

THE HIGH COURT

FAMILY LAW

[2012 No. 97 and No. 98 CAF]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989

AND IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

A.B.

APPLICANT/RESPONDENT

AND

C.D.

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Keane delivered on the 2nd April 2014

Introduction

1. This is an application on behalf of the applicant/respondent in these proceedings ("the mother") for Orders excluding *bona fide* representatives of the press from Court during the entire hearing of a particular motion brought in the proceedings by the respondent/appellant ("the father"), and prohibiting the publication of any evidence given, or referred to, during the hearing of the motion.

2. Both Orders are sought pursuant to the provisions of section 40(3A) of the Civil Liability and Courts Act 2004 ("the 2004 Act"), as inserted by section 5 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013 ("the 2013 Act"). That newly inserted sub-section came into operation on the 11th January 2014 under the terms of Courts and Civil Law (Miscellaneous Provisions) Act 2013 (Sections 3 to 12) (Commencement) Order 2014 (S.I. No. 5 of 2014).

The change in the law

3. Under section 34 of the Judicial Separation and Family Law Reform Act 1989 ("the 1989 Act") and section 38(6) of the Family Law Act 1995 ("the 1995 Act"), proceedings under those Acts must be heard otherwise than in public. In an earlier preliminary decision relating to the conduct of this motion, I found that under those provisions the Court had no discretion to permit Times Newspapers Limited ("Times Newspapers") to have a reporter attend the hearing of the motion for the purpose of reporting upon it; *A.B. v. C.D.* [2013] IEHC 578.

4. The coming into force of sections 40(3A) and 40(A) of the 2004 Act has fundamentally altered the position. The key principle, set out at section 40(3A)(a) is that "nothing contained in [the 1989 or 1995 Acts] shall operate to prohibit bona fide representatives of the Press from attending proceedings to which the relevant enactment relates."

5. Accordingly, *bona fide* representatives of the Press are now entitled to attend proceedings under the 1989 and 1995 Acts, subject to the exceptions contained in section 40(3A) of the 2004 Act. Where those exceptions apply, the Court may by Order –

(I) exclude, or otherwise restrict the attendance of, *bona fide* representatives of the Press from the Court during the hearing or particular parts of it, or

(II) prohibit or restrict the publication or broadcasting of any evidence given or referred to during the proceedings or any part of such evidence.

That sub-section goes on to provide that an order providing for any restriction may contain such conditions as the court considers appropriate.

6. Section 40(3A)(b) of the 2004 Act defines the circumstances in which an exclusion, prohibition or restriction of the kind just described can be ordered as those where:

"[A] court is satisfied that it is necessary to do so-

(i) in order to preserve the anonymity of a party to the proceedings or any child to whom the proceedings relate,

(ii) by reason of the nature or circumstances of the case, or

(iii) as it is otherwise necessary in the interests of justice."

7. Section 40(A) of the 2004 Act, as inserted by section 6 of the 2013 Act, makes it a criminal offence for any person to publish or broadcast, or cause to be published or broadcast, any information about a matter which would be likely to lead members of the public to identify the parties to proceedings to which section 40(3A) relates.

8. Accordingly, I must now consider the mother's application for an Order entirely excluding *bona fide* representatives of the press from court during the hearing of the father's motion and an Order prohibiting completely the publication or broadcasting of any

evidence connected with the application. Times Newspapers Limited ("Times Newspapers"), which wishes to have a reporter present in court for the hearing of the father's motion, opposes that application, as does the father, who is a litigant in person.

The underlying proceedings

9. The underlying proceedings have been brought under the Judicial Separation and Family Law Reform Act 1989 and the Family Law Act 1995. The parties have been in litigation for over a decade. They are now divorced and the remaining issues between them centre on the custody and care of their minor children.

The motion to which the present application relates

10. The mother seeks to exclude the Press from, and to prohibit the publication or broadcast of any evidence connected with, the father's application for an Order "striking out and/or setting aside" an Order made by Abbott J. in this Court on the 28th February 2013. That Order addresses a number of custody and access issues concerning two minor children of the parties. For completeness, it should be noted that, on the 21st July 2010, Abbot J. had made an Order addressing broadly the same issues on the facts as they then stood. The provisions of that Order were overtaken by subsequent events. Those events precipitated a number of applications to the Circuit Court. The resulting Circuit Court orders were then appealed to this Court, culminating in the making of the Order the father now seeks to impugn.

11. The father seeks to have that Order struck out or set aside by reference to a particular matter addressed in the judgment of Abbot J. delivered on the 11th July 2013. At paragraph 7 of that judgment, Abbot J. states:

"I asked [the mother] if, after the making of the High Court order [of the 21st July 2010] but before the furnishing of reasons [in a judgment delivered on the 26th July 2011], she asked a Dail Deputy to make enquiries for her in relation to the matter from the judge, and that the Dail Deputy sought the services of a Circuit Court judge to ask me was it a fact that [one of the parties' minor children] had been sent away to the primary care of the father. She agreed that she had made that approach to the Dail Deputy and apologised on the basis that it was at a time when she was unrepresented. I informed the court that on being asked the question by the Circuit Court Judge (quite improperly), I replied that a judgment would issue on the web in due course in relation to the matter."

12. At paragraph 10 of that part of the same judgment, headed "Findings", Abbot J. concluded (on the relevant point):

"I indicated to the parties that notwithstanding the entirely improper interference of mother via political representative and judge, that I did not propose to disqualify myself such as other judges might have done in the circumstances and the parties proceeded to authorise me to speak to [the minor child concerned] on the *P.O.D v. S.J.N* principle, which would indicate consensus of the parties that I should continue to act, notwithstanding this impropriety by mother and her fellow actors."

13. In the application the subject of the motion now at issue, by reference to the matters addressed in the portions of the judgment just cited, the father seeks to overturn the Order made by Abbot J. on foot of that judgment.

Relevant matters

14. Section 40(3A)(c) of the 2004 Act sets out various matters to which the Court must have regard in considering an application to exclude the Press or to prohibit or restrict reporting. The first such principle is "the desirability of promoting public confidence in the administration of justice." Next, the Court is empowered to consider any other matter that appears to it to be relevant. Thereafter, the Court is required, in particular, to have regard to eight enumerated considerations, not all of which are relevant to the present application. Those considerations that are relevant and upon which the mother placed reliance are addressed in the paragraphs that follow.

Considerations relating to the children

15. The first such consideration, at section 40(3A)(c)(i), is the best interests of a child to whom the proceedings relate. Section 40(3A)(c)(i)(II), requires regard to be had to the views, if any, of a child to whom the proceedings relate who is, in the opinion of the court, capable of forming his or her own views. On behalf of the mother, the Court was requested to interview two of the children of the parties in order to elicit their views. As the relevant provision is couched in mandatory terms and as the principle it enshrines is, in any event, a central one in family law generally, the Court acceded to that application.

16. The Court interviewed the children on the 12th February 2014. The first child interviewed by the Court did not want to see anything reported in the papers. The child also expressed a concern that if certain events in which the child was involved were reported upon it would make the child clearly identifiable to a number of people and would cause the child embarrassment. The second child expressed the view, in common with the first, that their family has already been identified in the locality in which they live as the family involved in this case, and as such they are already the subject of gossip. The second child gave the specific example of another child who brings up the case every so often when they are on the bus together and who, in the words of the second child, "intimidates" that child by doing so and by telling other people about the case, which the second child finds very stressful. The second child also expressed a concern that, if certain events involving the first child were reported upon, it would involve the disclosure of personal details and would permit the identification of the family concerned. In short, it seems to me that the views of each of the two children involved are that the Press should be excluded from the hearing of the motion and that the broadcast or publication of any evidence connected with it should be prohibited. The Court is satisfied that each of the two children is capable of forming his or her own views, and has done so. In considering the views of the children, the Court has taken into account the age and maturity of each (as it is required to do under section 40(3A)(d) of the 2004 Act).

17. Section 40(3A)(c)(iii) requires the Court to have regard to whether information given or likely to be given in evidence is sensitive personal information. "Sensitive personal information" is defined, under section 40(3A)(f), as meaning, for the purpose of that subsection:

"[I]nformation about a person that would, in the ordinary course of events, be known only to the person or members of the family, or friends, of the person, and includes but is not limited to—

- (i) information relating to the medical, psychiatric or psychological history of the person,
- (ii) information relating to the tax affairs of the person,
- (iii) information relating to the sexual conduct or sexual orientation of the person."

18. Section 40(3A)(c)(iv) requires the Court to consider:

"the extent to which the attendance of bona fide representatives of the Press might inhibit or cause undue distress to ... a child to whom the proceedings relate by reason of the emotional condition or any medical condition, physical impairment or intellectual disability of the party or the child concerned."

19. Under section 40(3A)(c)(v), the Court is required to consider "the need to protect ... a child to whom the proceedings relate against coercion, intimidation or harassment."

20. A final consideration that is relevant to this application, and to which the Court is required to have regard to under section 40(3A)(c)(viii) is:

"whether ["sensitive personal information"] when taken together with other information would, if published or broadcast, be likely to lead members of the public to identify a party to the proceedings or a child to whom the proceedings relate."

21. In support of her application for an Order excluding the Press from, and prohibiting any reporting on, the father's application, the mother submits that each of the considerations just described renders it necessary to make such an Order.

22. While no evidence was adduced in the context of the present application before the Court, the mother relied on the views expressed by the children to the effect that they have already been identified in the locality as the family involved in these proceedings. If it is indeed the position that such identification has occurred, it is not clear (and there is no evidence before the Court concerning) how it came about. It may have happened because a local person was involved in, or privy to, some of the events at issue in the proceedings (as the first child suggested), which then enabled the family to be identified when the relevant events were, necessarily, described in the reasoned judgments already delivered in the proceedings by Abbot J. on the 26th July 2011 and 12th July 2013 - although it is evident that those judgments were carefully drafted to protect, in so far as possible, the anonymity of the parties and of their children.

23. It follows that the mother cannot make the argument that it is necessary to exclude the Press or prohibit reporting "in order to preserve the anonymity of a party to the proceedings or any child to whom the proceedings relate", since, according to the mother (and, indeed, the children), the anonymity of the parties and of the children has already been lost, at least in their own locality. The mother's argument therefore must necessarily be that, where a party or a child concerned in any proceeding to which section 40(3A) applies has been publicly identified, however that may have occurred, the remaining provisions of section 40(3A)(b) (i.e. the nature and circumstances of such a case or the interests of justice) require the absolute exclusion of the Press from that proceeding, and the complete prohibition of any reporting on it, from that point onwards. In the particular circumstances of this case, the mother argues, by necessary implication, that, while the desirability of promoting public confidence in the administration of justice may militate in favour of permitting the Press to report upon the husband's application to set aside the Order of Abbot J, the fact, if fact it be, that the parties and their children have already been publicly identified (at least in their own locality) makes it necessary to conduct the remainder of the proceedings not merely subject to the criminal prohibition on publishing or broadcasting any information about a matter that would be likely to lead members of the public to identify either of the parties or any of their children, but also entirely in camera.

24. It is contended on behalf of the mother that the nature and scope of the exception being contended for in this case is limited and would apply, by analogy, to no more than 5% of the cases of this sort that come before the Court. It seems to me that there are two difficulties with that proposition. The first is that some degree of local identification must be closer to the norm than to the exception in family law litigation. Parties may confide their problems or difficulties in close friends or family members who may in turn confide in others, creating a ripple effect. Certain pivotal incidents involving family members may be witnessed by other persons who may in turn describe them to others. For these reasons, the sphere of personal or family privacy is rarely, if ever, entirely impermeable and few families, if any, are immune from local gossip, reprehensible as that may be.

25. The second difficulty relates to the other aspect of the matter that the mother contends renders it truly exceptional. The mother relies on what she describes as the particular identifying characteristic in this case that allows any report of the proceedings to be connected with the family concerned by those who have identified the family locally, even where nothing may be published or broadcast that would otherwise tend to identify any member of it. That particular characteristic is, in the words of Counsel for the mother, that "everybody knows that this case relates to the judges talking in the yard, and the allegation about [a named politician], and to pretend otherwise is wholly unreal." However, it seems to me that this is the very characteristic that lends particular weight to the countervailing consideration in this case, namely the desirability of promoting public confidence in the administration of justice. In a case that raises an issue of attempted interference with the administration of justice, the importance of the general principle enshrined in section 40(3A)(a) of the 2004 Act whereby *bona fide* representatives of the Press are entitled to report on proceedings of this sort appears to me to take on greater, rather than lesser, significance.

26. The only "sensitive personal information" about any person connected with these proceedings that has been identified on behalf of the mother for the purposes of the present application as being "information given or likely to be given in evidence" is the general detail concerning the custody and access arrangements in respect of the children in this case, and some particular detail concerning certain events involving one child, all of which information the mother herself has elected to put on affidavit in response to the husband's application. To the extent that such evidence is properly relevant to the issues raised on the husband's application, which issue has yet to be determined, it seems to me that any publication or broadcast of such information as is represented by that evidence would run the considerable risk of amounting to the commission of a criminal offence contrary to section 40(A) of the 2004 Act. Counsel on behalf of Times Newspapers has indicated that it has no interest in, or intention of, reporting on any aspect of the custody or access issues in the underlying proceedings. Moreover, the information concerned could quite properly be made the subject of a more limited Order, pursuant to section 40(3A)(b)(II) of the 2004 Act, restricting its publication without any necessity arising to prohibit the broadcast or publication of all of the evidence connected with the application.

27. The mother submits that the absolute exclusion of the Press, and the complete prohibition on the publication or broadcast of any evidence for which she contends, is necessary to prevent undue distress being caused to the children concerned by reason of their emotional condition. The emotional condition of each of the children, Counsel submits, is to be deduced or inferred from the views that they expressed when interviewed by the Court. There is certainly no medical or psychological evidence before the Court concerning the emotional condition of either of the children. The mother submits that the second child's emotional condition should be inferred from the view the second child expressed that the child finds it very stressful when another child talks about the case to her or to other persons in her presence. The Court is prepared to accept that the relevant consideration must be weighed in the balance in this case.

28. The mother submits that the absolute exclusion of the Press and complete prohibition on publication or broadcast for which she contends is necessary to protect the children of the parties against coercion, intimidation or harassment. It is contended that the coercion, intimidation and harassment relied upon is to be inferred from the view expressed by the second child, in particular, that another child on the bus intimidates her by bringing up the proceedings every so often. Counsel relies on the Court's own statement when interviewing the child that the behaviour the child was describing sounds like bullying. It is the Court's hope that, if the conduct concerned does amount to bullying, the parties have already taken the necessary steps to ensure that the appropriate authorities put a stop to it. Whether that conduct does amount to bullying or, more particularly, whether it amounts to coercion, intimidation or harassment may well be open to question. In any event, for the purpose of the present application the Court is prepared to weigh in the balance whether such conduct, however described, renders it necessary to entirely exclude the Press and completely prohibit the publication of any evidence, notwithstanding the desirability of promoting public confidence in the administration of justice.

29. In response to the mother's application, Times Newspapers has furnished an extensive submission on the proper construction of the provisions enumerating the relevant considerations under section 40(3A)(b) of the 2004 Act and on the correct approach to balancing privacy interests, such as those asserted on behalf of the children in this case, with the freedom of expression that the Press asserts on behalf of the general public. It seems to me that it is unnecessary to consider that submission in any detail for the purposes of the present ruling, in circumstances where Times Newspapers accepts that striking the proper balance in this case may well entail the imposition of restrictions concerning the publication or broadcast of evidence connected with the custody, care and control of the parties' children.

30. The husband has also filed an extensive written submission in which, at risk of over-simplification, he emphasises the importance of the principle that justice should be administered in public in order to promote public confidence in the administration of justice.

Conclusion

31. Having carefully considered the submissions made on behalf of the parties on the present application, the Court has come to the firm conclusion that it is not necessary to exclude, or otherwise restrict the attendance of a reporter from Times Newspapers as a *bona fide* representative of the Press from the Court during the hearing of the father's application now at issue, nor is it necessary to prohibit the publication or broadcasting of all of the evidence connected with that application.

32. However, the Court is empowered under section 40(3A)(b)(II) of the 2004 Act to make an Order restricting the publication or broadcast of any evidence given or referred to during the proceedings or any part of such evidence, and any such Order may, with regard to any such restriction, contain such conditions as the court considers appropriate.

33. In exercise of that power, the Court will Order the following:

- (1) That Times Newspapers shall designate a reporter who shall attend at and report on the proceedings.
- (2) That nothing shall be published concerning any custody or access issue or incident in the underlying proceedings in respect of any of the children of the parties.
- (3) That Times Newspapers and its designated reporter shall comply with such further directions as may be made from time to time by the Court in regard to the reporting of the case.
- (4) That no contemporaneous social media reporting – e.g. by Twitter – shall be carried out by the designated reporter.