**APPROVED**
**NO FURTHER REDACTION NEEDED**

# THE COURT OF APPEAL

# CIVIL

**Appeal Number: 2023 266**

**Neutral Citation Number [2024] IECA 63**

**Whelan J.**

**Allen J.**

**Meenan J.**

**IN THE MATER OF THE FAMILY LAW (DIVORCE) ACT, 1996**
**AS AMENDED BY THE FAMILY LAW ACT, 2019**

**BETWEEN/**

**K.P.**

**APPLICANT/APPELLANT**

**- AND –**

**L.P.**

**RESPONDENT/RESPONDENT**

**JUDGMENT of Mr. Justice Allen delivered on the 21st day of March, 2024**

*Introduction*

**1.** This is an appeal against the judgment of the High Court (Jordan J.) delivered on 26th June, 2023 and consequent order made on 6th July, 2023, refusing an application by the appellant *("the father")* for an enforcement order in respect of a High Court order providing for access by the father to the parties' eldest child.

*Background*

**2.** The appellant *("the husband")* and the respondent *("the wife")* were married in the mid 2000's and lived together until the late 2010's when, unhappy differences having arisen, they separated. There are four children of the marriage the eldest of whom, a girl, Child A, was born in 2009 and the youngest some years later.

**3.** In the years immediately following the breakdown of the marriage there was protracted and bitter litigation in relation to the custody of and access to the children. In May, 2018, the wife commenced proceedings seeking a judicial separation and ancillary relief. In 2020 – the parties having in the meantime lived separate and apart for upwards of two years – it was agreed that the husband would issue divorce proceedings. That was duly done and the proceedings were determined by the High Court as an application for divorce.

**4.** On 15th December, 2020 the High Court (Faherty J.) delivered a carefully considered written judgment. At that time, Child A was not quite twelve years of age and the youngest was about six and a half.

**5.** Faherty J. awarded joint custody to the parties, the children to reside with the mother. She ordained a very detailed regime for access by the father, setting out a four-week cycle which would see the children in the care of the father for the weekend for three of the four weeks of the cycle and midweek in the other week. Faherty J. made provision for bank holidays, school holidays, midterm breaks, and Christmas; specifying the times and places at which, and the parent by whom, the children were to be dropped and collected.

**6.** For some reason the order of the High Court was not perfected until 27th July, 2022 but the decision of the court as to custody and access was very clearly spelled out in the judgment and the regime was implemented reasonably satisfactory for about two and a half years. I do not overlook the father's averment that the mother leveraged the absence of a perfected court order in order to dictate and control access arrangements: but if there were difficulties from time to time, the directions of the court were broadly adhered to.

**7.** In September, 2022 the regime broke down.

**8.** Child A was due to spend the weekend of 17th September, 2022 with her father. She was then aged about thirteen and a half. By the letter of the order she was to have been collected from school by her father but – perfectly sensibly and reasonably – it had been arranged that she would make her own way to her father's house. However, when she left school, Child A went to her mother's house and, regretfully, has not since then stayed with her father. Indeed since that time contact between Child A and the father had been almost exclusively by text message.

**9.** The father blames the mother for the breakdown in the access arrangements. The mother maintains that Child A independently decided that she no longer wished to stay with her father, or, indeed, to have any in person contact with him.

**10.** On 22nd September, 2022 the father had had the mother served with a copy of the order of 27th July, 2023 with a penal endorsement.

*The High Court application*

**11.** By notice of motion issued on 24th October, 2022 the father applied to the High Court for a variety of reliefs. Until shortly before then, the father had been legally represented but he issued the motion on his own behalf. He sought an order providing for *"compensatory access"* for the eight nights and nine days that – as of the date of issue of the motion – Child A was not in his care, proposing the dates in January, 2023 on which he would have that

additional access. He sought an order requiring the mother to facilitate, encourage and support the children to have professional therapeutic support and an order requiring the mother to enrol in and attend a *"Parenting when Separated"* course and to abide its recommendations. And *"further, and only in the event that the [mother] continues to frustrate contact between the [father] and the children"* an order for the attachment and committal of the mother. The notice of motion did not identify the legal basis on which the several orders were sought.

**12.** The father's application was grounded on a long affidavit the substance of which was that from August, 2022, the mother had persistently breached the perfected court order. He deposed that Child A was being manipulated, pressured and coerced by the mother into doing and saying what the mother wanted rather than what Child A herself wanted. By reference to the judgment of Faherty J., he asserted that the mother had exhibited a clear pattern of exaggerating and fomenting difficulties. And he deposed that the mother had *"breached the court order by withholding [Child A] and her belongings."* On 9th November, 2022 the father filed a supplemental affidavit, spelling out that he simply wanted the existing court order to be followed.

**13.** On 17th November, 2022 the mother swore a long replying affidavit in which she took issue with much of what the husband had said. The mother deposed that whenever difficulties arose with access, the father became hostile, defensive and offensive. The mother deposed that she had encouraged Child A to go to her father's house but that Child A had refused. The mother identified the triggering factor as the father's announcement to the children on 27th August, 2022 of his intention to re-marry. The father's partner was the mother of small children who were staying in the father's house when the parties' children were there. Child A, said the mother, was twelve and a half years of age and she could not physically force the child to go to the father's house.

**14.** On 24th November, 2022 the father filed a second supplemental affidavit, to which the mother responded on 28th November, 2022 and 11th January, 2023 the father filed a third supplemental affidavit, to which the mother responded on 13th January, 2023.

**15.** The mother's affidavit of 17th November, 2022 was sworn not only in reply to the father's motion but to ground her application – which was made by notice of motion issued on the following day – for an order for pursuant to s. 32 of the Guardianship of Infants Act, 1964 and/or s. 47 of the Family Law Act, 1995 giving directions for the purpose of procuring an expert report on the views of Child A.

**16.** The father's and the mother's motions were case managed together by Jordan J. At a directions hearing on 14th December, 2022, the judge – having read the papers in advance – identified the core issue as whether the mother had decided not to abide by the court order; or whether notwithstanding the mother's best efforts it was not possible to get Child A to go to or stay with the father; or a combination of the two. The judge impressed on the mother her obligation as the primary carer to ensure that the regime was followed and the potential consequences of a finding that she was responsible for it not being followed. The judge noted that the long and detailed affidavits on either side told two very different stories and that it was not possible to resolve those issues on affidavit.

**17.** Counsel for the mother moved the application for an expert report. The most recent report – a report ordered pursuant to s. 47 of the Act of 1995 – had been made three and a half years previously on 30th June, 2019 when Child A was less than ten years old and it was submitted that an updated report was required to allow the court to deal with the father's motion. The father – still representing himself – opposed any further report, emphasising that there was a final order in place. The transcript shows that Jordan J. was fairly strongly inclined to the view that he did need to hear the voice of Child A, but on the father's

application, agreed, reluctantly, to adjourn the question to January, 2023 to allow the father an opportunity to instruct a new legal team.

**18.** When the motions came back into the list on 24th January, 2023, the father had not instructed solicitors and Jordan J. made an order pursuant to s. 32(1)(b) of the Act of 1964 appointing Ms. Lisa Horgan to determine and convey to the court the views of Child A. Ms. Horgan duly reported on 13th February, 2023. The report was that Child A had demonstrated that she had her own perspective on how her parents' divorce had affected her and was using her age – she was by then fourteen – to protect herself and feel secure. She did not want any face-to-face contact with her father *"at this current time"* but would maintain contact by text message. Ms. Horgan offered the view that family therapy might assist the parents to work better together in the interests of the children.

**19.** The father's application was heard by Jordan J. on 17th February, 2023. Notwithstanding his previously expressed intention, the father continued to self-represent. The application had been listed for a day but although the judge sat until after 6.00 p.m. could not be completed. However, the court heard all of the evidence. The court already had the report of Ms. Horgan, who gave evidence and was cross-examined by the father. The father gave evidence and was cross-examined by counsel for the mother. The mother gave evidence and was cross-examined by the father. The case was adjourned for legal argument, with a direction that in the meantime the parties should file position papers.

**20.** The father's motion came back into the list on 8th March, 2023 for further directions. The order of 8th March, 2023 recites that the court was then *"advised that both parties [would] attend Family Therapy"* with Mr. Niall Reynolds and ordered that there should be no recording by either party of any part of the family therapy sessions; that the parameters of the family therapy were matters for the family therapist; that it was a matter for the family therapist to consider the nature and extent of engagement with the children; and – more or

less – that the parties bear the costs of the family therapy equally. There was no submission or discussion as to the jurisdiction of the court to make the order.

**21.** The motion came back into the list for argument on 11th May, 2023, by which time the father was again represented by solicitors and counsel. There was no focussed submission as to the legal basis on which the court was being invited to make the orders sought by the father's notice of motion.

**22.** The core issue identified by counsel for the father was whether the mother had done everything in her power to bring effect to the order. The mother, it was said, because she was the primary carer, had a particular onus and responsibility, greater than the father, to ensure that the regime worked. The family therapy was said to be ongoing but there was no evidence that it was having any effect and the court ought not delay acting on the motion. By reference to various findings in the judgment of Faherty J., the mother was said to *"come into the order under a cloud"* and not to *"come to the court with an unblemished attitude or record."* It was suggested that the court should declare that the order regulating access had been breached and – with a view to creating a *"dynamic"* to ensure that the mother would be *"extraordinarily motivated"* to ensure that Child A went to, and stayed with, her father – should make an order transferring custody of Child A to the father for thirty days, perhaps with a stay while compliance with the order of 6th July, 2022 was assessed.

**23.** Counsel for the mother laid considerable emphasis on the s. 32(1)(b) report to which – she noted – no reference had been made by counsel for the father. The substance of the father's submission, it was said, was that the mother had alienated the children. It was significant, it was said, that there was no mention in the father's grounding affidavit of the fact that he was in a new relationship and – by reference to the father's written submission – it was significant that in the four and a half years between the parents' separation and September, 2022 there had been no issue with regard to the children going between what the

father described as their two homes. The mother, it was said, was supportive of therapy but wanted to ensure that there was a safe space for Child A. Counsel submitted that one of the fundamental reliefs set out in s. 18A of the Guardianship of Infants Act, 1964 – specifically in s. 18A(4)(c) – was *"the counselling"* which the court had already ordered. It was submitted that so far as that process had started it should be allowed to continue. There was, it was said, no evidence that the mother was in breach of the order or was acting otherwise than as a mother trying to balance a distressed child.

**24.** Having heard counsels' submissions, Jordan J. reserved his judgment.

*The High Court judgment*

**25.** On 26th June, 2023 Jordan J. delivered a written judgment. He summarised very briefly the history of the litigation and of the father's motion and the circumstances in which he had made the order for the s. 32(1)(b) report.

**26.** The judge identified the precipitating event for the father's motion as Child A's failure to go to the father's house for the scheduled contact on 17th September, 2022 and before that, that the father's news that he was getting married to his new partner as news that did not go down well with the children.

**27.** The judge carefully examined the evidence he had heard as to an incident which occurred on 15th September, 2022 in the front garden of the mother's house. What happened then, he said was a significant source of dispute between the parties. Having considered the evidence – which he summarised – the judge was satisfied that the mother's version of events was more accurate.

**28.** Later in his judgment, the judge carefully examined the evidence he had heard as to an incident outside Child A's school on 16th December, 2022, and again preferred the mother's account of events.

**29.** The judge considered the criticisms made by the father of the mother – amongst which were a refusal to meet with him to discuss the children, a refusal to attend children's parties at his home, a refusal of invitations to meet, and a refusal to acknowledge his new partner by name – as examples of a lack of comprehension and consideration on the father's part of the mother's right to independence, space and autonomy.

**30.** The judge, having heard all of the evidence and submissions, found that the father's assertion that the mother was responsible for the current state of affairs was wrong. He identified the father's announcement that he was going to remarry as *"the elephant in the room"* which the father had studiously avoided.

**31.** The judge in particular noted the statement in the father's position paper that:-

> *"For the entirety of the four plus years from the separation of the parties in 2018 to September 2022 there was no mention of any issue with regard to the children going between their two homes. … The fact is that there was no issue in relation to [Child A] or any of the children, moving between their homes before the mother precipitated same in September, 2022."*

**32.** Having examined the conflicting evidence as to what happened on Easter Monday, 2022, the judge concluded that in failing to drop the children at 11.00 a.m. as agreed, the mother had not behaved properly or reasonably.

**33.** The judge identified the core problem as the refusal of Child A to have contact with her father, otherwise than by text messages. Having heard all of the evidence, the judge concluded that the father had not persuaded him that the mother was responsible for that. He found that neither parent could be absolved from responsibility for the breakdown of the contact arrangements but that the primary cause was not any conduct of the mother.

**34.** The judge recalled the purpose of the s. 32(1)(b) report and the circumstances in which it had been commissioned. He noted that the assessor appointed was an independent

expert who satisfied the criteria laid down by the Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 (S.I. No. 587). The judge noted the assessor's agreement under cross-examination that she had not previously prepared a s. 31(1)(b) report for the High Court but that she had prepared such reports – one each – for the Circuit Court and the District Court, as well as many reports under s. 20 of the Child Care Act, 1991. The judge expressed himself fully satisfied that the assessor had the experience, qualifications, competence and independence to prepare the voice of the child report and that she had done so in a competent, expeditious and independent fashion.

**35.** Having quoted extensively from the report, the judge found that the views expressed in the report were the authentic views of the child. The judge was not satisfied that there had been any influence by the mother on the views of the child. The judge found that he was obliged to take the child's views into account and that Child A had made a decision which she wanted to be respected.

**36.** At para. 90 of his judgment, Jordan J. noted that family therapy was already underway and – acknowledging that the family therapist was better placed to identify the areas requiring attention – suggested that amongst the goals or objectives should be:-

(a) Work to improve and achieve concise and respectful communication between the father and mother concerning all four children;

(b) Work to facilitate improved contact between Child A and her father; and

(c) Work to address any difficulties concerning contact between the other children and their father.

**37.** The High Court judgment of 26th June, 2023 was delivered electronically and the case listed for final orders on 6th July, 2023. Jordan J. then made an order refusing the reliefs sought by the father's notice of motion and directing that the family therapy continue.

*The appeal*

**38.** By notice of appeal filed on 16th October, 2023 the father appealed against the judgment and order of the High Court on 27 grounds which, in the written submissions, were grouped into three main themes:-

(a) the allocation of responsibility for the failure of access;

(b) the suitability of the assessor and the deference to her evidence; and

(c) the family therapy order and its supervision.

**39.** The most striking feature of the father's written submission in relation to the allocation of responsibility for the failure of access is that there is no mention whatsoever of the effect on the children, and on Child A in particular, of what the trial judge identified as the elephant in the room, namely, the father's announcement of his intended remarriage. In 26 paragraphs over six pages, the father's argument boils down to the proposition that it is necessarily to be inferred from the fact that access has broken down that the mother was responsible for the breakdown. The question in the High Court, it is said, is whether the mother was doing everything in her power to see that the court order was observed.

**40.** Probably because the High Court motion was drafted by the father at a time when he was unrepresented, it was – from a legal point of view – unfocussed. The substance of the case made by the father was that the Child A was being manipulated, pressured and coerced by the mother into doing and saying what the mother wanted rather than what Child A herself wanted and that mother was deliberately breaching the High Court order by withholding the child and her belongings. The substance of the mother's case was that the breakdown was attributable to the decision of Child A. The focus of the argument was on the facts rather than the law.

**41.** The mother opposed the father's appeal on all grounds and cross-appealed against so much of the order of 6th July, 2023 as directed that the parties attend family therapy *"on the*

*basis that such an order could only be made as part of an enforcement order pursuant to s. 18A(4)(c) of the Guardianship of Infants Act, 1964."*

**42.** Before going further, it is instructive to look at the legislative framework.

*The legislative framework*

**43.** Section 18A of the Guardianship of Infants Act, 1964 – as inserted by s. 60 of the Children and Family Relationships Act, 2015 – makes provision for enforcement orders. It provides that:-

> **"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."

**44.** Apart from the passing reference in the High Court by counsel for the mother to s. 18A(4)(c), the jurisdiction of the court to entertain the father's motion was first addressed in the written submissions filed on behalf of the mother on the appeal.

**45.** The concept of *"compensatory access"*, it is said, was and is unknown to the law. The power conferred by s. 18A of the Act of 1964, it is said, is a new power. In *J.G. v. Staunton* [2013] IEHC 533, Hogan J. found that s. 47 of the Child Care Act, 1991 could not be invoked to impose positive obligations of a personal kind in respect of persons other than the child. The language of s. 11 of the Act of 1964, it was said, was similar: so that could not have justified the order for family therapy. On the authority of *Mavior v. Zerko* [2013] IESC 15, *In re F.D.* [2015] IESC 83 and *N.K. v. S.K.* [2017] IECA 1, it was submitted that the limits of a particular statutory jurisdiction ought not to be extended by invoking a vague statutory jurisdiction. The High Court, it was submitted, had no jurisdiction to declare that the mother had been in breach of the order.

**46.** The mother's submissions then turned to whether the father had satisfied the proofs necessary to secure an order under s. 18A(4)(a). The substance of the submission was that although the father's notice of motion had not identified the jurisdiction invoked it could only have been – save as to the application for attachment and committal – an application pursuant to section 18A. The mother submitted that the father had not satisfied the requirements of s. 18A(1), not least that there had been an unreasonable denial of access.

**47.** I pause here to say that the submissions on both sides were largely directed to the evidence which was before the High Court and did not really engage with the trial judge's analysis and conclusions.

**48.** At the oral hearing of the appeal, it was more or less accepted by counsel for the father that the application was to be assessed by reference to the powers conferred by section 18A. Counsel for the father did not really engage with the issues raised by the mother as to whether – in the event that an unreasonable denial of access was established – the orders sought by the notice of motion or suggested by counsel in argument were orders which the court had power to make. That said, the core issue on the appeal was whether – as the father put it – the mother was responsible for the failure of access, or – in the terms of s. 18A(1) – there had been an unreasonable denial of access. It was accepted, however, that the court was not empowered to make an order for *"compensatory access"* in the sense of simply ordering additional time by reference to time lost.

**49.** In *P.M. v. E.M.* [2020] IEHC 700, Jordan J. observed that s. 18A is self-explanatory. I am bound to say that I am unconvinced that it is. It certainly requires close reading.

**50.** At first glance, the requirement in s. 18A(1)(b) that there should have been an unreasonable denial of custody or access appears to be a gateway requirement. Similarly, the apparent prohibition in s. 18A(3)(a) of the making of an enforcement order unless the court is satisfied that the applicant was unreasonably denied custody or access by the other parent or

guardian, appears at first glance to be a double lock. The provision in s. 18A(3) that the requirements of that subsection are subject to subsection (4) is difficult to understand. Section 18A(4) is directed to the content of an enforcement order and not to the circumstances in which an enforcement order may be made.

**51.** Section 18A(6) is directed to the circumstances in which the court is of the opinion that the denial of access or custody was reasonable. It is not absolutely clear to me that this is precisely the same as saying that the court is not satisfied that the denial of custody was unreasonable but in any event the court is clearly empowered to make an enforcement order without being satisfied that the denial of access or custody was unreasonable. There is no restriction in subsection (6) on the scope of the enforcement order that may be made, nor is there in the subsection an express requirement that the court must be satisfied that it is in the best interest of the child to do so.

**52.** What is, I think, clear is that the nature of an enforcement order that may be made pursuant to s. 18A(6) is limited. The power conferred by s. 18A(4)(a) to make an order that the applicant be granted additional access is directed to addressing the adverse effects on the relationship between the applicant and the child caused by a denial in subsection (1) – which is an unreasonable denial of access. The power in s. 18A(4)(b) to make an order for the reimbursement by the respondent of the applicant's necessary expenses is not expressly limited to an unreasonable denial of access but it is difficult to contemplate that a court might make such an order where it is of the opinion that the denial of custody or access was reasonable.

**53.** The power in s. 18A(4)(c) is very wide. That paragraph clearly contemplates that while a past denial of access might have been reasonable, either or both parties may be assisted to ensure future compliance with the order. Thus, a respondent parent who has denied access to an applicant parent in particular circumstances which were reasonable may –

individually – be required to attend a parenting programme or to avail of counselling or to receive information. The Oireachtas, it seems to me, has clearly recognised that the supervision and enforcement of court orders for custody and access is complicated and that the apportionment of responsibility for a breakdown in a court ordered regime may not be a black and white exercise. Moreover, given that in any proceedings in which the custody, upbringing or access to a child is in question the best interests of the child are the paramount consideration, it seems to me that the legislation contemplates that there may be a requirement for intervention irrespective of a finding of responsibility.

**54.** As to the circumstances in which – and the time at which – the power is available to the court, I think that it is important to underline that its availability is predicated on a finding that the denial of access either was unreasonable – s. 18A(3)(a) – or that the denial of access was, in the particular circumstances, reasonable – s. 18A(6). With the caveat that the issue was not argued, and so is not to be taken as decided, it seems to me that this rules out the possibility of interlocutory orders.

**55.** By s. 18A(7) the statutory power to make enforcement orders is expressly conferred without prejudice to the law as to contempt of court.

*The allocation of responsibility for the failure of access.*

**56.** The first theme or group of grounds of appeal identified in the written submissions filed on behalf of the father is the allocation by the trial judge of responsibility for the failure of access.

**57.** The first of the grounds of appeal under this heading was that the trial judge erred in failing to take as his starting point several identified findings in the judgment of Faherty J. of 15th December, 2020 where, in her consideration of various conflicts in the evidence given in the course of the trial of the main proceedings, Faherty J. had preferred the evidence of the father. That reflected the submission made to the High Court that the mother came to the

enforcement application *"under a cloud"* or, as it was put, did not come to the enforcement application *"with an unblemished attitude or record"*. When tested in the course of the oral hearing, this argument effectively evaporated. Counsel agreed that what it boiled down to was the proposition that the trial judge, rather than coming to the application impartially and with an entirely open mind and forming his own judgment on the matters in dispute, ought to have approached the mother's evidence as tainted by the findings of Faherty J. When the argument was so distilled, counsel accepted that the trial judge was not only entitled but bound to make up his own mind.

**58.** The foundation of the father's application was that the mother was responsible for the breakdown of access. The grounds of appeal and the father's written submissions were sometimes unclear as to where the onus of proof lay but at the start of the oral hearing, counsel for the father accepted that the onus of proof was on the father to establish any unreasonable denial of access on the balance of probabilities and to prove any breach of the order such as would warrant the mother's attachment and committal beyond a reasonable doubt.

**59.** From the father's perspective, the High Court order for access which had been perfected on 6th July, 2023 was final and was breached on each occasion on which Child A did not come to his house. Strikingly, there was no engagement whatsoever in the father's submissions with the findings of the trial judge as to the cause of the breakdown of access.

**60.** The focus of the evidence and the High Court judgment was on four identified dates on which it was said that the mother obstructed Child A's access.

**61.** The first incident was on Easter Monday, 2022. The mother was due to drop the children off at the father's house at 11:00 a.m. but did not do so until 6:00 p.m. Between the time when the children should have been dropped off and the time at which they were, the mother failed to respond to messages from the father inquiring where they were. The trial

judge found that the mother's failure had not been explained or justified and that she had not behaved properly or reasonably in failing to drop them off as had been agreed.

**62.** The second incident was an encounter in the front garden of the mother's house on 15th September, 2022 when the father called to collect Child A. On the father's account of events, the mother had obstructed his access, telling Child A that she did not need to go with her father. On the mother's account, the father was very angry and Child A said that she did not want to go with him. It was common case that Child A became very distressed. The conflict between the two accounts was not one that could have been resolved on affidavit. The father and mother gave oral evidence and were cross examined and the trial judge preferred the mother's account.

**63.** On 17th September, 2022 Child A was due to go from school to her father's house but instead went to her mother's house.

**64.** The third incident was on 16th December, 2022 when the father arrived unexpectedly at Child A's school. Again there was a sharp conflict of evidence in the affidavits and the trial judge, having heard oral evidence, preferred the evidence of the mother. He also accepted the evidence of the mother that following the initial directions hearing on 14th December, 2022, the mother tried to persuade Child A to go to her father's house, but to no avail.

**65.** The fourth incident was on Christmas Eve 2022 when the mother drove Child A and her siblings to the father's house but Child A refused to go in and became very distressed indeed. There was no conflict as to the nature or extent of Child A's distress. The trial judge accepted the mother's evidence that Child A became hysterical at the prospect of having to go into her father's house.

**66.** On the authorities – not least *Hay v. O'Grady* [1992] 1 I.R. 210 and *A.K. v. U.S.* [2022] IECA 65 – it is difficult to see how far any appeal against these findings of the trial

judge could have got but it is a truly remarkable feature of the appeal that while the father contends that the judge erred in his conclusion as to the allocation of responsibility for – or the cause of – the failure of access, there is no appeal against the findings of fact on which that conclusion was based.

**67.** The height of what is said is that the judge's finding that the news of the father's engagement did not go down well with the children *"wrongly preferred the evidence of [the mother], the person who was prima facie in repeated breach of the access order and in whose interests it was to deflect blame for the failure of access, over that of [the father] who was actually present when the news was imparted and whose motivation was for access to succeed."* This, it is suggested is a plain error on the part of the trial judge.

**68.** This, with respect, is not only loaded but muddled. The core issue to be determined by the High Court was whether the mother was responsible for the failure of access. In all the smoke and noise, the failure of access was an uncontested fact. The onus was on the father to establish that the mother was responsible for the fact that Child A would not go to her father's house. There was no presumption that she was in breach such as would have justified the judge in approaching the case on the basis that she was *prima facie* to blame. The father's undoubted desire that his access should succeed – or, as of the time of his announcement of his engagement, should have continued – simply does not go to the impact of the announcement on the children, or on Child A in particular.

**69.** It is said that the judge failed to give consideration to the fact that the father has never breached – nor was ever alleged to have breached – the order. But that goes nowhere. The fact that the father never breached the order does not go to whether the mother did.

**70.** It is said that the judge failed to give consideration to the fact that the father had, for the five years prior to the breakdown, sought therapeutic support for the children, including Child A, and that the mother failed to consent to the children receiving such support. As far

as the issue as to whether the mother obstructed access is concerned, that goes nowhere. The premise of the proposition that the mother ought to have agreed to therapeutic support is that it was necessary or desirable and that the father was necessarily correct in his view that it was necessary or desirable. Moreover, the proposition that the absence of therapeutic support in the years following the breakdown of the marriage had anything to do with the failure of access is quite inconsistent with the fact that the arrangement worked for the first four and a half years after the parents separated.

**71.** I have dealt with the incident on 15th September, 2022 in the mother's front garden, the conflict of evidence as to what happened, and the judge's resolution of that conflict. There is no challenge to the judge's finding – or the entitlement of the judge to have found – that the father was angry and that his behaviour was wholly inappropriate, in particular by refusing to listen and pay heed to what Child A was saying to him at a time when she was in obvious distress. It was, as the father submitted, common case that immediately after this incident he sent the mother a text inviting the mother and the two eldest children to come to his front garden to discuss the matter and that the mother refused. It is now submitted that:-

> *"Despite the High Court's acknowledgement of the shared parenting style imposed by court order, when the access broke down, the High Court accepted [the mother's] decision to prioritise her own autonomy and desire to be separate from [the father] over her obligation to show solidarity with [the father] and thereby support access."*

**72.** In other words, the trial judge should have found that the mother, immediately after the altercation in her front garden had been diffused, should have gone – taking the still distressed Child A and another of the children – to the father's front garden, so that he could take up where he had left off. This is not sensible.

**73.** In an apparent reference to the judge's acceptance of the mother's evidence that following the first directions hearing she encouraged Child A to go to her father's house, it is submitted that this indicated an improvement in her behaviour, from unsatisfactory to satisfactory and, implicitly, an acknowledgement that she had not previously been supporting access in accordance with her obligations. I cannot accept this. When, at the first directions hearing on 14th December, 2022, the trial judge impressed on the mother the importance of complying with the court order, he had not made any finding as to her behaviour. At the hearing of the enforcement application, the late drop at Easter was in the mix but the focus was on the breakdown of the father's access to Child A which dated from September, 2022. I reject the submission that the admonition of the mother at the first directions hearing was inconsistent with or contradictory of the position taken by the judge after he had heard the application.

**74.** Part of the case made on behalf of the father in the High Court and on the appeal was that the mother, as the primary carer, had a higher obligation than the father to ensure that the access order was complied with. In circumstances in which there was no issue as to the father's compliance with the order, it is difficult to see how, logically, any issue as to the parents' comparative obligations could arise. Moreover, the argument is not easy to reconcile with the father's eventual acceptance that the onus was on him to establish a denial of access. I accept that in practical terms the parent with whom the children are primarily living may well be in a position to do more than the other parent to ensure that access arrangements are implemented but I do not accept that in a shared parenting arrangement the legal obligation is any different.

**75.** The trial judge correctly emphasised the need for cooperation between estranged parents and the obligation on the primary caregiver to do all that could be done to implement the court order.

**76.** It is submitted by the father that in circumstances in which a custody and access regime has broken down, co-operation between parents must take precedence over post-divorce autonomy. What appears to be behind this is the submission that the mother was to be faulted for not accepting the father's invitation – or answering his summons – to come to his front garden and/or not attending the children's birthday parties in his house and/or that she should meet with his partner. I entirely agree with the trial judge that these criticisms of the mother are unfair.

**77.** The father's submissions as to the allocation of responsibility for the failure of access refers to the fact that Child A has refused to see him but does not engage with the reasons she has given or the view which she has expressed.

**78.** In his oral submission, counsel for the father sought to emphasise the fact that the mother had not applied to the High Court to vary the access arrangements. The short – and to my mind persuasive – answer to this was that the mother was supportive of the court ordered access and was doing what she could to encourage the restoration of the relationship.

*The suitability of the assessor and the deference to her evidence*

**79.** The second theme in the father's written submissions is *"The suitability of the assessor and the deference to her evidence."* Only one of the 27 grounds of appeal could be captured by this, which is No. 8:-

> *"The learned High Court judge placed inappropriate weight on, and gave undue deference to, the evidence of the Assessor having regard to her plain acknowledgement and explicit statement to the Court that she had no expertise in matters upon which the learned High Court Judge subsequently referenced as being seminal defining factors in his adjudication in the case."*

**80.** It must first be said that there was no appeal against the order of 24th January, 2023 by which the expert was appointed.

**81.** The ground of appeal and the father's written submissions on this issue are unfocussed.

**82.** Ms. Horgan was appointed under s. 32(1)(b) of the Act of 1964 as an expert to determine and convey to the court the views of the child. The Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 (S.I. No. 587) sets out, in art. 3, a list of those who may be appointed under s. 32(1)(b) to perform the functions of an expert. The ground of appeal refers to *"assessor"* and the written submissions refer, variously, to *"the reporter"* and *"an assessor"* and confuse Ms. Horgan's expertise and her experience. It is submitted that Ms. Horgan acknowledged to the High Court that she had no expertise. That is simply not so. It is submitted that while Ms. Horgan *"prima facie"* held the appropriate qualifications, she did not have the requisite experience. This is confused. There was never any question that Ms. Horgan was qualified as an expert.

**83.** It is baldly asserted that Ms. Horgan did not have the experience required to *"tackle an assessment of this particular complexity"*. In reply to a question from the father, Ms. Horgan said that this was the first time she had prepared a s. 32(1)(b) report for the High Court. The father expressed surprise at this and asked *"so … you haven't been in this experience before at all?",* to which the answer was *"No. judge."* After the father's cross examination and counsel's re-examination had concluded, the judge asked the witness a number of questions in relation to her experience and established that she had long experience as a social worker in child protection cases and children in care cases and had written many reports under s. 20 of the Child Care Act, 1991, which entailed listening to children and eliciting their views. In response to a further question from the father, Ms. Horgan acknowledged that she was not an expert in alienation: but, of course, she was not appointed as an expert in alienation and, on the father's case, the application was not about alienation but about compliance.

**84.** The father's submission focusses exclusively on Ms. Horgan's experience in writing s. 32(1)(b) reports. It fails to acknowledge that she is qualified as an expert for the purpose of her appointment and does not engage with her long experience in engaging with children and writing court reports ordered under other legislation. The submissions make a number of criticisms of the report or suggestions as to what else ought to have been included which were never put to Ms. Horgan and which are plainly beyond the competence of the father or of counsel who settled the submissions.

**85.** If what the father has to say as to Ms. Horgan's expertise and experience is unclear, what is clear is that there is no direct challenge to the trial judge's finding (at para. 65) that Ms. Hogan had the experience, qualifications, competence and independence to prepare a voice of the child report, and none at all to his finding (at para. 68) that the views of Child A as expressed in the expert's report were her authentic views

**86.** The father's written submissions ventured to suggest that:-

> *"While Ms. Horgan is charged with ascertaining the voices of the children, she must also ascertain if what they say represents their authentic voice or whether what they say is the result of undue influence. She manifestly failed to do so."*

**87.** On the only ground of appeal which referenced the report, no such argument was open to the father.

**88.** It was common case that the trial judge had not only a statutory but a constitutional duty to have regard to the voice of the child. It was common case that this was not determinative but is a clear and strong view and, having regard to Child A's age, was properly a weighty factor.

*The Family Therapy Order and its supervision*

**89.** The third theme of the father's written submissions captures three of the grounds of appeal.

**90.** It is suggested first, that the judge erred in refusing the relief sought at para. 3 of the notice of motion when it essentially reflects the order made by the court on 8th March, 2023. It seems to me that it is evident from a simple juxtaposition of the relief claimed – an order requiring the mother to facilitate, encourage and support therapeutic support for the children and restraining her from hindering or obstructing the father in bringing the children to such support – and the order made on 8th March, 2023 – regulating the conduct of the family therapy which the parties had agreed to attend – that the reliefs are not the same.

**91.** That the father did not, in fact, achieve what he sought is underlined by the second ground of appeal under this heading which is that:-

> *"By fashioning a solution which directs a continuation of family therapy, a process which is designed to be confidential and privileged, the Court abdicated its responsibility to ensure that it could monitor the implementation of and adherence to its own Order and thus ensure [Child A's] welfare needs were met."*

**92.** Thus, in one breath the father says that he got what he asked for, and in the next that the continuation of the family therapy was wrong as a matter of law.

**93.** The third relevant ground, which appears to me to be linked to the second, is that:-

> *"If family therapy does not succeed, the Court will not be able to know the detail of why, including potentially whether, as a matter of logic possible, [the mother] has failed to meaningfully participate in the family therapy or, as is also possible, she has used it as [a] device to escape oversight of the sincerity of her efforts to influence the restoration of the relationship with [Child A] and [the father]. In the result the learned High Court Judge fell into error."*

**94.** This, again, appears to me to be confused. There is no clear assertion that the judge erred in ordering the continuation of the family therapy with which the father, as well as the mother, agreed to engage. There was no suggestion by either party that the family therapy to

which they had agreed should cease. In his written judgment of 26th June, 2023 the judge had flagged his intention to continue the family therapy and there is no suggestion that there was any objection to that at the time the final order was made. It cannot sensibly be said that the judge should have supervised the family therapy or ordered the therapist to report to the court whether the mother's engagement was *"meaningful"* or her efforts to restore the father's access *"sincere"*. So the complaint appears to be that the judge should have made some other order: but there is no indication of what other order it is said ought to have been made, or whether that other order – whatever it might have been – should have been in addition to or in substitution for the order that was made.

**95.** The position is not clarified by the father's written submissions which do no more than repeat the substance of the grounds of appeal.

**96.** At the oral hearing of the appeal it was said that the trial judge should have made some order to *"unlock the situation"*, possibly an order for counselling, or telephone contact, or mediation. But the judge was not asked to make any such order. And by the way, counsel did not identify the jurisdiction to have made any such order.

**97.** At para. 97 of his judgment, the trial judge said that the court would direct that the family therapy would continue. He said that the court expected both parties to engage constructively with the family therapist but recalled that he had previously said that the family therapy was separate and apart from the court proceedings, save that the court was entitled to know whether the parties were attending family therapy and whether or not progress was being made. He said that if there was nonattendance or a lack of progress, then the court might give further directions.

**98.** The father's submissions show that when the matter came back before the High Court on 11th October, 2023, there was agreement that progress was not being made but counsel for the mother expressed the hope that progress might be made. It was said that the efforts of

counsel for the father to explain why progress was not being made were shut down. Plaintively, it was submitted that:-

> *"How, it might reasonably be asked could the court, by this approach, come to a conclusion as to whether there was constructive engagement by the parties and each of them with the family therapist? The effect of this narrow approach only served to provide [the mother] with a screen behind which her participation or lack thereof, in the therapeutic process would forever remain unseen by the court. This approach did not, and in the circumstances could never, serve the interests of [Child A]".*

**99.** In the course of his oral submissions, counsel suggested that the family therapy order was *"toothless".*

**100.** It needs to be said again that there was no appeal against the order of 8th March, 2023. Neither is there any appeal against any order that may have been made on 11th October, 2023. On one view, I suppose, what happened on 11th October, 2023 clearly illustrates the nature and effect of the order of 6th July, 2023 and puts in context the criticism that the father would make of that order. On the other hand, the judgment of 26th June, 2023 could not have been clearer as to what the trial judge would and would not hear about the progress of the family therapy and the father clearly wanted to go beyond that and draw the court into an examination the rights and wrongs of why progress had not been made and so, inexorably, into the family therapy process: where the judge had clearly said he would not go.

**101.** It is said that the family therapy order is toothless. It is. It is not supposed to have teeth. If family therapy, or counselling, or a parenting programme are to have any prospect of success there must be constructive engagement. No less, however, the process must be conducted in a safe space. The starting point is that there is a serious difficulty. The therapist will take his clients as he or she finds them. While disclaiming any expertise in any of these processes, the therapist or counsellor will surely encourage the parties to leave the past

behind them and to look and work towards the future. Every case will present its particular challenges. I expect that a case in which the parties have been trading blows in the courts for five years may very well present additional challenges.

**102.** The first step is engagement. If it could not have been said that the engagement over the summer had achieved any measurable progress, it seems to me that the parties' continued willingness to engage could fairly be said to have meant something. If the father was disappointed that there had been no improvement in his contact with his daughter, that is perfectly understandable but the impasse is not going to be broken by re-opening the war on a new front.

**103.** The young woman to whom I have referred as Child A is no longer a child. She is a determined young woman who, as described by Ms. Horgan, has her own perspective on how her parents' divorce has affected her and is now using her age to protect herself and to feel secure. The mother is not the enemy. While, for herself, the mother wants to have nothing to do with the father, her declared position is that she has encouraged Ms. A to see the father: and the trial judge so found.

**104.** The first in the list of the three goals identified by the trial judge was the improvement and achievement of concise and respectful communication between the father and the mother concerning all four children. The second goal in the list is the improvement of contact between Ms. A and her father. But it must be emphasised that they are concurrent goals. Concise and respectful communication is a two way street. Without getting into the blame game, it cannot be helpful that the parties are continuing to litigate. More importantly, while the improvement of communication between the parents may very well help with the restoration of the relationship between the father and Ms. A, it will by no means necessarily follow. The father has been shown to have been mistaken in attributing responsibility for the

failure of access to the mother. That being so, the key to restoring access is not the mother but Ms. A.

**105.** It is now eighteen months since Ms. A, then thirteen, now fifteen, said *"You are not listening Daddy … nobody has asked me …".*

**106.** The argument that the trial judge ought to have supervised the family therapy is premised on a fundamental misunderstanding of the nature and purpose of family therapy. The proposition that the trial judge abdicated his function in ensuring that the order was enforced is demonstrably unfounded. He made it perfectly clear that the family therapy was helping, he would consider what else he might do.

**107.** I would dismiss the appeal on all grounds.

*The cross appeal*

**108.** By her respondent's notice filed on 30th November, 2023, the mother cross appealed against so much of the order of the High Court as directed that the parties attend family therapy on the ground that any such order could only be made as part of an enforcement order pursuant to s. 18A(4)(c) of the Guardianship of Infants Act, 1964.

**109.** In the written submissions filed on behalf of the mother the point was developed. The father, it is said, had not established an unreasonable denial of access or otherwise satisfied the requirements of section 18A(3). It was acknowledged that there is a separate jurisdiction in s. 18A(6) to make an enforcement order in the terms of s. 18A(4)(c), but that jurisdiction, it was said, was predicated on the court being of the opinion that there was a denial of access, which, it was said, had not been established.

**110.** I can see the legal argument but it is less clear that the ground was laid for it in the notice of appeal. The basis of the argument which the mother would make is that there was in fact no denial of access but that is not identified in the ground of appeal.

**111.** Counsel acknowledged that there was no appeal against the initial order for family therapy of 8th March, 2023 but sought to characterise that as an order setting the parameters for an agreed family therapy, as opposed to the direction in the order under appeal that the family therapy do continue. It was accepted that the trial judge had clearly flagged his intention to make the order and that the issue which the mother sought to raise on her cross appeal had not been raised with the judge on the listing for the final form of the order.

**112.** I referred earlier to the fact that in the course of her submissions on 11th May, 2023, counsel for the mother identified counselling as one of the fundamental reliefs available to the court under s. 18A – specifically, s. 18A(4)(c) – which, it was said, had already been ordered. The transcript shows that it was submitted that:-

> *"The court has made an order in relation to that, and I say, judge, that so far as that process has started, it should be allowed to continue. It should be allowed to take its course, and it should take its course in circumstances where the pressure that the – that [Ms. A] demonstrates in her report to the section 32(1)(b) assessor, should not be exacerbated further."*

**113.** This court is thus confronted with an appeal by the mother against an order which the mother invited the High Court to make. I am not persuaded that the court should entertain an appeal against such an order. In any event, I believe that there was a sufficient evidential basis for finding that the father was denied access by the mother. When, in the mother's garden on 16th September, 2022 Ms. A became distressed, she was told by her mother than she could go inside. When, having been brought to her father's house on Christmas Eve, 2022 Ms. A would not go in, she was told by her mother that she did not have to. For the avoidance of any conceivable doubt, I make no criticism whatsoever of the mother's actions. If I seriously doubt that the mother could, on either occasion, have done anything which

would have ensured that access took place, the evidence – absent argument otherwise – was a sufficient hook on which to hang the direction for the continuation of the family therapy.

**114.** I would dismiss the cross appeal.

*Summary of conclusions*

**115.** The father's application to the High Court for the enforcement of the custody order was unfocussed. Given that it was issued by the father *pro se*, that is understandable. It is regrettable that it was not later recast and argued in the statutory framework.

**116.** Having heard the oral testimony of the parties and the court appointed expert and carefully reviewed the oral, affidavit and documentary evidence, the High Court judge was not persuaded that it was the mother who was responsible for the breakdown of contact between Ms. A and her father. The judge's conclusion was based on a reasoned analysis of the evidence and findings of fact which might have been difficult to upset on appeal but against which there was no appeal.

**117.** As he was required by the Constitution and by law, the trial judge gave directions for an expert report of the views of the child. There was an oblique attack on the expertise and experience of the court appointed expert but there was no challenge to the trial judge's conclusion that the views of the child as expressed in the expert's report were the authentic views of the child.

**118.** As he was required by the Constitution and by law, he gave due weight to that view, having regard to the age and maturity of the child.

**119.** As he was expressly asked by the mother and at least implicitly asked by the father, the judge made an order that the family therapy to which the parties had agreed should continue.

**120.** I find no error, and for all the reasons given I would dismiss the appeal and cross appeal.

**121.** As the mother has been entirely successful in resisting the appeal, it seems to me, provisionally, that she is entitled to an order for her costs. It is not obvious to me that the cross appeal added anything to the costs but that may be a matter for the legal costs adjudicator. In principle, and again provisionally, it seems to me that the father is entitled to the costs of the cross appeal. If either party wishes to contend for any other costs order, they may give notice to the Court of Appeal office within fourteen days of the delivery of this judgment, in which event the panel will reconvene to hear argument.

**122.** The parties may within the same time notify the office of any redaction of this judgment which they believe is necessary.

**123.** As this judgment is being delivered electronically, Whelan and Meenan JJ. have authorised me to say that they agree with it and with the orders proposed.