[2020] IEHC 432

**THE HIGH COURT**

**FAMILY LAW**

**[2018 No. 5 M]**

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

**BETWEEN**

**B.C.**

**APPLICANT**

**AND**

**P.K.**

**RESPONDENT**

**EX TEMPORE JUDGMENT OF Mr. Justice Jordan delivered on the 17th day of June 2020**

1. This matter comes before me pursuant to a notice of motion returnable to the 10th February last and in which the respondent father of the children requests, firstly, that the proceedings be re-entered and, secondly as the substantive relief, an order under s. 11 of the Guardianship of Infants Act, 1964 (as amended) dispensing with the consent of the applicant for the children, namely, J. and R., to attend with Professor S. for the purpose of ongoing therapeutic care as deemed appropriate by Professor S.

2. The position in relation to the matter is that Professor S. was previously involved after an order was made under s. 47 of the Family Law Act, 1995 (as amended) and he prepared a report in accordance with that s. 47 court order.

3. J. is thirteen years of age and R. is ten years of age. The mother, the respondent to this motion is agreeable that the children attend at an appropriate professional for ongoing therapeutic care but she disagrees with Professor S. being involved.

4. The position in terms of the background is that judicial separation proceedings, as a result of which a decree of judicial separation and ancillary relief were granted, were resolved by a settlement arrived at between the parties and ruled by this Court before Faherty J. on 3rd April, 2019. The Court Order was made at that time and included orders relating to J. and R. (the children) and further orders in respect of custody and access in respect of both of them were agreed and ruled before this Court, Faherty J., on 11th October, 2019. It was in the course of those proceedings that the s. 47 order was made and Professor S. prepared two reports, one on the 19th November, 2018 prior to the Decree and Ancillary Relief Orders, and one on the 18th June, 2019 prior to the most recent court orders concerning access on 11th October, 2019.

5. It is obvious that the applicant and the respondent, the father and the mother, and the children, attended at Professor S. on a number of occasions for the purpose of his preparation of the s. 47 report. The orders which were made in respect of the children in large part reflect the recommendations made by Professor S. in the s. 47 reports. He also recommended an ongoing review mechanism. However, the position is, as averred to by the father in his affidavit sworn on 21st January, 2020, that the ongoing review mechanism advocated for by Professor S. did not form part of the terms of settlement

agreed between the parties. It is also important to point out that the father includes in para. 8 of that affidavit an averment at the end which recites as follows:-

> *"I also acknowledge that the applicant [that is the mother] did not wish to personally engage further with Professor S. but the ongoing reviews with the children with Professor S., the subject of this application, will not involve either your deponent or the applicant albeit I am happy if required to attend with him in the best interests of the children".*

6. The emphasis I place on that averment is that the father was aware at the time of the settlement and at the time of the previous orders of the fact that the mother did not wish to personally engage further with Professor S.

7. I have read carefully the booklet of motion papers running to one hundred and twenty-four pages and the booklet of correspondence and some additional correspondence added in running to forty pages approximately. It is abundantly clear that the mother has no desire to see Professor S. involved further with her or the children. The mother is entitled to have a view in that regard despite the fact that Professor S. is well known to the court and has produced in this case and many others excellent reports. He is extremely helpful in providing practical solutions to difficult problems concerning custody and access issues with clear recommendations at the end of most of his reports. I cannot alter the mother's view or perception of Professor S. and his involvement even if she may be entirely incorrect in the view which she holds.

8. Although the mother, through her solicitors, provided the names and addresses of three alternative counsellors, the father did not engage with her suggestions in that regard and, instead, issued this motion which is before the court today.

9. I have said already that I consider this motion to be singularly unwise. It is the position that the Court has jurisdiction to make an order such as the order sought in the motion and there might be circumstances in which a court would be persuaded to do so. Those circumstances have not been proved in this case. It seems to me that as a matter of practice, it is unwise and undesirable to have a person who is the author of a report prepared pursuant to a court order made under s. 47, or similar provisions in other legislation, involved in subsequent counselling or therapeutic care of the children or child, the subject matter of the s. 47 report.

10. Firstly, an expert who prepares a report under s. 47 has a unique status, perhaps not entirely unique but a special status, as an independent expert reporting to the court. It is the position that one potential candidate, as set out by Abbott J. in *A.B. v. C.D.* [2011] IEHC 543, declined to engage for the purposes of preparing a s. 47 report because she had been involved as a counsellor to the children before the request was made of her or the suggestion was made to her.

11. The position of that individual is different to the position we have here in that the order sought would mean Professor S. would be involved in therapeutic care and counselling

after the preparation of the reports which were submitted to the Court. But the point remains valid; that being that a person involved in counselling should be different to a person preparing an independent expert report under s. 47 of the Family Law Act 1995. This is all the more so when allowing Professor S. to be involved in a counselling or therapeutic role although he has previously prepared reports under s. 47 could create problems in the future which are entirely avoidable. These children are young and there is still significant conflict between the parents involved in their co-parenting regime. It is not beyond the bounds of possibility that a dispute concerning custody or access could arise at a stage in the future when the Court would be asked to direct a s. 47 report. If Professor S. is at that time still engaged in the preparation of such reports, then he would be the obvious choice to prepare a report if the Court required one in the future. But if, in the intervening period, he has been involved in counselling and in the therapeutic care of the children, then:

(a) a significant difficulty arises concerning he giving evidence about his previous involvement;

and

(b) a real, and insurmountable difficulty would exist concerning his appointment for the preparation of a report after being involved in counselling and therapeutic care of the children.

12. So it seems to me from a practical point of view and applying good practice in terms of making an order which will impact upon the welfare of the children everything contraindicates making the order sought by the father on this application.

13. The point which the father has to make concerning Professor S.'s involvement and knowledge of the case is an argument in favour of the making of the order but it is also an argument against the making of the order.

14. Ultimately, insofar as the application is concerned, it is in my view unfortunately the position that the father well knew and has known for a long time now and has deposed to it on affidavit of the mother's position. He describes it - " (She*) did not wish to personally engage further with Professor S*.". Despite knowing of her position in that regard, he has sought to persuade this Court to make an order which would involve Professor S. in counselling and therapeutic care when the mother of the children, with whom they are living 50% of the time or thereabouts, is totally opposed to it.

15. I am not entirely sure as to the undercurrent which persuaded the father that it was appropriate to make this application but some feeling of that undercurrent can be gleaned from the correspondence passing between the parties in relation to the application. It is very difficult not to conclude that the father made a decision that he was going to try and force the issue regardless of the consequences when he ought to have known that pressing this issue at the very least would cause a tension in the family and in the home where the children are living for 50% of the time with their mother, and which could be

avoided easily by another counsellor being selected. This is all the more unfortunate when Professor S., way back in his first report dated 19th November, 2018, dealing with support and monitoring in the final paragraph of his report says that the parents "should attend the undersigned or some other suitable professional person with the children once every six weeks over the next eight months" with a view to ironing out any difficulties with respect to the order implementation and/or dealing with any unanticipated challenges that might arise. So even at that time and in the context of that report, and in the context of that paragraph which I accept is somewhat different to the reason for this application, and matters have also moved forward in time, Professor S. did not see the need for him to be the person who would be involved in ongoing support and monitoring as he described it at that time.

16. Mr. Aylward, B.L. is correct that there is not a provision in the legislation that would preclude Professor S. counselling the children and being involved in their therapeutic care. However, it is common sense, for the reasons I have set out and I expect for a number of other reasons which I have not touched upon, but it is common sense looking at the facts of this case, that the author of a s. 47 report should distance themselves, himself or herself, from counselling or therapeutic care because to do otherwise could impact upon their independence in terms of executing their role under section 47.

17. In the circumstances, I am dismissing the application of the father. If I have not already done so, I will make the order re-entering the proceedings. I will refuse the order sought at paragraph 2. I will direct that the parties engage with a view to agreeing an alternative counsellor and that such engagement and the decision in that regard take place within fourteen days of today's date.

**Costs**

18. I have heard what the parties have said in relation to costs. The respondent to the motion is seeking her costs. The applicant says that an order for costs ought not to be made and that the usual rule applied in family law proceedings ought to be applied, that is, that there ought to be no order as to costs. Firstly, I have already said that I believe that this application is singularly unwise. Secondly, the notion that there should be no order as to costs in family law proceedings as a standing protocol is a myth. It is a view which McKechnie J. has dealt with in some detail in *B.D. v. J.D.* (unreported, High Court, 4th May 2005) and which is quoted in the recent judgment which this court gave in *B.R. v. P.T.* [2020] IEHC 205. It is the position when a court is dealing with substantive proceedings involving a resolution of a dispute concerning matrimonial assets owned by either one or both of the parties following a relationship breakdown that it will ordinarily make no order as to costs. This is so in circumstances where the Court, will in the ordinary course of events, have regard to the cost of the litigation in deciding the issues in the case including the division of the matrimonial assets. There is frequently evidence given in relation to those costs in the substantive proceedings. But where applications, such as motions of an interlocutory nature or applications such as this, after the resolution of matters, are made or brought, then the court is entitled to exercise its discretion in relation to an award of costs in the ordinary way. It seems to me, that in an

application such as this, the court needs to be persuaded to depart from the position that costs ordinarily follow the event if it is to decide to make no order as to costs.

19. There is no good reason in this case not to award costs against the moving party, the applicant father. I am awarding the costs of defending the application to the respondent mother with an order that those costs be adjudicated in default of agreement.