.”

Analysis

25 How should I approach the decision-making process in light of the fact that the Care Agency requires a further period to assess the concerns which have now been raised about the father? This was discussed at some length at the hearing yesterday. I indicated that I proposed to approach the decision-making process by first considering what I would do on the assumption that both parents were perfectly able to take care of the child. Would I in any event order the relocation? If the answer to that question was yes, then there was no need to await the Care Agency's further report. If, however, I was of the view that it may be in the child's best interests to live in Gibraltar, then I should postpone any final determination until the Care Agency are able to provide further input on the concerns which have been expressed about the father.

26 Miss Pizzarello pointed out that in order to take a decision as to whether relocation is in the child's best interest I would have to factor in what arrangements would be in place were he to leave. She submitted that to do that I would have to know what the contact arrangements could potentially be. That cannot be established unless I either make a determination on the basis of the limited evidence I heard on this yesterday or the Care Agency finalize their investigation.

27 I agree that it would have been ideal to have had a complete and final report from the Care Agency. But, they have done what they can in the time available. For the reasons that follow I have proceeded to make a determination as to relocation in any event.

28 I will go through the *Payne* factors.

29 First, are the mother's reasons for relocating/returning to the UK genuine? Whilst it is submitted that there may be an element of wishing to prevent contact with the father by returning to England, I reject this outright. Clearly, the motivation for returning is that it will be near enough impossible for the mother to remain in Gibraltar. Furthermore, the mother has willingly agreed to contact in the weeks that the case has been before this court. She has not placed any impediment on contact taking place. It is true that the father complained in evidence that there was an occasion last week that the child had been brought to contact late and returned earlier than was then agreed but that does not support an argument that the mother wishes to deny contact with the father.

30 Secondly, is the mother's proposal realistic? Whilst no option will be perfect, the answer to this question is simply this: the mother is proposing to return to where she has lived throughout her life bar the last three months. The child would be returning to where he has lived for most of his life.

31 Thirdly, what is the motivation behind the father's opposition? I accept that principally it is his wish to remain in his son's life. Clearly there will be a detriment to him in that the child will be living in a different country and contact between them would not be enjoyed in the same way. It is also submitted that he has concerns, given the mother's past actions, that contact may be denied by the mother in future. I observe that arrangements can be enforced through court proceedings if necessary. Ultimately, I cannot ignore either that the father is English. He has been living in England for the last six years. He decided to move to Gibraltar with the mother and child in early July and they arrived towards the end of July. They have been in Gibraltar for a very short period.

32 Fourthly, what would be the impact on the mother if her proposal was to be refused? Miss Pizzarello submits that she would be in the same boat—so to speak—whether she has to remain in Gibraltar or return to the United Kingdom. She would have to look for employment in any event. I cannot accept this submission. It ignores the fact that the mother has no connection to Gibraltar. She may not be entitled to benefits of any kind. There are question marks as to her entitlement to health care. She has no entitlement to Government housing. In England, she would initially return to live with her aunt. She receives substantial welfare benefits. She is entitled to housing. She has a support network. It is where she has lived throughout her lifetime. It would most certainly not be the same for her.

33 I turn now to the applicable factors from the welfare checklist.

34 First, the child's physical, emotional and educational needs. In terms of physical and educational needs, the child will be looked after

adequately if he returns to England with the mother or he remains in Gibraltar with the father. The mother has access to benefits in England and has the support of family. In Gibraltar, the father is in employment and also has family support. His needs will however not be met if the mother stays in Gibraltar and remains his primary carer. It will be near enough impossible for the mother to make a life here in Gibraltar in her circumstances.

35 As to emotional needs, it is inevitable that the child will miss out on living with one parent or another. The father, who is in employment, would however be better placed to travel to the UK to see the child than the mother would be to travel to Gibraltar if the child were here.

36 The second applicable factor on the checklist is the likely effect of the change in circumstances on the child. It is inevitable that, unless the father were to relocate to the UK, he would be missing out on contact with the father. I do not ignore that.

37 Third factor is any harm which he has suffered or is likely to suffer. It is clear from the Care Agency's report that the child has suffered harm as a result of the domestic abuse incidents which he has witnessed. His parents are now living apart and that should therefore no longer be the case. As to likely harm, the father raises concerns regarding the mother's mental health. The mother has however indicated a willingness to engage with mental health services. Social services in England have been informed about the case. The Care Agency do not have concerns so long as the mother engages with the help that will be offered. In the last months she has had a rough time but yet no concerns have been expressed by anyone. In the circumstances, I do not have concerns about the child suffering harm if he were to reside with the mother in England.

38 As to the father, there are concerns which have been very recently brought up by the father's sisters. These have resulted in contact having to be supervised in the short term by social workers. These concerns have not been properly investigated or aired in court and I do not take them into account in deciding whether or not to allow the relocation.

39 Another harm factor is the risk of emotional harm if meaningful contact is not maintained. Contact has to be maintained.

40 The next factor on the checklist is how capable each of the child's parents is of meeting his needs. Subject to any investigation into concerns about the father, both parents are capable of meeting the child's needs.

41 Lastly, what are the court's range of powers? Clearly, I can make no order or make any order that is available under s.25. If I make a residence order I could also make an order under s.30. The father raises the question of enforceability of contact if the mother were to leave. I do not ignore that this is a genuine concern for the father. However, either this court or

the courts in England would have to deal with the enforcement of any order for contact that is made. In many respects, it would be no different to any other family unit that has broken up.

Conclusion

42 In my judgment, it is in the child's best interests that I order that he return to England with the mother. I have taken into account the factors that I have been through on the checklist and the following overwhelming considerations:

(i) The short space of time that the family has been in Gibraltar. Whilst there may have been an intention to reside here permanently, it has not worked out. At the point where the mother indicated her first intention to leave, they had been here for 2 months 10 days.

(ii) The mother is the primary carer for the child. He is only 18 months old and has principally been cared for by her since he was born. It is in the child's best interests that she continues to be his primary carer.

(iii) The mother cannot be expected to remain in Gibraltar. It is unarguable to suggest otherwise. Other than from social services and from the father's own sisters, she has no support. Forcing her to remain here (which is what would happen if I refuse her permission to leave with the child) would be setting her up to fail. That would be grossly unfair and unjust. The consequences of that would impact upon the child's well-being.

43 I do not ignore that the father has strong links to Gibraltar, his family are here and he has a job. It is perfectly understandable that he wishes to remain in Gibraltar. However, whether he chooses to leave for England as well as a result of my decision is a matter for him. Either way, and subject to any investigation into concerns about him, it is my hope that his son enjoys as much contact with him as possible.

44 I have not been able to factor into my decision-making process the contact arrangements that will be in place on the relocation. However, the case for relocation was so strong that it was in the interests of the case, and of course of the child, that a decision should in any event be made.

45 I will hear the parties as to contact and the orders that I should make.

Ruling accordingly.