UNAPPROVED

THE COURT OF APPEAL

Civil Record No.: 2023/35

BETWEEN/ **Neutral Citation Number [2023] IECA 154**

Donnelly J.
Pilkington J.
Butler J.

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989 AND IN THE MATTER OF THE FAMILY LAW ACT 1995 (AS AMENDED)

Y.B

APPLICANT/APPELLANT

-AND-

Z.B

RESPONDENT/RESPONDENT

JUDGMENT of Ms. Justice Butler delivered on the 16th day of June 2023

Introduction

1. This appeal raises a net but nonetheless complex legal question as to whether a court can exercise the jurisdiction conferred upon it under s.47 of the Family Law Act 1995 to direct the preparation of a psychological report concerning the welfare of a child when no specific relief is being pursued by the parties to the proceedings relating to the welfare of

that child. Although s.47 is widely invoked in family law proceedings, such directions are usually made on consent so there is very little authority on the construction of the section or how it should be applied, if at all, in the circumstances of this case.

2. The application in this case is being opposed largely because the child whose welfare is ostensibly in issue is due to turn 18 within a few months of the hearing of this appeal. Thus, even assuming it were possible to direct, organise and complete an assessment for the purposes of preparing a report under s.47 before the child turned 18, the substantive proceedings in which the application is made will not be heard much less decided before that date. This, in turn, gives rise to issues as to the status of a s.47 report when the subject of it is no longer a minor or a person whose welfare can be the subject of the proceedings to which the s.47 application relates.

Background Facts and Circumstances

3. These issues arise in family law proceedings issued by the husband by way of Special Summons in October 2021 following the wife together with the children of the marriage (only one of whom was a minor) leaving the family home a month earlier. The husband claims that the marital relationship broke down suddenly in July 2021 when the wife announced that the marriage was over and that she did this at a meeting with him in the presence of their children. Despite the wife and youngest child (whom I shall refer to as X) remaining in the family home for a further two months, neither she nor any of the children have spoken to him since July 2021 and he has been blocked on the children's phones and social media. He attributes what he characterises as irrational behaviour on the part of his wife as being potentially due to some *"medical malady"* and makes particular suggestions as to what this might be.

4. The wife disputes that the breakdown of the marriage was sudden. She claims that there were difficulties in the marriage over many years and that she had tried to address these with her husband, whom she describes as having a complex personality, but that he refused to engage meaningfully with her. On her account, the husband perceives the breakdown as sudden because of his lack of insight into how his behaviour negatively impacted on her and the children. She says that prior to 2020 the husband's regular absences from home on business afforded herself and the children some release from the strain of living with his unpredictability but that the stress of living together in close quarters during the Covid lockdowns made the situation intolerable. She alleges that the meeting in July 2021 was for the purpose of the children explaining to the husband how difficult they found his behaviour but rather than engage with their concerns, he was verbally abusive and demeaning of them. She does not dispute that the marriage had irretrievably broken down by this date. She denies the existence of any medical condition which would cause her to act irrationally.

5. The circumstances in which the parties' relationship broke down is of broader relevance because the husband believes the reason that none of his children have communicated with him since July 2021 – save to confirm that they do not want to be in contact with him – is due to parental alienation. In other words, he believes that their mother has manipulated or influenced them thereby causing them to reject him. The wife denies this. She says that the husband was never meaningfully involved in his children's lives and their current desire not to have contact with their father is a result of his behaviour towards them. She would be quite happy for them to have contact but, given that all but one of the children are adults and X is close to being an adult, she believes that this is a matter for the children rather than for her, or indeed the Court.

6. The husband raised the issue of his failed attempts to contact his children in solicitor's correspondence following the wife's leaving the family home with X. From October 2021

his solicitors wrote suggesting the joint appointment of a psychologist by both parents "*to provide a forum at which (X) and (the husband) might articulate and hopefully resolve whatever has taken place*". These letters expressed his hope that by creating this forum his older children might voluntarily engage in a similar process "*with the sole purpose of renewing his relationship with each of them also*". In reply, through her solicitor, the wife indicated that she would continue to encourage the children to reconcile with their father but noted that at their ages "*they can make their mind up if they wish to accept a call and contact from their father*". As the wife did not specifically respond to the suggestion of a jointly appointed psychologist, the husband's solicitors wrote again saying that if she did not revert with the name of a suitably qualified person, he would bring a motion seeking the appointment of a s.47 assessor. He did not issue a motion at that time.

7. Instead, the event which seems to have prompted the application before the Court was a move by the wife and X from the provincial town in which the family had resided to a house, owned by the couple, in Dublin. As a result of this move, which took place at the beginning of the summer holidays in 2022, X transferred from the local school which they had been attending to a school in Dublin. The older children are third level students, one of whom has moved in with the wife and X and all but the husband are now based in Dublin. The husband was made aware of this change by letter from his wife's solicitors sent on the day on which the move was made. The husband regards this as an "*extraordinary fait accompli*" and, insofar as it concerns X, a unilateral decision made by his wife without consulting him and to which he did not consent. As X's father he is, of course, also a guardian. In replying correspondence from his solicitor, it is stated that he intends to retain the assistance of a psychologist immediately and that while he had originally thought that such an expert could be appointed in a non-legal capacity, this could not now take place in a non-legal setting. The wife denies that the decision was unilateral in that it was "*discussed*

and explored in full" with the children but it is clear that it was made without reference to the husband. She disputed the necessity for a psychological report on the basis that the children "*have made their views perfectly clear*".

8. In the absence of agreement on the appointment of a psychologist, the husband issued his motion on 11 October 2022. The affidavit on which the application is based makes it clear that the husband believes his children's behaviour in breaking off contact with him was orchestrated by his wife. He believes that the move to Dublin has made any involvement by him in parenting X impossible. He also points out that the affidavit of welfare sworn by his wife in March 2021 less than 3 months before the move indicated that X was attending a local school and that this arrangement would not change. In submissions, counsel for the husband suggested that this averment was a lie as the wife must have been planning the move at the time she swore her affidavit.

9. Although the husband believes his proposal that X should be assessed by a psychologist elicited in response an allegation that he had been verbally abusive of his children and had assaulted X, in fact those allegations were made by the wife in her replying affidavit and counter claim in the substantive proceedings sworn in March 2021- i.e., some seven months before he first made his proposal. The wife's account of the alleged assault is denied by the husband who gives a materially different account of the same incident. He does not specifically respond to the allegations of verbal abuse.

10. The wife swore a replying affidavit to this motion in October 2022, but for reasons set out in an affidavit sworn by her solicitor, that affidavit was not filed until December 2022 nor served on the husband's solicitor until January 2023. In the meantime, the wife issued a motion for interim maintenance grounded on a separate affidavit sworn in November 2022. The husband replied to both affidavits on 26 January 2023 just a week before the date scheduled for the hearing of both motions on 2 February 2023. It was argued on the

husband's behalf that time constraints resulting from the late service of his wife's affidavit in response to the s.47 motion restricted his ability to reply in detail to the various averments made by her. In response the wife notes that he had no such difficulty in replying in detail within the same timeframe to the financial issues raised in her affidavit grounding the interim maintenance application.

11. This tit-for-tat should not matter were it not for the fact that the wife argues that her husband cannot dispute in legal argument averments which were not contradicted by him on affidavit and where he did not elect to cross examine her on her affidavit. The husband argues there is a conflict of evidence on many issues which cannot be resolved on affidavit and consequently that the Court erred in not taking his case at its height and assuming that X's refusal to communicate with him is a result of parental alienation. Many of the husband's grounds of appeal focus on alleged errors of law on the part of the trial judge in his treatment of the evidence. I will return to this issue.

12. I do not propose to set out all of the allegations made in the wife's affidavit many of which re-state allegations made by her in her counter claim and others of which were already canvassed in the correspondence between the parties. However it is correct to observe, as the wife does, that with the exception of the alleged assault on X, by and large the husband in his replying affidavit does not engage with her account of his relations with the children nor deny the details of that account. Instead, he makes general averments as to his relationship with his children being *"fine"* and *"loving and warm"* and takes issue with his wife's account of both the marriage and his relationship with the children as being *"false"* and *"untrue"*. Somewhat unusually in the context of an allegation of parental alienation, he does not describe a gradual withdrawal by X from their relationship with him. Instead on his account the relationship was fine until July 2021 and non-existent thereafter.

High Court Judgment and Basis of Appeal

13. The application was heard by the High Court (Sanfey J.) on 2 February 2023. The trial judge issued an *ex tempore* judgment on the same date, the transcript of which runs to some six pages. The interim maintenance application which was listed to be heard with the s.47 application was compromised between the parties. The husband points to the fact that both applications were listed for only ½ a day's hearing as suggesting that it was never envisaged that there would be oral evidence nor that any factual conflicts would be resolved.

14. The first page and a half of the judgment recite the essence of the husband's case and include direct quotations from his affidavits. The next page performs a similar exercise in respect of the wife's opposition to the application. The trial judge then acknowledges that the husband, due to his lack of contact with his children, is unable to gainsay his wife's averments as to X's satisfaction with the move to Dublin nor X's decision not to engage with the s.47 assessment and that this places the husband in a difficult position as regards that element of the litigation. The judgment proceeds by setting out the husband's original intention in proposing the joint appointment of psychologist, i.e. the resolution of whatever had taken place between himself and X, possibly with the voluntary engagement of the older siblings. It then describes and quotes extracts from the correspondence between the parties on this issue.

15. All of this is uncontroversial and the trial judge notes, correctly, that insofar as the parties have set out their differences on affidavit, the Court could not resolve such conflicts of fact. It is perhaps then surprising that the husband contends that the trial judge has made so many and such serious errors in his treatment of the evidence in the remaining two pages of the judgment. Much of the criticism centres on what the trial judge describes as "*observations*" made on the fourth page of the judgment. The observations in question are that none of the children has been in contact with the husband since July 2021 despite his

assertion that prior to this date he had a very good relationship with him; that there was no reason on the fact of the affidavits to suspect that the wife would act other than in the best interests of her children and that X has chosen not to contact the husband about the move to Dublin but that if the move had gone badly it might have been logical for X to contact the husband to organise a return to the provincial town in which they had previously lived.

16. Of course, just because a trial judge characterises something as an observation rather than as a finding of fact or an inference drawn from facts, does not mean that it has been correctly characterised, although I do note that both parties treat certain of these observations as factual findings. It may be necessary for the Court to consider whether these observations made by the trial judge are really factual findings or inferences and, if so, whether they were correctly made.

17. The trial judge then reverts to considering the various options that had been canvassed during the hearing including that the Court would interview X (an option the trial judge discounted, in my view appropriately so) or that an interview be carried out (presumably by a psychologist or similar professional) to ascertain X's views on whether a more wide-ranging s.47 report be ordered. This latter suggestion was rejected by the husband on the basis that it would put the person reporting on that interview into the position of a guardian *ad litem*, a position which is not recognised in Irish law in respect of a minor who is not party to the litigation. I am not sure that this would necessarily be the case but the option was not pursued in the face of the husband's opposition. The trial judge then records some of the arguments made on behalf of the wife, without expressly accepting or rejecting them, before focussing on the central question which he identifies as whether a 17 year-old should be required to participate in an exercise which, according to the mother, they trenchantly oppose.

18. In resolving these issues, the trial judge reaches a number of conclusions. He states that the husband's argument requires the Court to assume that the wife's move with X to Dublin necessarily harmed X's welfare and that engagement in the s.47 process might affect a reconciliation or at least assist the husband in understanding what had occurred. The trial judge does not decide this issue as such in the sense of accepting or rejecting the underlying assumptions. Rather he states that he would require very strong grounds to persuade him that a 17 year old should be required to undergo such a process against their will. The husband contends that the crucial assumption made by the Court that it would be against X's will is a finding based on hearsay evidence, i.e. the wife's reporting of X's views. The relevant circumstances relied on by the trial judge include the fact that X had chosen not to communicate with the husband since July 2021 *"in circumstances where (they) could have done so if (they) wished"* and there was nothing to suggest that X was not capable of deciding the extent to which they wish to communicate with their father. He then concludes that X's opposition is apparently *"of (their) own free will"* and consequently that to order a report would be to disrespect X's rights and autonomy. The husband argues strongly that this conclusion that X was exercising free will is precisely the issue that he wishes to explore in the proceedings and the trial judge has erroneously rejected his application based on the wife's hearsay reporting of X's views which, because X is not communicating with him, he is unable to test.

19. Finally, in deciding that it would not be appropriate to order a s.47 report to facilitate a reconciliation between the husband and his children, the trial judge concludes:

> *"It seems to me that part of the intention behind the request for the report would be to compel (X) to divulge the reasons for the estrangement, effectively a fact-finding mission rather than a process primarily directed to her welfare"*.

20. The focus of the husband's Notice of Appeal is the trial judge's treatment of the evidence. Although set out in a number of different grounds, the arguments made really fall into three broad groups. Firstly, because the application relates to a matter concerning the welfare of a child, the Court should have taken the husband's concerns for assessing welfare at their height, *i.e.* the Court should have assumed that X would be harmed by the lack of a relationship with him caused by parental alienation. Secondly, it is contended that the trial judge made findings of fact and/or drew inferences which he should not have done on the basis that there was conflicting affidavit evidence. Thirdly, the trial judge should not have relied on the wife's averments as to X's desire not to participate in a s.47 assessment when the husband had no way of verifying this or of establishing that X was acting of their own free will and not under the wife's influence. Finally, there is an additional legal ground to the effect that the trial judge was wrong to conclude that the husband's application is a fact-finding mission as s.47 has a broad potential to address welfare concerns even in the absence of an application for custody or access.

21. The wife in response focusses on this latter issue and contends that an order under s.47 can only be made in respect of *"any question affecting the welfare"* of a person to whom the relevant legislation replies. As such an order is no longer being sought by the husband and, in any event, would not be appropriate in light of X's age, there was no underlying question to which a s.47 report could be addressed. The wife also disputes the evidential grounds of appeal contending that the trial judge did not err and that the factual findings made and inferences drawn by him were justified either on the basis of the facts upon which the parties were agreed or on those which were averred to by the wife and not plausibly denied by the husband.

22. Thus, the issues on this appeal can be grouped under three headings. The first concerns the jurisdiction of a court to direct an assessment and report under s.47 in the absence of an

application for orders in relation to the welfare of the person to be the subject of the report. The second involves evidential issues which of itself has two interrelated strands, one being whether there was an onus on the husband as the moving party to respond directly to the wife's averments and to seek to cross-examine her on her affidavit if he disagreed with them and the other being the trial judge's treatment of the evidence more generally and whether he erred in the manner alleged. The third heading arises even if the husband succeeds in the first two as it concerns the appropriateness of the Court making the order sought in the particular circumstances of the case, most notably, X's age and the fact that X will become a legal adult before the substantive proceedings are heard.

Analysis - Section 47

23. The legal issue as to whether the Court has jurisdiction to direct an assessment under s.47 in the absence of relief being sought based on the welfare of the person the subject of such assessment has the potential to be dispositive of the entire appeal. If the Court does not have the jurisdiction the husband seeks to invoke then, regardless of the trial judge's treatment of the evidence or the merits of the application, the appeal must fail. On the other hand, if the Court has the jurisdiction contended for then it is necessary to examine the trial judge's treatment of the evidence and, if appropriate, to consider on the merits whether the requested order should be made.

24. In order to understand the jurisdiction conferred by s.47, it is necessary to examine that provision in the context of the broader architecture of the legislation governing family law proceedings. In written submissions on behalf of the wife, counsel describes the Judicial Separation and Family Law Reform Act 1989 as governing the granting of decrees of judicial separation and the Family Law Act, 1995 (in which s.47 appears) as governing ancillary relief which may be applied for and granted in conjunction with such decrees. Whilst the

wife's submission describes the granting of a decree under the 1989 Act as the gateway for ancillary relief (under the 1995 Act) it is not disputed that where proceedings are in being under the 1989 Act and prior to the granting of any decree, procedural mechanisms such as s.47 can be properly invoked for the purposes of the proceedings.

25. A decree of judicial separation may be granted under s.3 of the 1989 Act and, where such decree is granted by a court, then under s.3(3) the court may *"by order give such directions under s.11 of the Guardianship of Infants Act, 1964, as it thinks proper regarding the welfare or custody of, or right of access to, an infant…"*. The husband argues that as the sub-section envisages directions being given as to the welfare or custody of or access to a child, "*welfare*" necessarily means something different to and broader than custody and access *simpliciter*. I accept that this is so and indeed there are many examples of courts being called upon to make decisions as to the welfare of children, such as which school they should attend or whether they should receive particular medical treatment, where there is a dispute on these issues between separated parents albeit that the dispute does not extend to fundamental questions concerning custody and access of the child.

26. Section 10 of the Family Law Act, 1995 sets out the miscellaneous ancillary orders which may be applied for in conjunction with an application for judicial separation. At s.10(1)(f) those orders include an order under s.11 of the Guardianship Infants Act 1964.

27. Section 11 of the Guardianship Infants Act 1964, which is referred to in both s.3(3) of the 1989 Act and in s.10(1)(f) of the 1995 Act, allows for applications to be made to court by the guardian of an infant *"for its direction on any question affecting the welfare of the child and the Court may make such order as it thinks proper"*.

28. Looking at these provisions cumulatively, it seems that a court has a broad jurisdiction under the 1995 Act (in conjunction with the 1964 Act) to make orders in relation to the welfare of a child, welfare being a broader concept than simply custody or access. It goes

without saying that in deciding whether it is proper to make an order, the main focus of the court must be on whether it is in the best interests of the child to make the order in question. However, although broad, the jurisdiction is neither open-ended nor unstructured. Section 11 of the 1964 Act envisages that a court can give a direction on a question affecting the welfare of an infant. This presupposes that there will be a specific question raised in the proceedings upon which the court can give a direction. Section 10(1) of the 1995 Act envisages the making of orders, including orders under s.11 of the 1964 Act, on the grant of a decree of judicial separation. These provisions are consistent with the inherently judicial nature of the jurisdiction exercised by the courts in relation to family law proceedings, *i.e.* the determination of disputed questions arising in the context of, and most usually on the breakdown of, family relations and the making of orders based on the outcome of such determinations.

29. Section 47 itself provides that in proceedings to which the section applies (which include both proceedings under the 1964 Act and the 1989 Act):

> *"The court may, of its own motion, or on application to it in that behalf by a party to the proceedings, by order give such directions as it thinks proper for the purpose of procuring a report in writing on any question affecting the welfare of a party to the proceedings or any other person to whom they relate from."*

The immediately following sub paragraphs identify that the report can be obtained from a Probation Officer, a person nominated by the Child and Family Agency or at sub-paragraph (c) *"any other persons specified in the order"*. The husband accepts that this is not a case in which it would be appropriate for either the Probation Service or the Child and Family Agency to be involved and instead proposes the nomination of a professional psychologist to prepare the report.

30. Under s.47(2) before making an order the court can have regard to any submissions made to it by the parties to the proceedings but also by *"any other person to whom they relate"*. This appears to envisage that the person the subject of the order may make submissions as to whether a report should be directed into a question affecting their welfare. Of course, when the person the subject of the order is a minor and the parties to the proceedings are the minor's parents who cannot agree on the need for a report, it would be necessary for a third party to act as a *"next friend"* in order for the minor to make submissions. Where there is a significant level of disagreement between the parents, it may not be possible for them to agree on the identity of such third party without court intervention. Whilst there is a material difference between a person appointed to assess a minor and a person appointed to represent a minor, from the minor's perspective both are likely to require engagement with a court appointed or a court approved individual.

31. Under s.47(3) a report prepared under ss. (1) is to be given to the parties to the proceedings and, if he or she is not already a party to the proceedings, to the person to whom it relates. Sub-section (3) also provides that the report *"may be received in evidence in the proceedings"*. To a certain extent the understanding of the lawyers acting on behalf of the parties in this case does not coincide with the contents of this sub-section. The procedure as described by the lawyers (who undoubtedly have significant experience in these matters) is that the report is prepared for and presented to the court; the parties can have access to it through their solicitors and, if a report were to be prepared on X, it would only be provided to X on the direction of the court. It is certainly possible to envisage circumstances in which it would not be in a child's best interests to be given access to a report prepared in the context of the breakdown of their parents' relationship but, as the section envisages that the report will automatically be provided to the person to whom it relates, it would seem that

technically in such cases an application should be made to court for a direction that the report is not to be provided to the child rather than requiring the converse application.

32. Counsel pointed to s.32 of the 1964 Act (as inserted by s.63 of the Child and Family Relationships Act 2015) which confers upon a court hearing an application under s.3(1) (i.e., concerning the guardianship, custody, upbringing of or access to a child) power to give directions for the purpose of procuring an expert report on any question affecting the welfare of a child. That section contains an express provision (s.32(5)) under which the court determines whether a report so obtained should be furnished to the child to whom it relates. There is an obvious overlap between the procedure under s.47 of the 1995 Act and what is now s.32 of the 1964 Act but no legislative guidance as to whether any report obtained pursuant to s.47 where relief is sought under s.10(1)(f) of the 1995 Act and by extension under s.11 of the 1964 Act is to be treated as if it were a report under s.32 of the 1964 Act for the purposes of such application. Fortunately, in light of the conclusions I have reached on this appeal it is unnecessary to consider this issue further.

33. The fact that the report may be received in evidence in the proceedings is copper-fastened by the provisions of s.47(5) under which either the Court or a party to the proceedings may call the person who prepared the report as a witness in the proceedings. The lawyers were agreed that generally children who are the subject of a parental dispute will not be called to give evidence in proceedings affecting their welfare but their understanding of and their views on the issues will be conveyed to the Court through the evidence of a person who has prepared s.47 report. This would necessarily be hearsay evidence, but hearsay evidence procured and prepared in a very structured way.

34. Counsel for the mother identified a potential difficulty as regards the use of a s.47 report in this manner at a time when the subject of the report is no longer a minor. This is in part related to her argument that there can no longer be an issue coming within the scope of

the relevant sections concerning the welfare of a child when the person concerned is no longer a minor. However, it is also related to the appropriateness of using a statutory mechanism which by-passes the hearsay rule to convey to the court the views of a person who is an adult thereby excluding the possibility of that evidence being tested in cross examination. There is considerable merit in this argument, although it could also be observed that there may be little difference in terms of maturity, understanding or ability to give evidence between someone just shy of and just after their eighteenth birthday. Because of the conclusions I reach below it is not necessary for me to formally decide this issue.

35. Although there is no particular procedure prescribed by statute, the lawyers were also agreed that the usual procedure adopted by a psychologist or a similar professional person directed to prepare a report under s.47 would include interviews with both of the parents as well as with the child or children concerned. For reasons which are discussed further below, this procedure (although undoubtedly sound in itself) raises concerns in the context of this case.

36. The parties referred the Court to three cases dealing with s.47, none of which deal with the issue in this case namely whether a direction under s.47 can be applied for on a free-standing basis and unrelated to any question the Court is asked to determine regarding the welfare of a child. I acknowledge, of course, that the husband believes there is an issue regarding X's welfare before the court, *i.e.* whether X has been subjected to parental alienation by the wife, but he has not identified any specific relief which is sought consequent on the determination of that issue in his favour. Counsel on his behalf suggested that a finding that the wife had been guilty of parental alienation could have an impact on any property adjustment orders to be made between the spouses but did not elaborate as to how this might play out in the particular circumstances of the case. Given that the parties lived together with their children until X was nearly 16 and no property adjustment orders will be

made until X is an adult, I cannot realistically see a finding of parental alienation, if it were to be made, as having any impact on what constitutes proper provision as between these spouses.

37. The husband relies generally on *McG(P) v. F(A)* [2000] IEHC 11 (Budd J.) and on *AB v CD* [2012] IEHC 543 (Abbot J.) as illustrating the broad nature of the *"utility, purpose and function"* of s.47. In *McG(P) v. F(A)* Budd J. remarks upon the wide discretion afforded to a court under s.47 as to who should be appointed to prepare the report. However, that case was a nullity action which concerned the manner in which a medical inspector appointed pursuant to the Matrimonial Causes and Marriage Law (Amendment) Act 1870 should carry out his duties. As no application was made nor expert appointed under s.47, Budd J. was rightly cautious about what he described as *"a few preliminary thoughts"* on that section. Most of the views he expresses are, unsurprisingly, related to the similarities between the role of a medical inspector and a person appointed under s.47 in nullity cases and the evidential difficulties that may arise if that person interviews third parties as part of the assessment which was in fact the nub of the dispute before him.

38. In *AB v. CD* the Court accepted that parental alienation had occurred and transferred custody of the youngest child from the parent responsible for the alienation to the other parent. Insofar as the judgment might be regarded as illustrative of a classic example of parental alienation, there are notable differences between that case and this – the children were much younger and the breakdown of their relationship with the alienated parent was more gradual moving from a reluctance to engage in access visits through skipping some visits to an outright refusal to go. There was a history of very protracted and contentious litigation between the parties and a number of different experts had been appointed at various times to prepare reports pursuant to s.47. Most of the judgment, which is very detailed, turns on its particular facts. However, following his lengthy analysis of the facts and the

conclusions he draws thereon, Abbot J. makes a number of observations on the process and how the courts might have intervened to reduce the extent of what he characterised as *"profligate and destructive litigation"*. Some of these observations related to the monitoring and use of s.47 reports and the need for a court to record its conclusions based on such reports.

39. Abbott J.'s observation that there is *"unrestricted terms of reference dictated by the general terms of the section"* (which is relied on by the husband) is, in fact, made primarily in relation to the significant costs incurred by the parents when such reports are directed - quite often before the financial issues between the parties have been resolved. Consequently, he suggests the need for a court in directing s.47 reports to *"focus their terms of reference in line with the requirements of the case and the paramountcy of the welfare of the child or children involved to ensure that urgent children's issues are addressed without delay"*. He also deals with the status of evidence given by the person who has prepared a s.47 report and the extent to which information disclosed to the s.47 expert may become evidence in the case. Whilst Abbot J.'s comments are both interesting and important, they do not bear directly on the issue of whether a s.47 report should be ordered where the court is not being asked to rule on any specific issue concerning the welfare of a child. I note that at one point he describes parents and children as being *"subjected to"* s.47 reports (albeit in circumstances where multiple such reports were directed) suggesting an acknowledgement that the s.47 process may be burdensome or unpleasant for those who have to participate in it.

40. Both parties rely on *McD v. L.* [2010] 2 IR 199, a case which involved a biological father who sought guardianship of and access to a child which had been born to a lesbian couple in breach of the agreement which had been reached between the parties before the child's birth. A s.47 report was directed by the High Court and the expert who prepared that

report recommended that the applicant should not be afforded rights that interfered with the child's family life with the respondents. The respondents argued, and the High Court accepted, that the s.47 report should be attributed the same status as if the report were the evidence of a medical expert and that its recommendation should only be departed from for grave reasons which should be set out clearly by the court. The Supreme Court accepted the first part but not the second part of this argument. Denham J. did not accept that such report should mandatorily be accorded great weight and held that the court was neither obliged to accept the report nor explain its non-acceptance of it. In this context she stated that the report should be considered carefully and that *"It may assist the trial judge in determining what is in the best interest of the child, whose welfare is the paramount consideration"*.

41. It is the feature of both of the latter cases that issues concerning the guardianship and custody of and access to children were very much in issue at the time the courts in question both directed and received the s.47 report. I accept that the cases acknowledge the existence of a wide discretion as regards to the type of expert who might prepare a s.47 report and the terms of reference of such report depending on the particular facts of the case. In my view both of these things flow from the text of the section which allows the Court to direct a report to be prepared by *"any other person"* and relating to *"any question affecting the welfare"* of its subject. I do not think it follows from the open-ended nature of the section on these issues that it is similarly open-ended on the basis upon which a court may exercise the statutory power conferred by it. The section itself requires that there be a *"question"* pending before the court concerning the welfare of a child and, through its application to the 1964 Act and the 1989 Act, envisages the making of orders and/or the giving of directions on such a question. The husband has not been able to point to any case law which suggests that a report can be directed when no question concerning the welfare of a child falls to be determined by the Court.

42. Looking at the language used in s.47, it seems to me that it necessarily requires that there be pending before the court a question relating to the welfare of the subject of the report which (absent a subsequent agreement) the parties require the court to determine. The process is designed to facilitate the preparation of a report by a single expert with equal access to both sides of the proceedings so that the court has the benefit of the views of a fully informed, impartial expert. This can be particularly important when the parties are in dispute over issues concerning the welfare of a child. It is not itself a free-standing relief, but rather a procedure which may be called in aid to assist a court in reaching a conclusion as to the grant or refusal of other relief which has been sought by the parties to the proceedings.

43. The proceedings issued by the husband in October 2021 sought orders pursuant to s.10(1)(f) of the 1995 Act and s.11 of the 1964 Act granting the parties joint custody of X and regulating the manner and frequency of the access to be enjoyed by the parties to X. Given the passage of time since the institution of the proceedings and X's age, the husband conceded in the High Court that he was no longer seeking orders regarding the custody of or access to X. However, the husband contended that X's welfare was still *"before the Court"*. It was argued on his behalf that children who have been alienated from a parent can suffer long-term and serious consequences as a result. Further it was suggested that if a s.47 report could be prepared quickly and if the report showed that parental alienation had taken place, the court might order urgent intervention before X's eighteenth birthday. At the same time, it was acknowledged that the court could not purport to make orders in respect of X's welfare once X turns 18 and that any orders previously made would cease to have effect from that date (save, of course, orders directing the payment of maintenance for as long as X remains a dependent child).

44. It seems to me that there is no reality in the suggestion that an order under s.47 directing the preparation of a report in this case could have any bearing on any question

affecting X's welfare which the court is either being asked to or could determine prior to X turning 18. Consequently, in all of the circumstances, I do not think that it is open to the court to exercise the power conferred upon it under s.47 in the circumstances of this case.

Trial Judge's Treatment of the Evidence

45. It follows from the conclusions drawn in the preceding section of this judgment that the husband's appeal should be dismissed on the basis that s.47 does not confer upon a court jurisdiction to make free-standing orders directing the preparation of a report in family law proceedings when that report is not to be directed to a question concerning the welfare of a person which the court will have to determine in the context of those proceedings. Consequently, the observations made in this, and the following section of my judgment are necessarily *obiter*. However, because these matters were the subject of written and oral submissions and lest the husband wish to pursue the matter further, I will briefly set out my views on these issues.

46. The husband's grounds of appeal concerning the trial judge's treatment of the evidence start from the proposition that as the application for directions under s.47 is one heard on affidavit, the evidence underpinning such an application is typically not tested and the High Court should have taken the husband's case at its height, i.e. assumed the possibility - or perhaps the existence - of parental alienation as suggested by him. Instead, he contends that the High Court relied on the hearsay evidence of the wife and the views attributed by her to X to the effect that X did not want to participate in the s.47 process and that X's presumed unwillingness became determinative of his application.

47. The wife, on the other hand, contends that there is no evidence to support her husband's suggestion of parental alienation and that he is attempting to use the s.47 process in order to obtain such evidence. Further, she made a series of discrete factual allegations on affidavit

which the husband neither expressly disputed nor sought to cross-examine her on. Therefore, that undisputed evidence was properly taken into account by the trial judge. In her written submissions the wife attempts to parse out the extent to which certain facts are uncontested (*i.e.* broadly agreed by both sides) compared to the extent to which facts are undisputed (*i.e.* averred to by her and not engaged with by her husband) and the more limited category of facts which are expressly disputed. The uncontested facts have been set out in the first part of this judgment. The undisputed facts comprise detailed accounts by the wife of the circumstances in which the marriage broke down, the relationship between the husband and the children, the events leading up to the family meeting in July 2021 and the contents of, and the husband's behaviour at, that meeting. The husband of course has denied generally that there were any issues in his relationships with his children prior to the summer of 2021. The disputed facts comprise a repudiation by the husband of the wife's account of an alleged assault by him on X and a general assertion as to a positive relationship with his children contrary to the description of that relationship by his wife.

48. In an earlier part of this judgment I noted that the concluding and determinative part of the High Court judgment is relatively brief and that certain matters that the parties characterise as findings of fact or inferences are treated by the trial judge as observations on the evidence before him. The findings which the husband contends are erroneous include a statement by the trial judge that there was no reason on the face of the affidavit to suspect that the wife would act other than in the best interests of her children; that X had chosen not to inform or contact the husband in relation to the move to Dublin and there were no circumstances apparent to him which would suggest that X was not capable of making up their own mind as to the extent to which they communicate with the husband. The husband argues that if his thesis as to parental alienation is correct, then X may not be exercising or capable of exercising free will in choosing not to contact him.

49. There is a certain circulatory to the husband's arguments. If the Court were to assume his contention as to parental alienation is correct, then finding that X was capable of making up their own mind and chose not to contact him could be legally incorrect. However, the opposite is also the case. If the Court were not to make that assumption and to take as its starting position the lack of evidence as to parental alienation, then there is nothing before the court which would suggest that X, who is a normal teenager of normal mental capacity, is unable to make such a choice and therefore nothing to suggest the finding is legally incorrect. Nor, if the allegation of parental alienation is excluded, is there any evidence that the wife, to whom all of the children appear close, has acted other than in their best interests. The difference in the two conclusions depends on whether the court is required to take the husband's case at its height and assume that parental alienation has occurred.

50. The husband says that the court is obliged to do so but has not pointed to any authority to the effect that the court must assume the correctness of the facts under-pinning an application under s.47, even where those facts are disputed. In my view whilst it might well be appropriate to adopt such an approach in some cases, it would not be appropriate to do so as a universal rule. Obviously in some cases allegations made by one party can give rise to serious concerns as to the welfare of children and undoubtedly in those cases a court should take those allegations at their height in deciding whether a s.47 report should be directed. However, in a case where the allegations are of a lesser order such that the party making them does not envisage that consequential relief will flow from establishing them in the proceedings, then a court will not necessarily be required to assume the correctness of those allegations in deciding whether to direct a s.47 report. As Abbott J. implicitly acknowledged, the s.47 process itself is not inherently neutral. It adds to the costs of the proceedings and imposes a burden on the persons required to participate in it, particularly if compelled to do so against their will.

51. Parental alienation, if it has occurred, is a serious matter. However, in this case on the husband's own account the affected child lived with him and had a good relationship with him until nearly 16 years of age. This suggests that the rift in the relationship is fairly recent, that it may be temporary and that there is a sufficient foundation for the relationship to be restored at a later stage. I do not think that the allegation of parental alienation in a case such as this is one which must be taken at its height or assumed by the Court to be true for the purposes of determining whether to direct the preparation of a s.47 report.

52. In fairness to the trial judge, most of his conclusions are expressed very tentatively by him. Rather than making concrete findings, he refers to what is apparent or not apparent from the affidavits before him. It is uncontested that X has chosen not to contact the husband and it is undoubtedly the case that as a teenager with a mobile phone X could contact the husband should they wish to do so. The trial judge does not purport to make any finding – positive or negative - as to whether X's lack of a wish to contact the husband is due to the malign influence of the wife. The husband's written submissions suggest that based on the agreed fact that X has not contacted the husband, the trial judge went on to conclude that X was not malignly influenced by the wife because, if they were, X would have reached out to the husband. I do not think that the trial judge made such a finding. He did say that if the move to Dublin had gone badly such that X wished to return to the provincial town in which the husband lives, it would be logical for X to have contacted the husband. X's happiness or unhappiness in Dublin might well depend on factors outside the wife's influence such as the strength of the friendships X may have had at the old school and the ease with which X may have made friends at the new school.

53. It seems to me that the only finding made by the trial judge which might be regarded as crucial to his decision and which is based on a hearsay averment of the wife, is his acceptance of the fact that X was opposed to the making of a s.47 order and to being required

to participate in the process. The trial judge acknowledges that this opposition is *"according to (their) mother"* and that it is denied by the husband. Of course, he has earlier acknowledged the difficulties the husband faces in gainsaying the wife's averment as to X's current position in the absence of contact with X. Acceptance of the fact that X is opposed to being the subject of such a report underlies the trial judge's conclusion that to make the order would be to disrespect X's rights and autonomy. The appeal raises an issue as to whether the wife's averments should have been accepted at all (the husband contends not) or whether they should have been accepted in the absence of cross-examination by the husband (as the wife contends).

54. The wife contends that the burden of proof in the application lay on the husband and that if he wished to dispute her evidence, he had to cross-examine her. She relied on the decisions of *RAS Medical v. The Royal College of Surgeons* [2019] 1 IR 63 and *O'Donnell v. Bank of Ireland* [2015] IESC 14 to support this proposition. *RAS Medical* establishes that it is inappropriate for a court to reject sworn affidavit evidence by reference to either other affidavit evidence or documentary material without giving the deponent the opportunity to answer questions as to why the evidence should not be regarded as credible. This does not necessarily address what I regard as the husband's strongest complaint, namely that the wife's evidence as to X's opposition to a s.47 process was hearsay evidence which should not have been accepted by the trial judge.

55. The hearsay rule precludes one person purporting to give evidence of what another person said to them in order to establish the truth of what the second person said. Evidence of reported speech is not automatically inadmissible – a witness recounting what they were told might explain or justify action they subsequently took. In this case the wife's uncontested evidence that X told her they did not want to participate in a s.47 process must be accepted as evidence that the conversation in question took place. It is not however

evidence of the truth of what X said. Put simply, *RAS Medical* may require the court to accept the credibility of the wife's belief (based on what she was told) that X does not want to participate in a s.47 process, but it cannot elevate the wife's hearsay account of what X told her to the status of evidence of X's actual views.

56. The husband points to the fact that under O.70A, r.9(3) of the Rules of the Superior Courts interim and interlocutory applications in family law proceedings *"shall be heard on affidavit unless the Court otherwise directs"*. Insofar as the husband relies on this rule to contend that in an interim or interlocutory application in family law proceedings only a court acting of its own motion can direct the hearing of oral evidence, I do not accept this submission as correct. The rule sets out the general procedure to be adopted and allows the court to direct otherwise. There is nothing in the rule which suggests that the parties cannot apply to the court for a direction that they be permitted to cross-examine a deponent on their affidavit in accordance with the general practice under the Rules. Therefore, I do not see anything in this rule supporting the proposition that there is no provision for the potential cross-examination of deponents of affidavits in family law proceedings. That being the case, it was open to the husband to seek to cross-examine his wife as to the averments she had made with which he did not agree, and he did not do so. The principal set out by the Supreme Court in *RAS Medical* means that it would be inappropriate for the Court to have rejected the wife's uncontested sworn affidavit evidence without the wife being afforded the opportunity to answer any question as to why her evidence should not be regarded as credible or reliable.

57. The husband made a detailed written submission on the extent to which and the standard by reference to which an appellate court can review findings of fact and inferences drawn from those facts by a trial court relying in particular on the recent decision of Murray J. in *AK v. US* [2022] IECA 65. That judgment points out that where an appellate court is

addressing alleged errors by a trial judge in making findings based on affidavit or documentary evidence alone or secondary findings of fact which are not dependant on oral evidence, the appellate court is free to correct errors of fact as well as of law. Murray J. describes the deference to be shown by the appellate court to the trial court as *"limited"* but also holds that findings made by the trial court should only be interfered with where the appellate court is satisfied the trial court has clearly erred. Accepting that this Court may reverse findings of fact made by the trial judge based on the affidavit evidence and secondary findings of fact inferred from admitted facts, I am still not satisfied that the husband has shown that the trial judge has clearly erred as regards most of the arguments he makes.

58. The high point of the husband's submission is that the trial judge made findings as to X's views on the s.47 procedure based on the hearsay evidence of the wife. The husband points to Part III of the Children Act 1997 which allows for hearsay evidence of children in two situations namely where the child is not competent by reason of age and where the giving of oral evidence would not be in the best interest of the child and submits that in this case neither exception applied. Whilst it is arguable that the trial judge erred in accepting the wife's hearsay account of X's views, I am reluctant to be overly critical of him in doing so. This is because it appears that the wife's counsel made a suggestion that a person be appointed to ascertain X's views on engagement with the s.47 process but this suggestion was rejected by the husband. I appreciate that his rejection was in part based on the lack of provision for the appointment of a *guardian ad litem* in family law proceedings (although I do not think that this is necessarily what was being suggested on behalf of the wife). Therefore, it seems that the husband expected the trial judge to take his case at its height, *i.e.* assume that X was the subject of parental alienation, and to reject the sworn evidence of his wife, albeit that that evidence was in part hearsay in nature, without his wife been subjected

to cross-examination and without considering any other mechanism through which X's views might have been ascertained independently of the wife.

59. In any event, I do not think it is necessary to reach a decided view on this issue. With the exception of X's views, I do not accept that the other factual errors alleged by the husband in his Notice of Appeal constitute errors much less that the trial judge clearly erred in making those findings. In reality, the only basis for suggesting that he did is the contention that X has been the subject of parental alienation which, of course, is what the husband is seeking to prove. Whilst the views of a 17 year old are undoubtedly both relevant and important as regards to whether a court should direct the assessment of a child of that age, for the reasons set out in the following section of this judgment I do not think that they are determinative of the application in this case.

Merits of the s.47 Application

60. Assuming, without necessarily finding, that the husband is correct in his assertion that the trial judge should not have relied on the wife's hearsay evidence as to X's views on the application, does it follow that this Court should now direct the preparation of a s.47 report regarding X? In my view the answer is No, because such a report would not be directed to any question the High Court will have to decide regarding X's welfare. Although the husband is critical of the trial judge's characterisation of his intention behind the request being a fact-finding mission, it does seem that this is, at least in part, what the husband seeks to achieve. I accept the *bona fides* of his affidavit evidence that he hopes engagement in a s.47 process would provide a mechanism through which X might re-engage with him. However, notwithstanding the desirability of a reconciliation between the husband and his children, that is not the purpose of s.47. I do not think the Court has jurisdiction to make an order under this section in order to achieve that end, no matter how desirable it might be.

61. Further, it is impossible to disregard the fact of X's age at the time the application was first made to court and at the time of this appeal. X is now within months of becoming a legal adult and the husband accepts that no order could be made in relation to X's welfare (even if he were seeking such an order) once that milestone is passed. As a young person on the brink of adulthood, X has a reasonable entitlement to expect that they will not be made the subject of court orders in proceedings to which they are not a party requiring them to undergo medical or psychological evaluation without their active and on-going consent. This observation is made without assuming that X is positively opposed to a s.47 assessment. The wife has averred to the factual position which is that X and the other children of the marriage have all engaged in counselling to assist them in dealing with difficulties arising from their childhoods and the break-up of their parents' marriage. Compulsory involvement with another psychologist, albeit for a different purpose, could well interfere with that therapeutic relationship. I do not think it appropriate to compel X to participate in a s.47 process in circumstances where such an order could not be made in a few months time. Apart altogether from X's attitude to the s.47 process, I would be very reluctant to make a teenager of X's age the subject of a court order mandating such a process.

62. A report prepared under s.47 can provide invaluable assistance to a Court in deciding issues concerning the welfare of children. However, it is also the case, as acknowledged by Abbott J. in *AB v. CD* that the commissioning of a s.47 report imposes a financial obligation on the parties to the proceedings and in addition may be burdensome and unpleasant to those subjected to it. Therefore, independently of X's attitude to the process this application is made at a time when the outcome of any s.47 process would not be of sufficient utility in the context of the proceedings to justify the cost and intrusion that it would necessarily involve.

63. There is one final aspect of this case which, were the Court required to make a decision on the merits as to whether a s.47 report should be directed, causes me considerable concern.

In the course of the proceedings, the husband has made allegations against his wife suggesting that she is suffering from some medical malady and, in particular, something that may affect her brain or neurological processes. For reasons related to the circumstances of the parties, that allegation is particularly egregious. The wife has exhibited medical evidence contradicting this suggestion but, notwithstanding this and the fact that the husband did not attempt to take issue with this evidence on affidavit, the allegation reappears in the husband's written submissions. A s.47 report directed to a question concerning the welfare of a child normally involves a procedure whereby both the parents and the children are interviewed by the person preparing the report. I would be very hesitant to make an order which would compel the wife to be interviewed by a psychologist on foot of the husband's motion in light of the allegations which he has made, for which he has adduced no evidence and which he has maintained notwithstanding the contrary evidence adduced by his wife.

64. For all of these reasons, were I required to form a view as to whether I should accede to the husband's application on its merits, I would refuse that application.

65. The Court was informed that the wife did not seek her costs in the High Court but was no longer taking a neutral position on costs in light of the fact that her husband had appealed. In circumstances where the appellant has not succeeded on his appeal my provisional view is that the respondent wife should be entitled to an order for her costs of the appeal. If the appellant wishes to contend for an alternative order, he has liberty to file a written submission not exceeding 1,000 words within 14 days of the date of this judgment and the respondent will have a similar period to respond likewise. In default of such submissions being filed, the proposed order will be made in the terms suggested above.

66. As this judgment is being delivered electronically, Donnelly and Pilkington JJ. have indicated their agreement with it and the orders I have proposed.