THE HIGH COURT

[2020] IEHC 579

[2020 No. 3 CAF]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989 AND IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

X

APPELLANT
(FORMERLY RESPONDENT)

– AND –
Y (NO. 2)

RESPONDENT
(FORMERLY APPLICANT)

JUDGMENT of Mr Justice Max Barrett delivered on 17th November 2020.

1. This is an application for costs by Ms Y following on the judgment of the court in the substantive portion of these proceedings. The court has been provided with written submissions by both parties and gives its judgment by reference to same. Some of the points made for Mr X seemed more concerned with the substance of the principal judgment (*X v. Y* [2020] IEHC 502) than with the issue of costs following on that judgment; however, as a courtesy, the court has sought briefly to address all the points raised.

2. The court accepts the proposition advanced by counsel for Mr X that, although by no means a licence to litigate without consequence, it has long been accepted that in family law litigation a court should be slow to award costs to one party against the other. The court was referred in this regard to the judgment of McKechnie J. in *B.D. v. J.D*. [2005] IEHC 154. There, McKechnie J. observes as follows, at para. 24:

> *"I do not believe that any category of family law case should as a matter of principle be exempt from these cost provisions. It cannot be right that litigation can be open ended without even the risk of any type of cost order….I cannot accept that a court should be powerless to award costs even where the case, or the parties to it or their conduct within the proceedings, merit the making of such an order. If that were so I firmly believe that both justice and the public would be ill served."*

3. In other words, if a case, or the parties, or the conduct of the parties merit the making of an order as to costs, such an order can be made. But if it does not the implicit assumption seems to be that no such order will typically be made in family law proceedings.

4. In the within proceedings, Mr X considers that at this time he does not have enough by way of access to/physical custody of Z and wants, it seems in good faith, to have greater access/custody. Those factors seem to the court to offer a reasonable basis on which to come to court and seek greater access/custody. Though Mr X might have waited for the coming divorce proceedings in which to ventilate these issues, there was no obligation on him to do so. The court therefore sees nothing in this case that requires an order for costs to be made against either party.

5. Mention was made by counsel for Mr X that "*It is noted that more recently, Mr Justice Jordan has described any suggestion of a standing protocol against awarding costs in family law proceedings as a myth*. [Footnote*: B.C. v. P.K.* [2020] IEHC 432; *his comments are made in the context of a discussion of costs in misconceived interlocutory applications.]*" The court sees no departure in *B.C*. from the decision in *B.D*. Jordan J. considered the application made by the husband in *B.C.* to be singularly unwise and made an order for costs against him. Jordan J. refers to *B.D*. in his judgment, clearly considered that what was before him in *B.C.* was, to draw on the above-quoted language in *B.D*., a case where *"the case, or the parties to it or their conduct within the proceedings merit the making of…an order* [of costs]" and proceeded accordingly.

6. Turning to the additional points raised by counsel for Mr X in his submissions, the court would respectfully observe as follows:

   (i) the court does not propose to re-state its original judgment; however, it is not correct to state that "*the primary, if not the only, basis upon which the appeal failed was that the Court felt constrained from implementing the proposal made to the Court by [Mr X] or [Ms Y] (or any versions thereof) in the absence of an expert report to assist the Court as to any psychological issues or ramifications which might ensue from such a step*". What presented before the court was a case in which (a) it was commonly agreed between the parents that Z was thriving under the access regime ordered by the Circuit Court, (b) it was not agreed between the parents what was in the best interests of the child, (c) Mr X seemed from his oral evidence to be unsure as to what exactly he wanted or when, apart from a 50/50 split of custody at some future time (see the quoted evidence at para.12 of the principal judgment) and so not quite now, (d) Ms Y's overriding preference was that there should be no change in the existing arrangements pending the substantive hearing of the divorce proceedings, (e) the court therefore had (i) diverging parental views as to where Z's best interests lay, (ii) zero independent evidence as to where Z's best interests lay, and (iii) a father who was unsure as to what exactly he wanted or when apart from a 50/50 split of custody to be arrived in some form of staggered way at some future time, all in (f) a situation where there were and are pending divorce proceedings at which the issue of custody would again be considered. In all those circumstances, the court considered by reference to the factors identified in statute that custody was best left as is. The application was decided as it was for all the reasons stated in the principal judgment, following a holistic consideration, in accordance, with statute of a wide variety of factors. Would Mr X have had a stronger case if some expert evidence had been made available to the court? He might well: it would depend on what an expert made of what he proposed. But a party cannot complain if he is not given the benefit of a report that he never sought to produce and the court respectfully does not see that he has a valid complaint if a court regrets that there is no such report but at the same time considers that, on all the evidence that is before it, it can nonetheless properly proceed to judgment (as appears indeed to have been the view here of Mr X) and does not, in all the circumstances presenting, consider it necessary exercise

its discretion to commission a s.47 report under the Family Law Act 1995 (as amended).

(ii) the court never stated in its principal judgment, nor should the principal judgment be read to suggest, that there is any legal and/or procedural requirement that a psychological report should always be available in access/custody disputes. Indeed the court expressly states, at para. 4 of the principal judgment that "*It is not of course mandatory that such [expert] evidence be provided"* – though when it is not provided that may result in certain consequences; that is an unavoidable end-result of the fact that in all cases courts proceed on evidence. The court would reiterate here the point it made in the last sentence of point (i) above.

(iii) what was sought here cannot properly be described as but an "*alteration of a status quo*". Rather what was sought was a very radical restructuring of the custody/access arrangements. As the court stated at para. 4 of the original judgment:

> *"Mr X was seeking that a very young child relatively swiftly be entrusted 50% of the time to him and 50% of the time to Ms Y. This revision of the existing custody arrangements would involve a sea-change in the current arrangements, yielding a scenario in which a very young child (not yet three years of age) would lose a proximate relationship to his mother for relatively protracted periods of time."*

Any decisionmaker would likely proceed with caution in such a context, that caution being compounded in the situation that presented here in which, again, Mr X, when he gave his evidence in the witness box, seemed quite unsure as to what exactly he wanted or when, apart from an ideal of a 50/50 split of custody at some future point in time, to be reached in some staggered way).

(iv) Ms Y was clearly concerned in her evidence as to the impact that the radically restructured custody arrangements would have on Z. Issues of attachment and other factors were entirely in play: indeed Mr X himself appeared to accept as much when stating*, inter alia*, in his oral testimony, as quoted at para. 12 of the principal judgment that "*I'm saying this is how it [custody/access] could look, but I don't expect this to happen overnight, obviously in [Z's]...best interests and for both [Ms Y]...and I to adapt. It should be gradual*". And why should it be gradual? Because attachment issues and all the practicalities of the revised arrangements, had they been ordered, would have arisen and been required to be handled with the greatest of care, such is (save in unusual circumstances) the natural and renowned attachment between any young child and her/his mother.

(v) as to the observation that "*The presentation of expert evidence concerning the welfare of a party is not mandatory; it is not presumed and when viewed in the context of the vast 'busy-ness' of family law lists across the country, it may fairly be said that the presentation of such evidence is the exception rather than the*

norm", (a) again (see above), the court has not suggested that the presentation of such evidence is mandatory, nor should the principal judgment be read to so suggest (and it does not in fact so suggest; in fact at para. 4 of the principal judgment the court makes the opposite point), (b) the perceived 'busy-ness' of the courts ought not to be, nor does the court believe that it is, the driver or determinant of the evidence that a party elects to introduce in any proceedings. Although the High Court is busy, it is not *that* busy, and certainly not so busy that it cannot hear evidence. The job of judges is to hear/read evidence and arrive at a decision; the court is unaware of any instance in which a judge has ever declined to hear/read evidence on the basis that s/he is too busy to do so; and certainly this Court has never done so.

(vi) as to whether the court might have commissioned a s.47 report, the court elected in its discretion not to do so. Obtaining such a report would have been challenging, given that in the witness box Mr X went from seeking 50/50 custody at this time to a more gradual arrangement rising ultimately to 50/50 custody sooner rather than later, without any real detail as to how the staggered increase in custody that he appeared to contemplate might properly be structured, so the report would have had to look at 'shifting sands'. Even if that difficulty could have been overcome, the court had to consider in this regard whether it was in the best interests of Z (and it considered that it was not) to further protract the within acrimonious application, and the associated stresses imposed on Ms Y, by seeking a s.47 report (and perhaps prompting one or other or both of the parties to commission one or more separate reports) at a time when divorce proceedings are soon coming on, and custody will be decided at same. Moreover, Mr X appears to proceed in this regard on the mistaken notion that the court, in its principal judgment, said, in essence 'No expert report: you fail'. As indicated previously above, and as any fair-minded reading of the principal judgment will show, that is not the judgment that the court gave.

(vii) the court heard/read all the evidence before it and decided the case by reference to that evidence. Fundamentally, it is for parties to make their case, not for the court to intervene and indicate what evidence might be provided – and who is a judge in any event to advise/indicate how a party might better make a case? That is something a party and any (if any) advisors that s/he has are best placed to decide upon. Had the court considered that it could not properly proceed to judgment on the evidence before it, it would have so advised the parties. Had it considered that its discretion under s.47 ought to be invoked, it would have so proceeded. Having decided not to invoke that discretion and having decided that it could proceed properly to judgment on the evidence before it, the court so proceeded.

(viii) as to the proposition that the application was "*resolved against the Appellant for a perceived deficit in proofs",* a fair-minded reading of the principal judgment does not support this proposition, nor is it correct in any event. Neither is it the case that

the court declined to engage with the merits. The application was resolved on the entirety of the evidence before the court; see further points (i) and (vii) above.

(ix) counsel for Mr X observes as follows in his written submissions:

> *"The Respondent to the appeal made an open offer suggesting that overnight access should be offered to [Mr X]. This is important for a number of reasons. Firstly, it is an implicit acknowledgement that the Order of the Circuit Family Court was excessively restrictive of [Z's] contact with his father. Secondly it, at a minimum, was an acknowledgement that [Z's] welfare as of the date of the hearing of the appeal, merited and required an overnight contact with his father. In both of those circumstances, the Appellant was therefore justified in bringing the appeal and having it heard."*

The court respectfully does not accept the above logic. First, an offer of additional overnight access does not necessarily involve the suggested implicit acknowledgement. It could, for example, reflect a desire to bring an end to an antagonistic situation which a mother considers is not in the interests of her child (whether directly, or because of the stresses it was raising for her). Second, and for like reason, it does not seem to the court that it entailed the suggested "*at a minimum"* acknowledgement. Third, even if one or other point was correct (and the court, respectfully, does not consider either point to be correct), it would not follow even in that instance that an application for 50/50 custody was necessarily justified (albeit that in Mr X's oral testimony the 50/50 custody sought became something that was more an ideal to be achieved at some future point by way of a vaguely defined staggered process). That stated, the court has indicated previously above that (and why) it considers that Mr X was justified in bringing the appeal and having it heard.

6. For the reasons indicated, the court will make no order as to costs.

TO THE APPELLANT/RESPONDENT:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?

Dear Appellant/Respondent

I have dealt in the preceding pages with various issues presenting in this application. Much of what I have written might seem like jargon. In this section, I identify briefly <u>some</u> key elements of my judgment and what it means for each of you. ***This summary is not a substitute for what is stated in the preceding pages. It is meant merely to help you understand some key elements of what I have stated.***

To preserve your confidentiality I refer to you below as 'Mr X' and 'Ms Y'.

Ms Y has contended that Mr X should pay the costs of the access/custody application that I have heard. Mr X contends that there should be no order as to costs, in effect that you should each bear your own costs.

It has long been accepted that in family law litigation a court should be slow to award costs to one party against the other. In a judgment given by Mr Justice McKechnie of the Supreme

Court, at a time when he was a High Court judge, in a case called B.D. v. J.D. *[2005] IEHC 154, he indicated that an order for costs could be made* "where the case, or the parties to it or their conduct within the proceedings" *merit the making of such an order. For my part, I do not see anything in Mr X's case, or in his actions, or in his conduct during the proceedings, that would justify me making an order as to costs against him.*

Mr X considers that at this time he does not have enough by way of physical custody of your child and wants, it seems in good faith, to have greater access/custody. Those factors seem to me to offer a perfectly reasonable basis on which to come to court and seek greater access/custody. Though he might have waited for the coming divorce proceedings in which to ventilate these issues, there was no obligation on Mr X to do so.

I see nothing in this case that requires an order for costs to be made against Mr X. My sense is that you should each bear your own costs; I will achieve this by making no order as to costs.

Is mise le meas

Max Barrett (Judge)