[2020] IEHC 502

THE HIGH COURT

[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

RESPONDENT
(FORMERLY APPLICANT)

JUDGMENT of Mr Justice Max Barrett delivered on 9th October 2020.

I. Introduction

1. Unfortunately, the marriage between Mr X and Ms Y has, for practical purposes, ended, even though in law it continues, for now, to exist. The couple are judicially separated, Mr X is in a new relationship, and divorce proceedings between Mr X and Ms Y are due to come on for hearing (there is disagreement between the parties as to how soon those proceedings will be heard). Mr X and Ms Y have one child (Z) who is touching on three years old. Both parents agree that Z is thriving at pre-school and in life more generally. The two have joint custody of Z, who lives with Ms Y, Mr X having such access as has been ordered by the Circuit Court. This is an appeal by Mr X against that order.

2. The essence of this application is that Mr X wants much more access than the Circuit Court ordered. The nature of Mr X's work is such that he is in a position where he believes that he could take Z for 50 per cent of the time. Mr X furnished the court with a sample calendar of how this arrangement would work, and how, on a shifting basis, access could be arranged so that each of Mr X and Ms Y gets access to Z for a near-mathematical 50% split of time.

3. Both parents gave evidence in the witness-box and each clearly sought to be honest in the evidence given. The court is grateful to them for that. It summarises that evidence later below.

II. Absence of Expert Evidence

4. A court of law proceeds on evidence. Mr X's application, with respect, appeared to the court to stand possessed of a notable evidential deficiency. 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. Whether such an amended arrangement would be in the best interests of Z, whether the altered arrangements sought by Mr X should be effected quickly, slowly or at all, whether a lessening of maternal contact at this time could lead to an unhealthy cooling of relations between Z and Ms Y, how matters might best be structured so that Z enjoys the healthiest of relationships with both parents (an emotionally necessary end),

are *not* matters in which a law-court is inherently expert. So it has greatly disadvantaged the court in adjudicating on the within application that it has had no expert evidence as to whether the 50/50 form of access proposed by Mr X is in Z's best interests. It is not of course mandatory that such evidence be provided but that it has not been provided has had consequences in terms of how the court has approached the consideration of where Z's best interests lie in the context of the application made by Mr X.

5. It does not, with respect, suffice in this regard for Mr X to invoke the helpful judgment of Hogan J. in *MM v. GM* [2015] IECA 29, including but not limited to Hogan J.'s observations at paras. 4-7 and 14 thereof. This is because the court has to apply the principles identified, *inter alia*, in *MM*, by reference to the specific facts at hand, and it must, pursuant to s. 3 of the Guardianship of Infants Act 1964 (considered later below), "*regard the best interests of the child as the paramount consideration*" in its task. So although the court of course accepts (it is required to accept) the legal precepts and principles identified by Hogan J. in *MM*, those precepts and principles fall to be applied in the real-life context of each particular case; here, that real-life context is that the court has been confronted with (a) evidence of what access Mr X (in good faith) personally believes is in Z's best interests and why, (b) evidence of what access Ms Y (in good faith) personally believes is in Z's best interests and why, (c) some disagreement, even a degree of acrimony, between both parties on certain points, and also (d) a striking (and notable) commonality of evidence between both parents that Z is thriving under the access regime ordered by the Circuit Court.

6. Much the same points fall to be made, *mutatis mutandis*, as were made in the preceding two paragraphs, in respect of the proposed revised access schedule that Ms Y has advanced in the course of these proceedings, subject to the overriding observation that the court's decided impression was that Ms Y's proposed revised access arrangements were more an effort at seeming reasonableness than the product of a hard-held belief that access arrangements should be varied *at this time*. Certainly, her counsel referred more than once in all the submissions received to if the court was minded to vary the arrangements at all, a form of submission which did not suggest there to be much conviction on Ms Y's side that there should be a variation *at this time*.

7. It follows from all of the above that if (as is the case), (a) it is agreed between Mr X and Ms Y that Z is thriving in the access regime ordered by the Circuit Court, and (b) the court is faced with (i) divergent parental views and (ii) no independent evidence, as to whether an alternative proposed arrangement is in the best interests of the child, then, all else being equal, likely any judge would incline to the *status quo* as being the course of action which represents the thriving child's best interests, rather than an untested deviation from that *status quo* which may or may not be in the child's best interests, and where the court would essentially be proceeding blindly, for it can proceed only on what it sees in the evidence, and here it sees nothing by which to gauge the parents' well-intentioned but still mutually conflicting respective views on how access should proceed at this time.

8. One point, however, that the court would make in passing is that access is not a percentages process. The court suspects that even in marriages or relationships that endure through to the point in time when children of that union have attained adulthood, the number of such spouses/partners who can look back on a strict 50/50 split in terms of time spent with those children is low, if indeed such a union has ever existed; and here, of course, there is disunion, which brings its own challenges.

9. The court does not understand Hogan J. when he points to "*both parents having equal claim in respect of the upbringing of their children*" in *MM, op. cit.,* para.4, to be positing 50/50 access as an ideal; rather he is referring to an equality of input into that upbringing. This reading seems borne out when one has regard to para.6 of *MM*, in which Hogan J. speaks of "*both parents would, in principle, at least*, [being]…*the joint decision-makers in respect of…upbringing*". And even when he refers, in para.6, to "*children* [being] *entitled to the care, company and support of both parents*" and to their being "*equally entitled, where at all possible, to have a meaningful relationship with both…parents*", Hogan J. never posits a 50/50 access split as a general ideal or as a starting-point from which to commence or as an end-point at which to aim.

10. Here, Ms Y at all times in her evidence has fully and, it seems to the court, genuinely accepted that Z is, to borrow from the above-quoted wording of Hogan J., "*entitled to the care, company and support of both parents*" and to Z's being "*equally entitled…to have a meaningful relationship with both…parents*". The disagreement between the parties lies on how those principles fall to be applied in the practical circumstances at hand, *i.e*. how the access arrangements are to be structured in respect of Z, still a very young boy. That disagreement, compounded by the absence of independent expert evidence as to where the best interests of Z lie at this time, places the court in the difficult position identified previously above when it comes to adjudicating on the within application. In this context the common evidence of Mr X and Ms Y that Z is thriving under the current access regime acquires a significance that it might not possess if the court had been presented with independent expert evidence which indicated that Z's best interests lie in the court agreeing to the within application or entering upon some variation of the existing access arrangements. The court can only proceed on such evidence as has been placed before it, not by reference to some inherent, instinctive sense on the part of the court as to what is or is not working or what might or might not work in terms of the access arrangements that apply and/or might apply.

III. Mr X's Evidence

11. In summary, Mr X's evidence was as follows:

    (i) he gets access on two half-days each week, but never at weekends.

    (ii) he has been refused access on a number of occasions. (Court Note: Ms Y denies that this is so; she seemed credible in this regard; and the court notes that the dates offered by Mr X as dates on which access was refused do not tally fully with the dates on which access was due to happen).

(iii) Ms Y is unwilling to acknowledge or accept that Mr X is a co-parent. (Court Note: Ms Y denies that this is so; and her evidence and demeanour in the witness box do not suggest that this is so).

(iv) Mr X's job is not a 9-5 job and his work schedule is such that he knows a few weeks ahead at any one time when exactly he will be working. (Court Note: The court suspects that there must in reality be last-minute vagaries – it seems to the court that it can take judicial notice of the fact that life rarely runs to strict schedule – however, Mr X appears to have supportive family around him who would be able to 'plug the gap' in any such instances).

(v) Mr X has never yet had overnight access with Z, never holidayed overnight with Z, wishes to be fully involved in all aspects of Z's life, and believes that such overnight access would be in Z's best interests. (Court Note: Apart from Mr X's belief in this regard, doubtless genuinely held, there is no evidence before the court to suggest that such overnight access would be in Z's best interests at this time. Although Hogan J. observes in *MM*, at para.14, that "*Overnight access with each of the parents must* generally [the word 'generally' is emphasised in the original, showing that there may be instances that do not accord with the general] *be regarded an integral feature of* [a child's]…*right*" (the last-mentioned right being, per para.13, the right to "*the care and company of each parent, where this is judged objectively to be in* [the child's]…*best interests to have such contact*"), these observations of Hogan J. fall to be applied in the particular circumstances of each case that comes before the courts. Here, Z is very young (not yet three years old), an age when children tend generally to see a lot of mother, if there is a mother about. Whether and when it would be in the best interests of a very young child to have a lower degree of maternal access than has previously been enjoyed by that child is a matter on which the court would have benefitted from independent expert evidence, as opposed merely to the competing views of both parents, both of whom are doubtless acting in good faith but one or both of whom may be wrong in their conflicting views as to where Z's best interests lie access-wise. (In passing, the court notes that if Z had been principally in the care of Mr X since Z's birth, and he has not, a key issue that would arise for the court in determining where Z's best interests lay in *that* context – which does not present – would be 'If there is a sundering of the constancy of the relationship between father and child and greater access is granted to the mother, how will that impact on the best interests of the child?' In that imagined context too, the court would benefit from independent expert evidence, not least thought not only in the face of conflicting parental views).

(vi) because of his work schedule, Mr X has availability on days when people in a more 9-5 job would not be free.

(vii) Z spends a lot of time in pre-school each week and that is time that could be spent with Mr X. (Court Note: It is, but whether that would be in the best interests of Z

when he could be socialising at pre-school with other children his age, is not so certain; in his oral evidence Mr X acknowledged the importance of the socialisation dimension of pre-school for Z, an only child).

(viii) there would be a cost saving if Z was out of pre-school more and with his father (Mr X) more. (Court Note: Ms Y indicated that the pre-school charges would not diminish in the scenario contemplated by Mr X).

(ix) he wants fuller access to Z during the Festive Season.

12. Among the exchanges between counsel for Mr X and his client, while Mr X was in the witness-box, was the following:

> "Counsel – *Just maybe to anticipate something that might be said to you* [by counsel for Ms Y], '*Look, this is all too much for* [Z]….*He is not going to adjust to it. You are trying to run before you crawl*….[Y]*ou are being hopelessly optimistic about the type of proposal you've put together. What would you say to the court about that?...*
>
> Mr X – *Judge, I spend nearly every day thinking about this and, ah, yeah, it's hopeful, it's aspirational. I'm a positive guy. I have a lot of time and energy to give. Yeah, I'm really sorry for what happened [the ending of the marriage], but yes I'm saying this is how it 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 but not so gradual that it takes the next ten years because* [Z]…*is in his formative years….But yeah it's aspirational, it's hoping for a lot and maybe it's not the historic way that the family court system in Ireland works but then again parenting has moved on….It's not Mommy has to do everything, Daddy is at work….So yeah it's aspirational and no I don't think it should happen tomorrow that he's all of a sudden with me for three nights. It would need to be a gradual transition to protect* [Z]…*obviously….Yes it's aspirational but I think it should be aspirational because we're both his parents, we both love him and we both want to spend time with him and grow him in our respective families.*"

13. The above-quoted evidence highlights a central difficulty that presents for the court when it comes to the within application. Mr X repeatedly depicts what he is looking for (the 50/50 access split) as "*aspirational*" and indicates to the court that not only is what has been presented to the court "*aspirational*", but that what has been sought should be ordered in some way that would allow the aspirational end-goal to be reached over time. That leaves the court in a position where it is essentially being told 'This is something to which I aspire but which I appreciate can't happen as sought: please grant it or something to me by reference to your own sense of what might be done'. The vagueness inherent in this proposition creates an immediate apprehension as to what exactly Mr X is seeking, how he can be so certain that something so inherently vague is in Z's best interests, and how the court can properly gauge how something so amorphous is in Z's best interests or not (not least though not only because the court has no independent

expert evidence before it as to whether what is being sought is, or might be structured to be, in Z's best interests).

IV. Ms Y's Evidence

14. In summary, Ms Y's evidence was as follows:

(i) she is open to greater access between Z and Mr X but she wants to see the continuity of Z's general routine protected.

(ii) she is satisfied to see a greater number of overnights over time.

(iii) whatever is ordered at this time, the divorce proceedings are due to come on in the future and access can be more fully re-visited at that time.

(iv) there has been a degree of foul language and truculence in Mr X's dealings with Ms Y to this time (In her oral evidence, Ms Y observed, *inter alia*, in this regard, that "[O]*ur arrangements have been fraught, which is really sad*" and "*The last time we communicated was eight weeks ago and* [Mr X]…*said that he would not leave me alone until he got 50 per cent of our son").* (Court Note: It may be that the last-quoted observation was uttered by Mr X in temper; however, the court would note, by reference to the judgment of Whelan J. in *SK v. AL* [2019] IECA 177, at para.57, (considered later below) that while access "*is a right of the parent, particularly the non-custodial parent*…[and] *also a right of the child*", a parent does not have a *prima facie* right, by virtue solely of parenthood, to 50/50 access; the courts at all times must, pursuant to s.3 of the Act of 1964, "*regard the best interests of the child as the paramount consideration*" in adjudicating on, inter alia, an access application. In passing, the court notes the related evidence of Ms Y that there has been some 'badmouthing' of Ms Y when Z has been with Mr X. This was denied by Mr X in his oral evidence. So where Z got the 's––' jibe referred to in the evidence before the court must remain a mystery – or perhaps not; it clearly did not come out of nowhere.)

(v) it is in the context of the foul language, fraught relations and occasional truculence that Ms Y declined to go to mediation on the issue of access; she saw the requisite conciliatory intent to be absent on the part of Mr X.

(vi) in terms of the level of cooperation, there has been an issue around the payment of pre-school fees at this time (attributable, according to Mr X in his oral evidence, to a Coronavirus-related drop in his income). (Court Note: There did seem to be a degree of hesitancy on Mr X's part to enter into a discussion of his finances. But Ms Y is entitled to have a fairly detailed knowledge of Mr X's finances (rearing a child is expensive and the cost needs to be shared as far as is feasible on the facts of any one case, especially when, as here, both parents are in good jobs).

(vii) Ms Y does not believe the 50/50 regime proposed by Mr X is in Z's best interests at this time; "*A* [percentages-based proposal]…*to me, for a small child, a human being…I find it a bit hard to get my head around…I can't connect with this. I don't*

know how this would work in real life". (Court Note: This is an aspect of matters on which the court would have benefitted from independent expert evidence).

(viii) Ms Y has always sought to work around Mr X's schedule; but she has a schedule too, working at a good job on Mondays-Fridays with weekends free (so a weekend without Z for her is in effect a mostly missed full week and Z is entitled to have access to both parents).

(ix) regardless of what is ordered, there will always be flexibility on Ms Y's part (this extends to the Festive Season arrangements). (Court Note: Such flexibility has been displayed in the past and there is no reason to believe that it will not be displayed in the future).

(x) Ms Y is satisfied to take (and has historically taken) a facilitative approach to access on Z's birthday. (Court Note: Again, Ms Y has displayed flexibility in this regard in the past and there is no reason to believe that such flexibility will not be displayed in the future).

15. Contrary to what has been submitted by/for Mr X it did not at any point appear to the court that Ms Y "*continues to harbour a deeply felt resentment of* [Mr X]". She seems, if the court might respectfully observe, to be a pleasant person who is 'getting on' as best she can with the challenging task of juggling work-life and single motherhood and doing so successfully. She can hardly be expected, and is not expected by the courts, to exude warmth towards Mr X following on his free election to leave the family home and strike up a new relationship.

V. Some Law

(i) Case-Law

16. The court has been referred to, and is of course bound by, the judgment of the Court of Appeal in *SK v. AL* [2019] IECA 177. That was a case where a father brought a failed appeal against an order of the High Court granting liberty to a mother to remove the parties' 10-year old daughter from Ireland and relocate abroad. In her judgment, Whelan J. observes, *inter alia*, as follows, at para.57:

> *"In evaluating the right of a parent to access, it has to be borne in mind that not alone is access a right of the parent, particularly a non-custodial parent, it is also a right of the child and is, in the absence of evidence to the contrary presumed to be in the best interest of the child that they maintain a constructive relationship with the non-relocating parent. Care must be taken, accordingly, to structure contact arrangements so as to preserve and vindicate the child's relationship with the non-relocating parent so as to minimise disruption to same and ensure so far as practicable that the relationship is maintained in such a manner as operates in the best interests of the minor."*

17. Here, a structured contact arrangement has been put in place by the Circuit Court and the appeal is focused on whether that structured contact arrangement should now be varied.

(ii) Statute Law

18. As touched upon previously above, s.3 of the Guardianship of Infants Act 1964, as amended. now provides as follows:

> *"(1) Where, in any proceedings before any court, the— (a) guardianship, custody or upbringing of, or access to, a child, or (b) administration of any property belonging to or held on trust for a child or the application of the income thereof, is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration.*
>
> *(2) In proceedings to which subsection (1) applies, the court shall determine the best interests of the child concerned in accordance with Part V."*

19. Section 31 of the Act of 1964 (which sits in Part V) provides as follows:

> *"(1) In determining for the purposes of this Act what is in the best interests of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family.*
>
> *(2) The factors and circumstances referred to in subsection (1) include:*
>
> *(a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships;*
>
> [Court Note: It is accepted by all that this benefit presents. Ms Y is eager to see a healthy relationship develop between Mr X and Z. Both parents differ on how this is to be achieved. No expert/independent evidence has been placed before the court as to where the best interests of the child lie in terms of the forms of access proffered as alternatives in the within application. As mentioned previously above, if, (a) *as is commonly agreed between Mr X and Ms Y, Z* is thriving under the access regime ordered by the Circuit Court, and (b) the court has (i) divergent parental views and (ii) no independent evidence, as to whether an alternative proposed arrangement is in the best interests of the child, then, all else being equal, likely any court would incline to the *status quo* as being the course of action which represents the thriving child's best interests, rather than an untested deviation from that *status quo* which may or may not be in the child's best interests, and where the court would essentially be proceeding blindly, for it can proceed only on what it sees in the evidence, and here it sees nothing (for there is no other evidence) by which to gauge the parents' well-intentioned but mutually conflicting views on how access should proceed at this time].

(b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise);

[Court Note: Z is so young, not yet three years of age, that the court does not consider that his views (if views he has; it seems most unlikely that he does) are views that are duly ascertainable].

(c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances;

[Court Note: The court's instinctive sense is that Z is so young that he needs a great deal of his mother at this time; even if the court is wrong in this, the reality is that he has been enjoying a great deal of his mother at this time and a natural closeness will consequently have arisen between the two which needs to be factored into determining where Z's best interests now lie. In both respects, the court, again, would have benefitted from independent expert evidence in this regard. All the foregoing aside, the court would refer to its observations under item (a)].

(d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;

[Court Note: See the observations under point (c)].

(e) the child's religious, spiritual, cultural and linguistic upbringing and needs;

[Court Note: No particular religious, spiritual, cultural or linguistic upbringing/needs have been argued to present.].

(f) the child's social, intellectual and educational upbringing and needs;

[Court Note: It is commonly agreed between Mr X and Ms Y that Z is a bright child who is thriving under the access regime ordered by the Circuit Court. Besides that, the court has (i) divergent parental views and (ii) no independent evidence, as to whether the alternative proposed arrangement (the 50/50 arrangement or even the alternative access arrangement proffered by Ms Y) is in the best interests of Z. The court therefore inclines to the *status quo* as being the course of action which represents Z's best interests, rather than an untested deviation from that *status quo* which may or may not be in his best interests, and where the court would essentially be proceeding blindly, for it can proceed only on what it sees in the evidence, and here it sees nothing (for there is no other evidence) by which to gauge the parents' doubtless well-intentioned but still mutually conflicting views on how access should proceed at this time.]

(g) the child's age and any special characteristics;

[Court Note: See the observations under point (c)].

(h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being;

[Court Note: No such harm presents. Both Mr X and Ms Y love Z and want the best for him. The absence of any professional evidence in this case means that when it comes to the forms of access proffered in this application the court is completely blinkered as to where Z's best interests lie in terms of his psychological well-being. Apart from the basics, a court of law possesses no innate knowledge of human psychology, save what is put in evidence before it.]

(i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them;

[Court Note: This judgment comprises, in effect, a consideration of such proposals].

(j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;

[Court Note: Both parents have displayed a mature and sensible attitude in this regard; both, despite an occasional truculence on the part of Mr X (which needs to end), appear willing and able].

(k) the capacity of each person in respect of whom an application is made under this Act—

(i) to care for and meet the needs of the child,
(ii) to communicate and co-operate on issues relating to the child, and
(iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates.

[Court Note: The court's instinctive sense is that Z is so young that he has rightly been enjoying, and needs, a great deal of his mother at this time, though again it would have benefitted from expert evidence in this regard. A question arises in the court's mind (which again points to the benefit that expert evidence would have brought) is whether being away from maternal care for quite protracted periods, pursuant to the 50/50 proposal (or even the mother's revised access proposal), is in the best interests of a child so young. That aside, apart from an occasional truculence on the part of Mr X (which needs to end), appear willing and able, both parents appear on the evidence to be possessed of the requisite capacity.]….

(4) For the purposes of this section, a parent's conduct may be considered to the extent that it is relevant to the child's welfare and best interests only."

[Court Note: Apart from occasional truculence on the part of Mr X (which needs to end) the court sees nothing in Mr X's past behaviour that has a bearing on Z's welfare and best interests at this time.].

VI. Conclusion

20. For the reasons aforesaid the court affirms the order of the Circuit Court. For the avoidance of doubt, the court does not see that that order embraces weekend access. There are two reasons why matters were ordered so by the learned Circuit Court judge: (i) Mr X's work schedule gives him an availability on weekdays that persons in 9-5 jobs would not enjoy; and (ii) the fact that Ms Y, being in a good 9-5/Monday-Friday job means that a weekend without Z for her would be, in effect, a mostly missed full week and Z is entitled to have access to both parents. Those factors/circumstances continue to present. The court notes that there will come a future time when, almost certainly (all else being equal), there will be greater access afforded to Mr X; for the various reasons aforesaid, the court cannot properly conclude that that time has already arrived.

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 some 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.

FOR THE APPELLANT

It was clear to me that you love your son greatly and want to be the best father that you can be and to maximise your involvement in his life. However, two key issues present with the proposed 50/50 access arrangement at this time:

(1) I had no expert evidence before me as to how such an arrangement would impact on your son's emotional and psychological well-being. On the other hand, both you and your separated wife were strongly of the view that your son is a bright child who is thriving at this time in a context where the current access arrangements are operating.

(2) you repeatedly stated in your oral evidence that the 50/50 split was aspirational and to be attained over time. That left me in a position where I was essentially being told by you that 'What I have come seeking is something to which I aspire but which I appreciate can't happen precisely in the manner sought: please grant it or something to me'. That is a vague proposition against which to gauge where your son's best interests lie; matters were not helped by the absence of expert evidence; and then there

was the well-intentioned but conflicting evidence from you and your separated wife as to where your son's best interests lie at this time. In this context, a notable common feature of the evidence of both you and your separated wife was that your son is a bright child who is thriving at this time under the current access arrangements.

I am required by law to regard the best interests of your son as the paramount consideration in an application such as this. In this respect, I had conflicting evidence from you and your separated wife as to where your son's best interests lie at this time in terms of access, and I had no independent evidence against which to gauge that conflicting evidence. Having had regard to all of the foregoing, and to all the various other factors and circumstances which legislation directs me to consider in an access application, I have respectfully concluded that at this time that your son's best interests lie in continuing with the current access arrangements (under which you and your separated wife both agree that he is thriving).

I must make two further points. First, you have, with all respect, been occasionally brusque in your dealings with your separated wife. You need to be able to get along amicably with your separated wife for access to work well. Second, although you have denied 'badmouthing' your separated wife to your son, he picked up the 's––' word from somewhere. Even if it was not from you, you should be careful in this regard if access arrangements are to work well.

FOR THE RESPONDENT

It was clear to me that you love your son greatly. It was impressive that you realise (and you are right in this) that your son will require a healthy relationship with his father and that this will require his father enjoying greater access in the future.

For the same reasons as are mentioned above at (1), I consider that the access arrangements ordered by the Circuit Court remain in the best interests of your son at this time and are to be preferred even to the revised access arrangements that you floated at the proceedings in response, and as an alternative, to the 50/50 access arrangement sought by your separated husband.

Yours faithfully,

Max Barrett (Judge)