Neutral Citation Number: [2008] IEHC 468

THE HIGH COURT
FAMILY LAW

2000 100 M

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989
IN THE MATTER OF THE FAMILY LAW ACT 1995
AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964
AND IN THE MATTER OF T. C. O'D AND P. J. O'D MINORS

BETWEEN

S. J. O'D

APPLICANT

AND
P. C. O'D

RESPONDENT

Judgment of Mr. Justice Abbott delivered on the 26th day of May, 2008

1. The above entitled proceedings are judicial separation proceedings which have been superseded by divorce proceedings between the parties in which this Court gave judgment in 2006, as hereinafter appears, but the proceedings continue to have effect insofar as they relate to guardianship issues regarding the two minor children, G. a daughter of the parties who was born on the 2nd March, 1995, now thirteen years old, and P. a son of the parties who was born on the 8th August, 1996, who is now twelve years old.

2. The respondent father by way of notice of motion dated the 16th November, 2007, sought that the matter be re-entered for the purpose of:

> 1. Regulating the access to be enjoyed by the respondent to the children.
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> 2. An order pursuant to s. 47 of the Family Law Act 1995 (hereinafter to be referred to as a "s. 47 report"), directing that an assessment of the applicant, respondent and of the children be carried out by a named senior clinical psychiatrist, having regard to the access to be enjoyed by the respondent to the children.
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> 3. An order permitting the respondent to give oral evidence at the hearing of this application.

3. The application was grounded on the affidavit of the respondent sworn on the 16th November, 2007.

4. In this, his affidavit, the respondent avers to the ages of the children and the fact that in the course of the litigation, assessments had been carried out by Dr. Gerard Byrne, consultant psychiatrist, on a number of occasions as follows:-

> - the 27th April 2001;
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> - the 24th June, 2003;
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> - the 22nd June, 2004;
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> - the 22nd November, 2005;
>
> - the 10th July, 2007.

5. He avers that judgment was given by this Court in divorce proceedings between the parties on the 29th November, 2006, and the divorce decree was perfected on the 2nd March, 2007. The parties had separated in or about August, 1999, and the respondent father avers that there have always been significant difficulties and disputes in respect of the access which he enjoys to the children of the marriage, and that these have intensified since the hearing of the divorce action in July, 2006. He complains that there have been ongoing obstacles and difficulties put in his way and that he had to fight tenaciously to be allowed any type of reasonable access to the children. In an attempt to resolve these matters, the last s. 47 report was commissioned from Dr. Byrne. The respondent deals with correspondence between the solicitors of the parties following this report in 2007, in which the respondent alleges he sought to have access arranged in accordance with the report. In para. 9 of the affidavit, he draws particular attention to the fact that prior to the swearing of the affidavit, he had not seen G. for a period of eight weeks and had not seen P. for a period of five weeks. He complains that the applicant mother decides entirely of her own volition whether or not he is to see his children, and that when he is discussing matters with his children they are reluctant to do so without first referring to the applicant, who he claims is effectively in the background monitoring their telephone calls with him. He alleges that as a result of what is transpiring, the applicant is alienating the children from him, whether this is being done subconsciously or not, he does not know. He expressed concern about one of the children being in the care of a non family member while the applicant mother was in Germany and that G., in the past, had been taken out of religion class, and that he would have no alternative but to apply to have court assistance in relation to these matters. He complained that access had been interfered with in the mid-term break between the 27th October and the 3rd November, 2007. In addition to interference with his weekend access he had difficulty getting information in relation to the whereabouts of the children and arrangements for them on this weekend. He suggested that Christmas access should be alternated amongst the parents, so that the children are with one parent for the first half of the Christmas holidays, being approximately eight days, and with the other parent for the second half of the Christmas holidays with the periods alternated each year.

6. He further avers and suggests that Dr. Byrne's intervention in the case "has run its course" and that he does "not believe that any further intervention by him can be of any benefit to either the applicant, myself or to the children of the marriage". He avers that in order to avoid constant dispute on facts between the applicant and himself, it would be preferable to have a new assessment carried out by another specialist in the area of family therapy and assessment. He suggests a name of a suitability qualified person as "an honest effort to resolve issues" and to "break the log jam". He complained of a lack of consultation in relation to the purchase of orthotic treatment and its use, and also of lavish buying by the applicant mother of items refused to the children by the respondent, which he claimed undermined his relationship with the children and any sense of parental control that he had in respect of the children.

7. He says that in respect of the divorce proceedings, he has never discussed these or any related matters with the children, even though they have asked questions. However, he says that it is obvious from his conversations with the children that they are fully aware of much of what has transpired in these proceedings and this is interfering with his relationship with the children which he would otherwise consider to be a good relationship, notwithstanding what he alleges are the applicant's serious and consistent efforts

to undermine the relationship and to bring a halt to it. He seeks the assistance of the court in all the matters of access and says that his concern is for the welfare of the children and the continuing development of his relationship with them. He complains that the applicant seems determined not to engage in any constructive dialogue on the issue, whether it is in relation to his access to the children or in relation to the children's social, moral and educational development, medical issues or other pertinent issues concerning the children. He says that he finds this most frustrating and distressing, more from the point of view of the children than himself.

8. The Applicant's replying Affidavit

8.1 The applicant filed an affidavit in reply, sworn on the 11th December, 2007. The applicant denies that she has frustrated or hindered access. She claims that she has done her utmost to facilitate access by the respondent to the children but that he continuously finds fault and seeks to dictate unreasonable terms in respect of the access, and that he does not comply with the terms of access as recommended by Dr. Byrne. She refers to the five assessments of the children by Dr. Byrne and then in paras. 7 – 11 deals with the various assessments and reports of Dr. Byrne and the difficulties associated therewith presented by the respondent. She says that she received Dr. Byrne's final report on 10th July, 2007 and that she has been willing to abide by the recommendations therein and has been doing so. She complains that whereas in the past Dr. Byrne recommended that G. should not be forced to go on access with her father, as is alleged can be seen from the correspondence exhibited in the respondent's affidavit, the respondent seeks to force G. to attend access with him, whether she wants to or not. She denies that she is alienating the children from the respondent or that she interferes with the children when speaking to their father on the telephone and that the children have been left without adult supervision. She says that the respondent instructed his solicitors to send the Sheriff to one of the homes of the children seeking to enforce judgment against her on more than one occasion and that the respondent instructed his solicitors to register judgment on another home of the children, and that bankruptcy proceedings had been threatened against her. Along with other denials of allegations of the respondent set out in detail in para. 16, the applicant says that the respondent fails to adhere to any recommendations unless they suit him and further remains inflexible and rigid in his dealings with the children, and that the children have been adversely affected by the continuous difficulties in respect of access. In relation to having the children assessed for a sixth time, she welcomes the intervention of the court by hearing the children directly.

8.2 The notice of motion herein came on for mention on the 19th December, 2007. Prior to this, I had indicated to the parties that in an effort to assist the understanding of the court as to how the children stood in relation to a sixth assessment, either by Mr. Byrne or the alternative expert proposed by the respondent, I would speak with both of the children in the presence of the court registrar and a stenographer.

8.3 The background against which I suggested to the parties that I might speak with the children is that, by that stage, for over a year, I had begun to speak with children in some other family law cases. In doing so, I was primarily motivated by the imperative of the Brussels II bis Regulation, which requires the voice of the child to be heard in decisions relating to the enforcement of custody and access orders in matters of parental control outside the jurisdiction. While the s. 47 report procedure is the usual way in which this imperative may be observed, I found, in the past, that this procedure can be too cumbersome, expensive, intrusive or time consuming, and in these cases I decided, in certain instances, to briefly speak with the children to ascertain their views, subject to agreeing terms of reference for this procedure with the parents, who are parties to the family litigation.

8.4 Having embarked on this course, a further category of cases came into view which suggested that speaking with the children directly might be of some assistance. These were cases where the voice of the child had probably been adequately canvassed for the purpose of Brussels II bis Regulation by multiple assessments but where nevertheless, matters had reached a serious stalemate of non-communication by the children with one of the parents. The purpose of speaking with the children would not only be as a means of ascertaining their views, but also to engage in a tentative exploration as to what initiatives, whether by way of further therapeutic assessment or "baby steps" such as text or letter writing might break a log jam of non-communication. While matters have not deteriorated in this case to a level of such non-communication nevertheless, in view of the high number of assessments already undertaken and in view of the very many (twenty or so) applications to court in regard to access matters, I decided it might be helpful to speak with the children directly before the court makes a decision on any further formal assessment. Both parents, through their counsel, welcomed this proposal. For the purpose of facilitating such a meeting with the children the matter was put in for mention on 19th December, 2007.

8.5 I spoke with the children and will revert to the consequence of such activity later in this judgment. After I had spoken with the children I reported back to the parties in court and I was informed by the respondent's counsel that there was tentative agreement in a lot of areas and that the Christmas access was agreed, weekend access and alterative weekends excluding Christmas commencing in January, 2008 would continue, and access for midterm break between the 8th February and the 18th February was agreed also, but that it would be necessary for the parties to come back to court to have other matters determined on the 22nd February.

9. Final Hearing of the Motion

9.1 The motion was finally heard on the 1st May, 2008. The court considered the grounding and replying affidavits summarised above, read and considered all Dr. Byrne's reports and heard both the respondent and applicant in evidence, and in addition heard the submissions of Mr. Ó hUallacháin, junior counsel for the respondent and Ms. Cawley, junior counsel for the applicant.

9.2 By this stage, the matters at issue between the parties had, to a significant degree, been resolved by agreement and the outstanding matters left unresolved were canvassed by a letter from the respondent's solicitor to the applicant's solicitors dated the 25th April, 2008 and a reply thereto from the applicant's solicitor dated the 30th April, 2008.

9.3 In addition, the respondent's letter of the 25th April, 2008, set out in paras. 1, 2, 3 and 4 of the first page thereof, a helpful rêsume of his understanding of the detail of matters relating to access which had been agreed between the parties. These two letters are helpful points of departure from the point of view of the court giving the detail of the order which the court proposes to make in relation to providing for access in a reasonably foreseeable timeframe. While counsel for the respondent did not press the respondent's interest in having a further assessment carried out, either by Dr. Byrne or by the alternative expert proposed by the respondent, the respondent did touch on this issue in the evidence which he subsequently gave.

10. Talking with the Children

10.1 It is important to explain the approach of the court as regards talking with children in these cases. The Brussels II bis Regulation requires that judges are trained in the work of hearing cases regarding parental control, and I am fortunate that since my appointment as judge, I have had the opportunity of training relating to this area through networking and conferencing with judicial peers, lawyers, academics and professional experts, both nationally and internationally. I have taken a number of guidelines from such training when speaking with children, which are as follows:-

> 1. The judge shall be clear about the legislative or forensic framework in which he is embarking on the role of talking to the children as different codes may require or only permit different approaches.

2. The judge should never seek to act as an expert and should reach such conclusions from the process as may be justified by common sense only, and the judges own experience.

3. The principles of a fair trial and natural justice should be observed by agreeing terms of reference with the parties prior to relying on the record of the meeting with children.

4. The judge should explain to the children the fact that the judge is charged with resolving issues between the parents of the child and should reassure the child that in speaking to the judge the child is not taking on the onus of judging the case itself and should assure the child that while the wishes of children may be taken into consideration by the court, their wishes will not be solely (or necessarily at all,) determinative of the ultimate decision of the court.

5. The judge should explain the development of the convention and legislative background relating to the courts in more recent times actively seeking out the voice of the child in such simple terms as the child may understand.

6. The court should, at an early stage ascertain whether the age and maturity of the child is such as to necessitate hearing the voice of the child. In most cases the parents in dispute in the litigation are likely to assist and agree on this aspect. In the absence of such agreement then it is advisable for the court to seek expert advice from the s. 47 procedure, unless of course such qualification is patently obvious.

7. The court should avoid a situation where the children speak in confidence to the court unless of course the parents agree. In this case the children sought such confidence and I agreed to give it them subject to the stenographer and registrar recording same. Such a course, while very desirable from the child's point of view is generally not consistent with the proper forensic progression of a case unless the parents in the litigation are informed and do not object, as was the situation in this case.

11. Conclusions following Meeting with Children

11.1 Both children understood the process and engaged actively with me in conversation. There were very generous in spirit, articulate, warm and happy. They impressed me that they were very secure in the knowledge that their parents seriously loved them, and I got no indication of serious problems such as would warrant expert intervention. Both children are either in or approaching adolescence, but G. is very much more mature than P. than might be indicated on an examination of the papers and expert reports in the case. The children did not indicate any desire to have the detail of access changed, but equally indicated that if the court wished to change these arrangements, or if their parents agreed to do so, then they would have no problems. They impressed me as children with a rich and varied lifestyle who were anxious to get on with their life. I confessed during the course of submissions with the counsel for the parties that the impression was contrary to an expectation that the children might be somewhat war weary by the constant and manifest disagreements, bitterness and litigation between the parents themselves. I complimented, and continue to compliment the parents on this outcome which occurs against a background of adverse circumstances arising from the worst excesses of their prolonged litigation.

12. Outline of Decision

12.1 I intend to make an order for access, using as a template the first page of the respondent's letter of the 25th April, 2008, and para. C, of the second page together with paras. (i) to (iv) of the second page, subject to appropriate modifications of detail. I now deal with the particular requests of the parties as advocated by them in their letters and evidence, dealing firstly with those of the respondent husband:-

(A) The respondent should not have the option to look after the children when the applicant is out of the jurisdiction for more than one day, or when she is away from the family home (wherever it is currently situated) for more than one day, as this would give rise to undesirable and unpredictable negotiations leading to differences on an irregular but frequent basis. The caring of the children by the applicant herself or by her nanny has been a very stable feature of this case, and no doubt has added to ensuring a positive outcome for the development of the children. This is very much in the children's interests and while I have considered the husband's submission that he is not getting equality of treatment by reason of the fact that the applicant wife has day to day care of the children for an effective eleven out of fourteen days on average, equality of parenting in this context should be assessed in terms of quality rather than quantity, and the respondent husband's parenting is just as important when he is supporting this arrangement when not in actual control of the children, as it is when he has them in his control for access. I am strongly of the view that to change this arrangement in the manner sought by the husband would be to seriously destabilise the situation which has evolved, and built up confidence over the years.

(B) I cannot agree that the respondent husband is to be allowed to have the children for four weeks during the summer holidays by reason of the fact that the children have three full months off school during the summer period. Dr. Byrne's reports and the applicant wife's evidence indicate that the children might not agree with this. I consider that it would likewise be destabilising of a very good arrangement which has worked well so far. The respondent's complaints about lack of equality have to be counterbalanced by the fact that the applicant wife has only two weeks summer holidays with the children as against three weeks for the respondent husband.

(C) Lest there is any doubt about the respondent husband not having strongly pressed his case to have another expert appointed, I refuse to appoint a further expert for the purpose of having a s. 47 report prepared. This case is considered having the benefit of the last report of Dr. Byrne following discussions by him with both parents and the children. I note that the husband's bid for a new expert to report was based, in his affidavit, on a vague assertion that Dr. Byrne's involvement had "run its course". In evidence, he indicated that he thought another expert might disagree with Dr. Byrne's view that G. should be given an opportunity to agree or disagree with aspects of access given her age and maturity. I confess that I consider that it is most unlikely that any expert would disagree with Dr. Byrne's assessment that the children should have their views taken into account in relation to matters of access. I note too, that the respondent husband relies on Dr. Byrne's approach as regards the security and certainty which Dr. Byrne's drop off and collection arrangements have brought to access arrangements, notwithstanding his opposition to Dr. Byrne's involvement. I conclude that this security and certainty has been the hallmark of the success of Dr. Byrne in ensuring that the good result as has been found by me, for the children, has been assured. The respondent, in evidence, disagreed with Dr. Byrne's approach giving weight to the wishes of the children, especially, regarding details of access. The respondent's view on this aspect is indicative of the weakness of his approach in relation to the matter, rather than Dr. Byrne's.

Dealing with the applicant's letter of the 30th April, 2008, I have decided as follows:-

(A) The weekend access for the respondent from Friday, the 30th May to Saturday, the 31st May should be modified insofar as G. is to be there for one night as she goes to Irish college on Sunday with the nanny L. collecting G. from the respondent. As I consider that G., being a mature young teenager would naturally look to her mother to ensure packing and social and emotional composure in preparation to face into what may be a social and emotional challenge for her in going to Irish college. The parenting role of the respondent for this process, (notwithstanding his absence) should be to enthusiastically support it and speak positively about it. He should endeavour to have sympathy for this outcome as one in part wished for by G. when speaking positively about it.

(B) The access of Friday, the 30th May to Friday, the 6th June, with P. staying for one week with the respondent father, with the nanny to collect P. from the respondent's house. This is because G. will be at Irish college for that week and P. seems to be enthusiastic about it on the account of both parents.

(C) The applicant wife has proposed alterations to the collection points on the second page of her solicitor's letter dated the 13th April, 2008. I do not agree with such changes as they too would introduce an element of instability. While I bear in mind the applicant wife's evidence, that she considered the current collection arrangements, especially at a hotel, which is outside the hotel in a car, to be "cheap", I consider that any misgivings she may have about the cosmetic aspect of this arrangement are far more positively counterbalanced by the certainty and predictability which is brought into the arrangement; that is, the avoidance of continuous sources of friction and rows at a time when the children are likely to be exposed to it. I am encouraged by the fact that the respondent husband sees these recommendations of Dr. Byrne in relation to pick up and collection points as bringing a positive aspect of certainty into the arrangement. Hence I strongly reject the applicant's proposals in this regard, provided however, that in the interest of providing an opportunity for P. to profitably share a rich and varied surge of new experiences on the occasion of his leaving camp at C., he should be collected from C. when the other young people are leaving, by his father, the respondent.

12.2 I propose that an order be made dealing with the access arrangements as follows:-

1. Every second weekend, the respondent will collect the children on Friday and return the children on Monday, subject to the usual drop off and collection points.

2. Midterm breaks are to be alternated. In other words, one parent is to have the children for the first midterm and the other parent is to have the children for the next midterm break with the following midterm access arrangements to be reversed.

3. Easter access break is to be alternated in the same way as the midterm access arrangements as outlined in 2 above.

4. A minimum four weeks notice is to be given by one party to the other party when booking a summer holiday.

5. Christmas access is to be divided in two equal periods of time. One of the parents is to have access with the children for the first half of the Christmas access period and the other parent is to have access with the children for the second half of the Christmas access period. The Christmas access period is to be alternated in the same way as the Easter access period as outlined at 3 above. Subject to the foregoing, the parent not having access for Christmas Day should ensure short access for the other parent on Christmas Eve from 3.00pm to 8.00pm. The so called agreed drop off and collection arrangements set out in paras. I to IV in the letter of 25th April, 2008 are confirmed.

12.3 The parties are at liberty to address me immediately upon giving this judgment in relation to the form of order and refinements therein.