

THE HIGH COURT

CIRCUIT APPEAL

[2011 No. 32 CAF]

IN THE MATTER OF THE JUDICIAL SEPARATION

AND FAMILY LAW REFORM ACT 1989

AND IN THE MATTER OF THE FAMILY LAW ACT 1985

BETWEEN

L.T.

APPLICANT

AND

J.T.

RESPONDENT

JUDGMENT delivered by White J. on the 14th December, 2012

1. The applicant issued a motion dated the 7th November, 2012 returnable for the sitting of the court on the 9th November, 2012 to re-enter proceedings and seek other relief.
2. The court heard submissions on the jurisdiction of the court to hear the motion on the 23rd November, 2012 and reserved its judgment.
3. The substantive hearing was an appeal from an order of the Circuit Court of the 28th March, 2011 in judicial separation proceedings. The appeal was heard on the 26th, 27th and 28th June and the 9th, 10th, 11th and 13th July. Judgment was delivered on the 31st day of July, 2012. The motion now issued relates to the ongoing issues of custody and access to the only child of the marriage M. born on the 27th September, 2007, aged 5.
4. The *ex tempore* judgment of the court sets out a very difficult history of custody and access since the applicant left the family home in Carlow in August 2008 and returned to live with her mother in Co. Louth.
5. In the course of the proceedings in the Circuit Court, two s. 47 Reports were prepared by Dr. Anne Byrne Lynch dated the 30th October, 2009 and 1st February, 2011 respectively.
6. In the course of the appeal to the High Court the respondent applied by way motion to have a different assessor carry out a s. 47 Report. That application was acceded to and Mr. Robert Foley, Clinical Psychologist was appointed to carry out the report. He prepared a written report dated the 20th June, 2012 and gave evidence in the course of the appeal.
7. In addition Marie Louise McGovern, a Social Worker with the HSE prepared a written Assessment on the 30th January, 2012 and a Social Work Report from the Child Protection and Welfare Team, Dundalk HSE the 9th and 13th January, 2012 was also presented to the court.
8. The court on the 31st day of July, 2012 made an order pursuant to s. 11 of the Guardianship of Infants Act 1964, as amended. Some issues remain to be finalised either by agreement of the parties, facilitation or in default by the court. These related to the following:-
 - (a) The collection and delivery times on weekend access.
 - (b) The date and time of midweek access.
 - (c) The periods of time, dates and times for equal summer access and the periods, dates and times for the Christmas holidays.
9. The court requested Mr. Foley to recommend a facilitator. He recommended Catherine Irwin, Solicitor. I understand that no facilitation has taken place to date.
10. The reliefs sought in the notice of motion are to re-enter the appeal for further consideration and to vary aspects of the custody and access orders made on the 31st July, 2012.
11. The applicant also seeks to have a guardian *ad litem* appointed for M. pursuant to the provisions of s. 11 of the Guardianship of Infants Act 1964 or pursuant to the inherent jurisdiction of this court. The issues which have to be decided by this court as a preliminary issue are:-
 - (1) Has this court the jurisdiction to hear the motion?
 - (2) Has this court jurisdiction to appoint a guardian *ad litem* for M?

(3) If the court has jurisdiction, has it the discretion to decline or accept jurisdiction?

12. When the High Court is hearing an appeal from the Circuit Court, it is not conducting a hearing in accordance with the inherent jurisdiction of the court or conducting a hearing at first instance.

13. The High Court and the Circuit Court have a concurrent jurisdiction to grant reliefs pursuant to the Judicial Separation and Family Law Reform Act 1989 and the Family Law Act 1995. If the proceedings are taken in the Circuit Court at first instance a right of appeal lies to the High Court and if the proceedings are taken in the High Court at first instance a right of appeal lies to the Supreme Court.

14. Appeals from the Circuit Court to the High Court are governed by Order 61 of the Rules of the Superior Courts. The rules are silent as to the court to which a motion to review or enforce should be brought.

15. Order 61, rule 20 states:-

"Every judgment or order of the High Court on Circuit and of the High Court sitting in Dublin may (unless the court shall otherwise direct) be enforced by execution order issued by the Circuit Court in accordance with the Rules of the Circuit Court for the time being in force as if it were a judgment or order of the Circuit Court".

16. The court is of the view that where family law proceedings are initiated in the Circuit Family Court, and appealed to the High Court, and that court varies the order of the Circuit Court, any motion to enforce the relevant order, can be brought to either the Circuit Court in the original county, which heard the application, or the High Court sitting in Dublin or on circuit.

17. A motion to review or vary the order pursuant to the provisions of s. 18 of the Family Law Act 1995 or s. 22 of the Family Law (Divorce) Act 1996, must be brought to the court of first instance in this case the Circuit Court.

18. Custody and access orders are never final orders until the minor reaches the age of majority at 18 and has the mental capacity to make decisions.

19. Geoffrey Shannon in his legal text *Child Law* 2nd Edition at para. 12.77, p. 744 states:-

"All custody and access decisions are "interlocutory" by nature. Thus a decision is never final and conclusive but is open to variation, should the welfare of the child so demand. The original decision may be changed should altered circumstances or new information require it. Indeed, s 12 of the Guardianship of Infants Act 1964 enables a court to vary or discharge any previously made custody or access order in respect of a child. This led O'Flaherty J. in *S v S* [1992] 1 I.L.R.M. 732 to remark that:

"There must be a better solution to cases of this kind than to have protracted High Court proceedings with an appeal to the Supreme Court. As the situation was ongoing, the matter should be remitted to the District Court or Circuit Court for the purpose of monitoring progress at any easily accessible, local venue."

20. Denham J. further underlined the variable nature of orders made under the Act of 1964 when she noted in *C. v B.* [1996] 1 ILRM 63 that:-

"[t]he decision relating to custody of a child, especially a baby ... is never final but evolves with the child, retaining in changing times the fundamental concept of the welfare of the child".

21. A discretion always rests with the court dealing with custody and access disputes pursuant to the Guardianship of Infants Act 1964, to retain seisin of a case for the purposes of reviewing orders already made, once it reserves its position by either granting liberty to apply, indicating that it will retain seisin or indicating that it will review certain matters or deal with certain matters in default of agreement.

22. Any court however in exercising its jurisdiction to consider an application to vary a custody or access order, at all times having the welfare of the child as its paramount consideration must be careful to ensure that fair procedures are followed, and the jurisdiction of the court is not abused.

23. Where possible a party dissatisfied by an order of substance, should have a right of appeal.

24. Discretion must rest with the court of final appeal, in this case the High Court on appeal from the Circuit Court, to accept jurisdiction to re-open matters it has recently decided.

The Appointment of a Guardian Ad Litem

25. Section 28 of the Guardianship of Infants Act 1964, as inserted by s. 11 of the Children Act 1997, has not yet been commenced.

26. Section 28 states:-

"(1) If in proceedings under section 6A, 11 or 11B the child to whom the proceedings relate is not party, the court may, if satisfied that having regard to the special circumstances of the case it is necessary in the best interests of the child to do so, appoint a guardian *ad litem* for the child.

(2) Without prejudice to the generality of subsection (1), in deciding whether to appoint a guardian *ad litem*, the court shall, in particular, have regard to –

(a) the age and understanding of the child,

(b) any report on any question affecting the welfare of the child that is furnished to the court under section 47 of the Act of 1995,

(c) the welfare of the child,

(d) whether and to what extent the child should be given the opportunity to express the child's wishes in the

proceedings, taking into account any statement in relation to those matters in any report under section 47 of the Act of 1995, and

(e) any submission made in relation to the matter of the appointment as a guardian *ad litem* that is made to the court by or on behalf of a party to the proceedings or any other person to whom they relate.

(3) For the purposes of this section, the court may appoint as a guardian *ad litem* the person from whom, under section 47 (1) of the Act of 1995, a report on any question affecting the welfare of the child was procured, or such other person as it thinks fit.

(4) If having regard to the gravity of the matters that may be in issue or any other special circumstances relating to the particular case, it appears to the court that it is necessary in the best interests of the child that the guardian *ad litem* ought to be legally represented, the court may order that the guardian *ad litem*, be so represented in the proceedings.

(5) The fees and expenses of a guardian *ad litem* appointed pursuant to subsection (1) and the costs of obtaining legal representation pursuant to an order under subsection (4) shall be paid by such parties to the proceedings concerned, and in such proportions, or by such party to the proceedings, as the court may determine."

27. Mr. Corrigan on behalf of the applicant has argued that the Circuit Court and the High Court on appeal from the Circuit Court has power under the provisions of s. 11 of the Guardianship of Infants Act 1964, to exercise its discretion to appoint a guardian *ad litem*.

28. He has also argued that pursuant to the inherent jurisdiction of the High Court, this court has such a power.

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.

30. I am reluctant in this case to deliberate on the power of the Circuit Court or the High Court on appeal to appoint a guardian *ad litem*, as it is not a suitable case to do so, as this application can be decided on different grounds. There may well be a future case where the court at first instance or on appeal, considers it appropriate to appoint a guardian *ad litem*, and has to then examine its powers to do so.

31. I am satisfied that discretion does rest with this court to either accept or reject jurisdiction of a motion seeking relief, which seeks to vary orders that the court has already made, pursuant to s. 11 of the Guardianship of Infants Act 1964.

32. As the Circuit Court and the High Court have considered three s. 47 reports and the court has recently heard the appeal, it is not appropriate to consider the relief sought appointing a guardian *ad litem*. It is open to either party at a future date to make that application to the court of first instance the Circuit Court in this case, which would thus preserve any party's right of appeal.

33. As this Court by its order of the 31st July, 2012, granted liberty to apply, and as there are issues already before the court which have not been finalised it is appropriate to formally re-enter the matter and to allow the applicant to seek the relief set out at paras. 3, 4 and 5 of the motion.

34. It is appropriate for this court to hear the application to substitute midweek access, with further weekend access, as the application before it is to substitute another period of access for one the court has already granted.

35. If under the general provisions of relief, this Court is being asked to change its orders in a fundamental way, it would be appropriate to refer it back to the Circuit Court.

36. The court will allow the respondent suitable time to file a replying affidavit.