

THE HIGH COURT

FAMILY LAW

[2024] IEHC 679

RECORD NO: 2022 137 M

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT, 1996 AS AMENDED BY  
THE FAMILY LAW ACT, 2019

BETWEEN

C. G.

APPLICANT

-AND-

D. B

RESPONDENT

**Judgment of Ms. Justice Nuala Jackson delivered 11<sup>th</sup> day of October 2024.**

INTRODUCTION

1. This matter comes before me to determine the appropriate child arrangements schedule for two very loved and clearly very loveable small children. In his first expert assessment report, Prof. Sheehan recounts that the children “*impressed as two lively, friendly, engaging girls who get on very well together.*” In his second such assessment, he states and opines “*The [children] presented as a great team during this review process and I have no doubt that they will progress well.*” This bodes well and is encouraging for the future. However, it is important that arrangements are put in place which positively advance their wellbeing and best interests to the greatest possible extent, indeed, it is the obligation of this court to determine such arrangements having regard to their welfare and best interests.
2. A motion to vary current arrangements was issued by the Applicant in May 2024. I have had the benefit of the following evidence in this application:

- (A) The Report of Professor Sheehan of the 31<sup>st</sup> January 2023<sup>1</sup>;
- (B) The Report of Professor Sheehan of the 25<sup>th</sup> July 2024;
- (C) The oral evidence of Professor Sheehan, inter alia, proving the aforementioned reports;
- (D) The Affidavit of the Applicant on the 16<sup>th</sup> May 2024;
- (E) The Replying Affidavit of the Respondent of the 24<sup>th</sup> July 2024;
- (F) The oral evidence of the Applicant.

## **FACTUAL BACKGROUND**

3. The children are aged 5 years old and 7 years old. They have had a good degree of upheaval in recent years having lived in Country B from birth until the summer of 2021 at which time they moved with their mother to live in Ireland with curtailed contact with their father thereafter albeit contact continued which was regular and of relative frequency. This move occurred in the context of the breakdown of the parents' marital relationship. The Applicant ("C") moved to reside in Ireland in 2024 and the position now is that he is residing here on a permanent basis and the parents of the children live in close proximity to one another. It is regrettable that there is considerable acrimony remaining between the parties. C has a new partner, with whom he was expecting a new child at the time of the hearing of this application. It is to be presumed that the birth of this child has now occurred.
4. In the context of the consequent bilocation of the parents between 2021 and 2024, access and contact between C and the children was unsatisfactory. An arrangement was in place whereby C would visit Ireland for a block of time each month and there would be very frequent day time access but more curtailed overnight access during such visits. The usual term-time arrangements at the time this matter came before me involved the children having three overnight visits one month and five overnights every alternative month with C. The curtailments inherent in one parent living and working in another jurisdiction are now in the past as C has now relocated to Ireland and plans to permanently reside here. He has acquired and has, since February 2024, lived in stable accommodation in Dublin which accommodation is entirely suitable for the needs of the children.

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<sup>1</sup> Both reports were ordered pursuant to the provisions of section 47 of the Family Law Act, 1995.

5. The Respondent mother (“D”) has averred on Affidavit and has submitted that the current arrangements should prevail until mid-way through 2025 as Professor Sheehan in his first report recommended that there would not be a review until that time. D references the fact that Professor Sheehan was, in the context of that report, aware of C’s intended acquisition of a property in Ireland. She is entirely correct insofar as she references the recommendations made in January 2023. However, I am of the view that review at this time is appropriate and merited and I have formed such a view for two specific reasons:
- (a) Although the parties have successfully agreed some additional access times (for which they are entitled to great credit and recognition), the general arrangements involve a routine whereby the children do not have any physical contact with their father (there is some remote contact) for approximately two thirds of the month. It is my view that such curtailment of physical contact is entirely inappropriate and, indeed, potentially confusing for the children in circumstances in which there is now but a few kilometres of distance between the homes of the parents. When a parent resides in another far distant location, access gaps of significance may be necessary and inevitable and are entirely logical and explainable. This is not now the position here.
  - (b) I have considered the first report of Professor Sheehan and it is not entirely clear to me from this report that the assessor completed this report and made the recommendations therein on the basis that C would be moving to live and work in Ireland. It was clearly known and understood that a property was being acquired in Ireland but it is not clear that a full movement of habitual residence and place of employment was envisaged. Such full movement has now occurred.

## **ORAL TESTIMONY OF EXPERT ASSESSOR**

6. In his evidence upon questioning by Counsel for C, Professor Sheehan opined that the children were doing very well although concerns in relation to the psychological well-being of the children, in particular the elder child, emerged later in his testimony. He testified to the appropriateness of the current term time arrangements while the children and their father were living in different jurisdictions. He indicated that D displayed some anxiety concerning access but that the children were able to detach from her and that they were happy in their father’s care. The expert assessor referenced the principle of equality and indicated that this had been his starting point for his recommendations,

there being no contra-indications to the application of such principle. I did not hear any research outcomes or evidence of empirical research concerning this principle or as to why it would be a starting point from which one would embark in determining a schedule of arrangements. Professor Sheehan's evidence was that the principle of equality was one principle but not the only principle to be applied. He indicated that the appropriate arrangements for children depended upon many factors including the quality of parenting, the capacities of the parents and their availability. However, he indicated that a weekly rotation would not be appropriate as such period would be too long for the children to be without one parent, "especially the mother". The disagreement between the parties in relation to the attendance of F (the younger child) at play therapy was referenced. Professor Sheehan recommended that F attend play therapy with her sister but, while there was clear evidence as to why E (the older child) required to attend for such therapy, I was unclear as to why such therapy was required by F, save to achieve some sort of parity with her sister. This does not appear to me to be a reason for therapeutic intervention but this is a matter which I will further consider below. Mid-week access with C was recommended on the basis that the children should start off the week with their mother. Professor Sheehan did not consider the two overnights mid-week to be too fast for the children, having regard to the blocks of time which they previously spent with their father. Professor Sheehan was questioned by Counsel for D as to why his views (in terms of access arrangements and review of same) had altered from his first report and he replied that this was due to C now living in close proximity to the children. There was further probing of this in the context of the father's intended move to Ireland having been known at the time of the first report.

7. The evidence of Professor Sheehan, both in response to Counsel for D and in response to certain queries raised by me, indicated that there are a number of ongoing issues. He indicated that both children continue to struggle with the separation of their parents. When asked by the expert about the relationship between the parents, F responded "yes, they are friendly but not to each other." Professor Sheehan indicated that the children remain well aware of the conflict between their parents. Evidence of continued considerable, concerning, physical manifestation of anxiety on the part of E was heard. There was evidence of considerable continued dependency by the children on their mother. The importance of D's acceptance of C's partner was opined by Professor Sheehan who also recognised the greater availability of D having regard to the work

commitments of the parties. Professor Sheehan also indicated that the impending birth of C's child in his new relationship was an unknown factor as regards how this would transpire and impact on the children under consideration herein but he indicated that, pre-birth, the attitude of the children was positive.

8. Professor Sheehan's evidence supported the desirability of both parents being involved in all aspects of the children's lives and that mid-week access facilitates an involvement by the children's father in school related activities.

## **DETERMINATIONS**

9. While there are parenting criticisms levelled by each parent against the other, these deficits are not reflected in the expert assessor's report or in the reportage from the children. There is no evidence of any deficit in respect of either of the parties as regards parenting capacity. In his first report, Professor Sheehan states "both parents present as very competent, committed, and caring parents". There is nothing in the second report to indicate that the expert's view has changed in this regard and, in oral testimony, he confirmed and complimented the ability of the parents to parent and to care for their children. The evidence before me permits me to concur with this assessment by the expert. However, the averment of C, at paragraph 14 of his grounding Affidavit herein, that he wishes to see the children more frequently, to be able to care for them and to be involved in their day to day lives is entirely understandable. He proposes that a week on/week off arrangement is most appropriate. D disagrees with this. She believes that the children's father wishes arrangements to progress too far, too fast and that to review existing arrangements at this time is "inimical to the children's welfare".
10. It is regrettable that the relationship between the parents remains fractured and acrimonious. Unfortunately, they have not yet succeeded in moving on to a positive post-separation relationship. The evidence before me indicates that the children are very aware of this fractured situation. Some of the direct quotations of the comments of the children contained in the expert's second report demonstrate this awareness and are concerning. The conflict within the children is, however, evident from the fact that they would still appear to harbour a wish that their parents will reconcile notwithstanding that their father is cohabiting with a new partner and they are expanding their family

together. Indeed, the children's reality in terms of the parental separation appears to have regressed over the period between the two reports. This may be explained by their different ages and levels of understanding at the times of the different reports but it would appear that they will need the support and scaffolding of both parents in accepting the reality of their lives going forward.

11. While this confusion and instability are matters which must be assiduously addressed by the children's parents, it is important that the very considerable degree of agreement between C and D in relation to the arrangements for the children not be overlooked. In relation to the recommendations of Professor Sheehan in his second report (which are from (a) to (l)), only (a) and (c) were in contention, the former being the care schedule during the school term and the latter being the need for therapeutic interventions for the younger child.

Care schedule during the school term.

12. C believes that a week on/week off arrangement is appropriate. D. believes that such an arrangement would involve the children in an arrangement which results in them spending too much time away from her and would involve an excessive deviation from what they are currently used to. Professor Sheehan recommends every second weekend, Friday afterschool to Sunday (5.30 pm), with an extension to Monday morning in approximately one year together with Tuesday from school to school on Thursday morning every week (two overnights).
13. The general work hours of the Applicant are 9 am to 5:30pm, Monday to Friday. Reference was made by the Applicant to flexibility but, as the evidence was probed, it became evident that this flexibility is not perhaps as available as was represented. It appears that the Applicant is usually required to be in the office on Tuesdays and Wednesdays of each week and has the ability to work remotely from his home on the other days. Exhibited emails indicate that a degree of unpredictability can arise in this regard which is entirely to be expected. As is the case for many who work outside the home, there is significant travel time to and from work on the days when the Applicant is required to attend his place of work. The work schedules of the parties must be known to the Court in order to determine the welfare of these young children in terms of addressing the care needs of the children on a comprehensive basis. This is not to say

that third party care is always inappropriate. Part of modern life is that childcare assistance is needed and often desirable in terms of child development but this must be considered in light of the nature of the childcare assistance required, the extent to which it must be availed of and the availability of the other parent.

14. In the present case, I was informed of there being three separate elements in terms of third party childcare involved:

(i) *Pre-School*

From very early in the morning, (of course, an even earlier start once preparation for attendance is factored in), the children would attend pre-school to allow their father to drop them off earlier to then begin his commute into his place of work. This appears to be flexible and available on an occasional basis and will be most useful to this family, as well as others, but is it in the best interests of the children at the centre of this matter on a routine basis where there are alternatives available?

(ii) *School Time*

(iii) *After School time*

Again, although this is a routine part of modern life, it does lengthen the daily time away from home base for the children.

15. In the course of evidence, it appeared that C intended to avail of all three of these childcare supports. Having heard the oral testimony of C, it appeared that he viewed pre-school care as a facility which would only be required on an occasional or exceptional basis. However, emails which were exhibited by D do demonstrate the rigorous demands of C's work and that alterations to arrangements were sought by C with some regularity. Some degree of alteration and flexibility in arrangements is undoubtedly part of modern life but this does result in unpredictability for the children. In his oral testimony, C appeared to indicate that there was a hierarchy of access arrangements and that he did not view changing certain contact occasions (in particular remote contacts with the children) as being as important as other occasions. I found his evidence somewhat unsatisfactory in this regard. This hierarchy of arrangements seems to me to be based more on convenient perceptions to fit in with C's commitments rather than having an objective basis. The desirability of predictability and routine

apply to all aspects of arrangements for children. Having had regard to the totality of the evidence, C did not appear to see any possibility of adverse consequences of early mornings and late evenings with 3 separate, third party care routines for two relatively young children. C may well be entirely correct in this regard but this arrangement must be viewed in comparison to the arrangements of D, where she works substantially from home and has a work arrangement which is more compatible with hands on care for the children.

16. There is a reference in Prof. Sheehan's report of the 25<sup>th</sup> July 2024 to a degree of flexibility in terms of the work arrangements of C but the totality of the evidence indicates that there is not quite so much flexibility in reality. There is also no factoring in of travel times which will actually be incurred as a routine part of modern Dublin life, which can result in a considerable addition to the time that the children will spend in third-party care. The evidence is that C works two days in the office and these days coincide with the days on which it is proposed that the children live with him.
17. The exclusion of C's new partner from the arrangements with the children has caused acrimony between the parties. This is a strongly held view of D who believes that there should be no partner access of any kind (including that C's partner should have no involvement with drop offs or collections). A degree of hurt and emotional distress consequent from the separation of the parties is understandable but parents have a responsibility and duty to be pro-active in ensuring that this does not operate to the prejudice of their children. It is of vital importance that the children are not impacted by these parental feelings. The evidence of the expert assessor indicates a positive relationship between C's partner and the children. This should be welcomed and encouraged. C's partner is a permanent feature in their father's life and, consequently, in their lives. C's partner will be the mother of their half-brother or sister. The commitment and devotion of D to her children is beyond doubt and I am confident that she would not wish her grievances to negatively impact her children. On the evidence before me, there is no reason why C's partner cannot do picks ups/drop offs but only if D can bring herself to allow these to occur without acrimony. It would, in my view, be contrary to the welfare of the children to insert into their lives a further source of descension and acrimony. This will undoubtedly present a challenge to D but parents



must often step up for their children's benefit. These are matters which D must work towards with the benefit of whatever professional or therapeutic supports she needs. I am directing however that I see no reason why either party may not have a third party or a surrogate assist them with the logistical arrangements of childcare as is entirely normal and usual. I firmly believe from my observations and the evidence heard that D's parental commitment will result in her being pro-active in addressing these matters.

18. The commitment of C is likewise commendable. He has made huge lifestyle and professional changes to be close to his children and to have an active and regular role in their lives. The evidence demonstrates his positive relationship with the children. I did, however, find his attitude towards equality to be somewhat rigid and formulaic based on principle rather than based on robust recognition of and search for arrangements best suited to the needs of the children. Equality of time is not always in the best interests of the children. Unequal but generous time to both parties does not indicate inequality of parenting importance. Other matters such as stability, consistency and day-to-day impacts must be factors in also.

## **THE CHILDREN**

19. Both children are currently experiencing undue maternal dependency, which is to be somewhat expected. Both children have shared experiences of very considerable life changes. The children have very different personalities. The older child, E, seems nervous and prone to some anxiety. This impacts E's sleeping with some physical manifestations. E is currently attending play therapy upon the recommendation of their GP. All parties are agreed that this should continue. The younger child, F, is more robust and appears to be a somewhat braver child. There are suggestions that F should also attend play therapy with E, however, (although there was a reference to tooth grinding), there would not appear to be any particular reason for this. It is important not to unnecessarily pathologize children. If health or therapeutic interventions are needed, these are matters to be addressed without delay but such interventions must be based upon health needs and not to create commonality between children. I sought specific advices from the assessor in this regard and I have concluded that there is no particular need elucidated as to why F requires therapeutic interventions at present. Of course,

these matters may change and GP advice may be sought and parental agreement on the plan to follow is most desirable but therapeutic interventions should be required to address a particular physical or emotional need of the child concerned and not derive from a focus of commonality between children. The younger child, F, appears to be more outgoing, confident, independent and active. The older child, E, appears to have a little more difficulty with detaching from her mother but some reluctance in this regard was evidenced by both children.

20. The D's access proposals are meagre in the context of the circumstances of the family and puts far too much responsibility on the children as to whether they want to go on overnights or not. The factual circumstances in this instance support regular overnight periods with C and such as to fully enable him to have a fully participative role in all aspects of their lives during school and holiday/leisure times.

## **VOICES OF THE CHILDREN**

21. I am mandated by Bunreacht na hÉireann and by legislation to hear and, when appropriate, to have regard to the voices of children in matters concerning their custody and access. It is extremely important not only that the voice of a child is heard in litigation of this type but also that there be some degree of probing in an attempt to ensure that the authentic voice is heard. In this instance, the children concerned are quite young (7 and 5 years old respectively), however, I am of the view that both children were capable of forming and expressing clear views as to their circumstances and as to the arrangements which should be put in place going forward. The voices of the children in this instance, despite their young ages, demonstrated considerable maturity and insight in my view. There was ample reference to narrative from the children in the report of the expert assessor. This showed that they continued to struggle with their parents' separation and there was evidence of a realisation of and a concern regarding the continued acrimony between the parents. There was clear evidence of a love for both parents and a desire to be fair to both parents and, I believe, a craving that their parents' interaction would improve so that there could be a more positive, post-separation, family dynamic. I formed the view that the voices of these children displayed a conflict between what they considered fair and what they themselves

wanted and would be comfortable with. Overall, I have formed the view that the children wish to have ample time with both parents and are bonded with both but that they continue to have a need of and to express a wish for a greater time with their mother. They appear somewhat tired and anxious within the complexities of their lives and the default comfort place appeared to me to tend towards their mother.

22. There is a need for stability, predictability and time to grow and get used to the realisation of the breakdown of their parents' marriage and their new lives and the altered dynamics in the context of their new family unit(s) and configurations. Both parents need to fully support the children with this. The parents may require individual therapy and/or joint facilitation to achieve this.

## **SECTION 31 PRINCIPLES**

23. Section 3 of the Guardianship of Infants Act, 1964 (as amended) ("the 1964 Act") is clear that the paramount consideration in applications such as that under consideration in this case is to be the best interests of the child/children. Guidance in the application of the best interests test is to be found in section 31 of the 1964 Act. I have considered all of the factors and circumstances of this case and, in particular, those referenced in sub-section (2) of section 31 of the 1964 Act.

- (a) It is clearly of benefit to the children herein that they have a meaningful relationship with both parents and remoter relatives and persons involved in their upbringing. Parent/child relationships here are most positive. It is appropriate that the children have ample contact with both of their parents.
- (b) I have referenced the views of the children previously herein. I am satisfied that it has been possible to ascertain the views of the children herein and that it is appropriate that regard would be had to them as an important circumstance and factor. The voices of the children here display some anxiety and uncertainty. The primary focus in reducing such negative aspects of the children's existences, in my view, rests with the parents working together and separately to improve their relationship and their focussed attempt to establish a positive, post-separation family for their children.

- (c) The physical needs of the children are well cared for in this instance. I have sought to address the improvement of the psychological and emotional circumstances of the children in the orders which I am making herein.
- (d) The history of the children's upbringing here is one of change, particularly so since 2021. Stability has now been achieved in terms of their location and the centre of their lives and communities. Fortunately, this has resulted in both their parents being amply available for them.
- (e) It is most important that both parents respect the religious, spiritual, cultural and linguistic upbringing and needs of the children. There was evidence of some conflict here with the parents having different cultural backgrounds. It appears that the children have significantly embraced the cultural background of their mother which is easily nurtured in the context of their residence in Ireland. It is important that this not become another source of conflict which would only further confuse the children in their day to day lives. There is clearly room for multiple cultural experiences in children's lives but, if a cultural has been embraced, a supportive attitude will lessen conflict for the children.
- (f) There are no social, intellectual or educational concerns in this instance.
- (g) Full regard has been had to the ages of the children and their very different personalities as well as the close bond of sibling friendship which exists.
- (h) Fortunately, protection of the children as regards household violence does not arise in this instance. I have fully embraced the requirements of the psychological well-being of the children.
- (i) It is admirable that the parents in this instance were able to agree so many aspects of arrangements for the children and they are to be particularly complimented for their agreement in respect of arrangements for the summer of 2024. It is to be hoped that with facilitation assistance, the parents will succeed in being able to agree all matters pertaining to their children going forward.
- (j) The acrimony between the parents continues to somewhat impede the facilitation and encouragement of a close relationship with the other. I am of the view that D has particular challenges here which derive from hurt and history. Having heard oral testimony from C, however, I am of the view that both parents have challenges in this regard. Regrettably, their expressed views may not fully accord with their subliminal feelings. I can but reiterate that it for the adults to take responsibility for

these matters and to take steps to address them rather than burden their children with the adult animosity.

(k) There are no parenting capacity deficits arising in this instance.

## **CONCLUSIONS**

24. I find that it is in the best interests of the children herein that their parents would be their joint custodians and, having so determined, I determine that the child arrangements schedule which best serves the welfare of the children is as follows:

### **Child arrangements**

(a) Term time

Every second weekend, Friday afterschool pick up until Sunday evening at 5.30 pm (D to collect the children from C's home) and Wednesday from school to Thursday school every week (if he so desires, C may elect to have weekly overnights from Tuesday from school to Wednesday school but the overnight should be the same each week).

I am making a slight variation from the recommendations of the assessor, who suggests two overnights with C midweek. I am not satisfied that two overnights midweek are in the best interests of these children because of (i) current levels of anxiety and confidence deficits and (ii) the potentially disruptive care routines which are suggested by C.

(b) Per expert report and as agreed between the parents

(c) Only E to attend play therapy at present. F only to attend if a GP referral is provided based on the individual needs of the child. If such GP referral is made, I so order. While I do not intend to make an order in this regard, it does seem to me that the parents might consider and the children might benefit from attending Rainbows or a similar organisation which supports children with family change following separation.

(d) Per expert report and as agreed between the parents

(e) Per expert report and as agreed between the parents

(f) Per expert report and as agreed between the parents

(g) Per expert report and as agreed between the parents

(h) Per expert report save that the times be from 9 am to 6 pm as agreed between the parents

(i) Per expert report save that the times be from 9 am to 6 pm as agreed between the parents

(j) Per expert report and as agreed between the parents

The collection and delivery of the children may be facilitated by the father's partner (or another responsible adult of C's selection) if required. Likewise, D may wish to have a responsible adult of her choosing perform such role in the future. D must, with C's support, be encouraged to take such personal steps as she requires to enable this to occur. I have huge confidence that her commitment to her children aid success in this regard. In the short term, I direct that the parents only attend school and sporting events solely to avoid angst for the children. However, hopefully this curtailment will be unnecessary in the medium term. Sensitivity by all should be the order of the day. I believe that parental facilitation assistance would be most useful for the parents in this situation and I urge upon them that they activate the recommendation of Professor Sheehan at (k) of his recommendations (i.e. that they would attend jointly and/or separately Liz Wilson, Family Therapist and Parenting Counsellor) as soon as possible. I note that this recommendation was accepted by them both and I was so informed.

- (k) Professor Sheehan recommended bi-annual family meals which would be attended by the parents and the children. I do not intend to make an order in this regard as I am of the view that, absent voluntariness, such events would simply exacerbate the situations of anxiety for the children.
- (l) I make orders accordingly under section 15(1)(f) of the Family Law (Divorce) Act, 1996 and section 11 and section 11A of the Guardianship of Infants Act, 1964 (as amended) in accordance with the above conclusions. I will grant liberty to apply in the event that anything arises.