Neutral Citation: [2015] IEHC 207

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2013 No. 677 J.R.]**

**BETWEEN**

**A.B.**

**APPLICANT**

**AND**

**JUDGE RORY MCCABE AND JUDGE JOHN COUGHLAN**

**RESPONDENT**

**AND**

**P.M.**

**NOTICE PARTY**

**JUDGMENT of Ms. Justice Baker delivered on the 20th day of March, 2015**

1. The applicant and the notice party are the unmarried parents of their daughter H., born in December 2005 and the fraught relationship between them which ended acrimoniously has impacted on their ongoing relationship as parents of their daughter. Almost since their daughter was born disputes have arisen between the applicant, the mother of the child, and the notice party, her father. The child lives full-time with her mother and has had access pursuant to various court orders, the most extensive of which was made in the Circuit Court on the 22nd July, 2011 by then Circuit Court Judge Michael White.

2. The couple have been party to numerous court applications, and for the purposes of this application it is noteworthy that in or about 2006 or 2007 the notice party sought to be appointed as joint guardian of H. His application was refused in the District Court on the 15th January, 2007, and presumably on a separate application, on the 20th June, 2007. An appeal was lodged by him to the second of these orders but it seems that this appeal was not pursued. A separate application was brought by him some time later also in the District Court and this was transferred to the Circuit Court and ultimately became the subject matter of the final order of that Court by Judge White on the 22nd July, 2011 to which I referred above. The dates of some of the orders and applications are not clear to me but have no particular relevance save as background to the within application.

3. The applicant was given leave to seek judicial review of two orders, the first of Circuit Court Judge Rory McCabe made on the 23rd July, 2013 by which the notice party was appointed joint guardian of the child, and the second of an order made on the 26th July, 2013 by District Judge John Coughlan by which it is asserted that he "confirmed" breach of the order for access made by Judge White on the 22nd July, 2011.

4. In each case the grounds on which judicial review is sought is that the judge failed to accord the applicant fair procedure in due course of law.

5. The notice party did not serve opposition papers to the judicial review nor did he serve a replying affidavit, and as is usual in these matters, neither the Circuit Judge nor the District Judge took part in the proceedings. The notice party did not have legal representation and asserted before me that he wished to hold the guardianship order and that it was made within jurisdiction. I permitted him to give evidence on oath and I will deal later with my consideration of that evidence.

6. The two impugned orders raise different questions and I will deal with each in turn.

**The order of Judge McCabe**

7. Judge McCabe made an order as the Circuit Court judge sitting in a Midlands town on the 23rd July, 2013 by which he appointed the notice party guardian of his daughter and adjourned the matter of access to a sitting of the Circuit Court two days later. The order shows on its face that the notice party had brought the application by way of a notice of motion on the 15th July, 2013 by which he sought the following:

> 1) An urgent breach of the Circuit Court orders dated the 22nd July 2011 in relation to breach of access.
>
> 2) An order seeking variation of the guardianship order.

8. The order recites that it was made on reading the motion paper and "on hearing what was offered by Mr M", and it is not disputed that the order was made without any input or evidence from Ms B, and in her absence. The balance of the relief sought in the motion was not dealt with and was adjourned for two days.

9. From the notice of motion it is clear that it was returnable for 10.00 am on the day in question, and the evidence of the applicant was that the Circuit Court did not have on that day a designated Family Law List, but that Judge McCabe was sitting to deal with criminal matters at 10:30 am. The applicant in her affidavit asserts that she gave what she describes as "clear instructions" to her solicitor to appear to oppose the application for guardianship, and the claim that she had breached the access order, but that "as a result of mistake and inadvertence", the precise nature of which was not identified to me, neither the applicant nor her solicitor attended at the court until 10.15 am or 10.20 am on the morning of the hearing "in the belief that the court was commencing at 10.30 am".

10. In the events, the application had already concluded when Ms B and her solicitor arrived in the courthouse. The applicant in her affidavit says that just before 10.30 am she noticed the notice party leaving the courthouse but she did not speak to him. Her solicitor, however, sought clarification from the Registrar sitting with Judge McCabe, and was told that as there had been no appearance for the respondent to the motion that the matter had been adjourned to the 25th July, two days later, at 10.00 am, but arranged that the matter be listed for mention only before Judge McCabe at 2.00 pm. At that hearing Judge McCabe to facilitate the applicant directed that the adjourned sitting would be delayed until not before 12 noon on the 25th July, but it seems that at that

short mention no reference was made to the fact that the guardianship order had already been made, and the applicant says she did not know the guardianship order had been made until she received the order of Judge Coughlan on or about the 30th July, 2013.

11. The matter came on briefly on the 25th July when Judge McCabe remitted it to the District Court on the 26th July and Judge McCabe had no further dealings with the matter. The hearing on the 26th July occurred before Judge Coughlan and is the subject matter of the second part of this judgment.

**Arguments of the applicant**
12. The applicant seeks to set aside the guardianship order on the basis that it was made without jurisdiction and in her absence, the claim being that the Circuit Judge erred in not putting the matter to second calling, or in some other way to facilitate her, having regard to the fact that she was not present in court or represented when the matter was called on. The notice party gave evidence that he had available for the Circuit Judge an affidavit of service of the notice of motion, although he did not have this for me in the course of the hearing. It is, however, clear that the applicant and her solicitor were on notice of the time of the application, but it seems, and I must extrapolate from the somewhat elusive affidavit evidence, that they erroneously believed it was listed for 10.30 am, the normal time for the sitting of that Circuit Court.

13. A claim is made on the simple, but well established, ground that the trial judge failed to give the applicant an opportunity to be heard.

14. I accept the argument made by the applicant that although the motion paper was not framed as an appeal it bore a record number of a District Court appeal and that the applicant could not for that reason appeal the decision of Judge McCabe in lieu of seeking to quash it by review.

**The arguments of the notice party**
15. The notice party made no legal argument but asserts that he informed Judge McCabe of previous orders that have been made in the case, and the history of the litigation between the parents of this child. When pressed he also confirmed under oath that he had informed Judge McCabe of HSE involvement with the matter, and that the ongoing relationship between the parents of this child was fraught with difficulty and was extremely contentious and litigious.

16. He says the order was validly made and that there is no basis in which it might be set aside. His sworn evidence before me was that the hearing took between seven and fifteen minutes, he giving various estimates of the length in the course of his evidence in chief and cross examination.

**Discussion**
17. There is no rule that requires a judge in any court to adjourn a matter in the absence of a respondent, and no rule that requires a judge to let a matter stand to second calling or until later in the day if a respondent to an application is not present at the time identified in the initiating court papers. It would not be proper for a judge of the High Court to interfere with the management by a Circuit Court judge of his or her list and each court must govern its own procedures on a day to day basis and in accordance with its own judgement of the state of the list and the possible explanation for the non-attendance of a respondent.

18. The matter has been the subject of various decisions of these courts and in particular in the *State (Attorney General) v. District Justice Mangan* [1961] Ir Jur Rep 17 and in the *State (Llewellyn) v. Ua Donnchadha* [1973] 1 IR 151. The latter case is authority for the proposition that the High Court will not in general grant judicial review of the decision of a lower court to adjourn or refuse to adjourn a matter of which it had seisin. As Walsh J: said at p. 155:

> *"It is undoubtedly true that there are many cases in which it would indeed be advisable for a District Justice to elect not to proceed in such a situation; but that is quite different from saying that his decision to proceed was a decision taken in excess of his jurisdiction. If an appeal simpliciter were taken against his decision to adjourn (or not to adjourn), different considerations might apply in the court hearing such an appeal. This, however, is not such an appeal. These proceedings, being an application for prohibition, cannot succeed unless it can be established that the District Justice has acted, or is threatening to act, in excess of his jurisdiction or that he is usurping a jurisdiction which is not legally vested in him."*

Walsh J. pointed out the contrary proposition might "*adversely affect the smooth administration of justice*" and said at p.156:

> *"I am of opinion for the reasons I have already given that a District Justice is entitled to proceed provided he acts within his jurisdiction and takes into account only factors which are properly relevant to the matters before him in deciding that question."*

19. A court may make an order in the absence of one of the parties, even when the court believes or knows from its own judgement of what it hears, that the application is likely to be contested. The applicant does not urge a far reaching contrary proposition, but argues that it was disproportionate, unfair and in breach of fair procedure that the Circuit Court proceeded to hear the matter at the time it did and without her presence. Counsel for the applicant points me to a statement in Hogan and Morgan, *Administrative Law in Ireland*, 4th Ed., where they quote at para. 14.02 Tucker L.J. in *Russell v. Duke of Norfolk* [1949] 1 All ER 109:

> *"the standard of the right to be heard is plastic, varying with the circumstances, for 'domestic and administrative tribunals take many forms and determine many different kinds of issues and no hard and fast rules can be laid down…'."*

20. It seems to me that the key to this case is not in fact what Judge McCabe knew but what he was told. The notice party was elusive in his evidence to me, and on a number of occasions sought to rely on his lack of legal representation as a reason or an excuse for his failure to be clear in his evidence. I find it difficult to glean from him exactly how long the application had taken and what precisely he had said on oath to Judge McCabe. Indeed he was elusive on the question of whether he had in fact given evidence on oath and in that regard I note he had grounded his motion on a very short affidavit in which he exhibited no previous orders or correspondence, and to which he had annexed what he described as a letter but what was really a schedule of breaches of access which he asserted had occurred. I can merely extrapolate from the timeframe that the application before Judge McCabe took approximately ten minutes, and that ten minutes would have included a clearing of the Court and a call by the Registrar for appearances on behalf of the applicant.

21. In the course of his evidence before me the notice party said he told Judge McCabe about various matters which he claimed amounted to breach by the applicant of the access order of Judge White, and that he told the judge about the HSE and about Garda involvement with the matter, and that the applicant was "putting the child through emotional abuse". He did not confirm the he told

Judge Mc Cabe that the relationship between him and the mother of his daughter was acrimonious and had been the subject of much litigation and that he was in significant arrears of a maintenance order.

22. I am not persuaded by the notice party's evidence, and in particular whether he informed Judge McCabe of the acrimonious and difficult history of the matter, the recent involvement of the HSE, and that guardianship orders had been refused on a number of previous occasions. I accept that it is likely that the Circuit Court order of Judge White was on the file in the Circuit Court and that Judge McCabe had access to that, but I take the view having heard the notice party and noting in particular his elusiveness in answering straightforward questions, and the fact that he gave varying estimates for the length of the hearing as being between seven and fifteen minutes, that as a matter of probability Judge McCabe did not have any evidence before him which would have led him to believe that the application for guardianship was likely to be vigorously contested, and had been the subject matter of various orders over the previous six years or more. In that circumstance and had Judge McCabe known the degree of acrimony and likely level of resistance to the application I believe he would have left the matter stand in the list to ascertain the reason for the non-attendance of the applicant and her solicitor, and would have not dealt with the matter in her absence.

23. In the circumstances it seems to me that Judge McCabe did fall into error but one which was encouraged and induced by the lack of candour of the notice party, and accordingly I am of the view that he fell into an error of jurisdiction in hearing and determining this highly contentious application without giving a fair opportunity to the applicant to attend and be heard. In that regard a fair opportunity would have meant letting the matter stand in the list until 10.30 am, the normal starting time for the court. I am fortified in this view by the fact that Judge McCabe did not deal with the more obviously detailed and acrimonious question, involving scrutiny of the various occasions on which the access order was alleged to have been breached, and the fact that he adjourned the application for an order in relation to these alleged breaches. This leads me to the conclusion that he was not informed of the contentious and acrimonious nature of the guardianship issue, and the fact that it had been the subject matter of a long and bitter dispute between these parents. I note also that Judge McCabe made no mention of the fact that a guardianship order had been made by him when the matter came on for mention before him in the afternoon. He must have understood that the contentious matter was the alleged breach of the access order.

24. An application for guardianship is one which may be renewed from time to time and a court will consider the current circumstances of the relationship between a father and a child in the context of an application for guardianship. In those circumstances it seems to me that the notice party is not unduly prejudiced by an order now setting aside the order of Judge McCabe and he may re-enter the matter before a district judge.

25. Accordingly, I make an order setting aside the guardianship order on the ground that it was made without allowing fair procedure to the applicant.

**The order of Judge Coughlan**

26. Judge Coughlan's order is made under s.12 of the Guardianship of Infants Act, 1964 to 1967, and is described in its heading as a "variation order/order discharging previous order". It recites that the application had been remitted by Judge McCabe from the Circuit Court on the 25th July, 2013 (the order mentioned above), with respect to the matter of breach of access contained in the notice of motion of the 15th July, 2013.

27. The applicant seeks to set aside this order and argues that the District Court judge erred in making an order that she was in breach of the existing access order of Judge White. I consider that the applicant has misinterpreted the order of Judge Coughlan.

28. I quote the relevant part of the order in full:-

> "THE COURT ON HEARING THE EVIDENCE directed that the order granted at T. Circuit Court on the 22nd day July 2011 by Judge White be confirmed with respect of paragraph 8 in relation to access as follows:"

29. There follows then a long list of access arrangements, of weekend and weekday and holiday access. There is nothing in the order which declares that there has been any breach of the existing order and all this order does is affirm the order of Judge White with regard to access, and it does no more than implicitly refuse to vary that order. That part of the order which I quoted above is a recital of the action taken by the court and it cannot be interpreted as an order, or to reflect that Judge Coughlan formed the view and held that the applicant had breached the access order.

30. Following on the making of the order by Judge Coughlan the notice party caused an application to issue on the 31st July, 2013 seeking the committal of the applicant for breach of an order for access, and this application ultimately came to be adjourned from time to time. Nothing turns on the current state of these applications save to note that the notice party has sought to rely on his understanding of the order of Judge Coughlan made on the 26th July, 2013 to ground an application for committal for breach of the court order for access.

31. The order of Judge Coughlan makes no finding of breach, and the applicant is as a result not entitled to any order quashing that order. Equally the notice party is incorrect in his view that the order so found.

32. I refuse the second relief sought.