THE HIGH COURT

FAMILY LAW

[2016 No. 60M]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT, 1989 AND IN THE MATTER OF THE FAMILY LAW ACT, 1995

BETWEEN:

McL

APPLICANT

-AND-

McL

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 9th day of November, 2017.

Summary

1. This is an interlocutory hearing regarding whether a father (Mr. McL) is to be allowed to take his three young children away for a weekend. The children of the marriage are aged 6, 4 and 2. Mrs. Mc L claims that Mr. McL should not be permitted to do take the children away for the weekend, since he has an alcohol problem, while Mr. McL accepts that he used to have an alcohol problem but claims that this is no longer the case.

2. A secondary issue addressed in this case is the costs, not just to the parties, but also the cost to the State in the use of court resources, namely having almost a full day in the High Court spent on the issue of whether a father can take his children away for a weekend.

Factual background

3. Mr. McL and Mrs. McL are two successful professionals. Mrs. McL has instituted judicial separation proceedings against Mr. McL which are expected to be heard within six months of today's date. The marriage difficulties came to a head in September 2015 and although the couple are currently living under the same roof, they are living separate lives in every sense of the word. They interact regarding the children by email or text or by the use of a calendar in the kitchen. It is anticipated that they will be living in separate homes within a matter of months.

4. While Mrs. McL has taken the children on her own on overnight trips and has had care of the children on her own in the family home, it is the case that Mr. McL has never had the children away on an overnight trip. In addition, he has only had the care of the children on his own overnight in the family home on one occasion. That was in November, 2016 when Mrs. McL was away on an overnight business trip.

5. Most weekends however, Mr. McL does have sole control over the children for a number of hours during the day e.g. when he brings his daughter swimming or when he brings all the children to the park or to local cafés for hot chocolate.

Issue at stake

6. The matter has come before this court because Mrs. McL has refused to consent to Mr. McL taking the children away for a weekend to his father's holiday home about two hours' drive from the family home. Accordingly, Mr. McL brought a motion before this Court in which he seeks an order permitting him to take his children away for one weekend.

7. Mrs. McL objects to Mr. McL having sole control of the children overnight. She points out that between 2014 and 2016 he was drinking alcohol excessively for a period of some 18 months. His GP, Dr. O, referred him, and he was duly admitted, to a residential alcohol treatment programme for five weeks. In addition, in 2014 he was charged with drink driving but was not convicted even though he was over the drink driving limit.

8. Mr. McL accepts that he did have an alcohol problem at that time but he avers that he is now a social drinker and does not abuse alcohol and he produced in evidence a copy of a letter from Dr. O, who has been his GP for some 10 years. In that letter the GP stated that in his opinion Mr. McL has the necessary ability to have overnight access to his children and that he has successfully addressed his alcohol issues. He also states that:

> "I do not consider that he has an alcohol problem at this time, and provided that this continues he should have overnight access to his children."

9. As this is an interlocutory hearing, evidence was only provided on affidavit and so it was not possible to cross examine the GP about his actual knowledge about Mr. McL's current relationship with alcohol, in light of Mrs. McL's claims that he continues to drink alcohol to excess.

10. Accordingly, while this letter is of some relevance in the light of the 10 year relationship between the GP and Mr. McL, it does have to be treated with caution, since the GP has to rely on the information that is provided to him by Mr. McL.

11. The same can be said of the contents of the Report of a Consultant Psychiatrist who was engaged by Mr. McL to provide an assessment of him regarding his ability to care for his children on his own overnight. The psychiatrist concludes in that Report that Mr McL:

> "has used alcohol in a harmful way in the context of a difficult social situation. He sought treatment appropriately and has responded and it no longer appears to be a problem. He does not have a mental health disorder and there does not appear to be a psychiatric reason why he would not be fit to take his children on a holiday."

12. In summary therefore, the factual dispute between the parties is that Mrs. McL claims Mr. McL should not be permitted to have care of their children on his own overnight because she believes that Mr. McL continues to abuse alcohol and she points, for example,

to an recent incident of him falling asleep on the couch when she said he had a smell of alcohol off his breath. Mr. McL for his part denies these claims and says that for example in relation to this incident that while he fell asleep on the couch and had drunk alcohol, he was not drunk and did not smell of alcohol. Furthermore, Mr. McL points out that he is holding down a very responsible and demanding position which would not be possible if Mrs. McL's claims were true.

Legal issue regarding s. 11(3) of the Guardianship of Infants Act, 1964

13. A legal point was also made on behalf of Mrs. McL, regarding s. 11(3) of the Guardianship of Infants Act. That section states:

> "An order under this section may be made on the application of either parent notwithstanding that the parents are then residing together, but an order made under paragraph (a) of subsection (2) shall not be enforceable and no liability thereunder shall accrue while they reside together, and the order shall cease to have effect if for a period of three months after it is made they continue to reside together."

Since there is a reference in that section to an order under s.11(2)(a), it is relevant to set out that section:

> "The court may by an order under this section –
>
> (a) give such directions as it thinks proper regarding the custody of the child and the right of access to the child of each of his or her parents"

14. On this basis, Mrs. McL argues that an enforceable court order cannot be made regarding access or custody of their children because they continue to reside in the same house together. Accordingly, it is submitted on behalf of Mrs. McL that this Court should not make any order regarding the children. This Court does not find this argument to be persuasive since it has been held by McCracken J. in *McA v. McA* [2000] 2 ILRM 48 at 55 that:

> "I have no doubt that, just as parties who are physically separated may in fact maintain their full matrimonial relationship, equally parties who live under the same roof may be living apart from one another. Whether this is so is a matter which can only be determined in the light of the facts of any particular case."

15. In this case, there is uncontroverted evidence provided by Mr. McL that although the parties live under the same roof, the parties are living apart from each other. Although it is correct to say that the expression used in s 11(3) is "*residing together*", while the statutory wording in *McA v. McA* was the requirment that "*the spouses have lived apart from one another*" and that expression was used in the context of a divorce application in *McA v. McA*, while in this case the relevant expression is used in the context of guardianship, it is nonetheless this Court's view that the expression "*residing together*" should be interpreted using the same principles as McCracken J. used in interpreting "*living apart*" in a divorce application.

16. Therefore, it is this Court's view that the parties in this case are not "*residing together*" for the purposes of s. 11(3), even though they are living under the same roof, because they are living completely separate lives.

17. Even if this Court was wrong on this interpretation, it is clear that the Court is not prohibited from making a court order, where the parents are residing together, it is simply that under s. 11(3), the order is not enforceable. Although this is curious drafting by the legislature, it is equally true that it would have been open to the legislature to prevent the courts from making an order in the first place, if this was the legislature's intention. However, the legislature chose not to do so. Accordingly, this Court concludes that there can be doubt that it can make an order regarding the custody or access of the children even where the parents reside together.

Decision

18. There is a right on the part of a parent to have access to his or her child and a right on the part of a child to have access to his or her parent. It is clear from the judgment of Hogan J. in *MM v. GM* [2015] IECA 29 that overnight access by both parents is an integral part of the right of a child to have access to his or her parents. In *MM v. GM* [2015] IECA 29 at paragraph 14, he states:

> "Overnight access with each of the parents must generally be regarded as an integral feature of that right. It is that which conveys the essence of normal family living and is that which tends to separate out the normal, carefree element of family life from the somewhat stilted formality of a supervised access visit. The objection taken by the father that, without at least some, limited overnight access, the children can never really come to know their father or have a meaningful relationship with him is, I think, well taken. There must be a real danger that without such access the father will remain a remote figure, excluded from the lives of the children […]
>
> I nevertheless confess to an anxiety that, by reason of the unilateral actions of the mother, the children were being denied the substance of one of aspect of their constitutional entitlements under Article 42.1, namely, the entitlement to the care and company of their father by the total denial of any overnight access, even if such access is quite properly limited and supervised."

19. Mrs. McL has argued that Mr. McL already has overnight access since he shares a house with her and the children. However, it is clear to this Court, based on the uncontroverted evidence of Mr. McL, that the living arrangements in the house are very strained. For this reason, it is this Court's view that it will be difficult for the children to have a normal carefree relationship with their father unless they have overnight access with him, outside the stilted confines of the particular family home which exists in this case.

20. As regards the alcohol issue, there is conflicting evidence as to whether Mr. McL continues to abuse alcohol and this Court cannot make a finding of fact based on the conflicting evidence.

21. In the circumstances, this Court believes that the appropriate order is for Mr. McL to be permitted to take his children on an overnight trip to his father's holiday home on the basis of his undertaking not to drink any alcohol during the time he has sole custody of the children and an undertaking that his father will be present in the house that weekend. In this regard, it is to be noted that Mr. McL volunteered during the hearing that he had no issue giving any undertaking, including one not to drink alcohol, which the Court might seek in order to enable him be allowed go away with the children for a weekend.

The legal costs and court resources expended in dealing with this issue

22. There is one final issue which this Court cannot ignore. This is the fact that this case was essentially about one net issue, namely the question of whether a father can take his children away for one weekend. This question, although clearly of importance to both parties, should not have taken almost a full day in the High Court at an enormous cost to the parties. Indeed, it should have been possible to resolve this matter without any involvement of this Court.

23. It is ironic that the tens of thousands of euro in costs which were probably incurred by the parties in this case to decide whether the father could take his children away for one weekend in a holiday home in Ireland would cover the cost of an annual holiday for many years to come for families on the average income in this country.

24. In *S. M. v. H. M*. [2017] IEHC 655, this Court has already referred to the enormous legal costs which can be incurred in family law disputes and that case raised the question whether lawyers might be able to prevent litigants from the effects and costs of their own unreasonableness. However, it may be unrealistic in every case to expect the beneficiaries of a system to be willing or able to change the system and so it may be more realistic for the courts to focus on ensuring that court resources are not wasted.

25. In this case the parents are well off professionals and so it appears that they have the funds to pay the enormous costs that are involved in High Court litigation. However, from this Court's perspective, the means of the parties before the court is an irrelevant factor, particularly in family law disputes. The same legal issues apply to all litigants and more importantly the same question of the proper use of court resources applies, namely does this dispute deserve a full day in the High Court (funded by the taxpayer), irrespective of whether the parties themselves cannot be prevented from spending their own money on it?

26. In this Court's view, the answer to the question, of whether a full day in the High Court should have been spent deciding if a father could take his children away for the weekend, is a resounding no, regardless of how strongly the mother or the father feel about the issue in this case. It is this Court's view that this amounts to a waste of court resources at a time when there is a considerable delay in cases being heard in the Superior Courts.

27. The waste of court resources (and unnecessary legal expense) in this case can be briefly illustrated when one considers the amount of material and evidence which was put on affidavit by both parties and the nature of some of that material that was opened to this Court as being relevant to the resolution by this Court of the dispute.

Solicitors' letters, eight affidavits and a day in the High Court
28. The motion in this case was issued on the 16th June, 2017, with a grounding affidavit of Mr. McL dated 1st June, 2017, which runs to 19 paragraphs and exhibits letters from Gallagher Shatter dated 22nd March, 2017, 3rd April, 2017, 12th May, 2017, and 24th May, 2017, and from Walls Toomey dated 30th March, 2017, and 25th May, 2017.

29. The second affidavit is from Mrs. McL and it is dated 21st June, 2017, and runs to 39 paragraphs. The third affidavit is from Mr. McL and it is dated 13th July, 2017, and runs to 35 paragraphs. The fourth affidavit is from Mrs. McL and it is dated 26th July, 2017, and runs to 12 paragraphs. The fifth affidavit is from Mr. McL and it is dated 7th September, 2017, and runs to seven paragraphs. The sixth affidavit is from Mrs. McL and it is dated 2nd October, 2017, and runs to 27 paragraphs. The seventh affidavit is from Mr. McL and it is dated 6th October, 2017, and runs to 26 paragraphs. The eight affidavit is from Mrs. McL and it is dated 11th October, 2017, and runs to 10 paragraphs.

30. A very small flavour of the averments which were regarded as sufficiently relevant for insertion in the affidavits and for opening to this court are as follows. Mrs. McL avers that:

> • "I say I am the primary carer of the children and I say and believe [Mr. McL] has completely underestimated the extent of the responsibilities and organisational skills required in managing three young children. While it is true to say that [Mr. McL] occasionally dresses them and gives them breakfast at weekends, [Mrs. McL] facilitates this by ensuring each child's clothes are left out for them, and has a bag packed with necessary baby items for [the baby] in the event [Mr. McL] takes [the baby] out at any stage."
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> • "I further say that it came to my attention recently that when [Mr. McL] purportedly took [the children] to a café for hot chocolates at the weekend he in fact had left all three children in the car whilst he bought food returning to the car with take-away cups for the older two children."
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> • "I say that on his return from [his holiday], [Mr. McL] wrote 'afternoon with Daddy' in the calendar for the [Friday] and advised me he might take them to [a show], however I had already taking them [to that show]. I say [Mr McL] returned home from work on [the Friday] at 3pm and took the children to the playground and the car wash that afternoon before going out himself that evening."

31. Mr. McL's replied to these averments as follows:

> • "I have not underestimated the extent of the responsibilities and organisational skills required in managing our three young children and save that [Mrs. McL] insists on laying out the children's clothes and insists on preparing a bag for [the baby], these are things that I am well capable of managing on my own."
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> • "I did not leave our three children in the car whilst I bought food, returning to the car with takeaway cups for the two older children. Rather when I went into the [café] with the children, there were no tables available in the cafe and consequently I bought some food to take away and hot chocolate for the girls in take away cups and we all then returned to the car."
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> • "…whilst is had been my plan to bring the children to the show… they did not want to go a second time, having been with [Mrs. McL] … The car wash that [Mrs. McL] refers to took 10 minutes, and the children and I enjoyed a nice afternoon in the park and a hot chocolate."

32. It is this Court's view that court time and resources should not be used in having to consider this level of detail after detail of petty squabbles between parents.

33. This is not to say that Mrs. McL was wrong to feel very strongly about the welfare of their children or that Mr. McL was wrong to feel very strongly about the same issue. It is just that it should not have involved extensive solicitors' correspondence, eight extensive affidavits and almost a day in the High Court.

34. This Court is also conscious of the fact that in marital disputes, it is often the case that both parties have some responsibility for the failure to reach settlement and it is likely that in this case (although the Court cannot make any finding of facts at an interlocutory stage), that both parties have some responsibility for this failure in this case.

35. The Court wishes to emphasise that it has no reason to believe that the lawyers in this case bear any responsibility for this

matter not having being resolved without a court hearing. This is not only because the lawyers are very experienced solicitors and barristers who this Court would expect to have made strenuous efforts to settle the dispute (to ensure that court time was not wasted), but also because this dispute was subject to an unsuccessful mediation which no doubt was recommended by the lawyers as an attempt to resolve the dispute.

36. Finally, if this Court hears any further motions in this case, or indeed the application for judicial separation itself, the parties should bear in mind that, whether the parties can afford to pay their lawyers to spend a day or many days in the High Court is of no relevance to this Court in determining what is an appropriate application or an appropriate amount of time to be spent in dealing with this dispute. This is because court resources should not be wasted unnecessarily as it is the taxpayer who must foot the bill for those resources.