

**HIGH COURT****CIRCUIT COURT APPEAL****[2015 No. 63 CAF]****BETWEEN****V.R.****APPLICANT****AND****S.R.****RESPONDENT****JUDGMENT of Mr. Justice Abbott delivered on the 24th day of June, 2016**

1. This is an appeal by the respondent wife to have access arrangements for the eldest daughter of the parties (fictitiously referred to as "E." herein) altered so that she does not have to stay over night during weekend access with the father applicant and also to have access altered from the father applicant having overnight access for every weekend to every alternative weekend.

**Background**

2. The parties were married to each other on 14th March, 2002, and have three children: E. who was 12 years old; T. who was 10 years old; and O. who was born on the same date as T. Unhappy differences arose between the parties and the applicant issued proceedings claiming judicial separation in the Circuit Court on 21st October, 2014. Affidavits of means and welfare were exchanged in good time by both sides, but it was soon necessary to have interlocutory orders made in respect of the custody and access to the children for the parties. This was ordered by Judge Horgan on 3rd December, 2014, in terms of the father having day time access with strictures on his attendance at licensed premises with the children at times of access. There was an order that neither party was to speak badly or disparage the other party to the children, that the children should have their own sleeping facilities and that the parties are to be mindful of the ages of the children, but neither party to examine the children medically nor to cut the children's hair.

3. Under Family Law Act 1995, a Section 47 report was ordered in addition to the other more formal matters referred to in the order. A further order was made by Judge Fergus on 9th March, 2015, refusing the application to vary access and a further order was made dispensing with case progression. In the meantime, the father had appealed the order of Judge Horgan made on 3rd December, 2014, and this appeal was dealt with on consent, in terms that the access arrangements were altered and that the provisions and strictures in relation to licensed premises contained in the order of 3rd December, 2014, were removed.

4. By order dated 22nd July, 2015, the Circuit Court granted an order for judicial separation and made provision for the parties. In addition, detailed orders in relation to custody and access were made. The substance of such arrangements for custody and access were that the father would have overnight access with the children every weekend with some day time access during the week, with the children otherwise residing with mother and generally attending school from the mother's home. The mother was allowed to remain in the family home. The father appealed the entirety of the order of the Circuit Court and the mother, by notice of appeal dated 28th July, 2015, cross appealed in respect of the Circuit Court order dated 22nd July, 2015 insofar as it related to the access by the applicant to the dependent children.

5. In addition, the wife (respondent) issued a notice of motion dated 17th November, 2015, seeking an order varying the access to be exercised by the applicant to the dependent children pending the hearing of the Circuit Court appeal. This notice of motion was served against a background of the solicitors for the husband applicant coming off record and the matter appearing in the Directions List of this Court in circumstances where the mother was very agitated that E. was unable to attend overnight access with her father and that her health and school/educational activities were adversely affected.

6. On the other hand, the father was very upset that E. was not attending for access in breach of the Circuit Court order. In view of the fact that the father (applicant) was on a waiting list for legal aid and thus would not be in a position to deal with the substance of the appeal, this Court ordered that the notice of motion and wife's appeal would be heard on an urgent basis even though the father would have to be self represented.

7. An order was made to update the Section 47 report used in the Circuit Court with reference to the voice of the child, and with terms of reference confining the reporter to conduct the exercise by speaking to the child without interviewing the parents or any wider inquiry. These restricted terms of reference were in accordance with the approach of this Court in relation to matters requiring urgency and against the background of a very extensive report carried out under s. 47 of the Family Law Act, 1995 which was available to the Circuit Court and which showed that the children had a strong attachment to both parents and that both parents were strongly committed and engaged in attempting to provide proper parenting for their children.

8. It was decided to have an urgent children's hearing with the balance of the father's appeal being adjourned until such a time as he could be represented by legal aid solicitors which he is likely to be granted under the Legal Aid Scheme.

**The Evidence**

9. The mother's affidavit, sworn on 13th November, 2015, sets out the difficulties in relation to engaging in activities on a Friday evening such as hockey and scouting and also that the father had taken an apartment which provided little parking facilities and that handovers were hampered by him taking too much time packing the car and saying goodbye to the children. She referred to privacy issues of the children in relation to them being reluctant to take showers in the apartment and that the children were missing opportunities to engage in activities and employ themselves in the context of their relations on the maternal side and generally quality time was lost by not having, at least, alternate weekends for the children overnight with mother.

10. In para. 16 she suggested the following access arrangements for father:-

"(i) Access every alternate weekend from Friday after school until 5pm on Sunday evening when the applicant would then bring the children back to the family home... .

(ii) I say that I am most anxious to address the issue of Christmas access. I say that T. and O's birthday is on St. Stephen's Day and that I am most anxious to spend time with them at Christmas and on their birthday. I say that it is impossible to negotiate any arrangements with the applicant in respect of access."

11. She stated that father's solicitors responded to her solicitor's letter seeking arrangements in relation to access, saying that the parties should deal directly with each other and that he would not incur any legal fees or legal correspondence around the day to day issues regarding the children when they could be dealt with between the parties. The father delivered a replying affidavit to mother's affidavit sworn on 2nd February, 2016, in which he deals with historical matters that now do not immediately concern the court in relation to ongoing matters.

12. In para. 8 he addresses the concern of mother's weekend access as, causing the children to miss out on spending time with their maternal grandparents, uncles, cousins and friends, and from attending a number of extra curricular activities which they enjoy and he states that he often hears from the children that they regularly visit these various relations and friends and that he understands that their uncles and cousins visits them in the house on Sunday afternoons and evenings.

13. He further states that he brings the children to hockey practice on Friday after school and also brings them to swimming lessons on Saturday morning; something the mother had agreed they would enjoy, and would be beneficial to them. He complains that in a typical month of 30 days, the children have access of the respondent for 22 nights versus eight nights with father. He says that he regularly conducts conversations with mother and that access to his apartment is convenient as any other apartment.

14. He refers to the fact that the parties agreed Christmas access between themselves and as an indicator of how easy it was to negotiate in relation to this matter, that the mother had got what most people would consider to be the "better times" over the Christmas period e.g. Christmas Eve night, Christmas Day morning *etc.* and he also said that he availed of access at times that would facilitate mother going to work. He does not deny that he is currently upset and going through a difficult period. He believes that it is only natural that a child would be upset by the breakdown of their parents' marriage and that he was amazed that the children had not been more frequently upset by the breakdown of their parents' marriage, some eighteen months previously.

15. He averred that he attended a parent teacher meeting with one of the three children's teachers in November, 2015, and he was told that each of them was thriving. He averred that he had a lengthy meeting a week before swearing his affidavit in February, 2016, with the school principal to discuss the three children and in particular E.

16. He was told that E. had no issues academically, socially or any other way. He averred that he looked at E's fingers "last weekend" and he did not think they looked at all bad and certainly did not impact on her ability to do things like eat with chopsticks or use her mobile phone and tablet.

17. At the hearing before this Court, Mr. Robert Foley, Clinical Psychologist, presented his supplemental report and was cross examined by father and by counsel for mother. Mr. Foley gave evidence presenting his report subsequent to meeting E. and referring to his earlier reports of 3rd March, 2015, and 3rd July, 2015 (both of which have been read by me).

18. In his evidence, Mr. Foley informed the court that he had met with E. and that she was happy and well adjusted but that she expressed a preference for not spending overnights with father at the weekends. She stated that she enjoyed being with her mother at the weekends but reported that access contact with her father was more stressful for her.

19. She confirmed his report which stated:-

"He identified a number of routines and requirements that her father insists on in his apartment which are unsettling for her, including his requirement that the curtains remain closed and doors locked for most of the time they are there. She also reports that her father can be short tempered and he is inclined to give out about mother and her mother's family, which is distressing for E. and her sisters, but that does not stop him. E. reports that at times she feels 'trapped' in her father's especially when she has to stay overnight. She reports that she has asked him if she could return to her mum to sleep and apparently he has refused, telling her that 'she will have to get used to living in two homes'.

20. E. reported that father told her at the end of January 2016, she did not have a choice of staying with him when she told him that she was uncomfortable staying with him for extended periods in his apartment and she reported that in subsequent weeks when she refused to attend at the weekends, gardaí were called on three occasions and they came to the family home and spoke with her about the situation. On no occasion did they insist that she should go to her fathers.

21. The report went on to say:-

"E. reports that recently when she has gone to her father's apartment on a Wednesday after school, he has taken her aside and questioned her about her attendance or overnights. She felt that she is being lectured by him and that he does not have an interest in how she feels or what she wants. She reports that she has been ill on a number of occasions in recent weeks and she feels that her father did not believe her."

22. The report goes on:-

"E. reports that she would like to continue to have contact with her father but not to stay there overnight. Her wish is that her father would understand how she feels being there but sometimes she feels trapped because she feels compulsion to go. She wishes that her father would relieve her of his insistence and demand that she go."

23. I set out the opinions and recommendations of Mr. Foley in relation to the matter as follows:-

"On the basis of E's presentation and reporting at interview, in addition to telephone consult with the principal of the school, the indications are that E. is a child who is sensitive and struggling to adjust to the changed family circumstances since her parents' separation in late 2015. There are differing accounts of E's recent health, however, E. herself did not report illness, injury or traumatic event apart from the challenge of adjusting to family break up and changed living circumstances.

In my opinion, the situation is currently unstable and precarious. In this context, there is little to be gained by insisting on E. attending overnight access that she is uncomfortable with. In the circumstances, I recommend that father needs to reflect on; what changes he can make to his new home so that the children, particularly E., feel more at ease and

comfortable staying there. He should certainly listen carefully to E's discomfort around practical matters like doors being shut, curtains and blinds down.

Father should also use his attendance at psychological consultation to help him reflect on the children's point of view during this unstable transitional period.

In my opinion, father needs to be very careful that he does not inadvertently embroil his daughters in the ongoing disputes and disagreements with mother, an example of this is his insistence on calling the gardai to attend at mother's home when E. refused to attend access. This sort of intervention only escalates on an already precarious situation and increases sense of threat and discomfort for E.

In addition to father taking time to reflect on how it can become more child centred in the current situation, I recommend that it would be useful for a number of facilitated consultations to occur between father and the children where they can all openly discuss their preferences, fears and hope for how they can move forward with family life following the separation. Facilitation would be helpful in discussing these difficult matters as the indications are that father is finding it difficult to listen and hear clearly the children's point of view."

24. Father cross-examined Mr. Foley on his evidence and elicited from Mr. Foley a number of concessions that Mr. Foley's recording effect in his evidence and reporting were not correct. However, these omissions have no bearing on the thrust of Mr. Foley's report or its credibility so I shall pass on from them in consideration of the case. Father also suggested to Mr. Foley that he had recorded health issues surrounding tension and headaches and stress on the part of mother and her need to have psychological assistance. Mr. Foley suggested it did not impinge on her ability to parent the children or to provide them with a secure environment. He suggested that father was misguided on this aspect insofar as he was attempting to pathologize mother. It was put to Mr. Foley that his report could not be relied upon as the Circuit Court did not accept his recommendation that the children should spend overnights at weekends with their mother. Mr. Foley affirmed that he was still of that view notwithstanding the Circuit Court order and explained his reasons therefore in accordance with his reports. There followed a considerable discussion around this aspect between father and Mr. Foley, allowing Mr. Foley to emphasise to father that the quality of access was more important than the actual quantity and that father was falling into the trap of measuring the value of access in purely numerical terms. He emphasised again that it was important for father to get away from this numerical analysis and learn how to listen to his children and in particular to E. After the court had dealt with Mr. Foley there followed an exchange of submissions between counsel for the mother and father. During the course of these submissions and discussions in relation to the need for the parents to be flexible, father indicated how he had facilitated mother on a recent weekend with considerable time flexibility and availability of the children during the course of the weekend when strictly speaking he was entitled to access with them alone. This exchange prompted counsel for the mother to re-emphasise her arguments and requests to have the weekend access provided on an alternate basis only. It was noted that the apartment in which the children had weekend access was on the bottom of 17 other apartments and that there could be some sympathy with father keeping doors locked and perhaps even curtains pulled so that the passing inhabitants of the other flats did not impinge on the privacy of the apartment concerned.

#### **Decision of the Court**

25. The court has decided as a result of considering the litigation history and evidence herein that E. shall not be obliged to attend for access overnight at the weekends and that instead the father shall collect her from mother's home at 10am on each morning and return her at 5pm, or at such time as the parties shall agree. The father shall not have weekend access in one weekend out of four, the first weekend of such non-access commencing two weekends after this judgment to facilitate transitional arrangements, or as the parties shall agree. Apart from these changes the custody and access arrangements made by order of the Circuit Court shall continue until the Circuit Court hearing, on the basis that this decision deals with the wife's appeal and notice of motion, but recognising that, upon the full consideration of the appeal on the judicial separation the court is bound to consider the interests of the dependents in accordance with the Judicial Separation and Family Law Reform Act, 1989. The foregoing decision was made by the court having regard to the best interests of the child as the paramount consideration, in accordance with s. 3 of the Guardianship of Infants Act, 1964, as substituted by s. 45 of the Children and Family Relationships Act, 2015, and in that regard, this judgment sets out the factors and circumstances to which the court has regard, in accordance with s. 31 of the Act of 2015, by setting out such factors as provided for in s. 31(2) in seriatim and the conclusions of the court in relation thereto, as they effect this case.

26. These factors and circumstances are as follows:

*(a) The benefit of the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships.*

This benefit is clearly acknowledged by both parents and endorsed by the reports of Mr. Foley. The slight curtailment of overnight access for E. is very much in the interest of E. having such meaningful relationship and preserving a situation where she can develop her communications with father. The curtailment of one weekend in four access for father is also for the purpose of solidifying a meaningful relationship insofar as the children deserve the opportunity for exploring weekend activities at least once in every four weeks with mother against a background in which they have had no opportunity to develop this aspect of their lives as a result of the Circuit Court order.

*(b) The views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise).*

The views of E have been ascertained in accordance with s. 32 of the Children and Family Relationship Act 2015, as an extension of the Section 47 report process, having regard to the intervention of the said Act. I find, on the reports of Mr. Foley, that the views of E. are measured and responsible and do not indicate any immaturity or vindictiveness such as would suggest alienation. The *bona fides* of such views are strengthened by the fact that E. has always indicated that her preference is to continue week day access and day time access during the weekend access of father. In these circumstances I would be inclined to give considerable weight to the views of the child, even in the absence of Mr. Foley's report. The welfare aspects of Mr. Foley's report reinforce this view. The view of E. has little or no influence of the decision of the court to change away from one out of every four weekends as E. did not canvass this change in her views.

*(c) The physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances.*

The report of Mr. Foley points to the physical, psychological and emotional benefits for all the children in relation to the two changes proposed to be made in this judgment and in relation to the change involving the alteration of weekend access in one weekend out of

four, this reflects a healthy development of mediation between father and mother as outlined in the submissions, and which prompted counsel for mother to press more strongly for at least this change.

*(d) The history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships.*

This aspect has been considered under discussion in para. (a) and this factor is recognised by both parents although they do have continued differences and friction in relation to the detailed implementation of this aspect. However, as a result of Mr. Foley's recommendations, this judgment and any counselling they receive (if they attain a more mediatory approach), they should be able to iron out any further difficulties.

*(e) The child's religious, spiritual, cultural and linguistic upbringing and needs.*

Subject to the comments in (d) in relation to difference on detail, the parents are generally in agreement and focused in relation to these aspects and the approach may be improved with the improvements suggested under consideration of para. (d) circumstances.

*(f) The child's social, intellectual and educational upbringing and needs.*

Same comments as apply to (e) above.

*(g) The child's age and any special characteristics.*

Apart from the influence of the voice of the child as set out in (b), the age of E., now eleven, and shortly to be twelve years of age, is a factor dictating to the court that regard should be had to the need for her to develop independence and a relationship with father, as much as developing independence may be appreciated fostered and nurtured. There are no special characteristics as envisaged by para. (g), which have in any significant way impinged or influenced the consideration of the case.

*(h) Any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being.*

Mr. Foley's reports would have picked up any harm under this rubric, and while the earlier narrative as shown by the affidavits and pleadings in this case indicate that there were apprehensions of harm which father found very upsetting, these apprehensions have died down and would seem to be of less concern, especially having regard to the new arrangements arising from this judgment.

*(i) Where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them.*

These proposals insofar as they are applicable in this case may arise indirectly through the concessions indicated by father in his submissions where he had been facilitative of the mother's activities with the children at the weekend at a time when he was entitled to sole custody. The court also bears in mind that while the litigation history shows a number of court orders there was agreement at a certain stage which resulted in a resolution of an interlocutory High Court appeal as ruled by O'Hanlon J. The court should note that having regard to the desirability of achieving a appreciation of the children's needs (especially E's needs) by father, that the vast interests of the children will be served in future with agreed proposals made by the parents within the broad parameters of discretion which may be approved by the court.

*(j) The willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives.*

The court regards the willingness and ability of each of the child's parents in this case to facilitate and encourage the relations concerned in this paragraph to be an important positive factor in the case. However, where the criteria in this paragraph comes into real focus is in relation to the willingness and ability of father, and other relatives, to maintain and foster a relationship with his children. The father's willingness may not be so much questioned as his ability, as was highlighted in Mr. Foley's report. This ability is probably clouded by the great feeling of disappointment, which in objective terms father is feeling in relation to the disintegration of his marriage and being discommoded through moving out of the family home. It probably places him in a situation where he cannot "grow up with his children". The advice of Mr. Foley and the effect of the determination of this Court may well bring that aspect of father's personality into focus for him and enable him to address it more beneficially for his children's sake.

*(k) The capacity of each person in respect of whom an application is made under this Act—*

*(i) to care for and meet the needs of the child,*

*(ii) to communicate and co-operate on issues relating to the child, and*

*(iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates.*

In considering this aspect and circumstance it should be emphasised that in regard to their capacity, both father and mother, may be regarded as excellent parents. However under the Children and Family Relationship Act, 2015 s. 31(2)(k)(ii) ("communicate and cooperate on issues relating to the child") indicates a weakness on the part of the father within the context of that overall parental excellence, which if it goes unchecked might hinder, if not poison, the chances of good parenting in the future. It is important that the legislation has highlighted this aspect in para. (k) of the Act of 2015, and even more important that it is borne in mind to improve the prospects of good outcomes, in this marital situation, for the children in the future. It should be noted that whereas the legislation refers to the consideration of the child, the consideration of the court relates to all the children, insofar as the change in the order's appeal is concerned. For the sake of completeness it is appropriate to note that the court in its deliberations did not find it necessary to have considered any of the matters referred to in subs. 3, 4 and 5 of s. 31 of the Children and Family Relationship Act, 2015, for the purpose of giving this judgment.

27. Indeed, it is instructive having regard to the fact that father, in his submissions, drew the attention of the court to para. (a) of subs. 2 but did not consider that the court needed to be reminded of the criteria implied by para. (k), especially (k)(ii) thereof, in relation to the need to communicate and cooperate on issues relating to the child, and this shows that the recommendation of Mr.

Foley for the father to have the assistance of a psychologist to assist in gaining some insight into the manner in which he should approach his role in fully obtaining the best interest of the children in his care.

28. The court awaits proposals of counsel in relation to the compiling of an exact timetable of access and such further detail in relation to the finalisation of the order as may be necessary and in respect of any application for costs.