Neutral Citation Number: [2011] IEHC 411

THE HIGH COURT

CIRCUIT COURT APPEAL

2009 54 CAF

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

IN THE MATTER OF THE FAMILY LAW ACT 1995, AND

(IN THE MATTER OF PARENTING AND SCHOOLING OF A CHILD, D.N.)

BETWEEN

I.

APPLICANT

AND

I.

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 8th day of July, 2011

1. The applicant father and respondent mother were married on the 12th March, 2004. There is one child of the marriage, D.N., a boy who was born on the 23rd January, 2006. This appeal, brought by the mother, is in respect of an order made by the Circuit Court on the 4th November, 2009, in which the Honourable Judge Hunt ordered, *inter alia*:-

> 1. That D.N. remains in the joint custody of his parents.
>
> 2. Each parent to have access to D.N. on a fortnightly rota in accordance with the s. 47 report of Caoimhe Ní Dhomhnaill dated the 28th April, 2009, together with 30 minutes telephone contact as specified.
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> 3. Each parent would have a GP for D.N. with the intent that each GP shall thereby maintain a comprehensive set of medical records in respect of D.N.
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> 4. Each parent to bear in mind the recommendations of Ms. Ní Dhomhnaill as set out in paras. 75 and 78 of her report.
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> 5. Two appropriate relatives were nominated for the purposes of para. 76 of the said report.
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> 6. (And of most relevance to this appeal) from September, 2010 D.N. shall be enrolled to attend at school at a location to be agreed by both of his parents. In default of such agreement, D.N. is to attend at school situate within two miles of the applicant's home in F., but not further than three miles from the motorway, for ease of access by the respondent, with access to afternoon crèche facilities provided and paid for by the applicant, with transition and handover arrangements for D.N. to continue via the crèche as before.
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> 7. In order to ensure that D.N. is accustomed to the arrangements ordered hereby by the commencement of his primary schooling these arrangements are to come into force on Monday the 30th November, 2009.

2. By notice of appeal dated the 11th November, 2009, the respondent mother appealed to this Court from the said order of the Circuit Court dated the 4th November, 2009, save the order granting joint custody and sought a stay upon same. By notice of motion dated the 25th November, 2009, the respondent mother sought a stay and an order pursuant to s. 47 of the Family Law Act 1995, appointing an alternative assessor to carry out a s. 47 report. By order dated the 18th December, 2009, the High Court received consent in relation to the agreed access for D.N. and ordered that Dr. Paul McQuaid produce a report on any question affecting the welfare of D.N. and that that report would be forwarded to the registrar in the first instance. This report was to be a second opinion on the existing s. 47 report. A stay was granted upon the Circuit Court order appeal until the hearing.

Background to the Appeal

3. The parties were separated by decree of judicial separation made on the 11th July, 2008. By that stage Ms. Caoimhe Ní Dhomhnaill had been retained as a s. 47 expert to report on custody and care arrangements for D.N.. The consent order reflected a joint custody and care regime whereby care of D.N. would be shared by the parties in their homes, and the parties agreed to jointly request Caoimhe Ní Dhomhnaill to review the efficacy of the (then) current care and access regime and current crèche placements relating to D.N.. The parties also agreed that upon receipt of Ms Ni Dhomhnaill's further recommendations (if any) the parties would immediately co-operate in seeking to re-enter the proceedings into the list of fixed dates for the purpose of obtaining a hearing for the determination of any issues arising from the further recommendations upon which agreement could not be reached.

4. Caoimhe Ní Dhomhnaill prepared a s. 47 report dated the 28th April, 2009, the "considerations" whereof in para. 6 set the scene for her view of the difficulties of the parties as follows:-

> "6.1 This is an acrimonious separation and at the time of this review the relationship between father and mother was particularly volatile in the light of mother's allegations.

6.2 D.N. is a remarkably resilient little boy and in spite of ongoing tension between his parents about minor and major issues, he appears to be developing appropriately in all areas. This suggests to me that although parents are unable to co-parent they function well as individual parents. However, as he gets older he is likely to become more aware of the tensions. To ensure that he continues to stay well emotionally it is of paramount importance that the acrimony between parents reduces. I attempted to see them jointly and strongly recommended that they attend for professional support with regard to joint parenting.

6.3 D.N. was obviously more articulate than when I saw him aged one and a half years old. On the day he expressed a reluctance to make the transition from his father's care to his mother's care. If the transition had been the other way he may well have expressed a reluctance to transfer from father to mother. In the presence of his father I observed a secure warm attachment. In the presence of his mother I observed what I view as ambivalent attachment. This was apparent when I first assessed D.N. but now at aged three it is more evident. My recommendations in July, 2007 attempted to address this and provide mother with most of the intimate times with D.N. i.e. bedtime and early morning times. My recommendations leaned towards giving her the opportunities to enhance her relationship with D.N. I believe that his relationship with his father was very good and did not require extra input.

6.4 In my view, D.N. was very excited to have his parents together during the session. Father acknowledged the value of this for D.N. Mother appeared to value it less. When I met them as a triad, father attempted to make contact to relate in a manner that was appropriate in D.N.'s presence, mother, in my view, was reluctant to engage.

6.5 If D.N.'s attachment to this father is secure and comfortable then he will ally himself with his father, make comments about wanting to shoot his mother or that his mother is scarier regardless of whether or not he is coached to do so. If he perceives a hostility between his parents at aged three he has no choice but to choose one parent over the other. The ongoing conflict is certainly not in his interest and at present he appears to be attached and allied to this father.

6.6 In my opinion at present D.N. would not be happy to reside primarily in his mother's care. He would miss his father too much. Also it would necessitate a change from …crèche where he is well settled to a new crèche in B. It would also mean that he would move very close to his maternal extended family and the relationship between father and the maternal family has been very strained and I am unsure how well they would foster the boy's relationship with his father. (*Comment:- It is noted that the crèche issue has been replaced by a primary school issue with the passing of time*).

6.7 Due to ongoing hostility between the parties my recommendations lean towards reducing transitions. Normally I would recommend a five to two five system for an older child but given the level of hostility at the points of transition this may be the only option here. Also the longer period away from each parent might serve to prepare him for September, 2010 when the move to school will necessitate longer absences from either parent *i.e.* if mother wishes to remain in B. then to facilitate joint parenting D.N. may need to reside with one parent from Monday to Thursday and the other Friday to Sunday.

6.8 Whilst the financial benefits of a move to B. are important it will have a very significant emotional impact on the fluidity of movement from one home to the other and I understand that there has been no communication or consultation about this issue. Mother needs to bear in mind that she has made a unilateral decision to insert distance between herself and D.N.'s paternal home.

6.9 As a child psychologist I feel obliged to highlight for these parents the opportunity they have to ameliorate adverse long term consequences of their separation for their little boy. There is empirical evidence that divorce or separation *per se* does not have a negative affect on children but that most of the negative outcomes can be linked to the level of discord between the parents pre-separation and post-separation (authority), the worst outcomes occur when children are triangulated in the middle of parental conflict (authority)."

5. Caoimhe Ní Dhomhnaill's report continued then in para. 7 to make recommendations in accordance with her considerations and they have broadly been reflected in the order of the Circuit Court now being appealed.

Main Issues
6. The main issue is whether D.N. would attend school in B. or in F. or in the vicinity of F., or in accordance with the order of the Circuit Court. The second issue, which is not altogether related to the first issue but which may have an overlap, is whether D.N. would mainly reside with his mother in B. in accordance with the present arrangements when at school in B. The third issue is whether the view of Ms. Ní Dhomhnaill that D.N. would tend be alienated by mother if he remains in B. in the primary care of his mother, especially, if he goes to school in B. also, is borne out by the facts.

Sub-Issues on the Evidence
7. While an understanding of the sub-issues arising on the evidence did not emerge at the opening of the case, an extensive cross examination of Ms. Ní Dhomhnaill and Dr. McQuaid, the second s. 47 reporter, together with cross examination of father indicated that mother claimed that Ms. Ní Dhomhnaill's conclusions were unreliable for the following reasons:-

1. Ms Ni Dhomhnaill accepted, without question, father's allegation that mother was sexually abused when young.

2. That she accepted without proof father's allegation that mother had post-natal depression after the birth of D.N.

3. That father was violent and abusive towards mother and members of her family.

4. That father "messed up D.N.'s head" meaning that he alienated or generated an antipathy in D.N. against mother and her family by making adverse comments about them.

5. Father had introduced aspects of sexuality at an inappropriate age for D.N..

6. That father had sexually interfered with D.N., *i.e.* by inappropriately and prematurely making D.N. destructively conscious of sexual matters.

7. Inexplicably, through mother's expert, canvassed the idea of not allowing father to have any access at all, or at least supervised access in the future.

8. Contested the suitability of a school in the area suggested by the Circuit Court order as opposed to B. by reason of the additional travel time imposed on D.N. and mother together with the relative scarcity of opportunities to attend to emergencies through the availability of relatives or parents which were generally alleged to be more available in B.

The Evidence

8. Caoimhe Ní Dhomhnaill gave evidence in accordance with her report and emphasised now that attachment problems between mother and D.N. had abated and a good relationship had been established. It was necessary that with primary school beckoning D.N. would be better placed so as to have some more time with his father. She advanced two reasons for this. The first was that, at five and onwards D.N. would experience developmental benefit from greater contact with his father in psychological terms and secondly, (it appeared to me more critically) there was a real risk of alienation of D.N. from his father if he went to school in B. (B. is in a rural location within the city commuter belt and at non-peak times is just a short hop from the motorway, but at peak times a journey anywhere into the city could be well over an hour).

Cross Examination

9. Ms. Ní Dhomhnaill was cross examined by Mr. Kavanagh S.C., who appeared for the mother, and the approach was to seek to challenge the credibility of Ms. Ní Dhomhnaill. This approach had occurred in the Circuit Court and was reinforced by an application to have Ms. Ní Dhomhnaill 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 mother against father to be true, and complaints by father against mother to be untrue. In relation to the latter, sample "allegations" by father were first that 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. Ní Dhomhnaill's account of her interviews with the parties), that mother had told him so. Ms. Ní Dhomhnaill readily conceded that if her opinions 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 (PND) and sexual abuse (SA)) into this framework and it was suggested that if Ms. Ní Dhomhnaill 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. Ní Dhomhnaill 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 reasons 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 mother continued on with this style of cross examination in what became an attitrional process, not only in relation to Ms. Ní Dhomhnaill, but the other s. 47 reporter, Dr. McQuaid, and father when he gave evidence. I found that Ms. Ní Dhomhnaill gave credible evidence and where it was shown that 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 her dealings with the case.

10. This attritional aspect of cross examination continued on to such pitch in relation to allegations against father and Ms. Ní Dhomhnaill that when Dr. McQuaid gave evidence in support of Ms. Ní Dhomhnaill's conclusions of early attachment difficulties of mother with D.N., the Court posed the question to Dr. McQuaid as to whether he would change his conclusions if the myriad of allegations which had been pressed forward by mother's representatives in cross examination were proven to be true. (Mr. McCarthy at a later stage claimed that he had isolated 30 such allegations and it was put to Dr. McQuaid that he should state what his conclusions would be if this range of allegations were proven at their height.) It is instructive to at this stage to quote this part of the cross examination.

> "Question (Mr. Kavanagh): But assuming for the time being, as the court has asked you, that everything I said is provable to the satisfaction of the court and is found to be true, that is as far as we can go, we were not there, nobody can be a 100% certain to a mathematical certainty, but if on the preponderance of the evidence, having witnessed both witnesses in the witness box and all the things that judges do, they assess them, assess their credibility, decide it is more likely than true than not, what impact does that have upon the recommendations that you would make by way of options for the court to exercise?
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> Answer (Dr. McQuaid): It would further impact on the risk that the child is likely to continue to suffer with persistent, inimical and may entrenched opposition to his role as father and guardian of the child. So, the judge, no doubt, will take very serious account of what you have listed. I lost count of the allegations but it certainly added up to a very serious portrayal of the child's father and led me to think, as you were going along, that if I was managing this case, if I had been involved in this, I would have subjected, with the agreement of both parties, each of them to psychiatric evaluation.
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> Question (Mr. Kavanagh): I can tell you my client would have no objection to any such course?
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> Answer (Dr. McQuaid): It seems beyond that then to run counter to my observed normal relationship that the child enjoys with his father, and reciprocally, and equally to the child's relationship with his mother, which appears to be essentially normal and very caring. The problem lies in the relationship between the parents and therein lies the potential psychopathology. So, we are listening to a very serious state of affairs and it is pretty bizarre."

11. Mr. Kavanagh did evince from Dr. McQuaid in the context of psychiatric evaluation that father while a teenager had consulted a Psychiatrist in St. John of Gods, for "challenging" behaviour towards his father.

Mother's Evidence

12. In giving her evidence, mother concentrated a great deal in refuting the allegations of father recited by Ms. Ní Dhomhnaill in a record of preliminary interview with father, particularly the allegations of PND and SA, and gave an account of a very tormented relationship between the parties after the birth of D.N. where they had been living under the one roof but in separate rooms. She denied problems of lack of attachment with D.N. and described serial disagreements between the parties in relation to the micro-management of D.N., down to issues as to whether he should be taken up when crying or when the door might be left open in his room as a baby. She gave evidence indicating her preference for his education in the national school in B. and pointed to the logistical

advantages to him and to both parents in such a move combined with primary residence in B. associated with that school attendance. She agreed that there should be contact between father and son in the interest of D.N.. She was dismayed about the premature sexualisation of D.N., particularly in relation to the silver spoon incident. She concentrated on instances of violence against her, pushing her so that her shoulder was bruised where she had it examined by a doctor afterwards and pushing a bag at her father when in a car, and general alienating activity of father of D.N. against her, her family and indeed D.N.'s cousins and sometimes his friends in B, which she described as "messing up D.N.'s head". This was a term which other members of her family used when giving their evidence.

Interim Solution
13. The attritional nature of the case meant that the allocated three days for the case was greatly exceeded, and, as the term drew to a close at the end of July, the imperative of planning for D.N.'s progression to national school became more pressing as places were limited in potential schools. At this stage the Court decided, without prejudice to its final conclusion, that attempts should be made to enrol D.N. in T. national school with a cascade of options to be pursued without reference to the Court in the event of T. national school being unavailable, and the Court by that time had made certain admonitions to the parties (father in particular) to be more cordial, courteous and forthcoming in the communications with each other and that father should be less aggressive and challenging in tone (a feature of which mother had complained).

Interlocutory Findings of Fact
14. The above interim order was preceded by an interlocutory finding of fact by me which resulted from observations of father when giving his evidence, arising primarily from his conversational manner. While in his own evidence and in the re-examination of Dr. McQuaid father showed, and I accepted, that he was accommodative, willing to acknowledge his weaknesses and failings and mend his ways, and on the re-examination Dr. McQuaid had shown that he was agreeable to Dr. McQuaid's suggestion that father and mother would mediate whereas mother would not agree to same, I nevertheless found it important to comment that in many of his answers to questions both in examination and cross examination, father would preface his answer with the exclamation/imperative "look". Without purporting to be linguistically expert, my common understanding of this introductory remark/prefix is that it is introducing an aggressive, dismissive tone to the answer in most contexts. Of course I can accept that the exclamation can also preface a humiliating answer of self defeat as in answer as to why someone did not go on a second holiday when they might say "look!!, I had spent all my savings". In his answers to the questions I took the prefix "look" not to be used in the self deprecating context but rather in the context of aggression even though father did so unconsciously because he clearly answered the questions in a respectful way towards the Court and most often in a respectful way towards mother and the other participants in court. As this verbal style could portray an aggressive approach at the outset when speaking to mother, even in circumstances where there was an overall anxiety to cooperate and work towards joint action, I could easily understand how mother with a carry over of sensitivity and rawness from a period in the early years of D.N. .(which was characterised by high levels of conflict on a face to face basis), could be reminded inadvertently of some hurtful and destructively aggressive behaviours by father in the past, and would react negatively either by adopting a conflictual stance or most often by merely withdrawing and refusal to interact or contact. I thus drew this mannerism to father's attention and the implications of it. In the same vein I considered it important to make other interlocutory findings for the assistance of the parties during the hearing. After a certain number of days it appeared that the attritional aspect of the case could only be averted at the risk of not having a fair hearing of the parties and as this attritional approach put the proof of allegations by the mother against the father at a premium, Mr. McCarthy, counsel for the father, joined the fray by insisting that he put on the record of the Court a denial of many of these allegations. The making of findings during the course of the hearing on an interlocutory basis was to assist in focusing the parties on the real issues and avoid agitation and annoyance during the trial of either party in relation to upsetting issues where they were unresolved. The first such issue related to the silver spoon incident. This had been portrayed in the Circuit Court and in the hearing in the this Court on appeal, by the wife, as a shocking indication of at worst perverted child abuse or at best premature inducement of sexual awareness and/or guilt of the child D.N..

15. The activity had perplexed Ms. Ní Dhomhnaill who had no professional experience of it and it had perplexed the Circuit Court in the same way and, thus, the issue remained very destabilising. At the prompting of the Court that the issue might have something to do with schoolboy mythology on pseudo medicine, the father indicated that he had heard of it in the context of schoolboy rugby physios dealing with the issue. As the father had long since accepted that it was inappropriate behaviour and as the parties had medical expertise lined up in relation to setting up a real and unnecessary debate as to whether it was activity relating to real medicine or mythology (or worse), I found that having regard to father's explanation and altered behaviour that it was a regrettable but not very significant episode which had been rectified and did not deserve serious forensic medical examination so as to perpetuate it as a red herring. Equally I found it necessary to assure the parties that, on the run of the case, I could find as a fact that neither party was in need of, or would benefit from, psychiatric evaluation, but the problem they had was finding a functional solution to a practical problem of which both are capable with the assistance of court decision, notwithstanding (and with great respect to) Dr. McQuaid's opinion. Also (in view of the fact that father's "allegation" of sexual abuse of mother in her early years only amounted to his statement that he recalled such account of hers and her direct evidence to the contrary coupled with evidence of medical kind otherwise in the papers), I found it important to find as a fact that there was no sexual abuse of mother by any person in her childhood and early years or ever. Equally, on the basis that the only suggestion of PND was on father's surmise recounted to Ms. Ní Dhomhnaill, I found on the basis of denial and medical evidence elsewhere that mother did not ever have PND. I also found that whereas father was not a serial aggressor and that he was not given to violence, he was nevertheless in every sense of the term a "big personality" who could provide a very formidable if not oppressive front to mother who was more reserved (and even serene) and less expressive.

Other Evidence after Interim Order and Vacation
16. The hearing resumed in January, 2011 and involved hearing evidence of the progress of D.N. who had by then been enrolled in T. national school in September of 2010.

17. School reports were very positive, of a boy who had settled in very well and had made new friends, save that his colouring left something to be desired. Father was recalled and his evidence was that both he and D.N. were overjoyed with the new experience and that, logistically, problems were considerably eased by the fact that his sister and elderly mother called for D.N. at school and kept him in the company of cousins until father could collect him later in the evening at a time that was more suitable to his business needs. Mother's evidence on the experience was much less favourable. She recounted the grinding task of travelling from B. into school through heavy traffic with D.N., rising at half past six and being very tired and sleepy as a result. She said that D.N. had expressed a dislike of spending such a long time with father and said that his preference was to be with mammy, that he had become dependent on her and had slept in her bed. She admitted that she was very upset after the interim decision in relation to D.N.'s school but denied that this unhappiness would have transferred to D.N. She instanced episodes of extremely repetitive telephone messages and texts left by father to her and said that this was very oppressive. She also stated that he had been late (once) with D.N. and had missed a parent teacher meeting. Father denied the obsessive texting and telephone calling. Some efforts were made to ascertain from this phone that there were no such obsessive calls made in either medium, but I am satisfied from his general evidence that he did become somewhat obsessional and panicky when mother did not respond to his queries which itself is a subtle means of

either protection or provocation used by mother on occasions. Father explained that he was late only once and that this can be explained by the fact that D.N. "like father like son" is not a great morning person. The father explained that his absence at the parent teacher meeting was due to mother not sending on post or delivering messages and he complained that this was not a mistake but was a "set up" by mother to paint him in a bad light at the real hearings. Much to the protestations of Mr. McCarthy, Síle McNeill, an expert psychologist, was called to give evidence on behalf of mother. Mr. McCarthy objected that she had not been appointed as a s. 47 expert and he was supported by a written review of Síle McNeill's report by Ms. Ní Dhomhnaill. He stated that Síle McNeill had not met D.N. or the father and had not read Dr. McQuaid's report prior to coming to court that morning. He stated that at best Síle McNeill's report could only deal with the psychological state of mother when she met her. I decided that in ordinary circumstances Síle McNeill's evidence would not be admissible save in respect of her direct observations of mother. However, on the run of the case it would have been counter-productive and discouraging for mother in the sense of a feeling denial of a full hearing if the expert were excluded at the stage of the hearing. When Síle McNeill was introduced as a prospective witness it had become quite clear that mother, for whatever reason, had become very hurt by the non-resolution of issues and I was firmly of the view notwithstanding my continual objections to the attritional nature of the hearing, that there could be some beneficial catharsis out of a full hearing brought to conclusion which might assist in establishing a less confrontational and more mediating context for the parties after court order on the appeal. Thus, there would be a generally beneficial "catharsis affect" arising from a full dealing with Síle McNeill's evidence.

18. Ms. Ní Dhomhnaill's comments on Síle McNeill's report as per written memo introduced to court is thus of reduced relevance to the admissibility question regarding Síle McNeill's evidence, but it is appropriate that in reflection at the end of this judgment that I should revisit it with a view to establishing an important pointer relating to the commissioning of s. 47 reports in the future. Ms. McNeill's report and evidence was strongly against mother having PND and this was based on her own observations, and I have been assisted in making the interim interlocutory findings in relation to this matter by her evidence. Her other evidence related to her recitation of the various complaints about father's behaviour indicating premature sexualisation or worse and "messing with D.N.'s head", which were entirely based on a one sided account. She questioned, in view of the foregoing, whether father should have access for prolonged periods. Her terminology was "however, on the basis of concerns outlined above there would seem to be grounds to urge caution in placing D.N. in his father's care for prolonged periods". Mr. McCarthy characterised her recommendations as supervised access and she lurched into this position by saying "it would be in D.N.'s interest that he have frequent contact with his paternal extended family and be able to grow up with their support also. The Sunday lunch gatherings in his paternal grandmother's house may be the ideal opportunity for him to be with this side of the family" as indicating that there would be supervised access on Síle McNeill's view of the matter, this view is strengthened by her final sentence where she stated as follows:-

> "One would have to question the benefit of their being appointed joined custodians given their reportedly antagonistic relationship at present."

I really don't think that mother ever herself put forward such a case but her handling of her own and (through her representatives) other evidence was that her approach to the case might be characterised as being prepared to wound on the issue but yet afraid to strike.

Mother's Family
19. Mother's parents and sister gave evidence. I endeavoured to discourage this course as the case had been sufficiently aired on both sides to enable the court to make a decision. I considered that even at the highest point of the parents evidence in relation to various issues, the outcome would not be materially affected and any advantage to the mother in this highest point scenario would be greatly outweighed by the disadvantage of the long term antagonising affect of the appearance of such people to both mother and father and on the witnesses themselves. I considered this having regard to the fact that they were and can still be viewed as a treasured resource of family contact for D.N. whose availability and the quality of whose availability could be damaged by a confrontational court appearance. All of them gave evidence in varying degrees backing up mother's allegations, in particular grandfather and grandmother gave evidence in relation to the alleged assault on father by throwing bags at him in the car. While cross examination did uncover a discrepancy between affidavit accounts and grandmother's account, I am satisfied due to the re-examination of grandmother by junior counsel that the affidavit discrepancy has more to do with typographical error than reality and I am inclined hold that the throwing of bags incident with grandfather did actually occur, but that it was more like a "pushing against" assault by father rather than "head on" which was an isolated incident, and not part of a pattern and may well have been in the context of provocation and not such as to merit the denial of contact between father and D.N.

20. Mother also gave evidence that her meetings with father were far more cordial which she thought was as a result of the court's admonitions for a more courteous approach by father and she was of the view that he was on his best behaviour as a result of the continuing court process.

Conclusions
21. I had concluded in reaching the decision to have D.N. enrolled at T. or the alternative cascade of schools in the non B locations that while other things being equal, the logistics arguments would favour D.N. going to school in B., and the balance of logistical convenience favouring father as he had a more flexible business timetable than mother. The danger of alienating behaviour by mother and the larger family and community at B. would be so great a challenge to the welfare of D.N. regarding his relationship with his father and his parents that this danger would far outweigh the natural advantages of schooling at B. Whatever remaining doubts I had about this conclusion on the resumption of the hearing some months after D.N. had attended T. national school as a result of hearing about the obvious strain on mother and D.N. in the long journeys from B. to T. national school, were dispelled when I heard evidence given by grandmother and grandfather on maternal side together with sister. They presented as the obviously decent and honest people they are. But they were very incensed by the actual and perceived behaviour of father. They carried the weight of the history of the very conflictual relationship and they did not appear to have any insights at all in relation to the value of a relationship between D.N. and his father save that grandfather acknowledged that D.N. appeared to be very happy at school. I am satisfied that given the tendency of mother herself to alienate, there will be an added danger through lack of a countervailing force from her immediate family against this tendency and, in fact, the danger will be that the tendency will be reinforced by the quite understandable but misguided attitude of her family. I am satisfied that father's apprehensions that he would be isolated and effectively cast aside by mother's family and community in B. such as at times when he might turn up for handover or GAA matches, are well placed. However, I can say that to a very substantial degree father has only himself to blame for this, as he very quickly came to the conclusion (incorrectly) that mother's family did not have a vital input into the welfare of his son, notwithstanding his initial friendship with grandfather (but not grandmother). Equally, he has only himself to blame for the worsening of this tendency of alienation or prospective alienation by his complete dismissal of the professional and academic worth of mother whose third level qualifications are not of the academic kind in the humanities that he has acquired, but are in the practical scientific-medical area which are being followed up by a different career in the marketing end of the profession she had followed which entails discipline, skill and important interpersonal skills which the father would deny. He would do well to appreciate these qualities for their own worth, and also for their worth to the general parenting of D.N. in the future as well as the undoubted maternal skills of mother. I am satisfied that mother, still, is seriously at risk of being caught in an alienating syndrome detrimental to D.N.'s welfare if he were to attend

school in B. as an alternative to T. for the following reasons:-

1. I accept the opinion of Ms. Ní Dhomhnaill on the issue.

2. The attritional nature of her conduct of the proceedings by refusing to accept the rational recommendations of Ms. Ní Dhomhnaill and her concentration on proving (what were isolated by Mr. McCarthy in his cross examination) up to 30 allegations of misbehaviour on the part of father, indicates that mother has had a non-mediating and conflictual approach which will affect D.N. in the event of his being isolated into an alienating atmosphere, which must be entered by father if he is to have contact with him at B. in circumstances where he attends B. national school.

3. The mother specifically would not engage in actual mediation when suggested by Dr. McQuaid and would not engage in what Ms. Ní Dhomhnaill described as a mediated interview by which I understand she means a joint interview at which Ms. Ní Dhomhnaill would be present. (This latter interview would not be mediation within the meaning of the Family Law Acts, as it could not be admissible in evidence were it so).

4. The failure of mother to let sleeping dogs lie in relation to allegations of domestic violence (some of which have been proven in the case which themselves do not merit the denial of access between father and son and which, in fact, have not been the cause of any denial of such access between father and son in circumstances where mother herself has agreed access for father with son with court approval).

In my experience of such cases there is a very common feature of actions by the parent showing a tendency towards alienation where there is a constant dragging up of past wrongdoings in the face of continuing actual access and a stated policy on the part of the parent in favour of having access, very often over a large number of years. The question might be asked is this the type of psychiatric pathology which Dr. McQuaid apprehended. I rather think not. I am more of the view that it is acquired and learned behaviour of the parent concerned, very often contributed to, or caused by failure of courts and perhaps legal advisors to deal at an early stage, and as they occur with the actual or perceived wrongs suffered by the parent, and decisions clearly made by either court or advisors that they are not to prevent access. Very often this learned behaviour is coupled with strong family or group support which provides comfort, confidence and security on the part of the parent affected by it and very often this group or family support is unfortunately associated with the activities of the alienating parent intent on pursuing the behaviour through aggressive forensic activity through repeated court appearances. The mother's legal representatives in this case must surely have some serious questions to answer in relation to a case where, on Mr. McCarthy's account (which I do not doubt), there were 70 court appearances in all relating to the litigation between the parties and in relation to the issues on this appeal, there were five days in the Circuit Court and nine days on this appeal. In relation to the appeal, the nine days taken up were in the face of my initial strong protestations against taking such a rigorous and destructive forensic approach. In making these comments I make no criticism of Mr. Kavanagh S.C., who was instructed in the case for the first time in the High Court appeal, and had all the appearances of a "man on a mission" and was clearly under instructions to fight the case to the bitter end. This he did dutifully and professionally, notwithstanding severe buffetings by the court. As I stated, as a result of his endeavours there may have been some catharsis which could be of a therapeutic affect – but it should be realised that the primary duty of the court is to make decisions on issues – not to provide therapy.

Decision

22. I, therefore, confirm the interlocutory decision regarding schooling and direct that not more than two telephone calls, texts/emails would pass between the parties in relation to parenting matters to prevent obsessive behaviour on either side, and that any school reports are to be copied by both parties when received by them and copied immediately and notified by post, and if notification requires same by short summary by text or email. Prior to any further court proceedings (which cannot legally be prevented by order of this Court) the parties are to seek mediation and the court nominates Mr. Eugene Davy Solicitor to be mediator, which nomination may be changed by the parties at their discretion but that the parties shall be obliged to explain to the court in the event of any further proceedings why they did not take up this opportunity. The court invites the parties to address it in relation to incorporation of any further aspects of the Circuit Court order in the Order on appeal or such further orders as may be appropriate or agreed between the parties before finalising the order and to address the court in relation to costs.

Reflection

23. The court notes Caoimhe Ní Dhomhnaill's memo on the report of Síle McNeill in which she says that the appropriate manner to deal with these matters is to have such reporter appointed by the court under s. 47 so that they may be able to be in a position to speak to all parties and that such report should be based on the basis of a second opinion so that the experts involved could meet, discuss the reports and reach points of agreement and isolate the differences of opinion and the reasons therefor, so that a possible mediated solution might arise between the experts or at least that the evidence could be presented in the most professional manner to court. While this recommendation did not have much relevance to this case on the run of the appeal hearing, I consider that in relation to the appointment of further experts pursuant to s. 47 it is appropriate and has been a part of the best practice of this Court for some time. The discussion between the experts is certainly consistent with the general terms of the Family Law Practice Direction in this jurisdiction and also with its approximate equivalent in England and Wales. The further discussion between the experts is a matter that might be decided upon in the discretion of the court, and would be desirable. The restraining consideration in relation to a proposed discussion is that in many of these cases where a second opinion is needed, there is much hurt and raw nerve on the part of the conflicting parties, and the parties themselves might strongly resist the more objective professional approach of having discussions in favour of court resolution on the evidence.