An Bord Um Chúnamh Dlíthiúil
Legal Aid Board
Providing access to justice since 1979

Legal Ease

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Note from your Editor

Review of Cases – 2020

Despite the impact of COVID-19 on the courts in 2020, The Superior Courts still managed to deliver judgments in a considerable number of cases. This edition of Legal Ease sets out the main points from the majority of decisions which are of interest to the Legal Aid Board (some of the cases are from the latter part of 2019).

The issue of Wardship and hospital detention is discussed extensively by the Supreme Court in AC v Hickey; AC v Fitzpatrick. There is interesting comment here about the lack of legal aid in Wardship proceedings. The law on Adoption was teased out in the High Court in a number of judgments. In particular, the case of CFA v GK & CK, Jordan J. is critical of the manner in which the relationship between the birth mother and the child was managed by the CFA and the failure to nurture that relationship.

We are reminded in the case of BR v PT that proper provision is not an equal distribution of wealth. The impact of behaviour was commented on by Barrett J. in M v S and that raising issues of an intimate nature is not endorsed. The case of Y v X highlights the intolerance of any excuse for domestic violence and/or attempts to disparage another spouse due to their mental illness is completely rejected. A number of cases dealt with the issue of access and the notion of a 50/50 split not being upheld as a general ideal.

Child Abduction cases still represent a large proportion of the family law cases and the issue of the impact of the pandemic was rejected by the Court of Appeal as being a sufficiently high threshold to constitute grave risk.

Cases involving re-location are decided only on the best interest of the child and the case of LD v ND examined this principle in full.

The issue of psychological/psychiatric evidence is looked at in a number of cases. In BC v PK it is noted that an author of a section 47 report should not provide therapy to the parties and should distance themselves.

The Domestic Violence Act, 2018 is looked at in some detail in X v Y by Barrett J. and his comments will be useful in applications in the lower courts as it is clear that any form of Domestic Violence, whether real or threatened is never acceptable.

The case of J v CFA looks at historical sexual abuse and the procedure for investigating this pursuant to the 2014 Policy and Procedure of the CFA. This case and the case of CD v CFA are both strong authorities for upholding fair procedures in any such investigations.

It is hoped that practitioners will glean some assistance from these recent cases and be able to use them as persuasive authorities in the cases we run.

Catherine Ryan (Editor)

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1. Wardship

AC v. Hickey & Others; AC v. Fitzpatrick & Others [2019] IESC 73 (17th October 2019)

This Supreme Court judgment is important and offers guidelines for any hospital where someone wishes to leave against the hospital's advice and that person lacks capacity. Comments were made in the judgment as set out below regarding the provision of Legal Aid to challenge Wardship proceedings or have a Guardian ad litem represent their views.

"*Moving on to Mr. C.'s appeal, I have found that the procedures applied to the making of the wardship order in August 2016 were flawed in that Mrs. C.'s fair procedure rights were not vindicated. The notice given of the hearing date was, I believe, too short. She should have been furnished with the evidence that was to form the basis for the Court's decision, and should have had an adequate opportunity to challenge it. The absence of legal aid for such cases is a matter of real concern, given the consequences of a wardship order, and it seems to me that if a person is not in a position to get legal representation it may be necessary to appoint a guardian ad litem to protect her interests.*"

"I am conscious of the fact that, in making the order that he did, Kelly P. was already aware of both the medical evidence and the personal circumstances of Mrs. C. However, he had not, at that point, heard what might have been put forward on her behalf by someone who was not, unlike Mr. C., personally embroiled in the situation. It is essential that the voice of the individual be heard in the process, and if she cannot speak for herself then some person must be found, who is not otherwise involved in any dispute, who can speak for her."

This case had involved numerous proceedings, the basis of which were disputes over medical treatment for an elderly woman where two members of her family disagreed with same and the nurses and medical staff of two different hospitals who were responsible for her care. The HSE brought Wardship proceedings and one of the lady's sons brought three Article 40.4 applications in his mother's name seeking release of his mother from the hospital in which she was resident in.

Firstly, the constitutional guarantee of the right to liberty of all persons including those whose capacity may be impaired and secondly whether the actions taken sufficiently safeguard and vindicate those rights, is examined.

With regard law on Wardship the Court notes the position that there is no provision for legal aid or advice and Wardship hearings are not covered by the Civil Legal Aid Act or the Custody Issues Scheme (both administered by the Legal Aid Board). The Court goes into some detail examining European Court of Human Rights Authorities and the law relating to deprivation of liberty in accordance with Article 40.4.1.

The interaction of European Court jurisprudence is noted:

"it must be remembered that the European Court does not take the position that the Convention should be applied in Member States as a surrogate constitution. It is not intended to weaken rights established in national law, and is primarily concerned with ensuring the application of minimum standards rather than with imposing uniformity".

The Court outlines that firstly they must answer the question whether the lady herself wanted to leave the hospital or whether the family members may have wanted to

remove her. The Court notes that this was never fully considered in the lower courts.

Question 1: Was she deprived of her liberty?

Question 2: If she was, then is it in accordance with the law?

In answering these, the weight to be attached to the wishes of the patient and the process can be ascertained.

Question 1: Yes she was detained *"she was not free to leave*" "the measures taken involved restraint, pursuant to which she was kept in a hospital for an indefinite period under the control and supervision of those caring for her".

Question 2: Is the position altered because she did not have capacity, answer: No

"*to hold that persons cannot be found to be detained if they are not capable of making a valid decision to leave for themselves, or if they are not aware of or able to object to their situation would not simply permit restrictions on their freedom of movement for their own protection. It would also have the far-reaching consequence of denying to vulnerable persons in this category the benefit of constitutional guarantee that they will not be deprived of their liberty unless otherwise than in accordance with law".*

The issue of the discharge of a patient from hospital was examined and how the duty of care of the hospital extends to this scenario.

"the duty of care extends to a requirement in a discharge context to ascertain in the first instance whether the patient actually wants to leave, and has given some consideration to the consequences rather than simply facilitating departure on the spot. If hospital authorities believe on reasonable grounds as a matter of fact third parties are unduly pressurising a vulnerable patient to comply with their instructions to leave, it must, I think, be illegitimate to prevent such departure for a brief period while the situation is assessed."

The hospital has no power to be substitute decision maker but it can act under the doctrine of necessity which is only a temporary justification of detention. In this case, two weeks before a Wardship hearing is in most cases too long.

The issue of C's voice in the Wardship was highlighted and noted that there is not necessarily a constitutional right to legal aid in Wardship (noting that this was not argued in this case) but there needs to be some mechanism by which her voice can be heard through a Guardian ad Litem or an expanded role of the general solicitor. There is reference to the fact that the medical evidence in the Wardship proceedings was not made available and refers to the *case of State (Gleeson V Minister of Defence, 1976 IR280 and the case of Kiely V Minister of Social Welfare, 1977 IR267) and State (Williams V Army Pensions Board 1983 IR308.*

"the entitlement to know the case against you is a fundamental part of the right to be heard, for the right to be heard would be of little value if the person concerned did not know the issues which might adversely affect their interest in the relevant decision making process".

The remainder of this Judgement sets out very useful parameters in circumstances that a hospital needs to follow in situations such as this and is a very useful case for all those involved in Wardship applications or hospital detentions.

The claim of unlawful detention was not upheld in the circumstances.

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2. Adoption

In the matter of a proposed Adoption of X (A Minor) [2019] IEHC 946 (22nd November 2019) Jordan J.

This case highlights the threshold necessary to invoke rights under Article 8 of the ECHR. The question necessary to answer is whether family life exists between the natural father and the child in this case and if so then Article 8 rights are engaged. There is reference to *O'Neill J in WS* case where a decision to exclude a father in adoption proceedings will be in breach of Article 8 unless:

"it is in accordance with the law in pursuit of a legitimate aim and necessary in a democratic society" and it was clear that a child's interest may override that of a natural parent.

In this case the threshold was not reached and the Court made the order to proceed with the adoption without consulting the natural father.

The Child and Family Agency v. GK and CK and The Adoption Authority of Ireland and Another [2020] IEHC 419 (23rd July 2020) Jordan J.

This was an application by the Child and Family Agency to dispense with the consent of the mother to an adoption by the foster parents pursuant to Section 54 of the Adoption Act 2010.

The mother here had a history of psychiatric illness she also had another child that returned to live with her full-time at age 14. The child, the subject of these proceedings had been with the foster parents since she was 4 days old and a full Care Order had been made up to age 18 with the foster parents obtaining enhanced rights pursuant to Section 43(a) of the Child Care Act 1991.

With regard to access between the mother and child, Jordan J. notes that:

"the right of a parent to have access with his or her child in care and the right of that child to have access with his or her parents are basic rights. Arranging such access will frequently present challenges and obstacles. The first named Applicant has an obligation to do all that it can to nurture on-going access and to nurture the relationship between parent and child even where the parent is unable to care for the child".

Jordan J is critical of how access was managed by the CFA and in particular there was no allocated Social Worker for a period of time. He also criticises the failure to nurture the relationship between the mother and the child. He goes on to note that the child has thrived in foster care and her foster parents are devoted to her and she was part of their family.

The failures by the CFA are highlighted:

"the birth mother and the child have rights in terms of their relationship and the first named Applicant has s statutory duty to have regard to those rights and to adhere to its statutory obligation. It failed to do so particularly in terms of it's interaction with the birth mother or lack of interaction. He does note that the adoption is important in terms of creating a sense of identity and belonging for a child. He refers to a submission on the Child Care Act 1991 that "in all but exceptional cases courts should set minimum access levels with their family and extended family when making Care Orders".

He is critical of the lack of follow-up or gaps in follow-up regarding the mother's psychiatric treatment or recovery. He also states that once a decision is made to adopt there should not be a delay on the part of the agency. The welfare of a child in an

adoption setting is over and above those in care proceedings.

The Judgement then goes on to discuss in detail the law in relation to the State's duty in adoption proceedings and it's interaction with child care proceedings. There is a 3 stage process set out by Denham J in *Southern Health Board V An Bórd Uchtála:*

1. Failure by the parent in their duty to their child;
2. Whether the failure would continue to age 18;
3. Whether the failure constitute abandonment.

The term 'abandon' does not have to mean intentional abandonment and refers to the case of *Northern Area Health Board V An Bórd Uchtála* and the right of children to the care and company of their parents as set out in *Chigaru and Others V Minister for Justice and Equality and Other 2015 IECA167 "it is clear that the right of children to the care and company of their parents is a core constitutional value which is inherent in the entire structure of Article 41, Article 42 and Article 42(a)."*

There is one over-riding test of best interest of the child. Reference is also made to the UN Convention on the Rights of Persons with Disabilities, the European Convention on Human Rights the case of *KT V Finland 2001* where the Court notes *"there is a positive duty to take measures to facilitate family re-unification as soon as is reasonably feasible. This positive duty became more pressing the longer the period of care lasted, subject always to it's being balanced against the duty to consider the best interest of the child". "…the minimum to be expected of the authorities is to examine the situation anew from time to time to see if there is any improvement in the family's situation. The possibility of re-unification will be progressively diminished and eventually destroyed if the* biological parents and the children are not allowed to *meet each other at all or only so rarely that no natural bonding between them is likely to occur"*. He also refers to a more recent case of *Pedersen and Others V Norway 2020* and *Strand Lobben and Others V Norway 2019 "the ties between members of a family and the prospect of their successful re-unification will perforce be weakened if impediments are placed in the way of them having easy and regular access to each other"* and *"where authorities are responsible for a situation of family breakdown because they have failed to take measures to facilitate family re-unification they cannot base their decision to authorise adoption on the grounds of the absence of bond between the parent and the child"*.

The Court holds that the efforts here of the Child and Family Agency were wanting with regard to family re-unification and the UN Convention on the Rights of the Child.

Having taken account of all of these measures the Court weighed up all of the factors and made the adoption order. In this case Justice Jordan met informally with the child who was almost eighteen years of age. It was clear to him that the child was unable to comprehend why the Court would prevent this adoption and the Court was satisfied that to do so would be a huge disappointment and blow to the child's confidence, in the circumstances the threshold for making an order pursuant to Section 54 had been satisfied but was very keen not to send out the wrong message that the failings of the Child and Family Agency could be tolerated and the making of the adoption order was an approval to the short-comings of the Child and Family Agency.

In the matter of the proposed Adoption of X [2020] IEHC 493 (5th October 2020) Barrett J.

This was an application by the Adoption Authority to approve an adoption order without consulting the natural father. The father here had very little contact with the child and the mother was consenting to the

adoption by the child's step-father. Barrett J referred to the law in this area and the attempts to engage and consult with the father and decided to make the adoption order. It distinguished this case from *Keegan* in the length that the Authority went to consult the father and that he was given time to apply for custody but did not do that and that it is in the child's best interest to make the adoption order.

In the matter of the Proposed Adoption of Y [2020] IEHC 494 (5th October 2020) Barrett J.

This was an Adoption by the husband of the natural mother where the father was not known or un-contactable. The adoption was approved and the case shows the very real humanity embroiled in these applications where Barrett J quotes from the mother's Affidavit

"I wish to state that Y coming into my life saved my life. I was off the rails (when younger). Becoming a parent to Y gave me a reason to transform my life for the better, so I could be the best parent possible for him and give him the best upbringing that I could. To this day he is and always will be the best thing that ever happened to me".

Barrett J notes here that *"there is real personal greatness in those frankly inspiring sentiments, and the Court feels privileged to read them".*

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3. Divorce/Judicial Separation

B.R. v. P.T. [2020] IEHC 205 (21st February 2020) Jordan J.

This was an appeal by a husband against an order for a judicial separation. The husband had also issued divorce proceedings. The Appellant was a lay litigant. There were numerous applications to court. The Appellant was seeking significant financial relief which he claimed was necessary to provide proper provision for him. In the course of this lengthy Judgement Jordan J finds the husband to have deliberately understated his assets.

The law regarding proper provision is discussed in detail re-iterating that the requirement to make proper provision is not a requirement for the re-distribution of wealth citing the case of *DT V CT 2002* in support. Where there has been a change of circumstances what affect that can have on a subsequent application to vary terms *"someone should not be compensated for their own incompetence or indiscretions to the detriment of the other party".*

Also the case of *CC V NC 2016* is noted. Proper provision is not an equal distribution of wealth.

The Appellant's assertion that the Respondent was subjecting the children to abuse was rejected as were the many assertions made regarding bias and false information by the Judge in the Circuit Court and the Respondent's legal team. The Court found that proper provision had been achieved and nothing in the intervening years had altered that position. The Court also did not entertain his request for a further Section 47 report.

Interestingly the Court made an order for costs against the Appellant as to not do so as he was a lay litigant would be extremely unwise and could encourage bad behaviour. Ultimately he was ordered to pay 20% of the costs.

H v. H [2020] IEHC 552 (10th November 2020) Humphreys J.

This was an appeal by the mother against a Judicial Separation order. The Court affirmed the order of the Circuit Court and

made an order of 50% of the costs against the Appellant which the Judge felt was necessary as a right to litigate brings consequences and the award of costs was in some way to address that. The fact that someone is on legal aid is not a reason not to grant an order for costs.

"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 of 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".

M v. S [2020] IEHC 562 (6th November 2020) Barrett J.

This was an application for divorce and ancillary orders. The couple here had been involved in property gambling and were severely affected by the 2008 property crash. The Applicant here departed from these property gambles and thereafter managed her finances more effectively than the Respondent.

The behaviour of the Respondent was noted in the number of court applications and Barrett J notes his mean-spiritedness and that he raised issues of an intimate nature that he should not have and quoting from the *Case of X V Y* :

"one does not squander all entitlement to privacy on entering a courtroom".

The Respondent was also found to lack candour with regard to his financial disclosure and as such the Court found his evidence unreliable. There were significant dealings in this case with creditors. Barrett J goes on then to consider the meaning of proper provision and notes that there is a lack of rules to define this concept. He looks to *Case WA V MA, 2005* and surmises that a more rules orientated approach would be better. He sets out the current law on proper provision which derives from Article 41 of the Constitution and the 1996 Act and the Court must take into account the factors set out in Section 20 (2) before making financial provision but with the further complication that the Court should not proceed to make an order unless it would be in the interest of justice to do so. A clean break is not established in Irish law but it is a *"legitimate aspiration"*. The position of the wife in the home is not a basis for discriminating against her and/or the financial consequences for either spouse have relinquished his or her opportunity of paid work during the marriage.

The date of valuation of assets is noted again to be the date of the hearing. The Court goes on to make a number of orders including that the family home be sold, that creditors be paid out of sale proceeds, an order for the sale of other property, maintenance order, declaratory orders in relation to property ownership, pension adjustment orders and lump sum financial orders out of sale proceeds.

Y v. X [2020] IEHC 611 (23rd November 2020) Barrett J.

This case arose from an appeal of a Judicial Separation Circuit Court Order but now proceeded on divorce in the High Court. The Court commented on the conduct of Y as *"disturbing, even frightening"* and states that *"there is no excuse, none whatsoever, ever, for domestic violence or the threat of domestic violence between intimate partners of whatever gender / sexuality (be they married, living together, or in some more casual relationship)"*. The averments by Mr Y as to Ms X's mental health are commented on "*First to seek to disparage someone by reference to his or her mental health is to proceed on the premise that fault / shame is somehow at play when it comes to mental health as opposed to any other form of ill health the Court unhesitatingly rejects that premise".*

The Court notes that Mr Y's behaviour is easily categorised as *"obvious and gross"* conduct as set out by Lord Justice Denning in the case of Watchel V Watchel 1973 as endorsed by Chief Justice Keane in the case of DT V CT 2002, the Court went on to make various Orders including a sale of the family home but placed a stay on same for some period of time while the children were still in school.

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4. Access

S.L. v. M.L. [2020] IEHC 203 (13th February 2020) Ex tempore Judgment of Gearty J.

This was application for an Isaac Wunder Order-an order to restrict and prevent access to justice without the Court's permission. It is noted that it should not be used lightly. This application was brought pursuant to an application for Judicial Review brought by the Applicant with the Respondent seeking the Isaac Wunder Order. The Court finds it noteworthy that there is a continuing failure to work together on any aspect of their child's welfare and this is deeply disturbing. The Court finds that the behaviour upon which the order is sought does not centre around the court proceedings. What is needed here is to prove *"habitual nature of the litigation"* In relying on the *Case of M(MvM) G 2015 IECA 29 Kelly J* noted *"if this part of the order is read literally it constitutes a denial of access to the courts on a most important question, namely infant welfare. Such denial is not in conformity with constitutional norms"*.

She notes there is no provision in the Irish courts to make an order preventing parties in family law to come back to court. However, she does note that if he were to challenge a further Section 47 report or another Judge's ruling then that might suffice but that it is not proven on the facts here. The Isaac Wunder Order was not granted.

A. v. B. [2020] IEHC 480 (24th September 2020) Barrett J.

This was an appeal by a mother seeking more access to her children. The mother here had a problem with alcohol and orders were made in the Circuit Court effectively preventing future access. An expert had been appointed who had recommended that the mother deal with her alcohol addiction and/or go into residential treatment. The Court notes a sad observation by one of the children that "*I don't think I've met my real mum, just the drunk one*". In discussing the fact that the child worries about her mother Barrett J notes that: *"these are not appropriate burdens to be placed on a now 13 year old child. Childhood is or ought to be a time of magic and marvel, not an exercise in endurance and worry, as regrettably is has too often been for Child X".*

The Court affirmed the order of the Circuit Court but amended it slightly. Attached to this order is a form of letter addressed to the Applicant and Respondent in plain English.

X v. Y [2020] IEHC 502 (9th October 2020) Barrett J. X v. Y [2020] IEHC 525 (21st October 2020) Barrett J.

This was an application for access by a father in respect of a three year old child. He was seeking an order for 50% of the time to be spent with him. There was no expert evidence presented to the Court, which the Court notes as regrettable.

"access is not a percentage process. The Court suspects that even in marriages and

relationships that endure through to the point in time when children of that union have attained adulthood, the number of such spouses and partners that can look back on a strict 50:50 split in terms of time spent with those children is low". Hogan J in M v M "*both parents having equal claim in respect of the upbringing of their children"* was referring to equality of input into that upbringing and that 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 as which to aim".*

*R*eliance is also placed on the Judgement of *Whelan J in Case SK V AL, 2019 IEHA 177;* "*that while access is a right of a parent, particularly the non-custodian parent… and the right of the child, a parent does not have a prima facie right by virtue solely of parenthood, to a 50:50 access, the courts at all times must pursuant to Section 3 of the Act of 1964 regard the best interest of the child as the paramount consideration in adjudicating an access application".*

The Court declined to make an order increasing the access and the Court here set out a letter type appendix addressed to the Applicant and Respondent entitled "What does this Judgement mean for you" set out in plain English.

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5. Special Care

Child and Family Agency v. MO'L and BH [2019] IEHC 917 (27th December 2019) Humphreys J.

This was a case relating to special care and whether an application for a special Care Order should be named an Originating Notice of Motion in the circumstances where an order had already been made on foot of an Ex-Parte Motion. Humphreys J clarified the use of the word originating on subsequent Motion.

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6. Child Care

A.R. v. The Child and Family Agency and Director of Public Prosecutions [2019] IECA 323 (20th December 2019) McGovern J.

Appeal against refusal to bring JR proceedings. The applicant sought leave to apply for Judicial Review against the CFA and to vacate all District Court Orders and return her daughters to her and an Issac Wunder Order to prevent the respondent's further harassment of her. McGovern J dismissed the application, the allegations of bias were not upheld and the other grounds were likewise not upheld. In addition a lay litigant should not be treated more favourably than parties with a solicitor and counsel but some latitude could be afforded to them because of their lack of knowledge.

CFA v. A [2020] IECA 52 (28th February 2020)

This was an appeal related to costs. A substantive hearing in relation to a doctor applying to be allowed to disclose information to a third party which was refused in the High Court. The trial judge refused the costs to the mother because she had legal aid. The court distinguished the OA Case on the basis that the High Court did not interpret Section 33(2) of the Civil Legal Aid Act 1995 correctly in that a person with legal aid should for the purposes of a costs application be treated the same as a person without legal aid. The costs in this case were granted to the mother.

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7. Child Abduction

R (R) v. R (S) and In the matter of R (G) (a minor) 18/12/2019 No. 2019/32 HLC [2019] IEHC 925

This case centred on whether the court should refuse to order the return of a child if the child objected to being returned and had attained an age and degree of maturity at which it was appropriate to take account of her views. McGrath J granted the order sought and having taken into account her age, level of maturity and the environment in which she was in up to the time of her removal, and the length of time for which she resided there it was appropriate that the child be returned to the courts of Malta where further issues of access, custody and relocation could be considered.

C v. G [2020] IECA 223 (05 August 2020)

This was an appeal against an order of the High Court refusing a return of the child to Poland. The Court of Appeal overturned this order on the basis that travel during the pandemic was not a sufficiently high threshold to constitute grave risk pursuant to Article 13(B) of the Hague Convention. There had not been a comprehensive and considered balanced welfare assessment of the child and the High Court had taken into account the length of time the child had remained in Ireland in weighing up grave risk. Also the child's wish to have contact with her father had not been properly taken into account and this could only be done by a full examination of the child's best interest in custody proceedings in Poland. Power J held that the child was habitually resident in Poland and had been unlawfully removed.

Z.R. v. D.H. [2019] IEHC 775 (30th October 2019) Ní Raifeartaigh J.

This case involved a child brought into Ireland by his father from Northern Ireland. The court held that the child's objections to return had to be taken into account but rejected that the defences had been made out relating to change of habitual residence, acquiescence and grave risk. The order for return was made but a stay was placed on same to allow the courts in Northern Ireland to be initiated.

Z.C. v. A.G. [2020] IEHC 30 (30th January 2020) Simons J.

This related to an application for an updated assessment by a child psychologist in circumstances where the mother was now pregnant. Simons J directed a new updated report be obtained.

M.W. v. J.C. [2020] IEHC 260 (5th February 2020) McGrath J.

This related to a child removed from Australia where the father had been experiencing rights of custody at the time of the child's removal. The defence of grave risk was not made out and the court ordered the child be returned but put a stay on the order pending information in relation to proceedings in Australia.

Z.C. v. A.G. [2020] IEHC 217 (14th May 2020) Simons J.

This case was overturned on appeal where the trial judge had decided that there was grave risk and had not ordered the return of the child.

M.I. v. M.B.R [2020] IEHC 504 (25th August 2020) McGrath J

This involved a removal of a child from Italy by his mother and without the consent of the

father. The father here had made threats which the court held gave rise to grave risk but that the undertakings of the father were sufficient together with other safeguards prior to and on the child's return. A stay was placed on the order to await further information regarding proceedings in Italy.

V (J) v. I (Q), and In the matter of E and O (minors) 9/11/2020 No. 2020/215 [2020] IECA 302

This case involved children brought to Ireland by their mother from Belgium. Whelan J held that the children were at all times habitually resident in Belgium and the father was the holder of rights of custody and the appellant failed to establish the defence of consent and there was no evidence of grave risk. The court ordered the return of the children to Belgium.

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8. Re-Location

L.D. v. N.D. [2020] IEHC 268 (2nd April 2020) Jordan J.

This case was in relation to the evidence of a psychologist in an appeal where the said psychologist had not given evidence in the Circuit Court but had prepared a report. The father objected to the evidence but the court having heard legal submissions allowed the evidence as this was a full re-hearing and especially as this was a child welfare matter the evidence should be allowed. Likewise the court allowed the psychologist to discuss the reports with each other and to give evidence in the case.

L.D. v. N.D. [2020] IEHC 267 (27th February 2020) Ex tempore Judgment, Jordan J.

This is the follow on from the above case dealing with the appeal from the Circuit Court regarding relocation of a child to the UK. The mother was English and wants to re-locate and to bring their 2 year old child (now 4) with her. The Circuit Court did not allow the re-location and the mother appealed this. The court notes firstly that the start and end point for the court's assessment is what is in the best interest of the child. The law is set out by looking at various cases EM v AM unreported High Court 16.06.92 Flood J who identified the relevant criteria to be considered and also the case of UV v VU 2012 3IR19 McMenamin J where he notes there is no presumption in favour of a custodial parent and European case law of J Mc B v LE in relation to Article 7 providing for respect for private and family life home and communications. The full statement of Justice Whelan in the case of SK v AL 2019 IECA177 is quoted which sets out all of the criteria that the court must consider and quotes extensively from the reports of the two psychologists who were divergent in their opinions. The court notes that *"there is nothing to be gained by attributing fault or blame or dwelling on the causes of the breakdown in the relationship… the focus must be on a child welfare assessment"*. The court having weighed up all of the factors allowed the re-location but with a very generous access provision to the father. This is a good case to read in relation to any re-location cases as it sets out all the factors that the court must consider on a step by step basis.

Q v. P [2020] IEHC 524 (21st October 2020) Barrett J.

This was an appeal by a father against a decision not to grant a stay on an Order of the Circuit Court to prevent the relocation of a child to another part of Ireland. The appeal regarding the stay was out of time but the Court went on to hear the case on the basis that it was relating to the best interest of the child or children.

Barrett J. proceeds to examine the case against the factors set out in section 31 of the 1964 Act. The decision of the Circuit Court was upheld based on three factors primarily:

1. The relocation has now taken place and the Court must view things through that prism and not wind the clock back to the position beforehand.
2. The matter is about to be reviewed in the Circuit Court.
3. It would be positively detrimental to move the children now.

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9. *Psychological/Psychiatric Evidence*

A.B. v. X.Y. [2019] IECA 326 (20th December 2019)

This was an appeal against a Judicial Review decision to extend time to bring Judicial Review Proceedings and the quashing of a Circuit Court Order directing an expert report regarding child welfare. The legal principals underlining an application to extend time in bringing judicial review proceedings are analysed:

1. A good and sufficient reason -

The evidence of the Respondent was found not to be creditable, i.e. that she was not aware of the Order and therefore could not object in time and she had changed the reason for her objection.

2. All the relevant factors -

i.e. whether the reasons given were considered by the trial Judge in accordance with all the relevant facts and circumstances, and lists out all the relevant factors here, i.e. the practical effect of the orders for access made, the enforcement of same, the ordering of another Section 47 assessor etcetera.

3. The balancing exercise –

The Court must balance whether the extension of time is objectively justifiable. There are important constitutional rights at issue and the impact that the extension of time might have on any party.

Time limits are set for a reason and setting them aside likely would have adverse consequences for the judicial system.

The Court held that the Respondent had not used good and sufficient reason and the effect on the Respondent is she must now engage in a Section 47 assessment.

B.C. v. P.K. [2020] IEHC 432 (17th June 2020) Ex tempore Judgment of Jordan J.

This was an application by a father to re-enter proceedings to dispense with the consent of the mother for the children to attend a therapist. The therapist had provided a Section 47 report previously. The mother agrees with therapy but not with the author of the Section 47 report. It is not desirable to have the same person involved in such therapy and that a Section 47 assessor is unique and has a special status as an independent expert. Allowing the Section 47 author to provide counselling or therapy is problematic if a further report was needed. It is common sense for the author to distance themselves. He awarded costs against the father here.

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10. Domestic Violence

X v. Y [2020] IEHC 525 (21st October 2020) Barrett J.

This was an appeal against the granting of an Interim Barring Order in the Circuit Court. There was a long history of acrimony and various Court applications between the parties. The couple were married and had children.

The Interim Barring Order had been granted under Section 8 of the Divorce Act 2018. Barrett J. outlines that in looking at Section 8 it is the *"risk of serious harm"* that needs to be immediate not the harm. In other words is the risk *"immediate"* and that the Court must give the word *"immediate"* the widest possible interpretation.

Moving on to the interpretation of "significant harm" the Court states:

"*In truth once any harm is established the Court would expect that in practice there would well be few if any real life circumstances in which such harm is found not to be "significant harm". The word "harm" should be given the widest possible meaning."*

The situation at home was described as *"a pressure cooker"* environment and the Circuit Court Judge may quite reasonably have concluded that the risk of flare up in delivering children safely home from school and departing the moment Mrs X got home was unlikely to yield an explosion because there would only be a *"momentary interaction"* and that the Circuit Court Order had an element of *"not letting the perfect be the enemy of the good"* i.e. zero interaction between the parties was not feasible.

It was worth noting the Courts intolerance of mitigating factors in relation to perpetrating any form of domestic violence

"*There is no context in an intimate relationship in which domestic violence is permissible……a party to an intimate relationship should never have to live in the fear and or with the actuality of domestic violence being perpetrated upon that party. There are no ifs or buts in this regard, no exceptions, no mitigating circumstances. Domestic violence or the threat of domestic violence even where no actual violence ensues is always unacceptable".*

Barrett J. cautioned strongly about introducing intimate details of either parties sexuality or sexual practice and that these details are not relevant in most if not all family law proceedings:

"*One does not squander all entitlement to privacy on entering the Court room, even if it is for in camera proceedings".*

The Court affirmed the Order of the Circuit Court granting the Interim Barring Order.

C v. C 2020 IEHC691 Barrett J.

A Notice of Motion was issued by the husband seeking relief to vary a Barring Order made in the District Court. The Court found that it could not vary the Order and noted that the husband would make an application to vary in the District Court instead.

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11. Sexual Abuse

J v. Child and Family Agency [2020] IEHC 464 Simons J.

These are Judicial Review Proceedings to challenge a decision of the Child and Family Agency on historical child sexual abuse allegations. In examining the law on this area the **2014 Policy and Procedures Document** is cited as the principal document informing the Child and Family Agency as to how such investigations are to be conducted.

The law in relation to such an investigation derives from Section 3 of the Child Care Act

1991, Section 8 (1)(b) of the 1991 Act i.e. one of the functions of the agency is to support and promote the development, welfare and protection of children. These provisions must be read in light of Article 42 A of the constitution. There is a broad interpretation of the statutory function of the Agency from the case of MQ V Gleeson 1998 and the Court confirms that it is not confined to protecting identified or identifiable children but also children not yet identifiable. The MQ case highlights the risks attached to a false allegation of a complaint of child abuse and to safe guards against this and the safe guards which are now known as the Barr Principals were set out by Mr Justice Barr in the MQ case. These principals have been indorsed and accepted in various case law as has the broad interpretation of Section 3 - WM V CFA 2017 IEHC587, TR V CFA 2017 IEHC595, and FA V CFA 2018 IEHC806.

The Agency in its submissions put forward that any meaningful risk assessment can only be carried out after they have determined whether the allegation is founded or unfounded, this however is not an adjudicative role but rather inquisitorial.

"It is not the Agency's role to vindicate the complainant nor to sanction the alleged abuser".

The flimsy nature of the statutory basis for investigation is also highlighted and the comments therein are referred to from the case of CD V CFA 2020 IEHC452. The CFA in this case conceded that the incorrect standard of proof had been applied that only one of the social workers had actually interviewed the complainant and the decision to close the file was disclosed in contravention of Sub-Section 9, 4 and Section 22 2E of the Policy and Procedures Document where an alleged abused should be given all of the relevant documents. The Judgement then focuses on the principal issue which is whether the Agency should be further restrained from carrying out any further investigation into the alleged abuse.

The Court declined to make an Order preventing any further investigation but likewise does not direct that the Agency reconsider the complaint and notes again as a caution the principals of Justice Barr in MQ and Gleeson:

"*Health Board ought always to remember that such complaint, if unfounded, have of their nature a potential for great injustice and harm, not only to the person complained or but perhaps also to the particular child or children sought to be protected and others in the family in question. A false complaint of child abuse, if correctly interpreted by a Health Board, could involve the destruction of a family unit by wrongfully having the children if comprises taken into care. It may also destroy or seriously damage a good relationship between husband and wife or long standing partners".*

There is also mention of the revised procedure of the CFA entitled Child Abuse Substantiation Procedures but that has not yet been published.

C.D. v. The Child and Family Agency [2020] IEHC 452 (7th July 2020) Humphreys J.

This was a Judicial Review relating to an allegation of child sexual abuse. The Courts finds that the Agency does have jurisdiction to make the finding pursuant to Section 3 of the Child Care Act.

The applicant was seeking Judicial Review to prohibit the Agency from making conclusions regarding said allegations after preliminary conclusions had been reached by the Agency. There was an examination of the process of investigation by the Child and Family Agency. The Child and Family Agency claimed the application was

premature in seeking such relief as the investigation had not yet concluded. But Humphries J. says that although the Court should be reluctant to intervene in child sexual abuse investigations this actually involved a point of principal and therefore could be examined. The question to be decided is whether the CFA is acting ultra vires in carrying out such an investigation and coming to such conclusions. The statutory basis is found in Section 3 of the 1991 Act and the actual ambit of this is set out in the Barr Principals derived from the MQ V Gleeson case. He however calls the statutory basis as *"slender and wobbly basis"* for a *"wide ranging powers"* to investigate and make findings of child abuse against potentially anybody again who an allegation is made. The Barr Principals are however established law and contains a power to make findings "that a person is likely to be (or have been) a child abuser". But this power has some inherent dangers

"*first of all there are clear dangers in allowing an administrative decision maker, possibly even coming down to a individual social worker with the support of his or her superiors, to make a finding that has the consequences that it is officially asserted that an individual has been guilty of actions which amount to extremely serious criminal offences".*

Any safe guards must be viewed carefully to determine if they are real or illusory. An appeal panel cannot just ask if the procedures in the 2014 document were followed. He refers to the case of WM V CFA IEHC587 which outlines that the same social worker was involved in the pre-investigation and the making of provisional findings and then dealing with the appeal process and this could not be said to constitute fair procedures.

If a final finding is made without fair procedures then it is flawed. An independent social worker should become involved to bring a "*dispassionate and independent mind to bear on it".*

"No matter how sympathetic the CFA social workers may be to a particular complainant, they must at all times be alive to the possibility of a complaint not being accurate".

If there are findings then the dissemination of information to third parties should be provided to the person complained of and be given the opportunity to disseminate it themselves unless there are some degree of extreme urgency.

The safe guards needed in this type of investigation need to be stringent and "*it is hard to think of many administrative situations where there is a greater need for clear, objective and robust safe guards then a finding by a administrative agency that a person has committed child abuse or neglect, with all the potentially unending odium, contempt and devastatingly negatively life constraining consequences thereby unleashed*".

The use of the word alleged abuser in the 2014 Procedures Document is criticised as not giving the impression of fairness. The Court ultimately found that the findings by the CFA are not ultra vires the Child Care Act but the safe guards must be maintained. The applicant also contended that his right to a fair trial was breached but the Court did not uphold that stating that *"merely because there is a criminal dimension does not mean that the civil or administrative procedure must run into the sand".*

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