THE HIGH COURT

IN THE MATTER OF THE JUDICIAL SEPERATION AND FAMILY LAW REFORM ACT 1989, THE FAMILY LAW ACT 1995 AND THE DOMESTIC VIOLENCE ACT 1996

[2011 No. 94CAF]

BETWEEN:

M.

APPLICANT/RESPONDENT

AND

McS.

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 11th day of December, 2015

1. This judgment deals with a notice of appeal served by the respondent/appellant (father) on the 8th August, 2011, appealing an interlocutory order made by Judge Nolan, in the Circuit Court, on the 29th July, 2011. The interlocutory Circuit Court order dated the 29th July, 2011, the subject of the appeal, sets out that from that day until the 11th January, 2012, all access between the respondent/appellant (father) and the child should then be removed. This order had become moot by the time this matter came on for hearing before this Court, on the 19th December, 2012. The problem posed for this Court was what to do in a case where a report, under s.47 of the Family Law Act, 1995, on the 5 year old son had been furnished by the Court to the parties, and there remained serious outstanding disagreements between the parties in relation to custody and access. These disagreements required (in the interest of the infant) urgent resolution by court order.

2. The applicant/respondent (mother) filed a notice of motion on the 7th June, 2011, seeking the attachment of the respondent/appellant (father) for his failure to comply with the order of Judge McDonnell made on the 19th April, 2010. This notice shows the decree of acrimony that existed between the parties - and the respondent/appellant (father) had served a similar cross motion.

Appeal

3. The High Court is the Court of final instance in family law matters appealed from the Circuit Court, as is set out in the Courts of Justice Act 1936, s.39 re-enacted by the Courts Supplemental Provisions Act 1961, and outlined in the decision of Murray J. in *P. v. P.* (unreported, Supreme Court, 31st July, 2001) and Henchy J. in *Andrews Productions v. Gaiety Theatre* [1973] I.R. 295. In *P. v. P.* Murray J. explained that the terms of this section are "comprehensive and definite" in relation to an appeal from the Circuit Court to the High Court being "final and conclusive". It was argued in the *P. v. P.* case that the hearing in the High Court could not be considered a rehearing of the evidence, as is required by s.39, due to the fact of no evidence having been called during the appeal in the High Court Murray J. rejected this, outlining that at hearing "all issues were open for decision by the learned High Court judge, and the fact that the party appealing the decision decided not to call evidence on the one issue which remained in contention, for whatever reason, does not deprive the hearing before the High Court of its character as an appeal from the Circuit Court."

4. The Superior Court Rules, order 61, deals with appeals from the Circuit Court to the High Court. Order 61 r.8 of the Superior Court Rules sets out that:-

> "Where any party desires to submit fresh evidence upon the hearing of an appeal in any action or matter at the hearing or for the determination of which no oral evidence was given, he shall serve and lodge an affidavit setting out the nature of the evidence and the reasons why it was not submitted to the Circuit Court. Any party on whom such affidavit has been served shall be entitled to serve and lodge an answering affidavit or to apply to the court on the hearing of the appeal for leave to submit such evidence, oral or otherwise, as may be necessary for the purpose of answering such fresh evidence, provided, however, that the Court may at any time admit fresh evidence, oral or otherwise on such terms as the Court shall think fit, and may order the attendance for cross-examination of the deponent in any affidavit used in the Circuit Court or the High Court."

5. The Rules of the Superior Courts, order 86A r.4(b), deals with the issue of admitting new evidence in appeals to the Court of Appeal:-

> "(b) further evidence may be given without special leave on any appeal from an interlocutory judgment or order or in any case as to matters which have occurred after the date of the decision from which the appeal is brought"

6. The issue of new evidence being adduced on appeal was dealt with by this court in *P.C. v. P.W.* (unreported 31st October, 2008). In this decision the Court set out that:-

> "In general, the Court, when dealing with Circuit Court appeals in family law matters is conscious that there may be many developments in cases appealed to this Court from the time of the Circuit Court order to the date of hearing. Parties in family law proceedings may have abandoned their psychological withdrawal, which might typify their approach, even jointly, to the Circuit Court hearing and may either, separately or jointly, adopt a more pragmatic approach to the High Court hearing often involving mutual open offers. Leaving the High Court to decide issues which might not have been before the Circuit Court. Parties may upon reflection on the Circuit Court order decide that, with the intervention of bank borrowing a better solution might be obtained for all, and may wish the High Court to resolve outstanding issues in relation to a better financed set of proposals. Children grow up and mature at a rapid rate, and it would be unrealistic to expect growing teenagers not to interact with a Circuit Court decision so as to present the same parameters of evidence in the High Court hearing- especially if there is a significant lapse of time."

7. In *L.T v. J.T*. (unreported, 14th December, 2012) in considering a matter relating to custody and access, White J. discussed the jurisdiction of the family court in dealing with issues on appeal from the Circuit Court. He set forward, at para. 29:-

> "It is not appropriate to exercise the inherent jurisdiction of this Court side by side or in addition to hearing an appeal from the Circuit Court, unless the Court decides that a remedy is required, which cannot be provided pursuant to the limited jurisdiction of the appeal. If this Court exercises its inherent jurisdiction, logic would dictate that a right of appeal would arise to the Supreme Court subject to that court's view on the matter."

8. As the right to appeal is set out in statute, to deny it would be an invidious discrimination under the Constitution against the respondent if substantial matters were raised on appeal in respect of which the respondent might expect to have determined on a further appeal. The High Court must be careful in dealing with new issues that arise during the course of the hearing, that cannot be appealed to a higher court, in accordance with the decision of *P. v. P.* In forming a decision in a family law case there should, however, be consideration of new issues that arise, as by the nature of human development and relationships, dynamics change and diversify, particularly with the growth and maturity of children. It would be erroneous not to take into consideration these changes balancing the necessity thereof against the imperative of preserving and protecting the right of appeal as much as possible.

9. The question arises as what is the High Court to do, where it is asked to hear a case relating to an appeal, which has become moot, in a case dealing with the welfare of an infant in family law proceedings. Clearly, the High Court should keep in mind the paramountcy of the interest of the infant concerned on the appeal before it strikes out the moot appeal. In the first instance the Court should be satisfied that the outstanding issues (if any) in the litigation before the Circuit Court may be addressed without delay. Secondly (as occurred in this case) if it appears that the Circuit Court may not be in a position to afford a speedy hearing of such outstanding issues (as occurred in this case), then the question arises as to what jurisdiction the High Court on appeal has to deal with such urgent issues as may arise relating to the welfare of the infant, pending the hearing of outstanding issues by the Circuit Court, after a delay of some time having regard to the realities of scheduling in the Circuit Court. Senior counsel for the parties did not offer any assistance in relation to what the law dictates in such instances. Neither were they able to assist the Court in relation to any precedents applicable where the jurisdiction of the Court had been significantly reduced or eliminated by the afflux of time. This Court decided that the approach should be to examine the situation with a view to applying protective measures in the interests of the infant pending the matter being fully heard in the Circuit Court. This Court had taken a similar approach in crisis situations dictated by failing jurisdiction in other cases in recent years, and had been directed towards it by the concept of protective measures referred to in Art. 20 of the Brussels II bis regulation. Article 20 of the Brussels II bis regulation sets out as follows:-

> "Provisional, including protective, measures
>
> 1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter."

10. While the provisions of Art.20(1), quoted above, present the options for this Court as a question begging exercise, insofar as the Article directs that the measures to be taking are such as "maybe available under the law of the Member State", the general approach of Art.20 is broadly suggestive of a practical approach of the Court to deal with situations where the Circuit Court, from which the appeal has been taken, may not immediately be in a position to deal with all measures necessary for the protection of the infant.

11. This Court draws considerable support from taking a pragmatic view in relation to the power of the Court in such circumstances to make orders in the nature of protective measures, having regard to the practical approach taken by the Supreme Court in the *Baby Ann* case (in the matter of " Ann", a child *E.N. and M.L.N. v. The H.S.E., F.G. and A.G. and An Bord Uchtála, Notice Party,* [2006] 4 I.R. 374.) where the Supreme Court had decided the issue of principle, that the married parents should have custody of the child which had gone through an adoption procedure, but nevertheless made orders providing for the smooth transition of custody from the proposed adoptive parents to the martial parents. The Court is further encouraged by the fact that whereas mootness gives rise to an insufficiency of jurisdiction, the courts in many such situations may make an order in respect of party and party costs. Keane R., on "Equity and the Law of Trusts in the Republic of Ireland" 2.ed. (2011) at p.120 makes reference to *Re. O'Neill* [1943 IR 562] where Maguire P. accepted the view expressed by Kekewich J. in *Re. Tollemache* [1903 1 Ch 457] where he sanctioned the advancement of a sum to an infant contingently entitled under a trust, although such action was not sanctioned by such trust. In that case Kekewich J. explained that it was an illustration of the maxim that necessity has no law. The broad terms the Guardianship of Infants Act 1964 s.11(1) of would also add support to the foregoing analysis. The nature of such orders made by the High Court must be by definition interlocutory in nature, and, (exceptionally for High Court orders) reviewable by the Circuit Court when it engages in any further interlocutory hearing or a final hearing in the Circuit Court of the matter.

The Hearing

12. Mr. Cormack Corrigan S.C. for the mother, objected from the outset to the appeal going ahead, he advert to the fact that Maureen Clark J. had made the order for a report to be prepared under s. 47 of the Act of 1995, appointing Prof. Sheehan, in August, 2011. This report was dated the 11th October, 2012, and released to the parties sometime later. He submitted that the only part of the Circuit Court order which was appealed related to the six month prohibition on access with the father, which period had expired. He further submitted that not only did the Court not have jurisdiction by reason of mootness, but to hear issues arising from the s. 47 report would be to deal with matters which had never been canvassed in the Circuit Court and any decision thereon would be made without the mother having the benefit of having the ability to take an appeal to the High Court, as she would have had if the first hearing thereof where in the Circuit Court.

13. Ms. Inge Clissmann S.C. for the father urged on the Court that an examination of the correspondence between the solicitors, relating to the s. 47 and report, showed that the solicitors were debating the logistics of having a hearing and no mention was made of mootness or lack of jurisdiction. Ms. Clissman submitted that it was evident from this correspondence that an estoppel arose, she stated that it was only when Mr. Corrigan came on record to represent the mother in the High Court that the issue of mootness and/or jurisdiction arose; and that it was too late to raise such concerns by reason of the operation of estoppel by correspondence. This Court decided that while the correspondence was silent in relation to the issues of mootness and lack of jurisdiction, and discussed matters as if the appeal were proceeding as normal, the correspondence was not so clear as to create an estoppel against raising mootness and lack of jurisdiction, as the same were not canvassed or agreed in correspondence in anyway. The Court accepted the arguments of Mr. Corrigan, that the appeal was in fact moot but sought the views of the parties in relation to whether the Circuit Court would be ready to deal with the case immediately upon this Court striking out the appeal. The consensus among counsel was that there was no guarantee of an early hearing in respect of the outstanding issues. With Prof. Sheehan's s. 47 report

raising urgent questions regarding Christmas access, with the parties locked in their acrimonious differences about same, and, as the question of an early trip for the infant to Boston was strongly canvassed by Prof. Sheehan I decided that Christmas access, together with the early Boston trip would be dealt with by the Court under the rubric of protective measures.

14. The Court heard evidence from Prof. Sheehan and also read his s. 47 report. Prof. Sheehan was most adamant under cross-examination that although the mother had agreed to a Boston trip as early as August, 2013, the infant who is now five was greatly in need of establishing and preserving his social capital of numerous cousins and older relatives in Boston in early course. He put the matter so strongly as to suggest that an early solution of the Boston problem might be a special element – "a silver bullet" – which could take the chronic acrimony out of the parent's relationship. Prof. Sheehan also stated that:-

> "Although mother complained of never having seen her son getting the gifts from santa clause on Christmas morning she would have to reconcile herself to the necessary level of "give and take" which would leave access to her after lunch on Christmas day with further balanced access for father and mother with greater periods of access for father having regard to the fact of the increasing age of the infant."

15. Mr. Corrigan expressed the concerns of the mother that when the father took the infant to Boston his greater connection, employment and previous career in the U.S. would lead to the distinct possibility of a non-return. The Court discussed with the parties the options of protective measures to be taken in the U.S. as a condition of the infant being taken in early course for a holiday with his cousins in Boston. Ms. Clissmann stated, that the fact that the crime of abduction was taken very seriously in the U.S. would itself be a sufficient protective measure. The Court continued to discuss with the parties the possibility of having some protective measure in the nature of a minor order to be assisted in terms of scheduling by judicial networking, if necessary. The Court indicated that as an exceptional measure this Court would retain seisin of this aspect of the case, as a protective measure, to facilitate, (at short notice) any request by either party for such networking.

16. In addition to deciding that the Boston holiday should be afforded to the infant in early course, rather than been deferred to August, 2013, the Court decided that access arrangements for the infant with the father would be along the lines recommended by Prof. Sheehan. While this Court take's the view that Mr. Corrigan's apprehensions about the non-appealability of these decisions would be assuaged by the acknowledgment of this Court that they could be regarded by the Circuit Court as its own interlocutory decisions and therefore not to be binding on the Circuit Court as a final decision of the High Court. The Court is aware that Mr. Corrigan apprehensions might continue to apply to the residuary non appealable elements of the decision. These apprehensions can only be a reduced and dealt with by a consideration of the factors referred to in the passage in *C v. W* set forth above. Indeed, it is to be wondered what importance these apprehensions in relation to the non-availability of an appeal opportunity have from the parties, when the conduct of both parties themselves is considered to have allowed the appeal before this Court run into mootness. This outcome could have been avoided had the parties been alert to the case management imperative applicable to all infant cases, - and this one in particular. In the first instance, the parties should have requested Clark J., when ordering the s. 47 report, to restricted in terms of time targets. For instance, although the report was ordered in August, 2011, it was not furnished until October, 2012, and then, only, after the most extensive trawl of taking of statements from many individuals including the parents. It is to be wondered if a less extensive report could have delivered the same results, and the terms of reference could have reduced the extent of the research to be done by Prof. Sheehan to a level which would have enabled the report to be presented within a timescale such as would have prevented mootness. The Courts have developed such an approach in more recent years, and this case may represent an object lesson in relation to the hazards pertaining to unfocused use of s. 47 reports. The Court makes these comments having regard to the excellence and extensive nature of the report prepared by Prof. Sheehan which is typical of the top-class work produced by s. 47 reporters to the Courts if left to their own devices operating in accordance with the best professional standards. However, such standards may sometimes have to be modulated to serve the overriding requirement of case management producing timely results for infants involved in litigation, the prolongation of which may be seriously damaging to them. Each party shall be at liberty to apply to this Court to invoke or bring to an end any residual order allowing them to apply to this Court to facilitate whether by way of judicial networking or otherwise the scheduling of any protective or minor order which might be required for the early holidays of the infant in Boston.