THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 564 J.R.]

BETWEEN

P.G.

APPLICANT

AND

CHILD AND FAMILY AGENCY (TUSLA)

RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 13th day of December, 2018.

Background

1. The applicant is the mother of M. M. has four young children and this application concerns three of them, D. (aged 9), K. (aged 7) and A. (aged 6). Unfortunately, M. suffered and continues to suffer from addiction, mental health problems and other difficulties. She was and continues to be incapable of taking care of the three children. The situation has not been assisted by the fact that she is in a dysfunctional and abusive relationship with her current partner. M. has since given birth to a fourth child with this partner.

2. M.'s inability to look after the three children was recognised and in September 2013 the applicant agreed, following an emergency case conference with the respondent, to take care of the three children. This was envisaged as a temporary arrangement with the hope that M. would be able to rehabilitate and once again take care of the three children. The applicant agreed with the respondent to take on this role in light of the significant imminent risk to the welfare of the children. This was an enormous commitment on her part which involved her giving up her employment, leaving her then address and moving to another part of the country.

3. A child protection plan was formulated by the respondent in November 2013 which envisaged, *inter alia*, that: -

(i.) The applicant would become the temporary carer of the children.

(ii.) The arrangement was on foot of a plan put in place by the respondent.

(iii.) The arrangement required the absolute consent of M. to the conditions set out therein, including all issues regarding access.

(iv.) Should the arrangement break down, the social work department (of the respondent) would be informed.

(v.) If M. withdrew her consent, the respondent would seek legal advice about the prospect of formalising the arrangement.

(vi.) The social work department would look to review the case following the completion of M.'s rehabilitation programme.

(vii.) The programme would also work with M. in establishing her life in the community and assist her in sourcing suitable housing.

(viii.) If M. was in a position to parent the three children, there would have to be a gradual transition from their current placement to M.'s care.

(ix.) The social work department would also seek to assess any future boyfriend of the applicant who was likely to have contact with the children.

(x.) The social work department would seek legal advice in the event that M. were to remove the children from their grandmother's care.

4. A further case conference was held on 28 April 2014. No formal review of this plan has taken place since 2014 despite a number of issues having arisen from events over the intervening years which, in the view of the applicant, impinge upon the safety and welfare of the children. These events are: -

(i.) In April 2016 M. made an application to the District Court, without notice, seeking guardianship and unsupervised overnight weekend access to the children. When she learned of this order the applicant was extremely concerned and the matter was appealed to the Circuit Court.

(ii.) When the appeal came before the Circuit Court, the Circuit Court Judge stressed, in very clear terms, concern at the precarious situation, both legally and financially, which the applicant was in in caring for the three children.

(iii.) In 2017 M. brought another access application to the District Court. The respondent was made aware of this by correspondence but failed to reply.

The application was dismissed on technical grounds but there remains the possibility that M. could bring a further application. In the course of the application to the District Court, M. made a number of claims to the effect that: -

(i) The current arrangement was not agreed between the applicant and M.

(ii) She had not given permission for the applicant's boyfriend to live with the children because she claimed he was a known drug dealer and had a long prison record (it is understood that the respondent has deemed this to be a false allegation).

(iii) The previous access arrangement has stopped, which was not the case.

(iv) She knew nothing about the children's schooling or any health needs.

5. The three children involved have significant care demands owing to the inability of M. to look after them and require proper protection. The children have individual care issues and needs that require to be addressed. All three children are at a very vulnerable stage in their lives and, in the view of the applicant, require the protection of the respondent.

6. The applicant believes that in the absence of court orders there is no legal basis for the three children to be in her custody, care and control. The applicant is gravely concerned that either M., or her partner, may take the children and that she would not be in a legal position to prevent this.

7. For their part the respondent states that it is under no legal obligation to intervene and have no child protection or welfare concerns. On 16 April 2018 the respondent wrote to the applicant to inform her that it was closing her family's case as they had no current concerns regarding the family.

8. The position of the applicant has been set out in correspondence sent by the applicant's solicitor to the respondent. I will now set out this correspondence in detail.

Correspondence

9. The starting point is a letter dated 22 June 2016. This letter sets out, in detail, the application made in the District Court and subsequent appeal to the Circuit Court, referred to at para. 4 above. The letter stated the applicant's grave concerns about the children returning to the full-time care of M. The letter called upon the respondent "to urgently review and assess this situation and commence proceedings without delay to have the children's precarious situation stabilised. [The applicant] instructs that she wishes for the children to be placed in her care."

10. Following this letter, the social worker called to the applicant on 30 June 2016. This was followed up by a letter from the respondent dated 7 July 2016. In the course of this letter, reference was made to access arrangements and that the social work department would continue to monitor the situation. The letter further stated: -

> "As you will be aware your client can go to court and make an application for custody of her grandchildren and we would recommend that she discusses this matter further with yourselves. This is a matter which can be dealt with through the courts both between [the applicant] and M. with social work acting as witnesses."

11. Correspondence recommenced by a letter dated 21 February 2017, from the applicant's solicitor to the respondent. This letter, marked "urgent", set out in detail the background and stated: -

> "There continue to be ongoing problems regarding access to the children by the mother (M.), particularly as the access agreement which you have drawn up with M. has no legal force. This access is supervised because of the potential risk to the children of unsupervised access…furthermore, we reiterate the difficulties caused by M.'s threats to take the children from her mother, which threats were recently repeated. The urgency of the situation should be known to you, but for the avoidance of any doubt whilst the children remain with their grandmother without the protection of a childcare order they can be removed at any time by their mother."

In respect of the suggestion that the applicant bring proceedings the letter states: -

> "We respectfully point out to you firstly that this would expose my client to expense which she can ill afford and secondly, and even more importantly, would in her opinion cause further damage to what is in any event an extremely fraught relationship with her daughter something which, in her opinion, could impact adversely on the welfare of the children."

The letter concluded that if the respondent did not by 14 March 2017 take legal proceedings in the District Court then: -

> "[T]he appropriate proceedings will be instituted in the High Court to safeguard the children's, and our client's position.
>
> I await your urgent reply."

There was no reply.

12. A further letter from the solicitor of the applicant to the respondent dated 9 March 2017 refers to the fact that the letter of 21 February 2017 had not been replied to. The letter states: -

> "Our client has contacted this office in an extremely distressed state in relation to your insistence that the above named children be brought for access with their mother tomorrow when, she was informed, their mother plans to tell them of the birth of their new sibling."

This letter concludes by seeking an urgent response to the letter of 21 February 2017. Again, this letter was not replied to by the respondent.

13. In a further letter, dated 24 May 2017, again from the applicant's solicitors to the respondent, the following was stated: -

> "My client, [the applicant] has been placed in an intolerable and perilous situation in that she is neither a foster parent of the children nor has she legal custody over them, although she remains on an informal basis their fulltime carer."

and

> "We are instructed that under no circumstances is our client prepared to countenance a situation where the present ad hoc arrangements continue for any appreciable length of time. She believes that the present situation is contrary to the children's' interest and furthermore is putting her under extraordinary stress and strain. We refer to previous correspondence in this regard."

and

> "To allow me to fully advise my client on this proposed course of action, I need your agency without any delay to comprehensively set out the support that the agency intend offering her in the event of her bringing applications for sole custody of the children.."

The letter concludes: -

> "Please further note that if we do not receive a comprehensive reply to this letter by the 9th June next we will have no choice but to conclude that the agency is choosing not to respond and we will advise our client accordingly."

The respondent did not reply to this letter either.

14. In a final letter dated 16 June 2017 the applicant's solicitor, having noted the failure of the respondent to reply to earlier letters, states that unless a comprehensive response is received to the issues raised an application will be made in the High Court on 3 July 2017.

Application for judicial review:
"On 17th July, 2017 Heneghan J. granted leave for the applicant to seek the following reliefs: -

> (i) An order of *mandamus* directing the respondent to institute proceedings in the District Court seeking care orders pursuant to s. 18 of the Childcare Act, 1991, (as amended) in respect of D, K, and A.
>
> (ii) A declaration that the respondent has failed under its statutory obligations and in its duty of care in failing and/or refusing to institute proceedings pursuant to s. 18 of the Childcare Act, 1991 (as amended) in respect of D, K, and A.
>
> (iii) A declaration that the respondent has failed to act in accordance with the Childcare Acts in abdicating to the applicant its statutory duty to promote the welfare of and ensure the care and protection of D, K and A."

Position of the respondent
15. In its statement of opposition, the respondent states that the children are in the care of their grandmother pursuant to a private arrangement between the grandmother and her daughter. The respondent therefore has no power to direct what access occurs for the children. The respondent's involvement with regard to access has been limited to encouraging access between M. and her children, mediating between the applicant and M. on occasion and room booking to facilitate same. The respondent initially provided workers to supervise the access but this has now ceased and the only involvement the respondent has in relation to access is to provide minimal mediation between the applicant and her daughter. In an affidavit, sworn on behalf of the respondent dated 24 May 2018, it is deposed that: -

> "I say and believe that this case is closed to the Child and Family Agency as we have no child protection and welfare concerns in relation to the children whilst they are in their grandmother's care."

In April 2018 the respondent wrote to the applicant to inform her that the respondent was closing her family's case as they had no current concerns regarding her family and have not been actively involved in her family's care for some time.

Relevant constitutional and legislative provisions
16. Article 41 of the Constitution provides, *inter alia*: -

> "1 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law."

17. Article 42A provides: -

> "1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.
>
> 2 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

18. Section 16 of the Childcare Act 1991 (hereinafter the Act of 1991) provides: -

> "Where it appears to [the Child and Family Agency] that a child requires care or protection which he is unlikely to receive unless a court makes a care order or a supervision order in respect of him, it shall be the duty of the Agency to make application for a care order or a supervision order as it thinks fit."

19. Section 18 of the Act of 1991 provides: -

> "(1) Where, on the application of the Child and Family Agency with respect to a child, the court is satisfied that—
>
> *(a)* the child has been or is being assaulted, ill-treated, neglected or sexually abused, or
>
> *(b)* the child's health, development or welfare has been or is being avoidably impaired or neglected, or
>
> *(c)* the child's health, development or welfare is likely to be avoidably impaired or neglected,
>
> and that the child requires care or protection which he is unlikely to receive unless the court makes an order under this section, the court may make an order (in this Act referred to as a "*care order*") in respect of the child."

Consideration of issues
20. In September 2013 the applicant, on the advice of the respondent, took on the role of carer for the three children involved. It may well have been intended that the arrangement would be temporary in nature but this is not what happened. Indeed, in the intervening years, it appears unfortunately to be the case that the applicant's daughter, M., is now in even less of a position to provide the care and support which these three young children require on an ongoing basis.

21. The applicant wishes to provide this care but in the context of an appropriate legal framework. The various court applications which M. has made, to my mind, underlines the vulnerable legal situation which the applicant is in. Such cannot be of any benefit to the three children involved who themselves have significant childcare demands. I am satisfied that there is a basis, as set out in s. 18(1)(c), for a care order to be sought on the grounds that "the child's health, development or welfare is likely to be avoidably impaired or neglected".

22. From the respondent's point of view, it is stated that the arrangement which the applicant entered into in September 2013 was effectively a private arrangement. There has been no review by the respondents of the care of the children since April 2014, in excess of four years ago. In April 2018 the respondent wrote to the applicant informing her that they were closing her family's case as "they had no current concerns regarding her family". It is difficult to see how the respondent could reach such a conclusion not having carried out any review for four years. Further, as set out in detail, the various letters written by the applicant's solicitor to the respondent, which set out serious concerns about the children and the vulnerable legal position which the applicant was in, were not replied to. One would have thought that, at a minimum, a case review might have taken place in response to these detailed letters.

23. By reason of the foregoing, I accept that the position of the applicant and the three children involved is as is set out in the correspondence referred to and grounding affidavits.

Decision
24. Clearly the Constitutional provisions, referred to at paras. 17-18 above, recognise the "Family as the natural primary and fundamental group of Society, and as a moral institution possessing inalienable and imprescriptible rights". The "Family", however, may not always fulfil the role envisaged by the Constitution. Hence, the provisions of Article 42A(2)(1). Unfortunately, in this case, the children's parents have failed "in their duty towards their children to such an extent the safety or welfare of any of their children is likely to be prejudicially affected…". In response to this, there was the arrangement of September 2013. Unfortunately, since April 2014 the respondent has not had sufficient regard as to how the applicant's situation and circumstances have evolved.

25. Central to this application is the wording of s. 16 of the Act of 1991. For the reasons already stated, in particular the fact that there has been no case review for some four years and a failure to reply to repeated and detailed correspondence, the respondent is not in a position to contest the validity of the situation as set out by the applicant. Thus it should appear to the respondent that the three children require "care or protection [they are] unlikely to receive unless a court makes a care order or a supervision order in respect of [them]".

26. Section 16 was considered in *CL.T v. Health Service Executive* [2011] 3 I.R. 29. In his judgment, McMahon J. stated at p. 31: -

> "[6] On the legal issue, the first respondent relies on s. 16 of the Child Care Act 1991 which states that 'where it appears to a health board with respect to a child who … requires care or protection which he is unlikely to receive unless a court makes a care order or supervision order in respect of him, it shall be the duty of the health board to make application for a care order or a supervision order, as it thinks fit'.
>
> [7] There are two parts to s. 16. There is a 'trigger' in the first three and a half lines and if this trigger is fulfilled, the obligation is mandatory and 'it shall be the duty of the health board to make application for a care order or a supervision order, as it thinks fit'. The last four words 'as it thinks fit' relate to the choice of the first respondent as to whether proceedings for a care order or supervision order should be instituted and the choice of the first respondent depends upon the circumstances or facts of the case. 'Shall' is mandatory and it is therefore necessary to look at the first three lines of the section and the conduct of the first respondent, who in this matter, having assessed the situation, came to the conclusion that the child is not 'at risk'."

27. A number of the facts in the case before me are similar to *CL.T. v. Health Service Executive.* I refer to the following passage from the judgment of McMahon J. at p. 31: -

> "[4] The applicant's problem is that she has no rights at law under the relevant legislation. The applicant is the carer of the child and she is doing an admirable job as averred to in the affidavits of the social worker and her ability is not in question. The child is fortunate to have such support in her young life. The applicant has a fear/apprehension that the second respondent, the child's natural mother, will claim her child back without notice perhaps and the applicant's fear is based upon her observations, knowledge and experience and the fact that the child has not been cared for by the second respondent and has not been protected by her natural parents. The applicant has a fear that the child will be taken out of the jurisdiction in the care of persons who the applicant thinks to be found wanting. The basis for this fear/apprehension is that the second respondent is unreliable and influenced by the child's natural father and the affidavits refer to incidents where traits of unreliability have manifested themselves. The natural father has a criminal record and has spent time in jail and this has not been disputed. Furthermore, the natural father is facing proceedings in the District Court which are serious enough. The natural father is known to take drugs and mixes with people who may not be a good influence on either the second respondent or the child..."

28. Further, McMahon J. stated at p. 33: -

> "[11] The first respondent has to some extent deemed that the likelihood of the second respondent taking the child back was low and that there was no cause for immediate concern and this is probably a fair estimation of the likelihood of the second respondent's intention at present. Against that, one must pose the question: What would happen if the natural mother changed her mind and takes the child back tomorrow as she is perfectly entitled to do? In my view, this would result in a high risk to the child and whereas the probability may be unlikely, if the same came to pass, there would be a high risk of serious damage to the child. The applicant, having no legal rights, may have no opportunity to delay any attempt by the second respondent to take the child back and damage could well be done to the child before anyone could act. In calculating the risk, I must take into account not only the likelihood of the event happening but also the seriousness of the injuries that might occur if the child, unlikely as it may be, is taken back by the second respondent. I

am not satisfied that the first respondent has sufficiently addressed this latter aspect in its determination. Where a vulnerable child is involved the court should exercise extra vigilance."

29. Though in this case there is no suggestion that the three children involved, or any of them, may be taken out of the jurisdiction or that their father has a criminal record, there are nonetheless a number of parallels. In particular, the fact that the applicant in *C.L.T*. and the applicant in the instant case share the same concern about a lack of legal rights and a fear/apprehension that the children's natural mother could claim them back without notice which would result in the children being brought up and cared for in circumstances clearly inferior to those presently being provided for by the applicant. It would also appear that in *CL.T.* the first named respondent had completed an investigation into the matter. This does not appear to be the case here where, as I have previously mentioned, no case conference has taken place for in excess of four years.

30. Though *CL.T. v. Health Service Executive* does not lay down principles, it clearly does identify the circumstances under which it would be appropriate for a court to make the orders being sought in the instant case.

31. By reason of the foregoing, the applicant is entitled to succeed and I will hear the parties as to the form of the order that the Court should make.