Neutral Citation Number: [2011] IEHC 1

THE HIGH COURT

2011 33 P

IN THE MATTER OF BABY AB

BETWEEN

CHILDREN'S UNIVERSITY HOSPITAL, TEMPLE STREET

PLAINTIFF

AND

CD AND EF

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 12th January, 2011

1. In the early hours of the morning of 27th December, 2010, following a hearing in my house I made an order sanctioning the administration of a blood transfusion to a three month old baby who was desperately ill and who, I was told, urgently required that transfusion within a matter of hours. Although for the reasons I shall now shortly outline, a public hearing of the matter was perforce impossible in the circumstances and even though I also made an order pursuant to s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008 ("the 2008 Act") prohibiting the publication or broadcast of any matter that would be likely to identify the baby in question, at the conclusion of the hearing, I nonetheless indicated that I proposed to deliver a judgment in open court. The purpose of this judgment, therefore, is not only to give written reasons for my decision , but also to fulfil insofar as it is possible to do so, the requirement of Article 34.1 of the Constitution that justice be administered in public "save in such special and limited cases as may be prescribed by law." While it was not possible to hold the hearing in open court, the delivery of this judgment will perhaps mitigate the effect of this somewhat by providing a record of what transpired.

2. In line with the order which I made under s. 27 of the 2008 Act, I propose to use random letters to describe the baby ("Baby AB") and the parents ("CD and EF") to ensure that his identity is not thereby disclosed.

3. AB was born in September 2010, but his twin sister sadly did not survive. The baby was very unwell by reason of acute bronchiolitis on 25th December, 2010, and his condition deteriorated further during the course of the day. At one point AB stopped breathing and had to be resuscitated. He also had a hypoxemic episode (*i.e.,* a period of low oxygenation), an incident with potentially ominous implications,

4. AB was transferred from another hospital to the plaintiff hospital in the early hours of 26th December. By the early evening of 26th December the situation had become critical. While AB suffers in any event from low haemoglobin, this level was dropping further by reason of his illness and by reason of necessary blood testing that was deemed clinically essential for treatment optimisation. The fact that the haemoglobin was dropping further significantly hindered the capacity of his body to deliver oxygen to his vital organs and to maintain normal neurological functions. In that regard, evidence was given to the effect that AB's liver was somewhat distended .

5. The usual trigger for a blood transfusion is where the haemoglobin levels drop below 8.0 g/dl. By 9pm on 26th December, it was clear that the haemoglobin level was on a downward spiral and had reached the point where a transfusion was now absolutely necessary. While AB's parents, CD and EF, were clearly anxious for his welfare and sought the very best medical care, as committed Jehovah Witnesses, they were steadfast in their opposition to this procedure. They had, however, consented to the use of certain blood products earlier that day which had been administered to AB. By this point, however, it was clear that this in itself would not be sufficient and that a transfusion was now necessary.

6. Faced with this objection from the parents, the Hospital resolved that it should then apply to this Court for an order which sanctioned the transfusion. Contact was made with the Duty Registrar who in turn made contact with me shortly after 10pm on 26th December. It was agreed that an emergency hearing would be held in my own house at midnight or as soon thereafter as the parties could assemble.

7. In the event, the hearing commenced shortly before 1am on the morning of 27th December and concluded at about 2.30am. The Hospital was legally represented by solicitors and counsel and the parents appeared in person.

8. At the hearing counsel for the Hospital, Mr. McEnroy S.C., stressed the urgency of the matter and why a transfusion was absolutely necessary in the circumstances. While the parents were present, it was simply not possible in the circumstances for them to be legally represented or to have members of Hospital Liaison Committee of the Jehovah Witnesses present. The treating consultant, Dr. Kevin Carson, who is Clinical Director of Intensive Care at the plaintiff hospital, was sworn and gave evidence detailing the medical history to date. He confirmed that AB's life was in danger . He specifically confirmed in answer to a direct question from me that there were no medical alternatives to a transfusion and that the issue had to be dealt with immediately within a matter of hours.

9. As already indicated, the parents, CD and EF, were also present. They said that it had not been possible to obtain professional representation given the time constraints. They are the parents of a large family and it appears that this Court has also sanctioned a blood transfusion in respect of another child of theirs, so that they were to some extent familiar with the issues which would arise in such an application. While they wanted the best for their child and were delighted with the quality of the medical care which he had received, they explained that given the tenets of their religious faith they could not possibly consent to a blood transfusion. They also said that they understood their religious objections would be overridden by this Court and they seemed resigned to this fact.

10. There is no doubt as to the sincerity of the religious beliefs of the parents. They struck me as wholesome and upright parents who were most anxious for the welfare of their child, yet steadfast in their own religious beliefs. An abhorrence of the administration of a blood transfusion is integral to those beliefs. Mr. McEnroy S.C. for the Hospital very fairly acknowledged that it would be unreasonable to ask the parents to compromise their strongly held religious beliefs and it was for this reason that this application was thus made.

11. At the conclusion of the hearing I indicated that I would grant the orders sought and deliver my reasons in open court.

12. Before addressing the questions dealing with religious freedom and the welfare of AB, I propose first to address the reasons why it was not possible to have the hearing in open court, together with the circumstances in which I came to make an order under s. 27 of the 2008 Act.

Section 45 of the Courts (Supplemental Provisions) Act 1961 - hearing otherwise the in public
13. While Article 34.1 of the Constitution requires that justice "shall be administered in public", save "in such special and limited cases as may be prescribed by law", one such exception is provided by s. 45(1) of the Courts (Supplemental Provisions) Act 1961 ("the 1961 Act") which provides that:-

> "45.—(1) Justice may be administered otherwise than in public in any of the following cases:
> (a) applications of an urgent nature for relief by way of habeas corpus, bail, prohibition or injunction;
>
> (b) matrimonial causes and matters;
>
> (c) lunacy and minor matters;
>
> (d) proceedings involving the disclosure of a secret manufacturing process."

14. This application was undoubtedly urgent and relief by way of injunction was sought, so that the matter came within s. 45(1)(a) of the 1961 Act. Since the issue concerned a minor, it also came within s. 45(1)(c). Given the time constraints, the time of year and the fact that the application had to be heard in the early hours of the morning, I concluded that the most practicable venue for the hearing was in my own private residence. In passing, I should also add that a further consideration in that regard was that heavy snowfalls had blanketed the Dublin region, making travel at that time very difficult.

15. The hearing which took place in the early morning of 27th December was perforce heard otherwise than in public, since as Walsh J. put it in *Re R Ltd.* [1989] I.R. 126 at 134, "the doors of the court" were not open to the public. While the hearing was otherwise then in public, this was authorised by s. 45(1)(a) and s. 45(1)(c) of the 1961 Act. But while this was necessary and unavoidable, I believe that - not least given the importance of the matter - it is desirable in the public interest that the primary command of Article 34.1 regarding the public administration of justice be nonetheless observed insofar as it is now possible to do so and that by delivering a judgment in open court the public can at least thereby become aware of the existence of these proceedings and their outcome.

Section 27 of the Civil Law (Miscellaneous Provisions) Act 2008
16. Section 27(1) of the 2008 Act provides that:-

> "27.— (1) Where in any civil proceedings (including such proceedings on appeal) a relevant person has a medical condition, an application may be made to the court in which the proceedings have been brought by any party to the proceedings for an order under this section prohibiting the publication or broadcast of any matter relating to the proceedings which would, or would be likely to, identify the relevant person as a person having that condition."

17. Section 27(2) states that an application for an order under this section may be made at any stage of the proceedings. However, s. 27(3) provides:-

> "(3) The court shall grant an order under this section only if it is satisfied that—
> (a) the relevant person concerned has a medical condition,
>
> (b) his or her identification as a person with that condition would be likely to cause undue stress to him or her, and
>
> (c) the order would not be prejudicial to the interests of justice."

18. The phrase "relevant person" is defined by s. 27(11) as meaning:

> "(a) a party to the proceedings, or
>
> (b) a person called or proposed to be called to give evidence in the proceedings."

19. An order under s. 27 (1) of the 2008 Act was sought by the Hospital, since, of course, the non-identification of patients is a key feature of the confidentiality which is integral to the medical profession. CD and EF are, of course, parties to the proceedings and at the hearing before me indicated that they were - understandably - most anxious that neither they nor their family would be personally identified. Baby AB plainly had a "medical condition" and I was satisfied that his non- identification would not be prejudicial to the interests of justice.

20. It was on that basis that I made the order under s. 27(1). This presents one potentially difficult issue of interpretation which would have benefited from further argument had the time and opportunity been available which, however, was simply not the case. While this is not completely satisfactory, I must nonetheless now perforce address this question.

21. As we have seen, s. 27(3) provides that the relevant person must have the medical condition and that "his or her identification as a person with that condition would be likely to cause undue stress to him or her". In the present case, if one views s. 27(3) literally, then the only relevant person for present purposes is Baby AB. It is true that his parents are "relevant persons" within the meaning of s. 27(11) insofar as they were potential witnesses, but, of course, they did not have the medical condition which would justify the making of the order. And while Baby AB did have the relevant medical condition, given that his very young age he naturally did not have any consciousness or capacity in relation to the proceedings. He thus remained mercifully oblivious to the unfolding medical emergency. Again, viewed literally, it could not be said that even if Baby AB's identity were to be revealed, this would cause "undue

stress" to him within the meaning of s. 27(3)(b), precisely because he could not have had any consciousness of this fact.

22. If this is correct, then it would mean that the court would be powerless to make an order under s. 27 of the 2008 Act where - as here - the subject-matter of the application was a baby or a very young child, even though the identification of the child might cause immense distress to the parents or other close relatives. It would likewise mean that no order could be made under s. 27 where the proceedings concerned a patient who was unconscious or in a coma. I find it difficult to believe that the Oireachtas intended to create such an anomalous state of affairs.

23. It is clear that the literal rule remains the primary rule of interpretation: see, e.g., But given that s. 27 is essentially a remedial provision designed to complement the traditional concepts of medical confidentiality in a legal setting, it can be interpreted "as widely and liberally as can fairly be done": see *Bank of Ireland v. Purcell* [1989] I.R. 327 at 333, per Walsh J.

24. In these circumstances, it is, I think, legitimate to have regard to the provisions of s. 5(1) of the Interpretation Act 2005. This provides:-

> "5.—(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—
>
> (i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or
>
> (ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

25. In my view, the present case comes squarely within the provisions of s. 5(1)(b) of the 2005 Act, since the literal interpretation "would fail to reflect the plain intention" of the Oireachtas. In these circumstances, I believe that it is permissible to adopt a teleological approach to s. 27 by interpreting it broadly and without doing too much violence to the statutory language so as to permit the making of an order in a case such as the present, even though the child in question who has the medical condition will not by reason of its very young age suffer the stress which the language of s. 27(3)(a) would otherwise appear to require. Even if I am wrong in this, it is clear that as the present proceedings come within the ambit of s. 45(1)(c) of the 1961 Act, it is permissible to hold the proceedings in camera, while circulating the judgment and making its contents public in such a way as will preserve the anonymity of Baby AB: see, *e.g., Attorney General v. X.* [1992] 1 I.R. 1 at 46, per Finlay C.J. Either way, the identity of Baby AB - and, hence, his family - will thus be protected from disclosure. At the same time, I respectfully suggest that the Oireachtas might usefully wish to re-examine the actual language of s.27 of the 2008 Act in the light of the facts of this case.

Freedom of Religion

26. If we turn now to the substantive questions at issue, the starting point is, of course, Article 44.2.1 of the Constitution which provides:

> "Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen."

27. Along with the guarantee of free speech in Article 40.6.i, Article 44.2.1 guarantees freedom of conscience and the free practice of religion. Taken together, these constitutional provisions ensure that, subject to limited exceptions, all citizens have complete freedom of philosophical and religious thought, along with the freedom to speak their mind and to say what they please in all such matters. Article 44.2.1 protects not only the traditional and popular religions and religious denominations - such as, for example, Roman Catholicism, the Church of Ireland and the Presbyterian Church - but perhaps just as importantly, it provides a vital safeguard for minority religions and religious denominations whose tenets are regarded by many as unconventional.

28. If one may be permitted to speak bluntly, the antipathy of the Jehovah Witnesses to the taking of blood products may well come within the latter category. Most Irish people would, I suspect, express unease and even disdain for a religious belief which required its faithful to abjure what is often a life saving and essential medical treatment. The Witnesses, on the other hand, regard the blood prohibition as one which is not only scripturally ordained in view of the admonition in Acts 15:29 requiring Christians to "abstain from meats offered to idols, and from blood, and from things strangled, and from fornication", but is one which also poses - when it arises - a practical test of faith.

29. A secular court cannot possibly choose in matters of this kind and, of course, a diversity of religious views is of the essence of the religious freedom and tolerance which Article 44.2.1 pre-supposes. Nor can the State be prescriptive as to what shall be orthodox or conventional in such matters, for, as Jackson J. put it in a noted US decision concerning the Witnesses, *West Virginia Board of Education v. Barnette* 319 U.S. 624 (1943):

> "...if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

30. It probably suffices for present purposes simply to say that the right of a properly informed adult with full capacity to refuse medical treatment - whether for religious or other reasons - is constitutionally protected: see, *e.g., Fitzpatrick v. FK (No.2)* [2008] IEHC 104, [2009] 2 I.R. 7.

Article 42: Family Autonomy and the Position of Children

31. Of course, the present case concerns not an adult, but a very young baby. In this regard, Article 41 and Article 42 of the Constitution come squarely into play.

32. Article 41.1 provides:

> "1º The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
>
> 2º The State, therefore, guarantees to protect the Family in its constitution and authority as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."

33. Article 42.1 provides:

> "The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children."

34. Finally, Article 42.5 provides:

> "In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

35. There is thus no doubt at all but that parents have the constitutional right to raise their children by reference to their own religious and philosophical views. But, as Article 42.5 makes clear, that right is not absolute. The State has a vital interest in ensuring that children are protected, so that a new cohort of well-rounded, healthy and educated citizens can come to maturity and are thus given every opportunity to develop in life. This interest can prevail even in the face of express and fundamental constitutional rights. No one would suggest, for example, that the right of the State to protect children against possible exploitation and abuse would not, for example, enable the Oireachtas to enact legislation prohibiting the involvement of children in street preaching and the distribution of religious literature on the street at night, even if such activities were thought by some to be scripturally mandated or that the children were being directed in such religious activities for religious reasons by their parents: see, *e.g.*, the judgment of Ruttledge J. for the US Supreme Court on this very point in another noted decision concerning the Witnesses, *Prince v. Massachusetts* 321 US 158 (1944).

36. Of course, the right of the State to intervene and thus to override the constitutional right of the parents is expressly circumscribed by the language of Article 42.5. The circumstances must be "exceptional" and the intervention proportionate (".....with due regard") to the circumstances. There must also have been a "failure" of duty on the part of parents. But there is absolutely no doubt but that the court can intervene in a case such as this where the child's life, general welfare and other vital interests are at stake. As Denham J. said in *North Western Health Board v. HW* [2001] 3 I.R. 622 at 727:-

> "The courts will only intervene and make an order contrary to the parents' decisions and consent to procedures for the child in exceptional circumstances. An example of such circumstances in relation to medical matters may be a surgical or medical procedure in relation to an imminent threat to life or serious injury."

37. Of course, in one sense - as Birmingham J. pointed out in a case with very similar facts, *Re Baby B*, High Court, 28th December, 2007 - the use of the term "failure" in this context is perhaps a somewhat unhappy one, since there is no doubt but that CD and EF, acting by the lights of their own deeply held religious views, behaved in a conscientious fashion *vis-à-vis* Baby AB. The test of whether the parents have failed for the purposes of Article 42.5 is, however, an objective one judged by the secular standards of society in general and of the Constitution in particular, irrespective of their own subjective religious views.

38. Given that Article 40.3.2 commits the State to protecting by its laws as best it may the life and person of every citizen, it is incontestable but that this Court is given a jurisdiction (and, indeed, a duty) to override the religious objections of the parents where adherence to these beliefs this would threaten the life and general welfare of their child.

39. It was for these reasons that I granted a declaration to the effect that it would be lawful in these particular circumstances for the Hospital to administer a blood transfusion (along with other associated blood products) in the case of Baby AB. As Dr. Carson made clear in his evidence to me, such a course of action was clinically necessary and urgent and all possible alternatives had been exhausted. This declaration is, of course, limited to these clinical events and is not to be construed as conferring on clinicians an open ended entitlement into the future to administer such treatment to Baby AB irrespective of the wishes and beliefs of the parents.