Neutral Citation Number: [2007] IEHC 175

**THE HIGH COURT**

**[2007 No. 113 SS]**

**IN THE MATTER OF ARTICLE 40.4 OF BUNREACHT NA hÉIREANN AND IN THE MATTER OF AN APPLICATION FOR HABEAS CORPUS BY D O'H AND IN THE MATTER OF S H (AN INFANT), D [ALSO KNOWN AS "DJ"] H (AN INFANT) AND M A H (AN INFANT) AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964 AND IN THE MATTER OF THE CHILD CARE ACT 1991 AND IN THE MATTER OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS ACT 2003**

**BETWEEN**

**D O'H**

**APPLICANT**

**AND**
**HSE**

**RESPONDENT**

**AND**
**T H**

**NOTICE PARTY**

**Judgment of Mr. Justice Henry Abbott delivered on the 19th day of February, 2007.**

1. This is an application by the father of three children who have been taken into care by the officials of the Health Service Executive, who is the respondent in the case. As regards the present whereabouts of these children, they are in foster and the applicant makes this application on their behalf under Article 40.4 of the Constitution in relation to having an enquiry conducted in relation to the lawfulness of the alleged detention by the Health Service Executive through the agency of the foster carers, of the three children concerned.

2. The three children are named in the proceedings and were born of a non-marital relationship between the applicant and the second-named respondent. The applicant and the notice party lived together for a number of years, while the children were being born. The children were brought up by them until unhappy differences arose between them, and the couple separated. In those circumstances the applicant, the father, although in biological terms the natural parent of the child had little or no legal standing, except that under recent legislation he had a right apply to the court to be appointed guardian of the three children. And that he did. As a result of that application he was appointed guardian. Terms of custody and access in general terms were worked out by agreement for presentation to the District Court making the guardianship order, whereby in colloquial terms the mother, the notice party, had custody of the children and access was afforded to the applicant on Monday, Wednesday and Friday, and various other times. Christmas access was to be arranged between the parties and while the children were on school holidays the access would be extended from 12 noon to 6 pm on Monday, Wednesday and Friday.

3. It appears that the pattern of access and custody (in colloquial terms) developed over time after the order of the District Court granting guardianship status on the applicant. As time went on, difficulties arose between the couple insofar as the applicant continued to be unsatisfied with the manner of the care of the children by their mother. He had become more and more involved in the childrens day-to-day care as the custody access arrangements development, and he invited through a number of letters, one written by his solicitor, the officials, or the social workers representing the respondent Health Executive, requesting that the health authority would give the issue of care of the children some attention. As a result, the health authority seemed to have engaged with the mother of the children and, as far as the applicant is concerned in his account of matters in his affidavits to the court, the Health Executive did not in a sufficient way consult him in relation to how arrangements were to be made to improve the care of the children. It appears that a first period of a type of foster care, with suitable access for both natural parents, was arranged with the consent of both parents, but when this arrangement ceased there arose a second period of care, purportedly on consent of the parties, in which the children were sent into foster care for a period of twelve months.

4. The court directed an enquiry, under Article 40.4 and while not directing that the children the subject matter of the enquiry would be produced in court, was aware that the Health Executive would await the determination of the court in relation to their ultimate destination, and I am satisfied that was an appropriate way for both court and parties to deal with the matter. The manner in which the respondent Health Service Executive responded to the matter rested on two grounds, firstly, that the natural parents both consented to the consignment, or the sending of the children into foster care. The Health Service Executive contended that this was a situation dealt with under Section 4 of the 1991 Act, and that being so, that the children were in the lawful care and detention by the Health Service Executive, and that the applicant by withdrawing his consent to that arrangement having been given it, in the first instance, could not thereby make the detention unlawful.

5. I am inclined to agree with that submission insofar as if the consent were made in the first instance, then a party to that consent would have to go back to the District Court in relation to a guardianship of infants matter, following the earlier order of the District Court to have the matter sorted out in relation to whether the consent given jointly by the parents to the fostering arrangement could be unilaterally revoked. That would be a matter of private law between the parents and would not be a matter giving rise to a situation where a court, on an enquiry under Article 40 could hold that consent, which was a joint matter which emerged from a unit of two natural parents, had been revoked.

6. So it is important for me to decide whether, on the facts, the applicant did or did not give his consent to the Health Service Executive social workers and other officials in relation to this second period of 12-months foster care. I am inclined to decide that in fact the applicant did not so give his consent; firstly, because he says so in his affidavits; secondly, because the care programme meticulously filled out by the social workers, or worker for the first-named respondent was not actually signed by the applicant and, thirdly, because the replying affidavits on behalf of the first-named respondent did not positively assert in clear terms that the applicant had consented; and fourthly, and (this possibly begs a question which I have to answer later on in this judgment), the Health Executive officials, all of them (and, I might add all appearing to me to have acted absolutely in good faith and in a manner which would represent the best standard of care and attention which officials in this position have to give to cases of care under the child legislation, notwithstanding the high level of professionalism and care apparent in the activities of the Health Service Executive), it seems to me, could not be expected easily to consider that the consent of the applicant in this case was very material – in view of literal interpretation of the legislation.

7. I concede that the documentation produced by the Health Service Executive is indicative of the fact that they had the applicant in their sights, so to speak, and were consulting him and aware of his whereabouts, but on a literal reading of the section, requiring that the consent of the person having custody of the child was the relevant consent to be considered, that they, looking at the matter from a literal point of view and a reading of the section, that they could say, "well the mother in this instance has custody and the father, the applicant, is a guardian and the section doesn't seem to cover that". So, that being so, the Health Executive, it seems to

me, could be forgiven, and easily forgiven, for not paying much attention to the requirement of the consent of the applicant as a fundamental and necessary condition for proceeding.

8. And that brings me to the substance of the case being put forward by the applicant in terms of the case that once it is established that the consent of the applicant has not been given – one of the facts of the case – the applicant then has submitted that the requirements of Section 4 of the Child Care Act, 1991, subsection 2 have not been met, insofar as he claims that within the meaning of subsection 2 of Section 4 of that Act, that he is a "parent having custody". Section 4 of the Child Care Act relating to the taking of children into care by a Health Service Executive, under the regime of voluntary care provides as follows.

> "(1) Where it appears to a health board that a child requires care or protection that he is unlikely to receive unless he is taken into care, it shall be the duty of the health board to take him into its care under this section."
>
> (2) "Without prejudice the provisions of Parts III, IV and V, nothing in this section shall authorise the Health Service Executive to take a child into its care against the wishes of a parent having custody of him or of any person acting in loco parentis or to maintain him in its care under this section if that parent or any such person wishes to resume care of him."

9. Ms. Clissman, senior counsel, for the applicant has submitted that the wording of subsection 2 of the 1991 Act should be interpreted not literally in relation to the term "parent having custody", (which in the literal sense would point to the mother), but having regard to the requirement of a schematic interpretation being applied to a relieving and purposeful piece of legislation such as the Child Care Act 1991. She also submitted that the court, in deciding on an interpretation of a statutory provision should endeavour to ensure an interpretation which is consistent with the Constitution. The argument made was, if the provision subsection (2) regarding a parent having custody where taken literally, that would exclude the position of a lawfully married father merely having access, perhaps on a minimal visitation basis, but nevertheless being a natural guardian of a child where there had been a judicial separation or divorce granted.

10. It was submitted that it would be putting an absolutely unconstitutional interpretation on the subsection to propose the hypothesis that a married parent in that situation could not rely on the guardianship rights of that parent, which would still be subsisting and in respect of which that married parent had was a constitutional outcome which the court should avoid.

11. So I can conclude, as a first stage of my analysis of subsection (2), that in respect of married parents, at least, the purposeful and constitutional interpretation of the subsection is that a married parent, having custody, is to be interpreted as a married parent have guardianship or, as an intermediate position, a right to apply for custody. That being so, it remains to be seen and examined whether these principles would apply to a non-married parent such as the applicant in this case. While the position of a non-married father, was that some years ago he had little or no legal rights in relation to contact, or involvement with a child, as time has gone on in legislative terms, the legislature, and indeed the courts, have been more favourably disposed towards, firstly, facilitating a certain modicum of access, and in recent times the statutory amendment of the law was passed to enable the non-marital father to apply and give the non-marital father, not the right to guardianship, but the right to apply to court for guardianship, and thereafter, if given guardianship, the right to be a guardian. The question arises, is whether that right to guardianship to be put on a par with a marital father in the context of my view of a constitutional interpretation of the subsection 2.

12. One might have some misgivings about taking that approach, having regard to the very high legal status of marital parents in relation to the rights they have to their children, and their children might have in relation to their marital parents, which the constitution provides is antecedent to all positive law, and hence one might be inclined to take some care to ensure that one didn't conflate improperly an interpretation for the benefit of married parents with the same type of interpretation for the benefit of an unmarried parent. I am satisfied that I am not embarking on such an exercise in holding that the same interpretative approach is valid for the non-marital parent, for two reasons; firstly, to hold otherwise would be to introduce a seriously invidious form of discrimination as between citizens, both in relation to parents and children, which I consider not to be permitted by the Constitution; and secondly, I have been influenced by the judgment *in B -v-B* [1975] I.R. 54 of Mr Justice Walsh, opened to me by Ms. Clissman in the course of submissions, where in that case Mr Justice Walsh linked the wording of provisions in the Guardianship of Infants Act, 1964, as being taken directly from the Constitution in relation to the rights and obligations of guardians in relation to their children. So that on the basis of that identification of terminology and all the underlying policy and philosophical considerations underlying the opinion of Mr Justice Walsh I would be very, very fearful from departing from concluding that the constitutional interpretation that I put on the subsection (2) for marital parents is the same as it should be for non-marital parents, such as the applicant.

13. That is my interpretation, having regard to the test as to the constitutional interpretation, or the interpretation of a statute which is consistent with the Constitution rather than the interpretation which is inconsistent. An underlying assumption that I have made – and perhaps it is more correct to say it is a conclusion that I have made in relation to the statute in relation to starting off my analysis – was the fact that the statute is a purposeful statute and allows of a purposeful and schematic interpretation of the word "custody". While I don't propose to go through the analysis of the Act that I have made in detail, one finds in the 1991 Act, in the various sections, references for instance in section 13(7) notice of various acts to be taken by the Health Executive in relation to notice to the parents. In Section 14, there is requirement in relation to notification to a "parent having custody, or a person acting in loco parentis", which is wording more or less the same as, or similar to the wording of subsection(2) of Section 4.

14. In subsection (6) of Section 18, there is a reference that the court should make directions as it sees fit as to "the care and custody of a child." In section 34 there is a reference to "Any person having the actual custody of a child being guilty of a criminal offence and who has been shown an order for the delivery of a child under the legislation and refusing to act on it." That is a section designed to clearly set out where the criminal liability arises. But I do note, again, the introduction of a variation on the theme of custody, referring to it as "actual custody".

15. A certain looseness of the drafting of the Act is indicated by section 37(1) relating to access to children in care where the Health Authority is to "facilitate reasonable access to the child by its parents, any person acting in loco parentis, or any other person who, in the opinion of the Executive, has a bona fide interest in the child." There is no mention of guardian, and it seems to me that the definition of parent of the child, in the definitions section may not include an unmarried parent, who is not a guardian.

16. So that the throughout the entire Act of 1991 it would appear to me, one has to be careful to examine the particular purpose of the section and context of the section to glean just the correct meaning and nuance of the word "custody" if it appears therein. And, indeed, against the background of the lack of a definition of custody in the Act of 1991, as appears to me, that the word custody must be regarded as not absolutely, and in a universal sense, a term of art, but rather a general term: a general term that is in use by family law practitioners and social workers dealing with cases where it is the quality and perhaps not the definition of the word custody is not met by absolute tests, but rather by tests of the relative degree in which it is used and strength in which it is to

occur. When one looks at the actual settlements and decisions of the courts in relation to separation and divorce cases and various applications under the Guardianship of Infants Act and the violence in the home legislation, (all giving rise to orders for custody and access), one finds that there is a vast spectrum of degree involved in these two aspects of the care of the children.

17. I have looked at the manner in which Mr Shannon on his text book on Children and the Law, contrasts custody from access, and if I were to paraphrase his approach, he says that the custody is to do with the care, the responsibility for the child, whereas access is most often a mere visitation right. I would respectfully agree with Mr Shannon in that regard in relation to the stereotypical arrangement in the more contentious cases regarding the dichotomy between custody and access, but in the less contested cases where there is more cooperation between the parents one very often finds there is joint custody of the parents, with a provision for the day-to-day care of the children and that by, let's say the mother, and that day-to-day care might be from Monday to Friday, or even to midday on Saturday with the day-to-day care for the rest of the minority part, of the week given to the husband, and in these cases "custody" and "day-to-day care" are used as terms to provide a euphemistic and not combative way of describing what in more contentions cases would be "custody" and "access". And that being so there is, in practice, not a clear dividing line between two concepts.

18. Now I just mention that as a factor in respect of which I wouldn't base my decision solely, because I do find that the concepts of "custody", "access", "joint custody" and "access", and "day-to-day care", are concepts which are the common parlance and tools of trade of family law practitioners and the family courts. The people who use them know in functional terms what they mean, and it wouldn't be the purpose of this judgment to change in any way that very sound judgment and practice relating to these words, but I do draw from the lack of a clear boundary distinguishing these various forms of contact, to use a neutral word, between parent and child, access, custody and day-to-day care, that the course which I have taken in terms of a schematic and non-literal interpretation of custody in subsection 2, Section 4, is all the more correct for that, even if it weren't a point of departure for, and complete answer to the question posed from the outset as to what subsection 2, Section 4 means.

19. It has been further argued that the court should consider the influence of the European Convention of Human Rights in terms of the definition of the family, encompassing and including the unit of the two unmarried parents in this case, the applicant and second respondent. I don't think it is necessary for me to make a decision on that, but if it were necessary for me to do so, I would think that the unit does come within the definition of the family, and hence I should be influenced by that conclusion in seeking to interpret the legislation in a manner which is most consistent with the convention. I find that the constitutional interpretation which I put on the section is quite consistent with the Convention. I see no reason to find otherwise.

20. It has been further argued that the court should have regard to the jurisprudence of the Hague Convention, highlighted by the authority, the judgment of Finlay Geoghegan J. in *C(R) v. S(I)* Unreported, High Court, November 11, 2003 in relation to a Hague Convention case. I have regrettably not been able to get the reference of a decision made by personally in this court in relation to a Hague Convention case where I held that, a father in an Irish prison was held to have custody of a child, where that child was abducted to New Zealand during the course of the father's imprisonment, and that being so, schematic interpretation of the jurisprudence of the term custody within the terms of the Hague Convention is perhaps broader than I have envisaged it in this case. I would not adopt the jurisprudence of the Hague Convention in adding any legal force to my decision, except that it is a comfort to know that courts elsewhere, and courts dealing with another code of legislation have been prepared to go in the direction this court has gone in its judgment in affording a schematic interpretation of the word custody.

21. I consider that this court should be reluctant to adopt the particular, very extensive and radical approach of the Hague Convention jurisprudence on the basis that it is a separate code to Irish domestic law, it has the force of domestic law in relation to the matters to which it has been addressed, but it is not a piece of legislation which has amended Irish domestic law, and this court must pay due deference to the law as enacted by Oireachtas in relating to the particular policy issues and social issues concerned. So I want to clearly state that the Hague jurisprudence is not an actuating factor in making this decision, however comforting it might be.

22. That being so, I have to consider the other basis of the defence of the respondent, on whose behalf it was that in making this application the applicant sought, by using an Article 40 habeas corpus type enquiry, to circumvent the private law remedies, as in guardianship of infants remedies, which he had invoked in the District Court and which he had renewed in a special summons which was mentioned before the court, but not considered by the court, but it still is outstanding before the court.

23. I certainly accept that counsel for the respondent was correct to alert the court as to the need to guard against the abuse of an Article 40 enquiry, but I consider that the application of this case relates to an issue of public law. Once I have decided that the consent was not bilateral, but was unilateral by the mother only, there remains an outstanding public law issue in relation to the detention of the children. If the consent had been bilateral, notwithstanding the fact that it might have been revoked by one party in the meantime, I would be inclined to hold with the submission very ably made on behalf of the respondent that the position would be one to be rectified in the District Court or in such other proceedings such as the special summons procedure regarding the dispute between the two parent parties.

24. This statement provides me with a further reflection, perhaps, which I should have dealt with earlier in the judgment, but which I have considered in the course of preparing it, and that is that the interpretation which given to the word "custody", just central to the whole case, is an interpretation which bears in mind the fact that the legislation concerned in this application relates to public law. If the interpretation in this judgment of the word "custody" in the context of subsection (2) Section 4 differs from other definitions posited, or workaday assumptions in relation to custody, then it differs from these definitions or workaday assumptions in the context of private law, and it is open to the court to draw that distinction as a further justification and rational for the conclusion it has reached, that the word custody is to be considered as public law matter and not to be conflated with private law definitions and understandings of custody as between the persons in the private law sense interested in the care and welfare of children primarily as between themselves and in relation to the issues that arise between these private contracting parties to marital and non-marital relationships, such as they may be.

25. That is the substance of my conclusion. The question arises what remains to be done? Having regard to the conclusions of the Supreme Court in what is referred to colloquially as "the Baby Ann case", Supreme Court, Unreported, November 13th, 2006 I am disposed not to make any order for the immediate discharge or release of the three infant children, but rather would direct that they remain in the care, and careful care in which they now reside, until further determination of a court of the matter, as a matter of private law between the two parents, the applicant and the notice party. I make no finding in relation to whether the notice party has abandoned custody. I can see many arguments arising, and indeed fears arising from the knowledge that the fostering period was for 12 months, and I note that the Adoption Act, 1988, provides for a period of 12 months in relation to a test as to whether custody has been abandoned. This may have given rise to fears on the part of the applicant in this case that the notice party has abandoned custody. That certainly was a basis for submission for Ms Clissman, but I make no finding in relation to that. I want to make it very

clear that this is all a matter of private law as between the parties to be argued at a later date. That being so, I will hear what the parties have to say in relation to the final arrangements for the so-called soft landing which might arise, ultimately, in relation to a situation which has to be solved, in the first instance by private law proceedings and of course under the careful and watchful eye of the first-named respondent, the Health Service Executive.

26. In this case I have been asked to consider the residual jurisdiction of the High Court in an Article 40 enquiry dictated by the procedures adopted by the Supreme Court and described very fully in the judgment of the Chief Justice in the so-called Baby Ann case. I am satisfied in this case that the very heartbreaking and tension-laden consideration of Baby Ann having a very, very deep and loving attachment to the adoptive parents, and less of a relationship with the natural parents in that instance doesn't occur insofar as there is a much more "seamless" relationship between the three children and all parties, foster parents, the two natural parents, involved in this case, with none of what I describe as tension-laden issues of the Baby Ann case concerned.

27. Neither is there such a dramatic fear of the parents ceding care which in this case are the foster parents, causing difficulty, or finding difficulty in observing the directions of the court as the adoptive parents, or proposed adoptive parents in the Baby Ann case had expressed to the court. None of that complication arises in this case, so these conclusions would tend to steer me away from adopting the interim arrangements as suggested by the Chief Justice under the Article 40 jurisdiction regarding the three children in this case. However I do accept that the framework proposed by the Supreme Court dictates that the court, having decided that the children should be "released" under the Article 40 jurisdiction that the court should be mindful the children to be released are persons under a legal disability, are persons in respect of whom there has been the concern of a statutory body charged by law to have regard to the welfare of the children and the care issues surrounding that, and having regard to the fact that somewhere within the Health Executive a qualified person decided that foster care was in their best welfare interests.

28. It doesn't matter that the programme of foster care was flawed by its initiation in the formal sense, the present set of circumstances is highlighted by the fact that the court in the end of the day is faced with the fact that the children are in foster care. This foster care seems to be doing them some good, either by virtue of the foster care itself, or by virtue of the fact that it is just taking them away from alleged bad influence of the mother, as alleged by the father, the applicant in this case. So that is a factor that I have to take into consideration before taking the course which I was inclined to do in the first instance, that is to release the children obviously to their father, who is plainly the most likely person to whom I would have released them, and then remit the matter to the District Court on the basis that it was a convenient forum, especially to ensure that the mother, even without the good offices of the Legal Aid Board, could have her case put forward in regard to all issues regarding the rights of the natural parents and their children.

29. The only consideration that has prevented me from taking that course, as I had in mind from the outset, is the fact that the children are in fact in foster care. That does raise a concern of the court, that having arrived in foster care for welfare considerations, even if these considerations were not firmly legally based, the court, having regard to the very strong comprehensive guide of the Baby Ann case should enquire in relation to whether concerns parallel to the Baby Ann case relating to welfare, but not necessarily mirroring the terse type of issues that were exemplified in Baby Ann case, arise.

30. I am satisfied they do arise, and for that reason I won't order the release of the children to the day-to-day care or otherwise of the applicant just yet, in any event, but I consider the situation warrants the direction of the court to the Health Service Executive to prepare within ten days from the date hereof a welfare report in respect of all three children to be furnished to the court and that the matter will be put in for mention within a time around that ten-day period for the consideration of the court, in conjunction with the special summons. Given that the court is continuing to examine the matter it would be wasteful of resources to remit the special summons, as I was inclined to consider. On that basis that the transcript would be prepared with due expedition and as soon as it is put in printable, publishable form by me, which I hope will be expeditiously, I order that it would be furnished to the mother, and all the parties in this case.