Neutral Citation Number: [2009] IEHC 423

**THE HIGH COURT**

**2008 469 JR**

**E. R. O'B. (a minor)**

**Suing by her father and next friend W. O'B.**

**Applicant**

**And**

**The Minister for Justice, Equality and Law Reform,**

**Ireland and Attorney General**

**Respondents**

**Judgment of O'Neill J. delivered the 6th day of October 2009.**

**1. Relief Sought**

1.1 Leave was granted by this Court (Peart J.) on the 7th May, 2008, to the applicant to seek the following reliefs by way of judicial review:-

> 1. A declaration that the failure on the part of the respondents to establish and maintain a register of guardianship agreements constitutes a breach of the applicant's constitutional rights having regard to Article 41.1 of the Constitution of Ireland.
>
> 2. A declaration that the failure on the part of the respondents to establish and maintain a register of guardianship agreements constitutes a breach of the applicant's constitutional rights having regard to Article 40.3 of the Constitution of Ireland.

3. A declaration that the failure on the part of the respondents to establish and maintain a register of guardianship agreements constitutes a breach of the applicant's constitutional rights having regard to Article 40.1 of the Constitution of Ireland.

4. A declaration that the failure on the part of the respondents to establish and maintain a register of guardianship agreements constitutes a breach of s.3 of the European Convention on Human Rights Act 2003 ("the Act of 2003") insofar as said failure is in breach of the applicant's rights having regard to Article 8 of the European Convention on Human Rights ("*the Convention*").

5. A declaration that the failure on the part of the respondents to establish and maintain a register of guardianship agreements constitutes a breach of s.3 of the Act of 2003 insofar as the said failure is in breach of the applicant's rights having regard to Article 14 of the Convention.

6. An order of *mandamus* compelling the respondents to establish and maintain a register of guardianship agreements.

7. Further, or in the alternative, a mandatory injunction compelling the respondents to establish and maintain a register of guardianship agreements.

**2. The Facts**

2.1 The applicant is an infant, who was born on the 12th September, 2006, and is an Irish citizen. Her parents are unmarried. These proceedings were brought on her behalf by her father. On the 25th October, 2006, her parents executed a joint statutory declaration to the effect that they would be joint guardians of her ("*the guardianship agreement*"), in accordance with s. 2(4) (e) of the Guardianship of Infants Act 1964, as substituted by the s.4 of the Children Act 1997.

2.2 The case is made on behalf of the applicant that it would be in her best interests that the guardianship agreement be registered on a public register recording the existence of such agreements and that the failure on the part of the respondents to establish and maintain such a register constitutes a breach of the applicant's legal and constitutional rights. On the 1st November, 2007, the applicant's solicitors wrote to the first and second named respondents on behalf of the applicant, formally requesting the establishment of such a register and stating as follows:-

> *"As you are aware, there is no centralised system to record guardianship agreements concluded between unmarried parents. As such, the legal status that an agreement vests in the unmarried father is dependent on the preservation of the physical document. In the event of the document being lost or destroyed, there is no record of the father's legal status beyond his word to this effect.*
>
> *Our Client's parents have concluded such an agreement, and it is our view that the failure of the State to provide the aforesaid register constitutes a breach of her legal and Constitutional rights."*

2.3 The first named respondent replied by letter dated the 6th November, 2007, stating that the above letter was "receiving attention". These proceedings were instituted on the 22nd April, 2008.

**3. The Issues**

3.1 The principal issue to be determined is whether the absence of a public register recording the guardians of a non-marital child amounts to a breach of the applicant's Constitutional or Convention rights.

**4. The applicant's submissions**

4.1 Ms. Clissman S.C., for the applicant, submitted that the absence of a register of guardianship agreements meant that the applicant was at risk of losing her rights associated with having her father as her guardian in the event that the guardianship agreement was lost or destroyed, in the sense that it may not be proven that he is her guardian. She noted that a child whose status was altered by the addition of another guardian, such as the applicant, did not have recourse to any independent verification of their new status and she contrasted this with the position of a marital child who could look to the register of marriages for proof of guardianship. Ms. Clissman pointed to the recommendation in the 2009 "*Report of the Family Law Reporting Project Committee to the Board of the Courts Service*", that a central registry be established to record an official copy of the guardianship agreement. She submitted that such a register would record the existence of a new guardian, without the necessity of reliance on proof of the terms of the agreement.

4.2 Ms. Clissman contended that proof of the guardianship agreement depended solely on the survival of the physical legal document in the absence of a system of registration. Whilst she acknowledged that secondary evidence could be adduced to prove the existence of the document, she argued that this might not always be possible, especially in contentious cases and there may not be sufficient time to find and produce proof in emergency situations e.g. an emergency hospitalisation. The result, in such circumstances, she submitted, would be the de facto denial to the child of the benefit of its guardian.

4.3 She further submitted that it would not be appropriate in circumstances where the parents had reached an agreement as to guardianship for the applicant's father to apply to the District Court pursuant to s.6A of the Guardianship of Infants Act 1964, as inserted by s.12 of the Status of Children Act 1987 and as amended to be appointed as guardian. Such a step was usually taken, she submitted, when a dispute had arisen. Ms. Clissman observed that the appointment of a father as guardian by the Court is subject to the discretion of the Court and would involve an inquiry into the welfare of the child whereas, in contrast, a joint guardianship agreement comes into effect immediately and cannot be varied unless it is set aside.

4.4 The guarantee of equal treatment under Article 40.1 of the Constitution required that a public register of guardianship agreements be established for non-marital children, Ms. Clissman argued. The jurisprudence, in her submission, indicated that the rights of non-marital children deriving from Article 40.3 were of the same extent and nature as rights of marital children under Articles 41 and 42. Hence, she submitted the absence of a register of guardianship agreements placed non-marital in a disadvantaged position in comparison to marital children, who could avail of the Register of Marriages to easily establish their guardians, and was therefore an invidious discrimination against non-marital children, which was impermissible under Article 40.1 of the Constitution.

4.5 Ms. Clissman also argued that s.3 of the Act of 2003 was contravened. Her client's Article 8 rights, she submitted, were infringed by the absence of a public register as the difficulties her client would face upon loss or destruction of the agreement would not be faced by marital children. She relied upon the jurisprudence of the European Court of Human Rights which established that States have a positive duty to vindicate Article 8 rights such as *Eriksson v. Sweden* (1990) 12 E.H.R.R. 183 and *Hokkanen v. Finland* (1995) 19 E.H.R.R. 139. She noted that the margin of appreciation enjoyed by States is narrower in cases where a positive duty is established.

4.6 Ms. Clissman submitted that her client had locus standi to bring these proceedings and that the test in *Cahill v. Sutton* [1980] I.R. 269 was satisfied by her. The cases of *Crotty v. An Taoiseach* [1987] I.R. 713 and *Society for the Protection of Unborn Children (Ireland) Ltd. v. Coogan* [1989] I.R. 734 established, in her submission, that omissions were amenable to Constitutional challenge. Should the apprehended risks to her client crystallize, she argued, it may be too late and she was entitled to institute these proceedings at this point. She relied on *East Donegal Co-operative Livestock Mart Ltd. v. The Attorney General* [1970] I.R. 317 and *Desmond v. Glackin* (No. 2) [1993] 3 I.R. 67 in this regard.

4.7 The cases of *O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181, *T.D. v. Minister for Education* [2001] 4 I.R. 259 and *Sinnott v. Minister for Education* [2001] 2 I.R. 545 were sought to be distinguished by Ms. Clissman on the basis that the applicant did not specify the manner in which any such register might be established and in respect of expenditure it would be *de minimus.*

**5. The respondents' submissions**

5.1 Mr. Durcan S.C., for the respondents, submitted that if there was a constitutional right at issue in these proceedings it was the right of the child to have its welfare protected. The primary obligation to protect the rights and interests of a child lay with its parents, in his submission. He cited *Northwestern Health Board v. H.W. and C.W.* [2001] 3 I.R. 622 in support of the proposition that the power of the State to intervene in this area was a default power. On this basis he argued that there was no positive obligation on the State to intervene to establish and maintain a public register. He noted that there are many legal documents affecting children which are not the subject of a public register and that it could not be the law that the State is obliged to guard against every degree of risk or harm. He contended that it had not been shown that the applicant's rights were breached by the absence of a register or that the creation of a register would be necessary to vindicate her rights.

5.2 He noted that the prescribed statutory form for the guardianship agreement, under S.I. No. 5 of 1998 indicated on its face that it should be kept in a safe place and that the State was entitled to assume that parents would protect the interests of their children by doing so. He submitted that in the instant case the applicant's father was unusually aware of or alert to the risks associated with the loss or destruction of the agreement and he could take simple steps to guard against those risks materialising.

5.3 Mr. Durcan questioned whether s.3 of the Act of 2003 could be relied upon to bring about a register that did not exist already and noted that at the moment his client had no functions with regard to a register. He submitted that there was not a single case decided in the European Court of Human Rights where a country was found to be in breach of Article 8 rights for failing to establish a register and he contended that it was well within the margin of appreciation of the State not to establish a register. He relied on the case of *Botta v. Italy* (1998) 26 E.H.R.R. 241 which, in his submission, established that when positive action is sought there must be a direct and immediate link between the action necessary and the applicant's private life. In the present case, however, he argued that, at best, there was a possibility of a

contingent risk at an indefinite time in the future.

5.4 The *locus standi* of the applicant was challenged by Mr. Durcan on the basis that the applicant's apprehensions were predicated on an avoidable chain of events. He submitted that there was no evidence put forward to illustrate that such events were imminent or likely, as required by the test enunciated by Henchy J. in *Cahill v. Sutton* [1980] I.R. 269.

5.5 He submitted that decisions on the allocation of public funds were exclusively a matter for the executive and that even if the amount of money required to establish a public register was minimal, as the applicant submitted, this could not permit an infringement of the principle of the separation of powers.

**6. The Law**

6.1 Article 40.1 of the Constitution provides:-

> *"1. All citizens shall, as human persons, be held equal before the law.*
>
> *This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."*

Article 40.3.1 of the Constitution provides:-

> *"The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."*

6.2 Article 8 of the European Convention on Human Rights states:-

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

6.3 Section 6 of the Guardianship of Infants Act 1964, as amended by the Children Act 1997, reads as follows:-

> *"6.-(1) The father and mother of a child shall be guardians of the child jointly.*
>
> *(2) On the death of the father of a child the mother, if surviving, shall be the guardian of the child, either alone or jointly with any guardian appointed by the father or by the court.*
>
> *(3) On the death of the mother of a child the father, if surviving, shall be guardian of the child, either alone or jointly with any child appointed by the mother or by the court.*
>
> *(4) Where the mother of a child has not married the child's father, she, while living, shall alone be the guardian of the child unless the circumstances set out in section 2(4) apply or there is in force an order under section 6A (inserted by the Act of 1987) of this Act or a guardian has otherwise been appointed in accordance with this Act."*

**7. Decision**

7.1 The applicant makes the case that if her guardianship agreement is lost or destroyed that she is at risk of a variety of perils which would be avoided by the existence of a public register recording the existence of the joint guardianship agreement. Is the absence of a public register recording the guardians of a non-marital child a breach of her rights under Article 40.3 of the Constitution, in the sense that it injures her welfare or does it constitute an invidious discrimination?

7.2 The Supreme Court in *North Western Health Board v. H.W. and C.W.* [2001] 3 I.R. 622 held that parents have primary responsibility for their child's upbringing and welfare. In their role as the child's primary protectors, I am satisfied that the State is entitled to expect parents to take reasonable precautions in the interests of their children, which would include looking after a guardianship agreement. All that needs to be done is to create a numbers of copies, have them certified if desired and place them in safekeeping. Once steps are taken to safeguard the agreement all potential risks of its loss and destruction are eliminated. Therefore, is not necessary per se to have a register of the kind envisaged to guard a child against potential risks resulting from the loss or destruction of guardianship arrangements. It is to be observed that even if a guardianship agreement is lost or destroyed, secondary evidence of its existence can be given, though, of course, that would not deal with the emergency type situation, in which it was necessary to establish who were the guardians.

7.3 For the above reasons I am satisfied that the absence of a public register for guardianship agreements does not violate a child's constitutional right under Article 40.3 to the same rights in respect its welfare as a marital child.

7.4 Is the absence of a register an invidious discrimination against non-marital children in comparison to marital children? Marital children have the benefit of having their guardianship disclosed from birth by inference from the registration of their parents' marriage. Recording the guardians of marital children is a consequence of the recording of marriages in the public register of marriages. The primary purpose of the register of marriages is for relevant reasons of social policy in that regard, to record all marriages solemnized in the State and is not to disclose the guardianship of marital children. Thus, whilst from birth the guardians of a marital child can be gleaned or inferred from that register, changes which may occur

later in the life of a child in relation to guardianship, as when a testamentary guardian becomes a guardian on the death of one or both natural parents, or when a court appoints a guardian on the death of the natural parent, are not recorded in this register. On this basis alone it can be said that the mere existence of the marriage register in the absence of a register of guardianship agreements could not amount to an invidious discrimination against non-marital children.

7.5 The question arises as to whether the creation of a public register of guardianship agreements would enhance the position of a non-marital child vis-à-vis a marital child. Such enhancement would only arise where the guardianship agreement in the form of the statutory declaration is withheld, lost or destroyed. Where the agreement survives, it is the best evidence of and best record of the guardianship of a child, such that a public register would for the purpose of evidencing or recording guardianship, be superfluous. It is possible that the loss of the guardianship agreement could disadvantage the child and equally it is possible that the existence of such a register in that circumstance might enhance the position of the child. However, it cannot be said that the absence of such a register infringes the constitutional rights of the child to equality of treatment under Article 40.1 of the Constitution, in circumstances where there is an obvious and realistic alternative which is entirely within the ordinary competence of every guardian, that is, the preservation of the agreement. As said above, it is the parents as guardians who have the primary duty of safeguarding the welfare of the child, and only where is there is default in that sphere can the State be called upon to make good the deficiency. I am satisfied there has been no breach of the applicant's rights under Article 40.1 of the Constitution.

7.6 I am also satisfied that applicant's rights under Article 8 of the Convention have not been violated. The European Court of Human Rights has held that the imposition of positive obligations on States to uphold respect for private and family life arise only in certain circumstances. In *Botta v. Italy* (1998) 26 E.H.R.R. 241 the Court stated as follows:-

> *"33. In the instant case the applicant complained in substance not of action but of a lack of action by the State. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. However, the concept of respect is not precisely defined. In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, while the State has, in any event, a margin of appreciation.*
>
> *34. The Court has held that a State has obligations of this type where it has found a direct and immediate link between the measures sought by the applicant and the latter's private and/or family life.*
>
> *…"*

7.7 I am quite satisfied that there is not a direct and immediate link between the interest of the applicant sought to be guarded against, namely the harm that would result from the loss or destruction of the guardianship agreement and the introduction of a public register of guardianship agreements. The risk in question only arises in the event of careless loss of, accidental loss of, or malicious destruction of the agreement. As said above these are risks that can easily be eliminated entirely. Thus, it simply cannot be said that there is a direct and immediate link between the harm apprehended and the measure sought to avoid that harm.

7.8 The provision of a mechanism in S.I. No. 5 of 1998 whereby parents may enter into a guardianship agreement in a prescribed form creates certainty and reliability for the child, so long as the agreement is preserved. From the point of view of a child's dealings with the State, the statutorily prescribed agreement, in my view, exceeds any obligation under the Convention (if any) the State might have in relation to recording the guardianship status of a non-marital child.

7.9 I am satisfied that it cannot be said that there could be a breach of duty on the part of the State in circumstances where the introduction of a register would involve the consideration of a whole variety of policy questions, which manifestly are the exclusive preserve of the executive and the Oireachtas, under the separation of powers doctrine. Apart from the observance of that principle, it is clear that this Court in this judicial review application could not deal with the array of policy questions which would have to be addressed if there was a decision in principle to introduce the register sought by the applicant. A fundamental issue of policy would be whether to introduce such a register at all having regard to the potential adverse affects it might have in certain situations. Manifestly, these are matters which cannot be dealt with by the courts.

7.10 The respondents submitted that the applicant did not have a *locus standi* to bring these proceedings on the basis that the harm sought to be relieved against was contingent and remote. Whilst I would agree that the risk to the applicant can be fairly described in that way, I do not accept that the applicant did not have the necessary lack of a real and substantial interest in the subject matter of the litigation to deprive her of a locus standi. The mere fact that the apprehended harm was contingent and remote does not mean that there was nothing to litigate. If there was a justiciable question raised, and there was, then clearly the applicant had a real and substantial interest in that issue.

7.11 It may very well be the case that the introduction of a public register for guardianship agreements would be a desirable social reform. Whether it is or is not is a matter solely for the executive and the Oireachtas. I am satisfied that the lack of such a register is not a breach of any of the applicant's Constitutional or Convention rights and hence this Court cannot bring about the introduction of such a register through the compulsion of a judicial ruling.

**8. Conclusion**

8.1 For the reasons set above, I must refuse the reliefs sought in these proceedings.