Neutral Citation: [2014] IEHC 642

**THE HIGH COURT**
**CIRCUIT APPEAL**
**FAMILY LAW**

**[2011 No. 77 CAF]**

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

**BETWEEN**

**B.S.**

**APPLICANT**

**AND**

**B.S.**

**RESPONDENT**

**JUDGMENT delivered this 17th day of December, 2013, by White, Michael J.**

1. The matters presently before the court arise from substantive proceedings which were originally heard in the Circuit Family Court and finalised by order of 7th July, 2011.

2. Substantive orders on appeal were made by this court on 22nd March, 2012.

3. There have been ongoing difficulties with access by the respondent to the two youngest children of the marriage, A and B. Access has not been successful since the respondent left the family home on the 23rd October, 2010. The order made by this court on the 22nd March, 2012 has not been complied with. There have been numerous court hearings since that date but access has not been restored successfully.

4. The respondent issued a motion on 21st October 2013, returnable for 5th November seeking a variation pursuant to s. 18 of the Family Law Act 1995 of the order of this Court made on appeal directing an apportionment of the net sale proceeds of the family home, 60% to the applicant and 40% to respondent. Both parties have consented to this Court dealing with the application to vary its order.

5. The motion and review of the difficulties over access were heard in this Court on 21st and 28th November and judgment was reserved.

6. The court in its judgment of 22nd March, 2012, set out briefly the history of the parties' marriage and the proceedings to that date.

7. The court refused the relief sought by the applicant to postpone the sale of the family home for ten years but decided that because of her responsibility to house the dependent children, the net sale price of the family home should be apportioned 60% in her favour.

8. The court directed the property should be put on the market from 1st July, 2012.

9. The property was not put on the market by 1st July, 2012. By letter of the 25th June, 2012 the applicant sought a deferral because of great difficulty and upset to the children. The respondent wrote directly to the applicant on 10th September, 2012 refusing deferral. By letter of the 25th September, 2012 the solicitors for the applicant wrote to the respondent's solicitors confirming agreement to nominate Harper O'Grady auctioneers to have carriage of sale. The court expressed its concern about the delay on 12th October, 2012.

10. In November, 2012, the parties' son C was very seriously injured in an accident.

11. By motion issued on 30th November, 2012, returnable for 7th December, 2012, the applicant sought an order varying the order of 22nd March, 2012, directing a sale of the family home, on the grounds of C's serious injuries and his future prognosis.

12. The court by order of 7th December, 2012, did not put a stay on the sale, but directed the auctioneer not to take any steps, by putting up signs, or conducting viewings of the property pending further order.

13. As the court wished to have a definitive prognosis on C's condition, the court directed affidavits be exchanged not later than 15th February, 2013.

14. There was some difficulty hearing the medical evidence The matter came before the court on 18th January, 8th and 22nd February, 1st, 11th and 19th March, 2013.

15. By order of the court on 22nd April, 2013, the sale of the family home was postponed until 2nd September, 2013.

16. Subsequently by letter of 27th August, 2013, the applicant's solicitors wrote to the respondent offering to buy out his 40% interest in the family home based on a valuation of €750,000.

17. The respondent replied on 2nd September, 2013. He alleged that the applicant had chosen to withhold information about financial support available to her for the purchase of alternative accommodation. He alleged the failure of the applicant to make earlier disclosure of the resources available to her and her true intentions had caused tangible damage to him. He indicated in that letter that he intended to ask the court to revise the shares in the family home.

18. Subsequently, the respondent issued the motion already referred to seeking a variation of the order of 22nd March, 2012.

19. In this motion, the respondent at para. 5 sought:-

> "5. Such order or orders, whether pursuant to the acts referred to in the title of this matter, the Guardianship of Infants Acts, the Constitution of Ireland or other lawful jurisdiction of this Honourable Court having regard to the failure of the applicant to adhere to the provisions of the orders of the Circuit Court and of this Honourable Court for access and the communication of information concerning the children to the respondent as are required to vindicate the personal and

parental rights of the respondent, whether by way of damages, the imposition of a monetary penalty, or as a factor proper to be applied on the variations sought at para. 1 of this notice of motion or in such other manner as to this Honourable Court seems just and equitable."

**Ongoing Failure of Access to the Youngest Children**

20. A and B are the youngest of the eight children of the marriage. A is now aged 16 and B is 13. The respondent had to leave the family home as a result of a barring order granted on 20th October, 2010 in the Circuit Court and affirmed on appeal in this Court on 22nd October, 2010. This order was discharged on 7th July, 2011.

21. B initially had been quite prepared to go on access visits but difficulties emerged quite early after the respondent's departure from the family home. By interim order of the Circuit Court of 13th December, 2010, access to B was ordered from 12pm to 6pm on a Saturday and 11am- 3pm on a Sunday. At this time, A and the next eldest child, D, were 13 and 15 respectively. No specific interim access order was made in respect of these children.

22. In the course of the Circuit Court proceedings, which commenced on 1oth August, 2010, it was agreed that a report pursuant to the provisions of s. 47 of the Family Law Act 1995 would be procured. This report, dated 10th June, 2011, was prepared by Dr. Gerard Byrne from interviews conducted between February and June 2011 with the applicant, the respondent and three of the children, D, A and B. An addendum by way of clarification was issued by Dr. Byrne on 30th June, 2011.

23. In the course of the interviews for this report, the applicant had told Dr. Byrne that of all of the children, B is the one who showed her father most affection, but that B had been upset by the applicant's behaviour since the applicant had told the respondent she wanted a separation.

24. In respect of A, the common evidence of the parties on appeal and interview with Dr. Byrne was that A was reserved, shy and very quiet. The applicant had told Dr. Byrne that A had not been on access with the respondent as she had been too busy to do so.

25. The applicant told Dr. Byrne that D would not go on access and did not have a good relationship with the respondent. The respondent told Dr. Byrne that he thought the children were upset with him because they thought he had upset their mother and the upset only started when the question of marital separation arose.

26. Dr. Byrne was of the opinion that an improvement in the access would only be achieved in the context of family therapy.

27. Dr. Byrne recommended alternative weekend access to B and A and also Wednesday overnight access.

28. The Circuit Court order of 7th July, 2011 stated, at para. 4:-

> "4. An order directing that the parties have joint custody of the dependent children of the marriage with the applicant to remain the primary custodian as heretofore.
>
> 5. An order directing that the recommendations of Dr. Byrne be implemented, see attached copy of recommendations. The family therapy and the therapy for the respondent for the child [A] to commence forthwith. With regard to para. 12(4) of Dr. Byrne's report direct that the overnight access to [A] and [B] not to commence until the children have returned to school in September to allow some intervention by way of family therapy before it commences and to enable [A] to have commenced psychotherapy, which Dr. Byrne deems appropriate.
>
> 6. In addition to the recommendations of Dr. Byrne, the court makes further orders as follows:-
>
> (a) direct that the parties desist from berating one another or each other's friends or family in front of the children, as clearly this is an ongoing matter of considerable upset for the children.
>
> (b) direct that each party support the other party's relationship with the dependent children of the marriage and encourage and foster good relations with that party and support the access arrangements that have been put in place.
>
> 7. An order directing that the current access arrangements continue with the applicant dropping the children off to the respondent's accommodation and the respondent to return the children to the gate of the family home. Noting the respondent sought to change the access on a Sunday to a Wednesday and the applicant had no difficulty in that regard direct that the current access be varied and that Sunday access is no longer to take place, an access to take place on Wednesday instead from 6.30pm to 9.30pm. The drop-off and return of the children as above.
>
> Direct that any alterations that are necessary to the access arrangements save as they currently or as they are to be into the future, the respondent is to receive at least 48 hours notice in that regard and further if there are any activities involved for the children during the period at which the respondent enjoys access, it is a matter for the respondent to drop the children off to those activities or collect them as may be necessary."

Unfortunately, the order could not be implemented.

29. O'Neill Regan and Company Solicitors wrote to Hayes and Company Solicitors on 14th July, 2011, stating:-

> "Following on the court case herein our client did all she could to encourage [B] and [A] to go to access with your client on 9th inst.
>
> [B] was in communication with your client and advised that she did not want to see him for a while.
>
> We wish to advise that our client is not intentionally or deliberately in breach of the Circuit Court order herein. She has done all she can to encourage [B] and [A] to go on access but that is not the wish of either of the children and to force it would cause upset to them.

> We are surprised to note that your client in communication with [B] last Saturday, advised her that her fees [for her school] were now going to be paid.
>
> Having regard to the upset that he has already caused to [B] we considered it inappropriate that he would make this comment."

30. There followed a series of letters between the solicitors for the parties wherein the appellant was asserting she was doing all she could to facilitate access while the respondent was alleging total non-cooperation with the recommendation for family therapy and ongoing non-compliance with the access order. Corry de Jongh of the Clanwilliam Institute had been conducting the family therapy which was not a success. The respondent formed the view that the family therapy was obstructed by the applicant.

31. This was the background to the ongoing difficulties about access at the time the appeal to the High Court was heard.

32. In order to try and break the impasse, this Court modified the access order to once a fortnight from Saturday at 11am to Sunday at 7pm and every Wednesday from 5pm to 8pm during school terms with an extension to 9.30pm on school holidays.

33. In order to deal with the concerns of the applicant about family therapy the court put in place a facilitation process. The court made the following orders:-

> "An order in accordance with s. 10(1)(f) of the Family Law Act 1995 and pursuant to s. 11 of the Guardianship of Infants Act 1964, as amended, granting joint custody of the minor children, to the parties with primary care and control to the applicant, access is obligatory until each child turns the age of 15. Custody and access to the respondent every second weekend from Saturday at 11am to Sunday 7pm and every Wednesday between the hours of 5pm and 8pm, extending to 9.30pm during school holidays. The respondent to bring the children to their sports games and functions on that weekend. The children to be collected and returned by the respondent to an agreed location apart from Wednesday at 5pm when the applicant shall bring the children to the respondent's home or agreed location.
>
> At the nomination of the applicant and the respondent, a facilitator to be appointed, a person to be agreed between the parties or in default nominated by the court to develop access. A and B must be made available for interview to the facilitator if nominated. The applicant can see the facilitator if she so wishes but her attendance is not obligatory. The cost of the facilitator to be borne by the parties equally."

34. There was some access after the High Court order but difficulties still remained. The parties could not initially agree on the person to act as facilitator, with the applicant suggesting Harry Law and the respondent suggesting Corry de Jongh who had been familiar with the issues.

35. When the matter came before the court again on 3rd May, 2012, Prof. Jim Sheehan was asked to act as facilitator.

36. Prof. Sheehan over a number of months attempted to facilitate the restoration of access between the respondent and A and B without success. Ultimately, the applicant told Prof. Sheehan at the end of September 2012 that the children did not want to attend further appointments with him.

37. Since the order on appeal there have been ongoing difficulties about other aspects of the ancillary orders and also allegations by the applicant and denials by the respondent, that the respondent was coming near the family home without reason breaking the spirit of the undertaking given by him in the Circuit Court on 7th July, 2011, to stay away from the family home. There have been numerous incidents many, of them in dispute. The court does not intend to detail them or resolve the conflicts, other than to comment that some of the behaviour of the respondent has been counterproductive and accelerated further his alienation from the family. The court refers in particular to the incident when the respondent was locked out of his apartment, went to the family home to source keys from D and became involved in an unpleasant incident during which the Gardaí were called.

38. There was no further progress on access up to the end of October when C suffered the devastating injuries already referred to.

39. The court subsequently heard a motion to postpone or vary the sale of the family home. Due to the trauma on the family as a result of C's injuries, little progress on access was possible.

40. Having sought Prof. Sheehan's advice, I decided to interview A and B directly. The interview took place on 15th February, 2013. At that meeting, B was adamant she would not see the respondent and when pressed on the issue, became upset. A said very little but stated she might meet her dad.

41. Subsequently, I spoke to G, the eldest son of the parties, who agreed to facilitate an informal meeting between the respondent, A and B. This unfortunately did not happen.

42. The court subsequently by order of 1st March, 2013, set in motion a further process which was hoped would break the impasse. Prof. Sheehan was prepared to facilitate this but the applicant preferred another facilitator.

43. Prof. Sheehan arranged for the children to see Mr. Robert Foley, Psychotherapist. A did not attend any meetings but B attended for three sessions. Subsequent to B's attendance, Mr. Foley informed the respondent that B had told him she did not want access. Mr Foley was of the opinion that it was her own decision and was not influenced by the applicant.

44. The parties have strong views about who is responsible for the breakdown of access.

45. The applicant asserts that she has done all she can to facilitate access and the children have made up their own minds. She has denied trying to influence the children in any way against the respondent.

46. She refutes the suggestion that the deterioration in the older children's relationship with the respondent began in March 2010, when the marriage had irretrievably broke down. She stated the breakdown of the relationship between the respondent and the older children and the effect on them was in being for some time and was one of the reasons she initiated proceedings to separate. The applicant accepts that A and B had a constructive relationship with the respondent but asserts they were affected by the respondent's behaviour in the family home and the difficult relationship with his older children.

47. The respondent asserts that he had a constructive relationship with all his children except F up to March 2010. He accepted

there were difficulties but denied his behaviour had an impact on his relationship with his children.

48. The respondent alleges the applicant engaged in obstructive behaviour, and did not insist the children keep up their relationship with their father. He is incensed about the lack of cooperation with Corry de Jongh and Prof. Sheehan and the delay in those processes.

49. He viewed the period from his departure from the family home on 23rd October, 2010 for a period of three months as vital, when he felt the applicant failed to encourage access.

50. It is not easy to discern the reasons for the breakdown of the relationship between the respondent and A and B.

51. The respondent has a very forceful personality and has little objective insight into the reasons for the breakdown of the marriage and the impact of his behaviour on the relationship with the applicant and the children.

52. This Court does not accept the breakdown and the continuing rift with his older children have been caused by the children taking the applicant's side in the marital dispute. His own behaviour in the years prior to the breakdown substantially contributed to that rift.

53. It is quite possible that the younger children, A and B were affected by this.

54. Subsequent to the applicant's decision to end the marriage and to apply to have the respondent excluded from the family home, there was an onus on her to ensure the youngest children attended for access.

55. This did not happen. Probably, the breakdown of access occurred in the six months from 23rd October, 2010, and proved impossible to repair. It was vital the applicant was more forceful with the youngest children, who at that time were 13 and 10, were mature enough to attend access and had a constructive relationship with the respondent prior to his departure from the family home.

56. The court accepts the applicant was under intense pressure during this time, having to deal with the breakdown of a long standing marriage, financial insecurity and the responsibility of a large family.

57. The serious injury suffered by C affected further the ability of the court to re establish access.

58. In conclusion, the applicant did not alienate the respondent from any of his children. His own behaviour substantially contributed to that rift. However, the applicant handled access to the two youngest children badly which has led to even more bitterness that could have been avoided.

59. It would be unjust to penalise the applicant for these unfortunate events.

60. The court will not take into account the breakdown of access in the motion to vary the apportionment of the net sale proceeds of the family home.

61. The court accepts the evidence of the applicant that the offer of financial assistance from her sister and brother in law, Mr. and Mrs. X, only materialised shortly before the letter of 27th August, 2013.

62. The appropriate response from the respondent was to reject the offer. There was no need to bring a motion to vary the court's order.

63. The reasons why the court made the adjustment to the apportionment of the sale price of the family home is set out in the court's judgment of the 22nd March, 2012.

64. The applicant still has the responsibility to house E, D, A and B. There has been no change in circumstances.

65. The relief sought in the motion is refused.

66. The access order of 22nd March, 2012 in respect of A has expired as she is now 16 and the respondent has to try and develop some direct relationship with her. The access order with B still stands, but she has made her wishes clear at present.

67. It is still the court's hope that the respondent can restore a constructive relationship with his children, which will not be easy.