THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 1

No. 2016/431

Hogan J.
Hedigan J.
Heneghan J.

BETWEEN/

N.K.

APPLICANT/

APPELLANT

AND

S.K.

RESPONDENT/

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 17th day of January 2017

1. This is an appeal taken by the respondent husband against the decision of the High Court (O'Hanlon J.) delivered on 29th July 2016 whereby she (i) granted interim custody of teenage boys, U. and H. (then aged 18 and 15 respectively) to the wife and (ii) made an order pursuant to s. 11(1) of the Guardianship of Infants Act ("the 1964 Act") on an interim basis requiring the husband to leave the family home pending the determination of now pending judicial separation proceedings: see *NK v. SK* [2016] IEHC 572.

2. The appeal in these otherwise routine family law proceedings immediately raises two issues of considerable importance. First, does the Court have a jurisdiction to make an order for custody in respect of an admittedly young adult, but who has nonetheless attained his majority? Second, does the Court have a jurisdiction under s. 11(1) of the 1964 Act which is separate from and outside of the ambit of the Domestic Violence Act 1996 (as amended) ("the 1996 Act") to exclude a spouse from a dwelling which they own?

Background facts

3. Before considering these weighty questions, it is necessary first to consider the background facts. The couple were married on 2nd April 1995 and there are three children of the marriage, namely, M., born on 6th day of July 1996, U., born on 18th January 1998 and H., born on 9th December 2000. I propose for convenience to refer to them as "the wife" and "the husband" respectively.

4. M. is currently in his second year in third level education and does not live with either of his parents, save at weekends and in vacation. Although he remains financially dependent on his parents, he is now aged 20. His circumstances do not require to be further considered so far as the present application under the 1964 Act is concerned.

5. The second child, U., is now aged 18. It is common case that U. is autistic and is incapable of caring for himself independently of his parents at this time. U. is, however, currently in his 5th year in a mainstream secondary school, albeit that he is in a special class. So far as can be judged in the absence of a medical report, however, U.'s disability is a mild to moderate one.

6. The third child, H., is just 16 years of age and he is currently at school. No appeal has been taken in respect of the order for custody which was made in respect of him.

7. The family certainly enjoyed a privileged and affluent lifestyle, with the couple jointly owning four properties. The husband is well known in his own professional circle and he holds a very responsible position. Although the wife gave up her own career upon marriage and, in many respects, sacrificed that career for her husband and the children.

8. The trial judge had available to her two reports from a Dr. Gerardine Curtin, a consultant clinical psychologist. The first report was prepared in 2015 and the second report was prepared just before the hearing in the High Court in July 2015. Dr. Curtin reported that both husband and wife are loving and affectionate parents and that both should play a significant role in their children's upbringing and care through a joint custody arrangement. She concluded that Ms. K.'s parenting capacity is currently under utilised and that she was an insightful, caring and capable parent available to take primary care and responsibility for U. and H. I propose to return later to a consideration of the implications of Dr. Curtin's reports.

9. There are three family properties relevant to these proceedings, two situated at X and the other at Y. One may travel by car from X to Y in about 50 minutes. For convenience, I propose to describe the two properties at X as "House 1" and "House 2" respectively. As it happens, the family originally lived in House 2 before moving to House 1.

10. It would appear that the family relationship has been breaking down for some time, but matters came to a head in 2014. On 9th July 2014 the wife sought and obtained *ex parte* a barring order from the District Court pursuant to s. 4 of the Domestic Violence Act 1996 (as amended)("the 1996 Act") on the grounds that, as she alleged in the summons: "He gets aggressive, got me by the neck. Keeps threatening me and scaring me."

11. It is important to stress, however, that there has never been at any stage a judicial finding in respect of this allegation. As a result of that order the husband was obliged to leave House 1 and he resided for a week in a local hotel. He contended that the wife had no justification for making this application. The matter returned to the District Court on 17th July 2014. On that date the parties

arrived at a settlement and the barring order application under the 1996 Act was struck out by consent, so that the District Court never got to pronounce on the merits of the wife's domestic violence claim. As a result of that settlement it was agreed that the husband should return to the family home at House 1 and that the wife should reside at Y. It was further agreed that U. should stay with the husband at House 1 from Friday to Monday, but that he should otherwise reside with the wife. H. continued to reside with the husband in House 1.

12. On the 15th July 2014 the present proceedings were issued in the High Court by the husband. In those proceedings he sought a decree of judicial separation pursuant to the Judicial Separation and Family Law Reform Act 1989, order relating to custody and access in respect of U. and H. and other consequential orders, including property adjustment orders. By an affidavit filed in February 2015 the wife counter-claimed for similar reliefs and detailed what she said was the husband's unreasonable and dictatorial behaviour towards herself and the other family members.

13. In the course of these proceedings the High Court directed a psychologist, Dr. Geraldine Curtin, to prepare a report pursuant to s. 47 of the Family Law Act 1995 in respect of U. and H. Dr. Curtin completed her report in July 2015, but although it contained a specific direction that the full contents of that report were not to be released to the parties, the parties' respective legal advisers were allowed to summarise her recommendations. One of those recommendations was to the effect that it would be preferable if U. and H. were to remain at their school at X, although it was essential that they be allowed to move in an orderly, timely and conflict free fashion between the homes of their respective parents.

14. Although the wife first took up residence in the family property at Y, an application was brought by the wife in the legal vacation to the High Court in August 2015 for orders regarding custody and access to be regularised and to permit the recommendations of Dr. Curtin's report to be implemented. That application was also compromised, so that it was agreed that the wife would return to live in rented property in X, with U. and H. living with her during the week. It was further agreed that the husband would discharge the rent. The wife moved into rented property at X in November 2015 which was very close to House 2. The husband maintained that H. did not want to engage with her, whereas the wife asserted that this was as a result of pressure and negative influence exerted over H. by the husband.

15. At all events, the wife then issued a motion in December 2015 seeking maintenance and access. The husband then issued a counter-motion seeking the appointment of a fresh s. 47 report to be prepared in respect of H.. In his affidavit grounding that application, the husband expressed unhappiness with the approach which had been taken by Dr. Curtin, saying that he would never have agreed to her appointment in the first place had he known that the contents of the report were not to be made available to him. The High Court had already directed that Dr. Curtin should meet with both parents individually. Dr. Curtin met with the wife on 3rd February 2016 and – it would seem, after some difficulties - with the husband on 11th April 2016.

16. By this stage the maintenance motion was scheduled to be heard by the High Court on 24th June 2016. On that day the Court was informed of the husband's difficulties regarding the non-release of the report and of the fact that the wife was not prepared to agree with an alternative assessor. The Court then requested Dr. Curtin to advise on how to deal with her bar on disclosing the contents of the report. Dr. Curtin then prepared a supplementary or second report.

17. On the 18th July 2016 Dr. Curtin then gave evidence before the trial judge. At that point the parties had not seen the full contents of the reports, but O'Hanlon J. indicated that she would order disclosure of these (albeit subject to certain undertakings given by both parties not to discuss the reports with the children), so that the parties could later cross-examine Dr. Curtin if they were minded to do so. In the course of her evidence the following exchange then took place between Dr. Curtin and the judge:

> "DR. CURTIN: it was very difficult to recommend – [H.] shouldn't really be disturbed, he should stay in his school if he can…it's his one [source of] stability, socially and emotionally. Ideally, he should stay in his house, but it would seem as if that means he doesn't ever see his mother until he's an adult and that isn't really ……..
>
> JUDGE: But the mother could be moved back into the family home no bother by this Court?
>
> A. That would be a really positive development.
>
> JUDGE: And he could keep his school.
>
> A. Yes, that would be prioritising H….It would be an ideal situation for both U. and H., I think, to stay in their home with their mother.
>
> JUDGE: Yes. Why should they have to move? They are the primary concern under our Constitution, they have top priority over any party to proceedings…"

18. Following further exchanges with counsel, the judge granted both parties liberty to bring such further motions as they saw fit. The wife then issued a motion seeking, in effect, the exclusion of the husband from House 1 pursuant to both s. 11 of the 1964 Act and the provisions of the 1996 Act. That motion was heard on 26th July 2016. At that hearing Dr. Curtin was cross-examined on her reports and both parents gave evidence.

19. The husband explained how it was very convenient for him for work reasons to be immediately adjacent to his work where his presence at short notice after hours was very often urgently required. He also explained that House 2 was about 5 kms. away and was less convenient for him from a work perspective. He did stress that House 2 was a very comfortable one, with five bedrooms and four bathrooms.

20. The mother also gave evidence. She maintained that her husband had a dominating and controlling attitude. She also discussed with the judge the merits of a variety of possible custody and access arrangements with regard to both U. and H.

21. While the hearing may possibly have been truncated because of pressures of time, it is important to stress that at no stage was any evidence led of actual or threatened violence or other conduct on the part of the husband such as would have entitled the Court to make an order under s. 3(2)(a) of the 1996 Act barring the husband from House 1 on the basis that it was of opinion that "there are reasonable grounds for believing that the safety or welfare" of the wife and the children so required.

22. On 29th July 2016 the trial judge delivered a reserved judgment. In that judgment she made no finding of domestic violence, but she rather took the view that because the welfare of the two younger sons, U. and H. required it, she could direct the husband to leave House 1 and permit the wife, U. and H. to reside there instead of him. O'Hanlon J. accordingly made an interim exclusion order to

that effect pending the trial of the action. She also made an interim order awarding the wife custody of U. and H., with certain access rights granted to the father.

23. The father has appealed this decision to this Court, contending, first, that the High Court had no jurisdiction to make a custody order in respect of U. (as he was of full age) and, second, that the Court had no jurisdiction to make an order excluding him from House 1 in accordance with s. 11 of the 1964 Act. I propose presently to consider these questions in turn. The first issue, however, raised by the husband is whether the trial judge had pre-judged the matter by reason of certain comments which she made in the course of the hearing.

Whether the trial judge pre-judged the outcome by reason of her comments during the course of the hearing

24. The first objection raised by the husband is that the trial judge had pre-judged the matter by reason of certain comments which she made on 18th July 2016. The background to the application on that day was that the trial judge wished to hear from Dr. Curtin as to how the impasse regarding the circulation of her s. 47 report to the parties could be resolved and there were also issues regarding access to the children. Following exchanges between the respective counsel regarding the details of these access arrangements the judge said:

> "Can I just say this: It's a very lucky thing that the parties have arranged this [hearing today], because the view I was taking on the paper was going to be quite draconian as to what I was going to do today, so it's a lucky, lucky thing. So the kettle calling the pot black is not going to work."

25. Dr. Curtin then gave evidence. In the course of that evidence there then followed the exchange between Dr. Curtin and the judge regarding the wife moving back to the family home, the relevant extracts from which I have already set out.

26. Following further exchanges the judge then arranged for the wife and the husband to give sworn undertakings to the effect that they would not discuss the contents of Dr. Curtin's reports with the children. There was then a short adjournment to enable the parties confer with their respective legal teams regarding the contents of the reports, since this was the first time that the parties got the opportunity to see these reports in full.

27. On the resumption of the hearing there were further exchanges between counsel and the judge suggested that on an interim basis the husband might move out of House 1 on a without prejudice basis and the wife take up residence in that house with U. and H. The judge then gave liberty for the parties to bring whatever motion they wished. The following exchange between the judge, Ms. Browne S.C. (counsel for the husband) and Ms. Jackson S.C. (counsel for the wife) then took place:

> "JUDGE: If you think that you need to bring a motion, I am giving short service to either side to bring whatever motion.
>
> MS. JACKSON: Yes, I will bring a motion in relation to the matter.
>
> JUDGE: And I will direct that within 12 hours of receipt of the motion, there is a replying affidavit.
>
> MS. BROWNE: Yes, Judge, it is only that at the moment you see, the position is that the applicant sought a barring order in the District Court at the start and that matter, the barring order, I think was resolved in the end. It was actually was refused and an agreement was entered into. Sorry, it was agreed, it was struck out and the applicant was entitled to have exclusive right to reside at [House 1] and the respondent shall be entitled to exclusive right [to reside at Y].
>
> JUDGE: Yes, but I can vary that. I have no problem varying it on evidence and proven case. We will hear it on Tuesday.
>
> MS. BROWNE: Well I don't see that we actually vary that, Judge.
>
> JUDGE: Why not, why would that not be?
>
> MS. BROWNE: Because that was a consent of a barring application in the District Court.
>
> JUDGE: I can vary anything I like. I can change circumstances.
>
> MS. BROWNE: Unless the only interim application that can be made is an application for a barring order now.
>
> JUDGE: That is ridiculous now frankly.
>
> MS. BROWNE: It isn't, Judge, because either of them are entitled to live in the home.
>
> JUDGE: I am varying it on evidence if the appropriate evidence is put up on proof.
>
> MS. JACKSON: Judge, I am entirely perplexed by this.
>
> JUDGE: It is nonsense.
>
> MS. JACKON: The position in relation to it is that Ms. Browne has already indicated in some way that there would have to be a change in the order made. In fact, the position is that under the order being made by this Court on consent, my client has primary care of the children and the access to the applicant. The position so far as that is concerned, Judge, is that in accordance with the principles for welfare set out in section 31 of the Act, you are entitled to have regard to a whole list of factors, including the issue of who lives where in relation to the welfare.
>
> JUDGE: And then the motion is directed to the children's welfare and where they need to live. We will hear two hours of evidence on Tuesday morning and let's get on with it.
>
> MS. JACKSON: May it please the Court."

28. The question which now arises is whether in the light of this sequence of events, judicial comments and exchanges it can be said that the trial judge ought to have recused herself.

Whether the trial judge ought to have recused herself

29. While it appears that the father was unhappy with the comments which were made on the 18th July 2016, it should be observed that no application was made to the trial judge - whether on 26th July 2016 or otherwise – to recuse herself. I appreciate that the issue of judicial recusal is, in some respects, a delicate one and often calls for a nice judgment on the part of legal counsel as to whether and if so, when, such an application ought to be made. If, however, matters have come to a point where one party feels that the trial judge has inadvertently compromised the level of objectivity which ought to attend the judicial process, then, generally speaking, at least the appropriate step is to apply to the judge herself for recusal.

30. The leading contemporary authority on recusal and pre-judgment is probably the recent decision of this Court in *Garda Commissioner v. Penfield Enterprises Ltd.* [2016] IECA 141. It is certainly the most recent judgment which assembled and discussed in extensive detail the relevant authorities on this point.

31. In that case the judge assigned to hear a lengthy and controversial defamation case had been informed in open court by one of the parties of comments made by the defendant newspaper which – it was said – were highly prejudicial. On that occasion the High Court judge described the article as being "reckless and irresponsible" and further spoke of the article as constituting "reckless and irresponsible journalism". The judge then effectively invited the Chief State Solicitor (representing the defendants) to bring a motion for contempt should there be any repetition of such publications by the newspaper in question.

32. At the conclusion of the defamation trial the defendants brought a motion for contempt following further publications by the newspaper in question. The newspaper objected to the presiding judge hearing the contempt motion on grounds of pre-judgment. When the judge refused to recuse himself, the newspaper successfully carried an appeal to this Court. In her judgment allowing the appeal, Irvine J. stated:

> "The starting point for the court's consideration on this appeal is the right and indeed the duty of judges to hear and determine all such cases or legal issues as may come before them for adjudication, unless there are substantial reasons why they should not do so. It is relevant in this regard that judges, at the time of their appointment, make a declaration pursuant to Article 34.6.1 of the Constitution to administer justice "without fear or favour". They have made a public declaration to uphold the Constitution and the law. This necessarily includes a solemn promise to uphold the impartial administration of justice and to provide, for all who come before them, a fair and just hearing."

33. She then went on to say, however, that the judge should recuse themselves where objective bias has been demonstrated. Irvine J. then went to quote the words of Denham C.J. in *Goode Concrete v. CRH plc & Ors*. [2015] IESC 70, [2015] 2 I.L.R.M. 289 at para. 54 of her judgment:

> "The test to be applied when considering the issue of perceived bias is objective. It is whether a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that there would not be a fair trial from an impartial judge. As it is an objective test, it does not invoke the apprehension of a judge, or any party; it invokes the reasonable apprehension of a reasonable person, who is in possession of all the relevant facts."

34. Irvine J. next added:

> "What is also very clear from the leading decisions is that each case must turn upon its own particular facts and circumstances. Hence, the importance of establishing precisely what was said or done by the judge concerned and in what circumstances. It is fortunate in this case that there is a transcript of what was said by the High Court judge on 10th October 2014, and the context in which he said it. I will return later to his commentary on the article of 26th September, and my view as to whether the same, considered against the backdrop of all of the relevant circumstances, might reasonably raise an apprehension in the mind of the reasonable man that the appellants might not receive a fair and impartial hearing on the contempt motion. In considering whether comments or actions on the part of a judge ought to be classified as bias, objectively assessed, it is clearly relevant to consider whether those words or actions might suggest that the judge has in some way prejudged some issue he is due to decide. Thus, in *Fogarty v. District Judge Hugh O'Donnell* [2008] IEHC 198, McMahon J. said the following when considering whether the judge concerned had been guilty of actual bias:
>
> > "[I]t is important also that the judge does not give the appearance that he has prejudged a decision and in this respect he should take great care when expressing himself during the course of the trial that he does not express himself in language which would suggest that he has come to a hasty decision in the matter. Whether the language used by a judge during the course of a trial is such that it indicates bias in the sense that it shows that the judge has made up his mind before he has heard all of the evidence, depends on the facts and circumstances of each case. The use of an infelicitous word or phrase during the trial by the judge should not always compel such a conclusion. To define bias one must look at the overall picture."

35. In *O'Callaghan v. Mahon* [2007] IESC 17, [2008] 2 I.R. 514 Fennelly J. had stressed how important it was for the practical administration of justice that trial judges should not be required to refrain from expressing their views on the issues before them lest they be charged with pre-judgment. Such a model of justice was not to be emulated:

> "It is an inherent and invaluable part of the common law system of justice that open, sometimes even vigorous, argument takes place between the bar and bench. Judges on a daily basis express opinions in the form of questions, statements or argument in the course of a hearing. The whole purpose of these exchanges is to enable the parties to address doubts or difficulties raised by the judge. Arguments are tested and contested. This can, and frequently does, enable counsel to change the judge's mind. On other occasions, the weakness of an argument is exposed. If judges did not come to the process with some clear, even strongly held, views, based on the experience they bring to the judicial process, they would be of little value as judges. Parties and their legal advisers assess how a case is going. They discern the approach of the judge. This may lead to a settlement. I am aware that there exists a different culture in the courts of some European countries. I understand that in some it is unheard of for the judge to intervene. I can only say that I do not agree. Of course, the judge may so behave that he steps outside his judicial role. If he does, it would be obvious. In my view, that is what is required, something quite outside the bounds of proper judicial behaviour to establish objective bias, based on judicial statements."

36. In *O'Callaghan (No.2)* one of the issues was whether, based on the evidence before the High Court, the reasonable independent observer would have apprehended that the Planning Tribunal had predetermined an issue as to the credibility of one particular witness, Mr. Tom Gilmartin, against another witness, Mr. Noel O'Callaghan, such that it should be restrained from continuing with its investigations in that regard. In the course of his judgment Fennelly J. endorsed the view that:

"The normal judicial interventions, including debate and argument and, presumably, the expression of strong though necessarily provisional views on the subject matter of the litigation, would not normally be considered sufficient to justify a finding of bias….The principles to be applied to the determination of this appeal are thus, well established:-

(a) objective bias is established, if a reasonable and fair minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision maker will not be fair and impartial;

(b) the apprehensions of the actual affected party are not relevant;

(c) objective bias may not be inferred from legal or other errors made within the decision making process; it is necessary to show the existence of something external to that process;

(d) objective bias may be established by showing that the decision maker has made statements which, if applied to the case at issue, would effectively decide it or show prejudice, hostility or dislike towards one party or his witnesses."

37. In *Penfield Enterprises* Irvine J. referred to the decision in O'Callaghan (No.2) at some length and then concluded:-

"Returning to the core issue on this appeal, the real question is, armed with knowledge of all of the relevant facts, what would the reasonable, objective and informed person think of the pronouncements made by the trial judge on 10th October 2014? Would they apprehend that, regardless of the public declaration made by the judge pursuant to Article 34.6.1 of the Constitution to administer justice without fear or favour and his own stated belief that he would be able to provide an impartial hearing, he had prejudged the issue or had demonstrated hostility or prejudice against the appellants such that they might not receive a fair hearing on the contempt motion?

For my part, I am satisfied that a reasonable person, having knowledge of all of the relevant circumstances, might well apprehend that the appellants might not receive a fair and impartial hearing on the committal motion because of the opinions expressed by the judge and his repeated stern criticism of the article and its publisher. In response to [counsel's] submission, the judge stated that counsel had correctly characterised the article of 26th September 2014 as "reckless". He stated "it is a reckless and irresponsible article in the light of a case of great controversy which is due to come on before the courts".

38. Having given some further examples, Irvine J. ultimately concluded that the trial judge ought to have recused himself.

39. Applying these principles to the present case, I cannot say that they have been infringed. It is true that the trial judge used the word "Draconian", but this was in the context of comments directed at both parties. It is also true that the suggestion regarding the father moving out and the mother moving into House 1 came from the judge herself, but I do not think that by reason of this conduct alone the judge could be said in any way to have pre-judged the matter. She did after all give liberty to *both* parties to bring whatever further motion they thought fit.

40. There was, admittedly, a later exchange with counsel for the father, Ms. Browne S.C., who submitted that an application of this kind to exclude the father could only be made by way of an application for a barring order under s. 3 of the 1996 Act and in the course of these exchanges the judge used the words "ridiculous" and "nonsense." While perhaps it might have been better if these words had not been used in response to what, after all, was an informal submission by counsel, I am not persuaded that simply by reason of these stray comments that the judge might be said to have pre-committed to a particular position such as might give rise to a reasonable apprehension of bias on the part of any on-looker.

41. In this respect the present case is somewhat different from a decision of my own delivered as a judge of the High Court in *Maher v. Kennedy* [2011] IEHC 307. In that case counsel for the defence made a preliminary application to the trial judge in a drink driving prosecution that the appropriate authorisation for certain Garda vehicle check-points had not been validly granted. I then explained what had happened next:-

"At that point the judge indicated that he did not require to hear from the prosecution. He then turned to counsel for the applicant and is said to have stated: "the point is rubbish - utter rubbish. There is absolutely no ambiguity whatsoever". He then made a remark to the effect that the applicant had claimed that his solicitor would always get him off. He added that he had "no time for these technical drink driving points". When asked by counsel to state reasons, he indicated that he had just given his reasons. The judge then proceeded to affirm the conviction."

42. Having stressed that there was no question of actual *bias, I then quoted from the same passage in judgment of McMahon J. in Fogarty* v. Judge O'Donnell to which Irvine J. subsequently referred in *Penfield Enterprises*. I then continued thus:-

"To some extent, however, this is a matter of first impression. In the present case, however, I find myself coerced to the conclusion that these remarks were unfortunate and represented an uncharacteristic lapse from the highest standards of fairness, courtesy and civility which the learned Circuit Judge is justly known to uphold. However, if confidence is to be maintained in our legal system, then it is vital that these high standards of courtesy and civility are observed by all who have been privileged by society with the exacting task of administering justice. While this does not mean that judges are entitled to shirk from speaking the unpleasant truth in the name of excessive politeness or from speaking sternly where the situation requires it, as we are nevertheless administering justice in the name of the People of Ireland, it behoves us where at all possible to treat solicitors, counsel, witnesses - and, above all - litigants with such courtesy and decorum as befits the proper administration of justice. If this is, perhaps, a counsel of perfection which in practice cannot always be achieved and in respect of which every single judge will fail from time to time, it is a standard to which the legal system should nonetheless aspire."

43. I then concluded:-

"In the present case, the reasonable, objective and informed observer might justly fear that the judge's ability to preside over a wholly impartial hearing had been inadvertently compromised by these remarks. Such an observer might think as a result that the judge appeared resolute in his determination to find against the applicant, irrespective of the merits of the arguments of counsel. In these circumstances I must reluctantly come to the conclusion that the conviction cannot safely stand."

44. I consider, however, that the comments made in the present case ultimately fall on the other side of the line from those uttered in *Maher.* The comments in question were made informally and were not (unlike in *Maher*) in response to a formal submission in the course of a criminal trial. Moreover, the trial judge in *Maher* had made it clear that he had no time at all for objections of that kind, so that all in all the picture which had been created was one which might well have compromised the confidence of a reasonable onlooker in the objectivity of the criminal trial process which was before him. By contrast, the trial judge here had been careful to state that she would only vary the earlier consent order "on evidence and proven case."

45. In these particular circumstances and for all of these reasons, I am not persuaded that the husband's objections to the impartiality of the trial judge should succeed.

Whether the Court has jurisdiction to make a custody order under the 1964 Act in respect of a child who has attained his or her majority?

46. Section 11(1)(a) of the 1964 Act (as amended) is the foundation stone of the Court's jurisdiction in child custody matters, since it provides that:-

> "Any person being a guardian of a [child] may apply to the court for its direction on any question affecting the welfare of a child and the court may make such order as it thinks fit."

47. Section 11(2) then provides that the Court may be an order under the section:-

> "(a) give such directions as it thinks proper regarding the custody of the child and the right of access of the child to his father and mother;
>
> (b) order the father or the mother to pay towards the maintenance of the child such weekly or other periodical sum as, having regard to the means of the father or mother, the court considers reasonable."

48. The word "child" is defined by s. 2(1) of the 1964 (as substituted by s. 4 of the Children Act 1997) as meaning "a person who has not attained full age." Since the enactment of the Age of Majority Act 1985 ("the 1985 Act"), the phrase "full age" is to be understood as referring to a person who has attained their 18th birthday: see s. 2(1)(b) and s.2(2) of the 1985 Act.

49. It is true, however, that both s. 11(5) and s. 11(6) of the 1964 Act then provide for a special definition of the word "child" for the purposes of the maintenance provisions of s.11(2)(b) by providing that the reference in s. 11(2)(b) to a "child" shall include a reference to a person who:-

> "(a) has not attained the age of 18 years, or:
>
> (b) has attained the age of 18 years and is or will be, or if any order were made under this Act providing for payment of maintenance for the benefit of the person, would be, receiving full-time education or instruction at a university, college, school or other educational establishment, and who has not attained the age of 23 years.
>
> (6) Subsection (2) (b) shall apply to and in relation to a person who has attained the age of 18 years and has a mental or physical disability to such extent that it is not reasonably possible for the person to maintain himself or herself fully, as it applies to a child.]

50. In effect, therefore, the 1964 Act allows the court to make custody orders in respect of children only (*i.e.*, those who have not attained full age), although the court can nonetheless make an maintenance order in respect of a young person up to the age of 23 years where that person is either attending full-time education or where he or she is suffering from a disability such that it would not be reasonably possible for that person otherwise to maintain themselves.

51. It is absolutely clear from the structure of the 1964 Act (as amended) that there is simply no jurisdiction to make a custody order under that Act in respect of any person who has attained the age of 18. As U. was approximately 18 years and 6 months at the time the order was made by the High Court on 29th July 2016, it is clear that the Court's jurisdiction to make an order for custody in respect of him under the 1964 Act had simply ceased.

52. It follows, therefore, that the custody order which was made in respect of U. was made without jurisdiction and it must accordingly be set aside.

Whether the High Court had jurisdiction to exclude a spouse from the family home under the 1964 Act

53. I next turn to the question of whether the High Court had jurisdiction under s. 11(1) of the 1964 Act to make an order excluding the husband from the family home. It is important to state at the outset that there is, of course, a jurisdiction to exclude a spouse from a family home under the terms of the Domestic Violence Act 1996 (as amended)("the 1996 Act"). There is also a jurisdiction under the Judicial Separation and Family Law Reform Act 1989, the Family Law Act 1995 ("the 1995 Act") and Family Law (Divorce) Act 1996 to make property transfer orders which may require the transfer or sale of the family home consequential upon judicial separation or divorce.

54. In addition, s. 10(1) and s. 10(2) of the 1995 Act (as amended) enables the court to make an order consequent upon a decree of judicial separation or at any time thereafter excluding one spouse from the family home:

> "(1) On granting a decree of judicial separation or at any time thereafter, the court, on application to it in that behalf by either of the spouses concerned or by a person on behalf of a dependant member of the family, may, during the lifetime of the other spouse or, as the case may be, the spouse concerned, make one or more of the following orders:-
>
> (a) an order:-
>
> (i) providing for the conferral on one spouse either for life or for such other period (whether definite or contingent) as the court may specify the right to occupy the family home to the exclusion of the other spouse, or
>
> (ii) direct the sale of the family home subject to such conditions (if any) as the court considers proper and providing for the disposal of the proceeds of the sale between the spouses and any other person having an interest therein
> ……..

……

> (2) The court, in exercising its jurisdiction under *subsection* (1) (a), shall have regard to the welfare of the spouses and any dependent member of the family and, in particular, shall take into consideration:-
>
> (a) that, where a decree of judicial separation is granted, it is not possible for the spouses concerned to continue to reside together, and
>
> (b) that proper and secure accommodation should, where practicable, be provided for a spouse who is wholly or mainly dependent on the other spouse and for any dependent member of the family."

55. It must be stressed that the present appeal does not, however, concern either of these general jurisdictions which expressly provide for the power to exclude a spouse from a family home. The question rather is whether a spouse may be excluded from a family home under the general provisions of s. 11(1) of the 1964 Act regarding the welfare of H. for reasons *other* than domestic violence (or the threat of such) *or* a property transfer or adjustment order following a decree of judicial separation or divorce.

56. The wife's application to the High Court for an order excluding the husband from House 1 was grounded on, first, the welfare of the children pursuant to s. 11(1) of the 1964 Act and, second, pursuant to the terms of an application brought under of s. 3 of the 1996 Act. As it happens, this particular application for a barring order under s. 3 of the 1996 Act was *not* proceeded with and it forms *no* basis for the order which O'Hanlon J. actually made. While the wife's affidavit of 20th July 2016 which was sworn in support of the motion seeking to have the husband excluded from the property refers to what she contends was the husband's unreasonable and controlling behaviour, it is important to stress once again there was in fact no evidence before the High Court either at the hearing of 18th July 2016 or 26th July 2016 of any domestic violence on the part of the husband such as might have warranted the making of an order under s. 3 of the 1996 Act. Certainly, no such suggestion was put to him when he gave evidence before the trial judge on 26th July 2016.

57. The evidence of Dr. Curtin was rather to the effect that the husband is a powerful and influential individual who was used to getting his own way, both in his professional and domestic life. Dr. Curtin formed the view that the father had been dismissive of the mother in his dealing with the children and had effectively sought to alienate the mother from the children. Dr. Curtin considered that the wife, on the other hand, was in some respects a meek and submissive spouse who needed to be more assertive. Dr. Curtin was, nevertheless, of the view that both parents were caring and committed parents who loved the children.

58. What, then, was the basis for the judge's finding that the husband should be excluded from the family home? In her report to the Court, Dr. Curtin had stated that the husband's conduct was likely to cause "emotional damage [resulting] from the present unhealthy child alienation type dynamic he has unwittingly promoted." She further considered that it would be best if U. and H. remained in their present school environment with greater access to their mother, so that the present unhealthy relationship between these children and their mother could be best addressed and repaired. To that end, Dr. Curtin suggested that, ideally, in order to prioritise the interests of H., the mother would move into the family home instead of the father. This would have the effect that H. could remain in the family home with his mother and that the existing school arrangements could be maintained.

59. This appears to have been the basis upon which O'Hanlon J. made the order in question which she did pursuant to s. 11(1) of the 1964 Act:-

> "In all the circumstances of this case this Court directs that on the 6th August 2016 at 5pm in the evening [the] father is to have vacated the family home at that address and the mother is free to enter that property at 5.15pm on that evening where she is to remain pending a full hearing and determination by this Court. The two boys, U. and H., are to remain under her primary care and control in that property pending further determination of this Court following full hearing of the matter."

60. I should add at this point that although the curial part of the High Court order does not specify the precise basis by reference to which it was made, it is clear from a consideration of the judgment that the exclusion order was based solely on the general jurisdiction conferred by s. 11(1) of the 1964 Act. At the hearing of the appeal before this Court both parties were, moreover, agreed that this was the jurisdictional basis upon which the exclusion order rested.

61. I would also observe at this juncture that the trial judge's reasons for this conclusion are rather pithy. In particular, no reasons are given for her conclusion that s. 11 of the 1964 Act provides a jurisdictional basis for the order in question. Nor are any reasons contained in the judgment as to why it was actually necessary to make an order of this kind given that there were, at least, some options open to her which fell short of an exclusion order directed against the husband. The wife was, after all, living in perfectly good rented accommodation just outside of X and one imagines it would have been possible for H. (and, if he so wished, U.) to reside there with the mother while still attending their existing school nearby. The husband could equally have been directed to make House 2 (itself a large and comfortable home which was situated within a few hundred metres of the rented property) available for the wife and the children. They could have just as easily resided there and gone to their existing school from there. It is hard to see why this also would not have been at least a plausible option in the short to medium term pending the full hearing of the judicial separation proceedings.

62. Yet a further option would have been to permit the wife to reside in House 1 (which itself is a large and spacious residence) with primary care and custody of H, while at the same time not excluding the husband from that property. Pending at least the making of any final order for judicial separation under the 1989 Act the wife had, of course, a legal right to be reside in House 1, not least because she is a joint owner of that property. Although it may be that this latter option was not considered to be a practical one, it was nonetheless necessary for the trial judge to explain the reasons why she took the particular option which she did, not least given the unusual – if not entirely unprecedented – step which she did in fact take.

63. At all events, the practical effect of that order meant that the husband was obliged to leave the family home in which he had been residing. This caused him some professional difficulties because the home in question was immediately adjacent to his workplace where his presence was often frequently and urgently required, often after normal business hours. At the hearing of the appeal the Court was informed that since the making of the order the husband had first moved into a hotel close to his place of work and more recently has managed to find rented accommodation nearby.

64. Over and above these considerations, the removal by court order of a person from their existing place of abode is always a serious matter, often with far reaching implications for the individual concerned. In a family law context there are, of course,

regrettably many circumstances where such a step is necessary, inevitable and constitutionally justifiable, not least to protect the personal safety and integrity of the other spouse and children. But a mandatory exclusion order from a property owned or partly owned by a spouse is a matter of profound significance and clearly engages the constitutional rights of the party affected.

65. Even though the exclusion order will have been made *in camera* proceedings, the very fact that the party excluded is compelled to move house – sometimes, as here, at relatively short notice - is likely to cause not a little social embarrassment and sends its own signal to the excluded spouse's circles of friends and acquaintances, thereby impacting, at least to some degree, on that spouse's good name as protected by Article 40.3.2 of the Constitution. Perhaps even more to the point, the right of lawful abode in one's own dwelling is a feature not only of the protection of personal property rights which is also protected by Article 40.3.2, but is also part of the fabric of rights associated with the guarantee of inviolability of the dwelling protected by Article 40.5.

66. Indeed, it was considerations of this general nature which were to the fore when the Supreme Court stressed the importance of fair procedures in the administration of the granting of barring orders under the 1996 Act in *DK v. Crowley* [2002] IESC 66, [2002] 2 I.R. 712. As Keane C.J. stated ([2002] 2 I.R. 712, 759-760):-

> "In particular, the order ultimately made by the court dealing with the custody of the children of the marriage may necessarily be affected by the absence of one spouse from the family home for a relatively significant period as the result of a barring order : necessarily , because the paramount concern of the court on such an application will be the welfare of the children and the removal of one spouse from the home by legal process for a relatively lengthy period , even though subsequently found to have been wrongful, may be a factor to which the court may have to have regard in determining a custody issue."

67. All of this points to the necessity of ensuring that any order made excluding a spouse from a family home outside of the special jurisdiction conferred by the 1996 Act must have a secure and clear legal basis. This in its own way is illustrated by *The People (Director of Public Prosecutions) v. O'Brien* [2012] IECCA 68, a case where the Court of Criminal Appeal was required to address the issue of whether members of An Garda Síochána could lawfully effect an arrest of a person in a dwelling under s. 30 of the Offences against the State Act 1939 where it was found that the Gardaí were not lawfully present. Hardiman J. observed:

> "… Article 40.5 by guaranteeing the "inviolability" of the dwelling reflects long standing constitutional traditions in both common law and civil law jurisdictions…. This constitutional guarantee presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world. In so doing, Article 40.5 complements and re-inforces other constitutional guarantees and values, such as assuring the dignity of the individual (as per the Preamble to the Constitution), the protection of the person (Article 40.3.2), the protection of family life (Article 41) and the education and protection of children (Article 42). Article 40.5 thereby assures the citizen that his or her privacy, person and security will be protected against all comers, save in the exceptional circumstances presupposed by the saver to this guarantee.
>
> In these circumstances, clear, direct and express language would be necessary before this Court would be prepared to impute to the Oireachtas an intention to override such carefully protected constitutional rights: *cf*. by analogy the comments of Henchy J. in *Director of Public Prosecutions v. Gray* [1987] I.R. 173, 281 and those of Griffin J. in *Murphy v. Greene* [1990] 2 I.R. 566, 577. Certainly, we cannot find in the general language of s. 30 of the Act of 1939 any words which would allow us to presume that the Oireachtas contemplated that an arrest under that section might lawfully be made by members of An Garda Síochána of an occupant of that dwelling in circumstances where the arrest took place in the dwelling and where the Gardaí had, objectively speaking, no authority to be present."

68. While it is true that the facts of *O'Brien* are remote from the present case, the underlying principles are not. That decision rather prompts us to inquire whether there is a clear statutory authority contained in the 1964 Act such as would permit the conclusion that the Oireachtas intended "to override these carefully protected constitutional rights."

69. In this context, it is first worth observing that if the High Court is correct, then the courts must have had this jurisdiction to exclude spouses from family homes from the very commencement of the 1964 Act. If that is so, then it seems curious that the Oireachtas does not seem to have ever integrated the s. 11(1) of the 1964 Act jurisdiction into the corpus of legislation dealing with barring orders which commenced in 1976 with the Family Law (Protection of Spouses and Children) Act of that year through the Family Law (Protection of Spouses and Children) Act 1981 through to the 1996 Act and the subsequent amendments to that Act. Nor was this jurisdiction aligned with the power of the Court under s. 10(1)(a) of the 1995 Act to exclude one spouse from the family home following the granting of a decree of judicial separation.

70. In particular, the barring order jurisdiction under s. 3 of the 1996 Act is predicated on the existence of a threat to the safety or welfare of the other spouse (or, in some instances, the other partner) and any dependent children. Yet if the courts enjoyed a jurisdiction to make an exclusion order under s. 11 of the 1964 Act in cases involving children, there would be no necessity at all to show that there was such a risk to the safety of the children: it would be sufficient to show that the exclusion order was justified by general considerations of child welfare which were independent of issues of safety, fear or molestation. Such orders could, moreover, be made in circumstances where the particular safeguards introduced to the 1996 Act regime in the wake of the Supreme Court's decision in *DK* by the Domestic Violence (Amendment) Act 2002 might not have to be respected, given that the order itself was not made under the 1996 Act (as amended).

71. One might similarly observe that s. 10(2) of the 1995 Act imposes a duty on any court making an order excluding the other spouse following the making of an order for judicial separation to have regard "to the welfare of the spouses and any dependent member of the family" and, in particular, to take into consideration the accommodation needs of any dependent spouse and any other dependent family member. If there were such a jurisdiction to exclude spouses from a family home by reason of the making of an order under s. 3 of the 1964 Act, one might again have expected that the Oireachtas would have sought to ensure that this jurisdiction would have been attended by safeguards similar or analogous to those contained in s. 10(2) of the 1995 Act.

72. Second, to make a related point, if there were such a s. 11(1) jurisdiction, it is surprising that it has not generated its own corpus of case-law. There is, in fact, a dearth of direct authority on the point. Counsel for the wife, Ms. Jackson S.C., nonetheless placed reliance on three decisions in particular in support of this contention. In *MY v. AY*, High Court, 11th December 1995, Budd J. made an order under s. 11(1) of the 1964 Act directed at a wealthy father requiring him to make a capital sum available for the purchase of a property for his son. Next, in a child care case, *Southern Health Board v. CH* [1996] 1 I.R. 219 the Supreme Court indicated that the District Court could have regard (subject to safeguards) to certain types of hearsay evidence in deciding whether a father against whom serious allegations had been made should have custody of a young child following the death of the mother. The third case, COS and *TB v. Judge Doyle* [2013] IESC 60, [2014] 1 I.R. 556 addresses the jurisdiction of the courts in a guardianship dispute to resolve disputes regarding the administration of medical procedures and treatment for children. In that case the Supreme Court sanctioned

the administration of a booster injection to a five year child for measles, mumps and rubella over the objections of the mother.

73. But while all of these cases stress in their own way the wide breadth of the s. 11(1) jurisdiction, they nonetheless all directly concern the welfare of children in the sense of doing something to or directly in respect of the child, such as providing a money sum *(MY)*; child custody and care *(CH)* or the administration of a medical procedure *(COS and TB).* None of these cases concern the yielding up by a third party of vested rights to the general aim of the child's welfare. It is true that in MY the father was required to pay a capital sum for the child's benefit, but this may be said to represent only a variation upon a pre-existing legal duty qua parent to support the child financially which had already been expressly provided for in the 1964 Act.

74. As it happens, the case which in some ways provides the truest analogy to the present one happens to be a decision of my own which I delivered as a judge of the High Court in *JG v. Staunton* [2013] IEHC 533, [2014] 1 I.R. 390. In that case the question was whether in proceedings under the Child Care Act 1991 ("the 1991 Act") the District Court could direct parents to undertake specific courses, including a course in psychotherapy. It was argued that s. 47 of the 1991 Act gave the Court such a jurisdiction:-

> "….where a child is in the care of a health board, the District Court may, of its own motion, or on the application of any person, give such directions and make such orders on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order."

75. In my judgment I acknowledged that s. 47 is, as McCracken J. pointed out in *Eastern Health Board v. McDonnell* [1999] 1 I.R. 174, 184, "an all embracing and wide ranging provision." I then continued ([2014] 1 I.R. 390, 398-399):-

> "But the section is designed to give the District Court full authority to give directions to the HSE in all matters pertaining to the welfare of the child who is in care. Thus, for example, as happened in *McDonnell* itself, the HSE could lawfully be directed by means of a s. 47 order to prepare a care plan for the child which was to be reviewed by a child psychiatrist.
>
> Yet the s. 47 order must relate directly to the welfare of the child. The Oireachtas did not envisage that this jurisdiction could be used to impose *obligations* on third parties (even such as parents) to do certain things. Of course, removed from the general statutory context, it might be said that, for example, the child's welfare would be safeguarded if an abusive or neglectful parent were to be directed by court order to abstain from alcohol. As we in this jurisdiction sadly know all too well, there is plainly a clear link between excess alcohol consumption on the part of parents and the welfare of children in general and, as a succession of writers from Joyce to McCourt have shown, such excess consumption has historically been responsible for much childhood misery. Yet the Oireachtas cannot be taken as having conferred a power to impose personal obligations of this kind on third parties *simply* because there might be a link between the performance of such obligations and the child's general welfare. The purely general language of both s. 19 and s. 47 provide altogether too slender a basis for that far reaching conclusion so far as third parties are concerned. Accordingly, for all the reasons I have already set out with respect to the s. 19 jurisdiction, the generality of the language contained in s. 47 cannot be invoked as to justify positive obligations of this personal kind in respect of persons other than the child itself. If there were to be such a power to impose personal obligations of this kind on parents and others in the interests of the child, very clear and express language would be required for this purpose. To my mind, neither s. 19 nor s. 47 of the 1991 Act enable the District Court to impose conditions of this kind on third parties."

76. In my view, the same reasoning applies by analogy to the present case. If the Oireachtas had intended that the s. 11(1) jurisdiction could be invoked so as to affect the constitutional and other legal rights of third parties in such an immediate and potentially far-reaching fashion – such as, in this instance, by excluding the father from the family home in the absence of any judicial finding that he posed a threat to the safety of the children – then, in the light of the principles previously articulated by the Supreme Court in *Gaffney* and *Murphy v. Greene* and by Hardiman J. in O'Brien, clear words to this effect would have been required for this purpose. These words are simply not present in s. 11(1) of the 1964 Act.

Whether such a jurisdiction can be said to derive from the provisions of Article 42A.4

77. It is next necessary to consider whether such a jurisdiction can be said to derive from the provisions of Article 42A.4 of the Constitution. This provides:-

> "4. 1 Provision shall be made by law that in the resolution of all proceedings:-
>
> (i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected,
>
> or
>
> (ii) concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration."

78. The Children and Family Relationships Act 2015 ("the 2015 Act") may be said to represent the effectuation of the constitutional duty resting on the Oireachtas to give effect to the requirements of Article 42A.4.ii by making significant amendments to the 1964 Act for this purpose. Section 3(1) of the 1964 Act (as inserted by s. 45 of the 2015 Act) provides that in deciding all questions of "guardianship, custody and upbringing" the court shall "regard the best interests of the child as the paramount consideration."

79. Section 31(1) of the 1964 Act (as inserted by s. 63 of the 2015 Act) requires the court to have regard to "all of the factors or circumstances that it regards as relevant to the child concerned and his or her family." Section 31(2) then enumerates a lengthy list of factors and circumstances, including "the benefit to the child of having a meaningful relationship with each of his or her parents… and, except where such conduct is not in the child's best interests, of having sufficient contact with them to maintain such relationships." Section 31(4) then provides that for the purpose of the section, "a parent's conduct may be considered to the extent that it is relevant to the child's welfare and best interests only."

80. It might also be observed in passing that s. 31(1)(b) also provides that the "views of the child concerned that are ascertainable (whether in accordance with s. 32 or otherwise)" may constitute a relevant factor for this purpose. Section 32(1)(b) allows the Court to appoint an expert (such as Dr. Curtin) to determine and convey the views of the child. While Dr. Curtin certainly spoke with H. at some length in May 2015 and prepared two very helpful reports for the Court, it is not obvious to me that H. was afforded any opportunity to express a view on the proposed course of action which the High Court ultimately adopted. One can understand why the Court might not have wished to place H, in the unenviable position of being effectively forced to choose as between his parents. Nevertheless, given that the decision which was taken was done in furtherance of the best interests of the child as reflected in

Article 42A.4 – and not, as I again must stress, by reason of any finding of actual or potential domestic violence under the 1996 Act - it would, I think, have been helpful if the High Court had expressly identified some of the statutory criteria which impelled it to make this decision and, specifically, why in the case of a 15/16 year old his particular views regarding the potential exclusion of his father from the family home were not ascertained.

81. The basic point remains, however, that despite the breadth of generality of Article 42A.4 and the corresponding legislation designed to give it effect (*i.e.*, the 1964 Act, as amended by the 2015 Act), there is nothing in the 1964 Act which sanctions the *exclusion* of a parent from the family home on the general ground that the child's best interests so require where this is divorced from any finding of any actual or potential misconduct on the part of that parent. One may put this another way by saying yet again that if the Oireachtas had intended that the courts could take this step by the making of an order under s. 11 of the 1964 Act, clear and express words to this effect would have been necessary.

82. In these circumstances it is unnecessary to decide whether legislation which sought to give effect to the best interests provisions of Article 42A.4 could sanction the exclusion of a spouse from the family home in the absence of any finding of parental misconduct or future threat to the safety or welfare of the other spouse and children. It is sufficient to say that, once again, there is nothing in the 1964 Act (as amended by the 2015 Act) which admits of the making of an order of this far reaching kind.

83. It follows, therefore, that the order which was made by O'Hanlon J. excluding the father from the family home based solely on the general words of s. 11(1) of the 1964 Act and absent any finding of actual parental misconduct or future threat to the safety or welfare of the wife and children was one which was made without jurisdiction. The order must accordingly be set aside.

Is there an inherent jurisdiction to exclude a spouse from a family home?
84. Ms. Jackson S.C. argued forcefully that if she was wrong so far as the jurisdiction under the 1964 Act was concerned, that the High Court nonetheless enjoyed an inherent jurisdiction to make an order of this kind. The limits of the courts' inherent jurisdiction were, however, carefully examined by the Supreme Court in both *G.McG v. DW (No.2)(Joinder of Attorney General)* [2000] 4 I.R. 1 and *Mavior v. Zerko Ltd*. [2013] IESC 15, [2013] 3 I.R. 268. *In G.McG*. Murray J. stated ([2000] 4 I.R. 1, 26):-

> "The concept of inherent jurisdiction necessarily depends on a distinction between jurisdiction that is explicitly attributed to the courts by law and those that a court possesses implicitly whether owing to the very nature of its judicial function or its constitutional role in the administration of justice. The interaction between the express jurisdiction of the courts and their inherent jurisdiction will depend in each case according to the scope of the express jurisdiction, whether its source is common law, legislative or constitutional, and the ambit of the inherent jurisdiction which is being invoked. Inherent jurisdiction by its nature only arises in the absence of the express [jurisdiction]……Where the jurisdiction of the courts is expressly and completely delineated by statute law it must, at least as a general rule, exclude the exercise by the courts of some other or more extensive jurisdiction of an implied or inherent nature. To hold otherwise would undermine the normative value of the law and create uncertainty concerning the scope of judicial function and finality of court orders. It may indeed be otherwise where a fundamental principle of constitutional statutory [jurisdiction] is invoked against a statutory or regulatory measure determining jurisdiction, but that is not the case here".

85. In *Mavior* Clarke J. observed with reference to this argument ([2013] 3 I.R. 268, 275):

> "It seems to me that what Murray J. cautioned against in the passages cited was the creation of parallel jurisdictions, for resolving much the same area of controversy, founded on, on the one hand, existing law and, on the other hand, an asserted inherent jurisdiction. As Murray J. pointed out, to attempt to invoke an inherent jurisdiction of the courts so as to go beyond delineation specified, in a constitutionally permissible way, in a statute, would be for the courts to trespass on the legislative role of the Oireachtas. If, in a constitutionally permissible way, the Oireachtas have defined the limits of a particular jurisdiction then it is not for the courts to extend those limits by invoking a vague "inherent jurisdiction"."

86. The matter was further considered by the Supreme Court in *Re F.D*. [2015] IESC 83, [2015] 1 I.R. 741. In that case the plaintiff had received a very significant sum by way of settlement of an action and the funds were paid into court. His parents opposed the wardship process and instead applied to have the court create a trust outside of the wardship process by way of its inherent jurisdiction. The Supreme Court rejected the argument that the courts had an inherent jurisdiction for this purpose, saying that (as the law then stood) the wardship jurisdiction was enshrined in statute (Lunacy Regulation (Ireland) Act 1871 and s. 9 of the Courts (Supplemental Provisions) Act 1961) and in these circumstances the Court could not supplement or expand that statutory jurisdiction by invoking an inherent jurisdiction. As Laffoy J. explained in her judgment ([2015] 1 I.R. 741, 758-759):

> "Neither the nature of the High Court's judicial function nor its constitutional role in the administration of justice, in my view, permits the recognition of an inherent jurisdiction in the High Court to make provision for the protection of persons with mental incapacity outside the wardship process by, for example, sanctioning the establishment of a trust to protect the assets of a person believed to be incapable of managing his or her own property affairs. The rationale underlying the judgment of Murray J. in *GMcG v. DW* and of Clarke J. in the Mavior case makes it clear why such recognition is not permissible. No fundamental principle of constitutional stature has been invoked to justify a different conclusion. The effect of a finding that such an inherent jurisdiction exists by this Court would be, in the words of Clarke J., "to trespass on the legislative role of the Oireachtas.""

87. It is, I think, plain from these authorities that there is no room for suggesting that there is an inherent jurisdiction to direct the exclusion of a spouse from a family home where he or she would otherwise enjoy a legal right to reside in that property. Accordingly, it cannot be said that, for example, to adopt the words of Murray J. in *G.McG*, it is a power "which a court possesses implicitly whether owing to the very nature of its judicial function or its constitutional role in the administration of justice." In fact, as we have already seen, the first time that such a power was vested in a court *in express terms* was in 1976 with the enactment of the Family Law (Protection of Spouses and Children) Act 1976.

88. It is also clear that the jurisdiction in question is one which was exclusively created by statute. Nor is it one in respect of which the courts had ever exercised an inherent jurisdiction arising from the necessity to ensure the effective administration of justice so that in these circumstances there simply is no room for the operation of any such supposed inherent jurisdiction. This is, in some ways, yet another way of saying that clear statutory words are necessary before a jurisdiction which inevitably involves the over-riding of the constitutional rights of the spouse in question can properly be exercised. One might add that such a jurisdiction cannot be founded merely by implication either from the courts' inherent jurisdiction or the general words of a statute.

Conclusions
89. In summary, therefore, I am of the view that:

90. First, the trial judge did not pre-judge the outcome of the proceedings by reason of the comments which she made. Even if there had been an application for recusal – which there was not – there was no basis upon which the trial judge ought to have recused herself.

91. Second, there was no basis upon which the High Court judge could have made the custody order which she did in respect of U. given that he had already attained his full age some six months earlier.

92. Third, there is no general jurisdiction based on s. 11 of the 1964 Act to make an order which has the effect of excluding the husband from the family home. This conclusion remains unaffected by a consideration of the provisions of Article 42A.4 of the Constitution, since it is clear that the legislation enacted by the Oireachtas to give effect to these constitutional provisions (namely, the amendment of 1964 Act by the 2015 Act) has not conferred such a power.

93. Fourth, any jurisdiction to exclude a spouse from a family home has heretofore been expressly conferred by statute (*i.e.*, either the 1996 Act or s. 10(1)(a) of the 1995 Act). Any such statutory jurisdiction has been heretofore confined to cases of actual or potential misconduct on the part of the spouse in question or following the making of relevant property orders following the granting of a judicial separation or divorce. In these circumstances, the question of any inherent jurisdiction on the part of the High Court to make an order excluding the husband from the family home simply does not arise.

94. It follows, therefore, that the interim orders awarding custody in respect of U. and excluding the husband from the family home were made without jurisdiction and must accordingly be set aside.