NEUTRAL CITATION NUMBER [2012] IEHC 288

THE HIGH COURT

(2012 No. 1268 S.S.]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION

BETWEEN

K.A.

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

AND IN THE MATTER OF C.A. AND R.A., MINORS

JUDGMENT of Ms. Justice Iseult O'Malley delivered on the 3rd day of July, 2012

Introduction

1. The Applicant in these proceedings is the mother of C. A., aged 12, and R.A., aged 10 and she makes a complaint under Article 40.4 of the Constitution on their behalf. Both children have been in the care and legal custody of the Respondent since the 19th July, 2011, initially on foot of emergency care orders and thereafter on foot of a series of extensions of interim care orders made pursuant to the provisions of the Child Care Act 1991, as amended. On some occasions there was consent to the extensions. On others there was not and extensive hearings were undertaken. The most recent such extension order was granted on the 21st June, 2012 and by its terms extends the period of the interim care order for the further period of twenty-eight days to the 19th July, 2012. It is with the validity of that order that these proceedings are concerned.

2. There is an extant application for full care orders which has yet to come on for hearing.

3. The ex parte application to this Court was made on the 27th June, 2012 and the full hearing was on the 29th June. The Notice Parties, on the suggestion of the Applicant and by direction of the Court, are the children's guardian *ad litem*, Ms. McCluskey, and Mr. A.G. who has recently been established to be the father of R.A.

4. The essential point at issue is that, in circumstances where the Applicant was objecting to the extension, it was granted in the absence of any oral evidence.

5. The Legislation

6. Section 17 of the Child Care Act 1991, as amended, provides as follows:-

> (1) Where a justice of the District Court is satisfied on the application of the Health Service Executive that-
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> > (a) an application for a care order in respect of the child has been or is about to be made (whether or not an emergency care orders in force), and
> >
> > (b) there is reasonable cause to believe that any of the circumstances mentioned at paragraph (a), (b) or (c) of section 18(1) exists or has existed with respect to the child and that it is necessary for the protection of the child's health or welfare that he be placed or maintained in the care of the Health Service Executive pending the determination of the application for the care order,
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> the justice may make an order to be known and in this Act referred to as an *'interim care order'*.
>
> (2) An interim care order shall require that the child named in the order be placed or maintained in the care of the Health Service Executive -
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> > (a) for a period not exceeding twenty-eight days, or
> >
> > (b) where the Health Service Executive and the parent having custody of the child or person acting *in loco parentis* consent, for a period exceeding twenty-eight days,
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> and an extension or extensions of any such period may be granted (with the consent, where an extension is to exceed twenty-eight days, of the persons specified in paragraph (b)) on the application of any of the parties if the justice is satisfied that grounds for the making of an interim order continue to exist with respect to the child."

7. The circumstances mentioned in s. 18(1) are that:-

> (a) the child has been or is being assaulted, ill-treated, neglected or sexually abused, or
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> (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 a care order.

The Evidence
8. There are some factual discrepancies in the affidavits but these do not require to be resolved for the purpose of this application. What is clear is that on the 21st June the learned District Judge presiding over the Family Law List informed the parties at the call over that a judge would be available to hear the substantive application for full care orders pursuant to s. 18 for a two week period from the 16th July. It was thereupon indicated by counsel for the Applicant herein that she would not oppose an extension of the interim care orders pending that full hearing. However when the case was called again counsel for the Respondent told that Court that the HSE did not want a hearing date as yet as the assessment of Mr. A. G and his home circumstances was not complete. Counsel said that meetings in this regard were scheduled in the next fortnight but that reports would then have to be written up and the case would not be ready to proceed on the 16th. In the meantime the HSE was applying for an extension of the interim orders. This application was supported by the representatives of Mr. A.G. and the guardian *ad litem*. There followed what has been described as "a vigorous exchange of submissions", with counsel for the Applicant maintaining that there was no need to delay matters further. According to the detailed attendance taken by the Respondent's solicitor, exhibited in the affidavit of Ms. W, social worker with the HSE, the judge noted that there was an application for an extension and asked was there an objection. Counsel for the Applicant said that there was. The judge "said he does not have time". It is further clear that Counsel expressly withdrew consent to any extension unless the hearing date of the 16th July was confirmed. The learned judge adjourned the matter to the 19th July and granted the extensions.

9. According to the solicitor's attendance, Counsel for the Respondent gave the judge certain information verbally, mainly in relation to the progress being made with various channels of enquiry. He referred to but, objection being taken to hearsay, did not open a report from a Dr. Bownes. He told the judge that "there has been further information causing concerns and the social work report set out the background. He said the fundamental concerns still remained and he said there is no point re-opening it at this time." The judge agreed.

10. The social worker, Ms. W., and the guardian *ad litem* were both in court with up-to- date reports and were prepared to give evidence but were not called.

The Submissions
11. Mr. Colman Fitzgerald S.C., on behalf of the Applicant, submits that interim care orders can be made only if the application is based on evidence. He takes as his starting point the provisions of Articles 41 and 42 as interpreted in judgments of the superior courts. He argues that the constitutional presumption that the welfare of the child is best served in its own family cannot be displaced other than by evidence. He further argues that it is irrelevant that evidence had been heard on previous occasions.

12. As interim orders are by their nature time-limited the decision must, he says, on each occasion it arises, be made in relation to the circumstances as they are on the day. He submits that the level of data required for the interim order is of a like level to that for a full care order.

13. Mr. Felix McEnroy S.C., on behalf of the Respondent, initially made the point that he did not accept that there had been no evidence before the District Court since the guardian *ad litem* had filed an up-to-date report. However, he could not, and nor could Mr. McKenna on behalf of the guardian, say that the report had been drawn to the attention of the judge or considered by him. There was certainly nothing said by the learned District Judge to the effect that he had read it and was making a decision based on its contents.

14. More generally Mr McEnroy lays stress on the nature of proceedings under the Child Care Act - the inquisitorial role of the judge, the obligation of the court to vindicate the rights of minors and the essential continuity of the proceedings. He submits that the judge cannot "wipe his memory clean" and start each application afresh, but is entitled to be satisfied of the relevant matters by reference to previous hearings coupled with what Counsel tells him. He cites authorities, referred to below, in support of the proposition that rulings on applications such as this can be made on the basis of submissions by the parties.

15. Mr. McEnroy further submits that this case is in reality an argument about a case management decision and not appropriate to the jurisdiction of this court under Article 40.4. He points to the fact that the Applicant refused her consent because the full care order application was not going to be listed for hearing. He also says that if she is successful in this application the HSE will get a new interim care order and "the whole process will start again", resulting in further delay in adjudication on the ultimate application for care orders in respect of the children.

16. Ms. Inge Clissman SC on behalf of Mr. A.G. essentially reserves her right to make submissions after the determination of the case.

17. Mr. Conor McKenna for the guardian *ad litem* largely adopts the Respondent's submissions. He considers it to be preferable that some evidence should be heard but contends that it is not legally essential.

Case-law
18. I have been referred to the following cases in the course of argument on behalf of the Applicant: *In Re J. H.* [1985] IR 375; *North Western Health Board v. W* [2001] 3 IR 622; *O'H v. The Health Service Executive* [2007] 3 IR 177; *Caffrey v. the Governor of Portlaoise Supreme Court* (Unreported, 1st February, 2012) and *State (D. and D.) v. Groarke* [1990] 1 IR 305. The Respondent relies on *Health Service Executive v. NC and EC MacMenamin J*, (Unreported, 21st January, 2008); *R. v. Birmingham City Juvenile Court* 1 W.L.R. 337 and *In Re B. (Minors)* 3 W.L.R. 1.

Decision
19. In considering the interpretation of the s.3 of the Guardianship of Infants Act 1964, in the case of *In Re J.H. (An Infant)*, Finlay C.J. held that, having regard to the provisions of Article 42 of the Constitution, that Act must be construed as involving a constitutional presumption that the welfare of the child is to be found within the family unless the Court is satisfied on the evidence that there are compelling reasons why this cannot be achieved, or unless the Court is satisfied that the evidence establishes an exceptional case as envisaged by Article 42.5. This decision was followed by the Court in *N. v. Health Service Executive* [2006] 4 374, a case concerning the position of a child who had initially been placed for adoption by unmarried parents. Her parents later married before the adoption had been finalised and sought custody of her. A unanimous Supreme Court applied the "compelling reasons" test in favour of the parents.

20. There is no contention in the instant case that this principle does not apply to the Child Care Act 1991. The Constitution envisages the family unit as the centre of the child's life. The Act sets out a number of specified factual events or circumstances which will justify what is, even in the case of the interim order, undoubtedly a major interference with that model and with the normal rights of the family unit. The terms of the Act require that, in making a full care order, the District Judge must be satisfied that a specified factual event or set of events has happened, is happening or is likely to happen and that the child, in brief: needs the protection of the order. An interim order can be made where the Judge is satisfied that there is reasonable cause to believe that any of the specified circumstances exist or have existed and that the order is necessary for the protection of the child pending the determination of the application for the care order.

21. If there is consent to the making of an order, or to its extension, there will be little difficulty in satisfying these criteria. However, the question here is what is to happen where it has been made clear that the application is being opposed.

22. I accept that child care cases are not entirely analogous to other litigation; that the judge's role is more inquisitorial than usual and that there is a need to preserve a degree of flexibility in order to deal with exceptional circumstances. However, the normal rules are that courts act on evidence and that parties applying for an order must establish grounds for the making of the order. I see no reason why, if the rights of the Applicant and her children are to be accorded proper respect, these rules should not be considered applicable in cases under the Child Care Act.

23. I accept the argument of the Respondent that there is a continuity attaching to these cases and I do not agree with the contention of the Applicant that every time an application is made for an extension previous evidence should be considered irrelevant. The District Judge is entitled to rely on his or her own memory of evidence given at earlier hearings or on reminders offered by Counsel. However I do accept that the test to be applied at the time of the extension application must relate to circumstances as they are at that time and that therefore the Judge must be given up-to-date information as of that date. Such information should in the normal course of events be given by way of oral evidence so that it can be tested by the party opposing the application. I do not think that the authorities relied on by the Respondent support a contrary view, but they do allow for the possibility that the matter might sometimes be dealt with on submissions. I would prefer not to attempt to list the circumstances where this might be desirable but I think that, for example, the unavailability of a witness who has new and cogent evidence to give could justify a short extension in the absence of other probative evidence. This does not appear to have been the situation here. I do not know if the report of Dr. Bownes would have come into this category but there were certainly two potential witnesses -the guardian *ad litem* and the social worker- available to give evidence on the day. In the circumstances the Respondent should have called and the District Judge should have heard evidence so that, firstly, it could be tested and, secondly, the Judge could decide, taking account of his previous knowledge of the case, whether the statutory criteria continued to be met.

24. The nearest thing to up-to-date evidence that the Judge was offered was the assertion by Counsel, referred to above, that there were further concerns and that the fundamental concerns remained. It is true that, as Senior Counsel for the Respondents says, judges should be able to rely on what they are told by Counsel but that is in the context of the obligation not to mislead the Court. It does not mean that a statement by Counsel as to the existence of a disputed fact can be taken in lieu of evidence.

25. I do not accept the argument that this is essentially a dispute about a case-management decision not to fix a hearing date for the full application and should not therefore be considered suitable for a complaint under Article 40.4. The Applicant was perfectly entitled to consent to the extension of the interim order when she thought that she would have a full hearing in the near future, and equally entitled to withdraw that consent when it became apparent that such hearing would probably not happen for several months. The pressure on the court lists certainly means that the offer of a two week hearing should be taken if at all possible.

26. I also think that it is unfortunate that Counsel for a State body such as the HSE should suggest that if the Applicant succeeds in establishing a breach of the constitutional rights of herself or her children she will in fact make their situation worse by bringing about a situation whereby "the whole process will start again", delaying the ultimate adjudication. There is in being an application for a full care order. If the Respondent wishes to do so it is at full liberty to apply for a new interim order in those proceedings. The Respondent has spent the last year gathering information and putting it before the Court in relation to this case. As indicated above, there is an inherent continuity in the proceedings. The only effect of this judgment will be, hopefully, to ensure that orders are not made without the Judge being provided with evidence upon which they can properly be made.

27. For the avoidance of doubt it should be made clear that the Court is not saying that full evidence is required on all aspects of the case at every extension application. The Judge has both the right and the power to protect his court from any attempted abuse of process, such as an effort tore-litigate issues that have been dealt with previously, in the absence of good reason. Practitioners also have an obligation not to waste court time.

28. Consequences

29. It follows from the above that I consider that the extension orders were invalidly made and that the minors in question are not lawfully in the custody of the Respondent. However that is not the end of the case, given the Court's duty towards the two children and the decision of the Supreme Court in the N. case. I will therefore invite the parties to make submissions as to what the next step should be.