Neutral Citation [2013] IEHC 268

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2012/915JR

Between/

L.C.

Applicant

-and-

JUDGE HUGH O'DONNELL

Respondent

-and-

V.T.

Notice Party

Judgment of Ms. Justice Iseult O'Malley delivered the 18th June. 2013

Introduction

1. By order of the High Court (Peart J.) made on the 5th November, 2012 the applicant was granted leave to seek various reliefs in respect of orders made by the respondent District Judge on the 26th October, 2012 in family law proceedings between the applicant and the notice party. The notice party is the former partner of the applicant and the mother of two of his children.

2. The effects of the impugned orders were a) a variation downwards in the amount of maintenance payable by the applicant for his children, b) a refusal to vary the access order then in place and c) a refusal to deal with a summons brought by the applicant alleging breach of that access order. Peart J. also granted the applicant a stay in respect of an order made on the same occasion that he transfer his car and documents relating to it to the notice party. The purpose of this latter order had been to enable the notice party to sell the car in diminution of the arrears of maintenance that had accrued.

3. The complaint made by the applicant is, essentially, that the orders were made in the absence of sworn testimony, despite his wish to be heard.

4. The proceedings in question have been before the District Court since 2005. The parties have joint custody of the two children from their relationship. The children live with their mother and access is, apparently, currently available to the applicant every Thursday with overnight stays every second weekend but, as will be seen, this arrangement is not necessarily working well. It is clear from the affidavits that maintenance for the children is an ongoing source of contention. The history of the case over the years discloses a number of enforcement applications against the applicant and a number of bench warrants to compel his attendance in court. On the 9th September, 2011 he was committed to prison for three days for contempt in respect of the build-up of arrears of maintenance. The applicant has maintained that he has been unemployed since the failure of his business in 2007 and that he cannot comply with the various orders made against him. It is the view of the notice party, which appears to be shared to some extent by the various judges of the District and Circuit court who have dealt with the matter, that the applicant does have a source of income which he is concealing from the court.

5. The affidavits of both the applicant and the notice party go into the history of the case in considerable detail, which will not be repeated in full here.

Background to the hearing on the 26th October, 2012

6. An interim order in force relating to maintenance, made by the respondent District Judge on the 13th June, 2011, provided that the applicant was to pay €200 per week, being €100 for each child or, in the alternative, a lump sum of €10,000. The option was given in circumstances where the applicant's solicitor had informed the court that the applicant had available to him the sum of €30,000 from the sale of a property. The applicant says that his solicitor had misunderstood his instructions and he had in fact no money. The Statement of Grounds in these proceedings states that he "did not have an opportunity" to instruct his solicitor to that effect until after the hearing had been adjourned, but the applicant avers in his affidavit that he did so instruct him and that the respondent was so informed before making the order. The notice party says that the solicitor at no stage told the court that the figure was incorrect.

7. The applicant appealed that order to the Circuit Court. Before the appeal came on, at a hearing in the District Court in September, 2011, the applicant was imprisoned for three days for contempt. The applicant makes various complaints in relation to this order. However, it was not challenged, either at the time or in these proceedings and I do not therefore propose to deal with it.

8. The appeal in relation to the maintenance order was dealt with on the 2nd March, 2012. The applicant gave evidence and was cross-examined. It appears that certain bank statements were put to him. In brief, these related to an account in the name of an adult son and it was admitted that he had access to funds in it. Having heard the applicant, the Circuit Court Judge did not require to hear evidence from the notice party and affirmed the District Court order.

9. Also on the 13th June, 2011an order for discovery was made against the applicant in relation to his alleged employment with a particular company. The notice party had put in evidence a business card of the applicant's with the name of this company on it. The applicant has averred that he had been engaged by the business on a part-time, "short trial period" and was to be paid commission on goods sold. He says that he did not make any sales and was not paid. That discovery order has, apparently, never been complied with. The applicant says that he cannot comply because he has no documents.

The hearing on the 26th October. 2012
10. By the 26th October, 2012 the maintenance arrears had reached the figure of €12,040. On that date the following applications were before the court:

a) The notice party's summons to enforce maintenance.

b) The applicant's application to vary maintenance.

c) The applicant's application to vary access.

d) The applicant's summons against the notice party for breach of access.

11. According to the applicant, his solicitor made a preliminary submission in relation to maintenance to the effect that, after the Circuit Court hearing, there was no record of an ongoing application for maintenance. As this argument has not been pursued in these proceedings, I do not intend to deal with it in any detail. For the purpose of this case it is sufficient to say that the applicant alleges that the response of the respondent was to say that there was an order in being and he wanted the applicant's proposals. When told by the applicant's solicitor that the applicant's only income was the Jobseeker's Allowance, the respondent is alleged to have said *"We all know he is working".* It is further alleged that the respondent said that he would give the applicant five minutes and that if he did not make a proper proposal he would be going straight to Mountjoy. The notice party says that the respondent simply said that if the applicant did not make proposals he was facing jail. The matter was then let stand in the list.

12. When the case was called again later in the day the applicant, through his solicitor, offered to sell his car and give the notice party half of the proceeds. The car had been valued at €5,000 in March of that year. The applicant says that he made this offer because he was in fear of being sent to prison again without an opportunity to give evidence as to his circumstances. The respondent then said "No, he will give her the entire proceeds of sale. He will give her the car and registration documents and everything necessary for the sale within a week". It is averred that his solicitor said that the applicant was keen to give evidence on the point, and that the respondent did not reply to this. The solicitor told the respondent that the applicant was in receipt of Jobseeker's Allowance in the amount of €188 per week. He said that the work the applicant had been doing was only "to help a friend". The solicitor also told the court that the applicant had paid €20,000 to a friend, apparently in respect of what was said to be "living expenses". The respondent said that he was making an order for €50 per week in respect of the children and €50 per week towards the arrears.

13. It must be noted here that this order represented a 50% reduction from the previous figure set in the District Court and affirmed on appeal by the Circuit Court.

14. The next issue to be dealt with was the applicant's summons to vary access. The applicant's evidence in this regard is somewhat confusing. He does not say what the desired variation was. He says that his solicitor explained to the respondent that he had been unable to exercise access for the previous five weeks because he could not afford to tax or insure his car. The notice party's representative said that it had been a considerably longer period than five weeks.

15. The solicitor then went on to give the respondent further details relating to the applicant's means, saying that he had not received any social welfare for that period of five weeks because he had been evicted from his apartment and had moved into the home of his elderly mother. Asked why the money could not be paid into the applicant's bank account, the solicitor said that he did not have a bank account. He (the solicitor) said that the applicant was "keen to regularise the position regarding access" until "proper" access could be exercised again. It is not explained what was meant by this or what the applicant was hoping to achieve.

16. The respondent inquired what the current access was and, having been reminded of the arrangement mentioned above, said that he would not make any change.

17. The question of breach of access was then raised. The applicant's solicitor said that there had been a number of breaches on the part of the notice party. The affidavit gives no detail of these alleged breaches. The respondent pointed out that the applicant was not exercising access. The solicitor said that he would like the respondent to hear evidence but the latter said that he did not want to hear any more lies.

The applicant's case
18. The applicant makes the case that all of the impugned orders of the 26th October, 2012 were made without hearing sworn testimony and without, therefore, a proper examination of the facts. He says that the procedure adopted breached the requirements of natural justice.

19. The applicant further says that the respondent did not allow him to give evidence that his failure to comply with the order of the 13th June, 2011 was due to inability rather than wilful refusal or culpable neglect. There is also an argument that the respondent failed to apply the correct onus of proof, in that he should have required the notice party to have proved beyond reasonable doubt that non-compliance with the order was indeed due to refusal or neglect. He says that the procedure adopted breached the requirements of natural justice.

20. The applicant has averred that the respondent has only once allowed him to give sworn evidence, several years ago. He asserts that the respondent is biased against him.

The notice party's case
21. The notice party takes issue with many of the factual assertions made by the applicant, whether relating to his personal and financial circumstances or to events in court. She avers, for example, that the imprisonment for contempt in September, 2011 was on foot of a statement by the applicant that he would not, rather than could not, pay maintenance. She points to alleged expenditure by him, including foreign travel, living in a hotel and the purchase of the car, while he was not paying maintenance.

22. The notice party specifically avers that the applicant has given evidence in many appearances before the respondent and has had a fair hearing in front of him. She makes the point that the applicant was awarded joint custody and guardianship by the respondent. On another occasion, she says, the respondent refused her application to discharge the order in relation to access with her son and ordered that the applicant was to continue having access.

Discussion and conclusions
23. The parties did not refer to any authorities in argument.

24. Family law cases, particularly where the interests of children are concerned, are rarely directly analogous to other forms of litigation. A particular feature is that the case will, in general, take the form of a sequence or process of hearings, adjournments and interim orders leading to a final order or orders, rather than one unitary hearing.

25. In *K.A. v. Health Service Executive*, [2012] IEHC 288, this court dealt with certain principles applicable to the extension of an interim care order in the District Court. That was an application under Article 40.4 of the Constitution where the basis for complaint was that the learned District Judge had extended the order, against the opposition of the children's mother, without hearing up-to-date evidence. The most significant feature of the case was that it concerned both the constitutional presumption that the welfare of a child was to be found within the family and the legislative requirement that the court be satisfied that specified circumstances existed necessitating the making of an order, finding that that presumption had been displaced, for the protection of the child. I considered that, having regard to the nature of the rights at issue, it was in general necessary for the District Judge to be given evidential material justifying the renewal of the order.

26. The instant case is not concerned with fundamental rights of the same order. The main issue giving rise to the applicant's dissatisfaction is his liability to pay maintenance for his children. The efforts on behalf of the notice party to enforce the orders for maintenance cannot be seen as in any sense an interference with any constitutional right of the applicant. However, bearing that important distinction in mind, I wish to refer to certain observations in the judgment in K.A. of which the following appear to be relevant to this case:

- Courts normally act on evidence.

- The party applying for an order must establish grounds for the making of the order.

- Where there is consent it will not normally be necessary to hear evidence.

- There is a continuity attaching to cases of this nature and it is not necessary to prove again matters that have previously been established. The Judge is entitled to rely on his or her memory of the case and on reminders offered by solicitor or counsel.

- Where new information is offered, relevant to the order proposed to be made, and it is not accepted by the other party, it should in the normal course of events be given by way of sworn evidence.

27. There have been over 20 separate applications in these proceedings, most of which were listed on several occasions. The vast majority of these hearings were before the respondent. There is a conflict between the parties as to whether the applicant had ever given evidence, apart from the occasion early on when he was awarded joint custody and guardianship but I find it difficult to believe that that was the only time over a period of seven years before the court. The respondent had, on previous occasions, been offered evidence by the notice party that the applicant had an income or resources available to him and, as he was entitled to do, had accepted that evidence. He did not accept the explanations and/or evidence given on behalf of the applicant. He was further entitled to take into account the behaviour of the applicant in the past, including the committal for contempt and the bench warrants issued for him.

28. When the matter came before the respondent on the 26th October, 2012, after the unsuccessful appeal, the respondent was, clearly, entitled to take into account his knowledge of the case. The question that arises is whether he should have acceded to the request by the applicant's solicitor that he should give evidence.

29. On the earlier occasion when the respondent had been told that the applicant had available to him the sum of €30,000 he had given him the option of a lump sum payment of €10,000 or €200 per week. That order had been appealed and the applicant's evidence on the appeal had been disbelieved. The order that the respondent now made was entirely consistent with the earlier order, in that a car to the value of €5,000 was to be given to the notice party and the weekly maintenance figure was correspondingly to be reduced to, in total, €100 per week.

30. In these circumstances I can find no breach of the applicant's rights in the approach of the respondent to the issue of maintenance. The applicant was not entitled to run the hearing as a further appeal against findings made against him in two courts.

31. If I am wrong in this I would nonetheless, in the exercise of my discretion, hold that the applicant is debarred from relief. This is partly because of the applicant's own behaviour in the manner in which he has met the case in the courts below. He remains in breach of his obligation to make discovery in relation to his employment, whatever the nature of that employment was. If he has no documents, that does not relieve him from the obligation to swear an affidavit.

32. More to the point, perhaps, is the fact that this application has not been properly thought through. The impugned order varied an order of the Circuit court directing the applicant to pay €200 per week. To quash the District Court order would leave the Circuit Court order in full force. This is not, I think, what the objective was in bringing these proceedings.

33. As far as the orders relating to access are concerned, the applicant's affidavit does not disclose what his proposed evidence would have been or what he was seeking to achieve by way of variation. He was in a position where, on his own account, he had not exercised his right of access for five weeks because, according to him, he could not put his car on the road (although all of the parties live in areas served by public transport). He does not explain in what way he can assert that the notice party was in breach. In those circumstances I do not consider that he has established a right to any relief arising from the fact that he did not give evidence in the District Court.

34. I therefore refuse the reliefs sought.