Neutral Citation Number: [2006 No.1427 JR]

THE HIGH COURT
JUDICIAL REVIEW

BETWEEN

MJL **APPLICANT**

AND
DISTRICT COURT JUDGE GERARD HAUGHTON WATERFORD **FIRST RESPONDENT**

DISTRICT COURT JUSDGE WILLIAM HARNETT KILKENNY **SECOND RESPONDENT**

(THE LAW CENTRE) LEGAL AID BOARD, KILKENNY **THIRD RESPONDENT**

AND
DL **FIRST NOTICE PARTY**

HEALTH SERVICES EXECUTIVE (SOUTH) **SECOND NOTICE PARTY**

Judgment of Mr. Justice Declan Budd delivered on the 27th day of June 2007

Preliminary background matters

1. This matter comes before the court as an application for leave to apply for judicial review arising out of a family law matter in which a number of family law statutes have been invoked. The first matter which arises is that this case is a by-product of applications which have been made by one of the parents, namely DL being the applicant in proceedings under the Guardianship of Infants Acts 1964 to 1997, the Child Care Act 1991 and the Domestic Viiolence Act 1996 and she is also the first notice party, joined by MacMenamin J. in her husband's *certiorari* application. She is the mother of the two children, AL aged thirteen and BL aged eleven, both of whom are of what is usually school-going age and it seems to me that this case is clearly covered by the provisions of s. 45 of the Courts (Supplemental Provisions) Act 1961 and more specifically this case is covered by s. 29 of the Child Care Act 1991 which provides for proceedings to be heard otherwise than in public. Lest there be any doubt on this aspect, since the Domestic Violence Act 1996 has also been invoked, I should add that under s. 16 of this Act, civil proceedings shall be heard otherwise than in public. Indeed s. 16(2) makes it clear that, where under s. 9 the court hears together applications under several enactments then the court shall, as far as is practicable, comply with the requirements relating to the hearing of applications under each of those enactments and the other relevant provisions of those Acts shall apply accordingly. Since I have mentioned s. 9 of the Domestic Violence Act 1996, it is appropriate that I should set it out in full as this may be helpful in threading the way through the labyrinth of family law provisions which are so helpfully set out by Muriel Walls and David Bergin in their "Irish Family Legislation Handbook" published in 1999:-

> s.9 Hearing of applications under various Acts together.
>
> (1) Where an application is made to the court for an order under this Act, the court may, on application to it in the same proceedings and without the institution of proceedings under the Act concerned, if it appears to the court to be proper to do so, make one or more of the orders referred to in subsection (2).
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> (2) The provisions to which subsection (1) relates are as follows, that is to say:
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> (a) an order under s. 11 (as amended by the Status of Children Act 1987) of the Guardianship of Infants Act 1964,
>
> (b) an order under section 5, 5A, 6, 7, or 21A of the Family Law (Maintenance of Spouses and Children) Act 1976 as amended by the Status of Children Act 1987.
>
> (c) an order under section 5 or 9 of the Family Home Protection Act 1976.
>
> (d) an order under the Child Care Act 1991.

2. Accordingly, the hearing of this application for leave and this judgment take place in respect of an *in camera* case and it seems to me that neither the children nor the parties should be identifiable. I propose to deliver this judgment using the initials for the names of the parties and omitting identifying features, although being aware that there is a peril of confusion particularly since the husband is the applicant for leave to bring his application for *certiorari*, while his wife is the applicant in several other sets of family law proceedings instituted earlier. While this aspect was drawn to my attention by Paul Kavanagh of counsel for the wife, the first notice party in the *certiorari*, I should add that my understanding is that the applicant husband is content that the court should deal with the matter as having been heard entirely *in camera* and I so order. The intention is that this judgment has been amended in such a way that the parties are rendered anonymous and less identifiable.

3. A second preliminary matter was that the applicant husband made an application that Andrew King, a groundsman from Swanlinbar in County Cavan should be allowed to assist him in the presentation of his case as a litigant in person. Mr. King apparently has no legal qualifications and comes from a support group run by the National Men's Council of Ireland, which he said was not a lobbying group. It was suggested that Mr. King might help the applicant with his papers and make a note for him. However, counsel for the wife indicated that he would like to know more about the nature of this support group and at this stage Mr. King said that if his presence was going to be a cause of any difficulty then he would prefer to depart and rather surprisingly did so precipitately, cutting short any further discussion on this aspect. The applicant subsequently engaged a stenographer. He was alerted that this could be costly.

Appearances and the previous order made by MacMenamin J. on 4th December, 2006

4. This application for judicial review brought by MJL, applicant, initially came before MacMenamin J. on 4th December, 2006 on motion of the applicant made *ex parte* to the court for leave to apply for judicial review for an order of *certiorari* by way of an application for judicial review quashing the whole of the interim orders made on 26th September, 2006 by the second named respondent on a question affecting the educational welfare of the two youngest daughters of the applicant and his wife, the girls being AL who was born on 21st October, 1993 and is now thirteen and BL who was born on 5th November, 1995 and is now eleven years. Secondly, the

applicant sought an order of *certiorari* by way of application for judicial review quashing the interim order of the first named respondent which order was made on 29th August, 2006 and which order has been continued in force by the order made by the second named respondent. Thirdly, the application sought a declaration in the application for judicial review that the second named respondent, Judge William Harnett, acted improperly in continuing in force the *ex parte* order of the first named respondent, Judge Gerard Haughton, "which he must have known unlawfully superseded the fundamental constitutional right of the applicant herein to be a party in making agreements with his wife in the education of his children." The fourth paragraph of the application sought a declaration by way of application for judicial review that both the first and second named respondents acted improperly in failing to ascertain that proper notice had been served on the applicant informing him of the statutory necessity required by s. 2(3)(a) of the Guardianship of Children Act 1964 – 1997 that he deliver a memorandum or other document to the appropriate office of the court for the purpose of making an appearance in the matter. The application continued:-

> 5. A declaration by way of application for judicial review that the first and second named respondents acted improperly and/or erred in law in making orders without ascertaining that a memorandum or other document has been "delivered to the appropriate officer of the court for the purpose of an entry of appearance by the respondent".
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> 6. A declaration by way of application for judicial review that the first and second named respondents acted improperly and/or erred in law in making orders in the absence of the statutory certificate required by s. 20(3)(a) of the Guardianship of Children Act 1964-1997;
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> 7. An order of prohibition against the enforcement of the orders of the 26th September, 2006;
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> 8. An order of costs incidental to the making of the application herein to be found against the first, second and third named respondents;
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> 9. An order for compensation for damages to my family;
>
> 10. Such further or other order as to this Honourable shall seem just and proper.

5. MacMenamin J. having read the statement dated 4th December, 2006 signed by the applicant and his affidavit made on that day and, after hearing the applicant, ordered as follows:-

> "1. That the applicant's application for leave to apply for judicial review be on notice to the respondents;
>
> 2. That [DL] and the Health Service Executive be joined as notice parties to this application;
>
> 3. That the applicant do within seven days of the date hereof serve said notice of motion returnable for the 18th December, 2006 on the District Court Clerk for the District of Waterford District No. 22 on behalf of the first named respondent (District Court Judge Gerard Haughton);
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> 4. On the District Court Clerk for the District of Kilkenny District No. 22 on behalf of the second named respondent (District Court Judge William Harnett);
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> 5. On the third named respondent at their offices and on the third named respondent on behalf of [DL] and on the Health Service Executive."

6. As is usual in such cases no appearance was entered on behalf of either of the learned District Court Judges. This is in accordance with indications from the Supreme Court that in such cases where there is a *legitimus contractor*, or indeed several of them as in this case, then the court will have the assistance of those with an active interest in appearing on the judicial review and ensuring that the court is informed of their attitude to the application and the court will be informed of their views as to any differences with regard to the history and facts being related to the court and will also have the assistance of the applicant's adversaries in making their submissions in respect of the alleged procedural defect being suggested by the applicant and their submissions with regard to the law governing the situation. It is manifest that MacMenamin J. quite correctly regarded it as essential that the wife and mother of the two children should be joined as a notice party as having a very real interest in the matter of the children's education and also since it was clearly on her instructions that the two applications had been made to the two District Court Judges on her behalf which resulted in the orders being made which the applicant husband is seeking to impugn. The first of these orders was made on 29th August, 2006 on the application of the applicant wife and mother, being a guardian of AL born on 21st October, 1993 and BL born on 5th November, 1995 residing at an address in County Kilkenny, for the courts direction under s. 11 of the Guardianship of Infants Act 1964-1997 on the following question affecting the welfare of the children: schooling from September, 2006. The court being satisfied that notice of the application was duly served, and having heard the submissions made herein, and being satisfied that the welfare of the children requires the making of this order; hereby directs:-

> 1. Interim order directing that the children be sent to the following schools:- [AL] to commence schooling at [Named Post-Primary School in a town in County Kilkenny], , and [BL] to commence schooling at [Named Primary School in a town in County Kilkenny], up to and including the 26th of September, 2006 or such date when the application is adjudicated upon;
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> 2. Neither party is to remove the children from the jurisdiction without a court order;
>
> 3. Application stands adjourned to Kilkenny District Court on 26th September, 2006 at 10.30 am.
>
> Dated this 29th August, 2006.
>
> Signed: Gerard Haughton, Judge of the District Court.

7. A second interim order was then made on 26th September, 2006 by another experienced judge of the District Court, Judge William Harnett when the courts direction was again sought on the same question affecting the welfare of the children, namely their schooling from September, 2006. Again, the court being satisfied that notice of the application was duly served and having heard the submissions made and being satisfied that the welfare of the children required the making of the order, the learned District Court Judge directed:-

> 1. The interim order made by Judge Haughton on 29th August, 2006 at Waterford District Court, to continue up and

including the 13th December, 2006, or, until after an appeal has been heard;

2. Neither party to remove the children from the jurisdiction without a court order;

3. The application stands adjourned to Kilkenny District Court (Family Law) on 13th December, 2006 at 10.30 am;

4. The preparation of a s. 20 Report from the H.S.E.

Dated 26th September, 2006.

Signed William Harnett, Judge of the District Court.

8. At this point I must digress to make a couple of points which are vital to the understanding of the progress, or otherwise, of this case. The first point is that the applicant is a litigant in person and he is a University graduate, intelligent, diligent and courteous. He had clearly spent a huge amount of time preparing his case and preparing the documentation and his legal submissions which included thoughtful submissions in respect of s. 20 of the Guardianship of Infants Act 1964 (as amended) and also he referred the Court to the importance placed on a parental agreement by the Supreme Court in the case of In *Re: Tilson* [1951] I.R. 1 at p. 37, to which I shall return when reviewing the law. In essence, the applicant husband relies strongly on the majority decision of the Supreme Court in the *Tilson* case to the effect that both parents are possessed of the right and duty to provide, according to their means, for the religious education of their children. While Mr Justice James Murnaghan did not explicitly state that this right and duty would equally apply to the moral and intellectual, physical and social education which are also mentioned in Article 42.1 of the Constitution, nevertheless it is arguable that these would also be covered and he concluded by saying at p. 13:-

> "In my opinion the true principle under our Constitution is this. The parents—father and mother—have a joint power and duty in respect of the religious education of their children. If they together make a decision and put it into practice it is not in the power of the father—nor is it in the power of the mother—to revoke such decision against the will of the other party."

9. Accordingly, in the *Tilson* case the court held that the father was bound by his antenuptial agreement that the children should be educated in the religious denomination of their mother. There is a plausible contrary argument that an agreement as to future religious denominational upbringing differs from matters of type of schooling. I shall return to the *Tilson* case when outlining the background in Irish law to that case. I propose also briefly to consider the perils of inflexibility and the impracticality of failing to reconsider the changing needs as individual children develop. Both parents and their individual children develop. Parents may refine or alter their beliefs and their children's needs change with the passage of time and the changes in society and with greater understanding of the educational needs of the individual child.

10. The second point which it is necessary to make in this digression is that while the applicant husband has diligently put together a book of pleadings, not surprisingly, since he is not a trained lawyer, there are certain omissions from his book which could lead to confusion. For example, it was only at a late stage in the case that many of the orders made by the District Court and the sequence of these orders was made clear. For example, it will be noted that in the interim order made on 26th September, 2006 the learned District Court Judge under the heading "Guardianship of Infants Act 1964-1967 s. 11" made an order at Item 4 for the preparation of a s. 20 report from the Health Service Executive. Now while s. 20 of the Guardianship of Infants Act 1964 will eventually emerge as being central to an understanding or, more accurately, a misunderstanding at the core of this case, in fact the order in respect of the preparation of a s. 20 report is actually made under s. 20 of the Child Care Act 1991, a section which deals with proceedings under Guardianship of Infants Act 1964, Judicial Separation and Family Law Reform Act 1989 and other Acts. I have already mentioned that MacMenamin J. on 4th December, 2006 made an order that the application should be on notice to the respondents and also that the mother of the children and the Health Service Executive should be joined as First and Second notice parties and provided for the mode of service on the respondents and the two notice parties. Carmel Stewart of counsel appeared for the Health Service Executive and greatly assisted the court by pointing out that the applicant father was relying on an amalgam of his statement required to ground his application for judicial review (at p. 6 of his book of documents) and that he was also relying on an amendment to the original statement which addition takes account of the order joining the mother and the Health Service Executive. It was counsel who suggested that it is necessary to look at both documents and to consider them together. The applicant father made clear that in his submission, the Health Service Executive has no "interest" in the matter which he submits is a private family law matter and that, accordingly, the Health Service Executive has no "interest" (by which I understand him also to mean lack of *locus standi*) in opposing his application. In short, furthermore he argues that the second named respondent District Court Judge had no jurisdiction to hear the case because there was no certificate from the wife's solicitor about advice having been given which he suggested was required under s. 20 of the Guardianship of Infants Act 1964-1997 and in particular he submits that there has been no compliance with s. 20(3)(b) of the Guardianship of Infants Act which he submitted was a prerequisite and necessary under part IV of the Act in respect of counselling, mediation and attempts at coming to an agreement before litigating. Secondly, the applicant husband contends that the second named respondent District Court Judge did not have evidence in respect of concerns for the welfare of the children when he made his order. Indeed his contention was that each order made after the first order by District Court Judge Haughton was made outside the jurisdiction of the District Court . At para. 4 of the amended statement the applicant husband seeks:-

> "4. A declaration by way of Application for Judicial Review that the Second Named Respondent has continued to act improperly and/or erred in law in hearing an application or applications without ascertaining the authenticity of the s. 20 Certificates required under the Guardian of Infants Act 1964 and therefore without establishing the bona fides of the family law solicitors named as the third named respondent, especially in the absence of an appearance or the participation in proceedings of a respondent." [meaning himself here as a respondent and referring to Harnett as the second named Respondent.]

11. By this the applicant husband is articulating his contention that the Legal Aid Board, as represented by the Law Centre, failed to lodge a requisite certificate under s. 20 of the Guardianship of Infants Act and also that he, the husband, although he was physically present in court in Kilkenny and had cross-examined his wife and taken part in some of the proceedings there, nevertheless he maintained the stance that he had never entered an appearance or participated in the Guardianship of Infants Act proceedings. At paragraph 7 of his amendment to his grounding statement the applicant husband sought:-

> "7. A ruling that the second named notice party has not sufficient interest in opposing any aspect of this review application."

12. This refers to his proposition that the Health Service Executive South (the HSE) has no "interest or *locus standi*.

13. In this context I quote paragraph 8 to 12 of his amendments to grounds upon which amendments to relief is sought:-

> "8. The stated reason given by the Health Service Executive for the need for a supervision order in correspondence with the Applicant and contained in their partly completed section 20 report was that the deponent refused to consent to the Health Service Executive interviewing the children. The Applicant withheld consent because the H.S.E. had confirmed at an interview on the 24th October, 2006 that no grounds existed for making a supervision order.
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> In these circumstances it is beyond the authority of the second named notice party to seek to overrule the authority of the deponent without a finding that the threshold required by Article 42.5 of the Constitution had been met.
>
> 9. On or about the 1st February, 2007 Notice was received from the Third Named Respondent of an Application for Custody and Access by the First Named Notice Party to be made at Kilkenny District Court on 14th February, 2007.

14. No contact or communication seeking the position of the Applicant or aimed at attempting to reach an understanding between the parties, and so seek to avoid court proceedings, was received by the Applicant from the Third Named Respondent prior to Notice being served.

> 10. Notwithstanding this the Applicant herein, consistent with his duty as a husband in managing the process of the spouses working together for the benefit of the family unit, wrote to the Third Named Respondent to ascertain the perceived difficulties of the First Named Notice Party so that the family could avoid the legal forum, which everyone agrees is detrimental to family harmony.

15. Clarification was sought in this letter as to the First Named Notice Party's proposals, and how these proposed changes to the family dynamics could be deemed necessary for the benefit of the children's welfare. No response was forthcoming, demonstrating that no difference was ever established and verifying that the application was vexatious and should be struck out.

> 11. The Third Named Respondent failed to follow the recommended Code of Practice of the Law Society for Family Law Practitioners, now codified in the Guardianship of Infants Act 1964-1997 Part IV, Safeguarding the Interests of Children: wherein it states the solicitor 'should encourage their client to co-operate with the other parent when making decisions concerning the child, and should advise parents it is often better to make arrangements between themselves, through their solicitors or through a mediator rather than through a court hearing.'
>
> 12. The First Named Notice Party contended to an Application by the Second Named Notice Party to be supervised in her parenting. In the circumstances she fails to have standing to make an application under the Guardianship Act under s. 11."

16. All this makes clear the wisdom of MacMenamin J. in ordering that the wife of the applicant husband and mother of the two children should be a notice party, particularly as the applicant maintains that her affidavits are a gross misrepresentation and maintains that there was a lack of evidence of public welfare concerns in court and that he was entitled to refuse his consent to the welfare officers of the Health Service Executive in respect of visiting the children in their home. His stance was that "he had satisfied himself that there were no public welfare concerns whatever and that his wife's application was not properly grounded" and he then went so far as to say in argument that he considered the application to be nothing other than a fraud. In respect of her application as to custody, he submitted that the concerns expressed were well below the level where the State should butt in and intervene. He stressed that he was still basing his case on the lack of jurisdiction in the courts to make any order and he went so far as to say that he believed that the application by the Legal Aid Board was an harassment of his family and himself. In view of the fact that District Court Judge Harnett on 26th September, 2006 made a further interim order continuing the order made by Judge Haughton on 29th August, 2006 up to and including 13th December, 2006 or until after an appeal has been heard and also an order for the preparation of a s. 20 report from the Health Service Executive, it is clear that it was very necessary that the Health Service Executive should be represented as it has been bound to intervene on foot of the District Court Order and to take steps to prepare the report required.

17. Rossa Fanning of counsel appeared for the Legal Aid Board instructed by Mason Hayes+Curran Solicitors and he explained that the Law Centre in Kilkenny is not a separate entity but is an arm of the Legal Aid Board. At the first appropriate opportunity he indicated that he was present to represent the Legal Aid Board as it had been sued as the third respondent in the *certiorari* proceedings by the applicant but that in his submission no conceivable relief could be obtained against the Legal Aid Board because the only function of the solicitors in the Law Centre in Kilkenny was to act for the applicant's wife as her solicitor on her instructions in the various sets of proceedings. Counsel for the Legal Aid Board referred to the applicant husband's amended grounding statement and pointed out and stressed that no relief was sought against the second named respondent Legal Aid Board. However it rapidly became clear from the applicant husband's opening of the application that he was challenging the bona fides of the solicitors in the Law Centre and was submitting that they had failed to comply with obligations which he perceived and alleged that s. 20 of the Guardianship of Infants Act 1964 imposed on a solicitor acting for an applicant who is applying or proposes to apply to the court for directions under s. 6(A), 11 or 11(B) of the Act.

18. The applicant husband relies on the provisions of s. 20 of the Guardianship of Infants Act 1964 in respect of safeguards to ensure the awareness of alternatives to custody, access and guardianship proceedings and to assist attempts at agreement which he maintains were relevant to his wife when contemplating and applying for reliefs in the District Court. Accordingly I propose to set out this section in full as it is at the core of the applicant husband's contention which he summarised by saying:-

> "This Application for Leave for Judicial Review concerns proceedings in the District Court that were not properly instituted in accordance with the Statutory Law. A guardian is only obliged to respond to proceedings properly instituted. A court lacks jurisdiction and is not entitled to hear proceedings and make any orders unless it can provide evidence that the application was properly instituted. There was in this case a failure in governance of the District Court to comply the necessary criteria to ensure all of this".

19. Section 20 of the Guardianship of Infants Act 1964 as amended deals with safeguards to ensure applicant's awareness of alternatives to custody, access and guardianship proceedings and to assist attempts at agreement and states:-

> 1. In this section "the applicant" means a person who has applied, is applying or proposes to apply to the court for directions under 6(A) 11, or 11(B).
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> 2. If a solicitor is acting for the applicant, the solicitor shall, before the institution of proceedings under s. 6(A), 11 or 11(B), discuss with the applicant the possibility of the applicant –

(a) engaging in counselling to assist in reaching in agreement with the respondent about the custody of the child, the right of access to the child or any other question affecting the welfare of the child and give to the applicant the name and address of persons qualified to give counselling on the matter.

(b) engaging in mediation to help to effect an agreement between the applicant and the respondent about the custody of the child, the right of access to the child or any question affecting the welfare of the child, and give to the applicant the name and addresses of persons qualified to provide an appropriate mediation service, and

(c) where appropriate, effecting a deed or agreement in writing executed or made by the applicant and the respondent and providing for the custody of the child, the right of access to the child or any question affecting the welfare of the child.

3. If a solicitor is acting for the applicant –

(a) The original documents by which the proceedings under section 6(A), 11 or 11(B) are instituted shall be accompanied by a certificate signed by the solicitor indicating, if it be the case, that the solicitor has complied with subsection (2) in relation to the matter and, if the document is not so accompanied, the court may adjourn the proceedings for such period as it considers reasonable to enable the solicitor to engage in the discussions referred to in subsection (2),

(b) if the solicitor has complied with paragraph a, any copy of the original document served on any person or left in an office of the court shall be accompanied by a copy of that certificate.

4. The solicitor shall be deemed to have complied with subsection (3) in relation to the requirement of a certificate where the application under section 6(A), 11 or 11(B) is made in proceedings for the grant of –

(a) a decree of judicial separation under the Act of 1989 and section 5(2) of that Act has been complied with by the solicitor, or

(b) a decree of divorce under the Act of 1996 and section 6(4) of that Act has been complied with by the solicitor.

20. I have been very conscious throughout the hearing of this case that this was an application for leave only and indeed the applicant husband on several occasions made this point himself and also asserted that at this stage all he has to surmount the threshold is to persuade the court that he has an arguable case in law. He clearly has a sufficient standing and interest in the matter and the real issue is as to whether he has shown that he has a statable ground to support the relief which he is seeking. He has made his application promptly and in time but at the heart of the matter there remain two hurdles for the applicant husband to overcome. The first of these is whether the facts averred in his affidavit would be sufficient, if proved, to support a statable ground for the form of relief by way of judicial review, and secondly whether on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks. At an early stage, counsel for the wife, the first named notice party joined by order of MacMenamin J., indicated that he perceived that the applicant husband might be misconstruing the family law legislation. However, the applicant made it clear that he was convinced of the correctness of his submissions and the righteousness of his cause and submitted that he was entitled to proceed to open his case without the interventions of counsel. To be fair to the plaintiff, he tended to deal with any intervention or objection with courtesy and he dealt calmly with a couple of interventions from the bench on the theme that one needed to be careful to distinguish the wood from the trees when trying to untangle family problems. He exercised restraint when confronted with the admonition that in such a family law matter where all the children had either left home or opted to move out of the family home with their mother, and where the two younger children AL and BL were both now doing very well in their schools and socialising and mixing with their peer groups, perhaps a further look might be taken at the long term welfare of the two girls and deep consideration should be given as to how to bring about a future reconciliation of family differences, rather than the family being mired in litigation, expensive in terms of time, anguish, upset and financial cost.

21. The applicant husband has clung firmly to his submission that the proceedings in the District Court were not properly instituted in accordance with statutory law and his further contention that as a guardian of the children he was only obliged to respond to proceedings which had been properly instituted and that the District Court judges had both acted without jurisdiction. The application was made reasonably promptly and no point arises in relation to time. However, the point does arise that judicial review is not the only effective remedy available as it was open to the applicant to appeal the decisions, each and every one of them, to the Circuit Court and to make his various points there, such as the perceived lack of jurisdiction of the District Court because of a failure to comply with the requirements and safeguards referred to and supposedly in point as set out in s. 20 of the Guardianship of Infants Act, 1964 as amended. The Applicant also tenaciously sticks to his submission that while he was present in the District Court in Kilkenny on 26th September, 2006 and took part in the proceedings before the learned District Court Judge William Harnett, even to the point of making submissions and cross-examining his wife who was the applicant in those cases he makes the point that he had not entered a memo of appearance to proceedings under the Guardianship of Infants Acts or the Child Care Act, 1991 but as far as he was concerned was only present for the application under the Domestic Violence Act, 1996. This submission is refuted by counsel for his wife, who is supported in this by counsel for the Health Service Executive, who also submits that the court should exercise discretion and refuse the relief sought and also by counsel for the Legal Aid Board who endorsed Mr. Kavanagh's submissions and had already pointed out that the applicant husband's complaints were about the conduct of the solicitors in the Law Centre in acting for his wife and had made the point that the criticisms were wide of the mark and inappropriate; that the complaints were based on a misconception in respect of the requirements of s. 20 of the Guardianship of Infants Act 1964 as they were not mandatory in the circumstances. Counsel all agreed that the nub of the applicant's point, based on his construction and the suggested relevance of s. 20 of the Guardianship of Infants Act, was misplaced in the context of the Family Law Acts as a whole and that the court should anyway also exercise its general discretion and refuse relief. The applicant husband contested this by stating that he could not go back to the District Court which had made orders against him in such a manner and that he had been ambushed on three occasions. He complained that this came about first on 23rd July, 2006 in respect of notice of the proceedings, then secondly there was the attempt in court on 26th September, 2006 to join the Guardianship of Infants Act proceedings to the Domestic Violence Act proceedings; and the third ambush was that when he took part in the proceedings under the Domestic Violence Act he was also entering an appearance in the matter of the Guardianship of Infants Act. Counsel for his wife refutes the suggestion of any ambush and submitted that the kernel of the case was a misunderstanding by the applicant who says that he went to court to deal with a complaint under the Domestic Violence Act at Kilkenny on 26th September, 2006 . Counsel pointed out that also there was the interim

order on the question affecting the welfare of children under the Guardianship of Children Act 1964-1997 s. 11 subs. (1) directing that the children be sent to specific schools, and directing that neither parent was to remove the children from the jurisdiction without a court order and adjourning this matter to Kilkenny District Court on 26th September, 2006. I should make clear that an Information under the Domestic Violence Act 1996 s. 5 had been sworn before District Judge Gerard Haughton on 8th August, 2006 applying on a Summons pursuant to the provisions of s. 2 of the Act for a Safety Order and requesting a Protection Order against the respondent husband pursuant to the provisions of s. 5 of the above Act on the grounds that:-

> "On Sunday the 23rd July, 2006, the Respondent caused bruising on [AOL]'s arm, our 21 year old daughter, whilst he put her out of the kitchen. The Respondent caused bruising on my arm while he kept me in the kitchen. I was afraid. I put my hand on the telephone and threatened to ring the Gardaí as I appealed to [MJL] to control himself and for common sense to prevail. Our 17 year old son, [EL], was also present. Both [AOL] and [EL] refused to leave the area, fearing for my safety. I have been roughly handled by the Respondent. I have been physically confined by the Respondent. For example, he lent over me with his hands on both of arms of a chair which I was sitting in and another time he stood in front of the door of the small utility room and prevented me from going through.
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> The Respondent has seriously invaded my privacy and intimidated me using information received by secretly recording my private phone conversations over a period of 2 – 3 months. On 1st July, 2006 a dictaphone hidden on the house phone line and 4 tapes were removed by the Gardaí.
>
> Severe agitation and verbal aggression has increased as our situation deteriorates. There are major issues to be dealt with in the coming weeks and these will put us all under severe pressure. For example, the Respondent has been home schooling our two youngest children, [AL] 12 years old and [BL] 10 years old. I wish them to attend local schools next month. The National Education Welfare Board is aware of our situation has advised that they attend regular school but I cannot comply for fear of a scene. The Respondent's behaviour is unreasonable and cannot be safely challenged. My older children and I have experienced fear that the Respondent is on the verge of losing control. I fear for my safety and welfare and that of my children. Therefore I wish to have protection in place."

22. On 8th August, 2006 a protection order that the above named respondent husband shall not use or threaten to use violence against, molest, or put in fear the applicant or any dependant persons. I should add that by order on 8th August, 2006 District Court Judge Gerard Haughton had made an order for personal service on the respondent or service by a member of An Garda Síochána not less than 7 days before 22nd August, 2006 of notice of application under s. 11(1) for the court's direction on the following question affecting the welfare of the children AL and BL – schooling from September 2006. A summons for a Safety Order was also issued on 8th August, 2006 under section 2(2) of the Domestic Violence Act 1996 for the husband to appear at the Court-house Kilkenny on the 26 September, 2006 to answer the application of his spouse for a safety order. I note that the Order dated 26th September, 2006 of the learned District Court Judge William Harnett sitting in Kilkenny recites that the court was satisfied that notice of the application under the Guardianship of Infants Act was duly served. From this I infer that the applicant husband was well aware that an application about the children's schooling was to be made under the Guardianship of Infants Acts in Kilkenny. He has in fact conceded that he was actually present in Court and from his submissions it is clear that he was there in court for the transactions which led to the making of the order for the preparation of a s. 20 report from the Health Service Executive. In argument I was told that he did not raise the matter of his point about no memo of entry of appearance having been entered by him and since he was physically present for the various proceedings, including those under the Guardianship of Infants Acts, and had been offered an adjournment if he needed time by the learned Judge, William Harnett, it would appear that the husband failed to make any objection at the appropriate time in respect of the alleged lack of jurisdiction of the District Court.

23. Counsel for the Health Service Executive submitted that the court should exercise its discretion and refuse the relief sought by the applicant. In the Supreme Court case of *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374 at 377 Finlay C. J., which whose judgment the other members of the Supreme Court agreed, said:-

> "An applicant must satisfy the court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:-
>
> (a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20 (4)
>
> (b) That the facts averred in the affidavit would be sufficient, if proved, to support a statable ground for the form of relief sought by way of judicial review;
>
> (c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks;
>
> (d) That the application has been made promptly and in any event within the three months and six months time limits provided for in O. 84, r. 21, or that the court is satisfied that there is good reason for extending the time limit.
>
> (no point arises in respect of requirements (a) and (d))…)
>
> (e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure. These conditions or proofs are not intended to be exclusive and the court has a general discretion, since judicial review in many instances is an entirely discretionary remedy which may well include, amongst other things, consideration of whether the matter concerned is one of importance or of triviality and also as to whether the applicant has shown good faith in the making of an ex-parte application."

24. In fact, as narrated above, when the matter came before MacMenamin J. he prudently added the wife as first notice party and the Health Service Executive as a second notice party as each of them were in the position of a legitimus contradictor. The wisdom of MacMenamin J. in joining the wife as the first notice party and the Health Service Executive (South) as the second notice party is borne out by the fact that between them they were able to supply not only factual information by way of the sworn affidavits filed in the matter but they were also able to direct the court's attention to all the relevant sets of proceedings and the statutes governing the situation. I must confess to having a distinct sympathy for the applicant MJL in respect of the multiplicity of statutes governing the several relevant aspects of the marital and domestic situation in this case. I regret to say that it is not surprising that both counsel submit that the litigant has lost his way in the maze of statutes and has lost sight of the wood for the trees in respect of the essential realities of the unhappy differences and discord in the family.

25. For clarity I propose to follow the structure of the line of argument of Counsel for the Health Service Executive as she has referred me to the various sets of proceedings which were issued by the respective parties. It will be noted that she refers to several sets of proceedings which were extant and most of which had been presented in the District Court and had been considered before the *certiorari* proceedings were brought by the applicant husband. I intend to set out the several sets of proceedings not referred to by the applicant initially but brought to my attention by counsel for the Health Service Executive so as to complete the factual and legislative background to this *certiorari* application. I then propose to revert to the case made by the applicant the nub of which is that his wife never produced reasons to him, her husband before her 29th August, 2006 application. He maintains that nowhere and at no time was the issue of the education of the two younger children brought up properly and explained to him by his wife and there was a failure to use the prescribed procedures, presumed by him to be set out in Section 20 of the Guardianship of Infants Acts 1964-1997, before bringing any application before the court. Since the bedrock of the applicant's case is that there had been an agreement about the home schooling of the two younger children since 1998 and because there is authority in the *Tilson* case that the "Murnaghan principle" of the continuing authority of a pre-nuptial agreement made between the parents about the religious upbringing of their children should not be overruled unilaterally, while this is the first basic submission being made by the applicant, I intend to revert to a brief outline of Irish law with regard to the principles governing the education of children, particularly where conflicts arise with regard to the particular religious denomination or belief in which the children have been brought up and should be brought up in the future. In practice, in cases where the religious beliefs of the parents evolve and come to differ and also where the development of the individual children in the consideration of one or other of the parents requires a change of direction in respect of the type of education being received, it would seem rigid and inflexible not to consider whether a change would be beneficial for the child. In particular where one of the parents believes that it is now best for one or other of the children to attend mainstream schooling and to learn to socialise with her peer group and to derive educational and socialising skills from the more usual schooling system as opposed to isolation at home, then it would seem sensible that there should be reconsideration, discussion and reflection as to what would be best for each child, and if the parents differ in their genuinely held beliefs, surely it must be helpful for them, and those with a duty imposed on them to try to assist the parents, to have the benefit of expert reports and assessments on the situation as to what would appear best for the two girls. This view is all the more cogent when there is a strong wish expressed by the mother arising from her anxiety lest her two daughters be subjected to a strict religious regime inimical to the beliefs of one or other of the parents and which in this case the mother feels is stifling the development of the personality of each of the children.

26. The second basic point made by the applicant father is that his wife, being the mother of the two children, and her solicitors, the Law Centre in Kilkenny being an arm of the Legal Aid Board, omitted to follow the correct procedures in bringing the case before the District Court. The father maintained that the correct procedures set out in the Children Act 1997 and the District Court (Custody and Guardianship of Children) Rules 1999 which prescribes as follows:-

> "(Section I No.25 1999) Rule 9
>
> (1) A notice or court order required by this Order to be served shall be accompanied in the case of a notice of proceedings under section 6A of (inserted by the Act of 1997) of the Act, section 11 of the Act or section 11B (inserted by the Act of 1997), in which a solicitor is acting for the Applicant, by a certificate signed by the solicitor indicating, if it be the case, that the solicitor has complied with subsection (2) of section 20 of the Act of 1964 (as inserted by section 11 of the Act of 1997) in relation to the matter, and may be served upon the person to whom it is directed in accordance with the provisions of Order 10 of these Rules at least fourteen days or, in the case of proceedings under rule 2(2) hereof, at least two days, before the date of the sitting of the Court to which it is returnable.
>
> (2) Save where service has been effected by the Clerk, the original of every such notice or order served shall, accompanied, in appropriate cases, by a copy of the certificates described in rule 9(1) hereof, together with a statutory declaration as to service thereof, be lodged with the Clerk at least two days before the date of the said sitting."

27. had not been complied with properly; and that the solicitor for the applicant wife in the Guardianship of Infants Act proceedings should have discussed with her the possibility of entering into counselling, mediation or other procedures before launching the proceedings in the District Court, and the applicant father in the claim for *certiorari* submits that all necessary steps to establish the District Court's jurisdiction were not complied with by the solicitors from the Law Centre. The gist of his submission is that the solicitors acting for his wife had a duty to encourage communication between the prospective parties to the litigation and that this is aprerequisite to the jurisdiction of the District Court. Both counsel for the wife and for the Health Service Executive, as well as counsel for the Legal Aid Board, all refute this submission of the applicant father. Having set out the applicant's submission with regard to these matters and his history of the events, I propose to set out the additional features brought to my attention by counsel for the wife and Health Service Executive and then I propose to set out briefly the Irish law with regard to the education of children, particularly "home education" as applicable in this case. Counsel for the wife and for the Health Service Executive submit that the applicant father is acting under several serious misconceptions as to the legal situation, not just with regard to the effects of the *Tilson* case but also as to the framework of family law legislation particularly with regard to his perception of the suggested prerequisites to the jurisdiction of the District Court Judge as postulated by the applicant father. To put it bluntly, counsel for the Health Service Executive says that when all the legislation is read as a whole, then it is quite clear that the applicant father not only is barking up the wrong tree but also, in the overall context of the domestic problems arising in this case, has lost sight of the wood for the trees.

28. I then propose to summarise the relevant Irish law in respect of education in the home in this country such as is material to the issues in this case and to the situation which has arisen where the father of the children suggests that no problem arises with regard to home education and that there has been and still is agreement between the parents and their preference remains for home education separated from the usual mainstream school education. I shall deal briefly with what I understand to be the position with regard to the legal situation when each of the parents has a different view as to what would be best for each or both of the children but I will only touch on this by way of background as I accept the correctness of the applicant's submission in this *certiorari* application that this is an application for leave to bring an application for *certiorari* only and accordingly that this court is primarily dealing with the issue as to whether the applicant has satisfied the court that he has an arguable and statable case.

29. In the circumstance of this case I have referred to the background history as I feel that this is necessary for an understanding of how the issues have arisen and because I intend to deal not only with the vital conclusion to his submissions made on Thursday 19th April, 2007 by the applicant but I also intend to accede to the submission by counsel for the Health Service Executive, supported by the other two counsel for the wife and for the Legal Aid Board, that I should exercise a general discretion in respect of the making or otherwise of an order of *certiorari*. The applicant father's submission as to the kernel of the application was that the court should find that:

"This is an application for leave for judicial review and concerned proceedings in the District Court that were not properly instituted in accordance with the statutory law. A guardian is only obliged to respond to proceedings properly instituted. A court lacks jurisdiction and is not entitled to hear proceedings and make any orders unless it can provide evidence that the application was properly instituted. There was in this case a failure in governance of the District Court to comply with the necessary criteria to ensure all of this."

30. This is the theme of the applicant's legal submission in respect of the interlocking family law statues governing the situation and I shall return to these propositions put forward by the applicant father in due course.

Sequence of Events

31. Because this application for *certiorari* comes before the court in relation to the orders of two learned District Court Judges, the applicant's complaints as to their lack of jurisdiction come at an intermediate state of the history of events which are the subject of proceedings between the applicant and his wife, the respondent District Court Judges and the Health Service Executive and the Law Centre solicitors in Kilkenny acting for the Legal Aid Board. For the sake of clarification, I requested counsel to take me through all the sequence of events chronologically as I was apprehensive that the applicant unsurprisingly had put the focus on the provisions on which he based his submission that the District Court Judges were acting outside their jurisdiction and that there was a peril that I might miss some of the incidents forming the background to the conflict. In particular, I might not have been made aware of some of the proceedings and supporting declarations and affidavits which had been brought before the court which could have significant consequences in respect of the applicant's submissions that the wife and her solicitors had failed to comply with prerequisites and had led the District Court Judges to act without jurisdiction. Accordingly counsel for the wife and counsel for the Health Service Executive were diligent in dovetailing their submissions so that the court would be made aware of the sequence of applications made to the District Courts and this has been helpful in understanding the full situation and also explains the reasons why counsel submit that the applicant has misconstrued the statute by his failure the sections on which he relies in the overall context of the interlocking statutes.

32. Before I outline the sequence of applications to the courts, I propose to set out in synopsis the factual background to the present proceedings drawing in particular on the affidavit of the applicant sworn on 16th February, 2007. The applicant and his wife were married at the Church of Our Lady of the Wayside in Kilternan, County Dublin on 8th May, 1982. The applicant says that: "the Applicant and the First Named Notice Party made a Covenant of Marriage with God under the rites and ceremonies of the Roman Catholic Church on 8th May, 1982 at the Church of Our Lady of the Wayside". He then continues: "I say that the Applicant has made the First Named Notice Party [his wife) aware that in the circumstances of this Marriage the civil courts are only entitled to deal with the civil aspects and are not entitled to grant either spouse a decree to live separately. The Applicant has advised the First Named Notice Party that the authority over their marriage remains under the jurisdiction of the Ecclesiastical Courts."

33. At paragraph 4 he continues:-

"4. I say that my role as Husband in this marriage is to represent agreed family policy to the outside world. The decision to home school the children was agreed family policy for 8 years and was clearly and purposefully made on the basis of the evidence we had gleaned from sending the older children to school where we found the moral integrity of the family was being threatened. The First Named Notice Party has never advanced any reasons or produced evidence to show that sending the children to school would not now endanger the moral integrity of the family. However, after returning home from Australia where I had gone to carry out my obligations to the children's schooling, I discovered that in my absence the State had stepped in to now threaten and disrupt the moral integrity of my family.

5. I say that the First Named Notice Party has apparently "changed her mind" and moved from a position where she shared joint concerns for the threat to the moral education of the children if they attended mainstream school to one where she has apparently ceased to have concerns in this regard. However she has made NO ATTEMPT to address the concerns we both had initially and which she knows I still hold. She has failed to advance any reasons or provide compelling evidence to show that these threats to the moral education of the children no longer exist.

6. I say that the affidavit of the First Named Notice Party can be shown to contain serious errors and omissions and I believe it is likely the victim of undue influence by the Third Named Respondent. I believe this errant behaviour by her to be contrary to her normal character. I believe that these misrepresentations of the fact to the court would not be in her interests in as much as they would benefit the Third Named Respondent."

34. I have quoted these averments with a view to giving a flavour of the applicant's contentions and also to stress that the applicant husband puts much emphasis on his wife's alleged failure to advance any reason for wanting to change the schooling of their two younger children from home schooling by their father to a more mainstream education in local schools. In a supplemental affidavit sworn on 20th April, 2007, the wife, being the mother of the two daughters AL and BL, aged respectively 13 and 11, put in evidence a handwritten copy of her two letters the first being dated 19th January, 2006 and the second being dated 30th January, 2006, both to her husband, the applicant.

35. In her first letter dated 19th January, 2006 to her husband she wrote:-

"[MJL],

I have been in touch with free legal aid with a view to procuring a judicial separation. The fact that I have to write to you (as you refuse to talk to me) is an indication of how serious our situation is. Add to that (and I quote you) "you disobeyed me in the past, so I don't have to deal with you anymore" and lots more negative comments and threats and it is obvious we do not have a Christian marriage any more. The road ahead will be difficult for all – but the *status quo* is also dreadful and unacceptable to me, and I refuse to continue to live like this. I have major concerns about the wellbeing of all our children in this environment plus

· our divergence of faith/beliefs is a major worry.

· The education of our children needs reviewing – I do not want to continue home-schooling.

· Our 'home' life – so important to me.

· There is a review of [M – House guest] in the next week or so. I intend to be honest about our situation."

36. Her second letter also exhibited states

> "Dear [MJL],
>
> In view of the fact that I have taken the first steps towards separation – it is time to look at other concerns as outlined in my last letter …. The education of the girls must now be reviewed ….Considering the tensions and stresses and unhealthy relationships that permeate our 'home' these days – I think the environment is No longer healthy and Not the best option for the girls anymore. I intend to work towards change… we must look at their best interest in the short and long term. How best to integrate them into the system…? Where? When? Things are on the move… we cannot ignore the consequences of a breakdown in our relationship.
>
> [DL]"

37. The above letters are contemporaneous reconstructions made by DL and are neither carbon or photocopies but the applicant husband made it clear that he had no objection to these letters being adduced and he said that he was happy that these reconstructions were accurate and that the actual letters were available to him.

38. To my mind the content of these letters is significant as it makes clear that the applicant was well aware of their unhappy differences, particularly his wife's comments about the seriousness of their situation as he was refusing to talk to her and that she was refusing to continue to live life when the *status quo* was dreadful and unacceptable. She explained clearly that their divergence of faith views was a major worry and the education of the children needed reviewing, in particular she did not want to continue their home-schooling. She made clear her anxieties about their home life and also that they would have to be candid about their own situation as there was a review of their house guest's situation in the next week or so and they would have to be honest about their own difficulties and disharmony.

39. The significance of the two "copy letters" from the wife to the applicant are that they confirm in no uncertain terms that she communicated to her husband that life had become intolerable for her and that in particular she was extremely worried about the home schooling of the two youngest children and that she no longer wanted them to be schooled at home but instead that they be integrated into the ordinary school system. Of course the situation has since moved on from an advisory and warning stage to the position of the wife and all the children having moved out and none of them now wishing to live with the applicant.

40. During the hearing in this case on several occasions I gently suggested to the applicant that court proceedings might not be the best way to mend fences and to repair loss of trust and affection. Unfortunately the applicant had an enviable self confidence in the correctness of his construction of the relevant statutes and in the validity of his religious views as being the appropriate basis for his two young daughters' religious and social upbringing. He kept harking back to the fact that, some years before, he and his wife had apparently agreed that home schooling would be a good idea and he seemed to set at naught her anxiety and to give little heed or consideration to his wife's change of view as to the efficacy of home schooling not just from an academic point of view but also as to the suitability from the aspect of learning sociability and how to mix with one's own age group. This all seemed to register low in importance with the applicant. However, I am not trying such contentious issues of substance in this case as between the parties, but rather my focus must be on procedural matters and as to whether the learned District Court Judges exceeded their jurisdictions or seriously misconstrued the relevant statute

41. I think it is helpful that I should set out briefly a short further history of the background to this application and particularly the upbringing, education and working, social and domestic life of the husband and wife. The applicant husband is presently unemployed. However he is well educated, articulate and, despite his fervent beliefs, tries to be courteous. He has a BA degree in economics and public administration and graduated from Dublin University in 1978, after three years. His wife is a nurse by training and they have five children of whom the eldest is a twenty-three year old engineer, the second is a twenty-two year old, and the third is in college and dependent. The youngest son is now aged eighteen and is in secondary school and the two girls who are the subject matter of the present differences in respect of religion, education and way of life, are aged respectively thirteen and eleven. The applicant's wife and mother of the five children is a psychiatric nurse by training. As well as bringing up their own children, the applicant and his wife have fostered a handicapped girl for about 28 years, from when she was aged eight until the present when she is thirty-six. This young woman was living in the applicant's home and was going out by day for six hours of activation in Kilkenny with the Camphill Community near Callan in Co. Kilkenny which is run on the lines of the well-known Rudolf Steiner Schools.

42. There is one further feature on which I should remark at this stage. The situation has been evolving in that the two girls have gone to their respective schools in September, 2006 and to the credit of their parents, and no doubt to the joy of their father who undertook much of the burden of teaching them at home, they have done well academically at school and have learned to socialise. In the meantime, a District Court Judge in Kilkenny has continued to deal with applications in the matter and further court orders have been made with regard to the mainstream schooling of the two girls. Counsel for the Health Service Executive ("HSE") helpfully outlined the course of the litigation. The first application to the District Court was in Waterford when the wife swore an information under s. 5 of the Domestic Violence Act 1996 against her husband. This information was sworn by DL as informant before Gerard Haughton, Judge of the District Court on 8th August, 2006. She swore on oath as follows:-

> "On 8th August, 2006, I caused a summons for hearing at Kilkenny District Court on the 26th September, 2006, to be issued against the above respondent of [a named address in] Co. Kilkenny, applying pursuant to the provisions of s. 2 of the above Act for a Safety Order and I now request a Protection Order against the respondent pursuant to the provisions of s. 5 of the above Act on the grounds that:-
>
> > 'On Sunday 23rd July, 2006, the respondent caused bruising on [AOL]'s arm, our twenty-one year old daughter whilst he put her out of the kitchen. The respondent caused bruising on my arm whilst he kept me in the kitchen. I was afraid. I put my hand on the telephone and threatened to ring the Gardaí as I appealed to [MJL] to control himself and for common sense to prevail. Our seventeen year old son, [EL], was also present. Both [AOL] and [EL] refused to leave the area, fearing for my safety. I had been roughly handled by the respondent. I had been physically confined by the respondent. For example, he leant over me with his hands on both arms of a chair that I was sitting in and another time he stood in front of the door of the small utility room and prevented me from going through.
> >
> > The respondent has seriously invaded my privacy and has intimidated me using information received by secretively recording my private phone conversations over a period of two/three months. On 1st July, 2006, a Dictaphone hidden on the house phone line and four tapes were removed by the Gardaí. Severe agitation and verbal aggression has increased as our situation deteriorates. There are major issues to be dealt with in the coming weeks and these

will put us all under severe pressure. For example the respondent has been home schooling our two youngest children, [AL] twelve years and [BL] ten years old. I wish them to attend local schools next month. The National Education Welfare Board is aware of our situation and has advised that they attend regular school but I cannot comply for fear of a scene. The respondent's behaviour is unreasonable and cannot be safely challenged. My older children and I have experienced fear that the respondent is on the verge of losing control. I fear for my safety and welfare and that of my children. Therefore I wish to have protection in place.

8th August, 2006.

[DL].

Informant'"

43. This was sworn before Gerard Haughton, Judge of the District Court, on 8th August, 2006. On the same day as the *ex parte* application under the Domestic Violence Act 1996 was applied for and the Information was sworn before the District Court Judge on that day, a Protection Order under s. 5 of the Domestic Violence Act 1996 was also sought. Having recited that the applicant wife had caused a summons to issue for hearing at a sitting of the court at Kilkenny on the 26th September, 2006, pursuant to the provisions of s. 2 of the Domestic Violence Act 1996 for a Safety Order against the respondent husband, which application had not yet been determined by the court and as the court was of opinion that there were reasonable grounds for believing that the safety or welfare of the applicant and dependant persons so required, the learned District Court Judge Gerard Haughton on 8th August, 2006, ordered that the respondent shall not use or threaten to use violence against, molest or put in fear the applicant or any dependant persons.

44. Carmel Stewart of Counsel explained that DL also asked the learned District Court Judge on 8th August, 2006, to deal with the following question affecting the welfare of the children, AL and BL being the matter of their schooling from the beginning of September, 2006. District Court Judge Gerard Haughton put this aspect back to 22nd August, 2007, so that her husband, being the father of the children could be served. In fact there is a note on the application under the Guardianship of Children Acts 1964 – 1997 of notice of application under s. 11(1) for the courts direction to this effect in the District Court Judge's handwriting:-

"Order personal service on respondent or service by a member of An Garda Síochána not less than seven days before 22/8/06.

Gerard Haughton 8/8/06."

45. On 22nd August, 2006, the husband was still away and the learned District Court Judge adjourned both sets of proceedings, namely the proceedings under the Domestic Violence Act 1996 and the proceedings under the Guardianship of Infants Acts 1964 – 1997 under s. 11(1) for the court's direction in respect of the welfare of the children in particular about schooling from beginning of September, 2006. The matter again came before the learned District Court Judge Gerard Haughton on 29th August, 2006. The court being satisfied that notice of the application was duly served, and having heard the submissions made herein, and being satisfied that the welfare of the children requires the making of this order thereby directed:-

1. Interim order directing that the children be sent to the following schools: [AL] to commence schooling at [Named Post-Primary School], Callan and [BL] to commence schooling at [Named Primary School], Callan, up to and including the 26th September, 2006, or such date when the application is adjudicated upon;

2. Neither party is to remove the children from the jurisdiction without a court order and the application was adjourned to Kilkenny District Court on 26th September, 2006.

46. These matters came back to court in Kilkenny before the learned District Court Judge William Harnett on 26th September, 2006. On that date District Court Judge William Harnett being satisfied that notice of the application was duly served, and having heard the submissions made, and being satisfied that the welfare of the children requires the making of this order, hereby directs:-

1. The interim order made by Judge Haughton on 29th August, 2006, at Waterford District Court, to continue up to and including the 13th December, 2006, or, until after an appeal has been heard;

2. Neither party to remove the children from the jurisdiction without a court order;

3. The application stands adjourned to Kilkenny District Court (Family Law) on 13th December, 2006, at 10.30 a.m.

4. The preparation of a s.20 report from the Health Service Executive.

47. This fourth direction is quite clearly a direction for the preparation of a s. 20 report from the Health Service Executive in respect of each of the two children under the provisions of s. 20 of the Child Care Act 1991 which deals with proceedings under the Guardianship of Infants Act 1964, Judicial Separation and Family Law Reform Act 1989 and other family law Acts. This is quite obvious from the context and should not be confused with s. 20 of the Guardianship of Infants Act 1964 s. 20 which deals with safeguards to ensure the applicant's awareness of alternatives to custody, access and guardianship proceedings and to assist attempts at agreement.

48. Section 20 of the Child Care Act 1991 states:

"Where, in any proceedings under section 7, 8, 11, 11 B or Part III of the Guardianship of Infants Act 1964, or in any case to which –

(a) section 3 (3) the Judicial Separation and Family Law Reform Act 1989,

(b) Section 6(b) or 10(f) of the Family Law Act 1995 or

(c) Section 5(2), 11(b) or 41 of the Family Law (Divorce) Act 1996, relates, or in any other proceedings for the delivery or return of a child, it appears to the court that it may be appropriate for a care order or a supervision order to be made with respect to the child concerned in the proceedings, the court may, of its own motion or on the application of any person, adjourn the proceedings and direct the health board for the area in which the child

resides or is for the time being to undertake an investigation of the child's circumstances.

(2) Where proceedings are adjourned and the court gives a direction under *subsection* (1), the court may give such directions as it sees fit as to the care and custody of, or may make a supervision order in respect of, the child concerned pending the outcome of the investigation by the health board.

(3) When the court gives a direction under *subsection* (1), the health board concerned shall undertake an investigation of the child's circumstances and shall consider whether it should—

(a) apply for a care order or for a supervision order with respect to the child,

(b) provide services or assistance for the child or his family, or

(c) take any other action with respect to the child.

(4) Where a health board undertakes an investigation under this section and decides not to apply for a care order or a supervision order with respect to the child concerned, it shall inform the court of

(a) its reasons for so deciding,

(b) any service or assistance it has provided, or it intends to provide, for the child and his family, and

(c) any other action which it has taken, or proposes to take, with respect to the child."

49. By letter dated 26th September, 2006, Liam Nolan, District Court clerk wrote to the Principal Social Worker, Health Service Executive, Community Care Headquarters, Jame's Green, Kilkenny, informing her that at Kilkenny District Family Law Court on 26th September, 2006, an application under s. 11 of the Guardianship of Infants Act 1964 was listed for hearing and further adjourned to Kilkenny Family Court on 13th December, 2006. Judge Harnett directed as a matter of extreme urgency a Section 20 Report in the above matter in relation to the children, AL and BL. The report was to be available as quickly as possible in the event of an appeal to the Circuit Court within 14 days of this date.

50. The learned Circuit Court Judge had proceedings before him under the Guardianship of Infants Acts 1964 – 1997 s. 11 which is specifically covered in the Child Care Act 1991 s. 20. The relevant passage in synopsis of the material parts reads:-

"Where in any proceedings under… section 11 of the Guardianship of Infants Act 1964, … it appears to the court that it may be appropriate for a care order or a supervision order to be made with respect to the child concerned in the proceedings, the court may, of its own motion or on the application of any person, adjourn the proceedings and direct the health board for the area in which the child resides or is for the time being to undertake an investigation of the child's circumstances."

51. Subsection 2 follows:-

"Where proceedings are adjourned and the court gives a direction under *subsection* (1), the court may give such directions as it sees fit as to the care and custody of, or may make a supervision order in respect of, the child concerned pending the outcome of the investigation by the health board."

52. Subsection 3 follows:-

"Where the court gives a direction under *subsection* (1), the health board concerned shall undertake an investigation of the child's circumstances and shall consider whether it should—

(a) apply for a care order or for a supervision order with respect to the child,

(b) provide services or assistance for the child or his family, or

(c) take any other action with respect to the child".

53. The Health Service Executive, having stepped into the shoes of the Health Board, is accordingly under a duty to report and to keep the court informed.

54. The applicant seeks to impugn in his amended statement, filed on 16th February, 2007, in the High Court Central Office, the Supervision Order made under the Child Care Act 1991 s. 19(1) in respect of AL with the Health Service Executive South being the applicant and both MJL and DL being the respondents. The learned District Court Judge William Harnett on 13th December, 2006, being satisfied that notice of the application was duly served and that it is desirable the child be visited periodically by or on behalf of the Health Board and that the welfare of the child so requires thereby authorise the applicant Health Board to have the child AL visited on such periodic occasions as the Board may consider necessary in order to satisfy itself as to the welfare of the child and to give to her parents any necessary advice as to the care of the child and directed under s. 19(4) of the Act of 1991 (as to the care of the child as follows):-

"The Health Service Executive is hereby entitled to periodically visit the child at [a named address in] Co. Kilkenny, on any days between Monday and Friday 9.30 a.m. /5.00 p.m. on giving written notice to both respondents separately, said notice to be not shorter than 24 hours in advance. He also ordered the application to be listed for mention before the court on 14th February, 2007 and that the order should remain in force for a period of 12 months from 13th December, 2006, unless sooner discharged."

55. An order in identical terms was made in respect of BL except insofar as she was born on 5th October, 1995 and so is aged eleven years two years younger than her sister AL.

56. On the same day 14th February, 2007, the learned Judge William Harnett directed the interim order of 29th August, 2006, directing that the children be sent to the schools referred to therein, be extended up to and including 9th May, 2007 and that the applicant be at liberty without further consent of the respondent to allow AL to travel on a school trip to Northern Ireland from 4th May, 2007, to 6th May, 2007. On 14th February, 2007, Judge William Harnett issued a further interim order in respect of both girls and directed by interim order granting sole custody of the children to their mother up to and including 9th May, 2007 and adjourned the matter to Kilkenny District Court on 9th May, 2007. In his amendment to his statement required to grant an application for judicial review, the applicant father seeks an order of *certiorari* quashing the whole of the interim order made on 13th December, 2006, by District Court Judge William Harnett as second respondent. It is quite clear that the Health Service Executive has a very real and direct interest in the validity of these orders as the Health Service Executive was directed to prepare the report for the court and when the father of the children refused to allow the children to be interviewed by the Health Service Executive, the Health Service Executive then had to apply for supervision orders in respect of each of the children (see s. 20 of the Child Care Act 1991 at p. 105 of *Irish Family Legislation Handbook*, Editors, Muriel Walls and David Bergin. Their handbook may be likened to the ball of wool given by Ariadne to Theseus to enable him to find his way back out of the labyrinth after he had slain the Minotaur. I have cited s. 20(2) of the Act of 1991 above and I would point out that the learned District Court Judge did adjourn the proceedings and gave a direction under section 20(1) and that the court was entitled to give such directions as it sees fit as to the care and custody of, or may make a supervision order in respect of, the child concerned pending the outcome of the investigation by the Health Board. This is the very procedure which was adopted because the applicant husband prevented the children being interviewed by the appropriate staff of the Health Service Executive in their family home, hence the making of the two supervision orders dated 13th December, 2006. The courts' directions included a direction under s. 19(4) of the Child Care Act 1991 that the Health Service Executive was entitled to periodically visit the child having given written notice to both parents previously. I was informed by counsel that on 13th December, 2006 the relevant provisions were opened by the Health Service Executive to the District Court sitting in Kilkenny prior to the making of Supervision Orders in respect of AL and BL. Indeed apparently the applicant addressed the court at length in respect of s.20 of the Guardianship of Infants Act 1964, which was inserted into s. 20 of the Guardianship of Infants Act by the Children Act 1997, s. 11 which has amended part IV of the Guardianship of Infants Act 1964. In short all three counsel are agreed that the applicant has fundamentally misunderstood and misconstrued the intention and interpretation of s. 20 of the 1964 Act as amended. S. 20 of the Guardianship of Infants Act 1964 is to be found on p. 287 of the useful handbook of *Walls and Bergin*. This s. 20 is in part IV of the Act which deals with the safeguarding of the interests of children. The section sets out safeguards to ensure an applicant's awareness of alternatives to custody, access and guardianship proceedings and to assist attempts at agreement. I propose to set it out in full as the applicant places great reliance on his construction of this section and contends that it sets up prerequisites to the jurisdiction of the District Court which apply and were never surmounted or circumnavigated by the solicitors acting for the Legal Aid Board through the solicitors in the Law Centre in Kilkenny or by the Health Service Executive. The section states:-

> 20(1) In this section "the applicant" means a person who has applied, is applying or proposes to apply to the court for directions under section 6A, 11, or 11B.
>
> (2) If a solicitor is acting for the applicant, the solicitor shall before the institution of proceedings under section 6A, 11 or 11B, discuss with the applicant the possibility of the applicant:-
>
> > (a) engaging in counselling to assist in reaching an agreement with the respondent about the custody of the child, the right of access to the child or any other question affecting the welfare of the child and give to the applicant the name and address of persons qualified to give counselling on the matter.
> >
> > (b) engaging in mediation to help to effect an agreement between the applicant and the respondent about the custody of the child, the right of access to the child or any question affecting the welfare of the child, and give to the applicant the name and addresses of persons qualified to provide an appropriate mediation service, and
> >
> > (c) where appropriate effecting a deed or agreement in writing executed or made by the applicant and the respondent and providing for the custody of child, the right of access or any question affecting the welfare of the child.
>
> (3) If a solicitor is acting for the applicant –
>
> > (a) the original documents by which the proceedings under section 6A, 11 or 11B are instituted shall be accompanied by a certificate signed by the solicitor indicating, if it be the case, that the solicitor has complied with subsection 2 in relation to the matter and if the document is not so accompanied, the court may adjourn the proceedings for such period as it considers reasonable to enable the solicitor to engage in the discussion referred to in subsection 2,
> >
> > (b) if the solicitor has complied with paragraph (a), any copy of the original document served on any person or left in an office of the court shall be accompanied by a copy of that certificate.
>
> (4) The solicitor shall be deemed to have complied with subsection (3) in relation to the requirement of a certificate where the application under section 6A, 11 or 11B is made in proceedings for the grant of -
>
> > (a) a decree of Judicial Separation under the Act of 1989 and section 5(2) of that Act has been complied with by the solicitor, or
> >
> > (b) a decree of divorce under the Act of 1996 in section 6(4) of that Act has been complied with by the solicitor.

57. These safeguards according to counsel are to ensure that applicants are aware of alternatives to custody, access and guardianship proceedings and are to ensure generally that people are aware of mediation and other assistance to try to reach agreements. The purpose of the Oireachtas in including s. 20 was to encourage the applicant's solicitor to suggest the use of mediation or counselling. However, there is nothing in the s. 20 which places an onus on the applicant to engage in counselling, mediation or negotiation prior to commencing litigation. The nub of the applicant's claim for *certiorari* is that the proceedings in the District Court were not properly instituted in accordance with statute law. The bones of the applicant's contention is set out in his letter dated 20th October, 2006 to the Law Centre in Kilkenny, in which he refers to the notice of application dated 22nd August, 2006 under s. 11(1) of the Guardianship of Children's Acts, 1964 – 1997 and the subsequent hearings in Waterford District Court on

29th August, 2006 and in Kilkenny District Court on 26th September, 2006. The applicant in his letter continues:-

> "The first of these resulted in an interim schooling order made in respect of my daughters [AL] and [BL] and the second for its continuance until December 13th 2006, to which time the issue has been adjourned for a hearing at Kilkenny District Court. Also in this last instance an Order of a Section 20 report from the H.S.E. has been issued."

58. He continues:-

> "I note that in your service of documents to me there was not attached as required by the Children Act 1997, Section 20 (3)(b), and required as a necessary safeguard of the Children's interests, a certificate signed by the solicitor for the applicant indicating that subsection 2 of the above statute has been complied with. Neither has a copy of the same certificate been served on me to this day. Furthermore there does not exist as of this date such a certificate in the court files as confirmed to me by the Court Clerk Mr. Nolan.
>
> As this procedure is crucial to receiving the consent of both parties to the action, you will note that no such issue has been broached, and no consent to such a hearing can be given until both parties have thereby formally ruled out the option of counselling or mediation prior to the involvement of the courts.
>
> I therefore need to inform you that you need to drop this action forthwith, give time to get these procedures in place, effecting the return of the situation to the *'Status Quo Ante'*. This means the suspension of the Orders and the return of the children in question to their Home schooling situation.
>
> Failing these pleadings effecting of this, I am obliged to advise you that it is my intention to make application for leave for a Judicial Review naming you among the respondents and with a view to retrieving aggravating costs.
>
> Yours sincerely
>
> [MJL]."

59. For completeness on this aspect I intend to set out the reply dated 24th October, 2006 from the managing solicitor in the Law Centre which acknowledged his letter dated 20th October, 2006 and went on to say that any application for judicial review for the reasons set out in the applicant's letter would be vigorously contested and this letter would be used to fix the applicant with the costs of same. Niall G. Murphy then went on to write:-

> "Your interpretation of s. 20 of the Guardianship of Infants Act is flawed and erroneous. That section clearly envisages that the absence of the certificate does not invalidate the proceedings although the court may adjourn the case to allow discussions to take place. The Domestic Violence Act 1996 under which your wife obtained the safety order does not require certificates about counselling etc. You should bear in mind that this office is acting for your wife. She has given us the clearest of instructions that she wants the children to attend school. As you and your wife do not agree on home schooling the law requires the children to be sent to school whether there is a court order or not. The decision of Kilkenny District Court was made after the court gave you an opportunity to seek legal advice, heard your evidence and allowed you to cross-examine your wife. You did not raise any issue about the certificate during the hearing and you chose not to appeal. I am informed by the other solicitors at the Law Centre who have been representing your wife that all the options referred to in the section were explored with her prior to the institution of these proceedings. Indeed your wife instructed us that both of you attended six sessions of couples counselling earlier in the year. I have also requested that the matter be re-entered before the court sitting on the 8th November, 2006 at 10.30am to enable the court to address the point which you have now raised. Please find attached a formal notice to re-enter the matter returnable for that date along with the certificate pursuant to Section 20.
>
> Yours sincerely
>
> Niall G. Murphy
>
> Managing Solicitor
>
> Kilkenny Law Centre."

60. The applicant maintains that s. 20 of the Guardianship of Infants Act, sets up prerequisites to the jurisdiction of the District Court and in particular he submits that s. 20(3) is mandatory and must be complied with by the solicitor acting for his wife as applicant. Subsection 3 reads:-

> "(3) If a solicitor is acting for the applicant –
>
> (a) the original documents by which the proceedings under s. 6A, 11 or 11B are instituted shall be accompanied by a certificate signed by the solicitor indicating, if it be the case, that the solicitor has complied with subsection 2 in relation to the matter and if the document is not so accompanied, the court may adjourn the proceedings for such period as it considers reasonable to enable the solicitor to engage in the discussions referred to in subsection 2,
>
> (b) if the solicitor has complied with paragraph (a), any copy of the original document served on any person or left in an office of the court shall be accompanied by a copy of that certificate.
>
> (4) The solicitor shall be deemed to have complied with subsection 3 in relation to the requirement of a certificate where the application under section 6A, 11 or 11B is made in proceedings for the grant of
>
> (a) a decree of Judicial Separation under the Act of 1989 and section 5(2) of that Act has been complied with by the solicitor, or
>
> (b) a decree of divorce under the Act of 1996 in section 6(4) of that Act has been complied with by the solicitor."

61. While the word "shall" is used in subsection (3)(a), nevertheless this is qualified by what follows namely that the original

documents instituting proceedings shall be accompanied by a certificate signed by the solicitor indicating, if it be the case, that the solicitor has complied with subsection 2 in relation to the matter and, if the document is not so accompanied, the court may adjourn the proceedings for such period as it considers reasonable to enable the solicitor to engage in the discussions referred to in subsection 2. Thus it is envisaged that the document may not be accompanied by a certificate and also that, if the document is not so accompanied, the court may adjourn the proceedings for such period as it considers reasonable to enable the solicitor to engage in the discussions referred to in subsection 2, at some time after the matter has appeared in court. I accept the submission of counsel for the wife, counsel for the Health Service Executive, with the support of counsel for the Legal Aid Board, that the applicant has misconstrued the meaning and application of s. 20 and that there is in fact nothing in s. 20 of the Guardianship of Infants Act 1964 as amended, which places an onus on an applicant wife to engage in counselling, mediation or negotiation prior to commencing litigation.

62. During submissions in this case it was asserted several times by the applicant that this was a *certiorari* application about due process and not a conflict on the merits. While I am convinced that the applicant husband has misconstrued the section as constituting an insurmountable block on the line, I have come to the conclusion that he is not only wrong in this because he has misconstrued the section and its application but there are in any event further reasons why he should not succeed in his application for *certiorari*. In the verifying affidavit of the first named notice party, the wife, at para. 13 she states:-

> "I say that I have made known to [MJL], my intention to apply for a judicial separation with ancillary relief. I say that on 20th July, 2006 a section 5 certificate was prepared in advance of the said application for an order of judicial separation advising me of all other options available to me. I beg to refer to the said s. 5 certificate as exhibited at "A" above. I say that paras. 1 and 3, 4, 5 and 6 of grounds upon which relief is sought are therefore manifestly untrue and incorrect."

63. In fact the wife was the applicant in proceedings drafted for the Circuit Family Court in the matter of the Judicial Separation and Family Law Reform Act 1989 and in the matter of the Family Law Act 1995 between DL, applicant and MJL, respondent. The certificate pursuant to s. 5 of the Judicial Separation and Family Law Reform Act 1989 had in fact been given on the 20th July, 2006 and signed by Katie Gilhooly a solicitor in the Law Centre in Kilkenny in which she certified that she had discussed with the applicant the possibility of reconciliation with the respondent and had given the applicant the names and addresses of persons qualified to help effect a reconciliation between spouses who have become estranged; she also went on to say that she had discussed with the applicant the possibility of engaging in mediation to help effect a separation on an agreed basis with the respondent, and had given the applicant the names and addresses of persons in organisations qualified to provide a mediation service; and thirdly, she said that she had discussed with the applicant the possibility of effecting a separation by the negotiation and conclusion of a separation deed or written separation agreement with the respondent. From this it is clear that before 20th July, 2006 the wife was fully appraised and informed of the alternative methods to litigation whereby she might be able to resolve her family law difficulties. There can be no doubt but that DL was aware that there were alternative modes of proceeding to tackle the marital problems and, in any event, she was fully entitled to proceed with an application to the court in the circumstances of her case. Section 20 of the Act of 1964 does not actually require her to engage in any of these processes of counselling, mediation or negotiation since the only requirement stipulated in s. 20 is that she should be informed in advance of these options and counsel for the Health Service Executive submits that in any event if there were any such prerequisites, then there had been compliance with them. In fact counsel for the wife submitted that there was nothing in s. 20 which precluded the application from proceeding without the opposing party, the husband, being present.

64. There is a further point to be made on this aspect in that the applicant husband has said that he was present for the Domestic Violence Act proceedings in the District Court on the 26th September, 2006 in Kilkenny but he maintains that he was not present for the Guardianship of Infants Act proceedings on that same day. Counsel for the Health Service Executive says that this contention defies logic since there is nothing in the District Court rules which requires a memo of appearance to be entered and that when a person is summoned to attend court and, since the District Court has jurisdiction in these family law matters, as has the Circuit Court and the High Court, then the District Court has jurisdiction in all of the applications which are dealt with as one composite matter since under the legislation there is interlocking cross referencing between the various Acts giving jurisdiction to the District Court. The District Court in practice deals with all of the matters before the court in respect of the parties in a composite hearing and deals with all of the parties in all of the cases together and not on a consecutive or exclusionary basis. While the District Court deals with all of the matters between the parties at the same time nevertheless the order in respect of each application has to be made up separately; for example, the order under the Domestic Violence Act 1996 would be written up and then perhaps next the order under the Guardianship of Infants Act 1964 – 1997 s. 11(1) would then be written up. If a further clarification of this is required, then a reading of s. 7 and s. 9 of the Domestic Violence Act 1996 clinches the matter. Section 7 deals with power to make orders under the Child Care Act 1991. The Domestic Violence Act 1996 states:-

> s.7(1) Where in proceedings for any order under this Act, other than proceedings to which section 6 relates, it appears to the court that it may be appropriate for a care order or a supervision order to be made under the Child Care Act 1991, with respect to a dependent person concerned in the proceedings, the court may, of its own motion or on the application of any person concerned, adjourn the proceedings and direct the Health Board for the area in which such dependent person resides or is for the time being to undertake an investigation or, as the case may be, further investigations of such dependent person's circumstances.
>
> (2) Where proceedings are adjourned and the court gives a direction under subsection 1, the court may give such directions under the Child Care Act 1991, as it sees fit as to the care and custody of, and may make a supervision order under that Act in respect of, the dependent person concerned pending the outcome of the investigation by the Health Board concerned.
>
> (3) Where the court gives a direction under subsection 1 in respect of a dependent person, the Health Board concerned shall undertake an investigation of such dependent person's circumstances and shall consider if it should –
>
> (a) apply for a care order or a supervision order under the Child Care Act 1991,
>
> (b) provide services or assistance for such dependent person's family, or
>
> (c) take any other action in respect of such dependent person.
>
> (4) Where a health board undertakes an investigation under this section and decides not to apply for a care order or supervision order under the Child Care Act 1991, with respect to the dependent person concerned, it shall inform the court of -

(a) its reasons for so deciding,

(b) any service or assistance it has provided, or intends to provide, for such dependent person and his or her family and

(c) any other action which it has taken or proposes to take, with respect to such dependent person.

65. Section 9 deal with the hearing of applications under various Acts together:

9(1) Where an application is made to the court for an order under this Act, the court may, on application to it in the same proceedings and without the institution of proceedings under the Act concerned, if it appears to the court to be proper to do so, make one or more of the orders referred to in subsection (2).

(2) The provisions to which subsection (1) relates are as follows, that is to say:

(a) an order under section 11 (as amended by the Status of Children Act 1987) of the Guardianship of Infants Act 1964 ;

(b) an order under section 5, 5A, 6, 7 or 21A of the Family Law (Maintenance of Spouses and Children) Act 1976 (as amended by the Status of Children Act 1987);

(c) an order under section 5 or 9 of the Family Home Protection Act 1976 ;

(d) an order under the Child Care Act 1991 .

66. In practice where an applicant wife has applications under both Acts, there would almost invariably be just one hearing before the District Court Judge who then writes up each of the orders under each Act and, being human, can only write up orders under each Act one at a time. Clearly the Health Service Executive had a significant role to play and was directed by the learned District Court Judge to play a considerable role in the obtaining of a report. The refusal by the father of the two children to facilitate visits to the home made it necessary for the Health Service Executive to invoke other powers in order to comply with the courts' direction to investigate and make a report. There can be no doubt whatever but that MacMenamin J. was correct and prescient in making both the wife and the Health Service Executive notice parties as they were essential interested participants in the transactions and in the evolving family situation.

The role of the Legal Aid Board

67. Rossa Fanning after saying that he appeared for the Legal Aid Board stated that the Law Centre in Kilkenny was not a separate or independent entity but an arm of the Legal Aid Board and that the solicitors working in the Law Centre were the agents of the Legal Aid Board. He submitted that the only function of the solicitors working in the Law Centre in this case was to act for the first notice party, the wife, who had been joined in the *certiorari* case by MacMenamin J. He as Counsel was instructed by Mason Hayes+Curran, Solicitors for the Legal Aid Board, which was a statutory body and the legal entity which employed the solicitors in and was responsible for the Law Centre in Kilkenny. From the outset of the case, counsel submitted that the applicant was approaching matters on the basis of a misconception as to the role of the Legal Aid Board. In particular he contended that the applicant's notions with regard to the applicability of the provisions of s. 20 of the Guardianship of Infants Act 1964 as amended were erroneous and when the applicant gave him an opportunity to explain this, he drew attention to the third and fourth paragraphs in the letter dated 24th October, 2006, to the applicant from the managing solicitor of the Kilkenny Law Centre, which letter was written to the applicant to make him aware that his interpretation of s. 20 of the Guardianship of Infants Act was flawed and erroneous. This letter pointed out that s. 20 clearly envisages that the absence of the certificate which is referred to in s. 20(3) is not a prerequisite as

"that section clearly envisages that the absence of the certificate does not invalidate the proceedings although the court may adjourn the case to allow discussions to take place. The Domestic Violence Act 1996 under which your wife obtained the safety order does not require certificates about counselling etc."

68. Mr. Murphy in para. 4 referred to the role of the Law Centre by saying:-

"You should bear in mind that this office is acting for your wife. She has given us the clearest of instructions that she wants the children to attend school. As you and your wife do not agree on home-schooling the law requires the children to be sent to school whether there is a court order or not."

69. By this clear and concise paragraph the point was made that as there was a disagreement between the parents about home schooling it was their duty as her solicitors to act on her instructions that she wanted the children to attend school. Counsel reiterated this stance by the Legal Aid Board and sought and was granted an amendment of the third respondent's name in the title to the Legal Aid Board. He agreed with the submissions of the other two counsel in full and submitted that his client had a fundamental basis for opposing the applicant's claim for *certiorari* since his application was wholly misconceived and incorrect in law in that the applicant had no cause of action against the Legal Aid Board in this case although he acknowledged that the Legal Aid Board was a public body amenable in appropriate circumstances to judicial review. However the only relevant capacity in this case of the Legal Aid Board was because it featured as the wife's solicitor in her purely private capacity and she is entitled to have a solicitor to represent her; her choice of solicitor is her concern and should not normally be the concern of the applicant in that in the ordinary way the solicitor acting for one's legal adversary would not owe one a duty of care except in peculiar and exceptional circumstances. In his submission the Legal Aid Board was not exercising a public law function when it made available a solicitor to represent the wife in such family law proceedings. Counsel referred to the statement granting the application for judicial review at p. 6 of the applicant's book of documents and the amending statement at p. 32 thereof. The reliefs sought at 1 – 6 on p. 7 of the earlier grounding statement are all reliefs by way of *certiorari* and declarations against the first and second named respondents, albeit in para. 4 a declaration is sought by the Applicant that both the first and second named respondents acted improperly in failing to ascertain that the proper notice had been served on the applicant informing him of the statutory necessity required by s. 20(3)(a) of the Guardianship of Children Acts 1964 – 1997 that he deliver a memorandum or other document to the appropriate officer of the court for the purpose of making an appearance in the matter and at para. 5 a declaration was sought that the first and second named respondents acted improperly and erred in law in making orders without ascertaining that a memorandum or other document had been

"delivered to the appropriate officer of the courts for the purpose of an entry of an appearance by the respondents;"

70. and at para. 6 that

> "…the first and second named respondents acted improperly and erred in law in making orders in the absence of the statutory certificate required by s. 20(3)(a) of the Guardianship of Children Acts 1964 – 1997".

71. As I have related above, all three counsel have submitted that the applicant has misconstrued this section and it is clear from the wording of s. 20(3) that, if the originating documents are not accompanied by the certificate signed by the solicitor, then the court may adjourn the proceedings for such period as it considers reasonable to enable the solicitor to engage in the discussions referred to in subsection 2. When one looks at the reliefs sought in the original grounding statement there is no particular declaration or quashing order sought against the Legal Aid Board such as the applications to quash and the declarations which are sought against the first and second named respondents. A similar criticism applies to the amendment to the statement required to ground the application, which amendment was filed on 16th February, 2007. Even the declaration at para. 4 on p. 33 of his Amendment to Statement in his Book of Pleadings is directed against the second named respondent District Court Judge on the grounds that he has continued to act improperly and/or erred in law in hearing an application or applications without ascertaining the authenticity of the section 20 certificates required under the Guardianship of Infants Act 1964 and therefore "without establishing the *bona fides* of the family law solicitors named as the third respondent, especially in the absence of an appearance or the participation in proceedings of a respondent." This can be taken as being a further criticism of the second named respondent based on the misconceived notion of the s. 20 certificate being a prerequisite and a further criticism of him for acting "without establishing the bona fides of the family law solicitors named as the third named respondent (i.e. the solicitors in the Law Centre)". In the light of the fact that the applicant himself in this Court clearly indicated that he had participated in the proceedings before the second named respondent District Court Judge, it would seem that, despite the warning letter from the Law Centre, he persists in his contention that he had neither entered an appearance or participated in the guardianship proceedings. His stance underlines that he is ignoring the provisions in s. 20 of the Child Care Act 1991 and ss. 7 and 9 of the Domestic Violence Act 1996 which enables the court to make orders under provisions of others of the Family Law Acts and to hear applications under the various Acts together and at the same time.

72. Counsel for the Legal Aid Board asked rhetorically:- what is it that the Legal Aid Board did which the applicant is seeking to quash? He points out that the answer to this is that the applicant has sought no specific relief against the Legal Aid Board. He submits that even if the applicant's complaints in his lengthy submissions were cogent and correct, then even so the Legal Aid Board could not be made responsible at law for a mistake made by either or both of the first and second named respondents. In short, counsel submitted that the applicant had no case against the third named Respondent Legal Aid Board or its agents.

The legal framework

73. I am dealing with an application for *certiorari* and do not intend to delve into parental rights and the role of the State in respect of the education of children other than to say that it seems to me that times have changed since under the common law the father was given absolute authority over the religious or any other aspect of the education of his children. The enactment of the 1937 Constitution changed the previous situation. The applicant referred to *Re. Tilson* [1951] I.R. 1 when making his contention that in this case there was an agreement between himself and his wife that the children would be schooled at home and brought up in the Roman Catholic tradition. It was in *Re Tilson* at p. 37 that Black J. described the common law principle that a father was given absolute authority over the religious education of the children an "archaic law and a relic of barbarism" and said:-

> "This law was derived from another law - that of the serfdom of women - which I doubt not emanated from the cave-man, long ages before the art of writing was discovered. Yet, it survived nineteen centuries of the Christian era, some ugly aspects of it being ended only within living memory. One of these seems to me to be the absolute dictatorship of the father in the matter of his children's religion."

74. In that case Mr Justice James Murnaghan was influenced by the use of the plural word "parents" in Article 42.1 which states that both parents are possessed of the right and duty to provide, according to their means, for the religious education of their children. His conclusion was that:-

> "In my opinion the true principle under our Constitution is this. The parents - father and mother - have a joint power and duty in respect of the religious education of their children. If they together make a decision and put it into practice it is not in the power of the father - nor is it in the power of the mother - to revoke such decision against the will of the other party."

75. In that case the court held that the father was bound by his antenuptial agreement that the children should be educated in the religion of their mother. In the present case the applicant seeks to rely on the concept that once the two parents agree on home education then this remains immutable. I think that most parents would agree that each child is individual and as the child develops and the home and family circumstances change, then sensible and dutiful parents will reconsider what is now the most suitable mode of education for the child or children. With changing times and circumstances and the particular development of the individual child, there often comes a sensible decision on the part of parents co-operating and pulling together to reconsider the direction of a child's education and perhaps a change of school for the child or perhaps a change to thinking that a more sociable schooling in a school in the community would be preferable to home schooling at this stage of the child's development. In the present case the parents now differ with regard to their views as to what is the most appropriate type of education for their two younger children and from the tenor of the wife's letters to her husband, these differences have emerged and progressed over a lengthy period of time. From her affidavits it is clear that she is apprehensive that her husband's involvement in the Order of Saint Charbel, in which he apparently has been ordained as a priest in March, 2005, in Australia is a rather more fervent and fundamental manifestation of religion than the two children's mother had contemplated in earlier times. I note that the father celebrates mass at home on a daily basis and his wife does not allow the children to attend these masses. In all the circumstances of these conflicts and differences, it is hardly surprising that the learned District Court Judge, the second named respondent, thought it appropriate that there should be a Report to be prepared and given by the Health Service Executive under s. 20 of the Child Care Act 1991. Indeed, the second named respondent had the benefit of a report dated 2nd November, 2006 and a further report dated 11th December, 2006, when making subsequent orders.

76. The principle of joint responsibility of the father and mother as guardians of the child had been recognised by s. 6(1) of the Guardianship of Infants Act 1964. This had probably always been the position since the enactment of the Constitution in 1937. Article 18.1 of the United Nations Convention on the Rights of the Child provides:-

> "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

77. Conor O'Mahony in *Educational Rights in Irish Law* at p. 107 says that the clear inference of assigning joint responsibility to parents in relation to the upbringing and development of their children is that the educational rights of parents are to be exercised jointly and that preference is not to be given to one parent over the other. A similar concern can be seen in Article 5 of the seventh protocol of the ECHR, which states that:-

> "Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution."

78. However, if parental authority is to be exercised jointly, then the question arises as to who should exercise that authority where joint exercise is not possible. There was a suggestion in *Re. May* [1958] 92 I.L.T.R. 1 that some vestiges of the archaic common law position may have survived the enactment of the Constitution but Alan Shatter at p. 553 of *Family Law* (4th Ed. 1997) states:-

> "On the other hand, the court may not regard itself as bound by in Re May and simply decide that if it is in the interests of the child's welfare to be educated in the religion of that parent in whose custody the child, for other welfare reasons, is to be placed. The latter seems the more likely and desirable solution."

79. In the present case all the children have opted to reside with their mother and the two youngest girls have in fact been attending schools and appear to have settled in well and their academic prowess is indubitably a credit to their father's diligent tuition of them. However, family circumstances have changed and apparently the atmosphere in the home has led to conflict and the added security of the school and other social and community influences may well have beneficial effects on their upbringing. These would appear to be very much matters for the second named respondent if necessary to make decisions on with the assistance of reports from the Health Service Executive, and, one would hope, also with the help and assistance from both parents.

80. On reflection it seems to me that while parents may at a certain stage agree that a particular type of education or school may be appropriate for one of their children, with the vicissitudes of life and changing circumstances of the family and also the development of the particular child, and the evolving talents and interests and general growth of the personality of the child and his or her interests, then as the child develops different considerations as to what is best for each individual child may arise and these considerations may lead to views which would indicate that a change of regime as to type of schooling is needed. That such a change would be given due consideration and decisions made as to what is genuinely best in the child's interest would appear to be implicit in any such agreement about the education and upbringing of a child. Manifestly it would be wrong to force a child with particular needs and talents into a milieu or type of education which would be inappropriate for the particular child. No doubt if there are conflicting views between the parents then matters may reach a point where the assistance of the court may be required to try to strike the extremely delicate balance which will be required on the basis of reports from teachers and other experts and after hearing the views of each of the parents and after detailed consideration of the relevant circumstances of each child's case and personal development.

81. I do not propose to enlarge further on the above aspects because, as the applicant stressed and indeed reiterated, this is an application for judicial review and is not an appeal from the findings of the first and second respondent District Court Judges. The applicant at the conclusion of his submissions emphasised that his application was for leave for judicial review concerning proceedings in the District Court which he alleged were not properly instituted in accordance with the statutory law. His theme was that the proceedings had not been properly instituted and accordingly that he, as a guardian of each of the two children, had no obligation to respond to the proceedings because, as far as he was concerned, they had not been properly initiated. He advanced this theory on several fronts. While at risk of reiteration of points already made in explaining that the applicant has misconstrued the various statutes in particular by treating them as each being separate by ignoring or fail to note the sections in them which enable the court to deal with the various provisions in the same hearing and at times to treat the various pieces of legislation as interlocking with the court being able to make orders under the appropriate Act by virtue of such provisions as those in s. 20 of the Child Care Act 1991. I trust that I have explained why in my view the applicant has misconstrued the provisions in s. 20 of the Guardianship of Children Acts and in particular has taken an incorrect interpretation of s. 20(3) as being applicable in the present case. From this misconstruction he had wrongly supposed there to be an unfulfilled prerequisite which his wife's solicitor has failed to comply with in respect of the furnishing of a certificate signed by her solicitor in respect of having discussed with her the possibility of engaging in counselling or engaging in mediation or where appropriate effecting an agreement providing for the custody of the child, the right of access to the child or any question affecting the welfare of the child. I accept the submission of the three counsel that the applicant has misconstrued the meaning of these Acts in this respect when they are read in conjunction with each other and not read in isolation. I admit to a certain sympathy for the applicant as a thoughtful and well educated citizen who has had the diligence and self confidence to have faith in his capacity to construe the provisions of the statutes correctly for himself and also has the self confidence to rely on his own interpretation and his own opinion as to the consequences thereof. Accordingly it is with some considerable sympathy for him I am coerced into finding that he has misconstrued the legislation and is in error in thinking that the District Court Judges lacked jurisdiction. I have no doubt whatsoever that they were both entitled to hear the proceedings and make orders and I am satisfied that counsel appearing for the Legal Aid Board and the two notice parties, namely the wife and the Health Services Executive (South) have made clear that the various applications were properly instituted. Thus there was in this case no "failure in governance of the District Court" as submitted by the applicant in respect of compliance with the necessary criteria to ensure that the court acted within jurisdiction. For the sake of clarity and at risk of reiteration, the wife's proceedings were brought under the Domestic Violence Act and so the provisions in s. 20 of the Guardianship of Infants Act was not a mandatory prerequisite and this is quite clear from the wording of s. 20(3) when it uses the phrase "if it be the case, that the solicitor has complied with subs. (2) in relation to the matter and, if the document is not so accompanied, the court may adjourn the proceedings for such a period as it considers reasonable". Counsel for the second notice party pointed out that not only had the applicant misconstrued the relevant legislation and failed to realise that interlocking legislation gave the first and second respondents jurisdiction to make the orders in the absence of the certificate, which the applicant regards as a prerequisite to jurisdiction, but also he made several other submissions which do not stand up to scrutiny. His first of these points was that his wife had applied to the District Court in Waterford while he, the husband and applicant, was in Australia. In fact, it is clear from the documentation exhibited, particularly the copy letters from the wife to the husband, that the husband had knowledge of the marital difficulties and the wife's anxieties about the children's education and that he had been informed of her intention to bring the matter before the court and was aware that she intended to make a guardianship application as she was anxious that both girls should attend regular schools with term due to start in early September.

82. Secondly the applicant cited the *Tilson* case and in particular the principle in respect of the agreement in that case elucidated by Mr Justice James Murnaghan with his suggestion that once such a pre-nuptial agreement about the religious denomination for the upbringing of issue is made it cannot be revoked unilaterally. I have above referred to Alan Shatter's views on this proposition where the parents subsequently differ in their views and I have explained why I think that the interests of the child should prevail and if a particular school which was agreed upon is regarded by one or both of the parents as no longer being suitable for the needs of the particular child at his or her stage of development then it should be regarded as implicit in the agreement that there may be need for a change to fit the talents and needs of the individual child as family circumstances change and if the personal development of the

child requires consideration of a change of plan. Moreover, in the case at hearing it became clear from the wife's affidavit that while both were initially content that the children should be brought up with home schooling and in a devout Roman Catholic atmosphere, as time went on their mother apprehended that the applicant father had become more and more immersed in the Order of St. Charbel to the extent that he became ordained as a priest in this Order in a remote part of Australia. Furthermore, without her leave he had drawn funds from the family budget and had used a considerable amount of their joint family savings on travel to and from this religious community in Australia. From the submissions of the applicant husband and his description of this Order, one could understand why his wife had become apprehensive that he was overwhelming and alienating his children by his enthusiasm for the teachings and practices of this religious Order.

83. I mention this aspect in the context of counsel for the second notice party having indicated that the making of an order for *certiorari* is made not only after the applicant has shown the court that there is an arguable and statable case as to lack of jurisdiction but also there is the consideration that the making of such an order is a discretionary matter for the court. It is in this context that I make these present points. The applicant addressed the court about the principle of subsidarity and the need to recognise that power initially rests and is vested in the family as to choice in respect of education and schooling and issues in this context, and he submitted that it was the duty of the State to give room to the local and family unit and should respect the wishes of parents to have home schooling for their children. There is undoubtedly a strong argument to be made that parents who are in agreement in respect of matters of schooling and education have considerable duties and entitlements in that respect and I do not gainsay this, other than to point out that if there are unhappy differences between parents on such matters then it may be necessary in the interests of each of the children that one or other of the parents should seek the assistance of the court in the interests of the children.

84. Thirdly the applicant husband suggests that certain requisite procedures should have been used before his wife brought the matter to court and he argued that the issue of the education of the two children had never been brought up and discussed properly in that his wife had never produced reasons to him as to why the home schooling should not continue. In argument he suggested that there were ulterior motives on her part for bringing the application and that her solicitor had failed to make contact with him as the respondent in respect of the various measures available such as counselling and mediation. In particular he stressed that there had to be a real difference of opinion between the parents sufficient to upset a pre-existing agreement which had been operating between the parents for years as to the home education of the children. I regret to say that I think there is an element of self delusion in his making this point as it is crystal clear from the two copy letters which he had received from his wife early in 2006, that she was very concerned about the home schooling and what she clearly believed to be overbearing and too zealous religious instruction of the two girls by their father. The applicant to his credit had taken care at times not to be critical of his wife, but placed blame on the Law Centre solicitors and the learned District Court Judges. However, in argument at times he came out with submissions on the lines that DL was encouraged to do what she did in order to get out of her marriage. I propose to quote certain of his introductory remarks and extracts from his affidavits to give examples of the flavour and the fervour of his statements and beliefs.

85. At the start of his introductory remarks he quoted from para. 37:-

> "By using the first named notice party as the opposing party and by encouraging her to use as many personal details as possible, the third named respondent (the Legal Aid Board) has covertly contrived to force this hearing '*in camera*'. We are dealing with whether the court can hear a matter in which they have no evidence that there is something at issue and whether a court can make an '*ex parte*' order that supersedes the fundamental constitutional rights of a married parent to educate his children according to a long standing agreement that had been put into practice. There is nothing '*in camera*' about that. The general public need to know where in private family law matters, where there are differences to be resolved and the family facilitated by an application made under the Guardianship of Infants Act whether it is safe for those applications to be heard in the District Court. Are the District Courts fit to hear private family law applications under the Guardianship of Infants Act? Is there adequate governance to ensure that the principles underlying that parental authority and children's welfare exist in the District Court?"

86. In fact, to be fair to the applicant, when I indicated that I thought that it was in the interest of the family and in particular of the two children that the matter should be heard *in camera* I do not think that the applicant demurred and I recall he indicated his acquiescence to the matter being *in camera*. In fact, the matter is actually governed by legislation in the Family Law Acts, so the matter should be *in camera* and the participants should not be identified. Since this *certiorari* arises out of the fact of a marital dispute and family law proceedings, I had no hesitation in making an order that the matter should be *in camera* and my understanding is that the applicant was acquiescing to this.

87. I quote a further passage from the applicant's introductory remarks:-

> "In all cases relating to children, especially children born within the institution of marriage, the court must be mindful of the balance to be drawn between the State's interest in the child's welfare and the autonomy of the family. The Constitution and case law have set the threshold where the State may have an interest as being very high, indeed only where there exists certain compelling evidence that the child's welfare is in peril. That evidence does not exist, nor ever did it exist for the children of our family. Indeed the evidence which does exist shows that there were no concerns of the welfare of our children which are of public interest prior to the commencement of any court proceedings. Moreover, the nature of the original application under the Guardianship of Infants Act, as opposed to the Child Care Act, further reinforces the private nature and therefore subsidiarity of the role that is permissible to the State, either as Health Service Executive or through its judicial arm."

88. I have quoted this because while there may be considerable weight in what the applicant says about the importance of the role of parents in the education of children and the reticence which should be exercised by State Agencies in interfering in the autonomy of a family, nevertheless the applicant's remarks ignore the two letters which his wife wrote to him and her story in her affidavit as to how she became more and more anxious about the children's home schooling and her apprehension that her husband was inculcating in them his unusual and extreme Roman Catholic religious view of the variety favoured by the Order of St. Charbel. I am taking the trouble to set out these matters because the applicant gave the impression that he strongly believed in the righteousness of his cause and seemed impervious to suggestions that his wife was entitled to hold a view that his religious views had changed from devout Roman Catholicism to the more unusual and extreme views of the Order of St. Charbel. In this case I was concerned that there was a problem of communication with the applicant in that he seemed to be absorbed by legal points and by faith and utter belief in the righteousness of his cause, based on the tenets of a patriarchal role and his certainty of belief in the dominant position of the husband and father in the family.

89. Lest there should be any anxiety that the applicant was not aware of her intention to initiate proceedings, she has exhibited his letter dated 7th August, 2006 to the Waterford District Court office which was received and is date stamped 14th August, 2006, in

which the applicant stated:-

> "I wish to state that last Thursday 3rd August, 2006 my wife told me that she had been at your court on Tuesday August 1st, seeking a 'Protection Order' and that the proceedings were adjourned until 8th August, 2006."

90. He continued later in the same letter to say:-

> "I wish to put on record that because I do indeed have much to complain of, that in order to retrieve the lost opportunities for preparing next year's curriculum for our home schooled children next term, I have found the need to withdraw for the next three weeks from the continuous attempt at baiting, the psychological bullying and manoeuvring that has harassed me for the entire duration of the summer period and before. Because of the need to concentrate on this work I will not be contactable during this time."

91. By further letter dated 29th August, 2006 the applicant wrote to the effect that he had just been advised verbally by his wife by telephone conversation of a hearing to take place at Waterford District Court on Tuesday 29th August, 2006 in regard to the schooling of the two youngest children. In this letter he stated:-

> "Among these (e-mails) I found the following brief message from my wife dated Wednesday 23rd :-
>
> > 'Next Tuesday the judge will make a decision on the girls' schooling. Ring me for details.'"

92. It is clear that his wife had informed him of her anxieties about the children's schooling and that he was aware that she was making an application. In fact it was not until later that month that the District Court made its order in relation to the children's schooling.

93. In his amended grounds upon which relief is sought at para. 10 the applicant wrote:-

> "Notwithstanding this, the applicant herein, consistent with his duty as a husband in managing the process of the spouses working together for the benefit of the family unit, wrote to the third named respondent to ascertain the perceived difficulties of the First Named Notice Party so that the family could avoid the legal forum, which everyone agrees is detrimental to family harmony. Clarification was sought in this letter as to the First Named Notice Party's proposals, and how these proposed changes to the family dynamics could be deemed necessary for the benefit of the children's welfare. No response was forthcoming, demonstrating that no difference was ever established and verifying that the application was vexatious and should be struck out."

94. In his further verifying affidavit sworn on 16th February, 2007 after stating that the applicant and the first named notice party made a covenant of marriage with God under the rites and ceremonies of the Roman Catholic Church on 8th May, 1982 at the Church of Our Lady of the Wayside, Rathdown, Co. Dublin, he went on to aver at para. 3:-

> "3. I say that the applicant has made the first named notice party aware that in the circumstances of this marriage the Civil Courts are only entitled to deal with the civil aspect and are not entitled to grant either spouse a decree to live separately. The applicant has advised the first named notice party that the authority over their marriage remains under the jurisdiction of the ecclesiastical courts.
>
> 4. I say that my role as husband in this marriage is to represent agreed family policy to the outside world. The decision to home-school the children was agreed family policy for eight years and was clearly and purposefully made on the basis of the evidence we had gleaned from sending the older children to school while we found the moral integrity of the family was being threatened. The first named notice party has never advanced any reasons or produced evidence to show that sending the children to school would not now endanger the moral integrity of the family. However, after returning home from Australia where I had gone to carry out my obligations to the children's schooling, I discovered that in my absence, the State had stepped in to now threaten and disrupt the moral integrity of my family."

95. I do not wish to become embroiled in a theological debate and I acknowledge that certain aspects of family law in Ireland derived from the ecclesiastical courts as since adopted and adapted by the State, particularly the law of civil nullity jurisdiction. However, suffice it to say that perhaps consideration should be given to the practical reality in respect of the primacy of the civil courts in respect of the matters concerning Family Law and Guardianship of Infants Act matters, especially having regard to the welfare of children, including their education and schooling. No doubt the applicant is mindful of St. Mark's gospel Chapter 12, verse 17:-

> "Render to Caesar the things that are Caesar's, and to God the things that are God's and they marvelled at him."

96. The Civil Courts apply the laws of this State.

97. The applicant repeatedly emphasised that this case was not an appeal but a judicial review and that he merely wanted to have matters brought back to the *status quo* ante. However, neither tide nor time stands still and much water has gone below the bridge in the meantime. In particular I was concerned that the applicant seemed impervious to suggestion that the two children had now settled well in school and were gaining social skills and were apparently happy and doing well. He did not seem at all receptive to the suggestion that this was a factor which perhaps should be taken into account. He might wish to think again about his reiteration of the statement that this was not an appeal but a judicial review and that what he wanted to do was to return matters back to the "*status quo ante*". I was also concerned that despite his admission that he was present before District Court Judge Harnett on 26th September, 2006, the applicant was still maintaining that he was only there in the safety order proceedings and not in the Guardianship of Infants Act proceedings. In his replying submission the applicant again stressed that there has to be a difference, meaning "unhappy differences", between the parental guardians before one of them is entitled to go to court. I was concerned that the applicant, despite the early 2006 letters from his wife still felt there were no real differences of opinion between himself and his wife with regard to the schooling of the two daughters.

98. At para. 13 of his affidavit sworn on 16th February, 2007 the applicant husband said:-

> " … I say that the first named notice party is misleading the court into believing that my attendance at the District Court on the 26th September, 2006 was to take part in proceedings under the Guardianship of Infants Act, and that I cross examined the first named notice party in those proceedings. She is omitting to inform this court that my appearance on that day was only in a Safety Order matter and that it was in these proceedings that I cross examined the First Named

> Notice Party. I did not make an appearance in the Guardianship proceedings on that day. Furthermore, the evidence shows that I did not enter a memorandum or other document delivered to the appropriate officer of the court for the purpose of making an entry of appearance. I say that it is disingenuous of the First Named Notice Party to claim that my physical presence in the court on that day for another matter constitutes a legal appearance. Paragraph 14. Again I say it is misleading this court where the First Named Notice Party says that the District Court Judge offered an adjournment and this offer was refused. This happened as part of the safety order proceedings."

99. All three counsel are agreed that the applicant was present for the District Court hearing on 26th September, 2006 and that in view of the interlocking nature of the various Acts, the District Court Judge did have jurisdiction and was entitled to hear the matters together and I conclude that there is no question of the Safety Order proceedings being segregated from the Guardianship of Infants Act proceedings. I accept the submissions clearly made by counsel for the Health Service Executive on this aspect in which she was supported by counsel for the wife and counsel for the Legal Aid Board as being correct.

100. In his submissions the applicant confirmed his wife's suggestion in her affidavit dated the 2nd January, 2007 to the effect that both of them hold very strong Roman Catholic beliefs and that in recent times he had become involved in an Australian fundamentalist Roman Catholic group called the Order of St. Charbel, and he had been ordained a priest of that congregation. She averred that he had been excommunicated from the Catholic Church since March 2005. He said that the Order was under a serious cloud and that he had been following the events and progress of the Order since 1987 in the diocese of Wallongong in New South Wales (about two hours south of Sydney). He refuted his wife's suggestion that it was an extreme fundamentalist Order, but agreed that it was under a cloud as the head of the Order is in jail for child sexual abuse. He himself had become a priest of the Order of St. Charbel, who had been a Maronite hermit who was canonised in 1977. In her affidavit the wife says that she is concerned because of the direction he is taking with his religion and the impact of this change on the two younger children and in particular in the case of "home schooling" of the children by her husband and this was the reason why application was made to the court for the orders now being challenged. She said that her husband had been to Australia to visit the Order of St. Charbel and that his obsessions and fanaticism about the religion has had a profound adverse effect on family life, which had become dysfunctional. All of the dependent family members had been exposed to the applicant's extreme views and the lives of the children had been significantly affected. She referred in that regard to the contents of the s. 20 reports made by the Health Service Executive pursuant to the order of the District Court in that regard. She added that the older children of the family find their father very difficult . He had recently suffered a nervous breakdown in 2000 and was on medication for a short time and that he has been seeing a psychiatrist as an out patient for the last number of years. He had been on sick leave from work in February 2000, because of stated mental strain and he then lost his job in insurance.

101. Counsel for the wife in closing made the point that "on their marriage certificate there is a harp and not a cross" and that their marriage is registered in a civil marriage register. The wife is a qualified mental handicap nurse and the applicant is in fact a horticulturist. He went on to submit that this application was not about home schooling or religion but was in fact arising out of the conduct and attitude on the part of the applicant to his wife and children. He suggested that it was inconceivable that the applicant could submit that the court had no jurisdiction concerning a family living in the State. The proceedings under s. 16 of the Domestic Violence Act 1997 states:-

> "16(1) Civil proceedings under this Act shall be heard otherwise than in public."

102. Accordingly, Counsel confirmed that the Guardianship of Infants Act case should also be heard *in camera*. My note is to the effect that the applicant said that he was content that the matter should be *in camera*. In fact the Court Supplemental Provisions Act 1961 at s. 45(1) would also empower the court to hear the matter *in camera*.

103. The reality of what occurred on 26th September, 2006 is that the applicant took part in the proceedings in respect of the Domestic Violence Act, and the application for a Safety Order. He participated and the District Court Judge knew that he was present and simply went on, as he was entitled to do, to deal with the Guardianship of Infants Act proceedings subsequently. There has never been any suggestion whatsoever that the applicant husband at the time of the Court hearing sought to have matters under the two Acts dealt with separately. He was present, he participated in the Domestic Violence Act proceedings and made no suggestion that the matters under each of the Acts should not be dealt with together, but should be dealt with separately. In reality the situation is that the court had jurisdiction to deal with the matter at the same time under both the Domestic Violence Act and the Guardianship of Infants Act. Unfortunately the applicant did not realise that the District Court Judge has jurisdiction under s. 9 of the Domestic Violence Act to deal with both aspects at the same time and can make orders under the alternative Act even if there are not proceedings out under the Guardianship of Infants Act 1964. I should also make clear that the applicant is not challenging any of the statutes but he is making a challenge on grounds of lack of due process on the assumption that there should have been a certificate about engaging in consultation and negotiation and mediation. As for this contention, counsel for the wife correctly submits that this is not a prerequisite in the circumstances of the application having been first brought under the Domestic Violence Act 1996. Furthermore if one considers the history of the marriage as revealed in the affidavits it is clear that the parents of the two girls were going through a traumatic relationship for quite a while before these events in early 2006. District Court Judge William Harnett acted quite properly within his jurisdiction and was entitled to take the contents of the reports handed in to him by the Health Service Executive into account. Accordingly MJL knew well what was going on and how bad the situation had been on the domestic scene since January, 2006.

104. On the basis of the findings set out above the application for a grant of leave has to be refused. I will hear counsel with regard to the terms of the order to be made and also the matter of costs and such other matters as are drawn to my attention.