THE HIGH COURT

JUDICIAL REVIEW

Record No. 2019/283 JR

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964 (AS AMENDED)

BETWEEN/

L. M.

APPLICANT

AND

A JUDGE OF THE DISTRICT COURT

RESPONDENT

AND

E. H.

NOTICE PARTY

JUDGMENT delivered on the 19th day of July, 2019 by Ms. Justice Baker

1. This is a judicial review of a decision made by Judge Hughes sitting in the District Court area of Mullingar on 29 April 2019 and 1 May 2019 on the grounds that the order was made without affording the applicant, the mother of a young girl, fair procedures in accordance with the principles of natural and constitutional justice, and/or that the decision was irrational, disproportionate, and unreasonable.

2. The primary focus of the application for judicial review was the fact that the District Court judge refused to permit the mother the opportunity of cross-examining a consultant clinical psychologist who had prepared the report made for the purposes of s. 47 of the Family Law Act 1995 ("the Family Law Act") concerning the welfare of the child, the subject matter of the proceedings.

3. The background to the proceedings may briefly be stated. The mother and the notice party are married and there is one child of the marriage, a girl born on 19 August 2014. The couple separated in early 2016 and questions concerning access to their daughter have involved the parties in a number of applications before the District Court under the Guardianship of Infants Act 1964, as amended ("the 1964 Act").

4. The matter of access first came before the District Court judge in the middle of 2016, who made an order on 27 June 2016 granting the father overnight access to the young girl every second Tuesday evening to be supervised by her paternal grandmother. The supervision of the access was a matter of contention between the parties for some time, but a later order made on 26 September 2016 provided that access would be unsupervised and increased the access the father had to his young daughter so that he had access every second weekend from Friday evening to Sunday evening and overnight access every alternative Tuesday evening.

5. Further access was granted on a two-week cycle by order of 27 February 2017 which increased the access such that every second week the father had overnight access for two nights, Tuesdays and Wednesday nights. The mother appealed that order of 27 February 2017. An application was made by the father in June 2017 on the pleaded grounds that the mother had failed to comply with the access arrangements in respect of the young girl.

6. By order of 24 July 2017, on the application of the father, the access arrangement was varied so that the father had access three weekends in four from Friday evening to Monday morning, with the child residing with her mother during weekdays and on one weekend in four.

7. By order of the Circuit Court made on 11 April 2018 on appeal and following a hearing on oral evidence the Court upheld the order made on 24 July 2017, and made arrangements for the Christmas holidays and for Bank holiday weekends.

8. A further order was made in the District Court on 25 June 2018 varying the location of access which was appealed by the father to the Circuit Court. By order of the Circuit Court made on 20 December 2018, access in terms of the order of 27 July 2017 was restored.

9. By order made on 4 October 2018 on the application of the mother, the father's access was suspended for a short period.

10. An order was then made on 11 October 2018 that a report pursuant to s. 47 of the Family Law Act be prepared ("the Section 47 Report").

11. By order of 8 February 2019, the former unsupervised and weekend and overnight access of the father to the child was continued. The psychologist who prepared the Section 47 Report was required to submit her report to the Court immediately and the Court directed that it would hear from the social worker when a completed report under s. 20 of the Child Care Act 1991 ("the Section 20 Report") was received. On 25 March 2019 it was directed that the Section 20 Report be released to both parents and to the clinical psychologist.

12. The matter was then adjourned and came on for hearing when the Court made the order of 29 April 2019 the subject matter of this judicial review.

The order sought to be reviewed

13. The District Court judge who made the order under challenge had heard all prior District Court applications in respect of the care, access, and custody of the young girl since September 2016. It was he who directed that a report be made available under s. 47 of the Family Law Act. At the date of the hearing the report from the clinical psychologist was available to the District Court judge but had not been provided to the parties. It is clear that the District Court judge had some, albeit short, opportunity to read the report which runs to 24 tightly typed pages.

14. The hearing before the District Court was very short and a DAR transcript of the application was available for the hearing of the judicial review. The DAR runs to eight pages. The mother was not legally represented at the District Court hearing, but the father was represented by solicitor and counsel. The mother indicated early to the District Court judge that she had believed that the matter was to adjourn, and when she was told it was to be heard she formally made an application for an adjournment which was resisted and the application continued. Within minutes of the opening of the application, the District Court judge expressed a concern that the mother was alienating the child against the father and that he was concerned about the contents of the Section 47 Report. He then proceeded on the evidence contained in the report to make an interim sole custody order in favour of the father.

15. While some argument was had at the hearing before me regarding the precise order made by the District Court judge, the terms of the perfected order are reflected in the DAR transcript and show unequivocally that the District Court judge granted an interim order to the father giving him sole custody of the child "forthwith". No order for access or contact between the child and the mother was made at that juncture, albeit the case was adjourned to 1 of May, two days later. In the course of the hearing the District Court judge made it clear that he was making an interim order and, in response to the mother's request for an adjournment and that she permitted to have legal representation before the case proceeded and before the Court relied on the Section 47 Report, he said to her that "it is not a permanent order and I can revisit the matter".

16. The DAR transcript contains a short extract from the Section 47 Report read out in the course of the hearing which recommended an immediate transfer of primary care of the young girl to her father and access to the mother in a "structured and initially limited" form. It seems the report supported the application of the father for sole custody, although that is not quite clear as the extract read supported the transfer of primary care to the father, and not necessarily sole custody.

17. I should observe that the full report was annexed by way of exhibit to the replying affidavit of the father in the judicial review proceedings and I consider that it was not appropriate that I would read the report as the question of the merits of the application was not in issue in the judicial review and counsel for the mother expressed some concern that the contents of the report were prejudicial to her and might influence my thinking. The Section 20 Report was available but not in a legible form.

18. Having read out this extract from the report, the District Court judge adjourned the matter to 2 o'clock on Thursday, two days later, although he did say all he expected to be able to give to the matter on the adjourned date was "limited time".

19. It is apparent from his ruling that the interim sole custody order was made for the matters set out in the report and the District Court judge explained that he had "no hesitation in making that order" because of what he had read. His expectation at that stage was that the interim order was to last no more than a number of days, six at most. On a number of occasions the judge said to the mother, who by then was displaying some distress and surprise that an order of such magnitude was to be made without her input and on the basis of the reasons set out in a report which she had not seen, that he had limited time available on the adjourned date.

20. In her final submission to the District Court judge, the mother argued that she had been the "sole primary carer" for all of the four and a half years of the child's life to date and the District Court judge answered as follows:

> "No, you are not and not from this moment onwards, ok".

21. The District Court judge said he would revisit the order of the adjourned date but that the mother was free to apply to the Circuit Court in the meantime.

The jurisdictional conundrum

22. A complicating factor in the matter was that the father had already commenced proceedings in the Circuit Court for either divorce or judicial separation, (either proceedings would have had the same consequence for present purposes) and it seems that there was before the Circuit Court in those proceedings an application by the mother for directions concerning the welfare of the child that stood adjourned in the Circuit Court from time to time. The District Court judge was told in the course of the hearing on 29 April 2019 that the Circuit Court was due to have some hearing in the matter the following week and that the Section 47 Report would be before that court on that date. The District Court judge was understandably perplexed regarding the sequence and how parallel proceedings could be in being in the Circuit Court. The precise nature of his concern was not stated but, having regard to the judgment of Lynch J. in A. *M. v. District Judge Harnett* (Unreported, High Court, 6 July 1993), and my judgment in *K. L. v. Judge Ní Chondúin* [2015] IEHC 617, there may have been some jurisdictional difficulty with the Circuit Court proceeding to hear an application other than by way of appeal from a District Court order when proceedings seeking identical, or broadly identical, relief were in being in both jurisdictions.

23. The District Court judge's expressions of being perplexed by the jurisdiction conundrum is readily understandable and, at least at the level of principle, it seems that it would not have been jurisdictionally possible for the Circuit Court to enter upon the hearing of an application in regard to custody or access when that matter remained live before the District Court.

Requirements of fair process may be modulated in certain cases

24. The application for judicial review is grounded on the broad assertion that the making of the sole custody order by the District Court judge on 29 April 2019 was in breach of fair procedures and denied the mother the opportunity to be legally represented and to test, by cross-examination, the evidence on which the District Court judge based his decision and which had given him cause for immediate concern regarding the welfare of the young girl to the extent that he considered it necessary to make an interim order.

25. Counsel for the mother does not argue that the denial of fair procedures must always lead to a decision to quash and that proposition is well established from the line of authority starting with *The State (Lynch) v. Cooney* [1982] 1 IR 337. Counsel fairly points me to the recent judgment of Humphreys J. in *L. S. M. (A Minor) v. The Child and Family Agency* [2018] IEHC 500, where he held that the making of a short term order, in that case for a period of twelve days, in circumstances where some but not all of the evidence was heard due to pressure of time and court resources was not a denial of the fair procedure rights of the applicant. Humphries J. did note that some oral evidence had been heard, there had been an amount of written evidence, and cross-examination had been conducted of the first of the witnesses in what was likely to be a lengthy hearing under the Child Care Act 1991. Humphries J. regarded it as unobjectionable that the Court had made an order in a truncated process where the trial judge had fashioned what he described as a "practical and pragmatic" but not "fundamentally innovative" solution.

26. In the light of that case law and the general proposition, which counsel for the mother accepts, that the right to fair process is not absolute and may, in certain circumstances, have to give way to a particularly urgent situation, the order of 29 April 2019 taken alone, given that it was to last for two days only, may not be objectionable, or, at least, not so objectionable that a court should in its discretion grant judicial review. The argument is not made with respect to that hearing alone, and it was what occurred two days later, on 1 May 2019, that gave rise to the real concerns of the mother.

The hearing on 1 May 2019

27. The Court having made an interim order expressly for two days only on 29 April 2019, the matter came on for hearing again before the District Court judge on 1 May 2019, at which counsel appeared for the mother and the father was, as before, represented by counsel. The application was made on behalf of the mother that the District Court would vacate the interim order made two days earlier, having regard to the fact that the question of custody, access, and other directions regarding the welfare of the child were due to be heard the following Tuesday in the Circuit Court. Counsel pointed out to the District Court judge, who was again perplexed for understandable reasons, that there was what she described as "concurrent jurisdiction" in the Circuit Court under the Family Law Act where the parties had instituted proceedings for judicial separation or divorce. That is not a wholly incorrect description of the statutory regime, but it does serve to highlight the jurisdictional difficulty which seems to have been in the mind of the District Court judge when he had expressed himself confused as to the existence of parallel proceedings in the Circuit Court at the earlier hearing.

28. To be fair to the District Court judge, he informed the parties early on in the hearing on 1 May 2019 that he viewed the order he had made two days earlier as "precipitous" and he recognised and was conscious of the fact that the mother was not represented.

29. While initially the District Court judge said at this adjourned hearing that he would hear an application to vary or vacate his interim order, it became clear after a very short time that the matter could not proceed any further because he had no time in his busy schedule to hear the case and that, to use his words, "the best he could offer" was that the matter would be put in for 9 May 2019 for mention but not for a substantive hearing. He then said that he would "stand over" the interim order which he believed had been made in the best interests of the child and that he would not consider making a variation on the order if the evidence of the Section 47 Report was the only evidence before him. His answer to the difficulty that the mother expressed through counsel concerning her right to test the evidence of the psychologist was that the consultant psychologist could be heard in the Circuit Court hearing due to take place the following week, or that he would find a date in his schedule in the District Court to hear her evidence and to permit the mother's counsel to cross-examine.

30. The District Court judge did, in my view, recognise that any final order could be made only after oral evidence from the psychologist who had prepared the Section 47 Report and after an opportunity had been given to cross-examine that witness or tender further evidence. However, he refused to vacate the order until such time as a full substantive hearing could take place, and no prospect of that happening in the immediate future could be offered.

31. From my reading of the DAR transcripts on the second day of the hearing, counsel for the mother made a simple application, namely that the interim sole custody order be vacated or varied, and that the order so varied and the previous orders regulating access and custody would continue until a full hearing could be convened in the District Court regarding the welfare of the little girl. The District Court judge refused to do this, having understandably no time in his diary to offer dates for a substantive hearing. He believed himself to have been constrained by the evidence he read in the Section 47 Report, which he accepted had not been made available to the mother, and which had been read and relied upon by him without giving any opportunity to the mother to cross-examine or in any other way challenge its findings.

32. In the events, the mother appealed the Circuit Court order by Notice of Appeal dated 2 May 2019. On the adjourned date of 9 May 2019, the District Court could therefore no longer hear the matter. It seems also by that date that the Circuit Court application had been withdrawn, presumably because of the jurisdictional difficulty identified above. The date of 26 July had been given by the Circuit Court for the hearing of the appeal from the District Court order.

Basis of application

33. The application for judicial review is based on what might be called broad principles of natural justice and the applicant relies on the well-established and well-trodden authority of *In re Haughey* [1971] IR 217, *Kiely v. Minister for Social Welfare* (Unreported, Supreme Court, Henchy J., 16 February 1977), but most especially on the recent decision of the Supreme Court in *A. P. v. Minister for Justice and Equality* [2019] IESC 47 where judgments were delivered by Clarke C.J. and O'Donnell J. concerning a decision by the Minister to refuse naturalization as an Irish citizen to Mr P. The reason for the refusal was stated by the Minister to be based in national security interests, further details of which were not provided to Mr P.

34. In his judgement, Clarke C.J. expressed the general proposition that:

> "It is sufficient to record that, in the absence of any such legal basis, there is no process known to Irish law which would enable a court determining the merits of a case such as this to have regard to materials which are withheld from a party."

35. Absent a legal basis for a departure from the general proposition, at para. 4.25, Clarke C.J. held that:

> "It is wrong for a judge to make a decision when influenced by evidence which was not available to a party and which, therefore, the party concerned was not able to challenge in any meaningful or effective way".

36. The Supreme Court quashed the decision of the Minister and remitted the matter back for the making of a further decision following an "enhanced process" which conformed with the principles identified by Clarke C.J. in his judgment. The same result was arrived at by O'Donnell J. albeit by a different route, who also expressed the view, at para. 48, that:

> "[T]here are, to put it at its lowest, serious doubts that it would be permissible to provide that, certainly in respect of court proceedings, a court could proceed upon material which is not available to be considered or challenged by or on behalf of one party."

37. The principle is so well established that I do not propose further analysing the evidence in the present case, save to say that whilst, taken alone, the decision of 29 April 2019, which was undoubtedly made without giving the mother an opportunity to cross-examine or, in any way, challenge the evidence in the report which only the District Court judge had seen at that stage, might not warrant the making of an order of *certiorari*, the fact that on the review two days later, on 1 May 2019, the District Court judge expressed himself unwilling to vacate that order without a full and substantive hearing, and when a date for such hearing was not realistically in prospect for several weeks or, perhaps, even months, leads me to the conclusion that the process by which the interim decision was made, and more importantly, continued on 1 May 2019 was not legally supportable.

38. Regard must be had in that context to the nature of the order that was made. Both mother and father have *prima facie*, as a matter of statute, equal rights to custody and guardianship of their child. The order made reversed that statutory presumption and granted sole custody to the father. The question is not so much whether the merits or the evidence supported or could, in due course, support such a conclusion, but that the order made was of such profound legal import that it could not be made without a more complete hearing, and even allowing that the District Court judge saw some urgency in the matter, the order should not have

been allowed stand on the resumed hearing. The consequence for both parents and the young child are so profound legally that the order for more than a few days, even in the emergency identified by the District Court judge, could not be justified without fairness of process. The right of custody is not to be treated in any sense as equivalent to rights of very generous access or visitation, but because rights of custody entitle a custodial parent to make certain decisions regarding the day-to-day living and other arrangements of a child, they are profoundly important and ought not to be so readily capable of being lost.

39. I reject the proposition that the order of 29 April 2019 and, on the review on 1 May 2019, could be characterised as a mere alteration of the care arrangements in respect of the young girl. The alteration was to the custody of the child and, therefore, an alteration and variation of the existing statutory rights of the mother and father, and that order cannot be regarded as equivalent in its nature to the order under consideration by Humphreys J. in *L. S. M. v. Child and Family Agency*, where the child had already been under the care of the Child and Family Agency for eight days and the order was continued for a further twelve days with a real prospect of the substantive hearing continuing and concluding at or around that time. The urgency of the situation was also not that described by O'Higgins C.J. in *The State (Lynch) v. Cooney*, where he said that it could be appropriate, in certain circumstances, to make an order notwithstanding that there was some denial of fair procedures where there was "no opportunity for debate or parley", at p. 365.

40. An order made in circumstances of urgency must be proportionate to the needs and emergencies to be met. The District Court judge could have made a substantial reversal in the day-to-day arrangements regarding the child without reversing on an interim basis the custody that the mother had by statute to the child, where her engagement with the day-to-day life of her daughter had been under review by the same District Court judge for a period of almost two years and where he had given no prior indication that he might entirely reverse the situation and deprive the mother of custody pending further order.

41. Counsel for the father argues that the mother well knew that the Section 47 Report was in preparation and indeed she had engaged with and met the assessor herself, who was interviewed by her and who provided materials to her. It cannot, in my view, be said that she knew the recommendations made by the assessor or the contents of the very long report. Indeed, it is clear, and was clear to the District Court judge, that the mother had not seen the report and he had directed that the report would be furnished only to the legal advisors of the parties pending further order.

42. Reliance placed by the father on the judgment of McDermott J. in *S. O'N v. C. D.* [2018] IEHC 478 is unhelpful. McDermott J. refused the challenge by a litigant in person to orders made following divorce proceedings which included orders in respect of the custody of children. McDermott J., having considered the basic proposition from *Dellway Investment v. National Asset Management Agency (NAMA)* [2011] IESC 4, [2011] 4 IR 1, that the right to be heard was fundamental in procedural justice, went on to say that what amounts to fairness will "depend on all the circumstances of a case, and vary from one type of procedure to another", at para. 37. McDermott J. made his decision not on the basis that he considered that there had been fairness of procedure, but rather, because the applicant had consented to the terms of the custody and access orders which were ruled by the Circuit Court judge and became part of the order. The application that the District Court judge had misdirected himself as to the relevant statutory proceedings was rejected because the applicant was held to have been precluded by his conduct from challenging the orders made. That judgment offers no assistance in the present case.

43. I consider also that the District Court judge fell into a fundamental error in the manner in which he dealt with the adjourned hearing on 1 May 2019. This was mostly because he believed, wrongly, as it appears, that the merits of the application would get a full hearing, at first instance at the latest, before the Circuit Court on 7 May 2019 and that, at its height, the effect of his order was limited in time and scope.

The alternative remedy by way of appeal

44. The father argues that from the transcript of the two-day hearing the District Court judge did not embark on a full hearing and that he made what is obviously to be characterised as an interim order which he himself acknowledged was open for review. It is argued that the mother, by appealing the interim order by her notice of appeal of 2 May 2019, has chosen her remedy and ought not to be permitted to seek to quash the order by judicial review.

45. The availability of an alternative remedy is a matter that always influences the decision of a court to grant judicial review of a decision. The judgment of the Supreme Court in *Rowland v. An Post* [2017] IESC 20, [2017] 1 IR 355, is relied on by counsel for the father as authority for the proposition that a court should interfere with the process only when it is clear that "the process has gone wrong, that there is nothing that can be done to rectify it and that it follows that it is more or less inevitable that any adverse conclusion reached at the end of the process will be bound to be unsustainable in law".

46. It was submitted by the father that the decision of the District Court judge does not mean that the process concerning custody and access to this young girl has gone irremediably wrong, as the case has not had a full hearing at first instance. That is correct insofar as it goes, but does not answer the more difficult proposition that the District Court judge was unable to offer a date at which he would hear an application to review, vacate, or vary his order granting sole custody to the father, and that he himself thought that the matter could be remedied in the Circuit Court by way of a full hearing at first instance on an application for interlocutory relief in the Circuit Court proceedings. The District Court judge therefore considered that the order was capable of being remedied either by the District Court or by the Circuit Court but, in each case, by way of a hearing at first instance. In the events, and because of the jurisdictional issue identified above and which form a jurisdictional backdrop to the case, that basic proposition is incorrect. There were only two options available to the mother: She could appeal the District Court order and thereafter have the matter determined by the Circuit Court sitting as an appellate court whose decision is by s. 84 of the Courts of Justice Act 1924 final and conclusive.

47. The alternative option was to abandon entirely the District Court process and seek to rely on the jurisdiction of the Circuit Court to grant orders regarding the custody and welfare to the child. A difficulty with that latter option is that the father was the applicant in the District Court, and whilst the mother could have chosen not to appeal the order made on 29 April 2019, that order was made in proceedings commenced by the father, and by taking a step with the intention of abandoning that jurisdiction, the mother would not thereby vest jurisdiction to the Circuit Court to entertain the application by way of an interlocutory application at first instance, if the father's application remained vested in the District Court.

48. I consider that the jurisdictional conundrum presented a degree of difficulty such that the appeal by the mother is not to be seen as the taking of a step that precludes judicial review.

49. The order made by the District Court is jurisdictionally unsound, disproportionate, and wrong as a matter of fair procedures and is to be quashed. That has the effect that the appeal will also fall away. How the parties are to be proceed from here is not a matter that can engage me in this application, but for the present at least it would seem that the effect of quashing the order is that the

previous access regime, and where both parties enjoyed joint custody of their little girl will continue.

50. Accordingly, I propose to make an order quashing the decision of the District Court judge made on 29 April 2019 by which he granted sole custody of the dependent child to her father.