Record No.: H JR 2023 1103

[2024] IEHC 340

THE HIGH COURT

Between:

L.H.

Applicant

AND

P. J.

Respondent

EX-TEMPORE JUDGMENT of Ms. Justice Nuala Jackson delivered on the 15th May 2024:

1. The Applicant herein seeks leave to make an application for judicial review in respect of an Order of the Circuit Family Court of the 4th July 2023. This matter was, at that time, before the Circuit Family Court by way of an appeal from the District Court.

2. The Applicant seeks to progress an application for an Order of *certiorari* to quash the order appointing Ms. Maire Louise McGovern, social worker, to conduct a review assessment pursuant to section 32 of the Guardianship of Infants Act, 1964 (as amended) ('the 1964 Act'). The Applicant asserts that this order of the Circuit Family Court is irrational having regard to the issues arising in the proceedings and, in particular, his assertion that issues of parental alienation arise such as require the appointment of a specialist assessor to consider this issue. The report of Ms. McGovern was not before me. I do not consider this to be of significance as it amounts to no more than an expert report which forms part of the evidence before a court at hearing. In this regard, I refer to the judgment of Denham J. in **McD v. L [2009] IESC 81** where she stated:

> *"57. In this case the learned trial judge erred in determining that a s.47 report should be given great weight. Further, the learned trial judge erred in determining that the s.47 report should be accepted, as a mandatory matter,*

save for grave reasons, which the court should set out clearly. Such an approach is erroneous and would alter the role of the court. The court is the decision-maker. The court is required to consider all the circumstances and evidence. The section 47 report is part of the evidence to be considered by the court. It is for the court to determine, in accordance with the law, what is in the best interests of the child, the paramount consideration being the welfare of the child, in determining issues such as access and guardianship."

3. I am of the view that these principles apply likewise to reports pursuant to section 32 of the 1964 Act. I was informed that the assessment from which the report derived was ordered by the District Court and had been ordered pursuant to section 32 of the 1964 Act. I was not provided with a copy of the order of the District Court. The Applicant asserted that the appointment was pursuant to section 32(1)(b) of the 1964 Act (the verifying Affidavit in support of this application refers only to *"Section 32 Report requested by District Judge"*) while the Respondent was unclear but believed that the appointment was pursuant to "section 32" without specifying whether the report was pursuant to sub-section (1)(a) or (1)(b). It is clear from the order of the Circuit Family Court under consideration that the reference is to section 32 *simpliciter*. In these circumstances, I would assume and I believe the practice to be that the assessor would consider the factors arising in both sub-sub-sections of the 1964 Act. It would appear clear that the factors in each provision would potentially be relevant in the present circumstances given that this is a protracted dispute between the parents and the child in question is aged 12.

4. The proceedings herein are of long standing and there appear to have been many court appearances. Many of these are not of relevance to the present application. The documents before me in relation to this application are:
    A. The Statement of Grounds dated the 2nd October 2023;
    B. The verifying Affidavit of the Applicant sworn on the 2nd October 2023;
    C. The Order of the Circuit Family Court of the 4th July 2023;
    D. Parental Alienation Policy Paper, Department of Justice;

E. Parental Alienation: A Review of Understandings, Assessment and Interventions, Department of Justice;
F. High Court Order 21st March 2024;
G. The Order of the District Court of the 21st February 2023 (I understand this to be the Order which was being considered by the Circuit Family Court in this appeal);
H. The Order of the Circuit Family Court of the 27th October 2023, which post-dates the Order under consideration herein and, indeed, post-dates the commencement of the within proceedings;
I. The Affidavit of the Applicant of the 19th March 2024, setting out the procedural history herein;
J. Written submissions of the Respondent of April 2024.

5. The Applicant opened the application for judicial review on the 2nd day of October 2023 in order to comply with statutory time limits but the leave application did not proceed in circumstances in which there was an extant motion before the Circuit Family Court seeking the appointment of a specialist assessor. This motion was subsequently determined and the relief was refused by the Circuit Family Court on the 27th October 2023. However, this October motion and consequential orders are not the subject of the within application. This application arises from the order of July 2023.

6. While judicial review leave applications are usually made *ex parte*, this matter came before this Court on the 21st March 2024 and, by order of this Court (Hyland J.), it was ordered that this application be heard on notice to the Respondent who is the other parent of the child, the subject matter of the proceedings. The Respondent was subsequently served with the proceedings. The Respondent appeared at the 'on notice' leave application before me and was legally represented.

7. The Applicant asserts in his Statement of Grounds that it was irrational that the Circuit Family Court refused to appoint a specialist assessor and re-appointed the previous assessor to conduct a review. He further asserts that the order of the Circuit Family Court in making such appointment was contrary to section 32(1)(b) of the 1964 Act.

The Applicant asserts that the assessor failed to demonstrate a knowledge of parental alienation. At hearing, the Applicant further indicated that he was making this application in order to advance the best interests of his child and that the application being made by him had the potential to effect the greater good.

8. The Respondent submits that the grounds put forward by the Applicant in his Grounding Affidavit dated the 2nd October 2023 show no arguable case in law to entitle the Applicant to the relief which he seeks. She submits that, specifically, he states at page 6 of his verifying Affidavit:

> *"I raised a serious concern of Parental Alienation with Ms. McGovern, I raised the concern again in the District Court (21st February, 2023) and I raised it again in the Circuit Court. The Honourable District Court Judge Brendan Toale, in his closing speech on the 21/2/23, hinted at parental alienation all but by name. In hindsight the report should have been challenged at the District Court but I was poorly represented and the matter was regrettably not challenged, however, I did raise concerns on Appeal."*

9. She submits that the Applicant goes on to cite case law in respect of the issue and makes suggestions for alternative experts to be ordered. She further submits that the Applicant is using Order 84 as a mechanism to appeal an Order that he was not satisfied with and that he has failed to reach the bar required as set out in **G v Director of Public Prosecutions [1994] 1 IR 374** at 377–378. In consequence of the foregoing, she asserts that the Applicant should not be granted leave to bring a Judicial Review, and his application should be refused.

10. The proofs required for obtaining leave have been long established as set out in the judgment of Finlay CJ in **G v. DPP** [1994] 1 IR 374 at 377 – 378:

> *"It is, I am satisfied, desirable before considering the specific issues in this case to set out in short form what appears to be the necessary ingredients which an applicant must satisfy in order to obtain liberty of the court to issue judicial review*

proceedings. An applicant must satisfy the court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:—

> *(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20 (4).*
>
> *(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.*
>
> *(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.*
>
> *(d) That the application has been made promptly and in any event within the three months or six months' time limits provided for in O. 84, r. 21 (1), or that the Court is satisfied that there is a good reason for extending the time limit. The Court, in my view, in considering this particular aspect of an application for liberty to institute proceedings by way of judicial review should, if possible, on the ex parte application, satisfy itself as to whether the requirement of promptness and of the time limit have been complied with, and if they have not been complied with, unless it is satisfied that it should extend the time, should refuse the application. If, however, an order refusing the application would not be appropriate unless the facts relied on to prove compliance with r. 21 (1) were subsequently not established, the Court should grant liberty to institute the proceedings if all other conditions are complied with, but should leave as a specific issue to the hearing, upon notice to the respondent, the question of compliance with the requirements of promptness and of the time limits.*
>
> *(e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure.*

These conditions or proofs are not intended to be exclusive and the court has a general discretion, since judicial review in many instances is an entirely discretionary remedy which may well include, amongst other things, consideration of whether the matter concerned is one of importance or of triviality and also as to whether the applicant has shown good faith in the making of an ex parte application."

PROOFS FOR OBTAINING LEAVE

(a) Sufficient interest

11. It is undoubtedly the case that the Applicant has a sufficient interest in this matter.

(b) Do the averred facts support a statable ground for the relief being claimed?

(c) Can an arguable case in law be made in law based upon the facts averred?

12. I will consider these two requirements together. I have determined that I do not believe that these ingredients are met in this instance. The verifying affidavit of the Applicant does not set out any grounds for complaint in respect of the order made save that he disagrees with it. It demonstrates a complaint with the assessor - her conduct of the assessment and conclusions but there is nothing therein which indicates that there was any evidential challenge to this expert opinion or, more particularly, that the Court in any manner failed to consider the arguments of the Applicant before making its determination which it was entitled and, indeed, obliged to do.

13. The Applicant asserts that he believes parental alienation has occurred in this case and that, therefore, not appointing an expert from his chosen cohort is irrational. However,

(a) There is no suggestion of an evidential finding that parental alienation is engaged;
(b) On the Applicant's case, it would follow that if an allegation is made by either party, the Judge is obliged to exercise their s.32 jurisdiction based on this allegation *simpliciter*;
(c) This could result in an entitlement to or a requirement to order a multitude of experts and reports depending on the allegations made by the parties with the consequent negative impacts for children and families;
(d) There is no evidence before me that the Circuit Family Court judge did not fully consider Applicant's allegations and proposals and make a determination. This would not be irrational if evidence based;
(e) If the application was made, duly considered and rejected by the Circuit Family Court (and there is no evidence that it was not), such determination is within the jurisdiction of the Circuit Family Court;
(f) There is no evidence before me that current assessor did not consider all relevant matters or, if not, why not. There has been no explanation given as to why this issue was not pursued in evidence at hearing. The Applicant says this was due to deficiencies in his legal representation before the District Court but this did not occur before the Circuit Family Court either.

14. There is simply no evidence before me to indicate that the submissions made were not addressed by the Circuit Family Court, appropriately deliberated upon by that court and the order made pursuant to the absolutely correct exercise of that court's jurisdiction.

15. The Applicant makes reference to **CG v. BG [2019] IEHC 15** (Binchy J.). I have considered this decision comprehensively and I am of the view that it does not support the contention asserted by the Applicant and, furthermore, that it is distinguishable in that there would appear to have been some evidence in support of parental alienation therein albeit falling short of establishing same. The Applicant would appear to wish to use phrases in this decision to support his argument that one of his chosen experts should be appointed. However, in that case, a section 47 assessor had been appointed and had reported to the Court and the Court indicated that the Assessor already appointed or some other expert might address allegations of alienation if required. However, notwithstanding that assertions of alienation had been made to the appointed assessors therein, and notwithstanding that the assessor had formed no view on the issue

and notwithstanding that the court indicated that this was a matter which would require specialist consideration and there were evidential indicators, the court did not order any such assessment absent a sufficient evidential basis for same.

> *'44. It is very difficult for this Court, at this stage, to form a definitive view on this issue, one way or another. The Court certainly could not do so without a professional opinion, and this is something that would require specific investigation by the Assessors, or by others with appropriate qualifications. While the applicant did complain to the Assessors that the respondent has deliberately acted in such a way as to alienate him from A, the Assessors formed no views on the issue, and in her evidence, Dr. Ní Eidhin said that this would require a specific assessment. However, she also said that the respondent is not currently encouraging a positive relationship between A. and the respondent because of how negatively she feels towards the applicant.*
>
> *45. For now, my conclusion on the issue is that the evidence falls short of establishing that the respondent has been engaging in parental alienation. I think it is better that the focus of the court should be on the future, and giving such directions and making such orders as may help A. to build an enduring and loving relationship with the applicant. It is clear from the report of the Assessors that this will require considerable effort and co-operation between the parties. The focus of this Court, and of the parties, must be on the welfare of A. and what is in her best interests. This is a statutory imperative, imposed pursuant to s. 45 of the Child and Family Relationships Act 2015, although it would have been the approach taken by the courts prior to that act in any case.'*

16. The decision of Binchy J. which is relied upon by the Applicant clearly demonstrates that (a) the learned High Court Judge (as he then was) clearly envisaged that the current assessor could have addressed the issue if required and (b) he did not appoint another assessor in relation to parental alienation solely on the assertion of one party absent a sufficiency of evidence. It seems to me that there is no evidence in the verifying affidavit herein which supports an argument that the Circuit Family Court herein did otherwise than adopt the approach of the High Court in the case relied upon by the Applicant.

(d) <u>That the application is within time.</u>

17. This is satisfied herein. No issue of time arises.

(e) <u>Effective remedy</u>

18. I do not consider that the relief in respect of which leave is being sought to be the only effective remedy. It would appear that the assessor, who was originally appointed by the District Court, has not been called to give evidence either before the District Court or the Circuit Family Court. The Applicant avers that he provided the assessor with a very full and complete account of the alienating behaviours of the Respondent in his interviews with her but that these narratives did not appear in her report nor did she consider his concerns in this regard in her report. In such circumstances, the appropriate and effective course of action, in the first instance, would appear to me to be to cross-examine the assessor and to investigate these matters at hearing, in addition to the Applicant giving his own evidence in this regard to the Court (which evidence would, of course, also be amenable to cross-examination). It must always be remembered that the role of the assessor in circumstances such as these has been amply elucidated in the caselaw. The assessor is appointed by the court and usually has the benefit of interviewing all persons involved, the parties, the children and other relevant parties. This affords the assessor a holistic view of the family situation. In this regard, I would refer to the decision of Abbott J in **AB v. CD** [2011] IEHC 543:

> *"Expert Witness under Section 47*
>
> *9. It should be stated from the outset that an expert witness under s. 47, although ordered by the court, is not the court's witness and may be called by either or both of the parties and may be challenged by further expert witnesses. The proper practice is that further expert witnesses to challenge a s. 47 witness should be commissioned and brought to court by permission of the court and indeed their report may properly be ordered as a s. 47 report. The reason for the necessary court permission is due to the fact that one parent is not entitled to have an expert interview the children without the consent of the other parent*

and in certain instances where there is a danger of interview fatigue, the overriding jurisdiction of the court to protect children in cases under its control may necessitate the court could refuse permission for the second interviews. I do not propose to deal with the detail of the duties of expert witnesses when giving evidence in court. I find that most s. 47 experts appearing in court are regularly reminded of and tested on this knowledge by legal practitioners. The placing of the s. 47 witness in the mainstream of expert witnesses giving evidence in court has been dramatically and authoritatively exemplified in the Supreme Court judgment in the case J.McD. (applicant) and P.L. and B.M. (respondents) and Attorney General (notice party) [2010] 2 I.R. 199; [2008] IEHC 96, [2009] IESC 81 where in head note No. 2 of the Irish Reports it is stated:

> *"That the ordinary rules of evidence governing expert reports genera ly applied equally to expert reports commissioned pursuant to the s. 47 of the Family Law Act 1995. The s. 47 report should not be accorded undue weight. A court was not obliged to accept the views of an expert appointed pursuant to s. 47 nor was it required to specify the reasons for non-acceptance of the views as expressed in the s. 47 report. The court was the ultimate decision maker and it was for the court and the court alone to determine, in accordance with the law, what was in the best interests of the child.""*

19. Therefore, the statutory basis for their appointment does not elevate the assessor beyond the role of expert witness. This has been firmly established by the Supreme Court. The court hearing a matter is not, indeed, must not be bound or consider itself bound by the decision of the assessor but rather it is for the court to make its own decision on all of the evidence, including that of the assessor. It is well established practice that the assessor is not the witness of either party or the court's witness. The assessor is an expert witness who may be challenged by all concerned with a view to assisting the court in establishing the welfare and best interests of the child concerned. The effective remedy if a litigant perceives inadequacies in the report of the assessor or the manner of the assessment is to adduce evidence of such inadequacies such that the court may

address these issues. It would appear that no such evidence was adduced in the present case as the assessor was not called to give evidence and to be cross-examined on her report. This may, of course, be rectified in the context of the review assessment.

20. There is no doubt in my mind that this application is made by the Applicant in good faith. There is also no doubt that the matters which are being considered by the Circuit Family Court herein are important and can in no manner be described as trivial. There are few more serious issues that a court has to consider than the welfare of a child. However, the appointment (or re-appointment) by a court of an amply qualified and vastly experienced professional, which qualification has been accepted by the legislature (I understand Ms. McGovern to be a social worker and thus an "expert" within the meaning of SI 587/2018 Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018), to conduct an assessment pursuant to section 32 of the 1964 Act appears to me to be unassailably reasonable and could not be described as irrational. This is particularly so in circumstances in which the litigant has chosen not to challenge the expert witness using the normal and usual processes of an adversarial hearing.

21. I therefore must refuse the leave sought by the Applicant herein.