

THE HIGH COURT

CIRCUIT APPEAL

[2012 No. 18 C.A.F.]

CIRCUIT COURT RECORD NO. 001125/2011

DUBLIN CIRCUIT COUNTY OF THE CITY OF DUBLIN

IN THE MATTER OF THE JUDICIAL SEPARATION

AND FAMILY LAW REFORM ACT 1989

AND IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

P.

APPLICANT

AND

Q.

RESPONDENT

JUDGMENT of White Michael J. delivered on the 5th July, 2012

1. This is an appeal from an interim order of the Circuit Court of the 20th February, 2012, which directed the respondent to discover all e-mail accounts held by her and the mobile phone numbers xxxxxxxxx, (provider O2), UK sim card mobile number xxxxxxxx. US sim card mobile number xxxxxxxx (provider T mobile), and in addition all text messages held in respect of the mobile phone accounts. The discovery period is six months prior to the order of the 20th February, 2012.

2. The parties were married on the 28th December, 1992. They have one child aged 14 who was born on the 5th March, 1998. The applicant is a German citizen and the respondent is a United States citizen. The applicant is an engineer; the respondent is a full time homemaker. The parties met in North Carolina, U.S.A and lived there for a number of years before moving to California where they lived for 6 years. The parties moved to Dublin in August 2007, when the applicant commenced a contract with a company based in Ireland.

3. The applicant issued proceedings in the Circuit Court on the 29th July, 2011, seeking a judicial separation and moved out of the family home in January 2012.

4. The background to the order of discovery is the disputed sexual activity of the respondent.

5. In his affidavit of the 30th January, 2012, grounding the application for discovery the applicant avers that he became concerned that the respondent was involved in a third party relationship prior to the breakdown of the marriage. On further investigation it became clear that the respondent had been accessing different websites with a sexual content. He commissioned an investigator to carry out surveillance on the respondent, who reported that she was meeting a male regularly at two hotels and booking into a room at the hotels.

6. Subsequently he retained the services of a computer expert, who accessed the sites the respondent was using.

7. The respondent alleges that the passwords for her laptop computer and the access codes for the sites were kept in a locked safe, which the applicant must have accessed illegally.

8. The applicant alleges that the respondent has been accessing gay, kink, fetish, bondage and swinger websites, having sexual intercourse with either one or a number of gay men, then photographing and videotaping this activity and putting it up on a website. He alleges that this has become an obsessive and addictive activity on the part of the respondent, which severely affects her ability to care for the child. He is also concerned that the child has or may come into contact with explicit sexual material involving his mother.

9. In the respondent's affidavit sworn on the 20th February, 2012, she avers that she became involved in a loving relationship which commenced after the breakdown of her marriage in November 2011. She withheld this information from the applicant because she feared for her physical safety. She denies that she has been engaged in multiple affairs, and avers that she has accessed legal adult sexual content websites in the privacy of her own home, which is viewed also by her partner.

10. She accepts that her partner and herself have an exhibitionist streak and have posted explicit pictures and comments of their time together but neither of them has ever posted their names nor could they have been identified. The sites on which the photos were posted were subscription only websites, protected by personal codes and passwords. She further denies that she is engaged in risky sexual behaviour, and claims she has had only one partner, who loves and respects her.

11. She denies that the activity has interfered in any way with the child's welfare and he has had no knowledge of this activity.

12. She is very upset about the allegation that the child is not her priority, as she avers his care has been the main focus of her life since his birth and the implication that she is a child abuser, has been deeply painful to her. She avers that she respects the applicant personally and as the father of her child, but that he has not reciprocated and believes that the application for sole custody is a desire on the applicant's part to hurt her, and not based on the needs or welfare of the child.

13. By separate order of the 20th February, 2012, the Circuit Court pursuant to s. 47 of the Family Law Act 1995, appointed Professor Jim Sheehan to carry out an assessment. Professor Sheehan prepared a written report of the 8th May, 2012 and gave preliminary evidence before the Circuit Court on the 9th March, 2012.

14. Counsel on behalf of the respondent, has objected to the admissibility of this report, on the grounds that it was prepared subsequent to the order for discovery of the 20th February, 2012 and should not form part of the evidence considered on appeal.

15. There are conflicting allegations by the parties as to the motives for discovery. A court is entitled at its discretion to admit evidence not heard in the Circuit Court when the original order was made. It is a court ordered report permitted by statute and can be considered in the context of this appeal.

16. The respondent's right to privacy is an unenumerated constitutional right and one respected by the European Convention of Human Rights.

17. The right to privacy received judicial recognition in Ireland in the case of *Kennedy v. Ireland* [1987] I.R. 587 when Hamilton P. stated at p. 592:-

"Though not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, by the requirements of the common good and is subject to the requirements of public order and morality."

18. Article 8 of the European convention on human rights states:-

"Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

19. The welfare of a child in custody and access proceedings is a paramount consideration of the court. This is set out in s. 3 the Guardianship of Infants Act 1964, as amended, which states:-

"Where in any proceedings before any court the custody, guardianship or upbringing of a child, or the administration of any property belonging to or held on trust for a child, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration."

20. In *G. v. An Bord Uchtála* [1980] I.R. 32, at p. 76, Walsh J. stated as follows:-

"The word 'paramount' by itself is not by any means an indication of exclusivity; no doubt if the Oireachtas had intended the welfare of the child to be the sole consideration it would have said so. The use of the word 'paramount' certainly indicates that the welfare of the child is to be the superior or the most important consideration, in so far as it can be, having regard to the law or the provisions of the Constitution applicable to any given case."

21. The court must respect the right of an adult whose marriage has irretrievably broken down, to engage in consensual sexual activity in private. Moral repugnance of certain types of sexual activity should not of itself be a ground for any restriction on custody or access to a child of the marriage, unless it is demonstrably shown that this activity affects the welfare of the child.

22. As distinct from the welfare of the child, the health and safety of the parent is also a consideration, as this can affect the welfare of the child, if anything untoward were to happen to the parent.

23. In respect of any sexual activity involving restraint or pain it has to be borne in mind that a person cannot consent to the infliction of harm. This is referred to in the Irish Current Law Statutes annotation of the Non Fatal Offences against the Person Act 1997 at page 26-05 which states:-

"The general rule, as confirmed by the House of Lords in *R. v. Brown* [1993] 2 All E.R. 75, appears to be that consent is not capable of constituting a defence to a charge of assault causing actual bodily harm, in Irish or English Law: other than in some exceptional circumstances, where the assault is deemed to be justified by the purpose of the act involving the risk. For example, a patient may lawfully consent to a surgical operation, although it would otherwise constitute a serious assault. It would appear that where an act has a social purpose which the law recognises to be valid, the degree of harm which may be caused by the act will be balanced against the value of that purpose."

24. The court would be concerned for the health and safety of the respondent if she were involved in sexual activity with unfamiliar partners where restraint or the infliction of pain was part of the activity.

25. In respect of viewing websites with sexual content and posting photos or videos of sexual activity on websites it would be a cause for concern to any court that this material would be seen inadvertently by a child or that a child would learn about these matters.

26. Professor Sheehan has reported that the respondent because of her concerns that the applicant might tell the child, has told him that she and her partner look at sexual pictures of themselves put up on a website, and that the child on an air flight inadvertently saw a sexually explicit picture of her with her partner, which she immediately shut down.

Discovery in Family Law Cases

27. The issue of discovery has been addressed in family law proceedings in a number of cases. In *M.O'R v. C.L.* [1998] IESC 41 the High Court in a nullity case had permitted only limited discovery relating to any medical treatment the respondent had received over a period of seven years prior to the marriage. No medical records coming into existence after the marriage were to be discovered.

28. On appeal to the Supreme Court, O'Flaherty J. stated at p. 2 of the ex tempore judgment,

"I think that that really is to curtail the remedy of discovery, and while family law matters have to be treated with special care and decorum, nonetheless the rules of court apply in family law matters as they do elsewhere. The law is not in doubt. It is old law as laid down in *Compagnie Financiere du Pacifique v. Peruvian Guano Co* [1882] 11 QBD 55, which has been consistently followed by our courts. All documents relevant to matters in issue have to be disclosed. To quote from the judgment of Brett L.J. which is reproduced in the judgment of Kenny J. in *Sterling-Winthrop Group Limited v. Farbenfabriken Bayer Aktiengesellschaft* [1967] I.R. 97:-

"It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contained information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly", because it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences..."

29. The general principles referred to by O'Flaherty J. in *M.O'R v. C.L.* were subsequently accepted and applied by O'Neill J. in *F.P. v. S.P.* (Unreported, High Court, 17th December 2002). In that case, the Circuit Court appointed a consultant psychiatrist to examine the parties and subsequently made an order for discovery but restricted sight of any relevant medical and psychiatric records in respect of the respondent to the consultant psychiatrist. The respondent appealed the order on the basis that it would enable the medical examiner to rely on hearsay evidence and that to allow the examiner to rely on the records of persons other than the parties to the proceedings was an extension of the role of the examiner which was permissible. Given that the applicant appeared content with the restriction, on the facts of the case, O'Neill J. did not interfere with the order and the restriction remained. However, O'Neill J. stated at p.11 of his judgment.

"I have no doubt that the Circuit Court judge imposed the restriction which he did in order to restrict to the minimum the intrusion into the privacy of the respondent, but in imposing that restriction he may very well have impermissibly cut down on the range of discovery to which the applicant was legitimately entitled".

30. Referring to the judgment of O'Flaherty J. in *M.O'R v. C.L.*, O'Neill J. stated:-

"Applying the principle thus stated to this case would seem to me to lead to a conclusion that the applicant/respondent was entitled to discovery of the material encompassed in the order of the Circuit Court judge, but without the kind of restriction imposed, so that he could himself use this material either to advance his own case or damage the case of the respondent".

31. The family law jurisprudence referred to above is indicative of the general principle that the disclosure of material to a court in the administration of justice applies equally to *in camera* proceedings as in other proceedings. To permit otherwise could routinely deprive a court in matrimonial proceedings of proper disclosure were parties to be permitted to rely on privacy rights.

32. This general principle applies to the material ordered to be discovered by the Circuit Court in this case, as the material discovered could assist the applicant in advancing the case set out by him in the Family Law Civil Bill, and undermine the respondent's case.

33. The issue for the court to determine is complicated by the allegation that the respondent's privacy was breached illegally when the codes and passwords of her personal laptop were accessed, at a time subsequent to the commencement of family law proceedings. Although disputed by the applicant, the evidence before this court heard on affidavit would indicate that the passwords and access codes to these particular websites were retained by the respondent in a locked safe. There are many occasions and opportunities in family law proceedings, where parties to the proceedings access information which the other party regards as private, but which has not been obtained illegally. In this case the acquisition of the codes is tainted by illegality.

34. I accept the submissions on behalf of the respondent, that there is a broad principle of constitutional law, that evidence which is obtained by invasion of a constitutional personal right such as a right of privacy must be excluded unless the Court is satisfied that the breach was committed unintentionally or accidentally (which could not be the case here) or is satisfied that there were *extraordinary excusing circumstances which justify the admission of the evidence in its discretion*". It is respectfully submitted that there are no extraordinary excusing circumstances in this appeal. I would accept that principle as applying to a criminal prosecution, in order to protect the absolute right to a fair trial.

35. Where different constitutional rights have to be balanced, different principles apply.

36. A court should always be reluctant to admit evidence or approve discovery, which is tainted with illegality, but that is not to say that on all occasions where illegality is suspected or found, that the evidence so obtained is not admissible. This is particularly so when dealing with the welfare of a child.

37. If the court were only dealing with issues between the parties and not the welfare of the child, the court would have taken into consideration the sexual history of the marriage, and on balance would not make the order for discovery sought.

38. In this particular case, Professor Sheehan has stated in his report:-

"I have given some consideration to the question concerning the mother's fitness for exercising ongoing custodianship of the child in the light of my critique of her judgment and its possible consequences. I would like the Court to request her to attend Caoimhe Ni Dhomhnaill over a couple of months to enable her to reflect on the meaning of all that is happening for the child. This request is in no way meant as a critique of her own choices about sexual positioning as an adult. It is intended, rather, as a place where she can reflect on the management of the boundary between herself and the child and between her adult world and his still-developing adolescent world. I would ask the Court to suspend judgment for a number of months on this matter of her fitness to exercise ongoing custodianship."

39. The alleged sexual activity of the respondent has a direct bearing on the welfare of the child of the marriage.
40. The respondent has acknowledged in her affidavit and in her conversations with Professor Sheehan, that certain matters occurred which objectively in his opinion could have a bearing on the welfare of the child.
41. While the proceedings touching on the welfare of the child are adversarial in nature, there is an inquisitorial aspect to that portion of the proceedings dealing with his custody. Balancing the different constitutional rights and responsibilities the welfare of the child would take precedence over illegally gathered information touching on the child's welfare.
42. In addition the constitutional right to privacy of the respondent is protected in "*in camera*" proceedings, as the information disclosed is confined to the parties, their legal representatives and the court. The respondent's rights can be further protected by the addition of further conditions.
43. The court affirms the order of the Circuit Court with the following additional conditions:-
- (1) The material furnished can only be used for the purposes of determining the welfare of the child of the marriage and not for the purposes of s. 16(2)(i) of the Act in respect of the behaviour of the respondent.
 - (2) Any material discovered which does not impinge on the child's welfare, should be furnished but returned to the respondent, and not relied on by the court.
 - (3) In the event of any dispute the presiding judge of the Circuit Court should consider the material and decide on relevance.