THE HIGH COURT

CIRCUIT COURT APPEAL

DUBLIN CIRCUIT **COUNTY OF THE CITY OF DUBLIN**

Rec No. [REDACTED]

[2024] IEHC 568

BETWEEN:

A. F.

APPLICANT

-AND-

N. D.

RESPONDENT

EX TEMPORE Judgment of Ms. Justice Nuala Jackson, delivered 16th of January 2024

Introduction

1. The matter that is in today for my *ex tempore* judgment relates to the motion which was brought on behalf of the Respondent/Appellant, which is a motion dated the 5th January 2024, which was returnable for the 12th of January 2024. That motion sought 5 substantive reliefs. I have already made an order in relation to relief at number 5 which concerns the release of the DAR in respect of certain hearing dates as set out in the motion. In relation to the other reliefs that are set out in it, I am first going to indicate my determination in relation to them and I will then give my reasons in relation to it.

2. Before I do that, I note that the Notice of Motion is framed in terms of seeking these orders pursuant to the inherent jurisdiction of the court and I am mindful that, in the course of argument, it seemed to be accepted by both sides that I had an inherent

jurisdiction to make orders in the context of the Guardianship of Infants Act 1964. In relation to that, I have some doubts as to the inherent jurisdiction of this court in the context of making the reliefs sought and I am going to deal with that matter first.

3. In normal and usual parlance, the concept of the inherent jurisdiction of the High Court is understood to mean a broad jurisdiction vested in the High Court, as a court of original jurisdiction, to make a variety of orders in that context. However, it is well known to all the parties that, in this case, this Court is not sitting as the High Court, sitting as a Court of first instance, but rather is sitting as the High Court on appeal from the Circuit Family Court and the circumstance in which jurisdiction is vested in this court when a matter comes before this court by way of appeal, is in the context of Section 38 of the Courts of Justice Act 1936, which says that:

> *'38.- (1) An appeal shall lie from every judgment or order (other than judgments and orders in respect of which it is declared by this Part of this Act that no appeal shall lie therefrom and judgments and orders in respect of which other provision in relation to appeals is made by this Part of this Act) of the Circuit Court in a civil action or matter—...*
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> *(2) Every appeal under the section shall be heard and determined by one judge of the High Court and shall be so heard by way of a rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made*.'

Therefore, in these circumstances, this court sits as the High Court sitting by way of an appellate court from the Circuit Court, exercising the jurisdiction set out in Section 38 of the Courts of Justice Act 1936, rather than exercising the High Court's originating jurisdiction which would arise when sitting as a first instance court.

4. In those circumstances, I have sought to investigate from where the jurisdiction currently being invoked is derived and it is my view and I am satisfied that I have jurisdiction to deal with this motion and, indeed, to make the orders that are sought in

the motion in the context of the decided cases and the law generally as detailed hereinafter.

5. First, one of the issues that was raised in the submissions made related to the circumstances in which this court could retain a jurisdiction or a seisin of this case after the hearing and of course it should be noted that the reliefs that are being sought and the authorities that were open to the court in relation to these reliefs were based on Section 39 of the Courts of Justice Act 1936.

> '***39.***—*The decision of the High Court or of the High Court on Circuit on an appeal under this Part of this Act shall be final and conclusive and not appealable*.'

Therefore, essentially, the submissions that have been made relate and deal with circumstances in which, notwithstanding such finality and conclusiveness as provided for in Section 39 of the 1936 Act, it is open to the court to nevertheless reopen a matter. I have no doubt concerning and I do not in any way take issue with the authorities that were opened to me in this regard by the moving party. It is clear that there is an exceptional jurisdiction in terms of reopening or reconsidering a final order and I have no doubt as to the existence that jurisdiction as set down in ***Re Greendale Limited (No.3)*** [2000] 2 IR 514 and, in the context of the submission made to me, based upon ***P v P*** [2001] 9 I.C.L.M.D 96 in the *dictum* of Murray J and, of course, most helpfully in the recent decision of Simons J in ***G v A Judge of the District Court*** [2023] IEHC 386. However, in my view, the threshold of a 'special or unusual circumstance' is not met in this case, and I will indicate why in due course. While I am not of the view that that standard is met in this case, in any event, I do not believe that that line of jurisprudence is in fact applicable or appropriate in this case because there is no final and conclusive judgment that has been reached, but rather this court heard the appeal and made interim orders, putting the matter back for review.

6. I should say at this point, I took that course of action of putting this matter back for review and making interim orders, influenced by two very significant factors. First, I was requested to do so by the Respondent to the appeal, the applicant in the

proceedings, and, the Appellant/Respondent having not participated at the hearing, I therefore did not receive any opposition to that course of action. I also acceded to the application on behalf of the Applicant/Respondent to retain seisin and review the matter in the circumstances where the Respondent/Appellant had not participated and I remain of the view, as I have expressed previously and indeed as recently as yesterday, that the best interests of these children and their welfare requires the input of both of their parents and, therefore, I was anxious, in circumstances where the matter was proceeding in the absence of Ms. D, to have a situation whereby she would have an opportunity to deal with the matter on a review hearing and, indeed, in the circumstances where this court determined that it would be appropriate that there would be an assessment carried out by a psychologist, which assessment is underway.

7. As to the jurisdiction to so I am relying on the judgment of White J. in ***LT v JT*** [2012] IEHC 588, in particular I make reference to para. 21 and following of that case. This was a situation where the judgment deals with the concerns and issues that I have indicated at the beginning of this *ex tempore* judgment in relation to the inherent jurisdiction of this court when it sits as an appellant court. In relation to the query as to the jurisdiction vested in this court as an appellate court to deal with matters other than by way of final order, I would refer to paras.21 - 24 of White J's judgment in ***LT v JT***,

> '*21. A discretion always rests with the court dealing with custody and access disputes pursuant to the Guardianship of Infants Act 1964, to retain seisin of a case for the purposes of reviewing orders already made, once it reserves its position by either granting liberty to apply, indicating that it will retain seisin or indicating that it will review certain matters or deal with certain matters in default of agreement*
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> *22. Any court however in exercising its jurisdiction to consider an application to vary a custody or access order, at all times having the welfare of the child as its paramount consideration must be careful to ensure that fair procedures are followed, and the jurisdiction of the court is not abused.*

23. Where possible a party dissatisfied by an order of substance, should have a right of appeal.

24. Discretion must rest with the court of final appeal, in this case the High Court on appeal from the Circuit Court, to accept jurisdiction to re-open matters it has recently decided.'

White J. was sitting as an appellate judge from the Circuit Court in the case in question. The jurisdiction which I exercised in relation to retaining seisin and review is based on the jurisdiction clearly envisaged by this court in ***LT v JT*** decision.

8. In those circumstances, it is quite clear to me, albeit not part of the inherent jurisdiction of this court, that it is open to this court and I am prepared to make an order permitting the Respondent/Appellant, Ms. N.D., and such further other witnesses may be necessary, to tender evidence before this Honourable Court in the within appeal. Of course, that is something that is open to Mr. F as this matter is going to be in for review and it will therefore be open to Mr. D and, indeed, open to Mr. F, in that context, to tender evidence, whether from themselves or other witnesses before the Court, in the within appeal.

9. A further issue was raised in the submissions that were made in relation to the jurisdiction of this court and this relates in particular to the order which is sought at No. 4 in the Notice of Motion. The jurisdiction of this court in relation to the post-judgment orders was questioned. The matters that were before this court are those which are set out in the pleadings of the parties. In those circumstances, the orders which are sought in the Defence and Counterclaim are not particularly germane to the issues, but the orders that are sought in the amended Family Law Civil Bill, are orders relating to custody and access. Perhaps slightly unhappily phrased, the amended Civil Bill asked for an order for joint custody pursuant to Section 11 of the 1964 Act and an order for joint access pursuant to Section 11 of the 1964 Act and in those circumstances, it clear that the matters before this court were matters pertaining to custody and access as between the parents, either or both of them, and the children concerned.

10. In relation to the jurisdiction of this court under Section 11 of the Guardianship of Infants Act 1964 to have broader jurisdiction or an "inherent" jurisdiction (I use the term inherent in the context of being at large based upon the provisions of S.11 of the 1964 Act as amended), I think there is some merit to the submissions that are made, that the jurisdiction of this court in that context is extremely curtailed. In that regard, this is a matter which was addressed in the Court of Appeal in ***RL v Her Honour Judge Heneghan*** **& M.M** [2015] IECA 120. In that case, the Court of Appeal made it very clear that section 11 of the 1964 Act and the jurisdiction of the court hearing a matter pursuant to that statutory provision was curtailed by the reliefs that were sought before it. In this instance, reliefs relating to custody and access are sought. However, in relation to the post-judgment matters, I would refer to para. 26 of the judgment of the Court of Appeal.

> *'26. We do not doubt, of course, that there may be exceptional cases where the court might have to act immediately in order to safeguard the immediate welfare of the child so that an interim order might be required. Nothing of the kind arose here. Even then, where the court was required by circumstances to intervene in such a fashion, it would nonetheless be obliged to ensure that fair procedures were subsequently observed and the interim order made for the shortest possible period: see generally DK v. Crowley [2002] IESC 66, [2002] 2 I.R. 716.'*

In this particular case, I believe that these two requirements were satisfied i.e. the orders made were within the pleadings and the exceptional case scenario referenced in the Court of Appeal decision above were engaged. This matter came before me in the last quarter of 2023 for the purposes of giving judgment in relation to the appeal which I had heard. The event of giving judgment was attended by the Applicant/Respondent. It was not attended by the Respondent/Appellant. The *ex parte* application of the Applicant/Respondent was based on oral testimony heard by the court and this court was of the view that there were serious welfare issues arising in relation to the children. It was my view that there were exceptional circumstances which required steps to be taken to safeguard the immediate welfare of the children concerned. In that regard, leave was granted to issue a motion. No orders were made but rather leave was granted

to issue a motion, with short service, upon Ms. D being a motion seeking the production of the children and, in default, that a production order would be made. The concerns of the court in relation to the requirement to act immediately to safeguard the immediate welfare of the children were such that, in the view of the court, that requirement was engaged and was engaged still further on the date when the motion was returned before me. Not only was there no appearance by the Respondent/Appellant in relation to the matter, there was an Affidavit sent to the Court sworn by her, which Affidavit heightened the concerns to a very significant degree. It must be borne in mind that in that Affidavit no effort was made to address the issues which were known issues of concern, namely the place of residence of and whereabouts of the children. It was amply clear from the note of the evidence given by Mr. F that that was the issue which was engaged and the Affidavit, completely in reverse of dealing with these concerns, in fact did not indicate the whereabouts of the children, indicated that there had been a change of residence and, of greatest concern, made it quite clearly that it was the view of Ms. D that this was none of the court's business. So therefore, it is my view that the exceptional circumstances justified the making of the order and, of course, they were made for the shortest possible period of time, with orders being made on a Friday, returnable for the following Monday, at which point there was still no appearance by Ms. D. It will be remembered that the matter was put back from the Monday to the Wednesday to allow for engagement and to ensure that full information was given and that there was full knowledge of what was happening with notification provided at all times. The subsequent adjournment was on the application of Counsel who had come into this matter on behalf of Ms. D and, indeed, I want to indicate the significant help and assist that has been afforded to the Court by Counsel for the Respondent and their instructing solicitor, in advancing this matter.

11. Therefore, in my view, I am refusing the relief sought at number 4 because I believe there was a very real safeguarding concern which this court had in relation to the immediate welfare of the children and everything thereafter was done on full notice and indeed for the shortest possible period and I believe it to be entirely proportionate and in accordance with the direction of the Court of Appeal in the ***RL v Heneghan*** decision.

12. In relation to the reliefs sought at 1 & 3, which are the only two remaining, I do not believe that there is any requirement for an order to reopen the hearing of this appeal because the situation that arises that there have been no final orders made. Therefore, it is not necessary to show an exceptional circumstance such as is required in ***Re Greendale*** or indeed in ***G***, because the position in relation to it is that the order of this court itself indicates that the orders are merely interim orders and that this is a matter that will be reviewed as soon as the report of Dr. Byrne-Lynch is available and, of course, as previously indicated, that is a process and a manner of progressing appeal proceedings that is clearly envisaged in ***LT v JT*** decision. In the context of the review, I have indicated that I am prepared to make an order pursuant to number 2 of the motion. In relation to the matter at number 3 in the motion, that is setting aside the unapproved judgment or parts thereof, I am refusing that relief because to do so would be to indicate that this court is of the view that the hearing ought not to have proceeded when it was listed for hearing. The position in relation to this case is: this matter came into the callover list on the Monday of that week (4th December 2023), when it was listed for hearing in the usual way. A medical report was proffered to Jordan J. in that context to ground an adjournment and Jordan J. indicated that an adjournment was not being granted on foot of it. The position then was that the matter came before me in relation to the hearing on the assigned date in December. The situation insofar as that date is concerned, in fact, it is fair to say that no application for an adjournment was ever properly advanced before me. The situation in relation to this matter was that the medical report which had been produced to Jordan J. the previous day which caused him not to exceed to an adjournment application was submitted to the court by email, which of course is not an application in the normal way. However, the situation was that in circumstances where the medical report was before the court, albeit in an irregular fashion, the court entertained it. The court considered it and having heard the position of the Respondent/Applicant, it was quite clear that the report was not being admitted and that it was necessary for, as is the case with any written document or report which is contested, it was required to be proved. Opportunity was given for the doctor in question to attend remotely, opportunity was given to the Appellant/Respondent to appear remotely, a deferral of a commencement of the case was put in place for twenty-four hours to allow that application to be made and no application was made. There was no attendance by the doctor concerned. The position is that the report of the 30th of November 2023 does not at any point say that there is an inability to attend court, it is

extremely sparse and, indeed, I have dealt with the deficiencies in it in my written judgment in relation to this matter. I do not need to rehearse them here.

13. In the context of this motion, I was provided with a more expansive report from the doctor concerned. It does not, and I think this has to be remarked, at any point say that on the dates relevant to the hearing of this matter, it does not refer to an unfitness to attend court. Indeed, I note that in the more expansive report, the furthest it goes in relation to the matters at the time of the hearing is that it says, based on a consultation on the 30th of November 2023, a letter was given in support of needing to try to avoid stress for now. That is the furthest that it goes and it does not say at any point (in dealing with what the doctor was saying on the 30th of November or indeed on the 6th of December and it is noteworthy that the first day that this case managed to be heard was the 6th of December) anything relating to curtailments on conduct or behaviours. Indeed, the most that is said in relation to advice on the day when this matter is being heard, it says there was '*slight dizziness, advised must start to address her own health issues and encouraged re weight loss and exercise again*.'

14. This court and all courts are obviously are minded and will entertain sympathetically applications for adjournments based on ill-health where they are (a) made and (b) grounded on the appropriate evidence. Neither of those features were adhered to or would appear to arise in this matter and we must be mindful that court time, court procedures are important and are valuable and, of course, the Respondent to the appeal was here and was ready to run the case concerned. As I say above, one of the guiding features in my judgment herein was the fact that it was sought by Mr. F that there would be review but, also, that in putting this matter for a review, I was mindful of the fact that this would give Ms. D an opportunity to engage at the review hearing and that is a matter that she will be in a position to do. Indeed, I encourage her to do so fully. I think she appreciates that I am a person who listens. I am a person who wants to hear all of the information in relation to this matter because it is my fundamental aim in this case to ensure that we set the children off on the very best path in life and that we try and facilitate an arrangement whereby their parents are able to give to them of their parents' best. Therefore, I am granting the order permitting the Respondent/Appellant and such

other witnesses as may be necessary to tender evidence before the Court within appeal and that will happen in the context of the review date, which as I indicated to you yesterday, I intend to fix a date in that regard at the earliest possible opportunity after the report of Dr. Byrne Lynch is to hand.

15. I am refusing the other reliefs save I have already made the order under number 5.

16. I am reserving the costs in relation to this motion to the determination of the review in relation to matters.

The reference to Section 14 of the 1964 Act and the production order involved.

17. I agree with Counsel for the Respondent's submission in relation to Section 14 of the Act. It does not appear to me, on its straightforward language, to be applicable. It essentially says that where a parent of a child applies to the court for a production order, and the court is of the opinion that that parent has abandoned or deserted the child or otherwise so conducted themselves, the court should refuse that order. It essentially says that a parent who in fact has abandoned or deserted a child cannot then come seeking a production order. In fact, I think it is fair to say that it would be generally accepted that production orders, *inter* parents of a child, are essentially in the Section 11 arena. In relation to Section 14, there is a very good discussion of this in Mr. Shatter's book at page 569 and following. He, referring to Part 3 of Guardianship of Infants Act 1964 and the power of the court in relation to the production of the child, refers to the fact that Part 3, in essence, is to re-enact the Custody of Children Act 1891, and that it is primarily relating to disputes between parents and third parties. That is not to say that in the event that a parent who had abandoned or deserted a child brought an application for a production order as against the other parent, section 14 would not be engaged, but this is not such a case. I think the commentary of Mr. Shatter at page 569 and following in relation to the historical origins of Part 3 of the act, is useful and provides interesting reading.

18. I indicated yesterday that I would give judgement today in relation to arrangements pending the review hearing. It was indicted to me by Senior Counsel for the Applicant at the start of our hearing yesterday that there had been some discussion between the parties and that it might be of some assistance for me to indicate whether I envisaged that there would be overnight contact restored to Ms. D at this time. I want to be very clear that I am not avoiding making the overall decision in relation to arrangements to continue in the short term, I am quite happy to make such decision. However, I have thought about this long and hard and I believe that if it was possible at all for these parties to agree on something, if it was possible for their co-decision making relating to the children, even on a modest level, to prevail, I think that would be a big step down the road in this case. If this cannot be achieved, I will do it. In order to assist in advancing such co-decision making, I am indicating that I believe at this stage that overnight contact and care of the children should be returned to Ms. D. I do so indicate because Mr. F and Ms. D need to be afforded every possible support to make their own decisions, as opposed a decision being imposed upon them.

Interim Access Order

19. My reasoning for the interim access orders pending final review is based on many factors including Mr. F's work commitments and, while obviously I do appreciate that everybody has to work, I am also mindful that this is going to be for a relatively short period of time and is addressing the exceptional circumstances that have arisen in this case. I am also mindful that there are two small children and that while, for adults, the journey between [REDACTED] and [REDACTED] may be a short one, for small children of their age, the journey does seem to me to involve, with the potential of traffic delays, a travel time which is quite high so far. As I understand it, everything is agreed except in relation to the ending of the Monday arrangements and it has been indicated to me, by Counsel, that their clients are happy that I would determine that issue. So therefore what I am going to determine is that (there is an order for joint custody already in existence) the orders that are in being consequent upon my order in relation to not taking the children outside of the jurisdiction and notification of the Ports and Airports, all of those remain in being. All I am doing is setting out the interim arrangements for the children pending the review.

20. By consent, the children will go to their mother at 8:30 on a Monday morning. She will collect them from [LOCATION REDACTED]. That visit (I am not calling any of it access or anything, I am calling it arrangements) will continue until Tuesday morning until 8:30 am when the mother will return the children to Mr. F again at [LOCATION REDACTED]. That relieves Mr. F of the burden of travel entirely in relation to that journey in circumstances where I am told that Ms. D is not working at the moment and Mr. F's work commitments are more onerous.

21. By consent, the further arrangement is that the children will be with their mother from Thursday at 9am, she will collect in [LOCATION REDACTED] until Saturday at 11 am when Mr. F will collect them from the apartment in [REDACTED].

22. Those arrangements to continue until the resumed hearing which will be listed on as early as possible a date, after Dr. Byrne-Lynch's report comes to hand.

23. Liberty to apply.

24. I am content that an agreed letter would be sent, which would simply inform Dr. Byrne-Lynch of these arrangements, and it is for her to do what she believes necessary in relation to her assessment arising from these arrangements.