

THE HIGH COURT

2010 9488 P

IN THE MATTER OF ARTICLE 42 AND ARTICLE 40.3 OF THE CONSTITUTION AND IN THE MATTER OF THE CHILD CARE ACT 1991, AS AMENDED AND IN THE MATTER OF SECTION 45 (1) (C) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961, AS AMENDED AND IN THE MATTER OF MINORS A.B. 3, A.B. 4, A.B. 5, AND A.B. 6 AND IN THE MATTER OF THE REPORT OF THE NON-STATUTORY INQUIRY INTO THE A.B. CASE

BETWEEN

HEALTH SERVICE EXECUTIVE

PLAINTIFF

AND

A. AND B.

DEFENDANTS

EXTEMPORE JUDGMENT of Mr. Justice John MacMenamin delivered the 27th day of October, 2010.

Background

1. This judgment arises from an application on notice by the HSE heard on Friday, 22nd October, and Tuesday, 26th October, 2010. The HSE previously made an *ex parte* application for leave to bring the proceedings. An *ex parte* application is one where only one side is heard. In this case the notice parties made submissions at the substantive hearing. Thus the views of parties on notice of the proceedings could be taken into account. Consequently, this Court had the opportunity of hearing both sides of the matter. I stated at the conclusion of the hearing that I would deliver a short judgment outlining what happened at the in camera hearing and my conclusions.

2. A. and B. are the parents of six children. Both parents were convicted by the criminal courts of a series of offences, including assaults on their children, as a result of which A., the mother, received a sentence of seven years imprisonment and B., the father, a sentence of fourteen years of which the last eighteen months were suspended.

3. There was very deep public concern as a consequence of what emerged in the case. These concerns related to the care, protection and welfare circumstances of the six children. Questions arose in relation to the manner in which the Health Service Executive had discharged its child care functions in relation to the family. A particular issue was as to why the children had not been taken into care until the year 2004, when the HSE and its predecessor the Western Health Board, had been involved in some aspects of the family situation for a number of years prior to that date. The HSE undertook to initiate an investigation.

4. The final draft of the resulting report was made ready by 21st July, 2010. The applicant considers it is now ready for publication. It had to be considered by a number of parties. This judgment relates to the report of that date. Hereinafter it will be referred to as "the report". Needless to say, any prior documentation prepared in the course of the inquiry will continue to be governed by terms of strict confidentiality, by rights of privacy, by the law of defamation and also the terms of the orders already made by the criminal courts and now this Court. The report is redacted and does not identify any party.

5. Relying on the inherent discretion of the Court regarding the welfare of minors, the HSE has applied for a permissive order, allowing it to publish the report of the inquiry team. A permissive order is one which allows the steps necessary for publication to be taken. The HSE also sought a wide range of other reliefs for the continued protection of all the children's identities. The consequence is that the publication of any matter relating to, or identifying any of the children of the A.B. marriage is not permitted. This includes any of the children who are no longer minors. To that end, the Court has granted orders restraining publication in the media of any information whatever which either by itself, or in conjunction with other information, might tend to identify the children, and prohibiting any direct or indirect approach to the children by media representatives. Every necessary step has been taken to preserve the children's anonymity. The initials in the title of this case have been assigned by the Court. They are not their true names. I do not think it appropriate individually to identify the children in any way.

The issue

6. The question for the determination of this Court was whether; having regard to the Constitutional and ECHR issues engaged, an order allowing publication of the report should be granted. This Court has had no input whatever into the report. A permissive order of the Court, if granted, should in no way be interpreted as an endorsement of any part of the contents or its conclusions. It is not in any form or manner an indemnity. It would be simply an exercise of the inherent jurisdiction of the Court in the public interest. I am satisfied, that in this case, the Court has such jurisdiction. As the application has no precedent in this jurisdiction and raises important legal issues I will deliver a detailed judgment in due course. However, in the light of the urgency of this case, it seems to me appropriate to deliver this brief extempore judgment. It explains briefly the decision and the circumstances.

The decision

7. The decision of the Court is that, on balance, the report should be published. I emphasise that this decision was reached on balance because of the deep concerns which the children have regarding any further publicity. The Guardian Ad Litem who has been

appointed to take care of and represent the children's interests requested that I should meet with the children. We met in a relatively informal way in the absence of lawyers. What they wanted was that their voices be heard. I should place on record that I consider that the children both individually, and collectively, are remarkably brave and resilient. Most importantly, they wished it to be known that they wanted to be able to lead their own lives in a normal way. They wanted their right to privacy respected. One of them said "We just want to be normal kids". They are very fearful of the publicity involved in any publication. Some are reconciled to this, some are not. Despite all their bravery they are extremely vulnerable.

8. The children requested that a number of their particular concerns be expressed now. Among the questions that they asked were:

"Why are they listening to us now and they didn't before?"

They asked why they had never been taken seriously. One said:

"I didn't want this to happen to me. I now feel scared and frightened."

A particular concern was some of the sensationalised media coverage. One of the children said:

"I prefer that they never took me into care at all. It would be better to live at home than to go through what the media have done. I can't do it again."

One of the children wrote a song eloquently describing the human predicament all the children face in a situation not of their own making.

9. It is simply impossible to convey in words their sense of anger, hurt, frustration, betrayal and fear. Obviously there are many causes for this. Each expressed their concerns in different ways. Plainly, much of this was caused by the disturbing events which were the subject matter of the criminal charges. But one simply cannot ignore the extent to which the children themselves now feel that the publication of the report could lead to them having to re-live what they wish to forget. They vividly remember specific sensational headlines from criminal cases and quoted them. Some wished that the report not be published. Others had different views. All of them expressed the wish that the media understand the hurt caused to them by the earlier sensational headlines. The focus of the report is, after all, on the interaction of the HSE with the family. It surely should not be on the children. The children should not be asked, as they put it, to relive the experience. They want it understood that they are normal young people.

10. At the outset of the process of consultation had the children only their own wishes, they would have asked that the report not be published. However, on balance, a number, (but by no means all,) feel that more good than bad can come from the publication – provided that sensationalised coverage does not take place. I make no comment on any of these views. They speak for themselves. The quotations are the children's own, - in every sense.

11. I am satisfied no pressure was put on the children. While a majority of them were ultimately reconciled to publication the views of those opposing are entitled to equal respect. Two remain resolutely opposed to publication. The question comes down to a balance of rights – such as the right to freedom of expression, the constitutional rights and guarantees due to children generally, including life and bodily integrity; as compared to the rights to privacy, dignity, good name and the strong wishes of those opposed. Unfortunately, wishes and rights are not always reconcilable. A Court must try to strike the balance and prioritise those rights engaged.

12. The welfare of the children must be a paramount concern: all reasonable steps have been taken for their protection. But the subject matter of the report is a matter of public interest in the broadest sense. A number of the A.B. children strongly expressed the hope that the effect of the report might be to ensure that there was no repetition elsewhere of what occurred. I consider this to be decisive – provided, I repeat, that the children are not made to live through the experience again. All the children found it difficult to comprehend why any one would not understand the sheer hurt and emotional stress which some of the coverage caused them. The protections and restraints should be proportionate to the rights engaged.

13. A further reason is that the report was commissioned by the HSE in the fulfilment of its statutory functions under the Child Care Acts. There is a question of public accountability. One additional practical consideration is that it is already known that the report has been commissioned and is in being. A failure to publish, or prohibit publication might be misrepresented as some form of "cover up" using the children as an excuse; that is not the situation. To refuse publication would in any case necessitate a public judgment with consequent publicity. No other countervailing factors have been identified.

14. On balance these factors concerning rights of the public determine the outcome in favour of publication. For these reasons I have granted the permissive order. I understand the report will be published later today.

15. I would like to express my thanks to the guardian ad litem. Her work has been invaluable. I will not name her for obvious reasons. She has recommended a number of continuing steps that the HSE will adopt. All are necessary protective measures to safeguard the children's well being. The matter will continue to be under court supervision. There will be liberty to apply, if necessary, at short notice.