

THE HIGH COURT**[2001 No. 16485 P.]****BETWEEN****P.M.****PLAINTIFF****AND****D.C. AND THE HEALTH SERVICE EXECUTIVE****DEFENDANTS****JUDGMENT on Preliminary Issue by Mr. Justice Ryan delivered on the 31st May 2013**

This case is a difficult, sensitive and painful one. It concerns the circumstances in which the plaintiff's baby came to be placed for adoption and made the subject of an adoption order. These events happened in the 1970s. It is my intention in this preliminary judgment to state only such facts as I think are necessary and to express them in as non-specific a manner as possible so as to reduce the chance of any identification. For the purpose of this judgment the names of the plaintiff and the first defendant are redacted and replaced by initials.

The plaintiff had a baby when she was a teenager and unmarried. The baby was put up for adoption and an adoption order was made. This happened a long time ago and the child is now an adult.

In 2001 the plaintiff instituted proceedings against the first defendant, claiming that she was in their custody in a home that they operated at the time when she gave birth and thereafter, including when her baby was adopted. She subsequently joined the second defendant as the successor of the health board which was responsible for the adoption agency that arranged the placement.

The case against the defendants is that they took the plaintiff's baby for adoption without her knowledge or consent and even without consulting her. In the plenary summons and statement of claim these wrongs are characterised as negligence, breach of duty, breach of statutory duty and breach of constitutional rights. In reply to the defences, the plaintiff adds allegations of fraud and undue influence in regard to documents allegedly signed or written by her.

The plaintiff claims that as a result she suffered severe personal injuries in the form of psychological harm of various kinds.

Full defences have been delivered and it is apparent that the plaintiff will have to overcome significant obstacles if she is to succeed in the proceedings but none of those issues arises for consideration at this point and it is sufficient simply to acknowledge them.

It is not in dispute that the plaintiff's baby was the subject of an adoption order made by the appropriate statutory agency at the time. The plaintiff in her pleadings has not impugned the validity of the adoption order that was made in respect of her baby. Counsel made clear in submissions that this was a deliberate decision because the plaintiff has no desire to upset the arrangements that were made and is confining her claim to seeking damages for what she claims were the wrongs done to her. This is the point that gives rise to the issues in the case. The defendants submit that the plaintiff is not entitled to put forward this claim for damages without making any challenge to the adoption order and/or without joining other relevant parties including the statutory Adoption Agency and the plaintiff's child who is of course now an adult.

The adoptive parents might also have to be notified and made parties to the proceedings.

The question is whether the plaintiff, while disclaiming any challenge to the validity of the adoption order, can allege and prove facts for the purpose of her damages claim in tort when those facts would invalidate the order if proven in appropriate proceedings.

The first defendant submits that, if the plaintiff accepts that the adoption order is valid, she is not entitled in law to damages for any alleged injury or loss that she claims to have suffered as a consequence of the placement of her child with the adoptive parents. The plaintiff cannot be awarded damages for being wrongfully deprived of her child in the absence of a finding by the court that the adoption order was invalid. In circumstances where she has decided not to seek to establish its invalidity, the adoption must stand and it represents a bar to the plaintiff's claim. In claiming damages for the alleged wrongs, it is submitted that the plaintiff is mounting a collateral attack on the adoption order which otherwise enjoys a presumption of legality.

The second defendant submits that a decision in favour of the plaintiff to the effect that her consent was not properly given or was procured through fraud or other unlawful means would have the indirect effect of undermining the adoption order. In those circumstances it follows as a matter of common sense and constitutional fairness that the persons most directly affected by such a finding, namely, the Adoption Authority of Ireland and the adopted person, must be informed of the proceedings and given an opportunity of participating if they wish to do so. The basis of the plaintiff's claim necessarily constitutes a challenge to the validity of the adoption order.

"The validity of the adoption order in this case is wholly predicated on the existence and validity of the consent of the mother. Yet the existence and validity of the consent in this case are the core issues to be determined by the court. Moreover, the findings and orders of this Court do not operate in a vacuum. The plaintiff has not sought to have these proceedings heard in camera or subjected to reporting restrictions. Judgment, if it is given, will be in open court and a matter of public record. If the plaintiff succeeds in persuading the court that her version of events is correct and accurate, and the court so finds, the plaintiff will have brought about a situation in which the adoption order is subject not only to fundamental uncertainty, but also subject to a finding by the High Court of effective and presumptive invalidity."

The plaintiff's submissions place particular reliance on s. 50(1) of the Adoption Act 2010, which provides as follows:-

"(1) A relevant adoption shall not be declared invalid by a court if, after hearing any persons who the court considers ought to be heard, if it is satisfied that -

(a) the declaration would not be in the best interests of the child concerned, and

(b) it would be proper not to make the declaration, having regard to those interests and to the rights under the Constitution of all persons concerned

(2) A relevant adoption order, unless declared invalid by a court, shall be deemed for all purposes to be, and at all times since its making to have been valid."

The plaintiff concludes as follows:-

"It is the plaintiff's contention that the court can arrive at a conclusion that the defendants herein failed to obtain the plaintiff's full, free and valid consent when it 'arranged for' and was 'instrumental' in the adoption of the plaintiff's child and that such a finding does not invalidate the order unless the court makes it such an order which it does not have to do by virtue of s. 50(1) of the Act of 2010. It is further submitted that such an 'on the record finding' would not subject the order to fundamental uncertainty or presumptive invalidity where it is exclusively the preserve of the court to declare an order as invalid pursuant to s. 50 of the 2010 Act. If the court does not make such an order then, if anything, the adoption order is in a stronger position, the facts having been ascertained and not order having been made. The court is not being asked to declare the adoption order invalid and the plaintiff is prosecuting a discreet personal injuries case against the defendants herein due to their treatment of her and the manner in which they involved themselves in the ultimate adoption of the plaintiff's child."

The submission goes on to point out that neither of the defendants has quoted any case law to suggest that the plaintiff is not entitled to prosecute her case for damages, personal injuries without seeking an order to quash the adoption order.

Discussion

By way of general comment, it would be most unusual to dismiss a case *in limine* and there must be cogent grounds for doing so. It is only in circumstances where it is manifest as a matter of law or of logic that the plaintiff's claim cannot proceed at all or with only the existing parties that it can be stopped at this point. If the situation is legally or factually unclear, indeed, if there is any uncertainty, the decision must be to permit the action to proceed. A similar restraint is appropriate on ordering that another party must be joined as a condition of allowing the case to go on.

The case of *M v. An Bord Uchtala* [1977] I.R is central to the submissions of the defendants. The Supreme Court held that nothing less than full and free consent given by the mother together with relevant information about the statutory entitlement to withdraw consent was sufficient. In the absence of any of those essential features or elements of consent, an adoption order was not validly made. Other cases reiterate and apply the same analysis. *M v ABU* was a decision in a challenge by natural parents who married after the adoption order had been made and who claimed that the procedure whereby the adoption order was made and the mother's consent was procured was flawed because it was not in compliance with the statutory regime. The Supreme Court agreed.

There followed the enactment of the Adoption Act of 1976, one of whose provisions was that an adoption order was not to be held invalid merely because of certain procedural or formal frailties; neither were specified failures of notification to be fatal to an adoption order.

We now have section 50 of the 2010 Act, which in subsection (2) makes statutorily explicit the presumption of validity of an adoption order unless and until it is declared invalid. And under ss (1) the court is empowered to withhold a declaration of invalidity in the specified circumstances. Therefore, an adoption order is valid until such time as it is declared invalid. If its validity is questioned, the issue of consent is fundamental. But an order is for all purposes to be considered valid unless and until it is declared to be otherwise by a court. When that issue is raised in court, it is necessary to establish the full consent of the mother to the making of the order.

Section 50 of the 2010 Act envisages a situation in which an adoption order would otherwise be declared invalid, but the court is satisfied that a declaration of invalidity would not be in the best interests of the child concerned and that it would be proper not to make the declaration having regard the child's interests and all the constitutional rights of the relevant parties and the court can make that decision when it has heard any persons who the court considers ought to be heard.

Does the existence of the adoption order which is not being challenged operates as a bar to the plaintiff's claim? Does it amount to something akin to issue estoppel such as would arise if there was a decision of a competent court in relation to the specific issue that was being litigated or sought to be litigated again. Given that a valid consent is required for an adoption order, does the existence of an adoption order necessarily imply that all proper consents were given to the effect and to the extent of actually prohibiting any proceedings that are based on the proposition that the facts were such that they could in appropriate proceedings invalidate the order that was made?

The defendants' position is that since consent is necessary for a valid order, if there is an order that is not challenged, it follows that the consent must have been validly given. Since the plaintiff does not attack the order on the grounds that she has pleaded, she must be taken to have conceded the validity of the order. That means that she is accepting by necessary implication that the procedure was not flawed. The plaintiff's position is that, although the facts she intends or hopes to prove would be sufficient to invalidate the adoption order, she does not want to do that and has not claimed such relief. She seeks instead to recover damages for the wrong or wrongs that she alleges were done to her in the process that led to the making of the order.

My conclusion on this question is that the adoption order in itself does not constitute a circumstance that is analogous to issue estoppel so as to prevent the plaintiff from making her claim. It is not the case that a plaintiff must as a precondition of seeking damages include a claim that the adoption order is invalid. It does not follow as a matter of law or of logic that there should be such a rule. In my view that is the position at common law and as a matter of principle but the point is reinforced by s.50(1) of the 2010 Act. It is true as the plaintiff submits that the defendants did not cite any authority for that proposition.

It is for the plaintiff to plead her case and seek such reliefs as she claims to be entitled to. A party is generally able choose among remedies and may, for example, elect to seek damages rather than rescission of a contract.

Even if one were to accept the points made by the defendants, it would be open to a plaintiff to claim that an adoption order was

invalid but, relying on s.50(1), to disclaim an order of invalidity and confine the claim to such other relief as was found to be appropriate.

I propose accordingly to refuse the applications made by the defendants and to fix a date for the hearing of the plaintiff's action.

It is of course open to the defendants in the trial of the action to make any argument they think appropriate based on the plaintiff's failure to challenge the validity of the adoption order. The decision at this stage to permit the case to proceed does not constitute a final decision on any of the points raised.

Finally, it seems to me that the parties should consider how the case is to be heard and determined in a manner that respects the interests of all persons who may be concerned.