THE HIGH COURT

FAMILY LAW

[2020] IEHC 700

[2018 No. 84 CAF]

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, AND IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT, 1996

BETWEEN

P.M.

APPLICANT / APPELLANT

-AND-

E.M.

RESPONDENT

JUDGMENT of Mr. Justice Jordan delivered electronically on the 23rd day of October 2020

1. In this case the parties were married in 1998 and divorced by Circuit Court Order in 2018. There was an appeal in respect of ancillary orders but the Divorce was not a live issue in the appeal. There is one adopted child of the marriage who has just turned 14 and is named L. The separation and divorce have been high conflict with custody and access of L. being the main but not only contentious issue.

2. Custody and Access in this matter was initially set, it appears, in the District Court in February 2016. This ordered that the mother have four days of access and the father have three days of access. This remained the position until the Divorce proceedings came on for hearing in October 2018.

3. An application to vary the access was made by the father in October 2018. In the Circuit Court, Judge Ryan set access at two days for the mother following a five day hearing. It was at this stage the matter made its way into the High Court Family Law list by way of an Appeal by the mother.

4. The matter came before Faherty J. with an application for a stay on the Circuit Court order. On 19th November 2018 Faherty J. granted the mother three days of access at weekends.

5. The appeal ultimately come before me in April 2019 and was heard over the course of four days on 2nd, 3rd, 4th and 5th April inclusive. It culminated in a clear, detailed and comprehensive Order, perfected on 17th April 2019. Much of this order had ultimately been agreed between the parties. Arising from issues ventilated during the hearing, a written undertaking from the mother was appended to the Order and she gave those undertakings to the court on oath.

6. On 20th September, 2019, during the Long Vacation, the father had his legal team apply to the Duty Judge of the High Court, then MacGrath J., for an order varying the custody and access arrangements. This was done on an *ex parte* basis. In light of the grounding affidavit sworn by the father, MacGrath J. suspended the mother's access to L.. until 25th September 2019, the return date given for the Motion on Notice to the mother.

7. Discussions between the legal teams for both sides then brought about an interim settlement of the motion pending a full hearing – and pursuant to which the mother had some very limited access on an interim basis.

8. The matter ultimately came back before me on 10th October 2019. The Court had two reasons for adjourning it at that stage, namely there was not enough time on that date to deal with it and furthermore, it appeared to the court that an adjournment might allow some 'cooling off' between the parties.

9. A regrettable feature of the *ex parte* application made by the father is that he displayed a complete lack of candour in his affidavit before MacGrath J. The evidence on affidavit persuaded the Court to suspend access between L. and her mother. The father had failed to mention that he was getting married to his new partner the following day and that L. was to be a bridesmaid at the wedding. The mother knew nothing of this. That weekend was one L. was due to spend with her mother pursuant to the Order of this Court from April of that year.

10. In an *ex tempore* judgment dated 17th October 2019, this Court was critical of the father's behaviour in relation to that application and also his general approach and attitude to the Order of the Court. It must have been abundantly clear to the father after that judgment that the Court could not, and would not, tolerate non-adherence to its Orders in circumstances where so much time had already been spent in the High Court and the Circuit Court. A typed copy of the judgment is available, and the court will not repeat it here.

11. As outlined in that decision, the Court cited the father's lack of adherence to the Order but also his lack of courtesy to L's mother in circumstances where he decided to ignore the Order. For example, L.'s mother turned up to school on a Friday morning (13th September 2019) to find that their daughter was not there. She discovered that L. was absent for unexplained reasons. This is but one of the examples of unacceptable behaviour by the father and something that clearly demonstrates the attitude he appears to have adopted in respect of the Court Orders. In the context of this application there is clear evidence of another incident involving the school which occurred on 11th September 2020 and which illustrates the father's disregard for the orders of this court. He frustrated the mother's access by arriving at the school where the mother was collecting L. in accordance with the Court Order - and he took L. away in his car. He allowed no access that weekend. He prevailed in defiance of the Court Orders.

12. The access of the mother was restored to three days per week on foot of the October 2019 hearing, as per the Original Order. The father then sought to appeal the decision of this Court to the Court of Appeal. However, this application was struck out on the basis that the matter commenced in the Circuit Court, advanced to the High Court on appeal and was thus, unappealable. The mother avers, at p. 5 of her affidavit, that she got notice of this appeal just before Christmas and that it caused her significant hardship, both emotionally and financially.

13. A motion for enforcement brought by the mother came before the Court in July 2020. An objection in respect of jurisdiction was raised by the father. The objection was, in the view of the Court, well-founded and, as such, it declined to deal with the motion.

14. The mother then brought a Motion for the attachment and committal of the father for breach of the court orders and the matter was heard over the course of three days on Wednesday, Thursday and Friday, 7th, 8th and 9th October 2020, at the conclusion of which the Court reserved its judgment to the 23rd October 2020.

Emergence of Problems with Access

15. The mother avers that problems with regard to access began to re-emerge in January 2020, in that she was deprived access on two days in January 2020. She was then deprived of access for the entirety of the period between 20th March 2020 and 8th May 2020. She avers that in that period, there was a week reserved for Easter holidays as per the Order of this Court. After 8th May, she says that the Order was breached on a further eighteen occasions, but she says that she received two days back between the 6th July and the 13th July. She notes that the father relied on the Covid 19 crisis as the basis for denying her access to L., despite '*…the guidance of the courts and Minister for Justice.'* The mother estimates that she has been denied access to her daughter for 25 full and 23 partial days as of the date of her affidavit sworn on 7th August 2020 . Nor did she receive her full summer holiday entitlement. She had only 5 days of her first two week portion. She did not get her allotted week with L. prior to school resuming after the summer. Since 7th August 2020 the weekend access was further reduced to one day per week every week or thereabouts, and lessening. What is striking is the unilateral action by the father in implementing his "variations".

16. The father's explanation for the lack of access can be broadly characterised as centring on, (i) Covid-19 symptoms he says were exhibited by himself and L., (ii) uncertainty in respect of access orders, (iii) the vulnerability of his new wife as she was, at the relevant time, pregnant and (iv) the mother's work in a financial institution and resultant exposure to people which could expose her, and by virtue of this, L., to risk of transmission of Covid-19.

17. In his replying affidavit, he describes having woken up in the early hours of 18th March 2020 '*shivering uncontrollably and with other flu like symptoms – the uncontrollable shivering particularly was not something that I had ever experienced before. I was very concerned that these might be the symptoms of the Covid 19 virus'.* He goes on to describe having called his doctor who explained that there was no treatment for Covid-19 and to 'just take paracetamol'. Additionally, she advised that tests for Covid-19 were taking three to four weeks and as such, if he had contracted it, it would likely have lifted by the time the test was conducted. He says that he was very unwell for a period of four weeks and received advice to self-isolate from his doctor. During that period, he, L. and his new wife isolated, leaving only to buy groceries. He says that his new wife's brother on many times got the groceries for them.

18. In a letter from his solicitors to the mother's solicitors dated 8th April 2020 the case is made that the father and his wife and L. were still needing to self-isolate. The letter reads ;

Re: Our Client: DM - Your Client: YM

"Dear Mr. G,

I refer to the above matter and your letter of even date. As you are aware from previous discussions and correspondence approximately 2-3 weeks ago L.., Mr. M. and his wife M began to suffer from illness similar in symptoms to Covid-19. They have not been tested or received medical treatment. Instead they have been self-isolating. They are still having minor symptoms. M. is heavily pregnant and due in July as you aware.

As a result, Mr. M has taken the view, in line with the Government guidelines to self-isolation that L. should remain at home with them. It makes no sense in the current pandemic for her to be going between two households. Also your client, Ms. M. is still working in the bank with the public. Mr. M. is aware of guidelines passed down by the courts. He has considered these at great lengths. He is eager not to avoid compliance with any court order. However, in such unprecedented times he believes he has to take steps to protect the health and wellbeing of everyone involved. L. as a child has the right to protection as does M.C. and her unborn child, who are considered extremely high risk at this time. The unborn child also enjoys rights in these circumstances which cannot and should not be ignored. Your client's health is also at risk should L. be carrying the virus. Common sense needs to prevail in these unusual circumstances. My client has at all times confirmed that any access time your client misses will be made up with L. over the summer period when things have returned to normal.

L. has at all times been encouraged to contact her mum and Mr. M will continue to encourage her.

As you are aware your client contacted the Gardaí last Friday 2nd April, 2020 who attended the house and confirmed that L. was fine after speaking with her. There is no need to trouble the courts with applications during these unparalleled times in circumstances where all missed access will be fulfilled and made up in the future and in circumstances where Miss M. is well aware that there are no issues with the welfare of L. as confirmed by the Gardaí. This is not an emergency matter.

If you require anything further, please contact us."

19. By way of reply to the above letter of 8th April 2020 the mother's solicitors responded as follows:

"On the 9th of April of 2020:

Dear Madam,

We refer to the above and to previous correspondence resting with your reply to ours of the 8th of April received by email at 17:10 yesterday. For the sake of clarity can you confirm whether or not your client will release S to our client for her one week Easter access on Monday 13th of April? Our client needs to inform her employer of her required time off next week.

Your client's repeated breaching of the High Court order, not just in the current Covid-19 situation but many times since the October hearing, shows he has scant disregard for the order of Judge Jordan. Our client has informed the Gardaí of your client's breaches of the High Court order. Superintendent Curley is aware of all matters concerning this. We understand that they attended your client's house for the purposes of recording that particular breach. Our client will update the Gardaí of your client's intended further breaches.

Your client's reasoning as to why he will not release L. is and has been contradictory. On one hand he states that L. should remain with him as she has showed signs of an illness for the past three or more weeks and does not want to risk passing it on to our client but on the other hand he cites the fact that our client is still at work as being the concern. Clearly he is using the Covid-19 crisis to his own end in withholding access at this stressful time for our client. Not only is he doing so but you now inform us that he has not sought medical treatment for her. We previously requested that he authorise the family doctor, Dr. R., to release information regarding L. to our client but he has not done so, and seems to expect that our client must accept his word and presumably medical knowledge that she may be suffering from Covid-19.

You, and your client as a solicitor and officer of the court, are aware that the courts have confirmed that access orders must be complied with during the Covid-19 crisis, however he has chosen to ignore this and has applied his own rationale to the situation giving my client no input. Your client should be aware of recent cases regarding access and people using Covid-19 as an excuse to breach orders. Judge Mary Larkin at Ennis Family Court has highlighted that the law in Ireland is not based on HSE directives and said that people who breach court orders are in jeopardy of being sent to jail.

We appreciate that your client's partner is pregnant however this should have no impact on our client and her access. If this is their concern, then L. should have been returned to her mother and to allay your client's concerns could have stayed with her throughout the current crisis. It is not for your client to amend the access where no agreement has been reached.

Our client has asked us to make clear that she will facilitate additional access your client may have with L. when his new baby is due. She is prepared to discuss same in a reasonable manner to agree appropriate access. In relation to the situation at

hand your client has now left our client with no option but to bring an application to court to enforce her access. We will be bringing to the court's attention all of your client's other breaches since October and will highlight the breaches in September which resulted in Judge Jordan's judgment of October the 17th. We will use this letter and all previous correspondence to fix costs against your client and a variation of the current access order if necessary.

We look forward to hearing from you today regarding Monday."

20. The Covid-19 situation is also dealt with in the affidavits before the court. The father avers at para. 6 of his affidavit:

> *'At that time too there was a degree of uncertainty around access and suggestions that children who were the subject to access orders or agreements should remain in one household.'*

21. Additionally, he says that L. had symptoms at this time with *'a temperature and cough'* and that '*I would not release her to the Appellant* [her mother] *as I was concerned that she should be isolated also.'*

22. The mother avers that forty-six days of access were lost at the time of that affidavit , something that the father says he is not sure is correct, but he is '*…certain that L. does not want to spend those so called 'lost' days with the Appellant.*'

23. L.'s mother points out, and it is not contradicted in the replying affidavit of the father, that it appears that no medical treatment was sought by either the father or L. in respect of the suspected Covid-19 infection.

    There were two access weekends after the Covid-19 restrictions and thereafter, it would appear from the preponderance of the evidence that access petered out. The father says L. herself did not want to attend access with her mother. The mother points to the fact that she was not permitted to spend Mother's Day with L. in circumstances where the child spent Father's Day with her father.

24. Such is the extent to which matters progressed that the mother contacted An Garda Síochána and they became involved - but to no avail. Documentation in relation to the involvement with the Gardaí is exhibited in the mother's affidavit. While the mother portrays a situation where she is being alienated from L. by the father, he asserts in his replying affidavit that he is neither alienating L. from her mother nor trying to damage their relationship and that to suggest this '*…is simply not true'*.

25. The father sets out his reply to the allegations in a long replying affidavit which was sworn on 2nd October 2020. In summary the father states that: -

    (a) He is aghast that the mother has insisted on seeking to have him committed to prison instead of listening to L.

(b) Imprisonment is entirely unlikely to improve the relationship between L. and her mother and will be utterly counterproductive and potentially deeply injurious to L.

(c) This Court was in error in the judgment which it delivered in October 2019.

(d) The Court ought to have directed a report by an expert or should have met with S before giving judgment in October 2019. On this point it will be recollected that the judgment of the Court and the Court Order in April 2019 followed oral evidence over a number of days, including expert evidence. Furthermore, the cause of the father bringing the matter back to court in September 2019 was due to specific issues which the father alleged had caused him to have immediate concern for the welfare of S while she was in the company of her mother and did not centre on any suggestion that S had altered her position on contact with the mother. In fact, notwithstanding the issues which he said were concerning him, the father did acknowledge in September/October, 2019 (at para. 15 of his grounding affidavit) that things generally had taken a change in direction for the better.

(e) The father emphatically denies that he has frustrated or denied access and says that the current situation is due to L. choosing not to go to access with her mother.

(f) At para. 13 of his affidavit the father says "*that the situation changed materially during and after the lockdown*". This is undoubtedly the position in circumstances where the father unilaterally prevented access taking place during the lockdown.

(g) The affidavit sets out the detail of the father's concerns on the night of 18th March 2020 and subsequently that he may have Covid-19 and his fear of it spreading in his household. His evidence in this regard is not credible. He appears grasping for Covid-19 reasons to justify the stance he adopted during lockdown.

(h) Amongst the averments at para. 15 of his affidavit, the father, referring to the fact that no access took place during lockdown, states "*L. at no stage complained of this or urged me to make sure that she was returned to her mother. In fact the opposite was the case. She showed very little interest in returning to her mother and, whilst during that period, seven weeks in total, I repeatedly urged and encouraged L. to contact her. I increasingly got the impression that these contacts were difficult, that harsh words were exchanged and as a result L. would not want to speak to her again."* This averment in the father's affidavit illustrates his utter disregard for the court Orders. It is as if he considered that L. ought to have been proactive in ensuring that the court Orders were complied with.

(i) The father's affidavit goes into considerable detail in relation to the difficulties which L. has whilst in the company of her mother – and in particular the difficulties which have manifested themselves post-lockdown. In this regard, the Court considers that there probably are added difficulties and tensions between the mother and daughter post-lockdown and that the father's unilateral ceasing of

access during lockdown is a very large part of the explanation, if not the full explanation, for this happening.

(j) At para. 24 of his affidavit, the father details the occasions since the beginning of August 2020 during which L. has seen her mother – on 19th September 2020, 5th September 2020, 30th August 2020 and 22nd August 2020.

(k) The father's explanation for the holiday access not having taken place in accordance with the court Orders is that L. did not want this to happen.

(l) In relation to what the mother has alleged as being the failure of the father to 'top up' L.'s mobile phone, the father avers that this is rather a situation where L. is using this as an explanation to explain why she has not called her mother and to avoid her mother giving out to her. And indeed this may be so at this stage

(l) The father refers to the fact that L. is of an age where she wishes to be self-determining on the issue of access and this explains the deviations from the court ordered access.

(m) At paras. 29, 30 and 31 of his affidavit the father essentially sets out that he considers that the welfare of L. means that the access as currently ordered should not continue. In this regard, it is worth pointing out that this Court stated in the judgment delivered on 17th October 2019, at para. 20, that "*a court order is just that; if the father wished to deviate from it or to have it changed, he ought to have made an application to the court rather than doing as he did…".* One year on the father is still intent on imposing his regime in defiance of the court Orders. And this without any application to vary, save for the last minute *ex parte* application made on 8th September 2020 to Judge McDonnell in the Circuit Court seeking to have an emergency listing of an application to vary the current access order – and in circumstances where an enforcement motion had been served by the mother on 24th July 2020 and the motion for the attachment and committal was served on 23rd August 2020.

(n) The father details discussions with L. about the problems she has when with her mother and he also states that, according to L., the mother talks incessantly about the legal case and how she is glad that M., his wife, is there so it is safe for L. This particular issue concerning discussions with L. about this litigation is not new. It remains the view of the court that both sides are talking too much to L. about this litigation. It may well be that the mother is careful not to breach the undertaking which she gave to this Court but that she, and the father, still manage to create a topic of conversation with L. around this litigation with a view to improving their own position with L. and/or harming the relationship of the other parent with L.

(o) At para. 37 of his affidavit, the father avers:

"If the court is of the view that it is insufficient for L.'s wishes to (be) voiced by me it would of course be appropriate for an expert in such matters to meet and discuss with L. the issues raised for L. by this application and the consequences for her welfare if her father is to be imprisoned for either a definite or an indefinite period. The said expert should then report to this Court." This averment by the father says more about his approach to the current situation and his disobedience of the court orders than it does about his concern for the welfare of L. Indeed, it begs the question - has the father already conveyed to L. the information that the mother has brought this application? If he has genuine concerns about the welfare of L. and the importance of the mother and daughter relationship then he certainly would not have done so.

(p) Paragraph 43 of the father's affidavit is worth quoting in full:

"I say that I am left in the impossible situation whereby my 14-year-old daughter is telling me that she doesn't wish to see her mother as often as the order says she must; her mother is seeking to have me jailed for an alleged contempt, I am, temporarily at least, shut out from seeking to have L.'s views and wishes heard surrounding the very issue in respect of which I am to be held in contempt. Whilst I acknowledge that to say anymore risks straying into legal argument, I cannot conceive how this matter can properly proceed any further without inquiry into L's thoughts and wishes surrounding access and separately without inquiry as to the possible consequences for her of her father being imprisoned. Whether this is achieved by independent report or by a meeting between L. and the court, I have no fixed opinion."

26. In light of the assertion at para. 43 of the father's affidavit, it is necessary to point out that: -

(a) The father has had ample opportunity during the last twelve months to seek a variation of access if good reason existed to do so.

(b) It is abundantly clear that it was not the views and wishes of L. that led to the father's unilateral disobedience of the court orders during lockdown – and more specifically between 20th March & 8th May 2020.

(c) The father has caused a situation where the view of L. concerning contact with her mother has probably changed. This is probably due to the cessation of access during lockdown which is the entire responsibility of the father – and which was in fact a calculated move by him to alter the family dynamic and in particular the relationship between mother and daughter to his advantage.

(d) Para. 43 and indeed the tone and content of the affidavit in general indicates that the father has formed a view that the courts do not have any power to do anything at this stage which will impact adversely on him in any real way – or put another

way which will not adversely impact on the relationship between L. and her mother. Although it is entirely a matter for the court dealing with the variation application and any enforcement application brought by the mother it is probably the position that the mind set of L. has changed in a significant way in terms of contact with her mother. It is also a fact that incarceration of the father is likely to adversely impact L. and is for that reason a most unappealing sanction in terms of the conduct of the father. And if the father is incarcerated the likelihood is that the relationship between L. and her mother will also be irretrievably damaged. In many respects the father has arrived at the destination chosen by him in March of this year - when he seized an opportunity to improve his position in terms of his time with L. to the detriment of her mother.

27. It is simply not possible to accept the evidence of the father when he avers: *'I am aware of my responsibilities in the matter and am not ambivalent about L.'s compliance with the Court ordered pattern of access'.* This is especially so given the history of this litigation. It may be that L. is now asserting herself in the manner set out by the father. But if so this is recent and attributable in whole or in part to the fathers deliberate actions in preventing any access between 20th March 2020 and 8th May 2020.

28. It may also be that the mother is at times irritating L. as parents do sometimes irritate teenage daughters and sons. The converse is also true. Nor is it unusual for a child to get on better with one parent than the other and this can also change. But the evidence here leads the Court to conclude that the father has cynically driven a coach and four through the orders of this Court. His approach, behaviour and manipulation of all means possible to thwart the contact between mother and daughter is obvious. The Court is satisfied that the court Orders would have operated fine if the father had made a proper effort to obey them. And if he considered that reasons existed to justify a change he ought to have applied to the Court without delay for a variation.

The Law

29. The distinction between criminal and civil contempt is dealt with by Ó'Dálaigh C.J. in *Keegan v. de Burca* [1973] I.R. 233, at 227, as follows:-

> "…..The distinction between civil and criminal contempt is not new law. Criminal contempt consists in behaviour calculated to prejudice the due course of justice, such as contempt in facie curiae, words written or spoken or acts calculated to prejudice the due course of justice or disobedience to a writ of habeas corpus by the person to whom it is directed — to give but some examples of this class of contempt. Civil contempt usually arises where there is a disobedience to an order of the court by a party to the proceedings and in which the court has generally no interest to interfere unless moved by the party for whose benefit the order was made."

30. The courts do have an inherent jurisdiction to punish contempt. In *Shell E&P Ireland Limited v. McGrath* [2006] IEHC 108, [2007] 1 I.R. 671, at 688 Finnegan P. held as follows: -

"Circumstances may exist which cause the court to act of its own motion*: Jennison v Baker* [1972] 2 Q.B. 52, *Seaward v Patterson* [1897] 1 Ch. 545. However, where the interest of the public in general is engaged or where there is a gross affront to the Court it would be appropriate for the Court to proceed of its own motion to ensure that its orders are not put at nought. I am satisfied that such a power must be inherent in the Court. In the words of Curtis-Raleigh J.:

> "The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope."

31. It is well established in the authorities that a court must be satisfied beyond reasonable doubt that a person has in fact committed the alleged contempt before a court takes the serious step of depriving a person of his or her liberty for failure to comply with an order of the court – see also Keane J. in *National Irish Bank v. Graham* [1994] 1 I.R. 215 at 220, Clarke J. in *P. Elliott & Co. Ltd v. Building and Allied Trades Union* [2006] IEHC 340 and *Competition Authority v. Licensed Vintners Association* [2009] IEHC 439.

32. If there is a reasonable doubt as to the scope of, or correct interpretation of, a court Order, then this issue must be resolved in favour of the person who is alleged to be in contempt of the court Order – see Kearns P. in *Muller v. Shell E&P Ireland Limited* [2010] IEHC 238. While there was a successful appeal to the Supreme Court from the High Court decision, the Supreme Court did not disturb Kearns P.'s findings as to the standard of proof – see *Muller v Shell E & P (Ireland) Ltd* [2017] IESC 42.

33. Committal for contempt is primarily coercive in nature, although there may be a punitive element. In *Shell E&P Ireland Limited v. McGrath* [2006] IEHC 108, [2007] 1 I.R. 671, at para. 68, Finnegan P., after a review of the case law concluded as follows: -

> "… I am satisfied that committal for contempt is primarily coercive, its object being to ensure that Court orders are complied with. However, in cases of serious misconduct the court has jurisdiction to punish the contemnor. If the punishment is to take the form of imprisonment, then that imprisonment should be for a definite term."

34. In *Laois County Council v. Hanrahan* [2014] IESC 36, the appellant appealed against a High Court order which committed him to prison for contempt of court because he failed to comply with a previous High Court order which required him to remove large amounts of polluting waste from the farm belonging to his parents. The committal order directed that the appellant be committed to prison for a period of six months unless he purged his contempt by complying with the original order.

35. The Supreme Court allowed the appeal and remitted the matter back to the High Court. It held that the committal order unacceptably conflated civil and criminal contempt. Fennelly J. (with whom Laffoy J. concurred) extracted from the relevant authorities the following principles affecting the exercise of jurisdiction to punish in cases of civil contempt, at para. 70: -

'(i) It will normally be a matter for the court to decide of its own motion whether the case is one which justifies the imposition of punishment, which may be a fine or a term of imprisonment, although there may be cases involving matters of purely private interest where the court may be invited to exercise the jurisdiction,

(ii) The circumstances justifying the imposition of punishment will almost always include an element relating to the public interest, including the vindication of the authority of the court. The object is punishment, not coercion.

(iii) A court should impose committal by way of punishment as a last resort. The contempt must amount to serious misconduct involving flagrant and deliberate breach of a court order. Mere inability to comply will not amount to serious misconduct.

(iv.) Committal by way of punishment inherently relates to conduct which has already taken place, not to future conduct. A person cannot be punished for his future conduct: that would involve preventive detention.

(v.) Any imprisonment must be for a fixed term.'

36. Fennelly J. went on to point out that in cases of purely coercive orders, there is an element of punishment (since it is by committing the contemnor to prison that the court secures the observance of its orders), but that where a term of imprisonment is imposed by way of punishment, the above principles apply.

37. In circumstances where the court has jurisdiction to exercise both coercive and punitive powers, the authorities are careful to point out that the court must be vigilant when exercising such powers to distinguish clearly between its coercive and punitive intents.

38. This law in relation to attachment and committal for contempt of court is comprehensively and succinctly set out by Sam Collins in *'Enforcement of Judgments'* (2nd edn., Round Hall, 2019) where the necessity for close adherence to procedural requirements for orders of attachment or committal is also detailed from p. 175 onwards.

39. Amongst the most basic of the procedural requirements is a requirement for the penal endorsement. Order 41, r.8 of the Rules of the Superior Courts provides that every judgment or order requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done; and upon the copy of the judgment or order which shall be served upon the person required to obey the same, there shall be endorsed a memorandum in the following words or to the following effect: -

> *"If you the within named A.P. neglect to obey this order or order by the time therein limited, you will be liable to process of execution including imprisonment for the purpose of compelling you to obey the same judgment or order."*

40. This penal endorsement puts the person who is served with the court order and which has the endorsement on it on notice of the possibility of imprisonment.

41. In *J.O'G. v. Governor of Cork Prison* [2007] 2 IR 203 Peart J. held, at p. 215, para. 39 that:

> '….there can be no doubt about the absolute necessity to comply in every respect with the terms of the wording of the penal endorsement set forth in the current rules, whether in the Circuit Court or the High Court'.

42. In *Van Dessel v. Carty* [2018] IEHC 626 , Allen J., at para. 34 observed that the defendant's committal was sought pursuant to his breach of:-

> '……a prohibitive order to which O.41, r.8 has no application. If authority were required for this proposition it is to be found in *Murphy v. Willcocks* [1911] 1 I.R. 402.'

43. The deprivation of the liberty of a citizen is such that the procedural requirements cannot be ignored or dispensed with. The Court is concerned here with the requirement for a penal endorsement, as detailed above. It is probably the case that parties to litigation, and their legal teams, frequently do not consider serving a court order with the penal endorsement on it until it becomes obvious that it may be necessary to move to enforce the court order and that this may involve a motion for the attachment and committal of the party who is not complying with it. Indeed, there may be good reason to avoid serving a court order with a penal endorsement on it following the conclusion of difficult litigation in circumstances where the party having the benefit of the order might well take the view that to do so might escalate tensions, bitterness and hostilities even more. Whatever the judgment made in this regard, it should be made in the knowledge that the service of the court order with the penal endorsement on it is a necessary prerequisite to the attachment and committal of the person alleged to be in contempt of the court order. The court will of necessity look at the events following the service of the court order with the penal endorsement on it rather than the events preceding that date. It would be to ignore this procedural requirement if the court was to give it retrospective effect.

44. The UK Court of Appeal decision in the case of *Re L-W (Children*) [2010] EWCA Civ. 1253 is of interest when it comes to considering an application to commit a parent in circumstances where access is not working out and the other parent says that this is the fault of the father/mother on the other side. The case concerned appeals by a father from various orders made in the Maidstone County Court by His Honour Judge Caddick in the course of exercising his jurisdiction in private family law proceedings. A number of the appeals concerned compensation and enforcement orders made by reason of the conduct of the father and one of the appeals was against a committal order made on 24th June 2010 by Judge Caddick. Each of the appeals succeeded and with minor exceptions each of the orders under appeal were set aside. The Court of Appeal paid tribute to the care and attention to detail which Judge Caddick brought to bear in what was described as an exceedingly difficult case. However, the Court of Appeal found that his judgments were

vitiated by two fundamental errors in his approach. In the first place, it was held that Judge Caddick overstated what it was that the relevant orders required the father to do. Alternatively, on the facts before him he wrongly rejected impossibility of performance as being a defence. The decision of the Court of Appeal involves a detailed review of the authorities and in particular the wisdom of imposing the sanction of imprisonment for breach of a court order concerning access (or contact) involving young children and parents who are at war. In the course of his judgment, Munby L.J. sets out what he derives from the authorities reviewed and states:

> 'What I derive from these authorities are the following further prepositions:
>
> (1) The first task for the judge hearing an application for committal for alleged breach of mandatory (positive) order is to identify, by reference to the express language of the order, precisely what it is that the order require the defendant to do. That is a question of construction and, thus, a question of law.
> (2) The next task for the judge is to determine whether the defendant has done what he was required to do and, if he has not, whether it was within his power to do it. To adopt Hughes L.J.'s language, could he do it? Was he able to do it? These are questions of fact.
> (3) The burden of proof lies throughout on the applicant: It is for the applicant to establish that it was within the power of the defendant to do what the order required, not for the defendant to establish that it was not within his power to do it.
> (4) The standard of proof is a criminal standard, so that before finding the defendant guilty of contempt the judge must be sure (a) that the defendant has not done what he was required to do and (b) that it was within the power of the defendant to do it.
> (5) If the judge finds the defendant guilty the judgment must set out plainly and clearly (a) the judge's findings of what it is the defendant has failed to do and (b) the judge's finding that he had the ability to do it.'

45. The dynamic at play and the contest between incarceration and a softer approach is well illustrated by the following passage from the judgment of Judge Caddick which is quoted in the Court of Appeal judgment of Munby L.J. (along with several other passages): -

> 'In truth, M actually wants to see the mother and have a good relationship with her. The adults – and in particular the father as the resident parent – must get behind the talk of not wanting to see the mother and remember what he really wants and needs. It gives mixed messages: Sometimes the outward talk is 'I don't want to see the mother' but inside he really does and when people get through to him he admits that. There is no reason apart from M's mind-set and the attitude and mind-set of the father why he should not go on regular contact with the mother. There is no proper reason that has been put before me as to why he has not been going on those occasions when there has been a contact order for him to go on contact and the father, for whatever reason, has failed to produce him. It is the

father's privilege to have a residence order in respect of M. He is in the powerful position of being able to influence M in what he thinks and does, but it must not be abused. He can if he wishes bring proper influence on M to make sure that he goes to contact. If the father wants to I am quite sure he will achieve that; just as he gets the child to go to school every day, no doubt sometimes when he does not want to go…

Contact is not optional to M or the father as a resident parent. How does the father do that when M objects? It is part of his parenting skills – reasoning, persuading, cajoling, probably in the end sanctions. I appreciate that he does not believe in any form of physical chastisement. But how he does it is up to him using his parenting skills. It is not for me to advise him as to how to do it. He is the parent and he should know how to handle his child. But there comes a point when a child has to do things even though he does not want to do them, and this sometimes is one of them.'

46. The above passage illustrates vividly the dilemma this Court and other courts in similar circumstances find themselves in when access is not working although the court order is clear as to the regime which ought to apply and when the circumstances are such as to put the court on enquiry as to the reason why. In high conflict cases the charge will ordinarily be that access is not working because the father or mother is preventing it working. Not infrequently there will be an allegation of steps being taken to alienate the parent being deprived of access from the child. But family conflicts and family dynamics, particularly following an acrimonious breakup and with a young child or teenager involved, create complex situations. It may well be that access is not working notwithstanding the best efforts of the parent who is being blamed. For this reason, it is necessary to examine the facts and the background closely in each case. In the *CPL* case Munby L.J. referred to the fact that the court had been taken to various decisions of the Court of Appeal bearing on the appropriateness or otherwise of making committal orders in cases such as that which was then before the court. The following extracts from the judgment are worth quoting in full:

'It is well known that Ormrod L.J. held strong views on the subject. In *Churchard v. Churchard* [1984] FLR 635 he expressed himself (at p.638) in trenchant terms:

"To accede to the father's application for the committal order would not conceivably be in the best interests of the children. It would mean two things: First, if committed, that their mother would be taken away from them for a time and their father would be branded in their eyes as a man who had put their mother in prison. That is a brand from which no parent in my experience can ever hope to recover. It is the most deadly blow a parent can inflict on his children. There is no doubt and it should be clearly understood – I am speaking for myself now – throughout the legal profession that an application to commit for breach of orders relating to access (and I limit my comments to breaches of orders relating to access) are inevitably futile and

> should not be made. The damage which they cause is appalling. The damage in this case which they have caused is obvious. To apply for a legalistic but futile remedy, because it is the only thing left to do, is, in my judgment, the last hope of the destitute. The court is only concerned with the welfare of the children and ought not to trouble itself too much about its own dignity. These cases are exceedingly intractable. They can only be dealt with by tact not force. Force is bound to fail."

Brandon L.J. agreed.

A softer version of the same point was made by Balcombe L.J., with whom Glidewell L.J. agreed, in *Re S (Minors: Access)* [1990] 2 FLR 166 when he said (at p.170):

> 'The usual problem in this type of case where the custodial parent resolutely refuses to obey an order for access by the court is that the court has no effective sanction to enforce that order…it is a rare case – although I would not go so far as to say it can never happen – that the welfare of the child requires that the custodial parent be sent to prison for refusing to give the other person access.'

Ormrod L.J.'s approach was doubted by Ward L.J., with whom Beldam L.J. agreed, *in A. v. M. (Committal: Refusal of Contact)* [1997] 1 FLR 533. Dismissing a mother's appeal against the activation of a suspended committal order, Ward L.J. observed (at p.540) that the welfare of the child, although obviously a material consideration, was not in this context paramount. Referring to the observations of Sir Thomas Bingham M.R. *in Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124 and of Sir Stephen Browne P. in *Re F* (Unreported, 13th May, 1996) Ward L.J. said (at p.541):

> 'The stark reality of this case is that this is a mother who has flagrantly set herself upon a course of collision with the court's order…in my judgment, it is time that it is realised that against the wisdom of the observations of Ormrod L.J. is to be balanced the consideration that orders of the court are made to be obeyed. They are not made for any other reason…it is perhaps appropriate that the message goes out in loud and in clear terms that there does come a limit to the tolerance of the court to see its orders flouted by mothers even if they have to care for their young children. If she goes to prison it is her fault, not the fault of the judge who did no more than his duty to the child which is imposed upon him by parliament.'

Beldam L.J. said much the same, commenting (at p.542) that:

> 'The court has been placed by the mother in a situation in which it either has to yield to her obstinacy and back down from its own order or it has to enforce it. If the court were to yield to such persistent

intransigence, respect for its orders and for the administration of justice would be at an end.'

Similar sentiments were expressed by all three members of the court (Thorpe, Arden and Neuberger LJJ) dismissing a mother's appeal from a committal order in *Re S (Contact Dispute: Committal)* [2004] EWCA Civ 1790, [2005] 1 FLR 812. It suffices to note what Neuberger L.J. said (at para. 14):

'It seems to me that this was an order which was justified both in terms of enforcing respect for the orders of the court, and, therefore, for the rule of law in society, and also, as a last resort, to coerce the mother into complying with court orders. In my view, the judge's decision was amply justified.'

Finally, I go to *B. v S.* [2009] EWCA Civ 548, a case where Wilson L.J., with whom Ward L.J. agreed, said (para. 16):

'The days are long gone when mothers can assume that their role as carers of children protects them from being sentenced to immediate terms of imprisonment for clear, repeated and deliberate breaches of contact orders.'

For my part, and I wish to emphasise this, I agree entirely with the approach adopted in *A. v. N.*, in *Re S* and in *B v. S* committal is – has to be – an essential weapon in the court's armoury in cases such as this. Nothing in this judgment should be seen as a charter for avoiding enforcement of contact orders in whatever is the most appropriate way, including, where appropriate, by means of committal.'

47. This Court is struck by the wisdom of the views expressed by Ormrod L.J. in *Churchard v Churchard* [1984] FLR 635. There can be no doubt but that the imprisonment of a parent (whether the primary carer or not) will inevitably impact in a profound way on the child or children of that parent. Such a profound affect will be amplified when the children are at the core of the dispute leading to the imprisonment. It is the case that the sanction of imprisonment for such a contempt of a court order must remain as a sanction or as a weapon in the court's armoury. But as a weapon there cannot be any doubt that it is an option of last resort. Its true value lies in the fact that it is available as an option of last resort. The cases where it is to be availed of as a sanction are and ought to remain rare. It will be an exceptional case where incarceration for coercive or punitive purposes in family law proceedings will trump the child welfare considerations which ordinarily arise in such circumstances.

48. Fortunately, s.60 of the 2015 Act inserts new provisions in the Guardianship of Infants Act, 1964. They are as follows:-

'Enforcement orders

18A.(1) A guardian or parent of a child who has been—

(a) granted, by order of the court made under this Act, custody of, or access to, that child, and

(b) unreasonably denied such custody or access by another guardian or parent of that child,

may apply to the court for an order ('enforcement order') under this section.

(2) An application under subsection (1) shall be on notice to each guardian and parent of the child concerned.

(3) Subject to subsection (4), the court, on an application under subsection (1), shall make an enforcement order only where it is satisfied that—

(a) the applicant was unreasonably denied custody or access, as the case may be, by the other parent or guardian,
(b) it is in the best interests of the child to do so, and
(c) it is otherwise appropriate in the circumstances of the case to do so.

(4) An enforcement order may provide for one or more than one of the following:

(a) that the applicant be granted access to the child for such periods of time (being periods of time in addition to the periods of time during which the applicant has access to the child under the order referred to in subsection (1)(a)) that the court may consider necessary in order to allow any adverse effects on the relationship between the applicant and child caused by the denial referred to in subsection (1) to be addressed;
(b) that the respondent reimburse the applicant for any necessary expenses actually incurred by the applicant in attempting to exercise his or her right under the order referred to in subsection (1)(a) to custody of, or access to, the child;
(c) that the respondent or the applicant, or both, in order to ensure future compliance by them with the order referred to in subsection (1)(a) do one or more than one of the following:

(i) attend, either individually or together, a parenting programme;
(ii) avail, either individually or together, of family counselling;
(iii) receive information, in such manner and in such form as the court may determine on the possibility of their availing of mediation as a means of resolving disputes between them, that adversely affect their parenting capacities, between the applicant and respondent.

(5) An enforcement order shall not contain a provision referred to in subsection (4)(a) unless—

(a) the child, to the extent possible given his or her age and understanding, has had the opportunity to make his or her views on the matter known to the court, and
(b) the court has taken the views (if any) of the child referred to in paragraph (a) into account in making the order.

(6) Where the court, on an application under subsection (1), is of the opinion that the denial of custody or access was reasonable in the particular circumstances, it may—

(a) refuse to make an enforcement order, or
(b) make such enforcement order that it considers appropriate in the circumstances.

(7) This section is without prejudice to the law as to contempt of court.

(8) In this section—

'family counselling' means a service provided by a family counsellor in which he or she assists a person or persons—

(a) to resolve or better cope with personal and interpersonal problems or difficulties relating to, as the case may be, his, her or their marriage, civil partnership, cohabitation or parenting of a child, or
(b) to resolve or better cope with personal and interpersonal problems or difficulties, or issues relating to the care of children, where the person or persons is or are affected, or likely to be affected, by separation, divorce, the dissolution of a civil partnership or the ending of a relationship of cohabitation;

'family counsellor' means a person who has the requisite skill and judgment to provide family counselling;

'parenting programme' means a programme that is designed to assist (including by the provision of counselling services or the teaching of techniques to resolve disputes) a person in resolving problems that adversely affect the carrying out of his or her parenting responsibilities.

Person presumed to have seen order of court

18B. A person shall be deemed to have been given or shown a copy of an order made under this Act if that person was present at the sitting of the court at which such order was made.

Power of court to vary or terminate custody or access enforcement order

18C.(1) The court may, on application by a person granted by order of the court made under this Act, custody of, or access to a child, make an order varying or terminating an enforcement order or any part of that order.

(2) The court may, in proceedings to vary or terminate a custody or access order, in those proceedings vary or terminate an enforcement order that relates to that custody or access order.

Enforcement of custody or access order

18D.(1) Where a guardian or parent of a child—

(a) has been granted, by order of the court made under this Act, custody of, or access to that child, and

(b) fails, without reasonable notice to another guardian or parent of the child, to exercise the right concerned, the other parent or guardian of the child may apply to the court for an order requiring the first-mentioned guardian or parent to reimburse to the second-mentioned guardian or parent any necessary expenses actually incurred by that guardian or parent as a result of the failure of the first-mentioned guardian or parent to exercise that right

(2) In this section, and section 18A, 'necessary expenses' include the following:

(a) travel expenses;

(b) lost remuneration;

(c) any other expenses the court may allow.".

49. This new regime which deals with the enforcement of parenting orders is a welcome addition to the remedies available to the court when dealing with an intransigent/unreasonable parent who is not abiding by a court order concerning custody or access/a parenting order.

50. The sections are self-explanatory.

51. Section 18A (3) of the 1964 Act sets out a procedure for the making of enforcement orders by a court where a guardian or parent of a child has been held to have unreasonably denied the applicant parent custody of or access to the child. The court can only make an enforcement order where it is satisfied that the applicant was unreasonably denied custody or access, where it is in the best interest of the child to do so and where it is otherwise appropriate in the circumstances.

52. As stated by Dr. Geoffrey Shannon in '*Children and Family Relationships Law in Ireland: Practice and Procedure'* (Clarus Press, 2016) at para. 6-04 :-

> *'This is a novel provision, in that it attempts to address the situation where custody and access arrangements are made and then routinely not complied with. The explanatory note in the bill states that the policy intention behind it is to address this non-compliance by means of a less drastic and more proportionate response than contempt of court proceedings.'*

53. An enforcement order can provide the applicant with compensatory time with the child in addition to the time already provided for in the existing court order. This is to allow any adverse effects on the relationship between the applicant and child caused by the breach of the existing court order to be addressed. The court will not generally grant this extra time to the applicant unless the child, to the extent possible given his or her age and understanding, has had the opportunity to make his or her views known and the court has taken these into account.

54. Enforcement orders are not made in all circumstances. Section 18A (6) states that, if the court is of the opinion that the denial of custody or access was reasonable in particular circumstances, the court may refuse to make an enforcement order or make the enforcement order that it considers appropriate in the circumstances.

55. In this case the mother did seek to invoke the enforcement provisions introduced by s.60 of the 2015 Act. This application was made by motion on notice to the father which came before this Court in July of this year. However, the father objected on the basis that the court did not have jurisdiction to grant the orders sought since it had determined the appeal from the circuit court. In effect, it was argued that the court no longer had *seisin* of the matter. The court accepted this argument. It was in those circumstances that the mother brought this application for the attachment and committal of the father. This application by her is justified.

56. The mother can be aggrieved at the father's July objection to the jurisdiction of this Court in circumstances where the father did himself on an *ex parte* basis invoke the jurisdiction of this Court in September 2019 following the determination of the appeal and did at that time successfully seek and obtain a significant variation of the order made by this Court in April 2019.

57. The father was aggrieved at the decision of this Court in relation to his variation motion and sought to appeal the matter to the Court of Appeal. The Court of Appeal did not entertain the appeal which was filed with it in circumstances where this Court had finalised an appeal from the Circuit Court and made a final order in the matter – and there was no further appeal to the Court of Appeal. This Court had re-entered the appeal on the father's application to deal with the motion which he had brought before the court for variation of access.

58. On 8th September of this year the father brought an application in the Circuit Court for a variation/alteration of access in the circumstances now prevailing. The Circuit Court declined to entertain that application at that time whilst the motion for attachment and committal was pending in this Court. On the conclusion of the evidence at the hearing of this motion for the attachment and committal of the father this Court reserved judgment but made it clear to the parties that it was then appropriate to apply to the Circuit Court in relation to the variation of access sought by the father.

59. This Court is here dealing with a motion for the attachment and committal of the father by reason of his behaviour.

60. What is at issue is particularly important in light of s.3 of the Guardianship of Infants Act 1964 (as amended) which provides ; -

'3. — (1) Where, in any proceedings before any court, the —

(a) guardianship, custody or upbringing of, or access to, a child, or

(b) administration of any property belonging to or held on trust for a child or the application of the income thereof, is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration.

(2) In proceedings to which subsection (1) applies, the court shall determine the best interests of the child concerned in accordance with Part V'.

61. The mother asserts that the father's behaviour amounts to a deliberate breach of the court orders in relation to access. Thus, it is reasonable to say that what is in question is: -

(a) The proper interpretation of the court orders made,

(b) whether or not the father is in breach of the court orders,

(c) whether or not this breach is deliberate or excusable, and

(d) if the court does find the father in contempt what the appropriate sanction is.

62. On this basis, it is reasonable to assert that, although the court orders in question concerns custody and access to the child, that is not what is in question before the court but on the contrary, the issue is simply whether there is a contempt of court insofar as the court orders are concerned.

63. However, it does seem that this would be a strained and artificial construction of s.3. These proceedings which are before the court by way of a motion for the attachment and committal of the father concern the guardianship, custody or upbringing of, or access to, a child. The central issue is the joint custody which the parents enjoy pursuant to court order and the contact or access which they are both entitled to pursuant to the court orders.

64. In deciding the question which is before the court (i.e. whether or not the father ought to be committed to prison for contempt of court) it does seem that the court must regard the best interest of a child as the paramount consideration. To do otherwise would be to lose sight of the function of the court in these family law proceedings and of its role in evaluating the child welfare issues that arise and which carry alongside them parental rights and obligations on the part of the father and mother.

65. Section 25 of the 1964 Act as inserted by s.11 of the Children Act 1997 provides as follows:

'Wishes of child.

25.—In any proceedings to which section 3 applies, the court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child's wishes in the matter.'

66. Similarly, Article 12 of the UN Convention on the Rights of the Child 1989 provides as follows: -

> "(1) State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of natural law."

67. The statutory obligation obliging the court to take into account the wishes of the child has been elevated to a constitutional duty by the recent successful referendum. Article 42A.4.1 provides: -

> "Provision shall be made by law that in the resolution of all proceedings –
>
> (i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
> (ii) concerning the adoption, guardianship or custody of, or access to, any child, the best interest of the child shall be the paramount consideration.
> (iii) Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in sub.(i) of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child."

68. A child's voice, when the child in question is old enough and mature enough and capable of forming his or her own views is important in properly informing the court before reaching a determination on what orders may or may not be in the best interests of the welfare of the child. The time at which the child's voice is heard, the manner in which it is heard and the circumstances in which it is heard will depend on each individual case and on the immediate issue presented for determination by the court. In circumstances where the welfare of the child is the first and paramount consideration it would be wrong to canvass directly the views of a child on whether either one or both of the parents of the child ought to be incarcerated or otherwise sanctioned for contempt of a court order – whether the issue be custody or access or something else concerning parenting. A child must be insulated from any direct role in the decision as to whether a parent ought to be incarcerated or sanctioned for contempt of court by reason of the behaviour of the parent in question in failing to abide by a court order concerning custody of or access to the child. To do otherwise would be to disregard the first and paramount consideration as any direct participation in that decision by the child would inevitably impact upon the welfare of the child in an adverse way.

69. Whilst the facility of being allowed to seek variations may allow for a multiplicity of court applications the position is that the new sections introduced by s.60 of the 2015 Act are robust and do provide the court with ample scope for sanctioning any abuse of the court process. They provide also a range of sanctions to deal with a parent disregarding court orders. The Court also has the usual discretion in relation to the costs of proceedings.

70. In terms of hearing the voice of the child the court has a wide discretion as to the appropriate approach to adopt given that the facility is open to abuse and manipulation by either one or both the parents involved. The decision on the exercise of the discretion will depend on many factors including the surrounding circumstances - such as the issues in dispute, the age of the child or children, the previous involvement of the Judge and the Courts and the number of expert reports already available to the court.

Findings

71. The Court is of the view that the father has deliberately used the Covid-19 public health emergency to frustrate the operation of access as set out in its Orders. Further, this has been done by him in order to disrupt the relationship of L. and her mother. What is particularly concerning in this regard is that it is a repeat of a pattern where he has endeavoured to minimise contact between L. and her mother.

72. I do not find credible his assertion that access was not possible in March and April because of the Covid-19 crisis. This is illustrated by the inconsistencies in his averments as to why access was denied and by his clear grasping for excuses.

73. An obvious solution to the father's concerns, if genuine, would have been to let L. stay with her mother during this time. This could have been rebalanced by means of a *quid pro quo* where the time she spent with her mother could be made up to him in terms of lost time at a later stage. Such a solution had much to commend itself when the father was, with his wife, preparing for the arrival of their first child together. The suggestion made by the mother in that regard in her solicitors letter dated 9th April 2020 was completely ignored.

74. The father's solicitors correspondence surrounding "Covid concerns" indicated a willingness to make up lost time to the mother "in the future". It is no coincidence that this promise evaporated when the lockdown was eased. Instead of having more access than permitted by the Court orders the mother found she had less.

75. It does seem that the break in access had a significant adverse impact on L.'s desire and / or willingness to be moving from one house to another at weekends for access with her mother. As a matter of probability, L.'s attitude in this regard was influenced to a significant extent since May of this year by the continuing attitude of her father. However, it is not possible to conclude beyond a reasonable doubt that the current impasse is not attributable to L.'s own mindset as opposed to the influence of her father.

76. What is clear, however, is that a different attitude and approach, and more conciliatory behaviour on the part of the father would be a significant and probably determining

influence in allowing access and contact between L. and her mother, in accordance with the court Orders. This court has no doubt that the crux of the problems concerning mother daughter contact has been the behaviour and attitude of the father. He is and has been resolute in frustrating the mother daughter relationship and equally resolute in acting as his own court of appeal in respect of the orders made by this court. He does not and has not accepted the orders made by this court and he has not complied with them nor has he made any real effort to do so.

77. The Court is therefore satisfied that:-

A. The father did, beyond all reasonable doubt, act in wilful disobedience of the court Order in March and April of this year and before then. He did so in a cynical attempt to drive a wedge between L. and her mother. The father has beyond all reasonable doubt acted in a way which has frustrated the operation of court Orders that have provided for custody and access insofar as L. and her mother are concerned.

The situation pre-8 May 2020 and post-8 May 2020 is different.

B. Since 8 May of this year, it is not possible to say, beyond all reasonable doubt, , and apart from the discrete incident mentioned later, that the father is acting and has acted in wilful disobedience of the court Orders. He may not need to in order to succeed in his objective as the wishes of L. may have taken over. She may have decided that life is easier without having the access with her mother in accordance with the Orders and it may be difficult to persuade her otherwise. If that is her position, it has probably come about because of what the father did in March and April of this year. His actions back then altered the landscape in so far as mother/daughter contact is concerned and the father has succeeded in his objective.

C. The position now is that a variation application is being made to the Circuit Court with a view to regulating access in light of the current situation and in particular in light of the current views held by L. It is a matter for the mother whether to meet that application with an application for enforcement of the existing orders.

78. Although finding beyond all reasonable doubt that contempt of court on the part of the father is established in relation to the events pre 8 May 2020 the Court will not order the committal to prison of the father in circumstances where the Order with the penal endorsement on it was not served until the 30th July of this year. Furthermore, and importantly, committal to prison of the father would not be in the best interests of the welfare of L. Indeed, such an Order would likely serve to drive a further wedge between L. and her mother.

79. One discrete incident needs mention. The court would be justified in ordering the committal of the father to prison for his actions at the school on 11th. September 2020. It has decided not to by reason of the welfare considerations mentioned in the pre-ceding

paragraph. L. would not be well served by such an order and the mothers long term interests in so far as her relationship with L is concerned would be damaged.

80. It needs to be said also that the Court is alert to the fact that the mother has not approached this application with a malevolent or a vindictive attitude. In truth she does not want the father imprisoned. She wants the court ordered access and she clearly hoped that this application might cause the father to ensure compliance, which she feels he can achieve. Unfortunately for her and for L. the father has decided to press on and achieve his objective regardless - without making any real effort to secure compliance with the court orders and/or to nurture the mother and daughter relationship.

81. The father has acted throughout in a determined, premeditated and intelligent way. It is a real concern that he has largely succeeded to date in having his way despite the Court Orders made. If he continues to behave in defiance of Court Orders then he may well find himself falling into that category of rare cases where the sanction of incarceration is the last option available to the Court to show to him and others that Court orders are made to be obeyed.

N.B. Appendix in relation to costs

Appendix in Relation to Costs

1. The Court would like to thank the parties for the submissions in relation to costs and for the Book of Authorities including the recent legislation which have been considered.

2. The first thing to say in relation to the application for costs in this case is that this application for costs must be viewed in the context of the proceedings which have been before this Court, in particular the original hearing of the appeal in April 2019 and then the hearing as a result of the *ex parte* application which was made in September 2019 and which resulted in the decision of this Court following the hearing of the motion on notice to the mother and which culminated in the judgment which was delivered on the 17th October 2019.

3. The Court was minded when dealing with costs in relation to the hearing in October 2019 to award costs against the father by reason of the matters set out in some detail in that judgment. However, and it is apparent from the decision in relation to costs, the Court relented in its view in that regard and decided, given the history of the proceedings, and in the hope that things would improve between both parties, that it would not make any order as to costs.

4. The application which came before this Court in July 2020 for enforcement was brought in the wrong court in that it should have been brought in the Circuit Court. That particular application has to be viewed in the context that the father had applied, *ex parte*, to this Court in September of last year when, in the Court's view, that application ought to have been made in the Circuit Court but it proceeded nonetheless. It is understandable in many respects how the appellant, the mother, returned to this Court with an enforcement motion albeit it was in the wrong court. In saying it is understandable, the Court is not blind to the fact that motions in relation to enforcement of the type of court orders that we are dealing with in this instance are frequently brought for the coercive effect that they have to try and persuade the party who is not complying with the court order to do so.

5. In any event, the failure of that motion to proceed by reason of it correctly founded argument and jurisdiction, resulted in the mother deciding to bring the motion for attachment and committal which was dealt with and resulted in the recent judgment of this Court after a full hearing.

6. Again, the Court is not blind to the fact that motions for the attachment and committal of parties bound by court Orders for alleged breaches of such court orders are frequently brought for the coercive effect or persuasive effect that such motions have.

7. It is the position, and was pointed out in the course of the hearing, that the Order had been served at a late stage with the penal endorsement on it and it is the position that the motion for the committal of the father to prison was unsuccessful in that he was not committed to prison. However, the Court did point out in the course of the judgment that

there were two reasons why it was not committing the father to prison. One was the absence of the penal endorsement insofar as where the service of the order with the penal endorsement on it was not served until the end of July 2020.

8. Insofar as the substantive breaches of the Court Orders are concerned, it is the position that the breaches during lockdown in March and April were the most significant breaches that the Court found and the Court was not in a position to direct the incarnation of the father in circumstances where it was subsequent to those dates that the Court orders with the penal endorsements were served on him, the date of service being the 30th July 2020.

9. There was another reason, and an important reason, for the Court not directing the incarnation of the father and that was the welfare issue that arose insofar as L. is concerned because the relationship of L. and her mother, in the view of the Court, would not survive the incarnation of the father.

10. So there were two reasons found by the Court and it needs to be said that even if the Orders had been served with the penal endorsement on them both in November of last year, the welfare issue in relation to L. would still have remained as an important consideration insofar as the application to commit the father was concerned. It would not have been possible to distinguish the impact of the incarnation of the father in any way by reference to the fact that the Orders had been served earlier, it would not have made any difference in terms of her welfare if the Orders had been properly served, that issue would have remained a significant issue. It needs to be said, in addition to that, that the Court was satisfied that the father did breach the Court Order in September of last year at the school, and the Court is not going to repeat what it said in that regard in the judgment. Ultimately, insofar as the application before the Court is concerned, the Court found that the mother was justified in bringing the application. In fact, on one view, the mother had little alternative. She had the alternative proceeding not proceeding for enforcement in the Circuit Court, but she had two choices, proceed in that manner or bring a motion for attachment and committal in this Court in the hope that the coercive effect or persuasive effect of such a motion would have worked because it seems to me and it is commented upon in the judgment that it was not the desire at any stage of the mother to have L's father sent to prison. Her real desire was to see to it that the Court Orders were abided by.

11. Costs ordinarily follow the event. The successful party should in the ordinary course of events recover the costs. Mr. McGowan B.L. says he was successful in that contempt was found. He points to the findings of a judgment as proof of success on the part of his client. Mr. McCarthy S.C. says that the mother was not successful, she tried to incarcerate his client and failed. There is an argument on both sides and in the most simplistic approach to that argument, one might favour Mr. McCarthy's view because after all his client is not imprisoned and defended a motion for his attachment and committal to prison but the Court did say, and was satisfied, and remains satisfied, that the application before it was justified. It was also an application that was caused in the Court's view

entirely by reason of the conduct of the father. It is not necessary to repeat what has been said in the course of the judgment insofar as his conduct is concerned. The father's breach of the Court Orders is detailed and his approach to breaching the court orders is detailed in the judgment.

12. Ultimately, insofar as the application for costs before the Court is concerned, it is the position that the Court does have a discretion, it is the position that there is a complicated picture, a complicated dynamic at play insofar as this litigation is concerned and insofar as this particular application before the court is concerned. It is the position that the conduct of the father in breaching the court orders in the manner identified by the Court in the judgment is deplorable and deliberate and the Court has to look at the justice of the situation in deciding whether or not to exercise its discretion in favour of one party or the other, in this instance in favour of the mother because it is she who is seeking costs, and where the father is saying there should be no orders as to costs. The Court has to look at the justice of the situation and it seems that it would be an affront to justice if it did anything other than award the mother her costs of the motion for attachment and committal of the father. He brought all of this on himself and it was not by an error or by an incident, this was an orchestrated position adopted by him, particularly as the Court has said in its judgment during lockdown, problems emerging in January and then he decides during lockdown to disregard and disobey the court orders. So the Court has to say and it is unfortunate that it has come to this because the preference of the Court in family law proceedings is to avoid making an award of costs in favour of one party against another but a time comes when it is necessary to do justice *inter partes* and to avoid a situation where the mother in this case simply asking that clear court orders be obeyed, is out of pocket as a result of that simple and straightforward request. In those circumstances, the Court is awarding the mother her costs of the motion for attachment and committal of the father, to be adjudicated in default of agreement between the parties.