THE COURT OF APPEAL

Kelly J.
Irvine J.
Hogan J.

Neutral Citation Number: [2015] IECA 29
Appeal No. 2015/01

In the matter of the Judicial Separation and Family Law Reform Act 1989 and
In the matter of the Family Law Act 1995

Between

M.M.

Applicant/Respondent

and
G.M.

Respondent/Appellant

Judgment of Mr. Justice Kelly delivered on the 23rd day of February 2015

Introduction
1. This appeal is brought by GM against an order of Michael White J. made on the 12th December, 2014. Two parts of that order are challenged.

2. The first is that which suspended overnight access being had by the parties' two young children with GM. The second is that part of the order which directed that no further application was to be made to the High Court in respect of the two children either by way of enforcement or review before the 26th March, 2015.

3. In order to understand how that order came to be made it is necessary to sketch out briefly the background to this litigation.

Litigation
4. MM and GM were married abroad in September, 2006. They have two children. One was born in 2006 and is now nine years of age. The other was born in 2007 and is now seven years of age.

5. MM is now in her 56th year whilst GM is in his 70th.

6. MM was previously married and had two children who are now adults. That marriage ended in divorce in 1990. In the year following her divorce she had another child. MM is a grandmother since one of her daughters of the first marriage has a child.

7. GM was also married before. That marriage ended in divorce. He has one daughter by that marriage who is now in her forties. Thus, neither MM or GM are devoid of experience in rearing children.

8. These proceedings commenced in 2010. MM sought a judicial separation and ancillary relief. GM also instituted proceedings for a declaration of nullity or in the alternative judicial separation and ancillary relief.

9. It is fair to say that since the institution of these proceedings the parties have expended huge amounts of time, effort and money in litigating practically every issue that one could think of in a matrimonial dispute. Practically all of these matters have been dealt with by Michael White J. who has had seisin of the case since March 2012.

10. The original trial before him lasted fourteen days and there have been numerous applications which have been back before him and at least one other judge on many occasions since.

11. In April 2013, Michael White J. delivered a judgment running to some 259 paragraphs excluding the nine schedules appended to it. It dealt comprehensively with the matters in dispute. One of those matters was custody and access for the two young children of the marriage. The judge laid out what he described as a road map for custody and access in respect of those children.

12. The same judge delivered another judgment on the 19th March, 2014, dealing *inter alia* with custody and access of the children.

13. In the meantime an appeal had been taken to the Supreme Court in respect of a lump sum order which had been made in April 2013. In November, 2013, the Supreme Court directed payment by GM of a lump sum of €1.8 million in two instalments of €1 million and €800,000 respectively pending appeal.

14. The question of custody and access was back before the High Court again in December 2014 and it gave rise to the order which is now under appeal.

This Appeal
15. In preparing for this appeal and judgment, I have had to acquaint myself with what has gone on in the High Court between these parties during the course of this litigation. The parties are conducting a litigation war against each other. They are each, in their respective ways, extremely difficult people and I entirely agree with the High Court judge when he said that the court is "challenged to the very limit to try and deal with them". In that regard the High Court judge is to be complimented for the extraordinary patience and commitment that he has shown to this case. He has shown great skill in endeavouring to bring some order to the parties' fractious and fractured relationship. It is clear that throughout, despite all the difficulties with which he was confronted, the judge has endeavoured to ensure that the welfare of the infants is the first and paramount consideration to be borne in mind.

16. The judge has heard a huge amount of evidence, and in particular from MM and GM, an advantage which this Court does not have. In approaching this appeal, I bear in mind the views of the Supreme Court in S. v. S. (Unreported, 21st February, 1992) in dealing with an appeal against a custody order granted in favour of a father by the High Court, where it said:

> *"Having regard to the decision in Hay v. O'Grady it is clear that the court is bound by the primary findings of fact, which*

have been made by the learned trial judge upon the oral evidence before him if there is evidence to support such findings. I am also satisfied that having regard to the principles laid down in that decision, this is a case in which in many instances this Court should be particularly careful of reaching a different inference from the facts so found than that which was reached by the trial judge.

Quite clearly, if any question of error in principle has occurred in the findings and decisions of the trial judge concerning the welfare of the children and the vital question as to in whose custody they should be placed, this Court must intervene. Since, however, this Court does not have the opportunity to view and hear the oral evidence of the parents or guardians concerned, it should in my view, in general, be slow to replace the decision of the judge who has had that opportunity."

The custody/access regime

17. Just as the parties to this litigation contested financial matters, factual matters in relation to the nature of their relationship and the breakdown of that relationship, so they also contested issues concerning the parenting of the two young children. The conflicts and issues as to where the children would reside and whether there would be joint custody were resolved by orders made in the High Court. The result is that MM is the primary custodial parent and the children reside with her in Dublin. The High Court constructed what it described as access orders that were not "too intense". In that regard, the High Court did not follow certain recommendations which were made by Prof. Sheehan who has been involved in this litigation for a long time and has played an important role in endeavouring to try and facilitate the custody and access regime in respect of the two children. GM does not live in this State and originally Prof. Sheehan was of the view that there should be more than a single visit a month by the children to the city where GM resides. The High Court took the view that that would be too much and instead put in place structured access arrangements which would involve two visits to Dublin every month by GM at which access could be enjoyed and one visit by the children to GM's residence. That was the judge's plan, but sadly it has never been realised.

18. One of the difficulties that has manifested itself is a reluctance on the part of MM to tell the children that their parents are separated. The judge has been endeavouring to address that for a very long time and took the view that it had caused what he described as "huge problems for the children and has been very retrograde for their welfare". It is difficult to understand MM's attitude on this topic. The children are now of an age where they probably know of the separation.

19. The judge has endeavoured to try and impress on the parties the huge responsibility which they have to their children and in particular MM's responsibility to facilitate access to the non custodial parent. She appears to have difficulty with this. Both parties have chosen not to listen to the court on occasions in relation to aspects of the welfare of the children.

20. In the plan of the judge, overnight access was to be enjoyed in Belfast by the children on a regular basis with their father. The first time that that was to occur was at the end of October 2014. It is fair to say that in anticipation of that, GM did all that was required of him by the judge including the provision of a nanny who would be present. The judge was impressed with this nanny and this arrangement was approved of by Prof. Sheehan.

21. The evidence given by the nanny was that the children were settling down well on the evening of 30th October 2014, when an engagement took place between MM and the nanny. The judge found that MM's approach was as he put it "very disrespectful to" the nanny and she was very distressed as a result of that confrontation. The judge described it as entirely unacceptable behaviour on the part of MM to act in the way that she did. The net result of all of this was that the planned overnight access did not take place. Thus, the structure which the judge had attempted to put in place with a view to ensuring that the children's right of access to their father would be enjoyed sensibly and sensitively was effectively brought to an end. They have not enjoyed overnight access with their father since.

22. It was in these circumstances that the matter came to be dealt with yet again in the High Court in December 2014.

The December 2014 hearing

23. The hearing in the High Court on this occasion was concerned with the question of access by the children to their father. The judge had a great number of affidavits before him and also oral testimony from Prof. Sheehan.

24. At the outset of his evidence, Prof. Sheehan indicated his view, as he put it, "we are actually moving backwards since the date of the attempted first overnight". He spoke of the necessity of having to "stop the rot". He told the court that GM was missing the children hugely and was extremely angry with MM whom he saw as alienating the children from him and playing a deliberate role in preventing them from meeting with him on their own. GM refused to speak to MM. The Professor expressed the view that it would be very helpful if both parties would meet directly with him for discussions. He thought that that would make enormous difference to the children and could be what he described as "a real building block in terms of turning the corner".

25. He also expressed the view that MM was extremely tense, stressed, and agitated. He thought that she was on the verge of cracking up. She was felling "totally overwhelmed by the amount of legal proceedings and the way that that was distracting her from attending to the children".

26. As to the children the Professor described the elder child as being "really weighed down by the conflict between her parents". He said that she was regrouping under her mother in the face of the conflict. That did not surprise him, because usually as conflict between parents gets expressed more openly in front of children, the children will regroup under their primary carer. The Professor took the view that the children are terrified, but went on to say in very specific terms that they are not terrified of their father. He said they were "clearly not frightened of father" but were terrified of the conflict and that it (the conflict) had mounted. He then spoke of the responsibility on the parents to do something about the environment between them, so as to reduce the conflict for their children, because it was on the way to becoming an intolerable burden for them. As a result of all of this, the elder child was now saying negative things about GM. The elder child was demonstrating sleeplessness and was missing school. The younger child was also fearful. He actually said to the Professor at the conclusion of a meeting with him, "I want the war to end. I want peace". That was said spontaneously by the child. It is a poignant commentary on what the unfortunate children have been experiencing.

27. The Professor then suggested to the judge that there would be a moratorium on what he described as "all the current orders for a period of time". This would provide an opportunity for what he described as a "top priority intervention being the parents talking together with me for a couple of meetings". He made it clear that he was not suggesting that there should be no access during this moratorium. He was happy once again to facilitate that process, but pointed out there was only so much that a facilitator could do and indeed only so much that a court could do. At the conclusion of this part of his testimony, he told the judge that both parents

have a huge amount to offer the children. They were very different types of parents and he thought that things had been going moderately well. The question was of course whether MM had sabotaged the first overnight access that the court had directed.

28. There was a great deal more evidence given to the judge which it is neither necessary or indeed possible to reproduce in this judgment. It is clear however, that particularly as a result of the testimony given to him by Prof. Sheehan, the judge decided to make the two parts of the order which are the subject of this appeal.

29. In making the order under appeal, the judge made it clear that the regime directed by it was to be of short duration and that all access issues will be reviewed by him on the 26th March, 2015.

M.M.
30. The High Court has already adjudicated that MM is to be the custodial parent of the two children. That imposes serious obligations upon her. One of those obligations is to ensure that the right of her two children to have access to their father is respected and given effect to. Overnight access with their father is an important component of their entitlements. That is particularly so having regard to the ages of the two children and the age of their father. Failure on her part to live up this obligation will have serious consequences for the welfare of her children, but may also have legal consequences for her. If she frustrates orders which the court might make concerning access by the children to their father, her own role as the custodial parent may be called into question.

G.M.
31. GM was described by the judge as a very belligerent difficult man. He has a difficult temperament and seems to be unable to communicate civilly with MM. As the judge pointed out, it would be of assistance and in the best interests of the children if the parties were able to communicate about matters affecting the children in a civilised way. As the judge said more than once "the adversarial system in family law courts can bring out the worst in people, but if even half the belligerence displayed by GM is evident in his relationship with MM on dealing with the children, the ongoing issues of custody and access will continue to be fractious and this will inevitably affect the children".

32. Whilst there is a wretched relationship between GM and MM which is adversely affecting the children, it has to be said that as a father there is nothing to be said against GM not having generous access to his children. The High Court has found that he loves his two children that he is not a threat to them in respect of any court welfare issues and that he is a decent man. He has been financially responsible towards them. He wishes to have contact with his children. It was in the context of this very difficult situation that the trial judge made the order which he did.

The judgment
33. Some particular parts of the High Court judgment are worthy of repetition. The judge said:-

> *"Now any court in a situation like this where there is what I would call deep issues on the part of both parents which leads to conflicts over access and which leads to a breakdown of access, the court is confronted with how does it approach the situation. Does it invoke the coercive powers of the court by penalising the custodial parent where access does not take place? Does it try to look towards the welfare of the children and see what is in their best interest? I have always had no doubt in my mind that the approach that I have had to take at all times is to act in the best interest of the children and their welfare. I feel in the particular situation that we're confronted with, the coercive powers of the court provide no or little assistance to the very, very deep deep deep psychological problems which the court now has to confront in terms of the breakdown of Mr. and Mrs. M's relationship and the children's.*
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> *Now, it should be said that a matter of concern at all times for the court is the age of Mr. M and the time that it has taken to get the distance that we have. The judgment of the court was issued on the 25th April, 2013. The court allowed one year for the overnight access to be bedded in. There were difficulties which the court has outlined in relation to compliance with the court and engagement in the court's advices and engagement with Prof. Sheehan. We then have had a further delay now and we are eighteen months out from the 25th April, 2013 and I make no apologies for trying to commence the overnight access in October 2014. Both* (children) – (one) *will be nine on the 9th February, 2015.* (The other) *is seven and three months. I mean they are both children now, which are – I mean they may be immature for their age, but certainly they are at an age now where they should be actively engaging with their father and should be well in the position to go on overnight access. But that be as it may, we are now in a situation where Prof. Sheehan has no doubt that these children are under very significant distress, that Mrs. M is under very significant distress and the court's view, although it has not been set out in affidavit, I have no doubt that the absence of any contact with his children is causing Mr. M very significant distress and unfortunately the court has to go backways to forward. I have no other choice in relation to the matter. Mr. Hayden has made submissions to the court that the court does not have discretion to amend its order. That is certainly is not the case. Pursuant to the Guardianship of Infants Act 1964, in relation to any application before it, the court has discretion to try and deal with the issues that it confronts in relation to the welfare of the children.*
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> *I was particularly concerned about Prof. Sheehan's evidence that there should be a moratorium on access. I clarified that with him and he did not in fact mean that as such and in my view to try and bring the situation forward, I have to go back and I am going to have to suspend the overnight access for the foreseeable future. I do not want to in any way curtail the daily access. I am conscious that there may be ongoing difficulties about its fulfilment. I feel that just for the present, the Belfast access should perturb (sic) to one day, or Saturday, until hopefully we try and get it re-established. I feel strongly that there should be a litigation free period where the matter does not come back into court again for the benefit of the children. Obviously there are issues now coming up to Christmas which the court may have to try and deal with, but apart from that situation, I do not want it coming back into the court again.*
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> *So, I want to be absolutely clear from the court's perspective that I am very disappointed that this access has broken down. I am very disappointed that the court's orders are not being complied with. I am very disappointed that overnight access did not take place. I do feel that there was a window of opportunity on the evening of the 30th October, 2014 and that it was lost. I feel that the children could well have stayed overnight that night and would have enjoyed it. The comments made by* (one of the children) *to Ms. B on the evening in question would indicate that* (the children) *feel some displeasure of their mother if they stayed overnight and again I am not blaming Mrs. M that she is consciously alienating the thing, but there is certainly an atmosphere there in relation to that particular issue and there are deep deep-seated issues there which this Court in many ways and I think this Court and Prof. Sheehan are challenged to the very limit to try and deal with them. The only thing I can say to Mr. M in relation to the issue if his belligerence continues, if he is still offensive to Mrs. M there will be consequences in the relationship with his children. I have no doubt about that. I know it*

is definitely affecting the children. I do not know whether he can change his behaviour or not, but I pointed out very carefully to him in the judgment of the 19th March, 2014 and I can do no more in relation to that and it is clearly having an impact on Mrs. M's mental health at present, that type of relationship with Mr. M and there is no – the court never orders people to attend a – I don't anyway – adults to have – I expect them to act responsibly to their children and that if the person who – the facilitator, who is trying his very best to facilitate access is trying to do something that they should follow his recommendations and Prof. Sheehan is quite clear that at tête-à-tête meeting between Mr. M and Mrs. M is something that is very constructive and useful for them."

34. Later in his judgment the judge said this:

"I think at this point in time that it would not be helpful for Prof. Sheehan to interview the children at present. I think it should be left to his judgement to deal with that particular issue if it is causing them distress. Now I do not think that it is constructive at present that he would engage with them. It may well be that in a few months time that that situation would change. Unfortunately the court cannot avoid ongoing supervision of the issue, but it wants to do it on a basis where there is a period of time given to try and deal with the very difficult problems that have arisen. There is absolutely no benefit to this coming into this Court week in, week out. I absolutely say that with the greatest respect to Mr. M. It is not assisting the situation and it will not bring about a resolution to his satisfaction. I want to reassure Mr. M that as far as the court is concerned, it is very conscious that he is without access. The court believes that it is unfair. The court wants him to have contact. The court wants him to have overnight contact, but the responsibility of the court, and I think he will understand that at the moment, is that the court is now dealing with very distressed children and it would be a dereliction of duty of the court if it did not take that into account in its present reflections."

Discussion

35. As is clear from those parts of the judgment from which I have quoted the High Court judge was faced with a very difficult situation. The access arrangements which he had attempted to implement had collapsed. The children were extremely distressed as indeed were both parents. The judge was extremely mindful of the entitlement of the children to access including overnight access with their father. However, in the circumstances with which he was confronted, he was of the view that the only thing that he could do in order to provide a period of respite was not to proceed with overnight access for a period of some months. The hope was that the parents would show a greater sense of responsibility than they have to date and agree to meet with Prof. Sheehan so that whatever their differences as between themselves as adults they might respect the entitlements of their children.

36. The judge was also of opinion that a respite in the litigation war would also be beneficial. Hence he made the order under appeal.

Overnight access

37. I am quite satisfied that the judge was entitled to make the order curtailing overnight access. Section 11 of the Guardianship of Infants Act 1964, provides the widest powers to the court to make such order as it thinks proper on questions affecting the welfare of an infant. On the evidence before him, the judge was entitled to take the view that overnight access should be suspended, but just for a few months. The hope was that that would provide a respite period in which GM and MM might reflect on their responsibilities as parents and meet Prof. Sheehan. The evidence before the judge was that the two children were in a distressed condition and any form of forced overnight access would not have been for their benefit.

38. In these circumstances and bearing in mind the disadvantages which an appellate court has - an arid transcript with no viva voce evidence -, I do not believe that this Court ought to intervene and alter in any way the directions given by the judge concerning overnight access.

39. It is clear from the terms of his judgment that the judge is acutely aware of the entitlement of these children to generous access with their father and I have no doubt but that he will give effect to that at the earliest opportunity.

40. Without in any way trespassing upon the jurisdiction of the trial judge when the matter comes before him next month it would seem appropriate that consideration be given to the question of more generous overnight access being granted with GM than was originally contemplated so as to compensate the children for the loss of appropriate access that they have suffered to date.

Restriction

41. Objection is taken to the final part of the order made on the 12th December, 2014. That directed that "no further application is to be made in respect of the children either by way of enforcement or review" before the 26th March, 2015.

42. I have great sympathy and quite understand why the judge decided to make this order. He rightly said that there was no benefit being gleaned by this case, as he put it "coming into this Court week in week out". He hoped to achieve a period of respite from the litigation war, so that the parents might stand back and realise the damage that was being done to the welfare of their children. He also hoped, as is clear from the transcript, that the exchanges of solicitors' correspondence which were precursors to such applications might also come to a halt. Indeed he made it clear that both solicitors and counsel have a duty to the court in relation to the welfare of the children. He went so far as to demand compliance with that duty. He spoke about these letters as meaning "absolute and utter nonsense" as far as he was concerned. Immediately after that he made it clear that he wished access to happen and that he wanted to see GM seeing his children.

43. Whilst I understand and indeed sympathise with the position of the trial judge in making this part of the order, I regret to say that I do not believe that it can stand.

44. As I have already pointed out s. 11 of the Guardianship of Infants Act 1964, confers the widest possible powers upon the court when it comes to dealing with the welfare of infants. That is as it must be.

45. If this part of the order is read literally it constitutes a denial of access to the courts on a most important question, namely, infant welfare. Such denial is not in conformity with constitutional norms.

46. A literal reading of the order would be impermissible from a constitutional point of view. Such an interpretation would, to use the words of Ryan J. in *Quinn and Others v. Irish Bank Resolution Corporation Limited and Others* [2013] IEHC 116,:

"come with heavy legal baggage including, inter alia, interference with . . . rights, access to the courts, . . . and other Constitutional issues."

47. If the order is to be interpreted in a constitutional way, then it cannot mean what it says. It is not possible to do what it purports to do without offending constitutional norms. That is particularly so in the context of the welfare of children.

48. I have no doubt, but that if an urgent matter pertaining to the welfare of the children arose, no judge would construe the order literally. Rather it would be construed in accordance with constitutional norms and thus would be ignored. Thus, the order really serves no purpose. Well intentioned as it was, this part of the order of the High Court must be set aside and the appeal allowed in respect of it.

Result
49. For the reasons already outlined, I would not interfere with the order made by the High Court in respect of the suspension of overnight access for the short period of time involved between now and the review which will take place on the 26th March, 2015. In so doing, I have no doubt but that on that review, the High Court will be fully cognisant of the children's clear entitlement to overnight access with their father and the fact that they have been deprived of such for a long period to date.

50. Insofar as the High Court order purports to prohibit applications by way of enforcement or review in respect of the welfare of these infants it should, in my view, be set aside.

Note: A separate concurring judgment was delivered by Hogan J.

Irvine J. agreed with both judgments.