**THE HIGH COURT**

[2020] IEHC 553

**[No. M00796/2017]**

**CORK CIRCUIT** **COUNTY OF CORK**

**BETWEEN**

**H.**

**APPLICANT**

**AND**

**H.**

**RESPONDENT**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on Tuesday the 10th day of November, 2020**

1. The respondent has appealed against the ancillary orders made on the granting of a decree of judicial separation by the Circuit Court. On 23rd October, 2020 I gave an *ex tempore* judgment broadly affirming the order of the learned Circuit Court judge with some minor adjustments on points of detail. The applicant sought costs and having heard submissions I gave an *ex tempore* ruling awarding partial costs. The respondent then suggested that some issue of law was raised by the costs decision, so I indicated to the parties that I would deliver a more formal judgment at a later date giving written reasons.

2. I have been greatly assisted by Ms. Helen O'Driscoll B.L. for the father and Mr. Timothy Harley S.C. (with Mr. Kenneth O'Sullivan B.L.) for the mother, who were exceptionally helpful to the court and each did the best possible job for their respective clients. I will begin with the question of the ancillary orders and then turn to the question of costs.

**Ancillary orders**

3. The primary consideration for the court regarding access and custody is the best interests of the children and I do think that both parents are committed in their own way to the welfare of the children.

4. I do not think it would help the parties going forward if I gave a completely detailed set of reasons on a point-by-point basis, but I broadly agree with the approach taken by the learned Circuit Court judge, His Honour Judge Seán Ó Donnabháin, and consider that the orders he made broadly represent the appropriate ones and represent proper provision for the parties and the dependent children. Hopefully the parties will be able to see that if two different judges come to the same conclusion that's got to say something.

5. It is obviously essential that the mother continues work on her alcohol addiction and maintains her sobriety on a permanent basis. Broadly speaking, having seen and heard the parties, I generally accept the father's evidence where it differs from the mother's as being more consistent with known objectively verifiable facts. I have to take a serious view of the evidence, which I accept, that the mother exercised access while under the

influence of alcohol and in particular tried to drive the children in such a condition on more than one occasion. That can't be allowed to happen again.

6. As regards the incident of the mother's attempted drink-driving with the children in January 2020, I accept the evidence of the neighbour and of the father in that respect and indeed the mother pretty much accepts the incident occurred as well.

7. The neighbour's intervention was very public-spirited (having been alerted by the mother shouting at the children "*get in the fucking car*"), but was followed by a very disturbing sequel where the mother tried to create a problem in the neighbour's relationship by making a false allegation to the neighbour's partner that the neighbour was having an affair with the father.

8. As regards the allegation of attempted drink-driving with the children in July 2020, I accept the father's evidence in relation to that and reject that of the mother insofar as it differs. The father's evidence is consistent with the mother's conduct thereafter by texting that night saying she was going to the Mercy Hospital and apologising for everything she'd put the father and the children through. In the witness box she said she didn't know why she was apologising. Having seen and heard her evidence, and having regard to the content of her evidence on that point, I don't accept that evidence.

9. It is implicit in the report under s. 47 of the Family Law Act 1995 that the mother admitted that there were previous occasions when she drove drunk with the children in the car. Her response to that in the witness box wavered between denial and saying that she couldn't remember.

10. I also have to take a serious view of the evidence, which I accept, that she exposed the children to witnessing violence and alcohol abuse and to denigration of the father. For example, the mother's denial of an incident of violence in Spain was rather bland and generalised and unfortunately I can't accept it. I accept the father's concerns in that respect and reject the evidence of the mother on that issue also.

11. I don't think that in all the circumstances there can be any real contest as to who should be the primary carer and, therefore, as to who should remain in the family home. I consider also the mother's violence was the primary reason for the incident in which her finger was broken and consider that on the balance of probabilities the father acted in self-defence on that occasion. The mother's account of that incident is very vague and unparticularised and I don't accept it.

12. I am also concerned that she has made a complaint to the Gardaí in relation to the children's paternal grandmother and having seen both her and the grandmother I would accept the grandmother's version of that incident. Generally, I don't find the mother's allegations whether about the father, the grandmother the neighbour or otherwise to be reliable. Having said that, I must also add that the father acted inappropriately at certain times particularly in relation to cancelling access due to COVID-19 and I will address that in the order.

13. We then come to Mr. Don Hennessy, who seems to be some kind of relationship adviser to the mother, and who purported to give evidence that the children had been weaponised against the mother, that the mother was being abused and was giving honest evidence and needed the protection of the court. Unfortunately, there was no basis for such sworn evidence whatsoever beyond what he had been told by his client, so unfortunately this "evidence" was inadmissible and inappropriate. Really he was out of his depth and in effect simply a mouthpiece for his client. His answer to what his duties to the court were showed a serious lack of understanding of the duties of an expert or professional witness – even if he is an expert, which seems unlikely and certainly wasn't established, he didn't seem to understand the need for independence and objectivity. I do agree with Mr. Hennessy on one thing though, which is that I would strongly encourage both parties to disengage emotionally and keep their communications calm and professional.

14. A strange feature of this case (which may sound like a digression, but it isn't in fact because it has been such a recurring feature of this matter from the very start), is that many of the interactions between the parties, even up to recently, took place in the small hours of the morning. The father gave a strange, and in my view, totally misconceived and bordering on ridiculous, explanation that he keeps his phone on all night because he once missed a call about his dying father many years ago. With respect, that doesn't stand up to analysis for a moment as a reason to keep one's phone on all night. It doesn't even make sense because his own mother's evidence was that the father dropped dead, so there was no time for goodbyes anyway. If people die in the middle of the night, there is very little one can do about it. So I would strongly encourage both sides to turn off their phones at night, but more pertinently I am going to make a specific direction about the times of communication. Both steps would help limit the sort of toxic communication in which they have been engaged and for which they are both responsible. There have just been far too many incidents between these parties. Obviously, one can't do anything about the incidents that have already happened, but the parties really have got to make sure that there are no further incidents and they both have a role in that.

15. So, broadly, I am affirming the order of the learned Circuit Court judge with some modest variations. Obviously, I affirm the decree of judicial separation. I specifically affirm the order that all access by the mother must be supervised and I will vary that to clarify that that includes at all times including transfer of the children by car or otherwise, in other words pick-ups, drop-offs and transport.

16. I will specifically direct both parents not to comment negatively on each other to the children and not to communicate with each other at all between 8 p.m. and 6.30 a.m., save in emergencies, and also to use their best endeavours to communicate in a civil fashion.

17. I will specifically make an order prohibiting the mother from driving the children without the maternal grandmother in the car, and the grandmother was happy to facilitate that. I

will also specifically direct that she can't consume alcohol during access or exercise access while under the influence of alcohol.

18. Subject to those variations, I will restore the agreed access schedule set out in the order of the Circuit Court of 10th March, 2020 plus such additional access as may be agreed with the variation that the weekend access, which isn't defined in the consent order, is to be from 12 p.m. every second Saturday to 6 p.m. the following day. That restored access would commence at 12 noon, on 24th October, 2020 for the first overnight.

19. While that reflects the previous order, I appreciate that the practice at certain points evolved beyond that, but I think the correct thing to do in the circumstances is to restore the order and then leave it to the parties if they can agree any adjustments depending on how things work out as time goes by.

20. I will specifically direct that the father may not suspend access merely based on general public health advice.

21. Given the history of confrontational incidents, even quite recently, there is a definite need for an order expressly excluding the mother from the former family home and from the estate in which the father resides, other than at agreed times for drop-off and pick-up.

22. I will also direct that when the mother is speaking to the children, whether on the phone or video conference when they are in the father's custody, that the father should not put the mother on loudspeaker and that neither he nor family members should listen in. Conversely though, the mother will obviously be bound by my general direction that the parties are not to denigrate each other or each other's families.

23. As regards the social welfare benefits, I will direct that the father is to get the benefit of Child Benefit and Domiciliary Care Allowance or any other comparable social welfare benefit and that the father has liberty to notify the Department of Social Protection of that order from time-to-time as required.

24. While I appreciate the mother wanted to revisit the orders under s. 14 and s. 15A(10) of the Family Law (Divorce) Act 1996, I think they're appropriate orders in all of the circumstances. So I would generally affirm the balance of the Circuit Court order apart from where specifically I have said otherwise.

25. I will give liberty to apply, but that is to be exercised by making application to the Circuit Court and not the High Court.

**Costs**

26. The father applied for the costs of the appeal. As regards costs, the general principle is of course that costs follow the event. Because I am affirming the learned Circuit Court judge's order albeit with some minor variations, there can be no question but that the mother has been unsuccessful on the major issues that strictly arise in the appeal. Her position as put on her behalf was that she was characterising the function of being the children's primary carer as her "*natural*" role - one might note in passing that it seems

that equality only goes so far in modern Ireland. But custody and access is not to be decided on by reference to some discriminatory theory of what is natural, but by reference to the best interests of the children which normally involves the society of both parents.

27. It is true that the mother's access has been in abeyance and has now been reactivated, but an appeal wasn't necessary to do that because that access was provided for under the Circuit Court order, so restoring it in the first instance was a matter for that court, or at least could have been pursued in that court as Ms. O'Driscoll pointed out. Nonetheless, I would factor in the element that the Circuit Court order has been reactivated by not awarding full costs against her.

28. The fact that this is a family law matter might have traditionally been seen as a reason for no order as to costs, but that can't be an absolute rule. My real concern is that if there is no award as to costs in matters of this nature on a virtually automatic basis, then there is no incentive for parties to act reasonably in general and in particular to minimise the amount of litigation involved.

29. This particular matter has now been thoroughly canvassed in a whole series of applications in the District Court, a full Circuit Court hearing and now a full appeal to the High Court, which has broadly affirmed the Circuit Court order. However, we are still only at the point of judicial separation, and the stage has been set for a further round of litigation in relation to divorce in the Circuit Court, and who knows, possibly on appeal to the High Court, particularly if there is no disincentive whatsoever to minimise the amount of such litigation. Costs do have that salutary purpose and while I would not necessarily wish costs orders to become a completely routine feature of family litigation, it must have its place in the appropriate case and it seems to me that this is very much the appropriate case.

30. Unfortunately there are a number of aspects of the way in which the mother has been going about this matter in general and the litigation in particular that are not especially reasonable, and where costs would have a role to play in avoiding the imposition of unnecessary litigation costs on the other side going forward. Those matters include:

    (i). obviously the putting of the children's lives at risk, not to mention her own and that of other road users, by the drink-driving and attempting to so drive with the children both previously, then in January 2020 shortly before the Circuit Court hearing, the repeat of that after the Circuit Court order and while the matter was under appeal to this court and while she was seeking primary custody, together with the denial of such matters in her testimony, apart from one instance;

    (ii). the unfounded allegations of various kinds against the father and the unfounded complaint to Gardaí against the grandmother;

    (iii). the unfounded allegation of an affair made against the neighbour, which she sought to stand over in the witness box despite the absence of any evidence;

(iv). the malicious act of contacting the neighbour's partner to disseminate this false allegation, simply because the neighbour had got involved in stopping her drink-driving with the children in the car;

(v). her unreliable evidence at the appeal generally; in that regard I would like to be able to say that the inaccuracies in her evidence were all unintentional, but that wouldn't be a fair evaluation; and

(vi). there is also the fact that rather than take responsibility for all matters arising from her alcohol addiction, she sought to blame the father, as "*triggering*" and so on, and insisted on bringing in her relationship adviser as a witness who doubled down on that and essentially put all blame on the father - her lawyers are blameless for this as it is clear this aspect was personally decided on by the mother.

31. Overall there are ample grounds for some award of costs here. In all the circumstances of this particular case, it seems to me that a costs order of 50% of the costs of the appeal and affirming the order as to no order as to the costs of the Circuit Court, is, if anything, a very modest and possibly even inadequate order. Despite being substantially successful in both courts, the father will be paying 100% of his costs in the Circuit Court and 50% of his costs in the High Court, so he is only getting about 25% of what he would get in a normal civil case.

32. I don't think that the outcome overall can be characterised as being unfairly punitive as against the mother, and in that regard I could summarise as follows:

(i). At the risk of repetition, I could have been much more detailed in some of the findings in relation to the mother, but I didn't do that because I didn't think it would help going forward.

(ii). I could have adjusted the Circuit Court order only in a manner favourable to the father, but I didn't do that either.

(iii). I could have confined any reservations about the parties' conduct to the mother, but I didn't do that, and in particular expressed concerns about the father using COVID emergency to interrupt access, or listening in to phone or video contact.

(iv). Given the mother's repeated physical endangerment of the children, I could have ensured that that aspect would be brought to the attention of the relevant statutory agencies, but I didn't do that either, mainly because having heard from both parents and both grandmothers, there was quite a degree of consensus as to how to obviate such risks, which was certainly not by pursuing the idea of giving the mother primary custody, but by an elevated degree of closer supervision of her access.

(v). I was conscious that if the children end up being harmed during the mother's access due to her alcohol addiction it will be seen as being to some extent on me, but I was prepared to make an order for access for the mother all the same, albeit

supervised, in the interests of the parent-child relationship, which only illustrates the point that unless everything else counts for nothing, one is in the business not of risk elimination, but of risk management, and the risks are to be balanced against other important factors.

(vi). I could have made an order for the mother's access to be phased in, which is what the father initially wanted, but I didn't do that.

(vii). I could have put off the start of the mother's access, but on the contrary I provided for her first overnight under the order to commence less than 24 hours after the making of my order.

(viii). I could have awarded full costs, but I didn't do that either.

33. Bearing those factors in mind, and situating the question of costs in the context that parties must have some incentives to deal reasonably with the matters at issue, and to put forward reliable evidence, since failure to do so imposes unreasonable litigation costs on the other side, set against the backdrop of the father being almost entirely successful in having the order below affirmed, I consider that a partial costs order was neither punitive nor unreasonable.

34. When I announced the partial order of costs, it was suggested by the mother that an issue of law of public importance might arise. This slightly surprised me because during the argument, no particular issues of law were raised, whether of public importance or otherwise, and no statutory provisions, rules of court or case law were cited by either side. The question wasn't presented, and nor did I particularly consider I was deciding it, as turning on a major issue of law. No such question was identified, but rather one that turned on the specific facts of the case. The fact that a party is impecunious or is on legal aid has never been an absolute bar to a costs order.

35. The nearest thing was the suggestion that a cost order would be an interference with the mother's right of access to the courts, but that is a misconception. Parties are free to litigate and free to appeal where the law so allows and indeed the nature of family law is such that an excessive degree of litigation is at times facilitated by the very open nature of the court's jurisdiction. But while a party does have a right to litigate, that must not be confused with a right without consequence to cause another party to be compelled to incur more litigation costs than are necessary.

36. My preferred option would have been to stay the partial costs order until the house is sold, but for some reason the mother didn't want me to do that, so I didn't. But if she changes her mind, the order hasn't been perfected yet, but in any event the court retains a jurisdiction to stay its order after the event even when it might otherwise be *functus officio*, so I remain open to entertaining any such proposal if made.