

**THE HIGH COURT
FAMILY LAW**

[2019/24 CAF]

**IN THE MATTER OF THE GUARDIAN OF INFANTS ACT, 1964
(AS AMENDED)**

AND

**IN THE MATTER OF THE FAMILY LAW (MAINTENANCE OF SPOUSES AND CHILDREN)
ACT, 1976**

AND

IN THE MATTER OF R.D. (A MINOR)

BETWEEN:

L.D.

APPELLANT

AND

N.D.

RESPONDENT

EX TEMPORE JUDGMENT of Mr. Justice Jordan delivered on the 27th day February, 2020

1. An objection has arisen at the outset of this appeal concerning the calling of evidence arising from the report prepared by Dr. L. The Court has considered the submissions of both sides. They raise an interesting question concerning the difference, if one exists, between the procedure in respect of appeals from the Circuit Court to the High Court as opposed to appeals from the High Court to the Court of Appeal and to the Supreme Court.
2. The matter arises because of the fact that in July 2018, having received the report of Dr. L, the solicitors for Mr. D. (hereafter 'the respondent') raised a concern that the author had made reference in a report to the fact that in addition to having cited the court affidavits, she had cited also emails and medical notes and other notes which were provided by the parties. The solicitors for the respondent (Dillon Solicitors) pointed out that their client was not asked to provide any additional documentation, nor did he do so. He was not given any opportunity to either have sight of, or to comment on, any of these additional documents and a request was made that the documentation in question provided by Ms. D. (hereafter 'the appellant') to the author of the report be furnished to Dillon Solicitors. Correspondence ensued on that particular issue, resulting in a letter from Keith Walsh Solicitors (representing the appellant) on the 18th September 2018, to Dillon Solicitors listing nine separate categories of documentation which the appellant had furnished to Dr. L.
3. There was further correspondence, which was professional and co-operative, between the solicitors on both sides in relation to the issue which had arisen and ultimately the solicitors for the appellant wrote to Dillon Solicitors on the 25th of October 2018, referring to a draft letter which had been prepared for another expert whom it was proposed to bring in, Mr. F. In the second paragraph of that letter, Keith Walsh Solicitors stated:-

"Having discussed this matter with counsel we believe it would be essential that a motion is issued by you grounded on a short affidavit setting out that for reasons

outside the control of both parties it has been agreed that Dr. L is no longer to continue in her appointment and that Dr. [sic.] F will replace her”.

4. Subsequently, there was some correspondence to achieve that desired end and Keith Walsh Solicitors wrote on the 2nd November by email to Dillon Solicitors, referring in the final sentence to *"the one outstanding matter is that we should agree a formula of words to deal with Dr. L's exit from the scene"*.
5. So by agreement between the parties, Mr. F. came in and Dr. L 'exited from the scene' and did not give evidence in the Circuit Court, although she had prepared and finalised a report.
6. Shortly before the commencement of this appeal hearing, the legal team for the appellant notified the respondent's legal team that they intended to call Dr. L and objection has been taken to her being called to give evidence. Mr. McCarthy S.C., for the respondent, says that this is fresh evidence which would completely alter the landscape and put his client at a disadvantage and perpetrate an injustice on him.
7. The Court has had the benefit of two folders of legal authorities, one from each side, and has heard submissions from both sides on the first and second day of the hearing of this matter.

Legal Issues

8. The first thing to say is that there is a difference between s.38 and s.37 of the Courts of Justice Act of 1936. Section 37 deals with appeals from the Circuit Court in any civil action or matter at the hearing or the determination of which no oral evidence was given and it provides for an appeal to the High Court sitting in Dublin. Section 37(2) provides that:- :

'Every appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made, but no evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal.'
9. Section 38 deals with other Appeals from the Circuit Court – i.e. where oral evidence was given in the Circuit Court. It applies in cases where Section 37 does not. It does not contain the embargo mentioned at the end of Section 37(2) - i.e. the provision which states:- 'No evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal'.
10. There is a clear difference between s. 38 and s. 37. On the face of it, the fact that s.37 provides for something different to s. 38 should be a pointer as to the correct procedure and the actual procedure that applies in relation to appeals from the Circuit Court to the High Court.

11. The position is that an appeal from the Circuit Court to the High Court is different in nature to an appeal from a Superior Court of record, i.e. from the High Court to the Court of Appeal or to the Supreme Court. The practical difference is that in appeals between the Circuit Court and the High Court, where oral evidence is given in the Circuit Court, the appeal hearing is by way of a rehearing of both sides and their witnesses. The appeal from the Circuit Court to the High Court differs in that regard from the appeal which exists from this Court to the Court of Appeal or to the Supreme Court. The authorities which the Court has been provided with address, in the main, the latter type of appeal - that is an appeal grounded on the transcript of evidence heard in the High Court when the appeal is being heard in the Court of Appeal or in the Supreme Court.
12. The Court has been referred to the principles enunciated in *Murphy v. Minister for Defence* [1991] 2 IR 161 (hereafter 'the *Murphy* principles') which apply. They are quite clear, and it has been provided with the main authorities in relation to their application; the Court will return to those authorities later in this judgment.
13. Insofar as the appeal from the Circuit Court to the High Court is concerned, this Court has not been provided with any authority which is directly in point in relation to the issue which arises in this case. Mr. McCarthy S.C., for the respondent, has referred to an authority that is mentioned in Delany, *The Courts Acts 1924 - 1997* (2nd ed., Round Hall, 2000) at p. 134 which dealt with *McCormick v. Cosgrave* [1947] Ir. Jur. Rep. 5. In that case, there was a claim and counterclaim before the Circuit Court. The claim was dismissed for non-appearance and the counterclaim succeeded. In these circumstances, an appeal lay in respect of the counter claim only. This was only because there had not been a hearing of the claim itself in the court below. For these reasons, it was determined that an appeal from the order dismissing the claim could not be determined by way of a rehearing in the appellate court, in this instance the High Court, in accordance with s. 37 of the Courts of Justice Act, 1936. It is clear that the situation that arose in *McCormick* is a different situation to the one the Court is dealing with here.
14. Insofar as the *Murphy* principles are concerned, they apply in relation to appeals between this Court and the Court of Appeal or this Court and the Supreme Court. The Court has been referred to the passage in the decision of Hogan J. of 18th December 2015, in the Court of Appeal in *Student Transport Scheme Ltd v. Minister for Education and Skills* [2015] IECA 303. In particular, this Court's attention has been drawn to the paragraph under the heading the '*Murphy* principles' at para. 11, where Hogan J. states as follows:-

"The first thing to note is that these principles apply indistinctly to all types of appeals. The extensive subsequent case-law shows, moreover, that these principles have been applied in a flexible manner. Thus, for example, the Supreme Court has stated that fresh evidence will be admitted if the underlying premise of the High Court "has been falsified by subsequent events" or where to do otherwise would "affront a sense of justice": see Fitzgerald v. Kenny [1994] 2 I.L.R.M. 8, 20, per Blayney J."

15. A flexibility of approach, or perhaps a willingness to be more flexible in the application of the *Murphy* principles, is also evident if one reads the decision of O'Donnell J. in *Emerald Meats Ltd v. Minister for Agriculture and Others* [2012] IESC 48, at p.48 and which is referred to at para. 12 of the decision of Hogan J. in *Student Transport Scheme Limited*. However, if one reads on in the judgment, it is clear, that although referring to all types of appeals, Hogan J. is referring to all types of appeals in the Superior Courts, or at least that is how it appears to this Court, because at para. 13 he states:

'13. It is true that Article 34.4.1 of the Constitution does not in terms specify the form which the right of appeal from the High Court to this Court should take. But it has been clear from the general structure prescribed by the Rules of the Superior Court and established practice that the right of appeal from the High Court to the Supreme Court during the period from June 1924 (following the establishment of the Supreme Court) to October 2014 generally took the form of an appeal based on the evidence already given and arguments heard in the High Court. Following the establishment of this Court in October 2014 the same has been true for appeals from the High Court to this Court under Article 34.4.1.'

16. The fact of the matter is that appeals from the Circuit Court to the High Court have been dealt with as hearings *de novo*. This Court is not aware of any authority, nor has any authority been put before it, which would indicate that evidence such as that proposed to be called on behalf of the appellant, should not be allowed.
17. Ultimately, insofar as the issue before this Court is concerned, it seems that the appellant is entitled to call the evidence that is under discussion. The evidence is relevant and admissible. The respondent is at liberty to, and will no doubt exercise the right of cross-examination, insofar as the evidence of Dr. L is concerned. It seems to this Court that, in circumstances where it is engaged in a child welfare assessment, it would be wrong of it to exclude the evidence and in those circumstances it proposes to allow Dr. L to be called by the appellant.
18. Insofar as the ramifications of this ruling are concerned, two issues occur to the Court; both matters have been mentioned. The first is whether Dr. L and Mr. F. should speak to one another before they give evidence. From a case management point of view, it seems that this is a sensible exercise. The Court will hear both parties in respect of this, but it does not see any point in them not speaking as they may reach some common ground in respect of some of the issues. It would seem to the Court to be artificial to have them both give evidence without they having had an opportunity to discuss their respective opinions with one another. So subject to what the Court hears in that regard, it is proposed to direct that they would both meet and discuss matters before giving evidence. Secondly, there is the question of whether or not a review ought to take place by either one or both of these experts. Again, the Court will hear submissions in that regard. It seems to the Court, before hearing submissions, that such an exercise is not necessary or warranted. After all, the reports of both of these experts were reports prepared for a hearing at which a determination on relocation was to be made. The Court will hear the

parties on both of those issues but its thinking at the moment is: yes to the former and no to the latter.

N.B.: - Following submissions, the latter questions were answered Yes and No, respectively. The hearing was later concluded following an adjournment and judgment was issued (see D v. D No. 2, CITATION TO BE ASSIGNED)