



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 258

Record No. 2014/52

Finlay Geoghegan J.
Peart J.
Hogan J.

In the Matter of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 and

In the Matter of the Guardianship of Infants Act 1964 and

In the Matter of the Family Law (Maintenance of Spouses and Children) Act 1976 (as amended by The Status of Children Act 1987) and

In the Matter of The Family Law Act 1995

BETWEEN

S.M.

Applicant/Respondent

-AND-

N.M.

Respondent/Appellant

JUDGMENT of the Court delivered by Ms. Justice Finlay Geoghegan on 19th day of November 2015

1. This judgment is given in an appeal brought by NM ("the father") against an order made on the 1st August, 2014, by the High Court (O'Hanlon J.) in which for the reasons set out in a written judgment delivered on the 31st July, 2014, she concluded that there is a power under the Guardianship of Infants Act 1964, to order him to make an interim maintenance payment to SM ("the mother") for the benefit of their dependent children. The order directed the father to pay an increased weekly sum of €5,000 in addition to the then weekly sum being paid by him to the mother for a period of 22 weeks commencing on the 8th August, 2014.

2. The factual and procedural background to that order was as follows. The mother is the applicant in two sets of proceedings in the High Court (2013 No. 15M and 2013 No. 22M). The father is the respondent in both sets of proceedings.

3. The father and mother are not and have never been married to each other. However, they have eight children together. Four children are adults and the four younger children are aged between twelve and seventeen. Four of the children have been diagnosed with medical and other conditions which give rise to special needs. In July 2014, six of the children were considered to be dependent and seven resided with the mother together with an infant daughter of the eldest daughter of the mother and father.

4. The mother is a homemaker. The father is a highly qualified professional person who has a valuable equity partnership in a well known international professional practice. The father earns significant sums from that partnership and it is not in dispute that his income over the last few years has been in excess of €2 million per year.

5. Regrettably, difficulties arose in the relationship between the father and the mother and the mother commenced proceedings on behalf of herself and the children under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, and also under the Guardianship of Infants Act and the other Acts referred to in the title of these proceedings.

6. At an early stage in the proceedings, the father agreed to pay an agreed periodic sum for maintenance and a consent order to that effect was made.

7. The judgment and order under appeal were made following the hearing of amended notices of motion issued in both sets of proceedings. In those motions the mother sought, *inter alia*, an order for a lump sum or in the alternative periodical maintenance or payment order, the purpose of which was to enable the mother provide for legal costs already incurred and envisaged to be incurred in preparation for the full hearing of both sets of proceedings.

8. In the High Court there were issues in dispute in relation to the jurisdiction of the court to make such orders and also as to the need for and amount of any such orders.

9. On the jurisdiction issues, the High Court judge concluded that the court did have jurisdiction under s. 11(b) of the Guardianship Act, as amended, to make an order of the type sought. On the facts of the case she determined that it was necessary and appropriate to make an order primarily to enable the mother secure her effective right of access to justice in order that the disputes which related to the welfare both of herself and the children in the two sets of proceedings could be fairly progressed and disposed of.

High Court order and further payments

10. The order of the High Court was that the father should pay an additional sum of €5,000 for a period of 22 weeks commencing on the 8th August, 2014. A stay was granted on that order provided an additional sum of €3,000 per week were paid for a period of 22 weeks.

11. It had been envisaged that the full hearing of the proceedings in the High Court would commence in January 2015. However, due to the sudden illness of counsel in the case, the matter had to be adjourned. At that point the father agreed to continue paying the additional weekly sum of €3,000.

12. At the time of the hearing of the appeal, the substantive proceedings in the High Court had not yet been heard and determined, but were due to be shortly heard. The father had paid a total sum of €110,000 approximately by the additional €3,000 weekly maintenance amounts. He confirmed to the court that he did not intend seeking the recovery of those amounts, but wanted the appeal heard in order to determine whether he was obliged to continue making such payments.

Appeal

13. The father pursued the appeal against the order made essentially on two grounds:

1. The High Court did not have jurisdiction to make the order pursuant to the Guardianship of Infants Act 1964; and
2. The High Court judge was incorrect in certain of the inferences drawn by her and in particular from the fact that there was a consent order for maintenance and the fact of the adjournment of a preliminary issue to the main hearing of the action.

Ruling on the 6th May, 2015.

14. At the conclusion of the hearing of the appeal, the court reached certain conclusions and reserved its decision on other aspects of the appeal. In a short *ex tempore* ruling the court informed the parties of the following decisions.

1. The Court reserved its judgment as to whether the High Court had jurisdiction pursuant to the Guardianship of Infants Act to make an order of the type made on the 1st August, 2014.
2. The High Court did, in any event, have jurisdiction under s. 7 of the Family Law Maintenance of Spouses and Children's Act 1976, as amended, to make an order of the type made on 1st August 2014 as an interim order for the payment of a periodical sum to an applicant such as the mother. The amended notice of motion had sought the order pursuant to this section.
3. Even if the order made by the High Court on the 1st August, 2014, was, on the facts herein a proper exercise of such a jurisdiction under s. 7 of the 1976 Act, the Court was of the view that the upper limit of the aggregate of any such periodical order which ought to have been made on the facts herein was the sum of €110,000 which had already been made by the father.
4. Consequently the father was not under any continuing obligation pursuant to the High Court order of the 1st August, 2014, or on any other basis, to make an additional payment of €3,000 per week referred to as a condition of the stay on that order or pursuant to the agreement made in January 2015.

15. The Court in this judgment is giving its decision on the reserved issue as to whether or not the High Court had jurisdiction to make the order of the 1st August 2014, pursuant to s. 11 of the Guardianship of Infants Act 1964, as amended, on the facts herein. It is also giving its reasons for decisions already reached that there was jurisdiction on the facts herein to make an order of the type made pursuant to s. 7 of the 1976 Act, and that €110,000 was the upper limit of the aggregate of an appropriate order pursuant to s. 7 on the facts herein.

Jurisdiction under the Guardianship of Infants Act 1964.

16. Section 11(1) and (2) of the 1964 Act (as amended) provides:-

"(1) Any person being a guardian of a child may apply to the court for its direction on any question affecting the welfare of the child and the court may make such orders as they think is proper

(2) The court may by an order under this section –

(a) give such direction as it thinks proper regarding the custody of the child and the right of access to the child of his father or mother;

(b) order the father or mother to pay towards the maintenance of the child such as weekly or other periodical sum having regard to the means of the father and mother, the court considers reasonable."

17. The issue herein arises as the father is not and was never married to the mother. While at first blush these provisions would appear to provide that the reference to "father" in s. 11 of the 1964 Act, is broad enough to include the father of non-marital children, a consideration of the statutory definition of the word "father" in s. 2 of the 1964 Act (as inserted by s. 4 of the Children Act 1997) demonstrates that this is not so.

18. Section 2 of the 1964 Act (as amended) provides that in the Act (except where the context otherwise requires) the word "father" does not "include the father of a child who has not married that child's mother" unless either:-

"(a) an order under s. 6A (as inserted by the Act of 1987) is in force in respect of that child;

(b) the circumstances set out in subsection (3) of this section apply.

(c) the circumstances set out in subsection (4) of this section apply"

19. The reference in paragraph (a) to an order under s. 6A of the 1964 Act is a reference to a situation where a father has been made guardian by court order. It is agreed that this has never occurred in the present case, so that this paragraph does not apply to him. Subsection (3) only applies to persons who have gone through a ceremony of marriage which does not apply. In these circumstances, Mr. M. can only be a "father" for the purposes of s. 11 of the 1964 Act if the following conditions specified in s. 2(4) of the 1964 Act are satisfied:-

(4) The circumstances referred to in paragraph (c) of the definition of 'father' in subsection (1) are that the father and mother of the child concerned –

- (a) have not married each other,
- (b) declare that they are the father and mother of the child concerned,
- (c) agree to the appointment of the father as a guardian of the child,
- (d) have entered into arrangements regarding the custody of and, as the case may be, access to the child, and
- (e) have made a statutory declaration to that effect as may be prescribed by the Minister for Justice, Equality and Law Reform."

20. It is plain from the wording, structure and layout of the sub-section that these conditions are cumulative. If it had been intended that they should have been read disjunctively, the conjunction "or" would doubtless have been used as between the various specified conditions. By contrast, the sub-section employs the opposite conjunction "and", thus making it plain that these conditions are, in fact, cumulative.

21. While some of these statutory conditions have been fulfilled, it is clear that others have not. Thus, for example, these parents have never agreed to the appointment of the father as guardian. Nor have they entered into agreements regarding the custody of the child or made a statutory declaration to that effect.

22. It follows, therefore, that N M is not the "father" of his children for the purposes of s. 11(2)(b) of the 1964 Act. As a consequence, therefore, that this means that the High Court had no jurisdiction to make a maintenance order against him pursuant to s. 11(2) of the 1964, precisely because he is not a "father" within the meaning of that sub-section.

23. Counsel for the mother, Ms. Clissman S.C., urged the Court to re-assess the interpretation of s. 11 of the 1964 Act having regard to the provisions of Article 42A.1 of the Constitution. This provision was inserted by the 31st Amendment of the Constitution Act 2015 and it took effect on 28th April 2015. Article 42A(1) now provides

"The State recognises and affirms the natural and prescriptive rights of *all children* and shall, as far as is practicable, by its laws protect and vindicate those rights". (emphasis supplied)

24. In our view, that submission was unsustainable having regard to the then terms of the 1964 Act, as amended. The submission is tantamount to a challenge to the constitutionality of s. 11 of the 1964 Act, as then amended, although no such challenge had ever been raised before the High Court.

Section 7 of the Family Law (Maintenance of Spouses and Children) Act 1976.

25. Section 7 of the 1976 Act (as amended) provides:-

"On an application to the Court for a maintenance order, the Court, before deciding whether to make or refuse to make the order, may, if it appears to the Court proper to do so having regard to the needs of the persons for whose support the maintenance order is sought and the other circumstances of the case, make an order (in this Act referred to as an interim order) for the payment to the applicant by the maintenance debtor, for a definite period specified in the order or until the application is adjudicated upon by the Court, of such periodical sum as, in the opinion of the Court, is proper."

26. The mother in the proceedings in the High Court has sought from the father a "maintenance order" as defined by the 1976 Act. That definition includes an order under s. 5A of the Act. That section expressly provides for the making of a maintenance order in respect of a dependent child whose parents are not married to each other. The father is a "maintenance debtor" as defined by the Act.

27. As appears from the above, s. 7 of the 1976 Act, give to the court jurisdiction to make what is termed an "interim order" "if it appears to the court proper to do so having regards to the needs of the persons for whose support the maintenance order is sought". The interim order which may be made is the payment "for a definite period specified in the order . . . of such periodical sum as, in the opinion of the court is proper".

28. The court was referred to the judgment and reasoning of Holman J. in the English High Court in *A. v. A. (Maintenance Pending Suit: Payment of Legal Fees)* [2001] 1 WLR 605, where he held in the context of English matrimonial proceedings and the relevant English statutes which referred without definition to "maintenance" that the concept of maintenance was wide enough to include a current need to pay legal costs. While precisely the same considerations do not apply by reason of the wording of s. 7 of the 1976 Act, nevertheless it is of assistance. Section 7 of the 1976 Act in substance gives to the court a discretion to make an interim order for the payment of periodical sums where it appears to the court proper to do so "having regard to the needs of [the dependent children] for whose support the maintenance order is sought". Where a court is satisfied, as the trial judge was herein, that on the particular facts and circumstances of the case a mother who is bringing a claim for a maintenance order needs the payment of periodical sums to meet legal costs in order that she be in a position to pursue the claim for a maintenance order on behalf of the dependent children then it has jurisdiction to do so.

29. The trial judge in her written judgment reached a conclusion that the payment of periodical sums to the mother in respect of legal fees was necessary on the particular and unusual circumstances of this case. At para. 19 of her judgment she accepted the following position as stated on behalf of the mother:

"It has been clearly stated on behalf of the applicant that her legal team will not be in a position to continue working on her case over the summer because they have not been in receipt of any fees, and the volume of work is extensive in terms of the complexity of the respondent's financial arrangements and the necessity to employ specific tax advice, a forensic accountant and to examine the documentation which arise by way of discovery. This Court notes that the applicant is a lay person and full time mother of eight children many of whom have additional welfare needs."

30. She later in her judgment concluded that the payments "are necessary as the applicant has neither the time nor the expertise to self represent".

31. Accordingly, whilst the trial judge incorrectly identified s. 11 of the 1964 Act, as the statutory provision which gave her jurisdiction, nevertheless she did have jurisdiction under s. 7 of the 1976 Act, as amended. Further the mother had included in her notice of motion an alternative claim for relief under that section. This Court is of the view that on the exceptional facts and

circumstances of these proceedings that the trial judge correctly concluded that the needs of the dependent children for whom the maintenance orders are being sought in the proceedings did require the making of an interim order for the payment of periodic sums specifically directed to enabling the mother retain lawyers and discharge fees to necessary experts given the scale and complexity of the father's financial affairs.

32. The Court wishes simply to add that this is a jurisdiction which it appears should only be exceptionally exercised. Further, where it is exercised it appears incumbent on a court to very carefully case manage the proceedings, including encouraging the parties to attempt to resolve matters by use of alternative dispute resolution mechanisms. In making such an order a court is effectively requiring payment out of a fund which might otherwise be available to provide different benefits for dependent children. It is, therefore, essential even where a court takes the view that it is necessary to make such an order so that the mother or other person making the claim for the maintenance order for the benefit of the dependent children may be able to effectively pursue necessary proceedings on their behalf, nevertheless great care should be taken to ensure that such proceedings are pursued in the most cost effective manner feasible.

33. As already indicated, at the time of the hearing of this appeal, the father had paid an aggregate of €110,000 in the periodic payments intended to discharge legal costs. Applying the above principles to the facts fully set out in the affidavits it is sufficient to say that the Court considers that €110,000 was the outer limit of the periodic payments which ought to have been directed on the facts herein. As the father had indicated that he was not seeking to recover any of the said €110,000 it is unnecessary to consider whether any lesser aggregate amount ought to have been ordered on the facts herein. The Court is not intending to so indicate.

Conclusion

34. The Court will, accordingly, vary the order made by the High Court on the 1st August, 2014, so as to vacate that part which refers to the conclusion that there is a power under the Guardianship of Infants Act 1964, to make an order for "an interim maintenance payment" to the applicant on behalf the dependent children. Having regard to the order made by this Court on the 6th May, 2015, no further order appears necessary having regard to the terms of this judgment.