

## THE HIGH COURT

[2008 No. 265 C.A]

## IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989, AND

## IN THE MATTER OF THE FAMILY LAW ACT 1995

## BETWEEN

A. B.

APPLICANT

AND

C. D.

(NO.2)

RESPONDENT/APPELLANT

## JUDGMENT of Mr. Justice Henry Abbott delivered on the 12th July, 2013

1. This is an appeal from the judgment of the Circuit Court in relation to the custody and access arrangements for the child, Edward. The background of the appeal is that the child Edward, according to counsel for the mother, organised his own escape from the custody of father while at a holiday location and organised his train journey to the city and from thence to a provincial station at which he obtained a taxi, which carried him home to be met by one of his aunts who, on the account of his mother, happened to be at home due to fact that she was convalescing from an injury.

2. In accordance with the order of this Court application was made to the Circuit Court (before Hunt J.) by the person claiming to be guardian *ad litem* in this case for orders basically seeking to regularise the situation where Edward found himself at mother's home, contrary to the order of this Court. Judge Hunt made certain orders preserving the *status quo* and appointed the solicitor, claiming to be guardian *ad litem*. Counsel for the mother explained that this was put forward not on the basis of the order of this Court, (which had prohibited such an appointment), but on the basis of a provision in the Circuit Court Rules. Judge Hunt adjourned the matter for a full hearing before Judge Lindsay. He also directed that the local Health Authority should be asked for a report on the welfare of Edward. The Health Authority nominated a person to report, but mother objected to this person and eventually a senior person furnished a report from the Health Board which indicated that in short "Edward was lonely". The matter was heard before Judge Lindsay who spoke to Edward. It was represented by mother's counsel that Edward "agreed with Judge Lindsay that if he was allowed to stay with mother in her fulltime care, that he would cooperate with access for his father more or less on the basis of a reverse of roles between mother and father as compared with the order of this Court". There was no transcript available for the conversation between Judge Lindsay and Edward, with whom she spoke in chambers.

## Hearing before this Court

3. From the outset the father appealed before this Court to have a reinstatement of the original order made by this Court, with Edward attending school in the city in the school J. He asserted that, notwithstanding the mother claimed had no part in the escape by Edward the sisters, (Seanie who is the mother's life partner described in the main judgment herein) and the two sisters conspired to organise the escape. He asserted that although Edward had his confirmation a short time before the escape in the city, mother did not attend. Mother claimed that the notice was too short and the father explained that Edward appeared to have gathered sufficient money to fund his escape from the confirmation money gathered by him from his friends and relative a short time before. A hearing and debate ensued in relation to the merits of the school "J" based in the city suburbs where Edward already was enrolled, and where he alleged he was unhappy. The schools proposed by mother consisted of W. or B. or M., most which I have some passing knowledge. All four schools each have a great deal to recommend them and the decision of this Court was not based on any merits or demerits of the schools, but rather what would particularly suit Edward. Edward by this stage was attending a small school in L., where apparently communications, by way of reports, from this small school were not to father's satisfaction. Father asserted that whereas he had blocked Edward's phone for crucial times during the holiday, the phone became unblocked by reason of a complex set of symbols and instructions sent by Seanie in or around the morning of the escape. He accepted that he gave chase to Edward as he appeared to be running out of range on dangerous seaside terrain, and eventually caught him and controlled him as he considered he was entitled to by court order. By any account it seems that Edward was in a state of considerable agitation and determination to escape.

4. On finding that Edward had arrived at mother's home some hours later, father contacted the local gardaí and the local Superintendent investigated the matter very promptly and found that he could not enter the house by reason of the lack of an express power for him to do so contained in the original order of this Court. On mother's account Edward barricaded himself into the house with chairs at the door etc, in fear of being apprehended by the gardaí and returned to his father's custody.

5. From the outset I indicated to counsel for the mother that I considered the appointment of a guardian *ad litem* by the Circuit Court was contrary to the original judgment of this Court given in the a fully considered judgment and contrary to law, but that if she wished to pursue the matter any further I would have this Court, acting in its capacity as the court hearing a circuit appeal, state a case in relation to the matter for the opinion of the Supreme Court, subject to her obtaining the approval of this Court for arrangements in relation to the costs of such case stated. I then adjourned this matter for the consideration at the opinion of counsel for the mother.

6. Mother gave evidence that Edward had fallen behind in mathematics, was unhappy in the J. school and had been poorly introduced into attendance in the J. school after leaving his national school. She stated that his father picked his friends for him and that he had failed to make any of his own friends in the city, like he had done when at home with her. She was cross examined in relation to the

relationship which father alleged existed between the guardian *ad litem*, E's sisters and Seanie. From this cross examination it emerged that Seanie had set out in a published trade promotion that his business had very close relations with the guardian *ad litem*, and attributed this close relationship to its success. This published information was in direct contrast to the rather detached description of the next friend given to the court from the outset, that she was a solicitor and no doubt would take very scarce conveyancing from any client including the likes of Seanie. Mother said that she would drive the two sisters into "town" close to home and that they would normally go to a coffee shop while she would attend to her particular chores, such as shopping, hairdressing etc. She said it appeared that in the course of such a sojourn in the coffee shop that they met the so called guardian *ad litem*. She described (with reference to records and her own experience of Edward, while she was more familiar with his school performance from home), how his scores in mathematics had fallen behind. Father cross examined her in relation to his sisters mathematics scores also falling behind during a time when his sister was allowed to accompany him in the access directed by the Circuit Court – a presence which he asserted was to (in effect) "patrol" the access between father and son and that the strain of this activity obviously had its affect on sister's maths results falling behind too. Mother complained that father insisted too much on having his rights in relation to everything and that he was not cooperative in relation to setting up mediation in relation to the matter. I asked her if, after the making of the High Court order herein but before the furnishing of reasons, she asked a Dail Deputy to make inquiries for her in relation to the matter from the judge, and that that Dail Deputy sought the services of a Circuit Court judge to ask me was it a fact that Edward had been sent away to the primary care of the father. She agreed that she had made that approach to the Dail Deputy and apologised on the basis that it was at a time when she was unrepresented. I informed the court that on being asked the question by the Circuit Court judge (quite improperly), I replied that a judgment would issue on the web in due course in relation to the matter.

### **Voice of the Child**

7. I spoke to Edward in the court room without the presence of lawyers or parties in accordance with the procedure described in *PO'D v. SJN*. This discussion was led off by Edward describing his trauma about being captured by his father on the rough terrain in the holiday destination. He stated that he few other friends other than those whom his father picked for him, and that while he had enjoyable times with some of the activities with his father, he wished to remain at home with his mother and that he had "agreed" with the last Circuit Court Judge (Judge Lindsay) that if he was allowed home to his mother he would abide with access arrangements made for his father. He complained that his introduction to the J. school was cold and detached compared with what he perceived to be the approach of parents of other new pupils. He said that he had examined and inspected B. school and that he had a preference to go there for secondary schooling (this was despite the fact that his two sisters now attend the W. school, one of the alternatives under consideration). He stated that he had an interest in rugby and Gaelic football and athletics and that he was involved in a rugby team at home. I queried him in relation to what might happen if some of his rugby games clashed with the dates on which his father would have access, and he agreed that he would welcome his father attend these rugby games but might sometimes prefer to travel with the team to venues if team transport had been provided.

### **Conclusion of Hearing**

8. I reported to the parties immediately after speaking to Edward, and indicated to the parties that I was giving particular weight to E's voice insofar as I found that he had taken possession of responsibility for his future and had hopes to improve his maths results to achieve his chosen career path. There was some suggestion from counsel for mother that the court should decide that he should be sent to school W. where his two sisters and where the subject of Art was taught particularly well. Father resisted the suggestion that he would drive Edward down to the country for *bona fide* rugby fixtures or the like in the midst of his access period. He suggested that the often 80 miles round trip would be a great imposition.

### **Findings**

1. When the court first made the order herein, Edward was nine and a very upset alienated boy but still with a chance to build a relationship with his father.
2. Edward is now twelve, and although he arranged his escape contrary to the court order, he now by all accounts has matured and, indeed, he has taken possession of his own future by indicating his preferences through his own voice to two judges in succession.
3. Having regard to E's attitude and obvious maturity, it would appear that the care of his father and his second wife, while much criticised by Edward and mother, had obvious beneficial effects which were admitted all round.
4. Edward is now at a stage at twelve years and having regard to his maturity and his obvious commitment to work out his future while attending the B. school, must be allowed a degree of self determination and it is inappropriate for the court to interfere with the broad findings of the Circuit Court subject to details in relation to existing schooling as appear in the order hereunder.
5. The objections of father driving Edward down to his rugby match betrays a certain lack of realisation on the part of father, that notwithstanding a dedicated and principled tutelage of his son while under his primary care, he must now learn to grow up with the son and appreciate that even in times of access allowed by the court his son is at a stage when, subject to normal proprieties, he should be leading activities during such access and making his own friends rather than pursuing the more individualistic activities preferred by his father in the past.
6. While it is desirable that E's sisters would have a good relationship with their father, it is to be noted that their father never sought court orders in respect of promoting that relationship to any great extent and the court should leave open the possibility of voluntary contact between father and, especially the next eldest sister, but on the basis that this next eldest sister has learned nothing and forgotten nothing in relation to patrolling type behaviour of access that her access to be encouraged should not be jointly with Edward until relationships normalise.
7. There has been a lack of information flow from the existing primary school in L., but this can be normalised by order of the court.
8. The sisters are using their mother's surname as their surnames, and one of the factors to be weighted against sending Edward to W. school is that the scene has been soured there to such an extent that mother's surname is used on a widespread basis. It is imperative that for the purpose of avoiding disputes that the name used by Edward would be the father's surname.
9. The court notes the tempestuous movements and applications which the parties have made over the years in relation to the Registrar of Births, Deaths and Marriages, and the proliferation of different birth certificates that have emerged.

10. I indicated to the parties that notwithstanding the entirely improper interference of mother *via* political representative and judge, that I did not propose to disqualify myself such as other judges might have done in the circumstances and the parties proceeded then to authorise me to speak to Edward on the P.O'D v. SJN principle, which would indicate consensus of the parties that I should continue to act, notwithstanding this impropriety by mother and her fellow actors. I, therefore, made the orders on record and adjourned the matter to this date for mention and consideration of any further developments in relation to the purported appointment of a guardian *ad litem* and costs if they arose.