Neutral Citation: [2013] IEHC 647

THE HIGH COURT

FAMILY LAW

[2011 No. 9 M]

M.R.

APPLICANT

AND

S.B.

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered the 27th day of September, 2013

1. This judgment is made on the conclusion of the hearing of matters in dispute arising under a summary summons herein between the applicant who is a former partner of the respondent, and the respondent who herself is the natural mother of two children, a boy, J. and a girl, C., aged fourteen and eleven respectively. The respondent was never married and the applicant is not the biological father of either of the children. Each child has a different biological father who have not been appointed guardians, and, with the exception of the payment of some maintenance by J's father, neither biological fathers have had any significant role in relation to the children.

2. When these proceedings were issued, the applicant (although separated for a number of years from the respondent), was very strongly in a position of *loco parentis* and had custody of the children by reason of orders both of the District Court and orders of the courts of England and Wales under Hague proceedings incorporating undertakings by the applicant and respondent relating to the return of the children from England to Ireland in 2010. The matter was first brought to the attention of the court by counsel for the applicant essentially making an application to be appointed guardian of the children and this application eventually matured into a notice of motion which in para. 1 sets out the substance of the relief claimed in explanatory form as follows:-

> "Notice of motion dated 22nd March, 2011…"
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> "(1) An order appointing the applicant guardian of the said children and declaring that he be entitled to apply for an seek any entitlement or right (whether statutory legal discretionary or otherwise) on behalf of and for the benefit of the said minor children including the furnishing of any consent (including consent to any appropriate medical treatment) the obtaining of a passport, the obtaining of a personal public service number (PPS) and the obtaining of any assistance, supporting (including financial support) or service concerning their care, protection and welfare (including any health personal social service or educational welfare service)."

History of the Family (So Called)

3. Both parties are aged about 32. The most significant events regarding these proceedings commenced in or about April 2003 when C. had been born. The respondent was then living in Ireland and on most accounts of the situation, it appears that J. became difficult to care, for on the arrival of C., his younger step sibling. The Irish Health Service Executive (hereinafter "the HSE") became concerned about the respondent's parenting arising, *inter alia*, from finding that J. had extensive bruising over his body and the failure of the respondent to cooperate with social services. This resulted in a HSE order for foster care for J. which, (in the main) was temporary. After approximately four months, the children were returned to the respondent on condition that N.B., their maternal grandmother came to Ireland, and lived with the respondent to assist in the upbringing of the children, on the basis that the social services considered that the said grandmother was a "significant protective factor in the plan to return the children to the care of the respondent".

4. In or about June 2004, the applicant met the respondent and they began cohabitating with one another in or about August 2004. Thereafter, the applicant became fully involved in the care and welfare of the children. He was assisted by N.B., the maternal grandmother, in the care of the children. In or about February 2005, the maternal grandmother left the home on the basis that she was satisfied that the children were well looked after. The applicant in his affidavit claims that the maternal grandmother's view was that they were being well looked after by the applicant only, but I am satisfied that notwithstanding that the respondent could at times be very neglectful of the children, and was unpredictable and unstable, nevertheless, she had a role in developing a level of attachment between herself and the children, and in the caring of the children. She was, at this stage, cohabitating with the applicant, and, of necessity, had a role in the home with the children.

5. The applicant and the respondent separated in August 2007, but the applicant continued to live within the vicinity of the so called family home and continued to have regular access to the children through July 2008. From July to August 2008, departed to England to follow up on another relationship and left the children in the care of the applicant in Ireland. Notwithstanding the protest of the applicant and the children the respondent brought the children to England with her but there was constant telephone contact between the applicant and children in England, four to five times a week. He also visited them on five occasions for four to five days at a time. The respondent and the children returned to Ireland for Christmas 2008 and stayed with the applicant for two and a half weeks. The social services in Ireland sought the address of the respondent from the applicant in order to alert the appropriate social services in England, but the applicant states that he pretended not to know where they were, as the respondent had warned him that if he did tell social services of her whereabouts that he would never get to see the children again.

6. At this stage, the applicant felt that he had no legal rights and the respondent continuously taunted him that it was only because of her kindness that he could see the children. Eventually, the applicant claims that social services in Ireland sent a general warning to all local authorities in the United Kingdom in respect of the respondent and the children. In or about April 2009, the respondent decided to return to Ireland with the children and while cohabitation between the respondent and the applicant did not resume, the children were frequently in the day to day care of the applicant and he had to send them to school when he was available. He stated that when he was not available they often just did not go to school. There was violence between the respondent and J. and there was one particular incident where the applicant slapped J. harder than he intended. It seems that throughout the relationship, the couple were very argumentative and confrontational, and I accept that in or about September 2009, the difficulties between the couple due to the habitually volatile and impulsive pursuit of the respondent of her own ends, made it very difficult for the children to have access to the applicant. At this stage, the respondent threatened to go to England but the children did not want to go there

and preferred to remain in Ireland, to have liberal access to the applicant.

7. On the 14th January, 2010, the applicant sought leave from the District Court in Ireland to make an application as a person in *loco parentis* for access to the children and for an order prohibiting the respondent from taking them out of the jurisdiction. Following the service of his application, the respondent stopped working as a hairdresser and immediately greatly upset C. by telling her that the applicant was not her father in circumstances where C. had believed that he was her father and while the applicant accepted that C. was entitled to know who her father was, the information he claims should not have been told to her in anger in conjunction with the District Court proceedings.

8. Interim orders were granted by the District Court on the 25th March, 2010, and the 30th March, 2010, granting liberal access and having heard the children, Judge Brady ordered that the children should not be taken out of the jurisdiction without the consent of the applicant. A s. 20 report was ordered and while the respondent appealed these orders to the Circuit Court, same was struck out when there was no appearance on behalf of the respondent. During the course of the District Court hearing in Ireland, the respondent threatened that she would move the children into emergency housing if she was not allowed to take them to the United Kingdom and that she could not afford her present accommodation. The applicant offered to pay half on a new flat, but the respondent refused. He also offered that the children could stay fulltime in his house, but that offer was also refused. The applicant made a complaint to social services about the situation but social services responded that as the housing was approved emergency housing, they would not get involved. However, further reports indicate that this emergency housing was not suitable for the children.

9. On or about the 17th June, 2010, in breach of the orders of the District Court, the respondent abducted the children to England. The applicant instituted Hague proceedings before the High Court of England and Wales and the respondent resisted the application by including grave risk in her defence in these proceedings. She pointed to the hazardous housing situation, lack of income and lack of qualification by reason of a decision by the Irish Department of Social Welfare that she did not qualify for unemployment or other assistance by reason of lack of habitual residence within the definition of the social welfare legislation.

10. By order of the High Court of Justice Family Division of the Courts of England and Wales following a hearing before Mr. Justice Hedley in London, it was ordered that the respondent return the children to Dublin, subject to the other usual ancillary orders, and more particularly to a schedule of undertakings on behalf of both the applicant and the respondent annexed to the order, by which the applicant was to undertake to make arrangements financial and otherwise for a three bedroom house for the respondent and the children in Dublin. It is important to set out the respondent's undertakings as mother in detail as follows:-

> "(1) To inform the applicant through his solicitors no later than close of business on Monday 2nd August, 2010, whether she intends to return the children to the Republic of Ireland.
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> (2) In the event that the mother does return to Ireland to use her best endeavours to make immediately a claim for state assistance and to provide the plaintiff with copies of any application made.
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> (3) To pursue her claims for state assistance expeditiously.
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> (4) To make the children available for contact with the applicant in accordance with the order of 31st March, 2010, and in accordance with any other contact agreed between the parties or otherwise ordered by the Irish Courts."

11. In due course, the children were returned to Ireland. The outcome of the general circumstances of that return is that the children returned to live fulltime with the appellant. The respondent seems never to have claimed or pursued a claim to obtain social service payments in Ireland, notwithstanding her undertaking to do so, nor has she maintained a residence for the children in Ireland, notwithstanding her undertaking to do so. Contrary to all her undertakings, she sought the involvement of the HSE in Ireland to have the children taken into care. These moves were resisted by continuing applications by the applicant before the District Court (Judge Brady), which themselves resulted in more custody orders for the applicant in respect of the children and ultimately, resulted in a sentence of imprisonment against the respondent for disobedience of the court's order in respect of which she served a period of three weeks.

12. The respondent has continued to criticise the applicant's parenting, alluding to particular events which could cause some concern. However, the HSE have maintained a light touch approach, and while there is an outstanding supervision order in relation to the children, the HSE appear to be generally happy with and supportive of the applicant's care of the children. Since the matter came before me in this Court in March, 2011, various orders for custody of the children were made allowing for access, visits to the respondent residing in Cornwall and to provision for telephone- Viber (Skype type) access. Two of the access visits were not availed of by the respondent and she explains this by saying that technical mistakes were made in the booking of the flights. Most importantly an access visit took place last Easter. Regular contact by Viber has been maintained throughout with C. by the respondent, and this contact is generally not interfered with by the applicant. Since Easter there has been no contact between J. and the respondent, apparently because J. felt he was rebuffed socially by the respondent.

13. From the outset and during the course of the proceedings before this Court Professor Sheehan, Child Psychologist, has been intensively involved and has, in accordance with terms of reference set by the court, delivered a number of reports to the court. While the respondent was not always cooperative with Professor Sheehan in terms of arranging visits to him, eventually he was in a position to arrange telephone contact with her to carry out interviews. The turning point in the District Court proceedings leading to the application being made to this Court arose from the respondent's refusal to allow or consent to Judge Brady speaking to the children and also the apprehension of Judge Brady that he did not have power to make orders, essentially in the nature of guardianship orders, authorising the applicant to authorise schooling, medical treatment, application for passports *etc*, for the children or to be in a position to have an input in relation to decisions on these matters before the relevant authorities.

14. In view of the difficulties posed by Judge Brady in relation to jurisdiction to make certain orders under the Guardianship of Infants Act 1964, as amended, the appellant took the precaution of instituting separate proceedings by way of plenary summons claiming such orders under the inherent jurisdiction of the court under the Constitution of Ireland. Throughout the course of the proceedings before this Court the participation of the respondent was sporadic insofar as she did not appear for some hearings and, on other occasions when refused her basic demand to have the children removed to her care in England, she did not engage to any satisfactory extent in relation to assisting the court with respect to making orders in the interests of the children as they remained in Ireland. I am quite prepared to make excuses for the respondent for this behaviour in most instances by reason of her volatile nature and her obvious difficulty in travelling to Dublin from Cornwall for every occasion, except in relation to one aspect. This aspect arises from the implications of the order made by this Court when dealing with other matters including the setting out of the terms of reference of a further s. 47 report from Professor Sheehan on the 5th October, 2011. On that occasion, the court adjourned the proceedings to enable the respondent to obtain legal aid and directed in the order that the court's registrar would write to the Legal

Aid Board alerting them to the importance and urgency of the case setting out that the case had had, and continued to have, international dimensions including Hague proceedings which set it into a category over and above the normal run of cases and could be expected to be given priority for legal aid by the Legal Aid Board. Such recommendations are made sparingly by the court from time to time in the knowledge that at the end of the day, the effect of such orders is aspirational only and must defer to the executive power of the Legal Aid Board. However, notwithstanding the aspirational nature of such order, I would have been very optimistic that the Legal Aid Board would respond positively and reasonably expeditiously as they have done in similar cases in the past, even in these times of financial stringency. It is a matter of great disappointment and significance that notwithstanding every effort being made by this Court to ensure that the respondent would have legal aid to assist her in relation to these proceedings, the respondent appears not to have pursued her application for legal aid and ultimately appeared as a personal litigant for the balance of the proceedings, including the final hearing herein.

15. This matter came on for hearing before this Court on the 8th and the 9th July, 2013. Evidence was given by Professor Sheehan and the respondent and the court relied on the affidavits of the applicant. Professor Sheehan gave evidence consistent with his early reports and the reported history of the case accepting the need for the applicant to provide stability for the children. He did, however, allude to the fact that there was a developing situation insofar as there remained continuing telephone contact at least between C. and the respondent, and that the last access availed of by the children with the respondent in Cornwall at Easter was highlighted by the arrival of another child, a daughter A., by a father who had remained in contact with the respondent, but did not have much financial or other involvement with that daughter, and that C. greatly enjoyed seeing and having the company and caring for the daughter, A. and had come around to the view that she would like to return to her mother, the respondent, and live with her in Cornwall, but was very conscious of the hurt that this view might give to the applicant and wished to retain contact with the applicant. Professor Sheehan said that J. on the other hand was adamantly of the view that he should stay with his father. I canvassed with Professor Sheehan whether the court might in giving weight to the children's view, allow for a splitting of the children and he was most adamant that the residence of the children was with each other and their company for each other had been the one constant source of security for the children over what were a number of turbulent and very unstable years of their lives, and that to separate them at this stage would be very dangerous for their welfare and he strongly recommended against taking this course. While continuing to maintain that the applicant was a strong rock of stability for the children and, therefore, in his view should be appointed a guardian of the children, he also recognised that the respondent had generally continued a warm relationship with the children and that this had become less erratic, and that she was currently expecting another child by the same father.

16. He said that the children had much to gain by continued contact with their mother and that while she had, and probably would remain impulsive, erratic and volatile; she nevertheless was very intelligent and had a good sense of humour – attributes which are most emphatically reflected in C. In evidence, the respondent indicated that she would like to have the children live with her in Cornwall and that while she did not have adequate housing at the moment, she would apply to the local authority in Cornwall for such housing in the event of her having the children with her and that there was a school available for them. She already had put to Professor Sheehan in cross examination that the fact that she had been able to rear her further child, A., up to the age of fifteen months had indicated that she was capable of being a parent. She also evinced from Professor Sheehan that she had as the mother of the children a special right to and contribution to make to the children. I make the following findings of fact:-

> 1. The relationship between the respondent and the children has been dominated, certainly from the birth of C., by impulsive, erratic and volatile behaviour which at times degenerated into sheer neglect and even worse, abuse of the children, especially J.
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> 2. The effect of such neglect and abuse has more permanently resulted in a realisation by the children at a tender age that whatever other attributes the respondent had, she could not provide them within their own realisation of the matter, the security and expectation of maternal care such as children would naturally (and mostly, with reflection), expect.
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> 3. The respondent accepted a standard by undertakings before the English Court in the Hague proceedings by which she was to be judged and has failed in maintaining that standard or complying with her undertakings insofar as she never allowed a situation to develop whereby she could keep a home for the children in Ireland, either by obtaining employment or by pursuing a claim for social assistance or unemployment assistance with the Irish Department of Social Welfare which, in my view, she had caused to be denied to her by setting up a spurious set of circumstances so that the department had no choice but to decide that she did not have the requisite habitual residence qualification.
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> 4. It is in the overwhelming interest of the children that the applicant would have a decisive and supportive role in their lives as he has done in the past and that this role would be best served by the continuing residence of the children with the applicant in Dublin, and that such residence and custody would be qualified by access through regular visits of the children to Cornwall and telephone/Viber access as hitherto arranged and practiced.

The Submissions

17. Mr. Donall Ó Laoire, counsel for the applicant, delivered a detailed set of submissions dealing, in the main, with the appointment of a guardian *ad litem* pursuant to the inherent jurisdiction of the High Court. His point of departure in relation to this approach was that there was a statutory prohibition in s. 4 of the Guardianship of Infants Act 1964, which states that:-

> "Where the mother of a child has not married the child's father, she while living, shall alone be the guardian of the child unless the circumstances set out in section 2(4) apply or there is in force an order under section 6(a) inserted by the Act of 1987 or a guardian has otherwise been appointed in accordance with this Act."

However, a discussion of the influence of ss. 14, 15 and 16, but usually s. 16, of Guardianship of Infants Act 1964, on the concept of abandonment in the context of establishing a prerequisite for the exercise of the inherent jurisdiction of the court, focused the attention of the court on what the real legal meaning and effect of s. 16 is. Mr. Ó Laoire in his submissions drew the attention of the court to the very helpful summary of many of the authorities relating to the concept of abandonment in the judgment of MacMenamin J. in the *Baby Ann* case, [2006] 4 I.R. 374 and the discussion focused on what were the implications of a court refusing to make an order for production of the infant pursuant to s. 16 of the Act. For instance, MacMenamin J. in his judgment noted that the only order he could make under the application of that case was to refuse to make an order for the production of the infant, but stated that he awaited the submission of counsel in relation to what further order might be made. Indeed, in the latest edition of Shatter's *Family Law* there is an extensive analysis of the case law relating to instances where applications by parents to have the infant produced might or might not have been successful. This analysis does not deal with the question as to what happened in terms of the requirement for orders actually looking after the welfare of the infant in circumstances where the order for production was refused. Mr. Ó Laoire submitted and accepted that the exercise by the High Court of its inherent jurisdiction has been considered by the

courts and the position was affirmed by Sheehan J. in *the matter of F.D. a respondent* [2011] 1 I.R. 75 at pp. 83-84 75 when he relied on the judgment of Murray J. in *G.McG v. D.W. (No.2)* (joinder of the Attorney General) Supreme Court [2000] 4 I.R.1 at pp. 26-27 that:-

> "The concept of inherent jurisdiction necessarily depends on a distinction between jurisdiction that is explicitly attributed to the courts by law and those a court possesses implicitly while owing to the very nature of its judicial function or its constitutional role in the administration of justice. The interaction between the express jurisdiction of the courts and the inherent jurisdiction will depend in each case according to the scope of the express jurisdiction whether its source is common law, legislative or constitutional and the ambit of the inherent jurisdiction which has been invoked. Inherent jurisdiction by this nature only arises in the absence of the express….
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> Where the jurisdiction of the courts is expressly and completely delineated by statute law it must, at least as a general rule, exclude the exercise by the courts of some other or more extensive jurisdiction of an implied or inherent nature. To hold otherwise would undermine the normative value of the law and create uncertainty concerning the scope of judicial function and finality of court orders. It may indeed be otherwise where a fundamental principle of constitutional stature is invoked against a statutory or regulatory measure determining jurisdiction, but that is not the case here."

Section 16 provides as follows:-

> "16. Where a parent has –
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> (a) abandoned or deserted an infant, or
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> (b) allowed an infant to be brought up by another person at that person's expense, or to be provided with assistance by a health authority under section 55 of the Health Act, 1953 , for such a length of time and under such circumstances as to satisfy the court that the parent was unmindful of his parental duties,
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> the court shall not make an order for the delivery of the infant to the parent unless the parent has satisfied the court that he is a fit person to have the custody of the infant."

Section 13 defines parent for the purposes of this section in Part III of the Act of 1964 as follows:-

> ""parent" includes a guardian of the person and any person at law liable to maintain an infant or entitled to his custody"

18. The question must be asked, if in the case of a parent any or all of the criteria set out in paras. (a) and (b) have been met, and the parent has not satisfied the court that he is a fit person to have custody of the infant, what if any powers are implied under the section having regard to the general imperative of the Guardianship of Infants Act that the welfare of the infant shall be paramount. The circumstances in which the court refuses to make an order for delivery of the infant must be looked at and considered in the context of this imperative. In such a case the person who had resisted the order and having charge and control of the child is, in fact, in custody of the child. In practice it would be extremely rare indeed for the matter to be left in abeyance without such conditions set out as are necessarily in the interests of the child to ensure that the custody is for the benefit of the child and its best interest. No one would suggest that the court might not, at least, consider how the child might be informed about, or enabled to have some contact with the parent who was found in default. No one would suggest either that the court might not be entitled by reason of a commonly accepted implied power to make provisions for some type of joint consultation or even decision making by the parent who failed to obtain an order for delivery under s. 16 and the person left with the custody of the infant. The developing awareness of the importance of both parents to a child, even in circumstances of break up and even severe disharmony, reflected by the practice of the courts and shunted forwards by legislative intervention in the 1980s, means that it is possible and even imperative that many such ancillary orders relating to each element of the welfare of the child could, and should having regard to the imperatives of the Act of 1964 and the fact that the court itself at common law is, during the pendency of the proceedings, a guardian of the child's interests.

19. It is interesting to note that there arises between the effect of the definition of parent in s. 13 and the operation of s. 16, that the person who resisted an order for delivery, in fact, satisfies the definition of parent in s. 13. If that is the case, then parent under special definition of s. 13 includes a guardian of the person. In any event, regardless of such technical analysis the person who has resisted an application for delivery under s. 16 is, in effect, the parent of such a child and it would be a dereliction of the duty of the courts not to treat him as such to the detriment of the interests of the child. It might be argued that the addition of ancillary orders following a recognition of *de facto* custody by a person who had resisted an order for delivery of the child, are merely conditions added to an order for custody and that custody is a flexible concept at law allowing of such conditions. For certain, the lack of definition of the concept of custody within the Act has been used with great flexibility to cater for the era of shared parenting. The most impressive example of such treatment is where an order for joint guardianship and joint custody is made subject to day to day care being shared between the parents over time slots of days within a week or a month.

20. The District Court in this case did not hesitate to make an order preventing the removal of the children from the jurisdiction. To make such an order effective of necessity might involve an order controlling the passport or making an order that any application for passport or visa would be on notice to the person with mere custody. Powers to make these orders are implied within the general framework and imperative of the Act of 1964 without difficulty or much reflection.

21. In short, the courts while exercising their powers under the Act of 1964 to make an order for custody might chose an order for custody so that the person taking the benefit of it might have all the powers and rights of a guardian, but yet not be so called. However, experience has indicated that where such types of custody orders are produced to authorities such as schools, passport offices, hospitals or service companies, they may not bring about the desired consequences in the interests of the infant and may even invoke the response of legal advice being sought from the body or organisation required to act. Thus, an essential element of normative effect, required of the law in the judgment of Murray J. quoted above is missing. In my opinion such normative effect may only be achieved by the making of an order for guardianship whether solely or jointly, depending on the circumstances, and not by the addition of conditions or ancillary orders to a custody order which, in effect, is an order for guardianship in all but name.

22. Indeed, when it is considered that in this case where the respondent consented to the Hague orders by positive undertakings to treat the applicant in a way which would dilute the benefit which he and the children obtained through the autonomous definitions of habitual residence provided by Brussels II *bis* would be to challenge the normative effect of Brussels II *bis*, which itself supersedes the Irish Constitution.

23. While the applicant instituted plenary proceedings to ensure that an application for an order under the inherent jurisdiction of the court be made, I am doubtful if such an order may be made in private law proceedings having regard to the passage just quoted from the judgment of Murray J., wherein he states that such orders are "invoked against statutory or regulatory measure determining jurisdiction". The High Court has held in my judgment in *A.B. v. C.D.* [2011] IEHC 543 (Unreported, High Court, Abbott J., 26th July, 2011) that inherent powers under the jurisdiction are not exercised by the court when exercising a private law jurisdiction as in that case. However, I will propose to adjourn the plenary proceedings generally to enable the applicant to have a fallback position in the event of any decision I make in these proceedings on the basis of private law being incorrect.

Decision

24. I find that there was an abandonment by the respondent of the infants, and that from time to time she allowed another person, that is the applicant, bring up the children, within the meaning of section 16. Further I find that the respondent has not satisfied the court that she is a fit person to have custody of the infant children by reason of her continued erratic behaviour, her failure to vindicate their interests through her presence, through her refusal of the likely availability of legal aid in these proceedings, her wilful failure to comply with the undertakings she gave to the English court in the Hague proceedings and her manoeuvring from the outset. This was compounded by her continued failure after the Hague proceedings to ensure that she would lose the capacity to financially contribute to the welfare of the children by continued employment or by obtaining Irish social welfare unemployment or other assistance. I am satisfied that the requirements of the children in terms of the applicant being the sole person with custody of the children in this jurisdiction should be appointed guardian of the infants, but that that guardianship should be joint with the respondent to continue in accordance with current arrangements until further order of the court. In the outcome, this is an order which the District Court could have made in the discontinued proceedings, but by reason of the decision of this Court that it is an order arising by implication of the Act of 1964, it is an order that may be made by any court of limited jurisdiction in the future, where the exceptional circumstances (as in this case) merit it.