

THE HIGH COURT**FAMILY LAW****Record No: [2015/16CAF]****IN THE MATTER OF L.D., A MINOR****BETWEEN:****D.E.****APPLICANT/RESPONDENT****-AND-****C.D.****RESPONDENT/APPELLANT****JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 10th day of July, 2015.****Background to the current application**

1. The current application arises from proceedings that are extant before the Circuit Court, where D.E. (the applicant/respondent) is seeking numerous reliefs pursuant to the Guardianship of Infants Act 1964 in respect of the parties' child, L.D. In the Circuit Court proceedings, D.E. seeks the following reliefs:

(a). An order pursuant to section 6A of the Act of 1964, granting him guardianship of L.D.

(b). An order pursuant to section 11 of the Act of 1964, granting him access to L.D.

(c). If necessary and appropriate, an order pursuant to section 11 of the Act of 1964, granting the applicant custody of L.D.

2. During the course of the aforementioned proceedings, his Honour Judge Keenan Johnson of the Circuit Court heard evidence of allegations of sexual abuse perpetrated by D.E. upon L.D. These allegations formed C.D's (the respondent/appellant) substantive objection to D.E. having access to L.D. However, D.E. denies these allegations categorically.

3. In the Circuit Court, it was agreed that a social report, pursuant to s.47 of the Family Law Act 1995, be conducted so that the voice of the child could be ascertained and relayed to the Court on the issue of prospective access between the applicant/respondent and the child. However, the learned Circuit Court Judge decided to adjudicate on whether the sexual abuse as alleged occurred prior to appointing an appropriate expert to conduct the s.47 report. It seems that the learned Circuit Court Judge choose this course of action so as to ensure that any prospective s.47 report, carried out for the purposes of the Circuit Court proceedings, would be informed by the Court's adjudication on whether the alleged sexual abuse occurred.

4. On the 18th March, 2015, his Honour Judge Keenan Johnson, in a detailed and nuanced judgment, found that the aforementioned allegations of sexual abuse were untrue. In turn, the learned Circuit Court Judge directed the preparation of a s.47 report premised on the finding that the allegations of sexual abuse were untrue, and his observations on this point are noteworthy (at para.73 of the Circuit Court judgment):

"73. Accordingly, I am adjourning this matter to allow for the preparation of a s.47 report which will advise on the resumption of access. Such report is to be predicated on the basis that the allegations of abuse are not true. The author of the report must then look at access in terms of what is in the best interests of L.D. The court will look for guidance from the author of the report as to what steps need to be taken by L.D. and D.E. to re-establish access. The primary guiding principle behind the s.47 report should be that its recommendations reflect what is in the best interests of L.D., even if such recommendations are that access should not take place for the present."

5. On the 27th March, 2015, the respondent/appellant filed a notice of appeal seeking to appeal the judgment of the Circuit Court delivered on the 18th March, 2015. On foot of this judgment, the Circuit Court issued an order directing the appointment of Mr. Robert Foley to conduct a s.47 assessment in respect of L.D. for the purposes of preparing a social report for the Court. This order is dated the 18th May, 2015.

6. On the 18th May, 2015, the respondent/appellant applied for a stay on the aforesaid order pending the appeal of the Circuit Court judgment. However, the Circuit Court refused the respondent/appellant's application for a stay.

7. On the 22nd May, 2015, the respondent/appellant filed a notice of appeal outlining her intention to appeal the decision of the Circuit Court to decline a stay on its order appointing Mr. Robert Foley to produce a social report on L.D pursuant to s.47 of the Family Law Act 1995.

The Current Application.

8. The current application arises from the respondent/appellant's notice of motion dated the 22nd May, 2015, seeking a stay on the order of Circuit Court dated the 18th May, 2015, pending the substantive appeal of the Circuit Court judgment. This Court heard this motion on the 26th June, 2015 and on the 3rd July, 2015. The Court requested written submissions from both parties, and it has considered these submissions extensively.

9. Two issues arise from the current application. The first issue pertains to whether this Court has jurisdiction to grant a stay on the aforementioned Circuit Court order where the substantive proceedings are extant before the Circuit Court. In summation, the applicant/respondent adopts the position that this Court does not have jurisdiction to hear that substantive appeal of the Circuit Court judgment and in turn, this Court does not have jurisdiction to impose a stay on the Circuit Court order pending that substantive appeal. The respondent/appellant counters this proposition. If this Court is to decide that it has jurisdiction in regard to the first issue, the Court must decide the second issue of whether a stay should be imposed on the Circuit Court order dated the 18th May, 2015 pending the substantive appeal of the Circuit Court judgment.

10. From the outset, it is important to note that the respondent/appellant does not object to a s.47 report being conducted. Rather, the respondent/appellant objects to the premise upon which the report is to be conducted.

The Position of the Respondent/Appellant.

11. On the issue of whether this Court has jurisdiction to hear the substantive appeal of the Circuit Court judgment of the 18th March, 2015, and in turn grant a stay on the Circuit Court order, counsel for the respondent/appellant directed the Court to s.38 of the Courts of Justice Act 1936 which states;

"38. An appeal shall lie from every judgment or order (other than judgments and orders in respect of which it is declared by this Part of this Act that no appeal shall lie therefrom and judgments and orders in respect of which other provision in relation to appeals is made by this Part of this Act) of the Circuit Court in a civil action or matter—

(a) where such judgment or order is given or made by a judge of the Circuit Court for the time being assigned to and sitting in the Dublin Circuit, to the High Court sitting in Dublin, and

(b) in every other case, to the High Court on Circuit sitting in the appeal town for the county or county borough in which the action or matter resulting in such judgment or order was heard and determined.

(2) Every appeal under the section shall be heard and determined by one judge of the High Court and shall be so heard by way of a rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made.

(3) The judge hearing an appeal under this section may, if he so thinks proper on the application of any party to such appeal, refer any question of law arising in such appeal to the Supreme Court by way of case stated for the determination of the Supreme Court and may adjourn the pronouncement of his judgment or order on such appeal pending the determination of such case stated and, in particular, may so adjourn such pronouncement to Dublin and there pronounce his said judgment or order at any time after such determination."

12. Counsel for the respondent/appellant referred to s.38(1) of the Courts of Justice Act 1936 and that the order of words contained in the statutory provision should be given their ordinary and natural meaning. In turn, the respondent/appellant submits that if the Court is to accede to interpreting s.38(1) of the Act of 1936 in a manner that gives the words contained therein their natural and ordinary meaning, it is axiomatic that every judgment or order (except for specific judgments and orders stipulated within part IV of the Act of 1936, of which no such judgment or orders arise in the current proceedings) of the Circuit Court is amenable to appeal. Moreover, counsel for the respondent/appellant highlights that there is no provision contained within the Act of 1936 that stipulates that only judgments or orders of the Circuit Court that dispose of the substantive Circuit Court proceedings can be appealed to the High Court.

13. The respondent/appellant submits that there is legal authority that supports the proposition that an appeal can lie from preliminary matters. In this case, counsel for the respondent/appellant claims that the Circuit Court determination on whether the alleged sexual abuse of "L.D." occurred is a preliminary matter amenable to appeal. The Court was referred to the decision of Denham J. in *Dublin Wellwoman Centre Ltd v. Ireland* [1995] 1 ILRM 408. In *Dublin Wellwoman Centre*, the Supreme Court had to determine whether a trial judge's preliminary determination, refusing to recuse herself from the substantive High Court proceedings, could be classified as a "decision" for the purposes of Article 34.4.3º of the Irish Constitution 1937. Article 34.4.3º of the Constitution stipulates that the Supreme Court shall, subject to exceptions and regulations prescribed by law, have appellate jurisdiction from all decisions of the High Court. Thus, the Supreme Court had to adjudicate on whether it had jurisdiction to hear an appeal on the trial judge's preliminary determination under Article 34.4.3º of the Constitution. Denham J. held that the preliminary determination by the High Court Judge was a "decision" for the purposes of Article 34.4.3 of the Constitution, and the determination was amenable to appeal to the Supreme Court (at pg.417):

"In this case there were formal words — the order and a reserved judgment. There was a determination by a High Court judge of an issue. The determination affecting the interest of one of the parties. Carroll J in refusing to discharge herself from the case between the parties on the basis that there was no bias made a decision, against the application of one party, on constitutional justice. The issue of bias goes to the root of constitutional justice—to the constitutional right to a fair and impartial hearing. The issue is one to be determined in accordance with Irish law and the Constitution.

The determination had all the characteristics of a decision. The preliminary issue had been raised before the High Court, arguments were submitted on behalf of opposing parties, the law and the Constitution were referred to, the judge reserved her decision, and then delivered a written judgment in which she gave her determination and the reasons therefor. Thereafter a High Court order on the issue, and regulating the appeal, was drawn up.

The fact that it is an issue preliminary to a trial does not divest it of the status of a 'decision' under Article 34.4.3º. Preliminary matters, such as for example a request for an adjournment, are not infrequently appealed to this Court. It has been the practice of this Court, quiet rightly in my view, to treat such a decision from which an appeal may lie. Such a decision is analogous to the decision in this case."

It is appropriate that the issue be tried now rather than after a full hearing of the substantive action in the High Court. It is a decision on an interlocutory matter in the course of an action.

I am satisfied that in substance and in form, the judgment and order of the High Court in this case are a 'decision' pursuant to Article 34.4.3º of the Constitution. Consequently, an appeal lies therefrom to the Supreme Court."

14. Counsel for the respondent/appellant submits that the current application is analogous to the Supreme Court's ruling in *Dublin Wellwoman Centre Ltd v. Ireland*, as:

(a) There was a hearing on whether the alleged sexual abuse occurred in the Circuit Court. During this hearing, both parties made submissions.

(b) The learned Circuit Court Judge reserved judgment.

(c) On the 18th March, 2015, the learned Circuit Court Judge delivered a written judgment, upon which, an order dated the 18th May, 2015, was made appointing Mr. Brian Foley.

(d) The determination affected the interest of one of the parties, namely, the respondent/appellant and the subject of the proceedings, L.D. The Circuit Court judgment directed that a s.47 report be conducted on the premise that the sexual abuse as alleged did not occur. Both the respondent/appellant and L.D. continue to assert that the applicant/respondent perpetrated the sexual abuse, and submit that a report conducted on the premise that the abuse did not occur compromises their position and in turn, their interests.

15. Counsel for the respondent/appellant also referred to the decision of the English Court of Appeal in *In re B. (A Minor) (Split Hearings; Jurisdiction)* 1 W.L.R. 790, in support of the proposition that this Court has jurisdiction to hear the substantive appeal and in turn, impose a stay on the Circuit Court order dated the 18th May, 2015. In *re B. (A Minor)*, the minor had suffered eleven fractures within a three month period before being admitted to hospital. The minor was taken into interim care with the substantive care proceedings heard by way of split trial before the County Court. The County Court judge envisaged that the first part of the proceedings would determine causation of the injuries, and on that determination, the second part of the proceedings would determine where the child should reside. The case came before the English Court of Appeal, on whether the County Court judge was correct in disregarding expert medical evidence in preference for the testimony of lay witnesses. In the initial proceedings, the County Court judge made findings of fact, but did not issue any order or declarations upon those findings. On appeal, the issue arose as to whether the Court of Appeal had jurisdiction to deal with the matter, as its function was to adjudication upon orders or judgments of the court of first instance as opposed to adjudicating upon mere findings of the court of first instance. On this issue, counsel for the respondent/appellant directed this Court to the judgment of Dame Butler-Sloss P. where she stated (at pg. 793):

"I am satisfied for my part that the way in which this case was presented to the court was by way of a hearing of a preliminary issue. The preliminary issue was that of causation. The decision, which was very much dependent upon the medical evidence, was crucial to the final decision of the court as to where this child should live and with whom. The determination of the preliminary issues was crucial to the disposal of the care proceedings. Without it, it would be impossible for the local authority and guardian to put forward the appropriate proposal to the judge, or indeed for the mother and grandparents to be able to meet those proposals. I can see why, in this particular case, there was a split hearing. Whether such a hearing presents other difficulties is another matter.

Mr. Ames, representing the grandparents, who had not had an opportunity to argue this below, in his excellent submissions to us has cited the obvious example of a preliminary issue, an issue such as a defence in limitation or in civil personal injury cases of liability. But preliminary issues are not limited to such obvious examples. There are other examples, which we have canvassed with counsel during argument upon which findings are made which are of enormous importance, although not necessarily entirely determinative of the second part of the hearing. But such issues which are determined as a preliminary part of the case, which are crucial to the final determination, can be treated, if appropriate, as a determination for the purpose of allowing the Court of Appeal to hear it without waiting for the second part of the hearing. In this case, in the unusual circumstances which prevail, I am satisfied that the court does have jurisdiction to deal with the issues which were determined by the judge and that those are issues determined in accordance with section 77 of the County Court Act 1984."

16. It was submitted by the respondent/appellant that the current proceedings are analogous to the procedural circumstances of *In re B. (A Minor)*. Consequently, it is proposed that this Court has jurisdiction to hear an appeal of the Circuit Court judgment dated the 18th March, 2015, and pending that appeal, this Court has jurisdiction to impose a stay on the order of the Circuit Court dated the 18th May, 2015.

17. If this Court is to hold that it has jurisdiction to grant a stay on the aforementioned Circuit Court order directing a s.47 assessment and report, counsel for the respondent/appellant submits that a stay should be granted for two reasons. Firstly, the Circuit Court order stipulates that the s.47 assessment and report be conducted on the premise that the allegations of sexual abuse are untrue. Moreover, counsel for the respondent/appellants highlights that if this Court refuses a stay on the aforementioned order, the assessment will be conducted in circumstances where Circuit Court judgment requires the respondent/appellant and her family to praise the applicant/respondent's fatherly characteristics: (at para. 70 of the Circuit Court judgment):

"I am acutely conscious of the dilemma faced by CD in this case and have nothing but sympathy for her position. As I have said already, she is clearly a loving and concerned parent who wants to do the best for her daughter. She adores her little girl and cannot envisage her concocting the allegations of abuse, which she has levelled against her father. We may never establish the source of the allegations, but at this stage it is important that we move on and start rebuilding trust between DE and LD. CD and her family have an important role to play in providing reassurance to LD as she embarks on the re-establishment of a relationship with her father. This involved CD's family speaking well of DE in the presence of LD and praising his fatherly characteristics. In this respect I would like to wish all of the parties, especially LD, well."

Counsel for the respondent/appellant claims that this caveat contained in the Circuit Court order requires the respondent/appellant to embark upon an assessment process whereby she will have to praise the respondent/appellant's parental characteristics to the child while simultaneously maintaining that the child was subject to sexual abuse. The respondent/appellant submitted that adopting such a position could have a drastic impact on the mother-daughter relationship. Secondly, counsel for the respondent/appellant claims that the s.47 assessment process, as stipulated by the Circuit Court Judge, could pervert any prospective evidence the child may provide on the allegations of sexual abuse at the substantive appeal. The respondent/appellant substantiates this proposition by claiming a s.47 assessment process, which is premised on the basis that the allegation of sexual abuse are untrue, would undermine the child's consistent position that she was sexually abused by the applicant/respondent. Counsel for the respondent/appellant claims that such a prospect could have a damaging effect on the welfare of LD.

The Position of the Applicant/Respondent.

18. On the issue of jurisdiction to grant a stay on the order of the Circuit Court, the applicant/respondent submits that this Court can only impose a stay on the aforesaid order if the respondent/appellant has a right of appeal. Counsel for the respondent/appellant directed the Court to s.38(2) of the Courts of Justice Act 1936, which states;

"Every appeal under the section shall be heard and determined by one judge of the High Court and shall be so heard by way of a rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made."

19. It was submitted by the applicant/respondent that, as a matter of statutory interpretation, s.38(2) of the Act of 1936 precludes an appeal from a "part-heard" case. Moreover, the applicant/respondent claims that an appeal pursuant to s.38 of the Act of 1936 only lies when the action or the matter can be reheard in its entirety on appeal. To hold otherwise would endorse a practice where the Court could rehear part of the action or matter in which the judgment or order, the subject of such appeal, was given or made.

20. Counsel for the applicant/respondent also referred to the decision of the English Court of Appeal in *In re B. (A Minor) (Split Hearings; Jurisdiction)* 1 W.L.R. 790, and submitted that this Court, in deciding whether it has jurisdiction to hear an appeal and in turn a stay on the Circuit Court order pending the appeal, should not follow the dicta of the English Court. It was submitted that this Court should be cautious in following foreign authorities especially in circumstances where there is no procedural parallels between this jurisdiction and the jurisdiction which the foreign authority originates. In particular, counsel for the applicant/respondent claims that there is statutory authority within the jurisdiction of England and Wales that permits the Courts of Justice to engage in split hearings at first instance, and if so arising, an appeal of the preliminary determination prior to the commencement of the second stage of the split hearing. Counsel for the applicant/respondent submits that there is no statutory authority within this jurisdiction that permits the Courts of Ireland to engage in such a procedure.

21. Counsel for the applicant/respondent highlights that the substantive proceedings were before the Circuit Court for thirteen days. Moreover, the applicant/respondent estimated that the substantive appeal in the High Court would require at least twenty hearing dates. In turn, this would result in a significant delay of the Circuit Court proceedings and exacerbate prejudice to the applicant/respondent and the revival of his relationship with L.D. Counsel for the applicant/respondent explained to the Court that the applicant/respondent has not had access with "L.D" since July 2013. Thus, any further delay of the Circuit Court proceedings advancing could render any prospect of reviving the father-daughter relationship futile. In addition, the applicant/respondent claims that if the respondent/appellant has concerns regarding the caveat contained in the Circuit Court order, she can petition the Circuit Court to vary its order pursuant to s.12 of the Guardianship of Infants Act 1964. Counsel for the respondent/appellant disagrees with the proposition that an application for variation can be made to the Circuit Court. Rather, counsel for the respondent/appellant claims that the Circuit Court judge, on issuing the aforementioned judgment and order, is *functus officio* on the issue of whether the allegations of sexual abuse occurred, and in turn, is bound by the principle of *res judicata*.

22. The applicant/respondent claims that the respondent/appellant's appeal is inconsistent with their agreement, that was facilitated with the leave of the Circuit Court, that the Circuit Court hearing would deal first with the contested matter of fact, namely, the issue of whether the applicant/respondent had abused the parties' daughter, before turning to the preliminary issue of access between the applicant/respondent and "L.D". Counsel for respondent/appellant highlighted that the parties never entered any substantive agreement that waived her right to appeal the Circuit Court determination as to whether L.D was sexually abused by the applicant/respondent.

23. If this Court is to accept that it has jurisdiction to impose a stay on the Circuit Court order dated the 18th May, 2015, the applicant/respondent submits that the Court should consider four factors. Firstly, this Court, in determining whether a stay should be granted, should not embark upon the substantive appeal as per *Redmond v Ireland* [1992] 2 IR 362. Secondly, the Court must determine whether the bringing of an appeal could damage the applicant/respondent and "L.D", and the parent-child relationship. Thirdly, the Court must consider the length of time between the "part-heard" Circuit Court proceedings and the hearing of an appeal in the High Court, which would, according to the applicant/respondent, be substantial. Fourthly, the respondent/appellant submits that the Circuit Court Judge delivered a careful and nuanced judgment, and that this Court ought to give appropriate deference to the Circuit Court Judge who exercised due consideration in making the order dated the 18th May, 2015.

Conclusion.

24. The respondent/appellant's application for a stay comes before this Court in unconventional circumstances. These proceedings came before the Circuit Court where the applicant/respondent was seeking numerous reliefs under the Guardianship of Infants Act 1964. These proceedings remain extant before the Circuit Court. The Circuit Court adopted a course of action whereby it decided to determine a preliminary factual dispute, namely, whether L.D was the subject of sexual abuse by the applicant/respondent, which was answered in the negative by the Circuit Court Judge in a detailed and nuanced judgment. On foot of the judgment, the Circuit Court issued an order directing that the s.47 assessment be conducted on the premise that the allegations of sex abuse were untrue. The respondent/appellant has lodged an appeal of the Circuit Court judgment to the High Court. Pending the appeal, the respondent/appellant comes before this Court seeking a stay on the Circuit Court order directing a s.47 assessment of L.D.

25. One component of the applicant/respondent's objection to a stay being imposed on the Circuit Court order is that the High Court does not have jurisdiction to hear an appeal of a "part-heard" case and in turn, this Court has no jurisdiction to grant a stay pending an appeal that cannot, in effect, be heard. However, if this is the applicant/respondent's position, this Court finds it peculiar that there have been no positive steps to strike out the appeal prior to opposing the respondent/appellant's application for a stay.

26. Firstly, in unusual circumstances, this Court must determine whether it would have jurisdiction to hear the substantive appeal pursuant to s.38 of the Courts of Justice Act 1936. Section 38(1) of the 1936 Act states that:

"An appeal shall lie from **every** judgment or order (other than judgments and orders in respect of which it is declared by this Part of this Act that no appeal shall lie therefrom and judgments and orders in respect of which other provision in relation to appeals is made by this Part of this Act) of the Circuit Court in a civil action"

27. Section 38(1) of the 1936 stipulates that an appeal shall lie from **every** judgment or order of the Circuit Court to the High Court. In this case, it is clear that there was a sole hearing on the issue of whether L.D was sexually abused by the applicant/respondent. Evidence and submissions were heard by the Circuit Court to that end. In turn, the Circuit Court delivered judgment exclusive to the issue of whether L.D. was sexually abused. On foot of that judgment, the Circuit Court issued the order dated the 18th May, 2015. Thus, it is clear that there was a judgment and order of the Circuit Court within the meaning of s.38(1) of the Act of 1936.

28. It was contended in this application, that s.38(2) of the Act of 1936 precludes an appeal of a "part-heard" case. It is the view of this Court that the correct interpretation of s.38(2) of the 1936 Act is that an appeal prescribed by the Act shall be heard and determined by one judge of the High Court and that such appeal is de novo in that the evidence must be reheard and tested. Thus, an appeal under s.38 of the 1936 Act can be distinguished from an appeal from the High Court to the Court of Appeal where such appeal can only address issues of law. This Court rejects the proposition that the words, "*shall be so heard by way of a rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made*" as contained in s.38(2) of the Act prohibits an appeal of the Circuit Court judgment or order until the substantive Circuit Court proceedings are concluded. Moreover, this Court is of the view that s.38 of the 1936 Act is not exclusive to Circuit Court judgments or orders that dispose of the proceedings in the Circuit Court.

29. Thus, it is clear from the wording of s.38(1) of the 1936 Act that an appeal shall lie from **every** Circuit Court judgment or order of the Circuit Court except for particular judgments or orders excluded by the Act. To hold otherwise would be to subvert the intention of the Oireachtas. In addition, the Circuit Court order in this case is not precluded from the exceptions as referred to in s.38(1) of the Act of 1936. Thus, this Court finds that it would have jurisdiction to hear an appeal and on that basis, this Court does have jurisdiction to determine whether a stay on the Circuit Court order is necessitated.

30. At this point, it is imperative to emphasize that it is not the role of this Court to determine the substantive appeal, which is to determine whether the allegations of sexual abuse are true. Rather, this Court must determine whether a stay should be imposed upon the Circuit Court order, which directed that a s.47 report be conducted on the premise that no sexual abuse was perpetrated by the applicant/respondent upon L.D.

31. In *Dankse Bank A/S trading as National Irish Bank v. Mc Fadden* (Unreported, High Court, Clarke J, 27th April 2010), Clarke J. outlined the applicable principles that should be considered by the trial judge before an application for a stay is granted (at pg 2, paragraphs 2.1- 2.2):

"It is clear from both *Redmond v. Ireland & Anor* [1992] 2 I.R. 362 and *Irish Press Plc v. Ingersoll Irish Publications Limited* [1995] 1 I.L.R.M. 117 that, in general terms, two broad issues will ordinarily arise for consideration in relation to whether a stay should be placed on an order of this Court pending appeal to the Supreme Court. The first issue is that, in order that a stay might be considered, any such appeal must be *bona fide*. For example, McCarthy J. in *Redmond* noted that a heavy responsibility lay on the legal advisers of those seeking a stay to assist the court on the reality of an appeal and also noted that appeals have been known in the past to have been brought for tactical rather than *bona fide* reasons".

Clarke J. continues (at pg 3, paragraphs 2.4-2.5):

"Where the appeal is genuine, it seems clear from *Ingersoll* that the court should conduct a process analogous to the balance of convenience test which the court is required to apply in determining whether to grant an interlocutory injunction. It is obvious that a successful party in this Court may lose out to a greater or lesser extent and with a greater or lesser degree of permanency as a result of having a stay placed on any order obtained. Likewise, it is equally clear that an unsuccessful party who fails to obtain a stay, but who ultimately succeeds on appeal, may suffer, again to a greater or lesser degree of permanency, as a result of the fact that a court order has been effective against them in the intervening period. In the words of McCarthy J. in *Redmond* the court is, in those circumstances, required to "*maintain a balance so that justice will not be denied to either party*".

"To those considerations, I would add one further matter. In the context of the interlocutory injunction jurisprudence, I expressed the view in *Evans v. I.R.F.B Services (Ireland) Limited* [2005] IEHC 107, that, in a case, where there was significant potential detriment on both sides, it seemed to me "that it is necessary to consider whether there is any form of injunction which might meet, to the greatest possible extent, the legitimate concerns as to detriment of both parties". It seems to me that an analogous principle applies in the context of a stay. It may be that a stay on terms or the imposition of terms without a stay can ameliorate the potential detriment to both sides in the event that either a stay is granted and the appeal fails or a stay is not granted and the appeal succeeds".

32. In determining the necessity for a stay in the present proceedings, it is clear from the above dicta of Clarke J., that this Court must adopt a two-stemmed test. Firstly, the Court must assess whether the prospective appeal is *bona fides*. If the Court finds the prospective appeal brought by the respondent/appellant is for *bona fide* reasons, the Court must assess whether the balance of convenience lies in granting or refusing a stay.

33. Firstly, this Court must consider whether the appeal is *bona fides*. In this case, as the Circuit Court judgment and order are intertwined, this Court must consider whether the substantive appeal of the Circuit Court judgment is *bona fides* in determining whether a stay should be granted on the Circuit Court order. In assessing whether the substantive appeal is *bona fide*, this Court is not determining the prospective success of the substantive appeal. Rather, the Court is assessing whether the appeal is stateable, and whether the appeal is being pursued for genuine rather than tactical reasons. This Court concludes that the respondent/appellant's appeal is *bona fides* in that she continues to maintain that the applicant/respondent abused their daughter. It seems that the respondent/appellant bases her position on the findings of St. Clare's Unit of Temple Street Hospital that L.D.'s allegations of sexual abuse were credible.

34. As this Court has concluded that the respondent/appellant's appeal is being pursued for *bona fide* reasons, this Court must consider whether the balance of convenience warrants the imposition of a stay on the Circuit Court order dated the 18th May, 2015. This case concerns the welfare of a child, which is now a formal constitutional imperative under Article 42A of the Irish Constitution 1937. Thus, the best welfare interests of L.D is the paramount factor that should guide this Court as to the necessity of a stay on the Circuit Court order. In assessing what is in the best welfare interests of L.D., this Court must balance two conflicting perspectives. Should this Court refuse a stay, resulting in the production of s.47 assessment of L.D, which may be a positive step to the revival of the father-daughter relationship? Conversely, should this Court grant a stay preventing L.D., who maintains that she was the subject of sexual abuse, from engaging in an assessment process that is premised on the finding that she was not sexually abused by the applicant/respondent?

35. It should be noted that the Circuit Court's direction that the s.47 assessment be premised on the basis that the allegations are untrue would not automatically result in a report that recommends the resumption of access. This was acknowledged by the Circuit Court judge in his judgment (at para. 73 of the Circuit Court judgment:

"73. Accordingly, I am adjourning this matter to allow for the preparation of a s.47 report which will advise on the resumption of access. Such report is to be predicated on the basis that the allegations of abuse are not true. The author of the report must then look at access in terms of what is in the best interests of L.D. The court will look for guidance from the author of the report as to what steps need to be taken by L.D. and D.E. to re-establish access. **The primary guiding principle behind the s.47 report should be that its recommendations reflect what is in the best interests of L.D., even if such recommendations are that access should not take place for the present.**"

36. Although, the Circuit Court determination is the subject of appeal, at this point in time, the applicant/respondent has been vindicated with regard the allegations of sexual abuse. The Circuit Court directed Mr. Brian Foley to carry out a s.47 assessment of the child on the premise that the allegations of abuse were untrue. It is experience of this Court that the psychologist appointed conducts social assessments with the highest integrity and professionalism. L.D. could benefit from Mr. Foley's therapeutic expertise.

37. Although, the Circuit Court directed that the s.47 assessment should be conducted on the premise that the allegations of sexual abuse are untrue, this Court is of the view that Mr. Foley will apply the highest standards of professionalism and carry out his assessment with sensitivity with regard the fragile circumstances of this case.

38. As a s.47 assessor, Mr. Foley's role is to determine the wishes and best welfare interests of the child, and whether there is a suitable pathway for resuming access between father and daughter, if he concludes that same is in her best welfare interests. It is

not the role of the s.47 assessor to confront L.D with regard to the allegations of sexual abuse. Rather, the s.47 assessor must be cognisant of the child's concerns in formulating his ultimate recommendations to the Court, which must also be tempered by the Circuit Court's determination that the allegations of sexual abuse are untrue. In summation, Mr. Foley must use his professional judgment and expertise in approaching the various strands in this case.

39. There is nothing to prevent Mr. Foley from being notified that the Circuit Court determination is under appeal. This information may also inform his ultimate recommendation to the Circuit Court. It would be best practice for Mr. Foley to be provided with a copy of the pleadings, the Circuit Court judgment and order and a copy of this judgment. In addition, Mr. Foley could seek such further directions as he deems necessary from the Circuit Court as to how to conduct his assessment in the most appropriate manner leading to the best possible outcome for the child.

40. The applicant/respondent has not seen his daughter since July 2013. It is vital that positive steps are taken to revive the relationship between father and daughter. A s.47 assessment of L.D is the first step in a delicate process. If this Court was to grant a stay pending the substantive appeal, it would be subverting the efforts of reviving the father-daughter relationship. As a result of the foregoing reasons, this Court refuses the respondent/appellant's application for a stay and directs that the Circuit Court order be effected.