THE HIGH COURT

[2019 No. 5 JR]

IN THE MATTER OF J.D., A CHILD BORN ON THE AND C.D., A CHILD BORN ON AND IN THE MATTER OF THE CHILD CARE ACT 1991 (AS AMENDED)

BETWEEN

THE CHILD AND FAMILY AGENCY (ORSE TULSA)

APPLICANT

AND

M.D.

RESPONDENT

AND

M.B.D

RESPONDENT

AND

K.N.

GUARDIAN AD LITEM

JUDGMENT of Mr. Justice MacGrath delivered on the 28th day of March, 2019.

Background

1. The applicant is a statutory agency established under s. 7 of the Child and Family Agency Act, 2013 (hereinafter referred to as "*the Act of 2013*"). Pursuant to s. 8 of the Act of 2013, the applicant's functions include the supporting and promotion of the development, welfare and protection of children, including the provision for the protection and care of children in circumstances where their parents have not given, or are unlikely to be able to give, adequate protection and care. The function of the applicant includes supporting and encouraging the effective functioning of families.

2. In these judicial review proceedings, the applicant seeks an order of *certiorari* quashing an order and direction of the District Court made pursuant to s. 47 of the Child Care Act 1991 (hereinafter referred to as "*the Act of 1991*") on the 7th December, 2018. The order was made in the context of childcare proceedings concerning two children. J.D. who was born on the 15th December, 2005 and her sister C.D. who was born on the 2nd March, 2008. They are now the subject of interim care orders which were made by the District Judge under s. 17 of the Act of 1991. There is no dispute regarding the making of the order that the children be taken into care on an interim basis. However, what is challenged is the order of the District Judge whereby she directed the applicant to place the children in the care of their sister, the second named respondent, when they are attending school during the week and in secure foster placement otherwise. A stay is also sought in respect of that order. By order of the 4th January, 2019, leave was granted to the applicant to apply for judicial review on notice to the respondents. The case has been dealt with by way of a telescoped hearing.

Pleadings

3. In the statement of grounds upon which this application is based, dated the 4th January, 2019, it is accepted that the District Court has supervisory jurisdiction in relation to the applicant's functions. S. 47 of the Act of 1991 provides that the District Court:-

> *". . . may, of its own motion or on 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".*

It is the applicant's case however, that it has statutory responsibility for determining the type of care to be provided to a child who comes into its care. S. 36 of the Act of 1991 provides that subject to s. 36(4):-

> *"36.—(1) Where a child is in the care of a health board, the health board shall provide such care for him, subject to its control and supervision, in such of the following ways as it considers to be in his best interests—*
>
> *(a) by placing him with a foster parent, or*
>
> *(b) by placing him in residential care (whether in a children's residential centre registered under Part VIII , in a residential home maintained by a health board or in a school or other suitable place of residence), or*
>
> *(c) in the case of a child who may be eligible for adoption under the Adoption Acts, 1952 to 1988, by placing him with a suitable person with a view to his adoption, or*
>
> *(d) by making such other suitable arrangements (which may include placing the child with a relative) as the health board thinks proper."*

Such places of care, therefore, may include foster placement, residential care, adoption or other suitable arrangement as the applicant thinks proper, such as placing the child with a relative. The applicant's case may be summarised by stating its contention that by virtue of the provisions of s. 36 of the Act of 1991, it enjoys an exclusive function in relation to the initial placement of children. The applicant challenges the order made by the District Court to place the children in the care of their sister at certain times of the week, on the basis that the District Court does not enjoy such powers under the Act of 1991.

4. The children, the subject matter of these proceedings, are daughters of M.D., the first respondent. Their father J.D. died on the 4th November 2016. They have eight adult siblings and one sibling who is aged sixteen years. She resides in England. An older sister, the second respondent, is now aged 20. She has been involved in the care of the children in recent times.

5. It is pleaded in the applicant's statement of grounds that it has had a complex and longstanding involvement with the family and that it has historic and existing welfare concerns. Historic concerns relate to emotional abuse, suspected physical abuse and neglect

from what is described as poor parenting capacity. More recent concerns in relation to the children relate to physical neglect, medical neglect, homelessness, inadequate supervision, emotional neglect and educational neglect. There are concerns about poor supervision, maternal alcohol and drug abuse, poor maternal mental health, failure to provide adequate follow up in relation to the children's medical and developmental needs, and lack of protection and exposure to danger. It is acknowledged, however, that the children have been supported by their sister, the second respondent. She has acted as a protective factor to the children within the ability of her capacity as a young adult and has cared for them since September, 2018. Nevertheless, the applicant has concerns about her capacity to provide care on an ongoing and long term basis.

6. On the 24th September, 2018, the applicant applied pursuant to s. 17 of the Act of 1991 for interim care orders in respect of the children. This application was adjourned to the 17th October, 2018, to permit the first respondent to seek legal representation. A guardian *ad litem*, K.N., was also appointed on that date.

7. The application was heard on the 14th and 15th November, 2018. The case was adjourned to the 7th December, 2018. A solicitor came on record for the second respondent and an application was made for her to be granted guardianship and sole custody of her sisters. At the resumed hearing on the 7th December, 2018, the solicitor for the applicant informed the court that the second respondent did not intend to apply to foster her sisters until the custody application is determined.

8. At the conclusion of the hearing the District Judge made interim care orders. Also, of her own motion, she made an order pursuant to s. 47 of the Act of 1991 directing that the children be placed with their sister, the second respondent, during the school week but to remain in respite with foster carers at weekends and during holidays.

9. This form of order was opposed and objected to by the applicant. It was submitted to the District Judge that she did not have the power to make such an order in light of the provisions of s. 36 of the Act of 1991. It was submitted that the type of care which may be provided pursuant to s. 36 is governed by regulations, provided for and made under s. 39 of the Act of 1991, in particular the Child Care (Placement of Children with Relatives) Regulations, 1995 (S.I. No 261/1995)(hereafter the "*the 1995 Regulations*"). The applicant states that these regulations are used in conjunction with the national foster care standards and internal policies of the applicant to ensure that the provision of care for children who come into care is properly regulated.

10. The applicant maintains that the requirements of these regulations are satisfied by the applicant in deciding the type of care to be provided for a child who comes into its care, but that did not occur in this case. The District Court was offered, for its consideration, a letter from the principal fostering social worker in which the opinion was expressed that it was unlikely that the placement of the children with their sister would pass a fostering assessment. It is pleaded that the judge declined to read this letter as the principal social worker was not in court.

11. The applicant believes that the placement of the children with the second respondent is inappropriate for a number of reasons, including:-

(i) Her young age.

(ii) Her lack of parental experience.

(iii) Her own poor experience of parenting – details of which were known to the applicant.

(iv) Her ability to manage complex relations and/or to maintain contact with her extended family and her mother.

(v) Her ability to ensure the safety of herself and her siblings.

(vi) Her ability to complete day to day parenting tasks, such as bringing her siblings to school on time and her availability to collect them.

(vii) At the date on which the order was made, she had not applied to foster her two siblings nor had she been assessed or approved as a foster carer.

12. The applicant is particularly concerned that the placement is unapproved within the meaning of the regulations, and that such placement does not comply with the necessary requirements for children who have been placed in care. The guardian *ad litem* supports this view. There was a suitable approved foster placement available for the children . This is not a case where there is no alternative to that decided on by the District Judge. Following the making of the order, an interim plan was agreed whereby the children resided with foster carers for most of the Christmas school holidays.

13. It is the applicant's case that the scope of the power to make directions under s. 47 of the Act of 1991 is not unlimited and must be interpreted in the context of the general framework of that Act and consistent with the Constitution. It is pleaded that such interpretation requires a consideration of the provisions of ss. 36 and 39 of the Act of 1991 and the regulations made thereunder. Insofar as the order purports to direct the applicant in the management of day to day decisions, it is pleaded that this is *ultra vires* the powers of the District Judge under s. 47 of the Act of 1991 and that the power to decide on the accommodation and maintenance of children in care is specifically conferred on the applicant by s. 36 of the Act of 1991. It is pleaded that s. 47 of the Act of 1991 does confer on the District Court the power to direct the type of accommodation to be provided for a child placed in the care of the applicant. It is also pleaded that the jurisdiction of the court to make directions which are in the form of mandatory injunctions regarding accommodation to be provided for children who are in the care of the applicant may be exercised only in very exceptional circumstances and where there has been a clear disregard of constitutional rights. There was no such disregard of the children's constitutional rights in this case by the applicant. Those rights were considered. The process adopted by the applicant in allocating foster placements ensured this. There was an approved foster placement available. Therefore, it is pleaded that the circumstances in which the court was entitled to exercise this exceptional jurisdiction did not arise.

The evidence of the applicant

14. The application is grounded on the affidavit of N.B., sworn on the 3rd January, 2019. She is a senior social worker employed by the applicant and confirms many of the matters pleaded in the statement of grounds. The applicant has worked with the family since 1995. N.B. avers that, together with the social work team leader assigned to the children's case, P.M., she worked with the family since May, 2018 when the case was transferred from a child protection team based in a different region. The first respondent has been diagnosed with a personality disorder. Numerous supports have been offered to the family over the years, including family, mental health and domestic violence services. Following the death of the children's father in November, 2016, the situation deteriorated. The family moved between various locations and at one stage moved abroad. They lived outside Dublin and N.B. avers

that the first respondent and her four youngest children left that accommodation in an unplanned manner in September, 2017. They then lived in accommodation provided by homeless services in the Dublin area. Subsequently the children resided with their mother and the second respondent, in accommodation which was managed by a trust. They continued to reside there until the 14th September, 2018. They moved to another facility and were cared for by the second respondent, with the permission of the first respondent. The first respondent withdrew her consent to that arrangement. An initial social work assessment was completed on the 17th August, 2018. The children were deemed to be at ongoing risk of harm, neglect and emotional abuse. On the 19th September, 2018 a decision was made to apply for an interim care order.

15. At the hearing of the application on the 7th December, 2018, the reports of social workers were submitted to the court, which included reports prepared by P.M. and N.B. The District Judge was satisfied that the threshold for the taking of the children into care on an interim basis had been met and she made orders under s. 17 of the Act of 1991.

16. N.B. avers that the judge of her own motion directed that the children be placed with their sister in the manner which has been previously described. As stated that the applicant opposed the making of that order and submitted that the court did not have jurisdiction to make such order. N.B. places particular emphasis on the 1995 Regulations. She avers that the applicant complies with these regulations in deciding the type of care to be provided for a child who comes into its care. The regulations require that prospective foster parents be fully assessed prior to approval as foster carers. Such assessment is carried out in accordance with the regulations by the Agency's fostering team. The decision on approval goes to a placement committee which is comprised of experienced child welfare professionals drawn from within and outside the agency. The second respondent did not apply for fostering assessment and she was not assessed or approved in accordance with the procedures laid down by the regulations, the Foster Care Standards, 2005 and various internal policies. The concerns of the applicant with regard to the ability of second respondent to care for the children were submitted to the court. N.B. confirms that the applicant provided the court with a letter dated 29th November, 2018 authored by a principal fostering social worker in which it was stated that it was unlikely that the placement with second respondent would pass the fostering assessment. The judge declined to read this letter as the author thereof was not in court.

17. N.B. does not believe that it is in the best interests of the children that they be placed with an unapproved foster carer. There are concerns regarding the ability of the second respondent to care for her sisters. In the two-week period between the 10th December, 2018 and the 21st December, 2018, when cared for by the second respondent the children were late for school on six out of nine days. They were not late for school on the day upon which they were brought to school by their foster carers. There were also concerns about the children's physical presentation.

The opposition of the Respondents and the Notice Party
18. The application is opposed by the respondents. The guardian ad litem submits that it is not in the best interest of the children to be placed as they have been, but disagrees with the applicant in relation to the power of the District Judge under s. 47.

The evidence of the Respondents
19. The second respondent avers that she has been looking after her sisters on a full-time basis since the 14th September, 2018 and that what she describes as a '*private arrangement*' was agreed to by the applicant's social workers at that time and was consented to by her mother, M.D. She gave evidence to the court on the 7th December, 2018. The District Judge also heard evidence from nine witnesses. The proceedings were contested. Her ability to care for her sisters was addressed in detail and she submits that the judge had more than sufficient evidence to form the view that it was in her sisters' best interests to be placed with her in the manner provided for. The foster carers reside in a different county and it is averred by the second respondent that by placing her sisters with her during the week, the District Judge has ensured that they can remain in the school they now attend.

20. The point is also made that an appeal has not been brought against the decision of the District Judge and that the interim care order has been extended on a number of occasions, without application having been made to vary or discharge the orders. She confirms that she has applied for custody of her sisters. That application has been adjourned until the 8th July, 2019. The order of the District Judge includes a direction that the applicant conduct an assessment of her as a relative foster carer. This too has not been appealed. Thus the specific directions contained in the judges' order have not been challenged. She states that she was informed by a social worker that she was not going to be assessed pending the outcome of these judicial review proceedings. She also states that it is apparent from the applicant's annual report that the applicant does not in all cases of children in care, necessarily provide an allocated social worker or carry out a fostering assessment in accordance with the regulations.

The evidence of the Notice Party
21. K.N., the notice party, is a qualified social worker and was appointed guardian *ad litem* of the children on the 24th September, 2018. She states that her affidavit is submitted in the childrens' best interests and "*having regard to their expressed wishes*". She acknowledges that the arrangement put in place by the District Judge has both advantages and disadvantages. In her professional opinion, however, the disadvantages outweigh the advantages and she believes the best interests of the children will be prejudiced by the order of the District Judge. The advantages of the arrangement put in place by the District Court are that the children live within their birth family during the school week, they are of similar backgrounds, the children can compare their experiences with their sister and they can continue at their current school. This will not be possible if they are moved to the home of the foster carers. While the children appear to enjoy their foster placement, their expressed wish is to be with the second respondent.

22. The disadvantages which she highlights are that placement with the second respondent is unassessed and unapproved by the applicant. The second respondent is living in one bedroom emergency accommodation. She was subjected to neglectful parenting which, in K.N.'s view, is likely to affect her ability to parent the children. She is also quite young and it is unlikely that she has had the time and space to process her own traumatic upbringing. K.N. notes that repeated late attendance at school was a major problem when the children were in the care of their mother. She believes that the children cannot afford to miss further time from their education. She describes how the children have been playing the second respondent against their foster carers and vice versa, and that the children are in need of stability.

23. K.N. avers that when she asked the children on the 11th January, 2019 about how they liked their foster placement and the activities that they undertook, that *"[one child] repeatedly stressed that they undertook similar activities in the care of the second respondent".* K.N. believes that the children's expectations that the current arrangement will continue indefinitely are likely to be raised and it may thereafter prove difficult, particularly in the case of one of the children, to adjust to full time foster care in the long term. On the 4th January, 2018 the children informed her that they do not like travelling between their placements. K.N. also believes that there are concerns that the second respondent, at times, has not been open with the social work department. K.N. states that the second respondent permits the first respondent access to the children outside of the access sessions supervised by the applicant, contrary to the safety plan agreed by the second respondent with the applicant. This makes it difficult to be confident that the children are safe in her care and also calls into question her willingness to act protectively and to withstand pressure from her mother. K.N. also raises an issue concerning an earlier incident which requires further assessment in the absence of which there are

unknown risks. She is also concerned about a flight risk; that the children will leave for the United Kingdom where several of their siblings are residing. One of the children is reported to have conveyed to her foster mother that "*they would get the boat anyway*".

Notice to admit facts
24. Somewhat unusually in an application of this nature, a notice to admit facts was served by the second respondent on the applicant on the 4th February, 2019. The second respondent sought the admission of two facts from the applicant:-

> *"1. The First Named Respondent has previously placed children (other than the children the subject of the within proceedings) who were in its care under the Child Care Act 1991 with relatives on an interim basis without having completed an assessment of the said relatives pursuant to Article of the [1995 Regulations].*
>
> *2. The First Named Respondent has previously placed children (other than the children the subject of the within proceedings) who were in its care under the Child Care Act 1991 with relatives on an interim basis without having completed an emergency assessment of the said relatives pursuant to Article 6 of the [1995 Regulations]."*

25. A response dated 14th February, 2019 was delivered by the applicant. The applicant outlined the policy followed by the applicant as follows:-

> *"For interim relative placements pursuant to Article 5 of the [1995 Regulations], the interim assessment can be conducted whilst children are placed with relatives. However it is the Applicant's policy to not place children with relatives, either under a voluntary care arrangement or under care orders (interim and/or full), until it has completed section 36 emergency approvals as is set out below. Once these steps are taken, the policy is that approval is granted by the team leader and principal social worker for fostering prior to the children being placed… In any case, it is the Applicant's view that the approval of relative foster care placements and the procedures surrounding same are at the sole discretion of the Applicant."*

The response to the notice to admit facts goes on to state:-

> *"Whilst the full rigours of a full emergency assessment may not be concluded in advance of placing the child, it is the Applicant's policy to carry out certain emergency checks before any child is placed with a relative on an emergency basis (pursuant to Article 6 of the [1995 Regulations]) … In any case, it is the Applicant's view that the approval of emergency relative foster care placements and the procedures surrounding same are at the sole discretion of the Applicant."*

The applicant's submissions
26. Ms. Phelan B.L. on behalf of the applicant submits that in arriving at her decision the District Judge failed to have regard to the provisions of s. 36(1). The Act of 1991 envisages a division of roles in relation to foster placements. The Oireachtas had decided that the role of *overseeing foster placements* should be that of the applicant. Thus, there is a clear distinction between the functions of the District Court under s. 47 and the functions of the applicant under s. 36. It was intended that only the applicant has the power to determine what type of care is to be provided once the children are brought into care.

27. Counsel submits that by virtue of the provisions of s. 36, it is a matter for the applicant to decide if placement with a relative is proper. Emphasis is also placed on the provisions of s. 41 of the Act of 1991, which provide:-

> *"(1) The Minister shall make regulations in relation to the making of arrangements by health boards under section 36 (1) (d) for the care of children and for securing generally the welfare of such children.*
>
> *(2) Without prejudice to the generality of subsection (1), regulations under this section may—*
>
> *(a) fix the conditions under which children may be placed by health boards with relatives;*
>
> *(b) prescribe the form of contract to be entered into by a health board with relatives;*
>
> *(c) provide for the supervision and visiting by a health board of children placed with relatives".*

28. Counsel submits that the District Judge did not take into consideration the factors stipulated in s. 41 when directing that the children be placed with the second named respondent. The second respondent was neither assessed nor approved as a foster carer. Further, following the enactment of s. 41, the Minister introduced 1995 Regulations which provide, *inter alia*, for the promotion of the welfare of children; pre-placement procedures, monitoring of placements, removal of children from placements and for contact between the applicant and relative foster carer. She emphasises the specific and particular nature of these regulations and statutory provisions, and contrasts this position with what is described as the general jurisdiction vested in the court under s. 47.

29. Reliance is placed on *dicta* of McCracken J. in *Eastern Health Board v. McDonnell* [1999] I.R. 174, a decision which will be considered in more detail below, where he stated that:-

> *"… s. 47 of the Act was intended to entrust to the District Court the ultimate care of a child who came within the Act and this jurisdiction was exercisable by the court on its own motion in respect of a child who was already in the care of a health board whether or not there were proceedings before the court and the only reasonable interpretation of s. 47 was that it was intended to give the overall control of children in care to the District Court".*

Particular emphasis is placed on the following extract where McCracken J. stated: -

> *"This is not to say that the District Court should interfere in all day to day decisions made by a health board, but rather that whenever any matters of concern are brought to the attention of the District Court, which could reasonably be considered adversely to affect the welfare of the child, and only in such circumstances, should the District Court interfere".*

30. It is submitted that the first part of the above *dicta* of McCracken J. is qualified to the extent outlined in the last paragraph and that as the assessment and approval of foster placement is a day to day decision of the applicant, the Act does not assign a role or

function to the District Court in relation to such assessment or approval. Indeed, it is submitted that it is difficult to see how the District Court could assess or approve foster placements. Such function is capable only of being carried out by child welfare professionals and the Oireachtas has conferred this power on the applicant. Further, it is submitted that the regulations made by the Minister specify the requirements for the assessment and approval of foster carers.

31. Counsel further submits that the assessment and approval of foster carers is a power clearly delegated under the Act of 1991 to the applicant by virtue of s. 36. Reference is made in this regard to dicta in McDonnell, where McCracken J. stated at p. 183: -

> *"That where the welfare of a citizen and in particular, of a child who was in need was concerned, there would have to be a very clear delegation of powers if that obligation of ensuring that the constitutional guarantees given to the citizen were to be imposed on somebody other than the courts".*

It is submitted that *J.G. v. Staunton and the Health Service Executive* [2014] 1 I.R. 390 is authority for the limitations placed upon a court's powers under s. 47. There it was held that the Oireachtas cannot be taken as having conferred a power to impose personal obligations on third parties simply because there might be a link between the performance of those obligations and the child's general welfare. Hogan J stated that the "purely general language" of both ss. 19 and 47 provide altogether too slender a basis for such a far reaching conclusion in so far as third parties are concerned. Hogan J. continued: -

> *". . . for all the reasons I have already set out with respect to the s. 19 jurisdiction, the generality of the language contained in s. 47 cannot be invoked as to justify positive obligations of this personal kind in respect of persons other than the child itself. If there were to be such a power to impose personal obligations of this kind on parents and others in the interests of the child, very clear and express language would be required for this purpose. To my mind, neither ss. 19 nor 47 of the Act of 1991 enable the District Court to impose conditions of this kind on third parties. If the law here is considered to be unsatisfactory, this would be a matter of policy properly committed by Article 15.2.1° of the Constitution to the exclusive judgment of the Oireachtas".*

32. Counsel submits that s. 36 contains such clearly expressed language. It specifically provides that where the child is in the care of the applicant, subject to s. 36(4):-

> " . . the agency shall provide such care for him, *subject to its control and supervision, in such of the following ways which it considers to be in the best interests."* (emphasis supplied)

33. Reliance is also placed in this regard on the decision of the Supreme Court in *Western Health Board v. K.M*. [2002] 2 I.R. 493 where McGuinness J. stated at p. 511:-

> *"This does not, of course, imply that s. 47 can be looked at apart from its context in the general framework of the Act, or that the widely drawn terms of the section means that the District Court is simply at large in the orders it may make pursuant to the section. Counsel for the respondent is correct in laying stress on the fact that the child in question remains in the care of the applicant pursuant to the order of the District Court… Both the applicant and the court must at all times bear that fact in mind when making any proposals for the future care of the child".*

34. It is submitted that while the District Court is entitled to make orders under s. 17, the applicant cannot make any such order. However, the applicant has the power to determine the type of care to be provided once the children come into care. In this regard, it is submitted that in fulfilling its statutory obligations, the applicant must comply with the provisions of s. 3 of the Act of 1991 to promote the welfare of the child and to take such steps as it considers requisite to identify children who are not receiving adequate care.

35. It is also submitted that in fulfilling its responsibility under the Act of 1991, the applicant has an obligation to ensure that children, who come into its care, are placed with assessed and approved foster carers. It is necessary to ensure that the provisions of the regulations made by the Minister are adhered to and if it were the intention of the Oireachtas that the District Court could place children in foster care, then it is submitted it would not have given the responsibility to the applicant under s. 36. It is argued that it could not have been the intention of the Oireachtas to take children from the care of their parents in exceptional circumstances and place them in unregulated and unapproved placements by allowing the foster placement of the children pursuant to an order made by the District Court under s. 47.

36. The applicant cautions about the introduction of what ae described as two parallel systems for the placement of children in care. A system has been designed by the Oireachtas which takes into account all of the rights of those involved, where prospective foster carers are assessed and approved before children are placed with them. On the other hand, if there is a parallel jurisdiction, the courts may simply direct the children are placed without any assessment as to their suitability for the task of caring for such vulnerable children who have come into the care of the State. In that environment and with that option there would be no control or supervision by the State agency entrusted with responsibility for the care and protection of children.

37. Reliance is also placed on the decision in *V.Q. v. Horgan and The Child and Family Agency* [2016] IEHC 631, where Baker J. stated that precedent emphasised the far reaching and wide jurisdiction under s. 47, subject only to the *proviso* that the court ought not interfere unless matters arise which require consideration of the welfare or interests of the child. Baker J. accepted that the court will not generally make orders more properly characterised as day to day matters, and thus cannot be said to exercise a role by which it interferes with reasonable and prudent decisions made by the Agency or the foster parents. She also observed that a decision of the court may be required in matters where there is disagreement as to whether a particular course of action is in the interests of a child, or where the issue may be one where it is difficult to assess where the bests interest of a child might lie.

Submissions of the second respondent

38. The second respondent, who is supported in argument by the first respondent, contends that the consideration of the Act of 1991 and the Constitution, the District Court is the arbiter of questions affecting the welfare and best interest of children in care. It is submitted that the applicant is inviting this Court to interpret the Act of 1991 in a manner such as to "*insulate*" an area of the applicant's decision making regarding children in care from District Court scrutiny and supervision. Such interpretation, it is submitted, is contrary to the scheme of the Act of 1991, contrary to existing jurisprudence and also contrary to the provisions of Bunreacht na hÉireann.

39. Mr Brady B.L., on behalf of the second respondent, argues that there is a clear statutory framework within which the assessment of relative carers takes place. That framework identifies specific matters which must be considered. A challenge to the findings of the District Judge, it is contended, is properly a matter for appeal or an application to vary or discharge the order, rather than an by way

of application for judicial review. It is further submitted that in order to succeed in this application, the applicant must satisfy this Court that no District Judge could ever lawfully make an order of the type made in this case. The District Judge heard the evidence of eight witnesses, considered the evidence of the second respondent and gave careful consideration to the argument of the applicant, that in the light of the provisions of s. 36, the court did not have power under s. 47 to make the order which was proposed. Precedent establishes that the welfare of children in the care of the applicant remains under the supervision of the District Court pursuant to the provisions of s. 47 of the Act of 1991 and an expansive view has been taken of that jurisdiction. Further, insofar as it is contended that the court exceeded its jurisdiction because the requirements of s. 36 or the 1995 Regulations have not been complied with, it is submitted that those provisions are directed to the applicant and not to the District Court. The jurisdiction of the court is not limited by the responsibilities placed on the applicant under s. 36. Mr. Brady B.L. also places reliance on *Western Health Board v. K.M.* [2001] 1 I.R. 729, as authority for the proposition that the District Court is entitled to make orders that go beyond the requirements of, and are not subject to the limitations imposed by, s. 36. He also places significant emphasis on the decision in *McDonnell*. Further, it is submitted that the applicant, by its own admission does not always comply with all aspects of the 1995 Regulations to the letter. He refers to replies to the replies to the notice to admit facts in this regard.

40. It is further contended that it is important to consider the nature of an order made under s. 17 of the Act of 1991. It is an order of definite duration and cannot exceed 29 days without the consent of the respondents. It is common for interim care order proceedings to come before the District Court on a monthly basis, prior to either an application for an order under to s. 18 to its discharge.

41. Counsel highlights the difference in wording between s. 17 and s. 18. Thus, s. 18(3), which concerns a full care order, obliges the applicant to have control over the child as if it were its parent and to decide the type of care to be provided for the child under s. 36. There is no equivalent provision in s. 17. Therefore, it is submitted that the Oireachtas determined that there would be a "*lesser level of control*" for the applicant in respect of children in interim care and that such "*lesser level of control*" expressly extended to issues concerning placement. A decision relating to the welfare of the child not entrusted to the applicant under s. 17 is determined by agreement with the parents or in the absence of agreement by the court. Thus, it is submitted that in interim care order proceedings, the extent of the applicant's powers regarding placement must be less than the powers that arise under s. 18. An analysis of the wording of s. 36 suggests that the placement of a child with relatives is an "*other suitable arrangement*" within the meaning of s. 36(1)(b) as the definition of foster parent excludes relatives under s. 36(2). It is also contended that insofar as s. 41 of the Act of 1991 authorises the making of regulations by the Minister, it does not impose any specific statutory criteria which must be met by a proposed relative placement. It is contended that it merely gives the Minister power to adopt regulations in respect of placements. The 1995 Regulations were adopted pursuant to the provisions of s. 41. Mr. Brady B.L. highlights the provisions of those regulations, which dealing with the assessment of relatives, at para. 5 (1)(c) states:-

> *"A report in writing of the assessment has been considered by a committee established under sub - article 2 of this article and the committee is satisfied that having regard to the said report and the information furnished to or obtained by the board, pursuant to this sub – article, that the relatives are suitable persons to take care of the child on behalf of the board ..."*

Thus, he contends that there are no formal eligibility criteria imposed for relatives in Regulation 5 of the 1995 Regulations and that the applicant must go through a two – stage internal process. First, an authorised person must conduct an assessment of suitability and secondly the applicants committee must, having considered that report, decide that the relative is a suitable person. While the authorised person in the committee is internal to the applicant, there is a clear division of responsibility in Regulation 5. Regulation 6 deals with emergency assessments. Mr. Brady B.L. points to these provisions indicate that there is a clear statutory framework within which the assessment of relative carers takes place.

Notice party's submissions

42. Counsel for the guardian *ad litem*, Mr. Durcan S.C., contends that the decision in *McDonnell* is clear authority for the proposition that the District Court enjoys the power under s. 47 of the Act of 1991 to make the order which was made in this case. Counsel invited the court to consider the circumstances which gave rise to the decision in *McDonnell*. There, the District Judge had made an order under s. 47 directing the applicant's statutory predecessor, the Health Board, as to how the care order should be implemented. The court's directions called for a plan to be prepared within a specified time and for it to be reviewed by a named consultant psychiatrist. The court also set a date for re-entering the proceedings and made provision for other matters regarding the child. Thus the order made by the District Judge was as follows:-

> *"THE COURT DOTH ORDER in the context of the judgment delivered herein:-*
>
> *1. That the next Social Worker allocated by the Eastern Health Board to this case should not be a new recruit because of the complexity of the case.*
>
> *2. That the Eastern Health Board prepare a care plan for CK (a child) within three months of the 26th March, 199, and that the same be submitted to Dr Tom Moran for a report by him on the proposed child care plan.*
>
> *3. That these proceedings should be re-entered at a date six months hence for consideration of the care plan.*
>
> *4. That the solicitors for the Eastern Health Board shall lodge all reports with the registrar of the court at least one working week in advance of the said adjourned hearing.*
>
> *5. That pending receipt of the care plan and of Dr Moran's report the following directions are given concerning the child's care:-*
>
> *(i) There should be no plan to change the foster parents without the prior leave of the court. In the event of an emergency change of foster placement being required then the solicitors for the Eastern Health Board shall re-enter these proceedings in court for the court's direction on such change either immediately before or after such change.*
>
> *(ii) There shall be no change of the social worker assigned to this child by the Eastern Health Board without notice to this court having regard to Dr Moran's specific concerns on this issue.*
>
> *(iii) The first named respondent's access to this child shall be supervised by the Eastern Health Board and conducted on Eastern Health Board premises...*

(iv) That the second named respondent have a regime of access which shall be so structured with a view to enable him to enjoy overnight access at his home.

(v) That CK not be sent for any therapy without prior reference by the Eastern Health Board to Dr Tom Moran and the leave of the Court."

43. Mr. Durcan S.C. highlights the specific and detailed nature of the order of the court and directions made in *McDonnell*. The issue, as described by McCracken J., was whether the respondent acted intra vires in giving such directions. He stated:-

> *"This can be reduced to the even more basic issue as to whether, under the Child Care Act, 1991, the District Court can retain or impose some form of control or conditions with regard to the care of a child which restrict the operation of the applicant after a child care order has been made."*

Mr. Durcan S.C. submits that there are analogies to be drawn between McDonnell and the case under consideration.

44. In *McDonnell*, McCracken J. observed that the applicant's argument was that the scheme of the Act was clear in that it gives the District Court power to give directions with regard to the welfare of a child in emergency or interim situations under s. 13 and s. 17, but that once a permanent care order has been made under s. 18, the child is then committed to the care of the Health Board and the powers of the court under the Act are spent. McCracken J., observing that the applicant had highlighted the specific wording of ss. 18(2) and (3) and s. 36, commented, at p. 182:-

> *"Furthermore, the applicant points to the various regulations relating to the placing of children as set out in Statutory Instruments 259 of 1995, 260 of 1995 and 261 of 1995, which are commonly known as the Child Care Regulations, 1995, and which provide that where a child is placed in residential care, foster care or care of relatives, a care plan must be prepared by the health board, thereby emphasising its jurisdiction over the child. The applicant also argues that the practical view should be taken in the interpretation of the Act, in that administratively, there could be serious problems caused if more than one body is responsible for the detailed and day to day welfare of the child once the child is in care".*

Mr. Durcan S.C. points to what he described as the stark similarities between the arguments made by the Health Board in that case and the arguments advanced by the applicant in this case.

45. McCracken J. concluded that the court must interpret the Acts in the light of our Constitution, including the provisions of Article 40 thereof. This is echoed in the arguments made before this court. Counsel highlights that since the adoption of Article 42A of the Constitution, the child's position under the Constitution has been strengthened further in that the courts must now have due regard for the best interests of the child as a paramount consideration in child welfare cases.

46. In *McDonnell*, McCracken J. stated at p. 183: -

> *"In interpreting a statute, the court must bear in mind this constitutional guarantee, and should interpret a statute in accordance with the Constitution and on the assumption that it complies with the Constitution. It is the function of the courts, and not of local authorities or health boards, to ensure that the constitutional guarantees given to an individual are upheld. Therefore, where the welfare of a citizen, and in particular of a child who is in need, is concerned, there would have to be a very clear delegation of powers if the obligation is to be imposed upon somebody other than the courts.*
>
> *In any event, there are two particular provisions of the Act which satisfy me that the respondent was entitled to give the directions which he purported to give in this case, and indeed is entitled to enforce those directions".*

McCracken J. identified s. 24, as containing the general provision conferring jurisdiction on the court. It clearly stipulates that the court shall have regard to the welfare of the child as the first and paramount consideration. This is not qualified in any way. It is a function which cannot be delegated to the Health Board. This is so notwithstanding the fact that the Health Board is under the same regime pursuant to s. 3(2), which confirms that the Health Board, in carrying out its functions, must also have regard primarily to the welfare of the child. Further, s. 47 of the Act, which was described by McCracken J. as conferring an extremely wide jurisdiction. Unlike s. 24, it is not limited to cases where there are proceedings before the court, rather to situations where the child is already in the care of the Health Board. It is a jurisdiction which may be exercised by the court on its own motion or on the application of any person.

47. Of fundamental importance and as applicable in this case, according to counsel for the notice party and the respondents, is that McCracken J. accepted that:-

> *"… 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.*

48. Counsel for both the notice party and the respondents also rely the decision of the Supreme Court in *Western Health Board v. K.M.*, and upon *dicta* of Baker J. in *V.Q. v. Judge Horgan* [2016] IEHC 631 where at para. 29, she stated:-

> *"Section 47 is 'couched in the widest possible terms', and a restrictive interpretation of the extent of that power is not justified in the scheme of the legislation. As Finnegan J. pointed out in Western Health Board v. K.M. [2001] 1 IR 729, there is no qualification on the statutory power, and the section empowers the District Court to make directions and to do whatever it deems appropriate to achieve the policy of the Act as a whole".*

Thus, it is submitted that if the power of the court under s. 47 was wide enough to be engaged in relation to the welfare of the child concerning issues such as dental treatment, then a *fortiori*, the power under s. 47 makes a stronger case in the context of the placement of the child with foster parents.

Decision

49. There can be little doubt but that all parties to these proceedings have a desire to act in the best interests of the children. The issue for determination is whether the District Judge has power under the provisions of s. 47 of the Act of 1991 to make an order in relation to the initial placement of the children; or whether by directing that the children be placed, at certain times, in the care of their older sister, the court impermissibly sought to exercise a function reserved to the applicant under statute and thereby

trespassed on the powers, obligations and responsibilities conferred on the applicant under and by virtue of the provisions of the Act of 1991, particularly ss. 36, 39 and 41 and the relevant regulations made thereunder.

50. Central to this debate is the manner in which the courts heretofore have interpreted the powers conferred by s. 47 of the Act of 1991; and at the heart of this discussion are the decisions of McCracken J. in *McDonnell*, Baker J. in *V.Q.*, and importantly the decision of the Supreme Court in *Western Health Board v. K.M.*. In my view this must be the starting point in the analysis.

51. In *K.M.*, the case came before the High Court by way of a case stated pursuant to the provisions of s. 52(1) of the Courts Supplemental Provisions Act, 1961. The questions for the consideration were: -

> *"In relation to a child who is in the care of a Health Board pursuant to s. 18 of the Child Care Act, 1991,*
>
> > *(i) Can the Health Board lawfully place the child with relatives or foster parents outside the State pursuant to the provisions of s. 36 of the said Act?*
> >
> > *(ii) Can [the District Court] lawfully direct the placement of a child with relatives or foster parents outside the State pursuant to the provisions of s. 47 of the said Act?*
> >
> > *(iii) If the answer to question (i) and/or (ii) is 'yes', can the period for which the child is so placed be limited?"*

52. In the High Court Finnegan J, referring to s. 47, stated at p. 734: -

> *"… this section is couched in the widest possible terms and I can find nothing in the Act of 1991 insofar as the same deals with the powers, functions and duties of the District Court to suggest that a restrictive interpretation of s. 47 is appropriate. Unlike s. 36 there is no qualification requiring control and supervision in s. 47. It seems to me therefore that s. 47 empowers the District Court to do whatever it deems appropriate to achieve the policy of the Act of 1991 as a whole and the objective set out in s. 24 of the Act of 1991. Accordingly, I find that the District Court can lawfully direct the placement of a child with relatives or foster parents outside the State pursuant to the provisions of s. 47 of the Act of 1991".*

The Supreme Court upheld the decision of Finnegan J. and confirmed that the District Court had the power under s. 47 of the Act of 1991, to direct the placement of a child outside the jurisdiction, with relatives or foster parents.

53. McGuinness J., who delivered the decision of the court, accepted the respondents' submission that when construing the provisions of the Act as a whole, the court should approach it in a purposive manner and the Act should be construed as widely, liberally and as fairly as can be done. She continued, at p. 511, however, as follows: -

> *"This does not, of course, imply that s. 47 can be looked at apart from its context in the general framework of the Act, or that the widely drawn terms of the section means that the District Court is simply at large in the orders it may make pursuant to the section. Counsel for the respondent is correct in laying stress on the fact that the child in question remains in the care of the applicant pursuant to the order of the District Court made on the 22nd June, 1997. Both the applicant and the court must at all times bear that fact in mind when making any proposals for the future care of the child".*

54. Counsel for the applicant, Ms. Phelan B.L., describes this as perhaps the first step in the recalibration of the interpretation of s. 47 as expounded by McCracken J. in *McDonnell*. This recalibration is said to be further reflected in dicta of Baker J. in V.Q., where she stated: -

> *"The case law has emphasised the far reaching and wide jurisdiction under s. 47, by which is vested in the District Court the power to make all decisions relating to the care and welfare of a child, subject only to the proviso that the court ought not interfere unless matters arise which require consideration of the welfare or interests of the child. The court will not generally make orders more properly characterised as day to day matters and thus cannot be said to exercise a role by which it interferes with reasonable and prudent decisions made by the CFA or the foster parents. The decision of the court may be required in matters where there is disagreement as to whether a particular course of action is in the interest of a child, or where the issue is one where it is difficult to assess where the best interest of a child might lie".*

Having considered the authorities, I do not believe that the extracts referred to or the decisions in the cases to which I have referred detract from what I consider to be the implied, if not express, endorsement by the Supreme Court of *dicta* of McCracken J. in *McDonnell*, where he stated at p. 184: -

> *"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. This is not to say that the District Court should interfere in all day to day decisions made by a health board, but rather that whenever any matters of concern are brought to the attention of the District Court, which could reasonably be considered adversely to affect the welfare of the child, and only in such circumstances, should the District Court interfere. Having read the decision of the respondent in both the cases before me, I am quite satisfied that he had ample grounds upon which to intervene or impose conditions on the making of the care order, although that is not strictly the question before me".*

55. The case came before McCracken J. by way of an application for judicial review seeking to quash the orders of the District Judge and as noted above, these were very specific orders. In the Supreme Court in *K.M.,* McGuinness J. stated that although the decision of McCracken J. was not binding upon the Supreme Court, it required to be treated with considerable respect. She stated:-

> *"A very similar approach to the construction of s. 47 was taken by the trial judge in the judgment now under appeal. I would in the main share the views of both judges as to the construction of the section".*

56. The Supreme Court also explained that in Ireland, children and parents enjoy constitutional rights and that it is for the courts and not the Health Board (now the Child and Family Agency) to protect and enforce the constitutional rights of the children in their care. She continued:-

> *"This conveniently can be done through the powers given in s. 47 of the Act. In my view, these powers include a power to direct or permit the placement of a child outside the State where the evidence before the court indicates that such a placement is truly in the best interests of the child".*

As it has thus clearly been established that s. 47 of the Act of 1991 empowers the District Court to direct and permit the placement of a child outside the jurisdiction, then, it follows, *a fortiori*, that the court must have the power under s. 47 to direct and permit the placement of a child within the jurisdiction. This is particularly so in circumstances where the court will be better positioned to oversee the implementation and effectiveness of such order than may have been the case on the facts of *K.M.*.

57. In my view, however, it is evident from the Supreme Court's decision that in the exercise of this power, an important qualification has been placed upon the manner in which it may be exercised. McGuinness J. clearly observed that such an order should be made rarely and with considerable caution.

58. Given that the s. 47 order made by the District Court in this case, concerns directions relating to the placement of a child, it is my belief that this is an order of the type which must be made *rarely and with considerable caution*. There is good reason for this. The applicant is an independent statutory body which, in the context of a case such as this, provides a service of a specialist and expert nature.

59. I accept, as a general proposition, counsel for the notice party's submission that in the exercise of its power under s. 47 of the Act of 1991, on the facts of a case such as this and in relation to the placement of a child in the care of a relative, the court ought to have regard to the framework of the Act and the regulations made thereunder. That is not to say that the court is restricted or circumscribed in the exercise of its powers under s. 47 by the conditions, provisions or restrictions which may apply to the applicant when exercising its relevant powers, particularly those placed on the applicant by virtue of the provisions of s. 36, or the regulations made pursuant to the Act.

60. As a matter of principle, therefore, I conclude that in the exercise of its jurisdiction under s.47, in relation to the placement of a child or children, due consideration ought to be given by the court to the recommendations, observations or decisions made by the applicant regarding the placement of that child or those children.

61. Thus, as a matter of general principle it follows that if the court making such an order should, without good reason, fail to take into account (or disregard) the considerations referred to in s. 36, this may result in an order thus made being vulnerable to challenge. This is not because the court does not have the power to make such an order; rather because of the manner in which the power was or may have been exercised. That this is so is but a reflection of the requirement placed on the court, when exercising such power, to have regard to the best interests of the child and to have regard to the framework of the Act. It would also appear to be an acknowledgement and recognition of the type of care and caution which, I believe, the Supreme Court had in mind, when giving guidance as to when that power should be exercised. This is particularly pertinent in a case such as this. I find it difficult to see how the approach by a court under s. 47 in relation to the placement of a child could be regarded as careful or cautious, if it were not to have due regard for the role and function of the applicant and any conclusions or recommendations made by it in relation to the child or children's placement.

62. Rather than being a vires issue, I believe that the debate in this case is more properly to be addressed and considered in the context of the obligation placed upon a court when exercising a power or discretion under statute to take into account relevant considerations, or to exclude irrelevant ones. On such analysis it seems that the area of the dispute between the parties and in particular between the applicant and the notice party narrows considerably.

63. In summary, in my view the District Judge had and has the power to make the order which she made under s. 47. The manner in which she exercised or purported to exercise that power is not the subject of this challenge. Therefore, I must refuse the application.

64. Finally, in the circumstances, it is not necessary for the court to consider the alternative argument of the respondents that it should exercise its discretion to refuse the order given the availability of an appeal. I make no finding on this.