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THE HIGH COURT

2011 209 SS

IN THE MATTER OF THE CHILD CARE ACTS 1991 – 2007

AND

IN THE MATTER OF SECTION 52(1) OF THE COURTS

(SUPPLEMENTAL PROVISIONS) ACT 1961

AND

IN THE MATTER OF CATHRIONA McANASPIE,

DANIEL McANASPIE (DECEASED) AND OTHERS

BETWEEN

HEALTH SERVICE EXECUTIVE

APPLICANT

AND

MARTINA McANASPIE (DECEASED)

RESPONDENT

Judgment of Mr. Justice Birmingham delivered the 15th day of December 2011

1. These proceedings arise from the tragic death of Daniel McAnaspie in 2010 and concern an application by his next-of-kin, Cathriona McAnaspie, for access to reports prepared by Daniel's *guardian ad litem* during his time in the care of the Health Service Executive (HSE).

2. Daniel McAnaspie was born on the 13th November 1992 and was the subject of a care order made on the 12th April 2005 under s.18 of the Child Care Act 1991, which committed him to the care of the HSE for so long as he remained a child. Care orders were also made in respect of Daniel's four siblings, two of whom are still within the care of the HSE. A *guardian ad litem*, Ms. Aileen Dunne Quirke was appointed by the District Court as guardian to all five children in 2004. In the time that she acted as Daniel's *guardian ad litem*, Ms. Dunne Quirke brought three applications pursuant to s. 47 of the 1991 Act, seeking directions regarding his care. In the course of those applications, the guardian prepared a number of reports to which the family is now seeking access. It appears that in all, she prepared a total of twenty-six reports between September 2004 and March 2010 in respect of the family of which fourteen related specifically to the late Daniel McAnaspie.

3. On the 26th February 2010, Daniel McAnaspie was reported missing after failing to return to his place of residence. His body was discovered by members of An Garda Síochána on 13th May 2010, and a post-mortem concluded that Daniel died as a result of a stabbing. His violent death is now the subject of an on-going criminal investigation. At the time of his death Daniel was seventeen years old and was under the care of the HSE.

4. On the 21st May 2010, Daniel's next-of-kin, Cathriona McAnaspie, made an application to the District Court seeking an order directing the disclosure to her of all *guardian ad litem* reports prepared for the purposes of Daniel's child care proceedings, including all applications under s. 47 of the Child Care Act 1991, and further, for the lifting of in camera restrictions with regard to her use and publication of the reports and any subsequent use or publication made with her consent. Ms. McAnaspie also sought an order joining her as a party to the proceedings, to the extent necessary, including all s. 47 Child Care Act applications brought as a result of those proceedings relating to the late Daniel McAnaspie.

5. On 25th May 2010, an application was made on behalf of the Irish Times newspaper seeking permission to report on Ms. McAnaspie's application. Subsequently, similar applications were made on behalf of other media organisations. Judge Toale of the District Court made orders permitting the Irish Times to attend in court in relation to Ms. McAnaspie's application and to report the nature of the application, the submissions made, the Court's judgment and any order made, provided that any such report did not disclose confidential or privileged information or information that tended to disclose the identity or welfare circumstances of any other child not represented in the application.

6. The HSE also made an application on 25th May 2010, seeking an order allowing it to disclose to An Garda Síochána copies of all information relating to the proceedings under the Child Care Act 1991 regarding Daniel McAnaspie for the purpose of assisting it in its criminal investigation and also allowing it to disclose information to the Minister for Children and Youth Affairs for the purpose of the discharge of her regulatory functions. The HSE also sought an order declaring that it could not disclose any privileged or confidential information relating to any other minor, without leave of the Court. Judge Toale agreed to make those orders and ordered further that the Irish Times could attend and report on that application in similar terms to the order made in relation to Ms. McAnaspie's application.

7. The matter then came before Judge Gibbons, on the 12th July 2010. Judge Gibbons directed that before dealing with the next-of-kin's substantive application, a hearing should take place with a view to determining the entitlement of the media to attend at, and report on, a substantive application. That hearing took place on the 12th July 2010 and in his subsequent written decision, Judge Gibbons indicated his intention to state a case to this Court by way of consultative case stated. The questions posed in the case

stated are as follows:-

> (i) Was the care order granted in respect of Daniel McAnaspie brought to an end on his death? If not, should the care order formally be discharged by the Court?
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> (ii) In proceedings brought pursuant to the Child Care Act 1991, does the definition of "child" within the Act or as the word is used in the Act include a child who was in the care of the Health Service Executive, but who is now deceased?
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> (iii) Where a child was within the care of the Health Service Executive but is now deceased, can a person who was not a party to the original care proceedings seek to bring an application in those proceedings for relief under the provisions of the Child Care Act, 1991?
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> (iv) Where a child was in the care of the Health Service Executive but is now deceased, does the District Court have jurisdiction either on its own motion or on the application of any person to give direction or make orders pursuant to s. 47 of the Child Care Act, 1991?
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> (v) Where a child was in the care of the Health Service Executive on foot of orders made by the District Court pursuant to the Child Care Act 1991, but where the child now is deceased, does the District Court enjoy any power at common law or otherwise to order or permit the release of documents or information that were prepared for the purposes of proceedings under Parts III, IV or V of the Child Care Act 1991?
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> (vi) If the answers to questions (iii), (iv) or (v) is yes, does this Court have jurisdiction to authorise the release of documents or information concerning Daniel McAnaspie which were prepared for the purposes of applications pursuant to the Child Care Act 1991, which themselves were heard otherwise than in public?
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> (vii) If the District Court has power to authorise the release of documents or information concerning Daniel McAnaspie which were prepared for the purposes of applications pursuant to the Child Care Act 1991, which themselves were heard otherwise than in public, can the District Court impose restrictions on the publication or use of such information or documents?
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> (viii) If the answer to questions (iii), (iv) and (v) is yes, does the Court have a jurisdiction to permit the media to be present to attend at and report on these applications?
>
> (ix) If the answer to questions (viii) is yes, does the Court have jurisdiction to impose restrictions on the manner in which the media reports on the application?

8. For the purposes of assisting this Court in answering the questions posed, the Court received submissions, both oral and written, on behalf of the next-of-kin, the *guardian ad litem*, the HSE and the Irish Times.

9. The next-of-kin explained that her purpose in bringing her application was to ascertain from the reports more about Daniel's life circumstances. She believed that the reports may reveal that the health authorities failed in their obligation to take general measures to diminish the opportunities for children in care to harm themselves, or to come to harm. She believes that it is possible that the reports may also reveal that Daniel's death could have been avoided by the HSE and that the reports may assist her in securing an inquiry into the care that Daniel received and the circumstances leading to his death. The *guardian ad litem* supported Ms. McAnaspie's application to view the reports. For its part, the Irish Times confined its submissions to the final two questions, the newspaper believed that the death of Daniel McAnaspie raised serious public interest issues and that the application by his next-of-kin is a matter of serious and legitimate public interest. Counsel for the newspaper stressed that it was not seeking to intervene or become a party to the application, nor is it seeking disclosure of any information or files. Rather, the newspaper is seeking a specific and limited order entitling it to be present at, and to report on, the application in furtherance of the public interest. For its part, the HSE opposes both the application on behalf of the next-of-kin supported by the guardian and also that of the Irish Times. In opposing the application, the HSE has stated that it has no specific or, as it were, principled objection in general to a family accessing material in the manner sought by the McAnaspie family. The HSE stressed that it accepted that children and families who participate in child care proceedings have a legitimate interest in understanding how decisions that affected their welfare were reached and that there is a legitimate public interest in ensuring that child care authorities are accountable. Nonetheless, on the facts of this case, the HSE believes that the District Court does not have jurisdiction to waive or modify the in camera rule and it submits that the District Court cannot acquire jurisdiction, either by acquiescence or consent.

Question (i)

10. In the first question the judge of the District Court asks whether the care order granted in respect of Daniel McAnaspie terminated on his death and, if not, whether it should be formally discharged now by court order.

11. The care order was made under s. 18 of the Child Care Act 1991. Section 18(2) provides:-

> "A care order shall commit the child to the care of the Health Service Executive *for so long as he remains as child* or for such shorter period as the court may determine and, in such case, the court may, of its own motion or on the application of any person, extend the operation of the order if the court is satisfied that grounds for the making of a care order continue to exist with respect to the child". [Emphasis added].

The effect of s. 18(2) is that a child is committed to the care of the Health Service Executive for as long as he/she remains a child or, in certain circumstances, for a shorter period but not, however, for any longer period. Thus, a care order ceases to have effect and expires automatically when the child reaches his or her majority. There is nothing in the Act requiring a formal discharge of a care order when the child has turned eighteen. Section 18 does not address specifically the possibility of a child's death occurring while he/she is still the subject of a care order. However, any reasonable interpretation of the section would suggest that on death a minor ceases to be a human person and accordingly ceases to be a child. This does not mean that the HSE should not bring the death of a child who was the subject of a care order back into court. On the contrary, good practice would certainly require that this should happen. There are many reasons why this is so, not least the fact that a child in care is in the ultimate care of the District Court. See the case of Eastern Health Board v. McDonnell [1999] 1 I.R. 174 where McCracken J. commented as follows:-

> "In my view s. 47 is an all embracing and wide-ranging provision which is intended to entrust the ultimate care of a child who comes within the Act in the hands of the District Court. It should be noted that it is contained in part of the Act dealing with "Children in the Care of Health Boards" and is not qualified in any way. I think the only reasonable

interpretation of s. 47 is that it is intended to give the overall control of children in care to the District Court."

There are also mundane reasons as to why it would be imperative that the District Court would be made aware of the situation such as, inter alia, the need to maintain order in the Court's list, vacate review dates and deal with any outstanding questions in relation to costs.

12. In summary, so far as the first question posed is concerned, the position is that the care order granted in respect of Daniel McAnaspie was brought to an end on his death and there is no requirement that the care order should be discharged formally by the Court, no more than a formal Discharge Order would be required whenever a child in care reaches the age of eighteen years.

Question (ii)

13. The second question asks whether the definition of 'child' or the use of the term 'child' in the Child Care Act 1991, includes a deceased child i.e., a child who had been in the care of the Health Service Executive but who is now deceased. Section 2 (1) of the Child Care Act 1991 in so far as it is material provides:-

> "In this Act, except where the context otherwise requires –
>
> … 'child' means a person under the age of 18 years other than a person who is or has been married."

On its face, this statutory definition does not include children who are deceased. Neither does the ordinary meaning of the word 'child' include deceased persons who died before attaining their majority.

14. Whether one adopts a literal or purposive approach to the interpretation of the definition, the result is the same. In that regard the Supreme Court found that the Child Care Act 1991, was to be interpreted in a purposive manner. *In Western Health Board v. K.M.* [2002] 2 I.R. 493, McGuinness J. commented as follows:-

> "There can be no doubt that it is a remedial social statute, and was seen to be such by all who were affected by its provisions... I would therefore accept the submission of the respondent that the construction of the Act of 1991, as a whole, should be approached in a purposive manner and that the Act, as stated by Walsh J., should be construed as widely and liberally as fairly can be done."

The reference to Walsh J. is to his judgment in the case of *Bank of Ireland v. Purcell* [1989] I.R. 327 where he was considering the proper approach to the construction of The Family Home Protection Act 1976.

15. The 1991 Child Care Act is clearly intended to address questions relating to the current and future care needs of children. That does not mean that there can never be any element of retrospective inquiry into the past circumstances of children. Such an inquiry may be necessary in particular circumstances for the purpose of identifying the current or future care needs of a child in care. However, any such inquiry would be ancillary to addressing the needs of a child currently in care. The Act does not contain within it any broad entitlement to conduct retrospective inquiries in respect of a person who had been in care in the past but who was no longer in care when the application for an inquiry was made. The issue was considered by the Court of Appeal in the United Kingdom in the case of *R. v. Gwynedd County Council ex-parte B* [1991] 2 FLR 365. In that case, the long-term foster parents of a child who had died in care sought to challenge a decision by a local authority that it had no powers in respect of the child after her death and accordingly that the natural mother had the right and duty to bury the child's body. Malcolm L.J. accepted that the entire structure of the Children's Act 1980 was concerned with the living child, commenting that, "[t]he purpose of the 1980 Act is to promote the welfare of the living child." He held therefore, that the role of parties acting under the Act of 1980 came to an end on the child's death.

16. While there has been broad agreement that the definition of a child does not include a child that is deceased, the guardian, in particular, has drawn attention to the provisions of s.31 of the 1991 Act which contains a prohibition on the publication of certain material. The prohibition covers both children who are or who have been the subject of child care proceedings. Section 31 is in these terms:-

> "(1) No matter likely to lead members of the public to identify a child who is or has been the subject of proceedings under Part III, IV or VI shall be published in a written publication available to the public or be broadcast.
>
> (2) Without prejudice to subsection (1) the court may, in any case if satisfied that it is appropriate to do so in the interests of the child, by order dispense with the prohibitions of that subsection in relation to him to such extent as may be specified in the order."

In the first instance it may be noted that this provision deals with children who are or have been the subject of proceedings as distinct from children who are or have been in care. The prohibition is in relation to matters identifying a child/person who has been the subject of proceedings. The fact that an individual reaches the age of eighteen years, marries or dies does not rewrite history and does not mean that they, as a child were not subject to care proceedings. Accordingly, I do not believe that this section requires any strained interpretation of the word "child".

Questions (iii) to (vi)

17. In questions (iii) to (vi) Judge Gibbons asks, in essence, whether there is jurisdiction to lift or modify the in camera rule so as to allow the application of the next-of-kin.

18. It is convenient to begin by referring to the constitutional and statutory provisions that are in issue. Article 34 of the Constitution is in these terms:-

> "1. Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public".

Section 29(1) of the Child Care Act provides: "Proceedings under Part III, IV or VI shall be heard otherwise than in public".

19. The phrase "otherwise than in public" is one that appears in a number of other statutes. Section 25 of the Family Law (Maintenance of Spouses and Children) Act 1976, provides that proceedings under that Act "shall be heard otherwise than in public". The same formula is to be found in s. 34 of the Judicial Separation and Family Law Reform Act 1989 and in s. 16(1) of the Domestic Violence Act 1996 (so far as it concerns civil proceedings). Similarly, s. 33(2)(b) of the Family Law Act 1995, provides that a court

may hear and determine an application to dispense with the age of marriage or notice of marriage requirements "otherwise than in public". However, it is interesting to observe that other formulae are also to be found. So, s. 20 of the Adoption Act 1952, provides that questions of law referred by the Adoption Board to the High Court may, "[s]ubject to rules of court, be heard in camera". Sections 56 (12), 119 and 122 of the Succession Act 1965, provide that disputes pertaining to the appropriation of the family home, provision for spouses and children and dispositions for the purposes of disinheriting spouses and children, "shall be heard in chambers". Section 36(4) of the Status of Children Act 1987, provides that a declaration of parentage application "shall be heard otherwise than in public … unless the Court otherwise directs".

20. On its face, the requirement that proceedings should be heard otherwise than in public might be thought to afford a considerable measure of discretion as to how the proceedings should be conducted. The holding of proceedings in public is prohibited, however, other than that express prohibition, there is no precise stipulation as to what regime should apply. The manner in which the in camera rule operates, and I use that phrase as covering the various differing statutory formulations to which I have referred, has been considered both in England and in Ireland.

21. In England the matter was considered by Rees J. in the case of Re *R. (MJ) a Minor (Publication of Transcript)* [1975] 2 WLR 978. In that case, wardship proceedings had been commenced by the father of a child. The child was born to Mrs E. when she was unmarried. Subsequently, she married Mr. E., who was not the child's father. Mr. E. established a trust in Jersey for the benefit of the child. Mr. E. was adjudicated bankrupt, but was able to continue supporting Mrs. E. and the child. At a later stage, the child's natural father began wardship proceedings seeking an order for custody. Mr. and Mrs. E. then brought proceedings designed to obtain leave to adopt the child, and the natural father opposed his child's adoption. The application was heard in private. Transcripts of the adoption proceedings were sent to the trustee in bankruptcy who then applied under s. 12 of the Administration of Justice Act 1960, to obtain formally a copy of the transcripts which he would be in a position to use without being in contempt of court. His application was opposed by Mrs. E. and by the child's *guardian ad litem*. While Rees J. was primarily concerned with the operation of s. 12 of the Administration of Justice Act, 1960, he found it necessary to have regard to the situation that existed prior to the enactment of the statute and in that regard observed that no case had been cited to him which decided that a judge had no power to give leave to publish information provided in cases held in private. He then went on to observe that the practice of judges in wardship cases had been to authorise publication on a frequent basis giving the example of authorising publications of details in the press so as to enable a missing ward to be traced. It should be noted that the party applying for access to the transcripts in that case, the trustee in bankruptcy, was not a party to the original wardship proceedings.

22. An even more striking example is the case of Re *X and Others (Minors) [Wardship: disclosure of documents]* [1992] 2 WLR 784. That case arose from newspaper articles criticising two doctors for their work in investigating child abuse. The doctors sued in defamation and the newspapers pleaded justification relying on a number of case histories of children who had been the subject of wardship proceedings.

23. The newspapers sought access to documentation from the earlier proceedings. While the application was dismissed Waite J. held that the court had an unfettered discretion to allow the use by a third party of confidential information relating to child welfare proceedings. He held that in exercising that discretion, the court had to consider the effect of so doing on the children concerned, the public interest in the due administration of the wardship jurisdiction and the public interest in the fair and informed administration of justice in other proceedings. Balancing these factors, Waite J. took the view that while there was only a minor risk of injury to the welfare of the individual children, there was the prospect of a substantial detrimental effect on the wardship jurisdiction itself and, on the other side of the coin, the significance of the documentation to achieving a just result to the defamation proceedings was unproved and uncertain.

24. Having regard to the non-prescriptive terms of s. 29(1) and the English authorities, which of course are not binding on me but which I find of assistance, I would, in the absence of Irish authority, have little difficulty in concluding that a judge of the District Court had, in certain circumstances at least, a discretion to lift or modify the rigours of the in camera rule. However, there is in fact an amount of Irish case-law relevant to this issue, though none specifically dealing with the issues posed by Judge Gibbons. It may be said that the Irish cases are not all that easy to reconcile.

25. A useful starting point for consideration of the Irish cases is the case of *The People (D.P.P.) v. W.M.* [1995] 1 I.R. 226. This is a case on which, as I understand it, the HSE places considerable reliance. It may be said that the case in question was a somewhat unusual one and the consequences of the conclusions arrived at are so undesirable that one would wish to follow the decision only if it were directly on point.

26. In that case Carney J. was concerned with the provisions of s. 5 of the Punishment of Incest Act 1908, which provided: "All proceedings under this Act are to be held in camera". The accused pleaded guilty to certain charges under that Act and when the matter came on for sentence the Court invited submissions as to whether members of the press were entitled to be in court. Having heard those submissions, the Court directed the press and all others not directly involved to withdraw. It appears that thereafter sentence was passed otherwise than in public. Subsequently the Court received a letter from solicitors acting for the Eastern Health Board stating that the Board had custody of one of the accused's children, that wardship proceedings might be initiated in respect of another child in the accused's custody and asking to be informed as to whether the accused had been convicted and sentenced or released. Carney J. took the view that while the Health Board manifestly ought to be entitled to receive the information, the Court was precluded from disclosing it, as it would fly in the face of the words 'in camera'.

27. It is clear that Carney J. believed that the failure to up-date the wording of the 1908 Punishment of Incest Act placed him in a very difficult position. He contrasted the bald language of the Punishment of Incest Act, 1908 with a number of more recent statutes. He stated specifically that the Eastern Health Board manifestly should have the information but that the legislature had tied his hands. That he was uncomfortable with the conclusion reached is apparent from the fact that he drew attention to the anomalous situation that arose, which was that his decision was not one which was capable of being appealed given that it was a ruling of the Central Criminal Court. This, he said, conferred on him an unsought-for immunity from appeal.

28. The case of *M.P. v. A.P. and Connolly* [1996] 1 I.R. 144 was another case in which the in camera rule was operated with some rigour. The background to the case is that a husband and wife, as part of a settlement arrived at in judicial separation proceedings, agreed that future disputes regarding access to the children of the marriage were to be mediated in the first instance by the applicant, a psychologist. A dispute then arose regarding access, with the result that court proceedings were taken by the defendant-husband. The applicant wrote a letter in which he expressed certain views to which the defendant-husband took exception. The defendant-husband then made a complaint to the Psychological Society of Ireland. The Society asked the applicant to provide his comments on the complaint. The applicant applied to the High Court for directions as to whether he was at liberty to discuss the matter with the Society, in the light of the provisions of s.34 of the Judicial Separation and Family Law Reform Act 1989 which provides that proceedings under that Act "shall be heard otherwise than in public", the same formula of words as to be found in

s. 29 of the Child Care Act 1991.

29. In the course of her judgment at p. 154 Laffoy J. commented:-

> "Section 34 of the Act of 1989 is mandatory and, in accordance with that provision these proceedings, including the defendant's motion for attachment and committal, being proceedings under the Act of 1989, have been held otherwise than in public. In submitting to the Society the documentation he submitted with his letter dated the 9th May, 1995, in my view, the defendant divulged to a section of the public, the staff and officers of the Society, confidential matters which arose in the proceedings and which s. 34 requires should be kept confidential and private to the parties to the proceedings and the court, and in doing so contravened section 34."

The effect of all of this is that while the proceedings before Laffoy J. were initiated by the applicant-psychologist seeking directions as to whether he could engage with the complaint made to the Psychological Society of Ireland, the approach of Laffoy J. was to focus on the entirely unauthorised disclosure to the Society by the defendant-husband, rather than on the situation facing the applicant.

30. Perhaps the most detailed consideration of the issues is to be found in the judgment of Barr J. in the case of Eastern *Health Board v. Fitness to Practice Committee of the Medical Council* [1998] 3 I.R. 399. This case arose out of a decision by the Fitness to Practice Committee of the Medical Council to carry out an investigation into the fitness to practice of Dr. Maura Woods against a background of alleged professional misconduct or incompetence on her part, following her examination of a number of children who had allegedly been sexually abused. In the course of the inquiry, the Fitness to Practice Committee made orders directing the EHB to make available to it the medical records relating to the children in question. The EHB was granted leave to seek judicial review on the grounds that the medical records in its possession that it was ordered to produce related to matters which were the subject matter of in camera proceedings before the Court. At the full hearing Barr J. refused the applicant the relief it sought and directed it to make discovery of the documents. He held that a statutory imperative that proceedings of a particular nature be held in private did not imply that there was an absolute embargo on the disclosure of evidence in all circumstances. In the course of his judgment he made a number of observations in relation to the case of *M.P. v. A.P.*, specifically pointing out that the issue in that earlier case was unauthorised disclosure; that the case should not be interpreted as implying that there was an absolute embargo on a professional body preventing it investigating matters protected by the in camera rule; and pointing out that the professional body itself, the Psychological Society of Ireland, was not heard in *M.P. v. A.P.* and; in all probability that the United Kingdom case-law on this issue had not been opened. Barr J. then went on to set out ten principles of general application which he believed to represent the law in Ireland having regard to Irish and U.K. case-law including in particular the seminal decision of the Supreme Court in Re *R. Limited* [1989] I.R. 126. He did so in these terms:-

> (1) Court proceedings relating to the alleged abuse of children are normally held in camera. This is authorised by Article 34.1 of the Constitution of Ireland, 1937, as an exception to the general rule that justice shall be administered in public.
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> (2) The primary reason for the in camera rule in such cases is to provide protection for minors from harmful publicity arising out of the disclosure of evidence and other related matters in protected proceedings.
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> (3) A statutory imperative that proceedings of a particular nature be held in private (as provided, for example, by s. 5 of the Punishment of Incest Act, 1908) does not imply that there is an absolute embargo on disclosure of evidence in all circumstances. Such an embargo requires specific statutory authority to displace judicial discretion at common law to permit disclosure in appropriate circumstances. If an absolute embargo on the publication of evidence adduced in the course of in camera proceedings in all circumstances were implied from a mandatory requirement that such proceedings be held in private, then grievous harm could be done to public and private interests and to the pursuit of justice. For example, if in the course of proceedings in camera, it was established that a witness was guilty of perjury or some other crime, the trial judge would be unable to refer the matter to the Director of Public Prosecution with a view to having a criminal prosecution brought against the wrongdoer. Likewise, if it emerged in evidence protected by the rule that a professional witness, or a lawyer acting in the case, was guilty of professional misconduct, the trial judge would be inhibited in referring the matter to the offender's professional body for investigation. It would also follow if there was an absolute embargo that a child concerned in such proceedings would be spancelled in pursuing claims which he or she might have for damages arising out of evidence protected by the in camera rule, notwithstanding that the primary purpose of the rule in such cases is to protect the minor. A major far-reaching change in the law, which sets aside established practice, could not arise merely by implication derived from a mandatory statutory requirement that certain proceedings shall be held in private but, in my view, would require specific statutory authority.
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> (4) I [Barr J.] have been unable to discover any specific statutory provision in Irish law which provides that there is an absolute embargo in all circumstances on the publication of information deriving from proceedings held in camera.
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> (5) There is an established practice at common law recognised in England and in this jurisdiction (*see P.S.S. v. Independent Newspapers (Ireland) Ltd.* (Unreported, High Court, Budd J., 22nd May 1995) that the Court in proceedings held in camera has a discretion to permit others on such terms as the judge thinks proper to disseminate (and in appropriate cases to disseminate himself/herself) information derived from such proceedings where the judge believes that it is in the interests of justice so to do, due and proper consideration having been given to the interest of the person or persons intended to be protected by the conduct of the proceedings in camera. In given circumstances the judge may find that a crucial public interest, such as the prosecution of crime or the protection of vulnerable children, takes precedence over the interest of the protected person in non-disclosure of the information in question.
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> (6) In considering a conflict between the public interest or the interest of a person seeking disclosure on the one hand, and the interest of an individual in retaining the full benefit of the in camera rule on the other hand, the court is bound by the concept that the paramount consideration is to do justice – see *In re R. Ltd.* [1989] I.R. 126.
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> (7) The use of evidence emanating from an in camera hearing in other legitimate proceedings where the public interest or the interest of the protected person or some other interested party requires, includes not only related litigation in court but also other non-judicial proceedings such as a statutory inquiry by a professional body into complaints made to it about a professional negligence or incompetence of one of its members – see *A County Council v. W.* [1997] 1 F.L.R. 574.
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> (8) It is a contempt of court for any person to disseminate information derived from proceedings held in camera without prior judicial authority.

(9) Some of the legislative provisions relating to in camera proceedings require mandatory privacy and in others it is a matter for the presiding judge to decide whether the proceedings shall be heard in private. In my opinion that distinction relates only to the particular proceedings and whether or not the presiding judge has any discretion therein in deciding on the imposition of the in camera rule. It does not affect in either case the exercise by the court of its discretion to permit the subsequent disclosure of in camera information in the interest of justice, the achievement of which, as previously stated, is its paramount obligation. In short, whether the in camera rule applies mandatorily or by way of judicial discretion does not affect the authority of the court to permit disclosure of protected information where justice requires that disclosure should be made.

(10) If justice requires disclosure of information protected by the in camera rule, the court should take all reasonable steps to protect the interest of minors and others who are intended to have the benefit of the rule in the given case. The court has power, as an incidence of its discretion to permit disclosure of protected information, to impose such terms in that regard as it deems necessary in the circumstances."

31. The comments of Barr J. offer powerful support for the proposition that the District Court has the power to lift or relax the in camera rule and it sets out the considerations which should be taken into account in so doing.

32. In the course of her judgment in the case of *Eastern Health Board v. E.* (No.2) [2000] 1 I.R. 451, McGuinness J. commented that she found the analysis of the question of publishing certain in camera matters which was given by Barr J. in *Eastern Health Board v. Fitness to Practise Committee*, both impressive and convincing. Over and above her endorsement of the approach taken by Barr J., her conclusions in relation to the specific requests that were made of her are of interest. The background to the case is that the High Court had conducted an inquiry, pursuant to Article 40.4.2 of the Constitution, into the taking into care and custody of an infant by a pregnancy counselling agency. The judge who dealt with the Article 40 aspect (Laffoy J.) permitted the circulation of an edited version of her judgment. McGuinness J. was required to consider requests from different media outlets to permit the naming of the pregnancy counselling agency and also the naming of a barrister and medical practitioner whose role in the affair had been the subject of comment by Laffoy J. McGuinness J. took the view that it was in the public interest to publish the name of the agency involved so as to offer protection to other pregnant women seeking counselling, and also in ease of other agencies which might have been adversely affected. However, she refused to permit wider publication and did not permit the publication of information relating to the barrister and medical practitioner as she regarded this as a matter of public curiosity rather than public interest in the true sense.

33. A further endorsement of the approach of Barr J. came in the case of *Martin v. The Legal Aid Board* [2007] 2 I.R. 759. It is of interest that this is a decision of Laffoy J. who was the judge in *M.P. v. A.P.* More recently, *Hanna J. in Miggin (A minor) v. Health Service Executive & Gannon* [2010] IEHC 169 expressly adopted the rationale of Barr J.

34. However, a different approach was taken by Murphy J. in the case of *R.M. v. D.M.* [2000] 3 I.R. 373. Murphy J. reconciled the diverging case-law by taking the view that the cases of Eastern Health Board v. Fitness to Practise Committee and A. County Council v. W. related to the in camera rule in relation to minors, and that the decision of Laffoy J. in *M.P. v. A.P.,* relating to judicial separation, applied to the case with which he was concerned. Insofar as E.H.B. v. Fitness to Practise Committee was distinguished as a case involving minors by Murphy J., it would appear to follow that the *R.M. v. D.M.* case is itself to be distinguished from the present case.

35. Insofar as the weight of Irish authorities would suggest that the Court has some discretion at least to authorise the disclosure of information relating to proceedings held in camera, that jurisprudence is consistent with the approach of the European Court of Human Rights (ECtHR). In the case *of B. and P. v. United Kingdom*, (Application Nos. 36337/97 and 35974/97), judgment of 24th April, 2001, the Court rejected a challenge to the Children's Act 1989, formulated on the basis that the presumption in the Act that proceedings would be held in private was objectionable and that the presumption should have been the other way; a presumption for public hearing with exceptions for matters to be heard in private. The Court felt that it was not inconsistent with Article 6.1 of the European Convention on Human Rights (ECHR) for a state to designate an entire class of cases as an exception to the general rule that judicial hearings should be in public but significantly commented that the need for such a measure must always be subject to the Court's control. Based on this decision it would appear that s. 29 of the 1991 Act, if construed in absolute terms, could fall foul of the provisions of the European Convention on Human Rights, and that for the section to be compatible with the Convention, it would require that the provision be subject to court control. The case of *Moser v. Austria* (Application No. 12643/02), judgment of the 21st September, 2006, involved a challenge to Austrian childcare proceedings. The ECtHR referred to the decision in B. and P. and went on to comment:-

"Moreover, the case of *B. and P. v. the United Kingdom* concerned the parents' dispute over a child's residence, thus, a dispute between family members, i.e. individual parties. The present case concerns the transfer of custody of the first applicant's son to a public institution, namely the Youth Welfare Office, thus, opposing an individual to the State. The Court considers that in this sphere, the reasons for excluding a case from public scrutiny must be subject to careful examination. This was not the position in the present case, since the law was silent on the issue and the courts simply followed a long-established practice to hold hearings in camera without considering the special features of the case."

36. The reference to the transfer of custody to the Youth Welfare Office as involving the opposing of an individual to the State is of some interest. This is a case where the death of a young person in the care of the State occurred in violent and tragic circumstances. By analogy to the attitude of the court in Moser, the imposition of a blanket prohibition on accessing material generated during the course of the care proceedings must require careful examination. That we are dealing with the death of a young person in the care of the State is of fundamental importance. Article 2 of the ECHR, on the right to life, has been interpreted as involving a negative duty, to refrain from the intentional taking of life; a positive duty, sometimes called a substantive duty, to ensure effective measures to protect life through the criminal legal system and professional regulation, and also to intervene in cases where there is a real and immediate risk to human life; and a procedural duty, sometimes called an investigative duty, to conduct an effective official investigation into certain deaths. A total prohibition on access by family members to material generated during proceedings heard in camera sits ill with the State's procedural or investigative duty. In that regard, it is of note that at a very early stage the HSE sought, and was granted, leave to disclose information to An Garda Síochána and the Minister for Children. If the prohibition on disclosure of all information was absolute, this was an application that could not have been made and certainly, could not have been granted.

37. I am of the view that the judge of the District Court does have jurisdiction to entertain the application and to consider whether to make the documentation sought available to the next-of-kin. While Daniel's death brought the care order to an end, it does not follow from this that the Court is *functus officio*. As we have seen, many of the cases where access to material was sought, both successfully and unsuccessfully, involved applications brought by third parties after the original proceedings concluded.

38. There is a further reason as to why I am convinced that the Court has a discretion to permit access to the reports from the *guardian ad litem*. These reports were created by the *guardian ad litem* for the Court's benefit and were submitted to the Court. These reports are the Court's reports. The Court, for whose benefit the reports were brought into existence, is particularly well placed to determine whether it is proper that disclosure of the reports be made. At para. 57 in Martin v. Legal Aid Board [2007] 2 I.R. 759, Laffoy J. commented as follows:-

> "The concerns of the plaintiffs in relation to access to an expert or welfare report directed to be procured by the court having seisin of the family law matter, such as a s. 47 report, a copy of which is on a case file, are wholly understandable. Such a report differs from ordinary in camera documentation. The report is the court's report. The solicitor on record in the proceedings is an officer of the court. It seems to me that it is a matter for the court which directed the procurement of the report to determine whether in a particular case it is proper that disclosure of the copy be made to the authorised person. It is not a matter which this court can determine in the abstract in these proceedings."

39. In this case the application for access to the *guardian ad litem* reports is being brought by a person who is the next-of-kin of an individual who met a violent death while in State care; the care of the Health Service Executive. That someone in the position of the applicant would wish to seek out information and consider and explore the possibility that the violent death might have been avoided had the HSE carried out its responsibilities differently seems entirely understandable. I have already expressed the view that the Court in such a situation has a discretion to permit access to documentation on the part of a next-of-kin. That general observation is reinforced by the fact that on the same day that a care order was made in respect of Daniel McAnaspie, care orders were made in respect of other members of the McAnaspie family, including and most significantly the applicant, Cathriona. An additional factor to be considered is that in this case the author of the reports is supporting the position that there should be access to them by the next-of-kin. Having regard to the view that I have formed I propose to answer questions (iii), (v) and (vi) in the affirmative. However, so far as question (iv) is concerned, where the question posed is whether the District Court has jurisdiction to give directions or make orders pursuant to s.47 of the Child Care Act 1991 in respect of a deceased child, having regard to the wording of the section, I propose to answer this question in the negative. That section is in these terms:-

> "Where a child is in the care of the Health Service Executive, the District Court may, of its own motion or an the application of any person, give such directions and make such order on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order." (Emphasis added).

The wording leaves very little room for doubt that before resort can be had to the section there must be a child that is in the care of the Health Service Executive. On the 21st May, 2010, it would not have been possible for anyone to say "Daniel McAnaspie is a child who is in the care of the Health Service Executive."

Question (vii)

40. Question (vii) asks whether the District Court can impose restrictions on the publication or use of such information or documents if release is authorised. At the outset it may be noted that a number of the reported cases that have permitted access to information or authorised the release of information have gone on to impose conditions. So, for example, in *Eastern Health Board v. E*. (No. 2) [2000] 1 I.R. 451 McGuinness J. permitted publication of some but not all of the material that it had been sought to publish. In *Martin v. Legal Aid Board,* Laffoy J., dealing with the situation that can arise where Legal Aid Board solicitors are representing both sides in a contentious matter, asserted that there must be proper procedures and protocols in place to ensure that the implementation of the decision in issue did not involve any flow of information against the interests of any client. The judgment in *Eastern Health Board v. Fitness to Practice Committee* imposed a number of conditions on the respondent, the Fitness to Practice Committee, and on the Medical Council. I can see no rational basis whatever for suggesting that a court has the discretion to authorise access to the documentation sought but can only say 'yea' or 'nay' and cannot seek to impose restrictions. First principles would suggest that if there is a discretion to authorise access, this has the corollary that there is a discretion to impose restrictions. Having regard to the authorities as to what has happened in the past, I am firmly of the view that the Court does indeed have jurisdiction to impose restrictions if permitting access to such documents.

41. Without sight of the reports of the *guardian ad litem* it is not possible to express any view on the sort of restrictions that the District Court might consider imposing. In any event, this is quintessentially a matter for the judge of the District Court. No doubt if there is material in the reports which would serve to identify other children who are or were in care, the judge would as a matter of certainty insist on redaction to prevent this happening. Whether restrictions beyond that are required is a matter for the judge of the District Court to consider.

Question (viii)

42. In question (viii) the District Court asks whether, if the Court has a discretion to authorise the release of documents, the Court also has the jurisdiction to permit the media to be present to report on such applications. The death in care of Daniel McAnaspie raises, or certainly has the potential to raise, serious public interest issues. That the next-of-kin is seeking access to documentation and information is a matter of interest to members of the public and, potentially at least, a matter of general public interest. That child care proceedings should be held otherwise than in public and that ordinarily there should be no question of media attendance is entirely understandable. The rule that proceedings are to be held otherwise than in public is there to protect the rights of the child and to ensure that details of the private life of the child may not find their way into the media perhaps to be dealt with in a sensationalist or even salacious fashion. What is currently emerging from the Leveson Inquiry on a daily basis shows how essential such a statutory provision is. That ordinarily there can be no place for the media in child care proceedings is obvious. The question which really arises is whether there might be exceptional situations where a court might wish to depart from the normal procedures and whether, if such situations arose, the court would have jurisdiction to vary the normal procedure. In the present case the Court is not being asked to deal with welfare issues in relation to a child who is currently in care. The question of the need to protect the private life of a child in care from media coverage does not arise directly. I say 'directly' because it is at least possible that reports might indirectly furnish information relating to children still in care. If that is the situation, I have suggested that it is matter that would probably be capable of being dealt with by directing redaction. On the other hand, it is possible that the manner in which the circumstances of the deceased minor and minors still in care are treated in the reports is such that it would be very difficult and perhaps impossible to allow access to the reports without damaging the interests of children still in care in an unacceptable and indeed legally impermissible manner.

43. In this case what is sought essentially is historical information in the belief that it would cast light on how a public body, a state agency, fulfilled its duties. As we know Daniel McAnaspie has died, but it does not follow that all of his interests, and still less that the interests of his family, died with him. The jurisprudence of the European Court of Human Rights derived from cases such as *Jordan v. the United Kingdom* [2001] ECHR 327, provides authority for the proposition that a person's right to life, as enshrined in Article 2, ECHR, embraces a right to have the circumstances investigated in which that right to life has been violated. If, as I have concluded,

the Court has jurisdiction to entertain an application from the next-of-kin to access information on an historical basis then it seems to me that the Court also has jurisdiction to permit the media to report on that application. Such an approach seems entirely consistent with the judgments of the Supreme Court in *Irish Times v. Ireland* [1998] 1 I.R. 359. In that case O'Flaherty J. had commented as follows:-

> "The administration of justice must be neither hidden nor silenced... The light must always be allowed shine on the administration of justice; that is the best guarantee for the survival of the fundamental freedoms of the people of any country".

That the Court should be in control of its own proceedings and exercise its own judgment is also consistent with the jurisprudence of the ECtHR as emerges from cases such as B. and *P. v. United Kingdom and Moser v. Austria* discussed above. It follows inevitably from a conclusion that the Court has jurisdiction to permit the media to attend and report on such applications in exceptional circumstances that when doing so the Court has jurisdiction to impose restrictions on the nature and extent of that reporting. In the course of the submissions on behalf of the Irish Times the newspaper accepted as appropriate a restriction on the publication of material which would tend to disclose the identity and welfare circumstances of any other child. It was clearly an appropriate concession. It does not follow that those are the only restrictions that would be appropriate. It would be for the District Court to address this issue. No doubt, if imposing restrictions, the District Court will be concerned to see that any such restrictions are proportionate and have regard to the balancing and protection of the various interests that are involved.

44. Having regard to the views that I have formed on the issues raised in the case stated I propose to answer the questions posed as follows:-

> (i) Yes, the care order was brought to an end on the death of Daniel McAnaspie. There is no requirement for a formal discharge of the order by the Court.
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> (ii) No.
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> (iii) Yes.
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> (iv) No.
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> (v) Yes.
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> (vi) Yes.
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> (vii) Yes.
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> (viii) Yes.
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> (ix) Yes.