THE HIGH COURT
(CIRCUIT COURT APPEAL)

[2021] IEHC 556

[Record No. 01476/2015]

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT, 1996

BETWEEN

A.MCN.

APPLICANT

AND

M.MCN.

RESPONDENT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 20th day of July, 2021

1. This application comes by way of appeal from an order of Her Honour Judge McDonnell dated 19th March, 2021 heard in Dublin Circuit Family Court. The essence of the reliefs made are set out hereunder:-

   (1) Effectively, this judge refused the relief sought in relation to the possibility of an updated s. 32 report on the grounds that this application is premature;

   (2) The father had sought primary care and control of the children and this was refused;

   (3) The judge refused the relief sought that the mother ought to undergo psychiatric evaluation;

   (4) An application to deal with any outstanding motions was adjourned generally by the judge who decided that no further applications were to be brought before the adjourned date;

   (5) An application by the father to prohibit Dr. Byrne-Lynch from having any future involvement in this case was refused;

   (6) The mother of the children was to organise therapy for the children when same became available;

   (7) Prof. Sheehan said liberty to assist the father with Facetime calls for better communication between the children and their father;

   (8) A copy of this order is to be sent to Prof. Sheehan;

   (9) The father was to pay any costs associated with Prof. Sheehan;

   (10) This judge retained seisin of this case;

   (11) The matter was adjourned for review to the 7th July, 2021 at 10:00am where the parties were to advise the court on:

      (i) the progress of telephone access; and

(ii) if agreed, appropriate persons to supervise or support access had been identified.

2. Following the making of those orders, an appeal has been lodged by the respondent in respect of same and the date of the appeal is the 29th March, 2021. The appeal is accompanied by a motion seeking additional reliefs not sought in the Circuit Court including orders restraining various Circuit Court judges from further adjudicating in this case.

3. On the 10th May, 2021, in the High Court, this case appeared in the list of fixed dates; Jordan J. directed that the matter be listed on the 13th May 2021 to hear from the parties in respect of access pending an appeal hearing.

4. On that date, Jordan J. listed the matter for hearing on the 9th July, 2021 for a physical hearing to last half a day and made the following directions:-

   (1) A core booklet was to be lodged by both parties which should include the relevant paperwork and court orders;

   (2) Each party was to file a position paper not to exceed two pages;

   (3) Each party to file a chronology of litigation;

   (4) The appellant is permitted to have Brian O'Sullivan and Dr. Kelly Keogh by way of subpoena should he wish no court direction in this regard; However, the matter was to be heard on affidavit unless the court determines otherwise on the day;

   (5) All paperwork was to be filed in the list room by the 30th June with copies to the other side except the judgment which was already in the possession of both parties.

5. On the 9th June, 2021, in the Circuit Court, there was a motion for judgment in default of appearance before the County Registrar and the father was not in attendance and there was an extension of time for him to file his appearance by 21 days and the motion was adjourned to the Judge's list on the 7th July, 2021 to run in tandem with the application currently before Judge McDonnell. The applicant's solicitor was to lodge a booklet for the next date which should include notification of the order to the Respondent and a copy of the order as sent to him by the applicant's solicitor and the respondent father is directed to attend Court 31 on the 7th day of July, 2021 at 10:00am.

Background to the Case

6. Significant note was taken by this Court of a decision of Faherty J. dated 25th March, 2020 (Record No. 2018/46 CAF) between the mother, who was the applicant/respondent, and the father, who was the respondent/appellant, in that case. This was an appeal by the father in relation to two previous court orders of the 21st June, 2018 and the 3rd July, 2018 made on foot of judicial separation proceedings instituted by the mother. For ease of reference, the mother was referred to as the applicant and the father as the respondent. The primary focus of that order was that the father wanted to be the primary

carer of the children. This judgment is 67 pages long and sets out in the most balanced way and in great detail the history of the case, the dynamic between the parties in what is a high conflict situation and the best interests and welfare of the children and what is required to ensure same. Faherty J.'s finding, having heard a number of professionals and parties, considered the following orders in relation to the custody care and access would be appropriate:-

(1) The parties were to have joint custody of the children with primary and control to the applicant mother;

(2) Subject to being satisfied that supervision measures can be put in place, i.e. that an accredited provider of such service is willing to provide the service, the Court proposes to provide for access by the respondent to the children every Tuesday and Friday from 3:30pm until 7:30pm which could be exercised in his house or elsewhere once it is supervised. The respondent is prohibited from discussing access arrangements with the children or eliciting their views on access overnights or holidays. He is further prohibited from engaging in any intimidatory conduct towards the access supervisors. If such discussions or conduct are reported by the access supervisor, then the applicant has liberty to apply to the Circuit Court for any variation or suspension of the access order as to that court may seem fit. The respondent is to be responsible for the discharge of the supervision fees. The above access order is only to come into force once the supervision service has been put in place and the applicant's solicitors to be charged with ascertaining whether any of the registered service providers are available to take up the supervision of access and to copy the respondent with all correspondence in this regard. Pending clarification that the above access order can be facilitated by an accredited supervision provider, the court will leave in place the extant interim access order involving Ms. McGuill, as made on the 28th January, 2020 and he is to discharge her fees;

(3) The court will hear from the parties on the logistics of any of the proposed access given the current COVID-19 situation;

(4) The respondent is to have telephone/Facetime access to the children from 7:00p to 7:30pm on Wednesdays and from 7:00pm to 7:30pm on Sundays;

(5) In line with Dr. Byrne-Lynch's recommendation and providing supervision from an accredited supervision, Vision Services is available for access by the respondent to the children from 11:30am until 7:30pm on Monday during the 2020 school Easter holidays;

(6) The court will hear from the parties on the logistics of any of the proposed access order given the current COVID-19 situation;

(7) Providing supervision is available two days in early July, 2020 and two days in early August, 2020 from 11:00am until 7:30pm additional to the respondent's scheduled access;

(8) The applicant to be entitled to two weeks' holidays with the children, either in later July, 2020 or late August, 2020 which can be taken in Ireland or abroad. On her return, the respondent's scheduled weekly access is to resume. Paragraph 8 of the Circuit Court order of the 3rd July, 2018 is hereby varied to reflect this;

(9) Providing supervision is available, Christmas access on the 24th December, 2020 from 11:00am until 3:00pm, 27th December, 2020 from 11:00am until 7:30pm and 2nd January, 2021 from 11:00am until 7:30pm.

(10) In all instances, J is not to be coerced into attending access but should be encouraged by the applicant to attend.

(11) The applicant is to have custody of the children's passports and consent for the renewal is not to be unreasonably withheld by the respondent;

(12) The applicant is to arrange forthwith for therapy for R and J as recommended by Dr. Byrne-Lynch. The respondent's consent thereto is hereby dispensed with;

(13) As set out in his evidence, the respondent is not in favour of the children attending Dundalk Grammar School. Notwithstanding that this issue has been ruled on by the Circuit Court, the respondent still urges this Court to direct that the children attend another named local school with a Roman Catholic ethos. He points to the fact that this is the school which the applicant attended. The court noted his email of July, 2019 to the applicant reiterating his desire that the children attend the other school. If they were to attend that school, he was prepared to look after their education costs but not apparently otherwise. In evidence, he acknowledged, however, that the children are doing well in Dundalk Grammar School and stated that he would support them in whatever school they attended and would leave it to this Court to decide the issue. This Court has decided that it is in the best interests of the children that they remain in their present school, therefore, accordingly, R and J will continue to attend Dundalk Grammar School, also K, when she is at an age to commence primary school;

(14) As recommended by Dr. Byrne-Lynch and, indeed, Ms. Nic Dhomhnaill, the respondent is to forthwith engage in a programme of psychotherapy with a registered practitioner, with a report being available to the Circuit Court, this Court directing that the question of the respondent's access is to be reviewed by the Circuit Court on a date not before the 25th January, 2021. The purpose of such review is for the Circuit Court to satisfy itself whether it is in the best interests of the children, access should continue to be supervised or otherwise.

(15) All communication between the parties to be by text and to relate only to matters pertaining to the children with no disparaging or derogatory comments. Copies of their communication to be available for Circuit Court review;

(16) There is to be no recording audio or visual or photographing of access handovers;

(17) There is to be strict compliance with the in-camera rule;

(18) The judgment of this Court is not to be shared with or disseminated to any third parties, save the parties' legal advisors.

7. At p. 50, in para. 121 of Faherty J.'s judgment, while she noted that the respondent presents as ready and willing to care for the children and notwithstanding the fact that he has demonstrated his ability to care for them in the past, she is not satisfied that it is in their best interests that he would become their primary carer and she said this was in circumstances where, for all intents and purposes, the children have been in the primary care of the applicant since June, 2015 and where, more particularly, Dr. Byrne-Lynch has firmly recommended that they remain in the primary care of the applicant for the reasons set out in her report. Having considered all of the evidence and in the light of the factors which the court had to have regard to under the 1964 Act, Faherty J. accepted Dr. Byrne-Lynch's recommendations that primary care of the children should remain with the applicant and she also recommended that access by the respondent should be supervised for the reasons set out in her s. 47 report and she recommended a scheme of access which she said met the exigencies of the present family dynamic. Save for variations to the frequency of the access regime recommended by Dr. Byrne-Lynch, she was satisfied that it was in the best interests of the children that, for the time being, access along the lines as suggested in the s. 47 report were to have been put in place and that the access requires to be supervised. In directing that access be supervised, the court bore in mind s. 31(2)(c) and (h) of the 1964 Act that regard must be had to the children's emotional and psychological wellbeing. Faherty J. noted that the reality of this case was that the interim supervised access which the court directed in May/June, 2019 had not debarred the respondent father from putting R and J under emotional and psychological pressure and she relied on the report of Dr. Byrne-Lynch in that regard. At para. 123 of her judgment, she noted that the respondent's attendance for therapy with Mr. O'Sullivan coincided with some of the access visits documented by the Core Supervisor and she said that despite Mr. O'Sullivan's good work, the contents of the Core Report shows that the respondent appeared not to be benefiting from his sessions with Mr. O'Sullivan. The reports document, *inter alia*, the respondent's wish to see the applicant in jail. These sentiments are also reflected in the respondent's text messages. She did note, however, that the tone of these was better to some degree since August, 2018 as noted by Dr. Byrne-Lynch. He felt, however, that there was no improvement in the respondent's insight and, based on a perusal of the respondent's text messages, the judge agreed with Dr. Byrne-Lynch. The court notes para. 124, p. 52 of Faherty J.'s judgment which sets out, based on Dr. Byrne-Lynch's finding and the contents of the Core Reports and the context of recent text messages, the court has a concern that, unless access is

supervised, the respondent will continue to involve the children in a campaign to be their primary carer, to their emotional and psychological detriment. Paragraph 125 of the judgment notes the opinion of Dr. Byrne-Lynch and that time, that a programme of therapy for the respondent was the optimal way to move forward if his suspected Asperger's is confirmed and she stated that, however, and even without such a diagnosis, the issue lay with his own behaviour. She said that the present difficulties can be mitigated when the children are older and better able to cope and indicate their own boundaries.

8. At p. 126, the court also accepted Dr. Byrne-Lynch's evidence that nothing in her interview with the applicant indicated parental alienation on the applicant's part. The court noted that this view was also shared by Ms. Nic Dhomhnaill as evidenced in her s. 47 reports. The first references to parental alienation were in Core Report of the 26th July, 2019 when the respondent stated to the access supervisor that the applicant was alienating J from him and a text message from the respondent to Dr. Byrne-Lynch on the 29th October, 2019 asking her to return to his house to "*witness first-hand what this abuse and alienation is doing to* [the children]". I am satisfied on the evidence that the applicant has not sought to alienate the children from the respondent.

9. As set out at p. 53 of that judgment, Mr. Robert McCormack of Core withdrew the access supervision on the 18th December, 2019 and he gave the respondent's "unacceptable behaviour" as the reason for the withdrawal. Faherty J. accepted that that was the case and she was satisfied that the decision to withdraw was not confined to a seatbelt issue. This Court notes that in para. 129 on the 28th January, 2020, the court before Faherty J. was advised by the applicant's solicitors that, despite contact made with Barnardos, Key Assets Consulting, Tusla, Springboard Navan and One Family Dublin 7, efforts to find an alternative to Core were in vain. It was not clear at the date of the decision that that remained the position.

10. In relation to the findings of Dr. Anne Byrne-Lynch, she described the eldest child, R (seven), at that time as "*a defended personality*", unwilling to be drawn directly into the difficult family dynamics, denying any difficulties. At para. 87 of the judgment, R reported to Dr. Byrne-Lynch regular conversations with the respondent about restoring overnight visits but, unlike J, she did not describe being perturbed by them. Dr. Byrne-Lynch reported R as being very clear about wanting the access supervisor's continuous presence. She found that R presented as "*a somewhat idealistic picture of her family situation"* and "*acting at times to cover up difficulties*". Dr. Byrne-Lynch noted that R had not been able to access a recommended Rainbows programme because the respondent had not consented. At para. 88 "*according to Dr. Byrne-Lynch, J. presented as an intelligent six-year-old securely attached to his mother and regularly unwilling to attend access with his father*". He presented as upset and conflicted in his relationship with the respondent. He reported to being subjected to "talks" with the respondent about resuming overnight access and was clearly under pressure to support the respondent's views. Dr. Byrne-Lynch reported that J seemed displaced "*during access, spending a good deal of time alone*". This was in contrast to his school report (June, 2019) when he was

described as "*a very sociable little boy*". At para. 89, Dr. Byrne-Lynch is described by Faherty J. as finding K (four) at that time to be largely sheltered from the family stresses, securely attached to the applicant and as having an affectionate relationship with the respondent. Her recommendation as set out at para. 90 of the judgment was that the present situation of the three children in relation to access visits with the respondent "*poses a significant risk to their healthy psychological and emotional development*". She found J to be "*manifestly distressed by the access requirement*". She recommended the court would take a conservative stance in relation to access and consider further modifying the present access arrangement to better safeguard the children's emotional and psychological wellbeing and she set out a pattern of access, all access to be fully supervised, preferably by Core and she recommended that J should not be pressurised to attend and should be able to forego the visit if he indicates he does not wish to attend. She recommended that the responded would be able to phone or Facetime the children also and set out those times, all calls to be monitored by the applicant or another appropriate adult. She also recommended that the respondent would have the children for a full day of access during the year providing supervision was available and set out those terms. She said that the recommendations were designed to allow the respondent to spend quality time with the children but to significantly reduce their exposure to his serious interpersonal difficulties and opined that the access system recommended could allow him to seek employment and to move beyond his preoccupation or fixed belief that he is the children's rightful primary carer.

11. Among the other recommendations of Dr. Byrne-Lynch was that both R and J would benefit from individual therapy with an experienced therapist and that R would benefit from attendance at Rainbows and that J may also benefit in time from that service. She recommended that the respondent's consent for therapy would be formally dispensed with by the court. She also stated that the court might view any application by the applicant for sole custody favourably as it would help reduce the children's exposure to repeated parental conflict over issues in relation to their education, medical care, participation in activities and attendance for therapy, travel etc.

12. These matters set out above give a fairly comprehensive background as to the difficult history in this case. In the context of this appeal, it was listed as a half day case but the court gave the case one and a half hours on Thursday, 15th July, 2021 and a three-hour slot on Friday, 16th July, 2021 with oral evidence.

13. The court was told on behalf of the father in the context of this appeal that he was seeking to have his access reinstated and that he really had not effectively had access since July, 2020 and in the short term, he did not want it to be supervised, but he wanted it to be fully reinstated in the medium term. He obtained extensive access orders between 2015 and 2019 but there were significant issues. Both Ms. Nic Dhomhnaill and Dr. Byrne-Lynch felt that the access should be supervised. The court was told that the father would like Prof. Sheehan to see the children who are aged nine, eight and five years and he only received a Legal Aid certificate on the 17th June this year. A report was received from Mr. Brian O'Sullivan who was called as a witness for the applicant and was heard by the court.

By contrast, his wife seeks dismissal of the access order because of the difficulties with what she refers to as her husband's behaviour. She notes that Core withdrew supervision in 2019 because of difficulties with same and that Ms. McGuill as supervisor of access for the same reason. It was pointed out that an alternative supervisor was not accredited and was, therefore, deemed not to be acceptable by the mother of the children. On the 27th July, 2020, Springboard withdrew because of the difficulties. One of the difficulties in the case is the attempts to find an alternative supervisor which has not been successful. It is quite clear from the findings of the learned High Court judge at that time, Faherty J., in her judgment that she felt the children were being placed in a situation of emotional abuse and the orders allowed the mother to intervene and cease access if there was anything inappropriate occurring. Faherty J. did not believe that there was much benefit at that time from the work that Mr. O'Sullivan had kindly undertaken with the applicant.

14. The father is subsequently seeing Mr. O'Sullivan for therapy and a Mr. Broad since August, 2019, although there is no report from Mr. Broad and we are not told how many sessions exactly he has been involved with him for. The learned Circuit Court judge, Judge McDonnell, felt that there was no real substance to the application before her and the views and wishes of the children are important and she was conscious of three reports from a very well-known and respected assessor, Ms. Caoimhe Nic Dhomhnaill, who refused to continue in the case because of difficulties which arose in 2019. On the 6th June, 2019, Prof. Sheehan was refused by one side as a choice because he was not a clinical psychologist and the court was told, therefore, that this issue is *res judicata*. The history of the case in the Circuit Court subsequent to Faherty J.'s decision is that identical reliefs were then sought in the Circuit Court which were struck out because the husband was not in the correct jurisdiction and the matter was then later heard by Judge Morrissey in the Circuit Court and by Judge Hutton. In effect, Core were about to reengage in terms of supervision but the father refused to accept their parameters as it were. The court was told that the CEO of Rainbows was contacted by the father and that Ms. Paula Murphy withdrew from doing therapy because of threats and there were findings of fact in the past that there was a campaign by the father to try and maintain primary care of the children. The court notes that an Isaac Wunder order prevents the father from bringing further applications under the domestic legislation.

15. Mr. O'Sullivan who produced a report on behalf of the father suggests every second weekend and good school holiday access with Christmas rotated every second year and that, in the past, the children did travel down to the family farm in Kerry and that they went camping in Mayo and went to Kilkenny and to football in Croke Park and that the contention is that they were happy on access, although it was conceded that J kept away if there was actual access, but the father contended in his evidence that J was taken to Belfast to some science exhibition and was staying in a hotel with his mother at the time of one access visit and that his grandfather has an aunt who owns a place in the North of Ireland.

16. The father told the court that he began living in Dundalk in or about the month of October, 2015. He mentioned when he was in the pool and J became upset and he felt

that it was the supervision which was causing him upset, that it was a horrible situation and was not normal. He also felt that Core just did not work nor did Springboard and he blames his wife because he says she interfered and blocked those interventions and he alleges that on the 16th May, she refused him access/breached a court order and that his wife wanted 45 minutes of access once a week. From the 1st to the 8th August, she was on holidays last year and he felt that the access did operate until the 25th July last year. He said that on 2nd December, he went along when K was on her first day in school to meet and greet the teacher and that he got one hour with R at her Holy Communion in the church. He said that he saw J on the 24th July last year and he wants the recommendations of Mr. O'Sullivan to be put in place and, essentially, he wants to co-parent the children.

17. Very poignantly, this witness told the court that, while he telephoned seventeen times last Christmas Day, the telephone was not answered, that his wife rang at 2:00pm and he said this happened three times and that it happened when he began a long drive down to Kerry for his Christmas Day. He described his having purchased gifts for the children given that it was Christmas. He feels that the children would be delighted to see him and that it would be an appropriate step and then to go on to overnight access. He says that he is living in the same house since 2015 and he has a dog and a cat.

18. The father said that he would like to introduce the children to his new friend, that he is now in another relationship and he was advised to take a very soft approach to this and he said he had met his new partner's children. In relation to why he wanted Prof. Sheehan, he said there was a long history conflict in the case and that he felt that someone new was needed clearly. He also told the court that he wanted to go forward with what he described as a workable solution. He told the court that he looks after his mental health and that he is aware, in his view, of what he describes as the children having been subjected to. He said that, in relation to his therapy, he described the wife as having cancelled an appointment with primary care and that Ms. Paula Murphy is described by him as a play therapist only. He was asked did he scupper therapy taking place and he complained that he got no notes or forms from the mother of the children but eventually got notes from Paula Murphy.

19. He described his financial situation as being difficult and outlined same to the court. He describes renting his house since October, 2015 and that he has very good neighbours and that there is a school opposite and a park to the back and that he goes walking in Blackrock and Sliabh Gullian. He described and reiterated his difficulties with the children being sent to the school they are now in as opposed to one he would have thought perfectly fine and he said there are 23 children per class in the school they attend and there would be 25 in a State school. He said that he wanted the voice of the children to be heard in an age appropriate way so that they would not be upset or stressed.

20. He said that he had attended Mr. Brian O'Sullivan for individual therapy for himself and that Mr. O'Sullivan is based in County Laois and that it was very expensive. He told the

court that the mother of the children refuses to have the children seen by Mr. O'Sullivan. M.McN. told the court that he was attending Mr. Broad for therapy since last year.

21. This gentleman described his difficulty in that he was charged twice with breaches of the safety order and that Judge Coughlan (as he then was) dismissed both of those applications and struck them out. He said his son J was not allowed to have access and he complained that his wife's mother had a close friendship with somebody from Tusla and that he made a report to Tusla of the children being abandoned at the Marshes Shopping Centre in Dundalk. He described children as a blessing and that he grew up on a farm. He described a very sad history to this. It was put to him in cross-examination that it was an indulgence in an emotional type of abuse that things were said to the children which really should not be said. He felt that the Saturday access could have been extended and it was put to him that, on 23rd April, 2020, he would have access between 10:00am and 12:00pm each Saturday, he denied that and he said that the first appointment with Springboard was on the 9th March, 2020 and he agreed that that access was stopped because of COVID and he said that agreement was signed by Springboard on the 28th May, 2020 exhibited in his affidavit of 28th October, 2020 and he said that he agreed to the Springboard terms but that he was not to ask the children any questions about their mother and that a new agreement was drawn up and he was to have 90 minutes a fortnight access. He said that when their birthdays came along, he would bring a main gift for the child whose birthday it was and then two smaller gifts to the two others but he said J got upset and left the access but he pointed out that it was not J's birthday on that occasion. He said he bakes with the children and he said that the next access day was to be about J. It was put to him that his handling of the situation was not child-centred and reference was made to an email of the 27th July, 2020 from Springboard not to involve staff regarding court or the other parent and that he was involved in what amounted to breaches of contract and warned in the email that any other braches would cause an end to the access. In his email, he alleged that the mother wanted to take the children out of his life and in answer to this, he said that he accepted what the terms of the agreement with Springboard were but he does not accept that he breached these during phone contact with the children. He said he just told them that their presents were in his house and that, when they are back, they would be together soon.

22. It was put to this witness that this amounted to emotional abuse but his response was that any father can only answer their child as best they can and he said he could not see them passed until he lodged papers in both Trim and Navan and that K was not born when they were in court initially.

23. The position from 2020 was put to this witness that on 22nd April, 2020 he was four minutes and 34 seconds on a call which was deemed by the mother of the children to be inappropriate and he said he does not know when these calls end in terms of the minutes but he said he calls regularly and he said she should regularly stop these calls if she gets in a mood or if the children get upset or if he says that he is down in Kerry.

24. It was put to this gentleman that the mother of the children will say that his own behaviour was inappropriate and that there would be a great number of calls. He said that, for example, the mother of the children's sister had a child who had gone to a different school and been taken out of the school his children were in and the child R was telling him this but was stopped by the mother who said to the child that the father did not need to hear that. He gave another example of an incident which one of the children referred to involving a dog having attacked a person and he said this was an example where there would be interference with what the child was telling him, essentially.

25. With reference to the 7th June, 2020, it was put to him that there was twelve-minute call involving inappropriate chat from him, their mother objected to him spending, for example, 31 minutes on the phone telling the children about seeing them again and showing their bedrooms in his house virtually. She also objected to what was referred to on the 11th November, 2020 as a virtual Christmas where a tree was put up in his house with Santa covers on their children's beds and lights flashing. He denies that that happened and he said that they made their Christmas requests and he put a note and a carrot in front of the fire and he did accept that he had shown them that and it was put to him that the youngest child K was so upset by this virtual Christmas that she urinated in school the following day and had to be taken out. On Christmas Day, 2020, he was most upset by seventeen calls being made by him to the designated telephone and not being answered and then calls when he was on the road which he could not take and then, when he arrived in Kerry, that telephone number was not answering. He had an objection to the manner of Dr. Kelly Keogh's carrying out psychometric testing on him and he argues that that breached all ethical guidelines and rules and he said he only did the Leaving Certificate himself in 1991 and she referred to him as having taken the Leaving Certificate Applied examination which, in fact, he pointed out only began two years later. On the 6th May, 2021, there was a 26-minute-long calls. It was put to this witness that his wife ended the call because he was telling J that he was fighting for him and that he has very angry and controlling ways. His response was that he would never use the word "fight" with little children and he said that in September, 2021, the mother of the children alleged that the Dundalk Gardaí had informed her that she should block the calls. He said he was arrested in front of his children, in front of the neighbours and that he left correspondence with the sergeant of the Gardaí and he left his number with them and he was assured by the sergeant that that had been sent to all Gardaí and that he had been locked up for two nights in the Garda station and released on bail and the childminder was a witness. He said that on the 11th November, 2020, Gearty J. refused to have him have the CCTV and Judge Coughlan then ordered for discovery of the CCTV and he also referred to the Isaac Wunder order.

26. In July, 2020, it was put to him that Springboard had ceased supervising access and he agreed that this happened and he said his proposal was that he would provide lunches and that he would appear to see the children for 60 seconds a day, five days a week at the school and he sent pictures of lunchboxes and he accepts that his wife asked him to stop providing these lunchboxes as she felt it was inappropriate and he said that there was no objection to day 1, but day 2, the children ran to him and tried to repeat the same

process of swapping around the lunchboxes and he said, by day 3, his former spouse behaved very badly and could not do it anymore. He said he saw R three weeks later and had not seen the other two children since. It was put to him that there was evidence that K was confused and crying and that the children were upset and he said that K was the there to greet her teacher for a ten-minute slot on the 1st September and that it was a lovely ten minutes, that K was grabbing his arm. He said that in March, 2020, his wife had dispensed with her solicitor, had settled her bills and even told him that she had no contact details.

27. With regard to other applications before other judges including Judge O'Malley Costello, it was put to this witness that he was directed to get psychotherapy by both Dr. Anne Byrne-Lynch and Ms. Nic Dhomhnaill but he said he does not accept that, he said it just did not work with Ms. Nic Dhomhnaill and he said that he wanted to have Christmas with the children, that they need to know their two homes and he wanted 50/50 co-parenting and that he wanted a new assessor, that the normal access should proceed on a Wednesday and he said that new allegations arose. He made the point about Dr. Anne Byrne-Lynch who he says never asked him about the risk assessment and that her report was to have been available on the 1st October but was only released on the second day of the court hearing.

28. Regarding Ms McGuill and Core who were supervising the access, it was put to him that he left unpaid bills with both of them and that he refused to meet Ms. McGuill in the Crowne Plaza. He said he has to protect himself regarding further allegations and that he accused the supervisor of providing false information and that they refused to allow him to have any further independent person with him. He said he himself is a worker with Special Olympics, he works with handicapped children.

29. It was further put to this witness that fourteen months before Faherty J. made her order, Core said that they would reengage in terms of supervising. He said that Core insisted that €728 be paid before they would make proposals for further engagement. For him, he said is about normalising things for the children and he said that on one meeting that he had suggested to meet in the Malt House for Holy Communion and that she said she wanted the Crowne Plaza and that they went with that.

The Evidence of A McN

30. This witness said she had always turned up for access and she had always gone with whatever structure he wanted to have on the calls because he always tries to control the calls. He would say things to her like "*go and get J, it's my call".* Her view was that her children hated these calls and that she has to use a timer to see when time is up and that he will say such things as, for example, to R that the court ordered her to have to speak to him for 30 minutes and he uses the word "fighting". The mother said that youngest child, K, messes with the telephone icons and then he accuses the wife of muting the calls. He will give orders during these calls telling the children to have their mother turn off the television or getting fussed because there is a fire lit in the siting room which he can see behind them, and then he starts saying that is unsafe. Another example this lady gave was that M.McN. would say to the children that this time next week they would be

back in his house and that he would take them to Tayto Park and that he had all the toys, she said he does not declutter. The children would be saying things like "*I don't like Peppa Pig anymore, Daddy*", in other words that they had moved on in their interests in certain toys but that he had kept all these things. She said that during his virtual Christmas which stunned them all, she said that she could not intervene because the children wanted to see what they got virtually. The mother of the children said that when she was walking J to school the next day, she asked him if he was going to tell his friends about this virtual Christmas and he said he would not and that the following day, two hours after K went to school, she was crying and asked to see her mother and was very clingy. This lady said she works full time and has only 20 days leave a year and she said she cannot call in sick because she is the sole earner. She said she has six years of the difficulties. She described one child being sick at one stage with chicken pox and did not attend the Core and was sick on the couch and she explained to the supervisor that the other two children did not have chicken pox but she was dealing with it in a very consultative way because she sought their advice actually as to whether she should send the children or not. She says that the Gardaí have been to her house so many times. This was described as in or around the whole conflict issues and she said she cannot really force J in relation to access and, indeed, it has been recommended that she would not do so. She described a natural flow of conversation being needed, that the father's own attunement is missing. The children adore her, he berates her and in front of them and she said she used to praise him to them but it came to a point where she does not berate him, but that they know what the situation is. She says he is very aggressive.

31. Turning to the children's interests, J is now aged nine years and he is interested in running and he runs on a Monday night from 7:00pm until 8:00pm. He also plays tennis and that can be at different times. He plays rugby on Saturday morning and they all do piano together, they are all doing preliminary grade including their mother and that is on a Wednesday. J is eight years old, and adding to the previous determinations based on the various reports of Faherty J.'s judgment, he is not to be coerced regarding access. He described his father to his mother as the sensation is that J is alive, but his father can walk around him. He is considered to be a particularly bright child and is going to have an assessment with regard to the DCU programme for particularly able children. R is nine years of age, since they are all learning the piano, the suggestion was that perhaps she might play a piece of music for her dad, and K, who is five years, is very easily distracted but she loves to sing and tell jokes and she likes to give people the news. Over the course of the unfolding evidence and in an effort to take the conflict out of this situation, the court suggested perhaps, rather than a full 30 minutes at a time and the telephone being passed between the children during that time, that the following might work: On a Monday: 5:45pm, K who is young and likely to be tired later on might sing for her father or tell him a little joke or give him her school news or news generally for a ten-minute period; at 6:15pm on a Monday and Friday, R, aged nine years, could have that ten-minute period speaking with her father or playing music to him, what she had learned that week, telling him about school, etc.

32. J, if he is willing to do it and he is not to be coerced, has the opportunity then at 6:00pm on a Monday for a ten-minute period, and on a Friday for a 10-minute period at 6:00pm, to tell his father about his sports activities and describe what he has been doing in that regard, or indeed his school or indeed if he happens in the future to have involvement with DCU, that these are examples of topics he can tell his father about and chat to him.

33. What the mother of these children wants above all else is that there would be end to threats and bringing her to court. She feels that if the father could stop the harassment that it would help. She said that it is great that he is in a new relationship but she is very concerned that the barrage of difficulty has not stopped and she said that, yesterday, she had learned that she had instituted divorce proceedings but that her husband is now opposing the divorce and she said she found that bizarre.

34. She said that there is a theme in his actions and words and then the written words. She said the theme is threatening herself or Rainbow or Tusla or all solicitors.

35. She takes two weeks every year of a holiday, she might not have the money to go away but they just take day trips, so for the first two weeks in August, she is taking unpaid leave from work. Rainbows have consented and that they would take the children for therapy and that is an organisation for separated parents or where children have a deceased parent, each sibling goes into a different group and the mother is not at all to be involved in that which she welcomes. They are enrolled for this therapy. She said she is paying for this therapy for the children but that she has paid for it but she cannot pay for therapy for herself and that she is exhausted and financially, at this stage, she has sought help. She also mentioned her concern that the in-camera rule would not be broken. This lady referred to the fact that she herself has topical psoriasis and she is on steroids and that she is suffering, at the same time, financial and physical abuse. She said that if she continues to be put under undue stress that the burden will come go of her control.

36. Under cross-examination, she denied that she was against access from the get-go as it were and she said from 2015 to 2019, when they did have access, Monday would be a write-off with sleeping behavioural patterns altered and disturbed with exhausted children and herself exhausted and she said that K was three years when she had access. She said that all of them were trying to do so well but that some behaviours snowballed. She feels that every bone in her own body tells her that there is something wrong with their father and that she is not psychologist but she feels something is not right. She does know that he can be very plausible but she said that it is a mask and that his written behaviour tells otherwise. She said that for four years she did not expect to put him on a pedestal, that she is in sales and she said that she tried to sell the situation in terms of their access but, as time went on, they became vocal with her and with assessors. J came home and said he did not want to go to access and it is not true that she is not keen on it. She says she is a working mother, that the children are thriving at the moment and that they are alive they are thriving academically and musically. She said that she got peace when access stopped. She said the first day it was put to her that K, in school, ran and hugged her

daddy and she said that K runs and hugs everyone and she was very happy to see him. She said that they initially liked the weekly calls but inevitably got to the point where they did not like it because she says it is not a natural flow of conversation. While he said that the calls were working, they are not actually working in her view. Her view was that if he could stop being so aggressive on the calls and that until she sees an end to the aggressive behaviour, she asks if he is not capable of controlling himself, that he might change the approach to his family as it were. She said they are the only grandchildren on his side of the family in which there are nine children. She says that she got the children to make Christmas cards which they sent to him but he sent a solicitor's letter, although there is a huge conflict on his side, she feels she has no conflict towards him. In her view, it cannot be unsupervised, that he is not behaving as a normal or well person and she feels she cannot predict or sanction the situation. He view is that before there would be any more access, she is not causing the conflict, she feels he needs help first. The court suggested phase 2 might be a supervised access in the house with a registered supervisor and Core are available to supervise but she feels that everyone in the word is wrong as far as the father of the children is concerned and that there is no evidence that he has changed.

37. Brian O'Sullivan, psychotherapist gave evidence. He has a master's degree in that he is a consultant systemic psychotherapist. He is a child and family therapist and a research supervisor. He accepted that he is not a clinical psychotherapist and there was an objection at the start of his evidence which was accepted that his report is simply there at the invitation of and as a witness for the father but it is not a s. 32 report and he would not be in a position to carry out this report in accordance with the terms of the relevant statutory instrument.

38. M.McN. said that he confirmed that M.McN. had undergone therapy with him. He felt that he had insight and awareness and stressed that across a lifetime the risk of clinical depression, chronic anxiety or suicidal difficulties can exist where people are denied access with a parent and he felt that there was a transgenerational aspect to that.

39. He confirmed that this gentleman has seen him for therapy and that he has seen Mr. Broad and has attended every consultation set up with Mr. Broad, that he has had a two-year therapeutic engagement. He felt that there was no reason why access with the extended family on the father's side would not take place but he felt that there were other issues at play and he talked about the importance of the opportunity as a quality lived experience. The children could suffer from academic underdevelopment if there is no contact with the father. Under cross-examination, he said that since February, 2021, he is not engaging with M.McN. for therapy as M.McN. is now attending Mr. Broad and he said that since October, 2019, it is likely that he saw him on a minimum of four occasions and possibly five occasions. He said he did ask Mr. Broad about how many times M.McN. had seen him and he said he thought that at least eleven times for the October, 2019 report and at least four times since and his own counsel intervened to say that he was seeing Mr. Broad every fortnight and that the Legal Aid Board did not pay for that. It was put to this witness that the parties are now separate and apart since June, 2015, that before the

separation, M.McN. was a hands-on dad and that there have been numerous court orders over four years and that the children never complained, that there was normal day to day situation with no red flags. Reference was made to the positivity of Caoimhe Nic Dhomhnaill's report and that the view was that it was a shame he fell out with her because it was an excellent and favourable proposal and he felt that M.McN. became suspicious of the process and that he had made an allegation to David Kerins in the HSE regarding one of his children being abandoned in the Marshes Shopping Centre. He said that the mother had concerns which Caoimhe Nic Dhomhnaill had taken on board he accepted that with Dr. Kelly Keogh there were problems and that that was a risk assessment. M.McN. had problems with her work and that Ms. Nic Dhomhnaill felt supervision was warranted for a short time and then in the medium term it could be supported by a family member or friend and that, in relation to Dr. Anne Byrne-Lynch, she was only engaged with him for a short time he wanted a man to look at the situation and that he would like Prof. Sheehan to carry out an assessment and ultimately move towards a 50/50 custody/access situation.

40. In submissions on behalf of the mother, reference was made to the high conflict behaviour on behalf of the respondent husband and that it was all rooted in the past and that you would ask about the effect of the behaviour on the children and that there has to be acceptance that therapy has been frustrated and is not in their best interests. Also, the fact that the husband had alienated both Springboard and Core. The fact of his refusal to have Ms. McGuill supervise access and the difficulties around that were highlighted and they need to put an end to this never-ending situation.

Conclusions

41. In suggesting making up the time for telephone access, a number of matters have been decided by this Court. Given that it is a very high conflict situation and given that its effect is telling not only on the father himself but on the mother of the children and, most importantly, on the three children themselves. I accept that the conflict itself is damaging the possibility of good access. The conflict has to be taken out of the situation and the father must obey what the various professionals have suggested and recommended in terms of what can and cannot be said to children during access. It has been supervised for a very good reason. In an effort to satisfy the situation and in accordance with the best interests of the children and the findings of Faherty J. and of the various judges who have dealt with this case, the court is very concerned not to have a situation like this continue. That has to be balanced with the right of a father to have some contact with his children and, more importantly, their need and right to have meaningful access with him. I think this has to be looked at in stages as follows:-

- Stage 1: Beginning Monday, 16th August, 2021, the youngest child K will have ten minutes' access at 5:45pm with her dad on a separate Zoom line, details to be furnished to him by email/text by the mother in advance. This cuts out the need for constant communication between mother and father. The mother is to be in the room for this access and for all access but is to try not to intervene unless absolutely necessary. The father is to desist from mentioning topics such as overall

custody or overnight access or anything to do with the conflict and is to listen to the children, to hear their voices. Examples of possible topics they can cover with K is that she loves to sing and tell jokes and likes to tell him the news and she should be allowed do that and he is to try and respond in a child-appropriate way with a five-year-old.

- At 6:00pm, J is not to be coerced and is to be encouraged, but not forced, to engage in this process, but if he wishes to do so, he can spend ten minutes on Zoom with his father on the same Zoom link from 6:00pm until 6:10pm, describing the sports activities he is involved in or his holidays, he runs on a Monday, he plays tennis at different times and he has his rugby on Saturday and piano lessons on a Wednesday. He may also wish to tell his father how he is got on over the summer and what he likes to do best, etc. and how he is doing in school. The father is not to be mentioning anything inappropriate about the case or anything like that, or putting him under the remotest bit of pressure nor is he to be showing him virtual visit rooms or rooms in his house all set up for the children, none of this.

- At 6:15 pm, R, who is aged nine, is interested in piano and she might play a piece or be invited by the father to play the piano and show him what she has learned each week. She is free to talk about school and her hobbies and really a child-centred approach at all times. The father is not to be talking about things that will put pressure of any sort on the children nor "fights" is he to mention or anything of that nature.

- This same process is to continue every Monday and from Friday, 20th August, 2021, the same times and conditions to apply, the same times as set out above for each child, the same conditions for each child. If in the future the father, having worked this system satisfactorily for three months, and having continued psychotherapy with Mr. Broad and having been assessed as appropriate and paid what he owes to Core, he can engage in a process of a focussed assessment to see whether there is any reality in trying further to make a workable regime of access a reality. Any further access would have to be risk assessed and he would have to have supervised access initially until the court is fully satisfied that there would be a proper and useful engagement for the children. At no times is J to be forced or coerced in relation to any access.

42. This was a profoundly sad case to hear and the court recognises the grave upset of the father but also of the mother and also recognises, above all, that this has had a very negative impact on the family. Liberty to apply is given in the event that there has to be any suspension of access or other urgent issue arises.

43. This Court accepts fully that there has been an extremely difficult background and history to this case but must look at the present situation during COVID-19 pandemic and has taken into account the needs of the children and the recommendations dully considered by Faherty J. in her extensive report and determination.

44. In theory, while the court has extraordinary sympathy for M.McN. in his present circumstances, it deems that he must ensure that the next phase of access, which I will refer to as phase 1, goes smoothly and is child-centred and that he does not increase or cause any conflict during same and does not refer to virtual Christmases, for example, in his own house. This is just worrying the children this type of behaviour. He should desist from mentioning his fight with his wife or any such matter.

45. If he can get matters back on track, he is to pay the €700 owed to Core and reengage with either Springboard or Core and go through a period of supervision organised through them and if the parties can agree increased access in addition to what is set out herein and if it is deemed in the best interests of the children by those working with the family during this process, then by all means it can be increased but only by prior written agreement between the parties witnessed by their respective solicitors. In specifying this, the aim is to get access working again properly firstly, to get the parties to realise that it is entirely preferable that they come to a way forward themselves by agreement, working with the professionals who had worked with them in the past. Following a successful period of supervision, it would be then possible to agree a way forward to increase the actual access. The court suggests that a Legal Aid Certificate be sought to obtain a focussed assessment. I will hear submissions on this aspect.

46. I am refusing the application at para. 1 seeking an appeal of Judge McDonnell's order for the appointment of an assessor to carry out a s. 47 report. I agree with the learned Circuit Court judge that same is premature at this stage. The steps outlined above must be taken and must be working well before there would be any point in looking for a further s. 47 report. Children can be subjected to extensive reporting, the point where it as actually to their detriment. The situation must be normalised. For the same reason, I am refusing the appeal in relation to para. 2 of Judge McDonnell's order where the father seeks to transfer primary custody of the three children of the parties to him.

47. Both parties have already been assessed to a significant degree and there is absolutely no basis for asking the mother of the children to undergo a psychiatric assessment at this point. The court takes the view that she is doing her best in very difficult circumstances and it is causing her strain, the fact that there is such conflict ongoing in the case. The father is also stressed but the fact that he has already been assessed by a psychiatrist, no significant issue has been highlighted that tells this Court that any further psychiatric assessments at this stage are not warranted. The court upholds the decision to adjourn generally outstanding motions and the direction given that no further applications were to be brought before the adjourned date given in the Circuit Court order. There has been far too much litigation in this case and not enough common sense applied by the parties themselves to the situation. Gardaí should not be involved at every turn in an access dispute where, if the parties could just agree, the conflict must end for the benefit of their children and get on with the process outlined here and the steps which the father must take, that would be of great assistance. The mother has also been given a role by the court and that is not to interfere with the ten-minute slot of access given to each child unless it is absolutely necessary. The three children do not have to sit and listen to the

ten minutes between each child and the father, that is not what is intended. The mother may be present but is not to be intrusive. Play therapy has been arranged in relation to para. 6 of that order. Liberty to apply. The court will hear counsel on the parameters of a focussed assessment and said parameters to be agreed between the parties, subject to a Legal Aide Certificate being available to the father. The name of the assessor to be included and agreed, when available. Adjourned for mention to a date in October, 2021.