Neutral Citation Number: [2009] IEHC 591

THE HIGH COURT

2009 1197 JR

BETWEEN

L. K.

APPLICANT

AND

THE HEALTH SERVICE EXECUTIVE AND JUDGE MARY DEVINS

RESPONDENTS

Judgment of Mr. Justice Hedigan delivered on the 7th day of December, 2009.

1. This is an application for leave to seek judicial review of a decision made in Westport District Court by the second respondent on the 22nd October, 2009. The applicant is a Latvian national living in Ireland since 2000. She is the mother of a daughter D who was born on the 1/4/2002. The child's father lived for a time with the applicant before their relationship broke up. He is a notice party herein and is referred to hereafter as DA. The applicant seeks an order quashing the above decision which ordered that the applicant's Daughter be committed to the care of the Health Service Executive (HSE) for so long as she remains a child, that is to say until the 3rd March, 2020.

Present in Court on the 7th of December 2009 for the application herein were the applicant L. K., who appeared on her own behalf, counsel for the HSE and counsel for the applicant's former partner DA. The father was added as a notice party by my previous order herein.

2. The applicant's claim is based upon the grounds that her constitutional rights were breached in that:

(a) The Judge made the decision before the trial.

(b) The trial was one-sided. The Judge did not want to look at the applicant's psychiatric evidence.

(c) No proof that the applicant was mentally ill was produced.

(d) A full care order was made despite no new allegations being submitted to the Court by the HSE.

(e) The applicant was not allowed to cross-examine the applicant's solicitor.

(f) The order having being made, the HSE passed her daughter into the custody of the child's father despite evidence the applicant had suffered domestic violence from him.

(g) The s. 20 report from the HSE is not supported by proof and contains false evidence.

(h) The s. 20 report of the HSE worker, M. M., on the 28th May, 2009 was written without any Court order.

(i) The Judge ignored her claim she had not seen her Daughter since the 23rd July, 2009.

(j) The Judge did not allow her call any witnesses during the Court hearing of the 22nd October, 2009.

(k) The Judge discriminated against the applicant and breached her constitutional rights.

3. The application was initially made *ex parte* to me by the applicant in person. I directed the application for leave should be made on notice to the respondents. On the appearance of the two respondents I further directed the applicant's former partner and the natural father of D, the applicant's daughter, be joined as a notice party. On the appearance of all the above on the 30th November, 2009, the first respondent served the affidavit of M. M., a social worker who has been the officer most recently involved in this case. The second respondent indicated through counsel that she saw no role for herself in the proceedings. The natural father briefly gave evidence to the effect that the child was presently in his custody and was safe. He stated he had no intention of leaving the country with the child or at all. He stated this had been alleged on many occasions over the years and that he had never done so.

4. I adjourned the matter for one week to have time to read through the voluminous papers submitted by the applicant which set out her case. Having done so, the application came back before me on the 7th December, 2009. The applicant again appeared on her own behalf, the HSE was represented by counsel as was the natural father.

5. I asked the applicant why she refused to submit to a medical assessment as was requested by the District Court. She replied that she refused because she considered it to be an attack upon her. My efforts to persuade her that this was not so and that there was nothing to be afraid of were unsuccessful. Equally she indicated her continuing refusal to co-operate with the HSE in resolving the situation. The applicant wished to raise details of the merits of the case. She confirmed the District Court order had been appealed by her. Counsel for the HSE indicated the appeal would come on for hearing in the Circuit Court in January.

6. I refused the applicant leave to seek judicial review and stated I would give my reasons later. I had the opportunity to

read through the papers in detail. This is a sad story of a dysfunctional family situation in which the principal victim is the child D. The parents parted in 2003 and the intervening years have witnessed constant arguments mostly centred on the access arrangements to the child. The two parents are manifestly incapable of resolving this apparent impasse. Scenes of dramatic conflict with the child at the centre have occurred mostly at "hand-over" times. Allegations and counter-allegations of abuse and mistreatment have been thrown back and forth. Since 2003 there has occurred a series of Court appearances by one parent or the other. On the 21st May, 2003, District Judge Garavan made an order awarding joint guardianship and joint custody to both parents. It is into this emotional maelstrom that the HSE's Childcare section was drawn in August 2005.

7. The first involvement of the HSE was when there was an alleged suicide threat by the applicant. The applicant in her Court appearances did agree that she had considered suicide. Fears have been expressed that she might do so with the child. A series of Court applications ensued brought by both parents concerning D.'s welfare. The unfortunate history of the case has thus involved the child from an early age with social workers, the Gardaí and other professionals. All efforts to resolve the situation having failed, the HSE had their solicitors write formally to the applicant and the natural father separately on the 16th May, 2008. These letters urged the parents to engage with the counselling and mediation services and warned that if they did not do so the first named respondent would be obliged as a last resort to apply to Court.

8. After this warning, the father, D. A., began to co-operate. L. K. adamantly refused to do so and continues to refuse to engage at any level with the HSE. Repeated efforts by the HSE to initiate engagement have been resolutely rebuffed.

9. On or about the 12th December, 2008 the HSE was informed by Dr W who was L. K.'s general practitioner, that she had presented to him in a disturbed state. The G. P. also contacted the Gardaí owing to his concern for the applicant and her Daughter. As a result the child was removed by the Gardaí from the applicant's care pursuant to s. 12 of the Childcare Act 1991. She was given into the care of her father. It is to be noted that the social welfare officers dealing with the case expressed the view that notwithstanding the allegations of mistreatment of the child made by the applicant, in their view she is safe in his custody. The social welfare officer currently dealing with the case, M. M., in her affidavit herein states this and also says that in private conversation with D., the child indicated that she felt safe with her father.

10. Subsequent to these events, the HSE has tried to have L. K. psychiatrically assessed. She has refused to do this and continues adamantly to refuse. She in fact refuses to co-operate in any way with the HSE whom she characterises as "criminals".

11. Following a District Court hearing of the 18th February, 2009, D. remains in the shared custody of L. K. and D. A.

12. In the light of continuing concern for the welfare of D., the HSE decided to seek a supervision order pursuant to s. 19(1) of the Childcare Act 1991 in respect of the child. The hearing came on before District Judge Aeneas McCarthy on 24th July, 2009 in Castlebar. D.A. who was present consented to the order. L. K., having previously been represented by the Legal Aid Board, now represented herself. She no longer wished to be represented by the Legal Aid Board because she considered they had taken bribes from D. A.. L. K. opposed the making of the order. Evidence was given by M. M., the social worker, and she was cross-examined by L. K. The District Judge made an emergency care order and made an order for a psychological assessment of the child.

13. The case returned before District Judge Anderson on 29th July, 2009 at Castlebar. An interim care order pursuant to s. 17(1) of the Childcare Act 1991 was made. It was made following evidence by M. M. of her concern for the safety of D. whilst in L. K.'s care. It was ordered that a psychological assessment be carried out and that both L. K. and D.A. were to co-operate fully with the respondent.

14. The case returned before District Judge Conal Gibbons on 26th August, 2009. M. M. and Dr. M. N., Clinical Psychologist, gave evidence and were cross-examined by L. K. The social welfare reports on the case were read by the Judge. L. K. herself gave evidence. The District Judge made an order extending the operation of the interim care order to 16th September, 2009. The District Judge expressed the view that, owing to the attitude and behaviour of L. K. he was left with no choice.

15. On 16th September, 2009 the matter again came before the District Court at Westport. M. M. again gave evidence and was cross-examined. L. K. made it quite clear to the District Court that she had no intention of co-operating with the respondents. The matter was adjourned to the 22nd October, 2009. On this occasion the case came on before District Judge Devins. In the intervening period there had been no change in the attitude of L. K. The District Judge afforded L. K. a final opportunity to co-operate and was given some time to reflect. The Court recessed briefly for this purpose. L. K. made it clear she would not co-operate with the respondents. In the result the second respondent made the order herein which is exhibited in the affidavit of M. N. sworn herein and which is dated 22nd October, 2009. This order appears good on its face and no case was made herein that it is not.

The decision

16. The applicant's case is grounded as set out above (a) to (k). Dealing with these grounds; I do not accept that any decision on the application before her was made by the second respondent prior to the hearing on 22nd October, 2009. The District Judge was, as she should be, fully aware of the previous applications made on 24th July, 2009, 29th July, 2009, 26th August, 2009 and 16th September, 2009. By the time she dealt with the case it was clearly apparent to the District Judge that the central concern was L. K.'s adamant refusal to co-operate in any way and most importantly to have a psychological assessment carried out on her so the Court's concerns for the safety and welfare of the child could be addressed. It was her adamant refusal to comply that precipitated the District Judge's decision. In my view, nothing more was needed to justify that order at that time.

17. The District Judge was quite correct, in my view, in refusing to accept L. K.'s written medical reports which were from Latvia. There was no way for her to assess the provenance and validity thereof. In any event, the District Judge was entitled to and, in my view, very wise to insist upon an assessment made by Irish medical assessors.

18. The order made was not because L. K. was mentally ill but because she would not co-operate in assuaging the Court's concern about her mental stability and its concerns thereby for the safety of D. It was these concerns that moved her G. P., in the first place and the HSE in the second. I note in passing that L. K.'s continuing adamant refusal to co-operate in

any way when what is at stake is considered, seems of itself to raise questions as to her mental stability. Moreover, bearing in mind the fears which have been expressed albeit not yet crystallised by any firm evidence, it is hard to see how any District Judge mindful of the safety of the child could have acted otherwise.

19. L. K. has already in the previous hearings listed above had ample opportunity to view the relevant social welfare reports and to cross-examine the relevant social welfare officer, M. M. and Dr. M. N. No right exists for her to cross-examine the HSE's solicitor nor, in the light of the central issue of non-cooperation, could such cross-examination have contributed anything germane to the central problem in this case.

20. The placing of D by the HSE. in the care of her father seems perfectly justified in the light of the fears expressed for her safety and the apparent satisfaction of both the HSE and D. herself with that arrangement.

21. The weight accorded to the admissibility of the s. 20 report prepared by M. N. are matters to be determined by the trial Court. The fact the applicant has not seen her Daughter since 23rd July, 2009 is to be deplored but seems something for which she is solely responsible. Every effort should be made to ameliorate this situation immediately.

22. The applicant's complaints about her witnesses not being heard does not engage with the central problem facing the District Judge i.e. her refusal to cooperate in any way with the HSE.

22. I am informed that L. K. has already appealed this matter to the Circuit Court which will hear the case in January. As it appears to me that everything in the applicant's presentation of her case seems directed towards a re-hearing of the merits of the case, I consider that this appeal is the far more appropriate way for her to proceed than by way of judicial review. For the reasons outlined above I do not believe that judicial review is the appropriate remedy in this case.