

THE HIGH COURT

[2021] IEHC 119
[2020 No. 102 M]

**IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989
AND IN THE MATTER OF THE FAMILY LAW ACT 1995, AS AMENDED BY THE FAMILY
LAW (DIVORCE) ACT 1996**

BETWEEN

A

APPLICANT

- AND -

B

RESPONDENT
[2020 No. 95 M]

**IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964, AS AMENDED, (AND
IN THE MATTER OF THE CHILDREN AND FAMILY RELATIONSHIPS ACT 2015 AND IN
THE MATTER OF [STATED NAMES], INFANTS**

BETWEEN

B

APPLICANT

- AND -

A

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 23rd February 2021.

I

Introduction

1. This is a supplementary judgment following on the court's judgment of 12th February in the above-entitled proceedings ([2021] IEHC 96). Further to the order made pursuant to that judgment, the court, on 19th February 2021, received from An Garda Síochána a USB stick containing a copy of a variety of voice and video recordings, the originals of which are in the possession of An Garda Síochána. The court is grateful to An Garda Síochána for providing the USB stick so promptly.

II

Discovery

i. Introduction

2. In the first of the above-entitled proceedings, discovery of the form identified by the court at para.1 of its previous judgment has been sought by Mr A. In this regard, the court has now listened to and/or viewed all of the recordings on the USB stick.
- ii. Relevance, Necessity, Proportionality**
3. Having listened to and/or viewed all of the recordings, the court is satisfied that all of the said recordings are relevant to the first of the above-entitled proceedings. This is because they comprise evidence (I) as to the nature and substance of the relations between (1) Mr A and Ms B, and/or (2) each of Mr A and Ms B and one or more of their children, and/or (3) between the family as a whole, and (II) that otherwise is of relevance to determining issues of guardianship and/or the upbringing of and/or parental access to one or more of the children of the family by Mr A and/or Ms B. The court recalls the observation of Murray J. in *Framus Ltd and Ors v. CRH and Ors*. [2004] 2 I.R. 20, at p.38, that once relevance is established it will follow in most cases that discovery of relevant

material is necessary. It considers that the proposed discovery is necessary in the first-entitled proceedings so as to allow for a fair disposal of same. No issue as to proportionality presents.

iii. Best Interests of Children

4. Most significantly, the court notes that all of the recordings that it has listened to and/or viewed to this time are relevant, *inter alia*, for the reason stated at point (II) in the preceding paragraph. This is of significance because s.3(1) of the Guardianship of Infants Act 1964, as amended, provides, *inter alia*, as follows:

"Where, in any proceedings before any court, the – (a) guardianship, custody or upbringing of, or access to, a child...is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration." [Emphasis added].

iv. Breathnach-style Balancing Exercise

5. The parties will recall that at para.33 of its previous judgment, the court indicated that it seemed to it that:

"...there are two key public interests in competition with each other in the within proceedings, viz:

- *Public Interest (1), being the public interest in the proper administration of justice in a case concerning the safety and welfare of children; and*
- *Public Interest (2), being the public interest in maintaining investigative privilege associated with the Gardaí investigating an alleged criminal offence."*

6. The court proposes now to engage in a balancing exercise between those two interests such as is contemplated by Keane J., as he then was, in *Breathnach v. Ireland (No. 3)* [1993] 2 I.R. 458, as considered in the court's previous judgment (at paras. 34 *et seq.*). Following that judgment of Keane J., and:

- (i) placing Public Interest (1) on one side of the scale and Public Interest (2) on the other; and
- (ii) noting, in particular, the obligations incumbent on this Court under s.3(1) of the Act of 1964, as amended, which obligations go on the same side of the scales as Public Interest (1); and
- (iii) given the court's finding as to relevance and necessity above,

the court is driven inexorably to the conclusion that this is a case in which all of the recordings that it has heard and/or viewed to this time should be discovered by An Garda Síochána to Mr A and also to Ms B. The court is mindful in this regard of the potential difficulties which such a conclusion might present for the Gardaí as regards their investigative work. Indeed were this a case in which s.3(1) of the Act of 1964, as

amended, did *not* apply, the decision as to which public interest was to prevail would have seemed much less clear-cut to the court than it does. However, these *are* proceedings to which s.3(1) applies and, given the court's findings as to (a) relevance and necessity, and (b) the statutory obligation imposed on it by s.3(1), it does not see that it could safely arrive at any conclusion other than that in this case Public Interest (1) outweighs Public Interest (2), with the result that the discovery sought by Mr A should now be ordered.

v. Variation of Implied Undertaking

7. Discovery was sought by Mr A in the first of the above-entitled proceedings. However, counsel for Mr A has indicated that Mr A may also wish to rely on any or all of the said recordings in (i) the second of the above-entitled proceedings and/or (ii) a pending Circuit Court appeal against the issuance of a barring order by the District Court against Mr A at the behest of Ms B. In essence, it seems to the court that what is being sought of it in this regard is that it order a variation of the implied undertaking that arises in any discovery process whereby documents discovered in one set of proceedings will not be discovered in another set of proceedings (consistent with the succinct observation of Murphy J. in *Countyglen plc v. Carway* [1995] 1 I.R. 208, at p.218, that "[D]iscovery is made solely for the purposes of the particular litigation in which the order is made and...the use or abuse of the information obtained in discovery for any other purpose would be a clear contempt of the court and punishable accordingly").
8. Although counsel for Ms B has never objected to such variation, the court is mindful that the issue of such variation has never formally been placed before the court. Counsel for An Garda Síochána also indicated at the hearing that preceded the previous judgment that the Commissioner would be grateful to be apprised as to the proceedings in which it is anticipated that the discovered documentation will be used (in effect, as the court understands matters, this means that the Commissioner wishes, perfectly reasonably, to be advised of the extent of any such variation of the implied undertaking as the court is prepared to countenance).
9. The court therefore puts the parties on notice that it considers an application to have been made to it by counsel for Mr A for a variation of the implied undertaking such that the documentation discovered in the first of the above-entitled proceedings may also be relied upon in the second of the above-entitled proceedings and/or the Circuit Court appeal. The parties might advise the registrar and the court's judicial assistant in writing whether they wish to make any submissions concerning such application. If no party intends to make any further submissions in this regard, the court will proceed to a final ruling as to whether and to what extent it will vary the usual implied undertaking.

III

Disclosure

10. In the second of the above-entitled proceedings, Ms B, by notice of motion of 3rd February 2021, has sought "*a direction that...(1) the recordings of the interaction between the Respondent and the children of the marriage...be furnished to [STATED NAME] to facilitate her Section 32 assessment*". The court proposes to treat this as an application

for (i) discovery to Ms B by An Garda Síochána of the USB stick recordings referred to previously above, and (ii) a direction that the documents so discovered may be disclosed to the person appointed to be the s.32 (and, as it happens, also the s.47) assessor.

11. For the same reasons, *mutatis mutandis*, identified in Section II of this judgment, the court is satisfied to order that the recordings aforesaid be discovered by An Garda Síochána to Ms B and her advisors.
12. The court is also satisfied to direct that one week after discovery is made by An Garda Síochána to Ms B (or such other time as may be agreed in writing between the legal advisors to the parties to the second-entitled proceedings) the recordings so discovered may be furnished to the s.32/47 assessor by the legal advisors to Ms B. This one-week timeframe (which is subject to written variation between the parties) is being inbuilt by the court into the process so as to allow either party, having listened to and/or viewed the discovered recordings, to raise with the court any objection as regards the furnishing of any of the said recordings to the s.32/47 assessor. If such objection is raised with the court (or an intention to raise such objection is flagged by one side to the other) the recordings are not to be disclosed to the s.32/47 assessor absent a further ruling by the court.
13. The court does not immediately recall whether counsel for Ms B indicated, over the course of the various hearings in this matter, an intention to seek a variation of the implied undertaking that arises in any discovery process whereby documents discovered in one set of proceedings will not be discovered in another set of proceedings. However, it seems to the court to be sensible that any order that issues under point (v) above ("*Variation of Implied Undertaking*") to Mr A in the first of the above-entitled proceedings (in respect of discovery in those proceedings) should likewise issue to Ms B in the second of the above-entitled proceedings (in respect of discovery made in those proceedings). Thus, when reverting to the court under point (v) above, the parties might also indicate whether (a) they wish to make any submissions in this regard, or (b) they are satisfied for the court to proceed on the basis that if any order allowing variation of the implied undertaking is made in favour of Mr A in the first of the above-entitled proceedings, a like order should be made in favour of Ms B in the second of the above-named proceedings.

IV

An Garda Síochána

14. Counsel for An Garda Síochána might, within a week of this judgment indicate to the registrar and the court's judicial assistant whether he wishes to make any submissions concerning (i) the practicalities of the arrangements that the court proposes to order pursuant to this judgment, (ii) any variation of any implied undertaking in relation to the use of documents that may be ordered, and (iii) any other matter in respect of which he considers it appropriate to make submission at this time. One practical point presenting is that rather than trouble An Garda Síochána with making further copies of the recordings, it may assist for the court simply to provide the USB stick it has received to counsel for one of the parties and that s/he make a copy of same and give it to counsel for the other party.

V

Prohibition on Playing of Recordings to the Children

15. Given the substance of the recordings the court proposes to order that, absent further contrary order of the court, none of the discovered recordings are at any time to be played by any of the parties or their advisors or the s.32/47 assessor to any of the children of Mr A and Ms B. This order was not the subject of any previous discussion and the parties are free to make any submissions that they wish to make in this regard.

VI

Further Online Hearing?

16. Rather than criss-crossing e-mails, it may assist if, instead of reverting to the court in writing as indicated at a number of points above, the court were to schedule a brief 10.30 a.m. online hearing one morning, at which counsel for the parties *and* An Garda Síochána would attend, in order that any practicalities arising from this judgment can be considered and resolved swiftly. Counsel might agree their preferred way forwards in this regard and advise what they wish to the registrar and also the court's judicial assistant.

VII

Conclusion

17. There is a lot of detail in the foregoing. So it may assist for the court to summarise how it intends to proceed. The court will:

(A) in the first-entitled proceedings:

- (i) order discovery by An Garda Síochána to Mr A of all of the recordings that it has heard and/or viewed to this time.
- (ii) following any (if any) submissions that it may receive in this regard (the parties to advise the court within one week of this judgment whether they intend to make any such submissions), proceed to rule on whether the documents so discovered may be relied upon by Mr A in the second of the above-entitled proceedings and/or the pending Circuit Court appeal against the barring order.

(B) in the second-entitled proceedings:

- (iii) order discovery by An Garda Síochána to Ms B of all of the recordings that it has heard and/or viewed to this time.
- (iv) following any (if any) submissions that it may receive in this regard (the parties to advise the court within one week of this judgment whether they intend to make any such submissions), make the same order in respect of Ms B in the second-entitled proceedings as may be made in respect of Mr A in the first-entitled proceedings under point (ii) above.
- (v) direct that either one week after discovery is made by An Garda Síochána (or after such other time as may be agreed in writing between the legal advisors to the parties to the second-entitled proceedings) the recordings so discovered by An Garda Síochána may be furnished to the s.32/47 assessor by the legal advisors to Ms B, this additional one-week timeframe (which is

subject to written variation between the parties) being inbuilt by the court into the process so as to allow either party, having listened to and/or viewed the discovered recordings, to raise with the court any objection as regards the furnishing of any of the said recordings to the s.32/47 assessor.

(vi) require that if any such objection as is referred to in the preceding point above is raised with the court (or an intention to raise such objection is flagged by one side to the other) the recordings are not to be disclosed to the s.32/47 assessor absent a further ruling by the court.

(C) in both proceedings:

(vii) following any (if any) submissions that it may receive in this regard (the parties to advise the court within one week of this judgment whether they intend to make any such submissions), order that, absent further contrary order by the court, none of the discovered recordings are at any time to be played by any of the parties or their advisors or the s.32/47 assessor to any of the children of Mr A and Ms B.

18. Again, instead of criss-crossing written communications, the parties may prefer to proceed as indicated in Section VI above.

19. Finally, for the avoidance of doubt, because, pursuant to Section IV above, counsel for the Gardaí is being given up to a week to revert to the court on the points mentioned in that Section, discovery will not follow immediately upon this judgment; rather its pace will be informed by whatever counsel for the Gardaí advises whenever he reverts in the manner contemplated in Section IV.