Neutral Citation: [2016] IEHC 555

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 420 JR]

BETWEEN

A O'D

APPLICANT

AND

JUDGE CONSTANTINE G. O'LEARY

RESPONDENT

AND

CC

THE CHILD AND FAMILY AGENCY

AND VAL KERR (GUARDIAN AD LITEM)

NOTICE PARTIES

JUDGMENT of Ms. Justice Baker delivered on the 14th day of October, 2016.

1. The applicant seeks an order of *certiorari* quashing an order made by the respondent judge of the District Court on 13th May, 2015 by which he ruled that the third notice party, the guardian *ad litem* appointed to represent the interests of her child, EOD, be entitled to instruct a solicitor or solicitor and counsel who might, with leave of the District Court, act as an advocate for her, the guardian *ad litem*, in the same way as an advocate of any party in the proceedings under the Child Care Act, 1991 ("the Act of 1991"), as amended, relating to the child.

2. Declaratory relief is also sought that it not within the power of a guardian *ad litem* appointed under the Act of 1991, as amended, to become involved in the determination of facts which are disputed between the Child and Family Agency (the "CFA") and the parent of a child the subject matter of child care proceedings.

3. Leave to bring judicial review was granted by Noonan J. on 20th July, 2015.

4. The grounds on which relief is sought may be summarised as follows:

> a. The order of the District Judge was made without jurisdiction and was *ultra vires* the Act of 1991, and in particular s. 26 thereof;
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> b. It is unlawful for the District Court to permit a person who is not a party to proceedings before it to instruct a legal representative to act as advocate for that party in the same way as an advocate might act for a party to the proceedings, there being no statutory provision by which this is authorised;
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> c. Permitting the notice party, not a party to the proceedings relating to the child of the applicant to instruct her legal representatives such that she could act as an advocate in child care proceedings is in breach of the right of the applicant to constitutional justice and in particular her rights under Articles 40.3, 41, and 42 of the Constitution of Ireland;
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> d. The order of the District Judge fails to show jurisdiction;
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> e. The Act of 1991 does not give to a guardian *ad litem* appointed under its provisions any role in a factual dispute between the CFA and the parent of a child the subject matter of care proceedings under the legislation.

5. Oral and written submissions have been furnished by the applicant, the CFA, and the guardian *ad litem*. The CFA did not file a notice of opposition.

Factual background

6. The applicant is the mother of EOD, a child born on 30th October, 2009 who is the subject of proceedings under the Act of 1991, commenced by the CFA. The child was placed into the voluntary care of the CFA on 14th March, 2011 pursuant to s. 4 of the Act of 1991 and placed with foster carers on 23rd February, 2012 with whom she continued to live until recently. The first care order under s. 18 of the Act of 1991 was made on 15th February, 2012, and the child remains in the care of the State pursuant to a succession of such orders.

7. The first notice party is the father of the young girl.

8. The care proceedings are fully contested, and the applicant wishes that her daughter be placed with her brother J and half sister A who live with A's father.

The order of the District Court

9. On 1st April, 2015 the District Court appointed Ms. Kerr to be guardian *ad litem* "to act in the proceedings on behalf of the minor", the Court having determined that she was a fit and proper person to act in such role, that she had no interest in the matter in question in the proceedings adverse to that of the minor, and that she consented to so act.

10. The form of the order precisely reflects the form contained in the provisions of O. 84 of the District Court Rules, 1997, S.I. 93/1997.

11. The guardian *ad litem* engaged Mr. Eamonn Carroll solicitor to act for her following her appointment. Her evidence is that as she regarded the case to be complex, the best interests of the child required that she engage a solicitor. Some degree of complexity arose from the relationship that the child has with her half sister and brother, both of whom live with the father of her half sister with whom the child has no blood link, but with whom she has a good relationship. The guardian *ad litem* also anticipates significant difficulty in the long-term foster placement for the child as the placement which had lasted for a number of years has now broken down. The guardian *ad litem* gives a number of examples of factual matters in respect of which she says she should be entitled to give evidence, cross-examine and make submissions in the interest of the child and that it is "irrational" to assume that she can advise the Court of the best interests of the child without "being permitted to enter into the disputed issues of fact regarding those best interests".

12. On 13th May, 2015 the applicant and the first respondent made an application that the District Court would determine the following question which gave rise to the decision impugned in these proceedings:

> "An Order to determine whether Mr. Carroll is entitled to fully represent Miss Kerr in these proceedings with a right of audience and a right to cross-examine or not."

13. The District Court heard submissions in the matter and by order of the 13th May, 2015 ruled as follows:

> " … that the Guardian *ad litem* is entitled to instruct a solicitor, or solicitor and counsel, who may with the leave of the Court act as an advocate for the Guardian in the same way as an advocate of any party in the proceedings."

14. The application for judicial review relates to the correctness of that order.

15. Two separate but related matters arise for consideration as to the meaning and effect of the order:

> (i) Whether the guardian *ad litem* is entitled to be represented in the care proceedings;
>
> (ii) Whether the guardian *ad litem* is to be considered to be a party to the proceedings.

16. In the hearing before the District Court the CFA supported the proposition that the guardian *ad litem* was entitled to be represented. It makes the contrary argument in this judicial review.

17. The primary argument made by the applicant is that the legislation does not permit the District Judge to make the order and that he acted *ultra vires*. I turn first to consider the legislative provisions

The legislation

18. Application for a care order is governed by the provisions of the Act of 1991. The power and duty to institute proceedings is vested in the CFA by s. 16 of that Act. The jurisdiction is vested in the District Court by s. 28. A care order may be made by that court until the child reaches its majority or for such shorter period as the court may determine. Section 18(6) permits the court to give directions as to the care of a child the subject of an application for a care order, and orders may be made by the court of its own motion or "on the application of any person".

19. Section 26 provides for the appointment of a guardian *ad litem*, and the relevant provisions of the section as amended are as follows:

> "(1). If in any proceedings under Part IV or VI the child to whom the proceedings relate is not party, the court may, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, appoint a guardian *ad litem* for the child."

20. No argument is made that the District Court did not have jurisdiction to appoint a guardian *ad litem*, and indeed the order for the appointment of Ms Kerr was made on the application of the applicant.

21. The section provides for the payment of the costs incurred by the guardian so appointed, subject only to the right of the CFA to seek an indemnity in respect of those costs from another party.

> "(2) Any costs incurred by a person in acting as a guardian *ad litem* under this section shall be paid by the Child and Family Agency. The Child and Family Agency may apply to the court to have the amount of any such costs or expenses measured or taxed."

The child as a party

22. That a child may become a party to the proceedings is apparent from s. 25 of the Act of 1991 which provides as follows:

> "25 (1) If in any proceedings under Part IV or VI the child to whom the proceedings relate is not already a party, the court may, where it is satisfied having regard to the age, understanding and wishes of the child and the circumstances of the case that it is necessary in the interests of the child and in the interests of justice to do so, order that the child be joined as a party to, or shall have such of the rights of a party as may be specified by the court in, either the entirety of the proceedings or such issues in the proceedings as the court may direct. The making of any such order shall not require the intervention of a next friend in respect of the child."

23. Provision is also made for the appointment of legal representation for the child:

> "(2) Where the court makes an order under *subsection (1)* or a child is a party to the proceedings otherwise than by reason of such an order, the court may, if it thinks fit, appoint a solicitor to represent the child in the proceedings and give directions as to the performance of his duties (which may include, if necessary, directions in relation to the instruction of counsel)."

24. The section provides for the payment by the CFA of the costs of the child who is a party:

> "(4) Where a solicitor is appointed under *subsection (2)*, the costs and expenses incurred on behalf of a child exercising any rights of a party in any proceedings under this Act shall be paid by the Child and Family Agency. The Agency may

apply to the court to have the amount of any such costs or expenses measured or taxed.

(5) The court which has made an order under *subsection (2)* may, on the application to it of the Child and Family Agency, order any other party to the proceedings in question to pay to the Agency any costs or expenses payable by the Agency under *subsection (4)*."

25. It can readily be seen there are no equivalent express provisions in s. 26 by which the court may appoint a solicitor to represent a guardian *ad litem*, although it does provide for application for by the guardian for the payment of "costs and expenses" in acting as guardian.

26. Where a child in respect of whom an order has been made under subs. 1 becomes a party to the proceedings, the Act of 1991 specifically provides that the order appointing a guardian *ad litem* shall cease to have effect:

> "26. (4) Where a child in respect of whom an order has been made under *subsection (1)* becomes a party to the proceedings in question (whether by virtue of an order under *section 25 (1)* or otherwise) then that order shall cease to have effect."

27. The Act of 1991 envisages a distinction between circumstances where a child is a party and those where the child is not a party, and a guardian *ad litem* may be appointed only when the child is not a party. The applicant argues that the Act of 1991 does not permit the District Judge to make the impugned order and that it is clear some real distinction was intended to exist between the role engaged by a guardian *ad litem* and that of a child acting as a party to the proceedings.

28. The judicial review raises a matter of statutory interpretation, and I will first consider the meaning of the provisions in the light of the authorities as to the correct approach to that exercise.

The scheme of the Act of 1991

29. The Supreme Court in *Whelton v. O'Leary & Anor*. [2010] IESC 63, [2011] 4 I.R. 544 considered the principles of statutory interpretation with regard to the meaning of s. 10(2) of the Criminal Justice Act 1984 as amended. McKechnie J. said that:

> *"Despite an abundance of rules and subrules as to how a legislative provision should be construed, and notwithstanding statutory intervention (generally, the Interpretation Acts 1937 to 1997 and the Interpretation Act 2005), the basic rule remains the primary rule words should be given their plain, ordinary and natural meaning set in the context of the surrounding statutory provisions, or, indeed, of the statute as a whole....*
>
> *"(b) It must be presumed that words are neither tautologist nor superfluous. The legislature must be expected not to be wasteful in its word use:- Cork County Council v. Whillock [1993] 1 I.R. 231 at p. 239.*
>
> *"(c) All words must be given a meaning. It must be presumed they were inserted for a purpose. Any construction which leads without a meaning words in a statute will normally be rejected."* (p. 564, para. 71)

30. Some difference is envisaged in the language of the Act of 1991 between the role of the child who is a party and the child on whose behalf a guardian *ad litem* is appointed, but in order to understand the role of the guardian *ad litem* appointed under s. 26 one must look at the general context in which the power of the court is being exercised under the relevant Part V of the Act.

31. Part V provides a number of means by which the interests of a child may be protected in care proceedings: The means provided in ss. 25 and 26 are different. Section 25 permits the court, of its own motion or following application made to it, to determine if "it is necessary in the interests of the child and in the interests of justice" to join the child to proceedings. An order under s. 25 may confer on the child certain rights as a party for a part or all of the proceedings. When the child is not a party, the court may appoint a guardian *ad litem* under s. 26. These are intended to be, and are expressed to be, mutually exclusive processes by which the child engages with the proceedings.

32. In addition to these choices, the court has a power under s. 27 to procure a report on any question affecting the welfare of the child.

33. The Oireachtas thus envisaged a nuanced approach to the question of the furtherance of fair process and the interests of justice, and the District Court is vested with a wide discretion to act in the interests of the child and in the interests of justice, s.25(1) and s.26(1).

34. The Act of 1991 has been considered in a number of judgments of the Superior Courts and has been treated as a social and remedial statute. In *Western Health Board v. K.M.* [2002] 2 I.R. 493 Mc Guinness J. giving the judgment of the Supreme Court held that there was "*no doubt that it is a remedial social statute*", and should for that reason be "*approached in a purposive manner*" and "*be construed as widely and liberally as fairly can be done*". (p. 510)

35. However McGuinness J. went on to express a view that even a purposive interpretation of the Act did not mean that the court was at large as to the orders it might make pursuant to the provisions of the Act, in that case the provisions of s. 47.

The power to grant legal representation

36. One difference apparent from the express words of the statute is that the child who is a party is entitled to be legally represented. Section 26 is silent as to whether the guardian *ad litem* may be so represented. The applicant argues that the difference represents the choice of the Oireachtas that the court does not under the existing s. 26 have such power to permit the guardian *ad litem* to engage legal representation.

37. Counsel for the CFA argues that the appointment of a guardian *ad litem* is seen as a halfway house between the adversarial approach that is envisaged when a child is a party, and circumstances where the child has a direct voice in court as a party, and that therefore that the guardian would have legal representation is not envisaged or permitted.

38. Counsel for the guardian *ad litem* relies on the judgment of MacMenamin J. giving the judgment of the Supreme Court in *CFA v. O.A.* [2015] IESC 52, [2015] 2 I.L.R.M. 145. There he considered the legislative policy on costs and noted that the Act of 1991 does not outline any general legislative policy on legal costs in child care matters. He made the following observation on which the guardian relies in these proceedings:

"*The Act is silent on this topic, other than in the cases of the joinder of a child as a party to the case (s.25 of the Act of 1991); and the appointment of a guardian ad litem for a child (s.26). In either instance, a court may make orders for the payment of the legal costs for lawyers who are representing those parties joined*." (para. 13)

39. It is not apparent to me that the express powers of the court under s. 26 were a feature of the argument before the Supreme Court, and therefore while the Supreme Court did express the view that the District Court did have a power under statute to award legal costs to a guardian *ad litem* for a child, and while he describes the guardian *ad litem* as a "party", his judgment is not explicit on the point which is to be considered in the present proceedings.

40. I turn first to consider how the practical effect of the provisions of ss. 25 and 26 are to be understood in the light of the differing needs of young and older children.

Section 25: child may be a party

41. The provisions of s.25 do not expressly preclude the making of an order that a young child be a party to care proceedings. A child who is in a position to express his or her wishes, and who is of sufficient age and understanding to do so, can readily be made a party. The court is enjoined however to have regard to the "age, understanding and wishes of the child" in considering whether the chid is to be made a party. I am of the view that the section envisages that a child have sufficient age, capacity and understanding before an order is made that he or she be joined as a party under s. 25. I consider that by the reference to "age and understanding" the Oireachtas was expressing an approach that it would generally not be appropriate to join a child of tender years as a party. That the immaturity of a young child might preclude that child engaging as a party is readily apparent, and must be seen to be additionally so in the light of the sensitive nature of the litigation and the likelihood that trauma might be caused to a child from engagement with the evidence.

42. Section 25 (1) contains a procedural exception to the general rule that a child has litigation disability and may not be a party to proceedings his or her own right without the intervention of a person with a representative role, and a child may be joined to proceedings under the Act of 1991 without the intervention of the next friend

43. The child lacks legal capacity even if it is appointed a party to care proceedings, and may not lawfully incur a liability to pay costs, or enter into a contract to retain a solicitor. Section 25(2) does not provide that the child himself or herself may appoint a solicitor, and the sub-section does not remove the contractual disability of the child. It is logical therefore, for this reason that the court may appoint a solicitor because the child cannot do so due to the disability caused by its minority.

44. For that reason, I am not persuaded that the power of the court to appoint a solicitor for a child who is a party to care proceedings must mean the guardian cannot engage a solicitor for the proceedings. The guardian may, and perhaps will be, appointed to a young child, who cannot for reasons of the understanding and age of that child be a party, or be afforded some of the rights of a party. The guardian will not suffer from the legal disability to which I refer, and has capacity to engage legal advice or representation.

45. The applicant argues that the appointment of a guardian *ad litem* under s.26 must be seen as providing a means of protecting a child in circumstances where it is deemed not to be necessary or in the interests of justice to join the child as a party, and that the level of involvement of the guardian *ad litem* appointed under s.26 will be less than that of a party in the true sense. To an extent then, the appointment must be seen as an alternative to giving full party status to a child. It is argued in those circumstances that the Act does not contemplate the engagement of the guardian as an adversary on disputed facts, or that she would act as advocate through solicitor or solicitor and counsel, in the same way as a party may.

46. The guardian *ad litem* argues that a lacuna would readily be apparent in that a child of tender years, incapable of understanding or expressing his or her wishes, could be left without legal representation. It is argued that it would be absurd and not in accordance with the principles of fairness that only mature children would have the full panoply of procedural rights, and the children represented by guardian *ad litem* would not, albeit those children would be at least as vulnerable, if not more vulnerable, than the older child, and might be less able to protect themselves.

47. I agree that an absurdity could arise if a younger and vulnerable child could not be as fully represented in care proceedings as the child with the age and capacity to be a party or to have some of the rights of a party. For that reason I consider that the power to appoint a guardian *ad litem* must be intended to be an alternative means by which a child can participate in the proceedings in such a manner as the District Court may deem appropriate. It does not impute a lesser status or a lower degree of participation.

48. I will return to the constitutional argument later in this judgement, but first will examine how the role of the guardian *ad litem* appointed under s.26 of the Act is to be characterised.

The role of the guardian ad litem

49. A guardian *ad litem* is appointed under s.26 only when the child is not party, but no assistance is found in the provisions of the section as to the powers and duties of the guardian *ad litem* appointed thereunder.

50. MacMenamin J. has considered the role of a guardian *ad litem* generally, in his considered judgment in *HSE v. D.K.* [2007] IEHC 488 and at para. 59 he summarised the submissions made by the parties with regard to the role of the guardian *ad litem*. He expressly said that the points he identified were not "*directions*" but rather were given for the assistance of practitioners.

51. I will not repeat here the fifteen elements he identified in the role of a guardian *ad litem*, but certain are relevant as follows:

> *"(b) The function of the guardian should be two-fold; firstly to place the needs of the child before the Court, and secondly to give the guardian's views as to what is in the best interests of the child.*
>
> *(c) A guardian ad litem should bring to the attention of the Health Service Executive any risks which he or she believes may adversely affect the best interests of the child, and if not satisfied with the response may bring the matter to the attention of the court. The guardian ad litem should take steps where necessary to co-operate with, and where possible share relevant information with, other care professionals engaged with the minor.*
>
> *(d) A duty of a guardian ad litem is to ensure compliance with the constitutional rights of a minor. For this purpose, the guardian should ensure that there is provided to the minor a means of making his or her views known.*
>
> *(e) A guardian ad litem may fulfil the dual function of reporting to the court regarding the child's care and also by acting as the child's representative in any court proceedings and thereby communicating to the court the child's views."*

52. MacMenamin J. was dealing with the role of a guardian *ad litem* appointed for the purposes of High Court proceedings in the form of an inquiry under Articles 40.3, 41, and 42 of the Constitution in respect of a fourteen-year old boy who died while he was in the care of the State. The inquiry into the events leading up to his death was carried out with a view to ensuring "*that the procedure for implementation of detention orders of young persons at risk works in the most effective way for the protection of these young persons*". MacMenamin J. was not considering the question of the nature of the role to be taken by a guardian *ad litem* appointed by a court of limited jurisdiction under its statutory power contained in s. 26 of the Act of 1991.

53. While I am informed that in the majority, if not perhaps in all cases, the person appointed to act as guardian *ad litem* on behalf of a child who is the subject matter of care proceedings in the District Court is a qualified social worker or childcare worker, there is no requirement in the legislation that he or she have such qualification. If the guardian is to represent the interests of a child it would be both reasonable and practical that the person appointed to the role have experience and knowledge in matters of child welfare, although on a strict interpretation of the legislation it seems to me that the court could appoint any person, for example a relative or a teacher, to act as guardian *ad litem*.

54. MacMenamin J. in *HSE v. D.K.*, albeit given in a different legal context, envisaged a guardian *ad litem* preparing a report, interacting with the staff of the CFA/HSE charged with the care of the minor during detention, ascertaining the interests of the child and advising the court of these interests, and advising the court that as to how a case is best kept under review. It was clearly envisaged by MacMenamin J. that the guardian would be an expert, and he referred to the general requirement that a guardian be "*suitably qualified*" to engage the various aspects of the role. The guardian *ad litem* is expected to give an expert prospective and to do so in an independent and neutral way, and the guardian is not merely a mouthpiece for the child, and the role is not confined to that of presenting the wishes of the child to the court.

55. However, the guardian *ad litem* in care proceedings in the District Court does not have the sole role of acting as expert with regard to questions of welfare. This is clear from the fact that under s. 27 of the Act, contained in the same part of the Act, the court may of its own motion or on application of any party to the proceedings

> "…give such directions as it thinks proper to procure a report from such person as it may nominate on any question affecting the welfare of the child."

56. Section 27 (5) permits the court in its discretion to call the person making the report as a witness, and any party to the proceedings has a similar right.

57. I must assume in those circumstances on a schematic interpretation of the legislation that the guardian *ad litem* appointed under s.26 is envisaged as performing a role different from the reporting and assessment role carried out by the person preparing a report under s. 27. I consider that the function of the guardian *ad litem* appointed under s.26 is to represent the child in the litigation, and to promote the interests of the child and the interests of justice. The furtherance of the interests of justice by the appointment of the guardian *ad litem* would suggest that the Oireachtas had in mind that the guardian *ad litem* would take a role consistent with the furtherance of the interests of justice, and therefore will take a role in the proceedings not merely as a witness.

58. The terminology used in the Act is perhaps less than clear as the term "guardian *ad litem*" has come to be used to identify expert witnesses or persons who act in a professional capacity in the course of care proceedings. It is the word used in the guidelines issued by the Children Acts Advisory Board under its statutory powers in May, 2009, "Giving a voice to children's wishes" in which a broad range of powers and duties are identified in the role. A person with the same qualifications and expertise may be appointed to act as guardian *ad litem* for the proceedings, and to prepare a report for the court on the interests of the child under s.27, but in my view the roles identified in ss. 26 and 27 are different, albeit it may in a suitable case be that the same person actually acts in both capacities.

Historic context

59. This interpretation is furthered by another argument. In the absence of legislative provisions as to the role and function of the guardian *ad litem* in child care proceedings, and because the Act does not define who may be appointed guardian, and nor is there any regulatory regime which informs the choice of the court in the appointment, one must assume that the Oireachtas did not intend in this Act, to adopt a wholly novel concept which is not to be interpreted in the context of legal history.

60. That this is a correct approach to the question of statutory interpretation is clear from the judgment of The Supreme Court judgment in *Clinton v. An Bord Pleanala & Ors*. [2006] IESC 58, [2007] 1 I.R. 272. In an authoritative judgment and the source of many of the principles of statutory interpretation. Fennelly J. said:

> *"61 In this legal context, the re-enactment of the relevant provisions of s. 19(3) of the Act of 2000 must be regarded as indicative of a legislative intention to continue the interpretation which had been generally and consistently followed to date.*
>
> *62 It was in this context that the applicant submitted that the Oireachtas must be presumed to have enacted the legislation in the knowledge of the legal and judicial history of the wording and with the intention, or at least on the assumption, that it would be accorded the same meaning. The proposition is thus expressed in Bennion, Statutory Interpretation (4th ed., 2002) at p. 511: -*
>
> > *'Under the Barras principle, [referring to Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd. [1933] A.C. 402] where an Act uses a form of words with a previous legal history, this may be relevant in interpretation. The question is always whether or not Parliament intended to use the term in the sense given by this earlier history.'"*

61. This is clear too from the dicta of Denham J. in *Clinton v. An Bord Pleanála & Ors*:

> *" The words in issue in the statute have been used previously in many statutes. There is extensive relevant caselaw. It is not a situation where a court is being asked to consider the words in a vacuum."*

62. The term guardian *ad litem* may loosely be translated as guardian "to the cause", or "for the cause". It has a long legal history and is found in s. 66 of the County Officers and Courts (Ireland) Act 1877.

63. It is also found in the Rules made under the Supreme Court of Judicature (Ireland) Act, 1877.

The guardian ad litem and civil proceedings under the District Court Rules
64. The term "guardian *ad litem*" is found in the District Court Rules, and is a person through whom a minor may defend proceedings. Order 7, rule 2 of the District Court Rules 2014; S.I. No. 17 of 2014 provides that:

> "A minor may sue by his or her next friend, and may defend any proceedings by his or her guardian *ad litem*."

65. The guardian *ad litem* represents the child in those proceedings.

66. The guardian *ad litem* may elect to have legal representation, and in *Almack v. Moore* [1878] 2 LR Ir 90, Palles C.B. having identified that the role of a next friend was similar to that of a guardian *ad litem* said as follows:

> "…*Until the court has actually determined that the infant is of age, the next friend is the* dominus litis. *That as such he is entitled to set aside a rule obtained, as the present has been by attorneys professedly, but without authority, acting for him, is too clear for argument*".

67. The person as *dominus litis* is a person to whom a suit belongs, the master or owner of a suit, the person with an interest in the decision of a case. In Murdoch's Irish Legal Companion (2016 ed.), he is defined as being "the person who is in charge of the suit and who has a direct interest in its outcome".

68. In my view the guardian *ad litem* is a person *dominus litis*, but as will appear below the role of the guardian *ad litem* appointed under s.26 of the Act of 1991 may not always fit readily with the breadth of the role of a party as fully understood. And the impugned order in the present case did not envisage a role for Ms Kerr by which she was vested in all of the powers of a party to the proceedings.

Example by analogy: administrator ad litem
69. An example of *ad litem* capacity is also found in the administration of estates. Where an action is sought to be commenced against a deceased person in whose estate representation has not been raised, or where a party to proceedings has died and representation has not issued to his estate, the court can, under s. 27(1) of the Succession Act, 1965 make an order giving liberty to an identified person to apply for and extract letters of administration *ad litem*. The administrator *ad litem* who extracts a limited grant for that purpose may be sued, and may for the purpose of defending the litigation appoint lawyers. The personal representative acting on an *ad litem* grant is "a complete representative of the estate" to the extent of his authority: See Miller's. Irish Probate Practice 1900 p.379. And the *ad litem* representative may bind the estate to that extent: see Daniell's Chancery Practice, p.156.

70. In the case of a person of unsound mind not so found a guardian *ad litem* may also be appointed to represent that person in litigation, and again the guardian *ad litem* acts for and on behalf such person in the litigation.

71. There can be no doubt in those circumstances that the guardian appointed under the provisions of the rules of the Superior Courts, may obtain legal representation, and does so for the purposes of defending the action in which the person on whose behalf he or she acts is a party to the proceedings.

72. In each case the person acting *ad litem* is a party to the proceedings, whether as plaintiff or defendant as the case may be.

73. The appointment of a guardian *ad litem* under the provisions of s. 26 of the Act of 1991 however, envisages the appointment of the guardian *ad litem* when the person whom that guardian represents is not a party to the litigation, and does not have the role of defending the proceedings.

Is the guardian appointed under s.26 to be treated as a party?
74. I turn now to consider whether the applicant is correct that the order made by the District Judge has the effect that the guardian is thereby considered to be a party. The applicant argues that the only person who may appear and address the court and conduct proceedings in the District Court is a party, or a solicitor or counsel for such a party and that the order was impermissible.

75. The role of a guardian *ad litem* in civil litigation is to represent a child in defending a suit, and to protect the interests of that child. *Ingram v. Little* [1883] 11 Q.B.D. 251 is an often quoted example of the use of such jurisdiction. There, the divisional court of the Queen's Bench considered the question of whether a guardian *ad litem* was a party to an action within the meaning of Order XXXI, Rule I of the then relevant rules of court, and within the meaning of s. 100 of the Judicature Act, 1873. Coleridge C.J. was answering the specific question of whether a guardian *ad litem* could be compelled to answer interrogatories administered by the plaintiff and considered that the guardian was relieved from the duty. He held that the definition of "party" in s. 100 of the Judicature Act, 1873, identical in form to s.3 of the Judicature (Ireland) Act (which remains in force), was sufficiently wide to include a guardian *ad litem*: viz

> "'Party' shall include any person served with notice of, or attending any proceeding, although not named in the Record".

76. The judgement of the divisional Court in *Ingram v Little* shows that the fact that a guardian *ad litem* is a "party" does not always impute to him or her all the obligations or rights of a party as are found in the Rules of Court. The role as thus understood did not make the guardian in the words of Lord Coleridge an "*opposite party*" on whom interrogatories could be served. That judgement is illustrative of the complexity of the matter and that to characterise a person as a "party" to litigation may not readily define that person's role.

77. A "party" in the District Court rules is:

> "any person entitled to appear and be heard in relation to any action, application or whatever proceedings"

78. A person entitled to "appear and be heard" is not a witness, but a party who has legal, constitutional and procedural rights to be heard with regard to an issue in litigation, and who may "appear" before the court for that purpose. The entitlement to be heard is one that arises only in regard to a party, or any person whose rights or interests may be affected by the litigation, not any witness, even an expert witness with professional background knowledge and approach to a case that a guardian *ad litem* in the general sense is required to have.

79. The relevant portions of O.6, r.1 of the District Court Rules provide as follows:

> "1. The following persons shall be entitled to appear and address the Court and conduct proceedings—

(a) any party to the proceedings; or

(b) a solicitor for such party; or

(c) a counsel instructed by the solicitor for such party;"

80. The guardian argues that child care proceedings are civil proceedings within the meaning of Regulation 2 of the District Court (Civil Procedure) Rules 2014, S.I. 17 of 2014. Proceedings which are not criminal proceedings are to be classed as civil proceedings for the purposes of the operation of those Rules. Therefore care proceedings under the Act of 1991 are "civil proceedings". This was the view of O'Malley J. in *HSE v. O.A.* [2013] IEHC 172, [2013] 3 I.R. 287, with which I agree.

81. The argument from the Rules however cannot inform my interpretation of the legislative provisions because the provisions of s.26 are silent as to whether the guardian appointed under its provisions is to be treated as a party, or is entitled to be heard. The Rules presuppose that the characterisation is not difficult or obscure.

82. Further, the fact that care proceedings are to be characterised as "civil" proceedings does not enable me to conclude that the role of the guardian appointed under s.26 is identical to that envisaged under the Rules. The Act is to an extent *sui generis* and jurisdiction vested in the District Court gives a wide discretion as to how to manage the process.

83. I am more persuaded by the approach of Lord Coleridge, that the purpose for which a person is appointed guardian *ad litem* may inform the nature of the rights and obligations thus vested. I consider that the order in the present case did not envisage that Ms Kerr was to be a "party" in the sense of an "opposite" or "opposing" party in the litigation, to borrow the language used by Lord Coleridge. I am accordingly not satisfied that the order was unlawful on the grounds that Ms Kerr was thereby constituted a "party" to the action.

The arguments from the Constitution and human rights law

84. I turn now to examine the argument of the guardian *ad litem*, that the construction of the statute for which she contends accords with fair process and the Constitution.

85. The guardian *ad litem* argues that s. 26 of the Act of 1991, when interpreted in the light of the Constitutional right to a fair trial contained in Article 40.3 and the rights of the child contained in Article 42A, as well as the principles contained in Articles 5, 6, 8, 12 and 14 of the European Convention on Human Rights, means that the District Court must be considered to have the power to appoint a guardian *ad litem* and to permit that guardian so appointed to act through solicitors, and if necessary solicitor and counsel. It also asserted that the guardian, as a person entitled to appear and be heard in relation to the proceedings, must be deemed to have rights equivalent to those of the persons who can be described as the primary parties to the proceedings, i.e. the CFA and the parent or parents, and may in a suitable case be involved in the determination of disputed facts.

86. A care order under the Act of 1991 can have far reaching impact on the rights and daily life of a child in fundamental ways. MacMenamin J. pointed this out, giving the judgment of the Supreme Court in *Child and Family Agency v. O.A.* [2015] IESC 52. That case concerned the question of whether a district judge could award costs against the CFA of the privately retained lawyer of a parent respondent in care proceedings. MacMenamin J. stressed that the question had to be considered in the broad context of the rights that might be impacted by an order under the Act of 1991. He described the decisions that a district judge might make under the Act as "*having a far greater personal and social significance to those individuals involved or affected, than judgments in other courts*".

87. The importance of the rights at stake in care proceedings were emphasised:

> *"3. Prior to considering the legal question, it is necessary to emphasise that in child care cases a number of constitutional rights are at stake. Among these are, first, a child's right to have decisions made with his or her welfare as a paramount consideration; second, the rights both of parents, (designated in the Constitution as the natural custodians of children), and of children themselves, to be properly represented in proceedings where the outcome can be truly life-changing for all involved. A further value, which forms an important part of the background, concerns the right of parents or guardians, in such proceedings, to choose their own lawyer, should they so wish. The practical protection of these rights necessitates access to an appropriate level of legal representation."*

88. At para. 41 of his judgment MacMenamin J. made it clear that he was not determining the question that arises for determination in this case.

> *"If there is to be an argument to the effect that the administration of justice, and/or the vindication of family rights under the Constitution, requires a more effective scheme of legal representation for parents and others in child care proceedings, (and I do not exclude that possibility), such a matter is one ultimately for this Court, in a case where the issues are properly argued, rather than be obliquely determined in a single ruling in the District Court on costs."*

89. Because of the extent to which a child care order can impact on the rights of a child, it must be the case that the child has a right to fair procedures. I am guided by the judgment of Finlay Geoghegan J. in *F.N. and E.B. v. C.O., H.O. and E.K.* [2004] 4 I.R. 311 which is clear in that the rights of the child in proceedings under s. 11 of the Guardianship of Infants Act 1964 to have decisions made in regard to its guardianship and custody taken in the interests of its welfare was a personal right of the child within the meaning of Article 40.3 of the constitution. She went to say the following:

> *"Such principles of constitutional justice appear to me to include the right of a child, whose age and understanding is such that a court considers it appropriate to take into account his/her wishes, to have such wishes taken into account by a court in taking a decision to which s. 3 of the Act of 1964 applies. Hence s. 25 should be construed as enacted for the purpose of inter alia giving effect to the procedural right guaranteed by Article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964, relating to the guardianship, custody or upbringing of the child."*

90. That decision was given before the amendment to the Constitution which has resulted in Article 42A which puts the welfare and interests of the child clearly within the sphere of constitutional, and not merely common law or statutory rights. That new Article must be seen as enhancing the rights of the child, and add more weight to the approach described by Finlay Geoghegan J.

91. The guardian *ad litem* on affidavit expresses the view that it would "impinge on the fairness of the proceedings were I not to have legal representation and all the rights of a party to the proceedings, including the right to seek disclosure, to adduce evidence, to cross examine and to make submissions on behalf of the child". She says that there would be an inequality of arms and a denial of the right to fair process were the child to be denied all of these rights available to the applicant mother, the father and the CFA.

92. The guardian has by this evidence shown the extent to which procedural fairness, up to and including a right to legal representation, is arguably mandated on the facts of this case.

Fairness to the parents?
93. The parents argue that to give rights to the guardian to act as a party, and to engage legal representation is a breach of their rights of fair process, and that, as the guardian *ad litem* supports the making of a care order, that *de facto* the parents are opposed by two parties, the CFA and the guardian *ad litem*, both of whom have the benefit of legal representation. It is argued that should the guardian *ad litem* be permitted to act through a solicitor or solicitor and counsel that the burden on the applicant of the litigation would be substantially and unfairly increased.

94. In the first place, I consider that any argument that cross examination might result in an unfairness of process is premature and that no prejudice is shown by the mere fact that the guardian has legal representation and is entitled to engage fully in the proceedings, as her role is to protect the interest of the child. The order made by the District Judge is constrained and careful, and permits the solicitor for the guardian to act as advocate only with the leave of the court. The District Judge, in my view, showed himself to be mindful of the possible prejudice of which the applicant now complains, and reserved unto himself the right to manage the process to ensure that this was avoided. I consider that to be a rational and careful means by which the rights of all parties would be protected.

95. It is also in my view consistent with the jurisprudence of the Superior Courts, which recognises the somewhat unusual nature of care proceedings, and the role of the District Judge in the management of the process, and while the proceedings may be to some extent inquisitorial, as explained by O'Malley J. in *HSE v. O.A.*, the process remains an adversarial one in its essence:

> *"63. I accept that child care proceedings under the Child Care Act, 1991 may not be directly analogous to most other forms of litigation. It is certainly the case that the judge's function is different, in that he or she must adopt a more inquisitorial role and reach a conclusion based on the welfare of the child beyond all other considerations.*
>
> *64. However, that is not to say that it is wholly unlike other litigation. The concept that "there are no winners or losers" is an appropriate one for the attitude of the professional staff of the HSE and its lawyers but it asks a degree of detachment that is very unlikely to be shared by a parent. The procedure is, as a matter of fact, adversarial. Furthermore, although the proceedings may often be more accurately described as a process than a unitary hearing, there may well be individual issues decided along the way in favour of one side or another."*

96. Further, the somewhat adversarial nature of the process is clear from s. 27 by which the District Court of its own motion or on the application of any party to the proceedings may procure a report on children. The court is given a wide range of powers to manage the process, and the order in the present case reflects that fact.

97. Finally, no argument can be made that the jointure of the child as a party with legal representation would be unfairly burdensome to a parent opposing the making of a care order. I can see no difference in the increased burden that might result from the order made by the District Judge in the present case. The extent of the welfare issues and the possibility that different approaches or emphasis might be canvassed by the parents, the CFA, the child acting as party, and the guardian *ad litem* arise because of the nature of the proceedings. I consider that it would be wrong to believe that the interests of the parent and the child will always coincide.

The Child Care (Amendment) Act, 2011
98. Section 13 of the Act of 2011 provides for an amendment of s. 26 of the Act of 1991 to provide the insertion of a new section 2A, 2B and 2C and by which the guardian *ad litem*, once appointed, is empowered to instruct a solicitor and if necessary solicitor and counsel, and that where this occurs the costs and expenses reasonably incurred shall be paid by the CFA. That section also defines to some extent the role of the guardian *ad litem*, namely to promote the best interests of the child and convey the views of that child to the Court.

99. This section has not been commenced.

100. Section 14 of the Act of 2011 amends s. 27 of the Act of 1991 by the insertion of a new subs. 6 to provide that a reference to a party or parties shall include a guardian *ad litem* appointed under s. 26 of the Act of 1991.

101. That section has also not been commenced.

102. The applicant argues that the proposed amendments are necessary amendments, but that they provide a significantly different scheme with regard to the role of the guardian *ad litem* in child care proceedings from that contained in the unamended s. 26 of the Act of 1991. It was argued by the applicant and the CFA that in the circumstances the Oireachtas must be regarded as not having been wasteful in its words and statutory amendments, and reliance is placed on the principle explained in *Cork County Council v. Whillock* [1993] 1 I.R. 231 at p. 237 and *Whelton v. O'Leary* [2011] 4 I.R. 544.

103. A legislative amendment may be declaratory of existing law. The amendment may be made in the light of discussion by academic or professional comment that uncertainty arises as to the extent of the power of the District Court. Such a view has been expressed, albeit *obiter*, by the President of the District Court in *HSE v S.O.* 2013 IEDC 19, where she said she was "*not persuaded that the Guardian Ad Litem is afforded party status*" in child care proceedings.

104. The primary amendment made by the Act of 2011 is to provide for a guardian *ad litem* a clear entitlement to costs not present in s.26. The other amendment is to the range of persons who may be entitled to receive a report prepared under s.27, not to make the guardian *ad litem* a party for all purposes. I am not therefore persuaded by the arguments of the applicant that the amendment is an expression by the Oireachtas of the meaning of the existing provisions, or that the legislative scheme is thereby fundamentally altered.

Conclusion
105. I consider that the Oireachtas intended the appointment of a guardian to be a means by which a child could engage in the

litigation, and the appointment is an alternative to the appointment of the child as a party, or as a person with some of the rights of a party. That being so, the guardian *ad litem* must in my view in appropriate circumstances have the capacity to engage a solicitor or solicitor and counsel. It is not mandatory that such be so, but it is in my view a necessary implication from the scheme of the Act if one is to interpret it in the context of constitutional and natural fair procedures, and if a child who is represented by a guardian *ad litem* is to be treated as having full procedural rights to engage in the proceedings.

106. The power of the court to appoint a solicitor to represent the child in proceedings contained in s. 25 (2), is not found in s. 26. There is perhaps an obvious reason for this, and a guardian *ad litem* may make his or her own choice to appoint a solicitor or solicitor and counsel, whereas in the case of a child of under the age of majority there are legal difficulties, not least of which would be the fact that a minor could not be legally responsible for the task of employing a solicitor, that might make it necessary for the Oireachtas to give the power to the court, rather than to the child, to decide whether legal representation is necessary.

107. The legislation enables legal representation in a suitable case, in one case where the court, making the decision on behalf of a child who is a party, determines that legal representation is desirable, and in the other case where the guardian *ad litem*, himself or herself, an adult charged with representing the interests of the child, may make that decision.

108. Section 26(2) provides that the court may award to the guardian "any costs incurred by a person in acting as a guardian *ad litem* under the section", and the subsection goes on to provide for the measuring or taxing of "any such costs or expenses", thus envisaging different categories or classes of expenditure. This is a recognition that a guardian may not always consider that legal representation is necessary, may require legal advice short of representation at trial, or may consider that the circumstances do not require legal expertise or advice. The choice to be made by the guardian in whom is entrusted the role of representing the child, and the payment of costs or expenses is at the discretion of the court.

109. I construe the combined effect of ss. 25 and 26 as follows:

110. A child of sufficient age and understanding may be made a party.

111. A child of sufficient age and understanding may be permitted to have the rights of a party for some of the proceedings only, and therefore will have rights short of those of a party, and may for example be excluded from parts of a case when the District Judge considers this to be prudent.

112. A child who is not a party may have his or her interests and the interests of justice in the conduct of the child care proceedings protected by means of the appointment of a guardian *ad litem* for him or her. Many of the children on whose behalf a guardian *ad litem* is appointed will be younger children, who themselves cannot be expected to take part as a party in the proceedings, or even engage the lesser role of engaging as a person with some of the rights of a party. The younger child may have a guardian *ad litem* for the purposes of the proceedings. The guardian acting as a person who represents the child may do so in whatever way the guardian considers appropriate, including if necessary through solicitor, or solicitor and counsel. In this the guardian is no different from any other person involved in litigation, who may choose the degree, if any, of legal representation required.

113. The guardian ceases to act in the role if the child is made a party, and one can readily envisage circumstances where proceedings continue over a number of years, perhaps where proceedings come to be re-entered after relatively short-term care orders are made. In those circumstances, a child who had the benefit of a guardian *ad litem* may himself or herself be of sufficient age and understanding to be a party in the proceedings or to have some of the rights of a party.

114. To describe the guardian *ad litem* appointed by the order in the present case as a "party" is neither accurate nor helpful. The authorities and the provisions examined by me suggest that the role of the guardian *ad litem* may depend on the context of the appointment and the extent of authority vested by an order. The order made by the District Judge provided that Ms Kerr may act as advocate through her solicitor only with the leave of the court. She would not need the leave of the court to act as advocate were she to be a party in the true sense, so some difference is to be discerned in the role envisaged by the order from the role that may be played by a full party, or a party who is in opposition to another in the proceedings. I do not therefore consider that the guardian was permitted to act as a party to the extent or in the manner for which the applicant contends.

115. This interpretation, in my view, gives effect to the provisions of Part V of the Act of 1991 in a purposive manner, is consistent with the Constitutional imperative of fair procedure, the approach identified in the case law with regard to the entitlement of a child to procedural fairness in matters where his or her rights are likely to be effected, having regard to the far reaching impact on the life of the child that will arise following the making of a care order, or indeed the refusal to make one. It also reflects a considerable legal history.

116. In the circumstances, I regard the order of Judge O'Leary to properly reflect the conflicting interests in this litigation, and he has carefully reserved unto himself the power to restrict the extent of the capacity of the solicitor for the guardian to engage in the factual and legal questions of which he has seisin. He has correctly engaged his statutory powers in the management of the process in respect to which he has considerable power and discretion in the interest of the various parties and in the light of the factual and legal issues that may arise.

117. I do not consider that the order was made *ultra vires* or was impermissible in the manner contended.

118. I therefore refuse the relief sought.