**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2015] No. 367 JR**

**BETWEEN**

**L. N.**

**APPLICANT**

**AND**

**JUDGE COLIN DALY AND IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**THE CHILD AND FAMILY AGENCY**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice McDermott delivered on the 16th day of March, 2016**

1. This is an application by O.R. to be joined as a notice party in the above entitled proceedings pursuant to Order 15 Rule 13 and/or Order 84 Rules 22(9) and 27(1) of the Rules of the Superior Courts.

2. The applicant is a qualified social worker with over twenty years academic and professional experience in the field of child protection. Pursuant to section 26 of the Childcare Act 1991 she was appointed by order of the Dublin Metropolitan District Court as guardian ad litem to four children of the same family. She was appointed guardian ad litem to K.G. on 12th October, 2012, to K.Y.G. and C.L.G. on the 2nd November, 2012 and to C.G. on the 29th August, 2013. She remained involved in care proceedings in the District Court involving all four children.

3. On the 16th January, 2015 the learned district judge granted full care orders pursuant to section 18 of the Childcare Act 1991 in respect of each of the four minors until each child reached the age of his/her majority. The reasons for the decision were set out in a judgment delivered on the 16th February, 2015.

4. The applicant was granted leave to apply for judicial review on the 29th June, 2015 (Noonan J.) to seek an order for *certiorari* quashing the decision of the learned district judge and a declaration that the granting of full care orders pursuant to section 18 of the Childcare Act 1991 until each child reaches the age of majority failed to properly apply the appropriate test for the making of a proportionate order and thus went further than was strictly necessary to ensure the welfare of the children. A declaration is also sought that the granting of the full care orders "failed to give due consideration to the constitutional rights of each individual child concerned and further the said decision failed to address the issue of proportionality in respect of each child individually". Additional declarations are sought pursuant to section 3 of the European Convention on Human Rights Act 2003 that the respondents their servants or agents failed to perform their functions in a manner compatible with the State's obligations under article 8 of the European Convention on Human Rights and Fundamental Freedoms and/or that the decision of the learned judge "is repugnant to the Constitution of Ireland". Leave was granted on the grounds set out at paragraph E of the statement of grounds dated 26th June, 2015.

**District Court Judgment**

5. The hearing before the District Court extended over seven days from 24th November, 2014 to 13th January, 2015. Each child had been admitted to the care of the Child and Family Agency pursuant to an application for interim care orders and had remained in the care of the Agency since their reception. It was noted that the views and interests of the children were represented in the proceedings by the guardian ad litem who indicated her support for care orders in respect of each child and recommended that such orders be for the full duration of their minority. The parents attended the court hearing and were represented. They consented to the care orders sought but submitted that they should apply only for a period of three years and that a care order for the full period of each child's minority was disproportionate. An extensive body of evidence was adduced from 15 doctors, social workers and psychologists in the case. The evidence of the guardian ad litem was also heard. The learned judge stated *inter alia*:

> "11. My reasons for making orders for these durations are as follows:
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> (i) The children's exposure to and experience of domestic violence between the parents;
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> (ii) The parents lack of adequate or proper supervision of the children while in their care;
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> (iii) The parents ongoing and pervasive drug addictions and failure to adequately address their addiction difficulties;
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> (iv) The children's exposure to the parents' drug addictions;
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> (v) The parents failure to deal with their own personal issues underpinning their drug related problems;
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> (vi) The parents current lack of capacity to parent and in particular the mother's assessed ongoing lack of capacity to parent without full-time support which the father is not at this time able to provide;
>
> (vii) The parents relatively little progress in addressing their own difficulties since the children's reception into care.

12. I am satisfied this decision is proportionate for the care of the children having considered that the question of proportionality maybe summarised as the making of an order that goes no future than is strictly necessary to assure the welfare of the children. Here I have considered the proportionate duration of the care order in light of the harm suffered by each of the children, the risk to them and that fact that the parents have made relatively little progress to address their own difficulties in the time the children have been in care."

6. The learned judge also directed that access between the children and their parents continue to be at the discretion of the Agency and that regular sibling access be facilitated to the children as a group. The Court directed that the case be re-entered by the Agency on notice to the parents and the guardian ad litem in the event of certain contingencies occurring. If the present guardian ad litem were no longer available, the Agency was to bring an application to the Court to have a guardian ad litem appointed pursuant to section 26 of the 1991 Act. This appears to envisage some future role for the guardian ad litem in the case unless she is "no longer available" if the case is re-entered in accordance with the terms of the judgment.

7. In addition, the Court directed that the case would be listed for a full review of the children's progress in care on the 29th January, 2016 with a review of the parents' progress in dealing with their various difficulties. It was also recommended that if the parents demonstrated sufficient progress on that date the matter could be listed for a full review of the children's care arrangements two years after the review date. The guardian ad litem was to be "re-appointed" ten weeks in advance of any review date.

**The Guardian ad litem's Evidence**
8. A forty-two page report was furnished by the guardian ad litem in respect of the children and she gave evidence in accordance with the report. She recommended that the children should remain in the care of the Child and Family Agency pursuant to care orders until they reached the age of majority with a court review of the children's circumstances after twelve months. It was suggested that the guardian be re-appointed eight months in advance in order to allow an opportunity to review the circumstances of the children, visit the children who were placed in four different foster placements and attend any necessary meetings. The report contained an extensive review of the circumstances of each child, having reviewed the social work files, interviewed both parents, observed access between the parents and one of the children and his maternal grandmother and having met with the children on a regular basis over a period of two years and attending relevant meetings in relation to the children.

**The Law**
9. Order 15 Rule 13 of the Rules of the Superior Courts provides that the Court may, at any stage of the proceedings, upon or without the application of either party and upon such terms as may appear to be just, order the names of any parties, who ought to have been joined as plaintiffs or defendants or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon or settle all the questions arising in the cause or matter, to be added.

10. Order 84 Rule 22(2)(A) provides:-

> "Where the application for judicial review relates to any proceedings in or before a Court and the object of the application is either to compel that Court or an officer of that Court to do any act in relation to the proceedings or to quash them or any order made therein - …
>
> (b) The other party or parties to the proceedings in the Court concerned shall be named as the respondent or respondents …"

11. Order 84 Rule 22(9) provides:-

> "If on the hearing of the motion … the Court is of opinion that any person who ought, whether under this rule or otherwise, to have been served has not been served, the Court may adjourn the hearing on such terms (if any) as it may direct in order that the notice … may be served on that person".

12. Order 84 Rule 27(1) provides:-

> "On the hearing of an application under rule 22 or an application which has been adjourned in accordance with rule 24(1) any person who desires to be heard in opposition to the application, and appears to the Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with notice of the application."

13. Order 15 Rule 13 was considered by the Supreme Court in *Dowling and others v. Minister for Finance and others* [2013] IESC 58 in which the different principles applicable to an application to permit the joining of a party in purely civil and private proceedings as opposed to those which concern public law were addressed. Fennelly J. (Clarke and McMenamin JJ. concurring) stated:-

> "29. … In civil litigation, generally speaking, parties are allowed to choose whom they wish to sue. In matters of public law persons other than the public authority may have a real and substantial interest in the outcome. The simplest example is the planning permission. While the judicial review must of necessity be sought on grounds that the planning authority or An Bórd Pleanála on appeal has committed an error of law affecting the validity of its decision, any decision of the Court is very likely to affect the very real rights and interests of private persons or corporations. The holder of a planning permission is, of course, potentially affected by the outcome of an application for judicial review of its validity. Civil and public-law proceedings are not, however, in completely watertight compartments. There is an underlying principle that a person is entitled to participate in proceedings which are capable of adversely and directly affecting his or her substantial interests."

14. Fennelly J. also stated:

> "33. … The conclusion from all this is that a person must demonstrate exceptional circumstances in order to persuade a Court to join him or her in an action against the will of the opposing party. The special circumstances must consist in some real or apprehended adverse effect on his proprietary interests. Reputational damage would not suffice. Nor would the fact that the case will lead to a decision on a point of law which could adversely affect the applicant in other litigation."

15. The Court noted that Order 84 "contains very different provisions".

> "34. … It makes express provision for ensuring that persons directly affected are put on notice of proceedings. The

> fundamental requirement is in Order 84 Rule 22(2) which imposes an express obligation on the applicant to see to it that the "notice of motion or summons must be served on all persons directly affected …"

The judgment was delivered before the substitution for Order 84 Rule 22(2) of Rule 22(2A) pursuant to the Rules of the Superior Courts (Judicial Review) 2015 (S.I. No. 345 of 2015). This Rule now clearly provides that when an application for judicial review relates to proceedings before the District Court and the object of the application is to quash the order made the other parties to the proceedings in the Court "shall be named as the … respondents". This is supplemented by two additional provisions namely, Order 84 Rules 22(9) and 27(1) quoted above.

16. I am satisfied that Order 15 Rule 13 has no application in these proceedings. The question of whether the applicant ought to be joined as a notice party is governed by Order 84 (*BUPA Ireland Ltd. v. The Health Insurance Authority and others* [2006] 1 I.R. 201.).

17. The applicant in this case claims that as guardian ad litem, she ought to have been joined as a party in accordance with Order 84(2)(2A) or in the alternative on the exercise of this Court's discretion under Order 84 Rule 22(9) and/or 27(1). I am satisfied that when a party has a "vital interest in the outcome of the matter" or is "vitally interested in the outcome of the proceedings" or would be "very clearly affected by the result", it is appropriate that they be joined in judicial review proceedings as notice parties (*O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 per Finlay CJ. at page 78; *Spin Communications T/A Storm F.M. v. Independent Radio and Television Commission* [2001] IESC 12 and *BUPA Ireland Ltd. supra*).

18. The applicant is placed in a difficult position. Having been involved with the proceedings concerning each of the children throughout the case until the full care order was made on the 29th January, 2015 she was not regarded as a party to the original proceedings and consequently the order granting leave did not cite her as a respondent nor was any application made to the learned judge to join her as a notice party. It is accepted that the guardian ad litem was represented by a solicitor during the course of the District Court proceedings who cross-examined and made submissions during the course of the case, and that she performed her functions fully and properly within the meaning of section 26 of the Childcare Act 1991.

19. Section 26 provides that:-

> "(1) If in any proceedings under part IV or VI the child to whom the proceedings relate is not a party, the Court may, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, appoint a guardian ad litem for the child.
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> (2) Any costs incurred by a person in acting as a guardian ad litem under this section shall be paid by the health board concerned. The health board may apply to the Court to have the amount of any such costs or expenses measured or taxed.
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> (3) The Court which has made an order under subsection (1) may, on the application to it of a health board, order any other party to the proceedings in question to pay to the board any costs or expenses payable by that board under subsection (2).
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> (4) Where a child in respect of whom an order has been made under subsection (1) becomes a party to the proceedings in question (whether by virtue of an order under section 25(1) or otherwise) then that order shall cease to have effect."

Though the Court has a power under section 25 of the Act to order that a child to whom the proceedings relate who is not already a party, be joined as a party where it is satisfied, having regard to the child's age, understanding and wishes and that it is necessary in the child's interests and in the interests of justice, to do so, such orders are rarely made. It is noteworthy that the section provides for the costs of the guardian ad litem to be discharged by the Health Board and measured or taxed by the Court on its application. The Board may also apply for any other party to be fixed with the guardian's costs.

20. In *HSE v. S.O. and anor*. [2013] IEDC 19 the District Court considered in detail the role of a guardian ad litem under section 26. The Court noted that it is the function of the guardian ad litem to convey the child's wishes and views to the Court and to express a professional view as to what is in the child's welfare. However, the Court was not satisfied that a guardian ad litem was to be afforded party status in childcare proceedings either in his/her own right (in the context of the child's welfare) or on behalf of a child (in the context of the child's expressed wishes) whether on a plain or purposeful reading of section 26. The District Court stated:-

> "48. A practice has evolved whereby the guardian ad litem gives evidence at the conclusion of the case between the HSE and the parent. It is not uncommon for the legal representative of the guardian ad litem in the course of the proceedings to seek to cross-examine the parties to the proceedings as if the guardian ad litem were also a party to the proceedings. Where the case being made by the HSE is aligned with the views expressed to the Court as being in the child's best interest, the guardian ad litem's evidence is sometimes taken directly after the evidence adduced by the HSE in the interest of fair procedure. It is a matter for the Court to ensure that the sequence of the proceedings is fair to all parties in the particular case before the Court.
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> 49. Guardian ad litem reports commonly contain important information gathered from collateral sources – family members, public health nurses, teachers and G.P.s who provide valuable insight to the Court as to a child's welfare. Such information is typically considered to be "hearsay" since it consists of out of court statements proffered as facts. However it also represents the work product of the guardian ad litem in the discharge of his/her statutory role to provide the Court with their opinion as to the best interests of a child.
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> 50. The guardian ad litem like any other witness is not immune from error in observation or from inadvertent bias. Any party to the proceedings may seek to challenge the accuracy or contextual relevance of such statements or may seek adduce independent evidence."

Therefore, under the Childcare Act 1991 as amended, it has been determined by the District Court that a guardian ad litem is not a party to the proceedings but has an important, if limited role, in assisting the Court in its enquiry as to the best interests of the child.

21. The role of a guardian ad litem is therefore regarded in a somewhat more restricted way than that of a guardian ad litem appointed by the High Court in exercise of its inherent jurisdiction, as described by McMenamin J. in *The Health Service Executive v. D.K. (a minor)* [2007] IEHC 488. It is clearly envisaged in that judgment that a guardian ad litem would act proactively in moving appropriate applications before the High Court and might be appointed to defend proceedings in which the welfare of a minor must be considered in the exercise of the Court's inherent jurisdiction. This is clear from the judgment (paragraph 44) and in particular,

paragraph 59(e):

> "A guardian ad litem may fulfill the dual function of reporting to the Court regarding the child's care and also by acting as the child's representative in any Court proceedings and thereby communicating to the Court the child's views."

I am satisfied that the court, quite apart from section 26 may, exercising its inherent jurisdiction, consider an application by O.R. to be nominated and appointed as guardian ad litem to the children for the purpose of their participation in these proceedings as Notice Parties, if the court considers that to be appropriate under Order 84.

22. It is clear, arising from the practice and interpretation by the District Court, that a guardian ad litem appointed under section 26, is not considered to be a "party" to the proceedings. The Court has been informed that the interpretation of the role of the guardian ad litem set out in *The Health Service Executive v. S.O.* is now the subject of a challenge in separate judicial review proceedings. It is submitted on behalf of the applicant that the District Court's interpretation of the statutory powers and functions of the guardian ad litem should be adopted as correct and is distinguishable from the wider authority vested in a guardian ad litem appointed to represent a child in High Court proceedings. However, assuming without so deciding that this submission is correct, the Court is still vested with jurisdiction under Order 84 Rules 22(9) and 27(1) to direct that any person who ought to have been served or who applies to be heard in opposition to the application for judicial review and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the application. In this case the Guardian has not been served with the papers and has a limited understanding of the specifics of the grounds relied upon. This is a handicap in forming a view as to whether the application should be opposed for the purpose of making an application under Rule 27(1). However, no such difficulty arises in respect of Rule 26(9). In *Yap v. Children's University Hospital Temple Street Ltd*. [2006] 4 I.R. 298 Clarke J. stated at paragraph 22:-

> "… if a regulatory authority makes a decision in proceedings between two entities, and one of those entities challenges the decision because it was unfavorable, if the Court is persuaded that the determination of the regulatory authority should be upset, then that decision has a direct effect upon the party who had secured the favorable decision in the first place and therefore that party must be joined as a notice party because the order itself (rather than collateral matters such as the reasoning of the Court or comments which the Court might make on the facts) affects the interests of that party."

23. Mr. Searson, solicitor, who represented the applicant in the District Court proceedings states that the guardian ad litem was appointed for the purpose of the District Court proceedings only and was discharged from her role in those proceedings upon delivery of judgment by the District Court. He states that the grounds upon which the proceedings are brought relate to an absence of fair procedures and a failure by the learned judge to apply his mind to the correct issues in making his decision. In particular, the grounds allege a failure to apply the law in respect of proportionality: specifically, the impugned decision is deemed to be disproportionate in all the circumstances of the case. It is therefore submitted that these proceedings relate to procedural matters and matters of law in which the guardian ad litem has no interest or involvement. It is said that the guardian ad litem can have no role in these proceedings since her role was limited to that defined under section 26 of the Childcare Act 1991 i.e. that it is limited to proceedings under that Act and does not extend to an involvement in judicial review proceedings.

24. It is further submitted that the welfare of the children is not the paramount consideration in these judicial review proceedings and that if the application is successful the matter will be remitted to the District Court, at which time a guardian ad litem may be reappointed to protect the interests of the children. It is further submitted that this Court is required to adjudicate on the matters the subject matter of the statement of grounds without regard to the views of the children and that the voice of the children does not require "an equality of audience in these proceedings". It is said that the joinder of the guardian ad litem as a notice party would unduly expose the applicant to an application for costs by her and would amount to a restriction of the applicant's right of access to the Court and her entitlement to have these matters adjudicated. It is said that such exposure would prevent the applicant from pursuing the matter and be contrary to the interests of justice. The applicant is represented by the Law Centre and has been granted legal aid. It is submitted that the guardian ad litem is *functus officio* once the decision of the District Court had been made.

25. In the *Dowling* case Fennelly J. rejected a similar argument that the notice party in that case would have nothing to contribute to the legal argument in submissions to be made in respect of the grounds upon which relief was sought and therefore it was unnecessary to join the notice party to enable the Court to adjudicate effectively and completely upon questions raised in the proceedings. This was not the correct test. Fennelly J. stated:-

> "54. I do not agree … that the question to be asked is whether the submissions of the party applying to be joined "are needed on any issue for the court to reach a just and complete adjudication." It follows that I also disagree … that there was "no benefit to be gained by the Court, from these parties attending the hearing and backing up the contention of the Minister that the … order was correctly made in the first place". That is not the correct test. An interested party, i.e. a party directly affected, is, in my view, entitled to be represented to defend his or its interests, even if the decision maker is there to advance the same arguments. … a party with a direct interest in an administrative decision is entitled to have his own case put to the Court by his own counsel independently of the defence made on behalf of the decision maker. That is his right. It does not depend on the Court's view as to whether it finds it necessary to hear the party. Naturally, it often happens in practice, usually to save costs, that a notice party will choose not to make independent arguments and to rely on the principal respondent to defend the case."

The same principle informs the authorities already cited above and is consistent with the provisions of Articles 40.3 and 42A of Bunreacht na hEireann.

26. Article 42A provides that:-

> "4.1 Provision shall be made by law that in the resolution of all proceedings –
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> (i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
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> (ii) concerning the adoption, guardianship or custody of, or access to, any child, the best interest of the child shall be the paramount consideration.
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> 2. Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1 of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be

ascertained and given due weight having regard to the age and maturity of the child."

27. The central issue to be addressed at the hearing of this judicial review application is whether the learned judge correctly applied and had regard to the law in respect of proportionality when making a determination that the four children should remain in care until they reach the age of majority, rather than the more limited period claimed by the applicant. This will inevitably involve the consideration of mixed questions of fact and law and a detailed review of the order and judgment of the learned judge. It will require a consideration of how the issues concerning custody and access to the four children were determined and the legal principles applicable to that determination. The decision of the District Court may be quashed. This would require a re-hearing. It is impossible not to view such a development as one in which each child has a vital interest. The future course of their young lives has been set out in the District Court ruling until they reach the age of majority. Of course they will be profoundly affected by any review of that order. Whether the guardian ad litem's appointment continues or not under section 26 following the District Court order, it is unrealistic to consider that the children are persons, who should not in the interests of justice be joined as notice parties in these proceedings. Clearly, any future proceedings in the District Court concerning their welfare will be guided by the decision of the High Court in this judicial review. It is also clear that the learned district judge intended that the guardian ad litem would be reappointed in respect of any future hearings or that another guardian would be appointed if she were not available at that time. I am satisfied that this Court has jurisdiction, if it considers it to be necessary and in the interests of justice and the welfare and best interests of the children, to direct that a guardian ad litem be appointed to the children to ensure that they are represented in respect of an issue which is so vital to their future lives and welfare. The legal issues under consideration in these proceedings are directly related to their best interests and welfare. Indeed, had one or all of the children been joined as a party under section 25 of the Act they would automatically have been joined as respondents in these judicial review proceedings. The interests of these children are no less important or vital in that respect than a child who might be joined as a "party" under section 25. I am therefore satisfied that the four children should be joined as Notice Parties in these proceedings and that O.R. should be appointed as their guardian ad litem for that purpose.