Neutral Citation: [2015] IEHC 840

THE HIGH COURT

[2014 88 CAF]

BETWEEN

L.K. & E.C.

APPLICANT/RESPONDENT

AND

M.M.

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Abbott delivered on the 6th day of November, 2015

1. This judgment relates to a notice of appeal served by the respondent of an order of the Circuit Court dated the 31st July, 2014. The first named applicant issued a notice of motion directing that an updated report, under s.47 of the Family Law Act, 1995 [hereinafter referred to as a "s.47 report"], be prepared by Ms. N.D. The respondent/appellant opposed this, and submits that a new report should be made by an independent assessor, as the assessor used in the Circuit Court was biased against him.

2. The applicants/respondents in this case are the testamentary guardians of a child who was born in 2003. The second named applicant/respondent, however, has stated that she intends to have no further involvement in the matter. The respondent/appellant, Mr. M., is the child's natural father. He was in a relationship with the child's mother that ended soon after his birth. The child's mother then began a relationship with the first named respondent, Mr. K., in 2006. The child was 3 at this time and formed an attachment to Mr. K.. The child lived primarily with his mother and the first named applicant/respondent from 2006 until the time of his mothers death in 2012. The child's mother appointed her own mother Mrs. C., the second named applicant/respondent, and Mr. K., as testamentary guardians of the child.

3. Following the sad passing of the child's mother, a dispute arose in relation to custody, access and guardianship. This dispute resulted in the Circuit Court, in 2012, directing that a s. 47 report be prepared in relation to the child E., by Dr. B., to assist the Court in deciding what living arrangements were in the child's best interests. The parties entered a settlement agreement on foot of the recommendations made in this report in relation to custody, access and guardianship on the 13th November, 2012. This agreement set out that Mr. K would have sole custody of the child E. with the second named applicant and the respondent/appellant (natural father) having regular access with the child. Recently however the situation between the parties has become strained and the respondent/appellant brought an application on the 17th December, 2013, for directions regarding the welfare of the child, in particular he sought greater access with the child. The Circuit Court directed that a s. 47 report be prepared, this was done by Ms. N.D. and the report was furnished to the Circuit Court on the 13th June, 2014. On the 17th June, 2014, the respondent/appellant (natural father) issued a motion seeking sole custody of the child. This motion was heard in the Circuit Court in June, 2014. The parties and Ms. N.D. (the s. 47 assessor) gave evidence.

4. Her Honour Judge Murphy provided a full written judgment in the Circuit Court, in relation to the application made by the respondent/appellant for full custody of the child. She awarded custody of the child to the first named applicant/respondent and provided the natural father and second named applicant/respondent with access rights in relation to the child. Importantly in this judgment, Judge Murphy assessed the allegation of bias submitted by counsel for the respondent/appellant, in relation to the author of the s. 47 report. She found that there was no such bias, and considered the report favourable to both parties and fair in its assessment.

5. The respondent/appellant (natural father) served a notice of appeal in relation to the decision of the Circuit Court. In light of this, difficulties have arisen in relation to the access arrangement currently in place. The applicant/respondent's solicitors wrote to the respondent/appellant in relation to Ms. N.D. preparing an updated s. 47 report. However, the respondent/appellant is not agreeable to this, as he outlined that Ms. N.D. was biased against him in formulating the original report. The respondent/appellant submits that Ms. N.D. stated in her evidence that "even if the M. family were perfect in all respects, I still would not have recommended that Mr. M. be granted sole custody of [the child]". He further submits that she that acknowledged she was incorrect in this assessment, and outlines the reason for this to be that she got emotional in the court setting. The solicitor for the applicants denies that Ms. N.D. made a statement in relation to becoming emotional in the court setting. Additionally, it is submitted that the respondent ignores the lengthy explanation provided by Ms. N.D., in this assessment encompassing many factors including the child's own view. He further submits that it is unfair to subject the child to have a further full s. 47 report, as this will be the third he will have had to engage with in the past 4 years. It is submitted by the applicants that Ms. N.D. is best placed to carry out the updated report, as she has significant previous knowledge of the case. It is therefore submitted that Ms. N.D. carrying out the report would save the strain on the child of another full report, carried out by a further expert.

The Hearing

6. The hearing proceeded on the basis of the affidavits, filed on behalf of both parties, being opened. These dealt with the respondent/appellant's allegations of bias and his claims that the applicants/respondent's (Mr. K's.) claim for an updated s. 47 report, should be refused.

7. Counsel for the applicant/respondent submitted that the position in relation to alleged bias by the s.47 expert ought to be considered in the light of the parallel jurisprudence of which the leading case was *Ryanair v . Limited v Terravision London Finance Limited* [2011] IEHC 244, (unreported 30th June, 2011). The judgement, of Fennelly J., in that case related to the criteria for establishing objective bias on the part of a judge sought to be prevented from hearing a case. She submitted that the suggested bias of the s. 47 expert fell far short of meeting these criteria, and, in any event, the position of the s. 47 expert should be considered in the light of the Supreme Court judgement analysing the role of s. 47 experts in *G.McD. v. P. L. and B.M.* [2010] 2 I.R. 199.

8. Counsel for the respondent/appellant submitted that the offending statement of the s. 47 report reporter clearly indicated bias, such that the respondent/appellant could have no confidence in her, and that furthermore the Court could not be justified in

continuing her appointment as an independent expert under s. 47. He cited the practice of this Court and of the Circuit Court in relation to the replacement of s. 47 reporters, and stated that the approach should be to pose the question (asked by one Circuit Court judge experienced in family law) as to whether the parties "could have confidence in the procedure going ahead".

The Facts
9. The statement of evidence which is claimed to give rise to bias on the part of the s. 47 expert is as follows:-

> "even if the M. family were perfect in all respects I would not have recommended that Mr. M. be granted sole custody of E."

10. The Court is of the view that this statement is a means of indicating the weight which the witness attached to the factors relied upon by her, to come to the opinion that the respondent/appellant should not be granted sole custody of the child. It represents, in verbal terms, a summary of a hypothetical situation being an improvement on the picture presented in the evidence of the respondent/appellant's situation, and an indication that these hypothetical improvements would not change her opinion. In doing so, the s. 47 reporter engages in nothing more than a literary exercise used by the courts in judgements to outline, by way of comparisons, the weight to be attached to various criteria directed by statute or regulation to be considered by the Court when making a decision.

The Law
11. Section 16 to of the Act of 1995 provides in paragraphs a-l matters which require consideration by the Court when making provision in judicial separation. Sometimes to indicate the relative weight given to the various factors, the judgment may state the parameters over which they operate. If the Court is inclined to impute earning power to a provider who has refused to work or to provide an account vouching of his earnings the Court might indicate parameters over which such an imputation could, realistically, be made. The offending statement of evidence by the reporter, while couched in extreme terms, is nothing more than an expression of the weight to be attached to the opinion of the s. 47 reporter, when tested against other,- and better outcomes for the respondent/appellant. The fact that the statement represented the extreme end of such weighting or comparison was suggestive of hyperbole, is only a means of adding emphasis to the opinion of the expert. The fact that the s. 47 reporter qualified her statement, and thus explained the context of her statement the reasons for her statement therefore shows that far from being a biased witness, she was prepared to consider queries and criticism and respond honestly and in a way that sought to clarify her independence from the conflict of the parties. This Court considers that it was not necessary for her to do so, bearing in mind the Courts understanding of her weighting technique described above.

12. The role of the expert psychiatrist in custody proceedings was considered by the Supreme Court in *L.(D). v. T.(D).* [1998] IESC 40 (9th November, 1998). In that case one of the grounds of appeal was that in the preparation of the report, the psychiatrist had gathered evidence from the father which had not been put to the mother and that the mother had not been afforded the opportunity to give evidence in relation thereto. Murphy J. pointed out that while the psychiatrist was involved in some extent in the gathering of facts and opinions of relevant persons, he was in no sense determining those matters. He said that the procedures adopted by such a person are not comparable to those of the Court and are not reviewed in accordance with criteria appropriate for the courts. The purpose of the report was to show the manner in which the judge went on to make helpful comments in relation to the assessment of the evidence of the expert in the circumstances, in which substantial failings of the expert, in his professional discipline could lead the Court to rejecting the opinion, of the expert or seeking the expert to make further investigation, or further considered opinion in the light of the court experience. The role of the s.47 reporter and their reports was considered by the Supreme Court again in *G.McD. v. P.L. and B.M.* at p. 466. The applicant in this case was a homosexual man who had donated sperm under agreement with the first named respondent to have a child by means of artificial insemination so that she and her female partner (the second named respondent) could have a family. The first and second named respondents proposed to move to Australia and I heard the interim and interlocutory application to restrain them from bringing the child to Australia. I made an order restraining the respondents from removing the child from the jurisdiction and ordered that a s.47 report be prepared. The plenary hearing of the matter took place before Hedigan J., he placed considerable weight on the s.47 report and held after lengthy discussion that the Court should depart from the recommendations of the s.47 report only for "grave reasons" which should be clearly set out. Hedigan J. thus set a very high standard for deviating from the terms of a s.47 report. The order of Hedigan J., permitting the child to be removed to Australia without any order for access being made in favour of the applicant, was appealed to the Supreme Court. The approach of the Supreme Court was that undue weight was given by the trial judge to the s.47 report, Murray C.J. stated:-

> "I agree that the ordinary rules of evidence concerning such a report should apply. A trial judge must be free, for stated reasons, to depart in his or her findings from evidence contained in such a report either because there is other more persuasive evidence or because he or she is not sufficiently persuaded by the report as to the correctness of a particular fact or conclusion in it".

Denham J. stressed that the Court was not obliged to accept a s.47 report, and added that any such application would erode the courts decision making role:-

> "The person writing the report remains an expert giving his or her opinion to the court. The report is produced to assist the Court while it is a matter to be weighed in all the circumstances or case, it should not as a mandatory matter be accorded great weight. A court is neither obliged to accept the report, nor is it required to expressly specify its reasons for non acceptance of the report. The report should be considered carefully, by the trial judge, together with all the factors and circumstances of the case, and it may assist the trial judge in determining what is the best interests of the child, whose welfare is the paramount consideration.
>
> In this case the learned trial judge erred in determining that a s.47 report should be given great weight. Further, the learned trial judge erred in determining the [s.]47 report should be accepted, as a mandatory matter, save for grave reasons, which the court should set out clearly. Such an approach is erroneous and would alter the role of the court, the court is the decision maker. The court is required to consider all the circumstances and evidence. The s.47 report is part of the evidence to be considered by the court. It is for the court to determine, in accordance with the law, what is in the best interest of the child, the paramount consideration being the welfare of the child in determining issues such as access and guardianship."

13. In the case *A.B. v. C.D.* [2011] IEHC 543 (unreported, 26th July, 2011), I took the view that the disqualification of the first six experts appointed by the Court at the instigation of the mother was wrongful, following the principles of the judgment of Murphy J. in *L.D. v. T.D.* although not specifically referring to that decision. During the course of the hearing which commenced in 2008, it is noted (in the end of the judgment referred to as the "reflection") paras. 107-111 on pp. 92-956 inclusive and further on in relation to suggested standards for the monitoring and use of s.47 reports arising form the extensive enquiries and experience made by the Court

in that case under paras. 1-19 pp.94-103 of that report, I also followed and made use of the judgment of Murphy J. in deciding *I. v. I.* [2011] IEHC 411 (unreported, 8th July, 2011). In that case custody issues arose, and in particular a question arose whether the child would attend a particular school and whether he would mainly reside with his mother. The hearing spanned the closing days of July to January, 2011, and involved an interlocutory order allowing the child to go to school with his father subject to a review at the full hearing. It is instructive to repeat para. 9 of the judgment which related to a cross examination of the s.47 reporter Ms. N.D.

"Ms. [N.D.] was cross examined by Mr. Kavanagh S.C., who appeared for the mother, and by whom the approach taken was to seek to challenge the credibility of Ms. [N.D.] This approach had occurred in the Circuit Court and was reinforced by an application to have Ms. [N.D.] disqualified as a s.47 expert in this case. This application had been refused in the Circuit Court and that order was not appealed. The tactic was to establish complaints of the mother against the father to be true, and complaints by the father against the mother to be untrue. In relation to the latter, sample "allegations" by the father were first that the mother had post-natal depression giving rise to problems after the birth of D.N., and second that she had suffered sexual abuse when young. The latter allegation consisted only of the fact that father had said (in Ms. [N.D's.] account of her interviews with the parties) that the mother had told him so. Ms. N.D. readily conceded that if her opinion on the strategy for care of D.N., were based on wrong conclusions in relation to the facts upon which such opinions were based, then her opinion was incorrect and should be reviewed. It was then sought to link the incorrectness of the various allegations, (for instance the post natal depression (P.N.D.) and sexual abuse (S.A.)) into this framework and it was suggested that if Ms. [N.D.] was wrong about these facts, then her opinion was wrong. This approach to cross examination did not cease notwithstanding that at an early stage I protested as trial judge that Ms. [N.D.] had set out the status of many of the "allegations" made by each of the parties in the preliminary interviews as irrelevant to her opinion for the reason set out in her conclusions as described above in this judgment. The Court also drew to the attention of mother's representatives the judgment of Murphy J. in L.D. v. T.D. (unreported 9th November, 1998) where it was held that an expert such as a psychologist or psychiatrist preparing a social report should not act as a judge in resolving conflict of fact – a function which is the sole prerogative of the court. Notwithstanding these admonitions the representatives of the mother continued on with this style of cross examination in what became and attritional process, not only in relation to Ms. [N.D.], but the other s.47 reporter Dr. McQuaid, and father when he gave evidence. I found that Ms. N.D. gave credible evidence and where it was shown she may have been inaccurate in noting facts or incorrect in her conclusion she was prepared to alter her opinion and I found that there was no reason to be other than convinced that she was perfectly competent and highly expert in dealing with the case."

14. I have had the benefit of considering an article by Claire Hogan B.L. and Sinead Kelly, solicitor, titled *"Section 47 reports in family law proceedings: Purpose, evidential weight and proposals for reform"*, [2011] 2 IJFL at p.27, in which the two Supreme Court decisions, dealing with this issue, are discussed. I note that the paper was produced having had discussions with the Honourable Judge Margaret Heneghan (as she then was), and both Dr. Houlahan and Prof. Sheehan, persons with enormous experience in producing s.47 reports and giving evidence in court. At p. 34 of the learned authors observe the following:-

"Both Dr. Houlahan and Professor Sheehan acknowledge that in general, the Irish courts place 'huge weight' on the recommendations contained in [s.]47 reports. Professor Sheehan suggests that in circumstances were the court has experience of and trust particular expert appointed, it is more likely that it will endorse the recommendations contained in his/her report. However, he cautions that this 'may not be a good thing'. He advises that in the High Court, where cases are afforded more time, judges tend to be able to tease apart the report more. However, in light of the volume of applications of cases in the Circuit Court, he notes that it is inevitable that the reports are sometimes dealt with in a more cursory manner. Overall, Professor Sheehan is of the opinion that judges accord 'great weight' to [s.]47 report. He hypothesises that such weight is accorded as a way of saving time in an over-stressed court system. For example, were a judge has the assistance of a detailed and useful report, he may naturally be more inclined to accept the recommendations contained therein, and to indicate to legal representatives the direction of his/or thinking and support the assessor's view, as a way of curtailing what might otherwise be a very time consuming hearing of all the issues. "

15. These practical observations go a long way to explain that in the Circuit Court the stressed dynamic of hearings may probably still give rise to an often uncritical acceptance of a s.47 report in certain quarters. In taking this approach Circuit Court judges maybe more amenable to disqualifying s.47 reporters, or to order second s.47 reports, on the basis that counsel for the respondent/appellant described, by saying that the judge felt that the "parties should have confidence in the system". An examination of the reflective parts of the judgement in *A.B. v. C.D.* and of the entire judgment in *I. v. I.,* has caused (certainly in so far as I would be concerned with the list in the High Court since these judgments) very few s.47 experts to be removed by reason of bias or inadequacy. I can refer to one case *G. v. K.* [2013] IEHC 650, in which a child proposed to be removed back from Ireland to Germany, had been examined by a s.47 reporter who heard certain complaints by the child against their mother in relation to violence. The s.47 reporter immediately referred the matter to the appropriate authorities under the "children first" principles. This approached was approved by the Circuit Court judge hearing the case, and there was much delay in having the matter processed by the Irish childcare authorities. The German authorities who referred the matter on to the German authorities who ultimately reported that the complaint was unfounded, thus considerable time was wasted. The particular s.47 reporter was not available to give evidence on a continuity basis, but, in any event, I acceded to a further application on behalf of the mother to have a further child expert appointed, and allowed a further child expert (not appointed under s.47 but retained unilaterally by the father), to give evidence.

16. Generally, as a matter of practice in running the High Court Family Law list I and the other family law judge in the High Court, follow the general guidelines suggested by the judgments of *A.B. v. C.D.* and I. v. I. in dealing with s.47 reports. This practice is now also generally followed by the Circuit Court, especially in Dublin. The approaches of the various judges to this task vary in detail. The experience generally seems to me that, while the courts are disposed to take care with the preparation of terms of reference for s.47 expert reports, and the protection of such experts as witnesses from abusive and vexatious cross examination, and objections including applications for removal by reason of "bias", the approach may vary. This varied approach has to be explained by the fact that judges in their courts must be conscious of the needs of fair procedures dictated by constitutional and natural justice, as applied to the particular facts of a case. However, having witnessed the approach of the courts towards a more disciplined use of s.47 reports, to the benefit of the children and families concerned, I must concede that the reality of counsel and solicitors following the instructions of their clients is such that the broadest possible terms of reference and freedom of movement in dealing with s.47 reports is required from the outset, by both parties. The position of legal representations must be respected in this regard, leaving an ever present duty on the judiciary to be watchful to ensure that the natural dynamic for the extension of litigation does not act to hamper the true purpose of a s.47 expert, or, for that matter, unduly run up costs and conflict for the families concerned.

17. While the Supreme Court judgments clearly indicate that the s.47 reporter is not the person who is determinative of any finding in a family law proceeding and may be treated during the course of the hearing like any other witness, the experience of the courts is that in other respects s.47 reporters are not like any other witness. Normally expert witnesses in "non family law" cases prepare their reports from willing witnesses and clients only from one side whereas the s.47 reporter prepares his reports from witnesses and parties who ultimately may be compelled by court order to cooperate and hence answer their questions. While the Supreme Court have clearly stated that the s.47 reporter is not carrying out an inquisition, nevertheless the first appearances for many parties and witnesses not familiar with this fundamental analysis may be quite the opposite. These first appearances give rise to the tensions and

misunderstandings conveyed to practitioners, which might erroneously (but understandably) give rise to instructions to practitioners, such as were received by counsel for the respondent/appellant in this case, and many other instances.

18. The learned authors Hogan and Kelly, in the article referred to, have at para. 5.3 called for clear guidance for judges, practitioners and experts in relation to s.47 reports and state:-

"It is submitted that a number of the problems with the system might be alleviated by formulation of clear guidelines for judges, practitioners and experts themselves. Such guidance could deal with issues such as letters of instruction, matters to be addressed by the experts, the manner of assessments, the recommended timeframe for conducting assessments, and the parties who should be assessed. Collaborative guidelines could be formulated and agreed by members of the judiciary, family law practitioners (both solicitors and barristers) and bodies representing experts (eg. the Psychological Society of Ireland and/or the Medical Legal Society of Ireland). The above-mentioned U.K. practice direction on 'experts and family law proceedings relating to children' might provide a useful point of reference for reform in this jurisdiction."

19. As yet such guidelines have not emerged, although the experience of following the practice arising from the Supreme Court decisions, and the *A.B. v. C.D.* and *I. v. I.* decisions, in addition to similar decisions, is indicative of the likely benefit of and success of such guidelines. The need for such guidelines is evident from the need to get somewhat more consensus in relation to the approaches to be taken by judges, so that counsel do not have to resort to the varied reported decisions pointing towards some managed system of s.47 reporting, and also to protect practitioners from the centrifugal force away from proper case management, arising from the primacy of their clients instructions.

20. The formulation of such guidelines should however protect the individual independence and discretion of each trial judge, and, above all, ensure the right to a fair trial in accordance with constitutional and natural justice. In *A.B. v. C.D.,* I dealt with the tentative proposals in the reflection at the end of the judgment regarding treatment of s.47 experts to ensure efficiency and fairness for all concerned, stating at para. 17 as follows:-

"This process of control should only be exercised sparingly having regard to the right of a fair trial in accordance with constitutional and natural justice of the parties involved, but under no circumstances would I accept that in appropriate cases is contrary to the right of a fair trial in accordance with the Constitution especially when it is realised that in modern times legislative restrictions have been placed on the right of the accused in relation to cross examination of compliance in sexual cases about their previous history and, in more recent times, in relation to restrictions in relation to the challenge of experts proposed to give evidence".

Conclusion
21. On the issue of bias, having regard to my conclusion on the facts I find that there was nothing untoward about the exchange between Ms. N.D. and counsel for the respondent/appellant (natural father), (never mind any suggestion of bias). In so far as the law is concerned, the experts role is not that of an arbiter of the differences between the parties, but merely a person who may give an opinion, and if they qualify this opinion this does not leave them any less qualified to give the opinion nor does it show any cause for disqualification by the judge. The judge alone is the arbiter of fact and law and is free to make conclusions in the case having heard the evidence of the s.47 expert in all its frailties, (if any), and the other evidence, together with the submissions and discussions at the hearing.

Notification of s.47 Expert
22. The question arises whether the parties and the Court would be under an obligation to notify the witness proposed to be disqualified by reason of bias in accordance with the principles set out in *Re Haughey* [1971] 1 I.R. 217. It is an indication of the desultory way in which these applications have been dealt with in the past that this does not seem to be the practice. Nevertheless, a holding against such a witness could be sought to be multiplied and aggravated by a complaint to their professional disciplinary body which might be then found to be unfounded, or (even without such complaint) be circulated among networks in certain quarters which, in breach of the *in camera* rule, have the information ready for recycling before another court, in an attempt to disparage the expert witness, or even achieve the same result of exclusion for bias. In view of the decision of the Court the question of notification of the expert witness does not arise in this case.

Section 47 Report
23. The Court accepts the submissions made on behalf of the respondent/appellant that the s.47 report, if ordered would be the third, and that the same would constitute a burden on all concerned especially the child. Nevertheless, all parties recognised that the child was at a very crucial period of his development, and that his present circumstances and views would be relevant, given the lapse of time since they were last heard. Accordingly, the court ordered that the same s.47 reporter would speak to the child for the purpose of reporting his up to date circumstances and, his views.