

THE HIGH COURT**FAMILY LAW****[2010 No. 76 CAF]****BETWEEN****M.Q.****APPLICANT/RESPONDENT****AND****T.Q.****RESPONDENT/APPELLANT****JUDGMENT of Mr. Justice Henry Abbott delivered on the 21st day of June, 2013**

1. This judgment relates to a decision on a preliminary issue arising during the course of consideration of an appeal to the High Court of an order dated the 26th June, 2010, made by the Circuit Court refusing access for the respondent/appellant (father) to the children of the parties.

Background of the Marriage

2. The parties were married to each other on the 4th May, 2002, and there were two children born of the marriage namely J. who was born on the 26th September, 2003, and L., who was born on the 21st January, 2007. The parties knew each other for some time prior to the marriage and shared their interest in social life and education. Certainly, from the birth of the children the mother became homemaker and the father engaged in well paid employment enabling the parties to purchase a house and, thereafter move to a preferable house and area. The marriage was a successful one and the mother and her family regarded the father as a good provider and father for the children. However, in or around the middle of 2007, whatever differences appeared to exist between them became more acute and arguments developed. In or about October, 2008 the father informed the mother that he was leaving. Various matters of complaint are detailed in the Family Law Civil Bill issued in 2009, but of particular importance to this judgment dealing with the issue now before the court, are the allegations set out in para. 9 of the Family Law Civil Bill. After reciting details of what was claimed to be an inappropriate close relationship between father and eldest daughter, J., the narrative goes on:-

"On 14th October an incident occurred which caused the applicant [mother] extreme concern. The respondent was availing of access to the parties' two children and the applicant took the opportunity to visit a neighbour. Approximately half an hour after the applicant left the family home, she received a phone call from the respondent who informed her that there had been an accident involving the infant J., and that she was bleeding 'down below'. When the applicant returned home the respondent and the two children were upstairs in the parties' bedroom. The infant J. was only partially dressed and had blood on her pants and in her vaginal area. She was hysterical and would not let anyone near her and was complaining of having a very sore 'front bum'. The respondent alleged that the infant had fallen on a toy which she had been playing with and had caused the injury to herself. The applicant was concerned that the respondent told her that the infant J. had been fully clothed when the incident occurred. The infant J. had complained of having a sore 'front bum' on several occasions during the previous six months. The applicant [mother] took J. to the doctor and thereafter to Tallaght Hospital where she was examined by a doctor. The applicant is most concerned that the respondent had behaved in an inappropriate manner towards the infant [J.], and had voiced these concerns to the social worker and to her GP and doctors at Tallaght Hospital. On the 2nd December a conversation took place between the infant [J.] and her grandmother and later, the applicant, which caused the applicant further alarm and concern in relation to the appropriateness of the respondent's behaviour towards her. On this occasion, the infant J. confided to her grandmother that her father touched her on her "front and back bum". The applicant has contacted social services about her concerns and is seeking a Section 47 report in the context of the within proceedings. She is particularly concerned that the respondent does not have unsupervised access with the children pending the outcome of same."

3. This conversation of the 2nd December between the infant J., and her grandmother has been referred to throughout the hearing of the case as the first disclosure. Of importance is that there is an allegation of a conversation having taken place in the infant J.'s bedroom between herself and her aunt, L., referred to as the second disclosure in which J. informed L. of dreams of a disturbing nature, some of which related to inappropriate touching which she demonstrated by way of playing and describing an imaginary recording.

4. While there were concerns expressed in para. 10 of the Civil Bill and by the maternal grandfather that the father had exhibited suicidal tendencies in the course of and in contemplation of a very acrimonious departure by him from the family home, it is the two incidents referred to as the first and second disclosure which ultimately gave rise to an investigation by St. Louise's Unit of Crumlin Hospital. This unit is an independent specialist child sexual abuse unit which provides both an assessment and therapy service to children and families residing in Eastern Counties and City. The assessments are therapeutic in nature and are conducted in order to provide an independent opinion as to whether or not a child has been sexually abused. The conclusion of the assessment team in St. Louise's was that, on the balance of probabilities, J. had provided a credible account of having been sexually abused and that, in the absence of a credible alternative explanation to her accounts by the father, the conclusion of the assessment team was that the father had sexually abused J.

5. The father did not accept the assessment of St. Louise's and his solicitors referred his concerns to a similar unit, St. Clare's Unit, attached to Temple Street Hospital. Having reviewed videos of interviews and read all the documents provided and analysed the process of the assessment by St. Louise's with a view to offering an opinion as to the process and outcome of it, the opinion of St. Clare's Unit was that there is no evidence of sexual abuse. The gardaí have been informed of the allegations of the mother of sexual abuse.

6. An interim access order was made on the 31st March, 2009, and a further access order was vacated on the 15th March, 2010, and finally, an order refusing access was made on the 26th June, 2010. It is from this order refusing access dated the 26th June, 2010, that the father appeals to the High Court by way of notice of appeal dated the 1st July, 2010. The appeal was expeditiously dealt with in the High Court, but it emerged during the course of interlocutory hearings in the direction list on a week to week basis that Professor Sheehan, an expert psychologist, would be appointed not to provide a s. 47 report to the court on the welfare of the children, but to seek to examine with the parties means by which some kind of access could be agreed notwithstanding the two conflicting reports from St. Clare's and St. Louise's. Ultimately, Professor Sheehan found it impossible to make progress in that regard and requested the court to hear evidence in relation to the difficulties he had experienced. His evidence to this Court was to the effect that while the father sought access, the mother and her family had found it impossible to engage with efforts to ensure any type of access by reason of their psychological, emotional and moral background they found it impossible to agree to any form of access for the children with the father by reason of the conflicting reports of the two sexual abuse investigation units, and their firm belief that the father had been guilty of sexual abuse. He, therefore, stated to the court that it would be impossible for him to proceed unless there was a definitive decision by the court as to whether there was or was not sexual abuse in the case. Having heard the submissions of the parties and considered the evidence of Professor Sheehan, the court made the following directions in relation to the matter on the 23rd July, 2012:-

"1. Arising from Professor Sheehan's evidence to the court, the court must determine:-

(a) Did any action happen?

(b) Did an action take place which was reported by the child to an adult which the adult interpreted as sexual? The child thereby learning that she was abused from others?

(c) Did the father use the child for his own sexual gratification?:

(d) Did inappropriate behaviour take place, which was inadvertent and not for sexual gratification?

(e) Did inappropriate behaviour take place in circumstance where the father did not understand the behaviour was inappropriate?

(f) Is there some other explanation?

2. The standard of proof in determining all matters of fact is the balance of probabilities.

3. The onus of proof is on the mother to establish all or any of the factors set out at (a) to (f).

4. In those circumstances, the mother's case should be put before the court first.

Eight further directions were made in relation to disclosure, discovery, reporting and engagement of expert witnesses.

The Experts' Reports

7. Having obtained the benefit of sufficient disclosure and discovery, the parties retained two experts of high calibre to examine the conflicting reports of St. Louise's and St. Clare's, and the video material and documentation upon which same were based. The mother engaged Dr. Anne Byrne-Lynch, Consultant Clinical Psychologist, and the father retained Teresa Burke, Ph.D. Consulting Neuropsychologist. The ultimate conclusion of Dr. Anne Byrne-Lynch in her report was as follows:-

"Overall, my clinical opinion is that while an incident or incidents of unwanted rough touch or tickling appear to have taken place, there appears to be insufficient evidence within the assessment material to conclude that the adult's behaviour was sexually motivated."

The conclusion of Teresa Burke Ph.D., was that the methodology of the examination and investigation by St. Louise's was seriously inadequate and the conclusions thereof of St. Louise's report were without foundation. In the face of all four reports available prior to the court hearing, the mother instructed counsel to proceed with the appeal on the basis that she still believed in the conclusions of St. Louise's report and that she believed her child.

8. The hearing took place over several days from the 8th October, 2012, and having overrun the allotted time to the hearing, concluded after hearings on various days which came free and finally concluding on the 20th March, 2013. Having heard the evidence of all the witnesses, and having heard Dr. Byrne - Lynch qualify her conclusion in the report that some action happened, albeit not sexual abuse by excluding such action to which the disclosures might relate, I am satisfied that all the questions posed by the court on the directions following Professor Sheehan's evidence should be answered in the negative. However, in view of the fact that the mother, under repeated questioning by Ms. Browne, counsel for the father, was most reluctant to countenance any situation other than that where the report of St. Louise's unit would prevail and insisted on repeating that she believed the finding of sexual abuse by St. Louise's and that "I believe what my child is saying", I concluded that all aspects of the case should be forensically examined and that, notwithstanding the overriding influence of the reports of Dr. Anne Byrne-Lynch and Dr. Teresa Burke, that I should take ownership of the entire evidence in the case and form views either supportive or otherwise to the experts reports.

9. On agreement by the parties I had the opportunity of looking privately at the videos of interviews carried out by Ms. A., the Social Worker in St. Louise's unit. I noted the hesitation of J. in relation to answering any question at the initial stages which might lead to information such as was recounted by the maternal grandmother and mother on the occasion of the disclosure of the 2nd December (the first disclosure). On this occasion I did not notice particularly the fact that the questioning was not open and that there may have been a leading element in several of the questions as was pointed out by the experts, Dr. Byrne -Lynch and Dr. Burke, and also by the St. Clare's report. I took it then that Ms. A., a qualified psychologist, would know better than I how the questions should be phrased and the pitch thereof in terms of direction or otherwise. However, I noticed a factor not taken up by any of the reports as follows: as the interviews went on, within each separate interview and progressively over the interviews, the infant J. received strong praise about the work she was putting into the interview and that strong praise almost always coincided with what could be a breakthrough in relation to an account tending to show some act or event which might support or be support for or confirmation of the first and/or second disclosures. I pointed out this observation again when I viewed the video recordings with the parties during the course of the hearing.

10. As a result of hearing the evidence, I find that if any event occurred as possibly covered by the first or second disclosures, or as

might incur the disapproval of the court, the same could only have occurred during the course of access of the father with J. and L. in the family home. It is most unlikely that such an event occurred in the sitting room/play room context while the mother was not far away. Having reviewed the pleadings and affidavits of the parties, including exhibits of texts between the parties, and also having considered the evidence, I find that the mother is extremely antagonistic to a mediative approach to access, and was so disposed - even prior to the first or second disclosures or, indeed, prior to the injury on the 14th October, when her daughter fell on the plastic figures. I find that the conclusions of Dr. Burke in relation to the possibility of suggestion of the disclosures to infant J. by her family not in a purposeful or malicious way, but by way of inference by J. to say what would be appropriate to taking sides in the conflict between mother and father, is reinforced by the evidence which emerged that in relation to the 14th October incident, grandmother offered to explain the injuries to the A&E doctor examining same for the purpose of obtaining a second opinion and was prohibited from doing so by that doctor, instead allowing infant J. to explain the matter herself showing clearly that the injury received by her was by way of accident through falling on the plastic figures. For the child to have experienced this over-weening interest in grandmother in explaining an event to which she was not a direct witness and in respect of whom she would be more distant by reason of the fact of being grandmother, would certainly be a factor which would further influence the child to make an inaccurate disclosure for the purpose of showing her support for her maternal grandmother and mother in a very conflicted situation. While I accept Dr. Burke's opinion that the frequent repetition of the story arising from conversations with the mother after the initial first disclosure to grandmother, the attendance of the father with the mobile phone (which unfortunately did not do anything other than an unrecognisable fuzz and which was later destroyed prior to the hearing) might involve a conditioning process, I would stop short in saying that part of this process involved a conditioning by Ms. G., Social Worker, when she made the official call to interview J. for the first time insofar as Ms. G's evidence on the 20th March, 2013 (which I accept) was to the effect that she did not introduce the stay safe symbols to J., but used some to ascertain, in the course of her general examination, the width and ability of expression of J. It seems that J. had been exposed to the stay safe symbols elsewhere, possibly from school and understood them. I do place particular weight on the fact that Ms. G did state that when first recounting acts which could be related to the first disclosure, that J. seemed to be unmoved by same, and that under questioning by the court and Ms. Browne, Ms. G emphasised that children even of that young age react to acts of sexual abuse with more feeling and distress than was exhibited by the unaffected responses of J.

11. I listened to the evidence and cross examination of evidence in chief and cross examination of Mr. C.L., who was the supervising senior social worker of the team carrying out the assessment on behalf of St. Louise's unit (although at a certain stage in the literature he described himself as an assistant). He certainly took on the mantle of speaking on behalf of the assessment unit in his evidence, and throughout that evidence he stoutly defended the methodology and conclusions in the St. Louise's assessment report on J. In his evidence he defended the occasional departure from an invitation for an open narrative by the infant J. during the interview process by saying that, at a certain stage in relation to investigation of sexual abuse, the interviewer must ask specific focused questions to carry out the interview properly. I would pay some deference to Mr. L's experience as a social worker and undoubted skill in participating in and/or observation or supervision of interviews in these situations, and make some allowance for the manner of questioning concentrating into a more leading form if it had been preceded by a more open narrative or opportunities for a more open narrative at earlier stages. Mr. L's approach in relation to reaching a conclusion in respect of the occurrence of sexual abuse was that in the face of J. giving a coherent account during the interviews of acts which could be construed as sexual abuse in the absence of a credible alternative explanation by the father, is defective insofar as the father did, in fact, give a credible explanation insofar as he claimed that J. had made her statements under the influence of the mother and her family. The further reports and this hearing have added more definition and nuance to this explanation.

12. A considerable amount of time was taken up by the evidence of the mother, aunt L., grandmother, and grandfather on the mother's side, dealing with alleged inappropriate behaviour concentrating on the alleged unhealthy close relationship which father had with J. and his admittedly less close relationship (or lack of bond) with the younger child L. These complaints relate to bouncing on the knee (too close to the crotch), playing of games such as prince and princess involving a little play about marriage between the prince and princess where father would kiss daughter J. as the princess (he acting as the prince), coming into maternal grandparents home to change his clothes, whether office clothes to working overalls or tracksuit, sport togs to other clothes, by bringing J. up to his bedroom where the change of clothes might be kept, to inappropriate holding of J. right from the time that she was a baby. I find, having considered all the evidence, that while the father had a close, tactile and loving relationship with J., there was nothing unhealthy or inappropriate about it. If there were any doubt to be cast on this conclusion by the hearing of the evidence adduced on behalf of the mother's witnesses, it was dispelled by the separate offering of the grandfather (independent of the excellent representation by Mr. O'Neill, B.L. of the mother), of a photograph of infant J. while she was a baby estimated by the grandmother to be about six months old, where the father was photographed by the grandfather on a social occasion within the family holding the baby upright with a supporting hand between her legs in the crotch area where the baby was well padded with a thick nappy. Both the grandfather and grandmother took particular exception to the hand under the crotch in this situation where the baby was being held in a standing position in circumstances where the baby obviously had to be supported at her age. The grandfather explained that he had kept this photograph and rediscovered it not as a social memento, but as evidence of sexually inappropriate behaviour from father from the outset of baby J.'s life. He was cross examined in detail by Ms. Browne (who initially objected to him taking the initiative himself in producing the photograph, but had to bear with the ruling of the court that he be allowed to take such initiative on the basis that the court had embarked on a free ranging inquiry in relation to all matters and that, in the interest of the infant, such matters as the grandfather wished to introduce should be allowed). Despite this cross-examination the grandfather remained adamant about his claim about this photograph. I have seen this photograph and considered it carefully in the light of the allegations made by the grandfather, and find that it is utterly preposterous to suggest that a baby held in such a position with its nappy covering would suffer anything in the nature of inappropriate behaviour, not to mention any sexually motivated behaviour. The production of this photograph by grandfather for the purposes which he intended it, has to a very great degree affected the credibility and objectivity of the grandfather, grandmother and their two daughters (including the mother) in relation to the various alleged inappropriate behaviour relating to the closeness of the father with infant J., which was obviously sought to be introduced into the hearing for the purpose of colouring the view of the court and exciting suspicion against the father.

13. However, having heard the mother and her family give evidence, I am satisfied that they are good and loving parents and relatives of infant J., and that the disclosures and accounts were not invented by them in the sense that they might be claimed to be fraudulent creations. In fairness to Dr. Burke she stopped short of that allegation too, although she was willing to consider it in her report. In view of this conclusion, I find that the mother and her family suffer from no more than the paradox of virtue, being good people driven to the point of obsession and error by a regrettable and understandable revulsion against the father arising from the sudden onset of a separation in the context of a marriage which had, in many ways, delivered much and promised much. This conclusion augurs well for the family's future.

Conclusion

14. I, therefore, answer all the questions set out by the court in para. 1 of the directions quoted above in the negative.