Neutral Citation: [2014] IEHC 378

THE HIGH COURT

Record Number: 2014 No.12 JR

Between:

Stacia Kelly and Mary Clarke as Executors of the late Annie Mcintyre deceased

Applicants

And

Circuit Court Judge Doirbhile Flanagan

Respondent

And

Edel Mcintyre

Notice Party

Decision to refuse leave to seek Judicial Review reliefs:
26th Day of June 2014:

1. The applicants appear in person in these proceedings.

2. They have applied for leave to seek reliefs by way of judicial review, namely an order quashing an order made by the respondent on the 1st October 2013 in certain Circuit Court proceedings before her (Record Number138/2006 Sligo Circuit Court) and in which they are defendants, and the Notice Party (their sister) is the plaintiff.

3. In those proceedings a number of reliefs no longer being pursued are set forth. What remains is a claim to have a certain Deed of Transfer set aside, as well as a claim for conversion of certain monies received on foot of a personal injuries claim. The details of the claim do not particularly matter for my present purposes.

4. The Notice Party in the present proceedings was put on notice of this application by the direction of this Court. The same solicitor appears for her before me now as appears for her, as plaintiff, in the Circuit Court proceedings.

5. Those Circuit Court proceedings are in progress. In fact a Notice of Trial was served at the end of 2008. The proceedings have been held up since then in various ways which I do not need to go into. However, the present applicants believe that the Notice Party lacks the capacity necessary to enable her to instruct her lawyers for the Circuit Court action. The Notice Party's solicitors do not agree. As far back as 2011 they swore an affidavit stating that they had interviewed their client on a number of occasions and that she had no difficulty in understanding her instructions on each occasion, and that on each occasion their client has been clear, careful and direct in relation to her instructions. The last such interview was stated to have been in November 2010. Her solicitor also exhibited a medical report dated 2006 from a GP, Dr Sorcha Dunne which confirmed that the Notice Party did not need to be made a Ward of Court. That pre-dated the commencement of the proceedings.

6. Nevertheless the applicants on the present application remain convinced that their sister lacks capacity.

7. Because of their concerns, they issued a Notice of Motion in the Circuit Court proceedings seeking an order that their sister be independently medically examined by a particular doctor named as Dr Canavan, a consultant psychiatrist. In their grounding affidavit they exhibited a letter from a different GP but from the same GP practice as Dr Dunne in which a Dr Dick stated that it had been five years since he had seen her, and that he would not be able to impart confidential information about their sister without her consent. He stated that he was unsure if she would be able to give "*reliable written consent*" and thought it best of she was to call and see him in person to give consent for the release of information.

8. A replying affidavit filed on behalf of the Notice Party was filed in answer to the applicants' motion for a medical examination, and in which Anne Hickey, her solicitor exhibited a recent report on their client from a Consultant Psychiatrist in Intellectual Disability Services attached to the HSE in Sligo, namely a Dr Inam Ul-Haq and in which he concludes that "*Edel is capable of standing the trial in relation to her property and is competent to sign any legal document to finalise the transfer of her property*". The applicants herein want an examination carried out related to their sister's level of cognitive functioning, and this is why they set up an appointment for her to be examined by Dr Canavan. However, she did not attend, and Anne Hickey notified the applicants that their client would not be attending that appointment. The applicants appear to have been able to get some comments from Dr Canavan and these appear in a letter from him dated 20th September 2013. He must have been provided with information on the Notice Party from somewhere, but this is not stated in his letter. He refers to an historical cognitive assessment carried out on the Notice Party in 1993 which he says indicated a functioning at the lower end of the mild range of General Learning Disability. He concludes by stating that an updated cognitive assessment would be required now as well as a language assessment to ascertain her current levels of functionality, and in that regard says: "*I do not see how it could be established that Edel is capable of decision-making in relation to her affairs without updated assessments being carried out. Thus, a cognitive assessment is urgent to establish whether Edel has the cognitive capacity to make decisions regarding her business and financial affairs*".

9. It was in these circumstances that the applicants' motion came before the respondent judge on the 1st October 2013. The respondent refused to make the order sought for independent medical assessment, and the applicants say that the hearing of that application was unfair and that they did not get a fair opportunity to be heard.

10. The grounding affidavit sworn by the first named applicant describes her complaint and what occurred on the hearing of the motion. She says that at the call-over of the list she told the respondent that she had an expert witness in court, namely Dr Canavan

and that he wished to give evidence. She goes on to say that the respondent refused to allow Dr Canavan to give any evidence on the motion, and adjourned the motion until 2pm that same day. She directed also that the matter be heard 'in camera'. This is something about which the applicants also complain, and they say that the matter ought to have been heard in open court.

11. The applicants say that "inexplicably and without any explanation" the respondent refused the independent assessment of the Notice Party and relied entirely in the report of Dr Inam Ul-Haq already referred to.

12. The applicants complaint is firstly that the matter ought to have been heard in open court, and secondly that the respondent acted contrary to principles of natural justice by refusing to give Dr Canavan an opportunity to give oral evidence on the hearing of this motion for a medical assessment. Ms. Kelly avers that the respondent "*flouted the in camera rules ... as a means of isolating me and intimidating me as a lay litigant, having had Dr Canavan, my husband and sister removed from the court prior to the commencement of the hearing at 2pm*".

13. Anne Hickey has sworn a replying affidavit on this application for leave. She says that she has acted for the Notice Party since 2005 in relation to the matters in issue in the Circuit Court, and she herself is completely satisfied that while the Notice Party has a mild learning disability she understands the nature of the proceedings and is able to give instructions and understand advice. She states that the application for 'in camera' was made by her Counsel on the basis that the proceedings at that stage included a claim for relief under section 117 of the Succession Act, 1965. She gives an outline of what happened after 2pm which I am not going into full detail, it appears that submissions were made as to why it was not open to the applicant to seek to have the plaintiff examined as to fitness within those proceedings, and that if anything an application to have her taken into wardship should be made by the applicants to address their concerns. It was submitted also that where the solicitor was satisfied that the plaintiff in those proceedings was capable of giving instructions and understanding advice it was perfectly open for her to sue.

14. This affidavit also deposes that the respondent declined to hear Dr Canavan's oral evidence unless the applicants herein could establish some legal basis for doing so on the motion, and that they were unable to do so. She says that it was on that basis that the respondent made the order refusing the motion. The applicants respond to that by saying that in their view the respondent had already made up her mind at the earlier call-over that Dr Canavan would not be heard. Further affidavits have been filed on each side which really do not add much of relevance to what must now be decided, namely whether arguable grounds for quashing the impugned order have been raised by the applicants on the basis first of all that the application should not have been heard in camera, and secondly that the principle of '*audi alteram partem*' has been breached on the application because the respondent did not permit the evidence of Dr Canavan to be heard on the motion.

15. In my view neither ground is raised to the level of arguability required, albeit that it is a low threshold.

16. No real prejudice was suffered by the application being heard in camera. A hearing in open court is not a rule so that a party would feel less intimidated as the applicant claims she was. In fact it is arguable that a greater sense of intimidation and fear can be engendered by a personal litigant when they have to conduct their affairs in public. But quite apart from that, where a claim includes a claim under section 117 of the Succession Act 1965, section 119 requires that it be dealt with in camera. I accept that the section 117 part of the claim is not now going to proceed, but nevertheless the respondent was perfectly entitled to direct an in camera hearing for that reason, but also in my view if the subject of the plaintiff's mental capacity was going to be argued. There is no real or proper basis for arguing that the respondent's direction in that regard contaminated the process or breached any right of the applicants, rendering any order made unlawful. It is simply not arguable in my view.

17. As far as the second limb of the applications; case is concerned, it would be highly unusual for the applicant on a motion of this kind to hear oral evidence. Such motions are heard on affidavit. In fact, the Notice of Motion issued by the applicants indicates that the motion will be determined on affidavit. If one looks at the final paragraph of their Notice of Motion it clearly states that it will be grounded on the affidavit of Stacia Kelly and its exhibits. Nowhere is there any mention of any oral evidence being given. That is as it should be. It is not open to the applicants to then come to court with another witness and demand that that witness be heard in oral evidence. They have no entitlement in that regard. The respondent was perfectly within her rights to have that motion heard on affidavit and to determine it by means of the hearing which took place. She heard both sides. She decided to refuse the application. There is nothing improper about what occurred. In my view it cannot be argued that the principle of 'audi alteram partem' was breached in circumstances where the applicants were in court and were heard. The principle does not require the judge to allow evidence to be given by anyone who happens to have come along to the hearing simply because one party so wishes. That is not how Courts function. In fact, if it was the way Courts had to conduct their business chaos would reign. Those types of motion are heard on affidavit for very good reason. The applicants could have arranged for Dr Canavan to swear an affidavit in support of their application. That was not done.

18. If the applicants were dissatisfied with the outcome of the application, they also had a right of appeal. Instead they have chosen to challenge the legality of the order by way of judicial review. In so doing they are mistaken in their view that there are arguable grounds for so doing.

19. For these reasons I refuse this application for leave to seek the reliefs set forth in the applicants' Statement of Grounds.