Neutral Citation Number: [2011] IEHC 42

THE HIGH COURT

JUDICIAL REVIEW

2010 1129 JR

BETWEEN

R. D.

APPLICANT

AND

DISTRICT JUDGE HAUGHTON

THE HEALTH SERVICE EXECUTIVE

RESPONDENTS

Judgment of Mr. Justice Hedigan delivered on the 8th day of February, 2011.

This application arises out of events in the applicant's family that are of the most tragic nature. I accept entirely the *bona fides* of the applicant and his wife who have found themselves faced since October 2007 with events that are close to overwhelming and must at times have seemed mystifying.

I have taken the opportunity prior to hearing the applicant herein, to read through the papers drafted by him fully. They are very detailed and well prepared and include written submissions. I have asked him if he wished to add anything and he states that he does not. It seems clear to me that throughout the events of the last three years and three months the applicant and his wife have been motivated solely by the desire to assist their daughter and grandson, C.J.D. as best they could. Clearly they are motivated by their undoubted ties of love and affection for both. The tragic downward spiral of their daughter into drug addiction, homelessness and crime has been an emotional disaster for them both. It has also led by a bizarre sequence of events to their grandson, C.J.D., being fostered by a couple who are not related to him. This in circumstances where, in the absence of their daughter being able to care for him, they are anxious to foster C.J.D. themselves. They wish to have him as a part of their apparently very large extended family.

The placement of C.J.D. occurred initially in circumstances where, upon his birth in October 2007, it was ascertained that he had traces of heroin in his system. This was due to his mother's ingestion of heroin during her pregnancy. He was detained in hospital until the 21st December, 2007. Hospital authorities notified the child protection services (HSE) and on the 3rd December, 2007 a meeting was organised with the interested parties to formulate a child protection plan. In the following months extensive efforts were made by all parties to try to support M but to no avail. M's partner's sister T agreed to look after C.J.D. and M had supervised visits with him. Subsequently, DNA testing ruled out M's partner as the father of C.J.D. T and her partner continued to look after C.J.D. M and her partner split up. Eventually it was decided by the HSE to apply for a care order. The applicant and his wife were anxious to have the care of C.J.D. but owing to serious reservations then held by the childcare people, this was not then considered possible. The applicant and his wife through their solicitor on the 16th September, 2008 made an application to the first respondent in the District Court for guardianship. This was objected to on grounds that the mother of the child was still alive. The application was rejected as was an application for access. The District Judge was therefore aware from the very beginning of the applicant's interest in looking after C.J.D. and having custody of him. An interim care order was granted to the HSE and this was extended on further occasions until on the 18th November, 2008 the District Judge granted a care order to the HSE for as long as C.J.D. remained a child. This order was made without conditions or undertakings contained therein. The order is good on its face. The District Judge was informed at this stage that the applicant and his wife would like to have the care of C.J.D. but that the HSE at that time had reservations about this. The fullest evidence about the situation was before the Court. Patrick O'Sullivan, solicitor for M, stated to the District Judge that whilst the issue of the applicant being given care of C.J.D. was being considered, they should be admitted to Court. He informed the Court that the applicant and his wife were in the precincts of the courthouse. The District Judge however decided not to hear them.

It is this order and the reviews thereof of the 17th November, 2009 and the 16th February, 2010 that the applicant seeks to quash.

The applicant also seeks a declaration that the placement of C.J.D. into the custody of T and her partner, D, from the 28th June, 2008 was unlawful. This placement appears initially to have been made by broad agreement and was continued subsequent to the care order made herein by the HSE. This further placement was made pursuant to s. 36(1)(d) of the Childcare Act 1991 which provides that where a child is in the care of the HSE, it shall provide such care for him by placing him with a foster parent or in residential care or for adoption or;

> *"(d) by making such other suitable arrangements (which may include placing the child with a relative) as the Executive thinks proper."*

In the circumstances that existed in the summer of 2008 the childcare authorities faced a situation where M's partner had been ruled out as father of C.J.D. and had split up with M. Serious concerns existed because M had not only taken drugs whilst in the applicant's house but had alleged (and subsequently retracted) that the applicant's wife had given C.J.D. methadone. M was, according to the applicant, at this time back on drugs and begging and stealing on the streets of Portlaoise and Mountmellick. T was ready to take care of C.J.D. It seemed the only solution to a terrible situation. The baby's welfare was at the centre of the child carers concern and, I have no doubt, the applicant himself. C.J.D. has now spent more than two thirds of his life with T and her partner D as his primary carers. The HSE in their reports consider he is well looked after and happy in this arrangement. There was extensive access to C.J.D. by the applicant, although this has in recent times been greatly reduced because of the concerns of the child carers that it is having a confusing effect on C.J.D.'s sense of who his primary carers are. In a supplemental affidavit the applicant has set out grave concerns that he harbours about the welfare of the child in the custody of T at the present moment. T naturally enough has developed strong ties of affection for C.J.D. and wants to continue having care of him.

At the present moment the applicant and his wife are in the process of being assessed as possible foster parents for C.J.D. They were furnished with a draft assessment last November and are currently preparing a comprehensive response thereto.

The judicial review jurisdiction of the High Court is a very limited one. The broad principles applicable are set out in *Meadows v. The Minister for Justice, Equality and Law Reform* (Supreme Court, 21st January, 2010) in the judgment of Denham J:

> *"25. The relevant factors in the general test are as follows:-*
>
> *(i) In judicial review the decision-making process is reviewed.*
>
> *(ii) It is not an appeal on the merits.*
>
> *(iii) The onus of proof rests upon the applicant at all times.*
>
> *(iv) In considering the test for reasonableness, the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense.*
>
> *(v) The nature of the decision and decision maker being reviewed is relevant to the application of the test.*
>
> *(vi) Where the legislature has placed decisions requiring special knowledge, skill, or competence, for example as under the Planning Acts, with a skilled decision maker, the Court should be slow to intervene in the technical area.*
>
> *(vii) The Court should have regard to what Henchy J. in The State (Keegan) v. Stardust Victims' Compensation Tribunal referred to as the 'implied constitutional limitation of jurisdiction' in all decision-making which affects rights. Any effect on rights should be within constitutional limitations, should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision."*

It is not therefore for this Court to interpose its view even were it different to that of the District Judge. It is he and the Circuit Court on appeal who have the jurisdiction in childcare matters. These courts have frequently stated that it is not for a High Court, save for exceptional reasons, to intervene as that would be to usurp the jurisdiction granted to the relevant tribunal.

There are two challenges made in these proceedings.

> (1) The District Court order should be quashed.
>
> (2) A declaration of illegality in the placement by the second named respondent of the infant, C.J.D., into the custody of T and D.

The respondents firstly challenge the *locus standi* of the applicant to bring these proceedings. He is neither the parent nor the guardian of C.J.D. and therefore has no legal interest in bringing these proceedings. Were the Court to grant an order of *certiorari*, the result would be the revival of the child's mother's parental rights to custody. Similar considerations apply to the declaration of illegality sought in respect of the placement. In response to this claim the applicant at page 8 of his submissions argues that he does have *locus standi* due to having been allowed attend the District Court on a number of occasions prior to the 16th February, 2010, that M wants him and his wife to care for C.J.D., that they are currently being assessed as relative foster carers, that in the absence of M they are seeking to protect C.J.D.'s interests and that they have a material interest in the matters raised.

In my judgment none of these answers stand up to the basic fact that no order quashing the care order made or any declaration of this Court can transfer guardianship or custody to the applicant. I have no doubt this application is made with the best of intentions but that does not of itself give rise to the legal interest necessary. Pursuant to s. 18 of the Childcare Act 1991 as amended full parental rights were transferred to the HSE when the care order was made. The applicant has no legal right or interest to vindicate herein. Whilst this finding disposes of the case, in the light of the obvious concern of the applicant, I think I should express a view on the case he has so carefully and thoughtfully outlined in his papers herein.

It is all but inevitable that in circumstances so fraught as these, personal relations between the applicant and the care workers involved and between him and T and D would come under intolerable strain. That is a great pity. In their affidavits herein the child care people have expressed their sensitivity to the genuine concerns of the applicant and his wife. It is very unfortunate that the strain of these terrible events have led to a breakdown of trust. I can only hope that in the interests of everyone concerned but most particularly C.J.D., that every effort will be made to restore friendly and co-operative relations. Continuing hostility will do nobody good least of all the innocent child at the heart of these sad events.

It seems to me from my reading of the papers that, throughout, the childcare authorities have done their best in a desperate situation. No such authority could ignore real concerns that existed relating to the decision into whose custody the child should be placed. Once a child as young as C.J.D. was placed into the custody of T that very placement developed its own inevitable dynamic. The child naturally developed strong feelings of attachment to T. The level of access to the child accorded to the applicant and his wife was of extraordinary frequency. This was entirely understandable but must certainly have raised considerable difficulties of both a personal and logistical nature. It is also entirely understandable that such a high level of to and fro would create some form of confusion on the part of C.J.D. as to who were his primary carers. The decision by the child carers to reduce that access, although undoubtedly painful to the applicant, was justifiable in the circumstance.

Subsequent concerns expressed by the applicant in his supplementary affidavit sworn herein no doubt express fears that are real to him and his wife. I cannot comment on these save to note that the childcare authorities state they are satisfied the child is safe, well cared for and happy. If the applicant wishes to do so he may at any time, pursuant to s. 47 of the Childcare Act 1991, make application to the District Court to give directions or make any orders it thinks proper. No question of *locus standi* will arise in such an application because the District Court may make such order or give such directions on the application of any person. This provision is all but tailor-made for the applicant and his current concerns.

In my judgment even did the applicant have *locus standi* herein, no order of *certiorari* would properly lie in this case. The District Court order is good on its face and the only real challenge to the procedures in the District Court is that the applicant and his wife were not allowed to be present. In reality they had no right to be present during the hearing of a childcare application which is made in camera. When the interim order was made they were present in court at the outset and through their solicitor applied for guardianship. On being refused they were asked to leave as the care order application was about to commence. The Judge was, in

any event, as is clear from that occasion and the reports of the other hearings, well aware of the full facts of the case including the interest of the applicant. There was in short ample evidence before him upon which to base his decision. Judicial review therefore would not lie in any event in respect of his decision herein.

As to the placement with T and D, the second named respondent acted initially on the basis of what seemed to be satisfactory to all in a desperate and urgent situation. This was subsequently confirmed after the District Court care order which allowed s. 36(1)(d) to apply in that the arrangements made were such as seemed proper. The placement which continued after the care order was made was clearly within the power of the HSE. No investigation of the original placement would be appropriate at this stage since, in the first place, it would be outside the time limits provided for judicial review and, in the second place, pointless since it is the present situation of the child with which everyone is concerned.

Many harsh things have been averred on affidavit in this application by the applicant. I have studied all the papers as carefully as I can and given this application all the care and attention that it deserves. Having looked at it as a Judge anxious only to help a fraught situation, I consider that most of the problems that have arisen between the parties are attributable to the extraordinary and terrible events that arose in this case and the pressures arising therefrom. Nothing but further heartache and distress can come from a continuance of the tension and distrust that has arisen. I would urge all but in particular the applicant to step back from this state of conflict and in the interests of the child at the heart of this application to work together to make the most of this difficult situation.

In the light of the sentiments I have expressed above, I do not consider it would be conducive to the restoration of good relations to make an order for costs herein against the applicants. There will therefore be no order for costs herein.