Neutral Citation Number: [2013] IEHC 533

THE HIGH COURT

[2013 No. 776 J.R.]

BETWEEN/

J.G., K.G., J.G. (A MINOR SUING THROUGH HIS PARENTS AND NEXT FRIENDS) AND B.G. (A MINOR SUING THROUGH HIS PARENTS AND NEXT FRIENDS)

APPLICANTS

AND

JUDGE KEVIN STAUNTON AND THE HEALTH SERVICE EXECUTIVE

RESPONDENTS

AND

A.D. (GUARDIAN AD LITEM)

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on 27th November, 2013

1. In these judicial review proceedings the first and second applicants (whom I shall describe as either "the parents" or "the H. parents") challenge the validity of certain orders made by Judge Kevin Staunton under the provisions of the Child Care Act 1991 ("the 1991 Act") in respect of two of their children, I., and J. Although these proceedings were held in open court, at the outset I made an order pursuant to s. 45(1) of the Courts (Supplemental Provisions) Act 1961, preventing the identification of I. and J. It is for these reasons that the identity of the applicants, their location in the State and anything which might identify them (or the identity of any of their other children) has been redacted for the purpose of this judgment.

2. I. and J. are two young boys who are now aged 5 and 4 years of age respectively. Ms. H. is also the mother of two older girls, M. (who is aged 14) and N. (who is aged 13), but Mr. H. is not the father of these girls. (Both Ms. H. and Mr. H. were previously married and then re-married following a divorce).

3. There a rather complex background history to these proceedings. The family first came to the attention of the HSE when M. presented at a local Garda station in September, 2012 alleging that she had been physically beaten by her step-father in the presence of her mother. The Gardaí involved the provisions of s. 12 of the 1991 Act and arranged to have M. examined by a consultant paediatrician. The paediatrician concluded that M. had bruising and linear marks on her body which she thought were consistent with M. having been struck with an instrument.

4. Following a succession of applications to the District Court, that Court ultimately made an order under s. 18 of the 1991 Act on 18th June, 2013, whereby the two elder girls were taken into care until they attain their majority. This order has been appealed by the parents to the Circuit Court and I have been informed that this appeal is likely to be heard in January, 2014. Nothing in this judgment should be taken as expressing any view as to how that particular appeal should be disposed of.

5. In the light of these events the HSE were naturally concerned about the welfare of the two younger children. An emergency care order was thereafter made by the District Court in respect of the two boys for an eight day period. On 3rd October, 2012, the District Court made a supervision order in respect of the two boys under s. 19 of the 1991 Act. While the boys were returned to their parents, they were subject to the supervision of the HSE. In the light of certain comments made by M. to her foster-family the HSE then applied afresh to the District Court for interim care orders in respect of the two boys. The orders were duly granted and the boys remained in care from late January, 2013 until 16th May, 2013.

6. I should pause at this point to say that the parents made an application to me for an inquiry under Article 40.4.2 of the Constitution in respect of the custody of their children. I directed that such an inquiry should commence and after several days hearing in April, 2013, I was informed that the inquiry need not continue any further.

7. On the 16th May 2013 the HSE made a further application to the District Court for the continuation of care orders on the basis that the young boys remained at risk if they remained in the care of their parents. Evidence was given by the court-appointed guardian ad litem, Ms. D., to the effect that the boys remained at risk if they remained in the care of their parents. The District Court nevertheless refused to make the care orders sought, but instead made supervision orders under s. 19 of the 1991 Act. While the conditions attached to these orders are the subject of a challenge in separate judicial review proceedings (2013 No. 688JR), it will nevertheless be necessary to re-visit the issue of the validity of these conditions at a later stage in this judgment.

8. On 11th September, 2013, the HSE applied again to the District Court for interim care orders pursuant to s. 17 of the 1991 Act in respect of the two boys. That application was heard in full on 20th September, 2013, with Ms. D. (as guardian *ad litem*) and Ms. R. (a HSE social worker) giving evidence in support of the application. Following legal argument on the subsequent days, judgment was reserved by District Judge Staunton until 21st October, 2013. On that day the Court made an interim care order pursuant to s. 17(1) of the 1991 Act in respect of the two boys and this order was originally due to expire on 14th November, 2013. On Friday, 25th October, 2013, this Court (Butler J.) granted the applicants leave to apply for judicial review and the effect of the order was stayed by Butler J. pursuant to the terms of O. 84, 20(7). These judicial review proceedings were then heard on an expedited basis by this Court and by agreement the potential operation of the care order was postponed to today, 27th November, 2013, in order to facilitate the preparation of this reserved judgment.

The constitutional jurisdiction to take children into care

9. The entire jurisdiction to take children into care derives from Article 42.5 of the Constitution which provides that:

> "In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

10. It is true that the right and duty of the parents to provide for the education and upbringing of their children is described by Article 42.1 as "inalienable". Yet it is also obvious from the express terms of Article 42.5 that these parental rights can be lost in the case of objective failure on the part of the parents themselves. While terms such as "inalienable", "imprescriptible" and "inviolable" are liberally employed throughout the Fundamental Rights provisions of the Constitution, it must be recalled that these terms draw their provenance from the use of the very same or similar terminology in the continental constitutions of the 19th and 20th century. Neither the drafters of those constitutions nor the drafters of our Constitution intended that terms such as "inalienable" or "inviolable" should be read absolutely literally: see *e.g.,* by analogy my own comments to this effect in *Wicklow County Council v. Fortune (No.1)* [2013] IEHC 406. These terms were rather used to signify and to emphasise the importance of these rights and to convey their importance so that, as I put it (in the context of the meaning of the word "inviolability" in Article 40.5 in *Fortune*) such rights would enjoy "the highest possible level of legal protection which might realistically be afforded in a modern society". Rather these terms were used to signify and to emphasise the importance of these rights and to convey their importance. The use of language of this kind further conveys an important signal as how necessary it was considered that these rights should be safeguarded against encroachment.

11. Indeed, the close similarity in both language, structure and thinking between the provisions of Article 41 and Article on the one hand and some of the constitutions of other continental jurisdictions on the other can only be described as striking. Thus, for example, Article 6(2) of the German Basic Law provides that the "care and upbringing of children are a natural right of parents and a duty primarily incumbent upon them". Article 6(3) then provides – in language, it might be thought, which is uncannily redolent of the language actually used in Article 42.5 itself – that:

> "Children may not be separated from their families against the will of their parents or guardians save in accordance with a law in cases where they fail in their duty or there is danger of the children being seriously neglected for other reasons."

12. Whether by sheer coincidence or otherwise, the language used here by Article 6(3) of the German Basic Law pretty well sums up the philosophy of Article 41 and Article 42. Parents are given the right and duty to educate their children, but that right can be – and will be – lost where they objectively fail in their duty or where for other reasons there is a danger that the children will be seriously neglected.

13. There is no doubt but that the loss of parental rights – whether on a temporary or permanent basis – is, however, a serious matter which the organs of the State should not lightly undertake: see, *e.g.,* the comments to this effect of Hardiman J. in *N. v. Health Service Executive* [2006] IESC 60. Yet Article 42.5 envisages that there will be cases where this step is objectively necessary to safeguard the child's own constitutional rights. As O'Flaherty J. observed in *Southern Health Board v. CH* [1996] 1 I.R. 219, 238:

> "…the child's welfare must always be of far graver concern to the Court. We must, as judges, hearken to the constitutional command which mandates, as prime consideration, the interests of the child in any legal proceedings."

14. It is accordingly impossible to catalogue *ex ante* the precise nature of the parental failure which might justify the removal of the child from the custody of its parents. It is sufficient to say that while weighty reasons for this step must always be established, yet as O'Flaherty J. observed in *CH*, such a step must also be taken in such circumstances of failure where it is clear that the best interests of the child so require.

15. Thus, physical abuse and sexual abuse of children naturally amount to an open attack on the "person" of the child within the meaning of Article 40.3.2 of the Constitution. The right to the protection of the person in Article 40.3.2 is clearly one of the "natural and imprescriptible rights of the child" for the purposes of Article 42.5. Such an infringement of these rights would unquestionably constitute "failure" in the Article 42.5 sense on the part of the parent concerned. It is important to stress that no such failure *of this nature* was identified by the District Court in the present proceedings so far as the *boys* were concerned.

16. In the present case, the District Court found that the parents were guilty of such failure in that (i) they failed to comply with the terms of the supervision order and (ii) they were guilty of emotional neglect. Indeed, the judge specifically acknowledged that there were ample grounds to have made a s. 18 care order, but he rather thought that the matter could be addressed in the first instance by the making of a supervision order under s. 19. This is what he directed at the May, 2013. It was only when he concluded that the H. parents had no intention of complying with the supervision order that the judge elected to make the interim care order under s. 17.

17. Can it be said that so far as the two boys are concerned that, viewed objectively, the parents have been guilty of such parental failure for the purposes of Article 42.5 as would justify the taking of the two boys into care? It is to this issue to which we may now turn.

Failure to comply with the terms of the supervision order

18. It is clear from the judge's ruling that the failure on the part of the parents – and, specifically, Mr. H. – to comply with the earlier direction contained in the supervision order requiring them to attend for parental capacity assessments played an important part in his conclusion that a s. 17 interim care order should also be made. It is true that the judge also acknowledged that a s. 17 order could not be made *simply* the parents did not comply with the supervision order inasmuch as it would also have had to have been established that the s. 17 conditions also were satisfied. Yet it also seems manifest from the terms of the judge's reasoning that one of the reasons why he made an interim care order for the duration of time which he did was that evidence was given before him at the hearing on 20th September, 2013, was that such an assessment could have been conducted within the three weeks or so originally specified in the s. 17 order.

19. As has been already noted, the validity of the original supervision order is under challenge in separate judicial review proceedings and it is, perhaps, unfortunate that the two sets of proceedings were not heard together. Be that as it may, it seems to me that I cannot nonetheless avoid pronouncing for present purposes on aspects of the supervision order in these proceedings as the steadfast refusal of the parents to submit to such an assessment certainly played a not insignificant role in the judge's conclusion that an interim care order ought to be made.

The validity of the direction that the parents must submit to a parental capacity assessment

20. It may first be observed that although the supervision orders were made under s. 19(1) of the 1991 Act, yet several of the

directions contained therein were directed towards the parents. Thus, for example, the parents were directed to have parenting assessments and psychometric testing and Ms. G. was directed to receive counselling and psychotherapy. It seems obvious that the H. family is a troubled family and there seems little doubt but that the parents in particular would benefit, for example, from parenting assessments and that they might obtain valuable guidance to cope with the stresses and strains of family life.

21. This, however, is not the precise issue which I have to determine. My task is rather to examine whether, irrespective of their merits in this particular case, there is a proper legal basis for such directions under s. 19(1) of the 1991 Act?

22. Section 19(1) of the 1991 Act empowers the District Court to make a supervision order in cases where the court is satisfied that there are reasonable grounds for believing that the child has been abused or neglected and that it is desirable that the "child be visited periodically by or on behalf of the HSE." Section 19(2) then provides that a supervision order shall authorise the Health Service Executive:

> "to have the child visited on such periodic occasions as the board may consider necessary in order to satisfy itself as to the welfare of the child and to give to his parents or a person acting *in loco parentis* any necessary advice as to the care of the child."

23. While the HSE is plainly authorised to visit the child and to give advice to the parents of a child who is the subject of a supervision order, the sub-section does not envisage that parents can be the subject of positive obligations of the kind which were actually directed by the District Judge and embodied in the supervision order. It is true that the 1991 Act is a remedial statute which should be construed broadly and liberally where it is possible to do so (see, e.g., the comments to this effect of McGuinness J. in *Western Health Board v. KM* [2002] IESC 104, [2002] 2 I.R. 493,510), but this principle of interpretation has no really application insofar as the question of whether positive obligations are thereby imposed on the parents is under consideration.

24. This is perhaps especially true in respect of any requirement that one of the parents receive a particular form of therapy such as psychotherapy. It is fundamental to our legal order that medical treatment (or something akin to medical treatment, such as psychotherapy) represents a voluntary choice on the party of the prospective patient (or, as the case may be, prospective client): see, *e.g.*, the comments of Laffoy J. in *Fitzpatrick v. FK* [2008] IEHC 104, [2009] 2 I.R. 7. Very clear and express language would be required before it could be assumed that the Oireachtas had given the District Court a power to impose a condition of this kind in respect of parents otherwise subject to a supervision order.

25. Indeed, it may be noted that s. 19(4) provides that the District Court is expressly empowered to require the parents of the child to cause the child "to attend for medical or psychiatric examination, treatment or assessment at a hospital, clinic or other place specified by the court." This sub-section is perhaps significant in two respects. First, it appears to be the only provision of the section which imposes a positive obligation on the parents of the child in question, since the Court can positively require them to present the child for medical or psychiatric treatment. Second, if the Oireachtas envisaged that the Court might be empowered to require parents to attend a particular course or undergo a particular course of treatment, it surely would have expressly so provided in this sub-section. Its failure to do so must be regarded as telling.

26. Viewed against this background, it is all too obvious that s. 19 gives no such powers to the District Court to direct a parental capacity assessment of this kind or to direct that one of the parents partake in a course of psychotherapy. The directions to do so contained in the District Court order of 16th May, 2013, must accordingly be regarded as invalid on their face.

27. Nor do I accept that s. 47 of the 1991 Act could properly provide an appropriate legislative basis for such directions in respect of the parents had this section been invoked by the District Court for this purpose. Section 47 states:

> "….where a child is in the care of a health board, the District Court may, of its own motion, or on the application of any person, give such directions and make such orders on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order."

28. It is true that s. 47 is, as McCracken J. pointed in *Eastern Health Board v. McDonnell* [1999] 1 I.R. 174, 184, "an all embracing and wide ranging provision." But the section is designed to give the District Court full authority to give directions to the HSE in all matters pertaining to the welfare of the child who is in care. Thus, for example, as happened in *McDonnell* itself, the HSE could lawfully be directed by means of a s. 47 order to prepare a care plan for the child which was to be reviewed a child psychiatrist.

29. Yet the s. 47 order must relate directly to the welfare of the child. The Oireachtas did not envisage that this jurisdiction could be used to impose *obligations* on third parties (even such as parents) to do certain things. Of course, removed from the general statutory context, it might be said that, for example, the child's welfare would be safeguarded if an abusive or neglectful parent were to be directed by court order to abstain from alcohol. As we in this jurisdiction sadly know all too well, there is plainly a clear link between excess alcohol consumption on the part of parents and the welfare of children in general and, as a succession of writers from Joyce to McCourt have shown, such excess consumption has historically been responsible for much childhood misery. Yet the Oireachtas cannot be taken as having conferred a power to impose personal obligations of this kind on third parties *simply* because there might be a link between the performance of such obligations and the child's general welfare. The purely general language of both s. 19 and s. 47 provide altogether too slender a basis for that far reaching conclusion so far as third parties are concerned.

30. Accordingly, for all the reasons I have already set out with respect to the s. 19 jurisdiction, the generality of the language contained in s. 47 cannot be invoked as to justify positive obligations of this personal kind in respect of persons other than the child itself. If there were to be such a power to impose personal obligations of this kind on parents and others in the interests of the child, very clear and express language would be required for this purpose. To my mind, neither s. 19 nor s. 47 of the 1991 Act enable the District Court to impose conditions of this kind on third parties. If the law here is considered to be unsatisfactory, this would be a matter of policy properly committed by Article 15.2.1 of the Constitution to the exclusive judgment of the Oireachtas.

31. In these circumstances, neither parents can properly be faulted for failure to comply with directions contained in the supervision order which imposed a positive obligation of this nature upon them. It follows, therefore, that this part of the decision of the District Court cannot stand and must be quashed.

The basis on which the District Court concluded that there was emotional abuse

32. The judge acknowledged that there was no question of any physical abuse so far as the boys were concerned, but he nonetheless made the interim care order on the basis that there was "overwhelming" evidence of emotional abuse such as would justify the making of an interim care order. Section 17(1)(b) permits the District Court to make an emergency care order where:

"…there is reasonable cause to believe that any of the circumstances mentioned at paragraph (a), (b) or (c) of s.18(1) exists or has existed with respect to the child and that it is necessary for the protection of the child's health or welfare that he be placed or maintained in the care of the HSE pending the determination of the care order…"

33. The conditions specified in s. 18 are as follows:

"Where, on the application of the HSE with respect to a child, the court is satisfied that:-

(a) the child has been is being assaulted, ill-treated, neglected or sexually abused, or

(b) the child's health, development or welfare has been or is being avoidably impaired or neglected, or

(c) the child's health, development or welfare is likely to be avoidably impaired or neglected,

and that the child requires care or protection which he is unlikely to receive unless the court makes an order under this section, the court may make an order…in respect of the child."

34. At the close of his ruling, Judge Staunton clarified that he had been satisfied that the conditions in both s. 18(1)(b) and s. 18(1)(c) had been established.

35. The use of the term "satisfied" in the context of legislation conferring discretionary powers on decision makers (including judges) is, of course, by now a very familiar one. It generally vests the decision-maker with power to do certain things contingent on specific pre-conditions to the exercise of jurisdiction having been "satisfied". Used in this manner and in this sense the term envisages that the impugned decision can be shown to have been taken *bona fide*, in a manner which is factually sustainable and which is not unreasonable: see, *e.g., The State (Lynch) v. Cooney* [1982] I.R. 337,361, per O'Higgins C.J. and *Mallak v. Minister for Justice* [2012] IESC 59 per Fennelly J.

36. A key part of the evidence of emotional abuse was the judge's finding that the parents had invented an allegation that the younger boy, J., had been sexually interfered with by his elder sister, N.. In July, 2013 social workers received a telephone call from a local general practitioner who informed them that Ms. H. had complained that during the course of a HSE supervised access visit to the elder girls in the previous week that one of the girls had kicked him in his genital area, pulled down his pants and then pulled his penis. The general practitioner noted that she had visually inspected J.'s genitals, but saw no evidence of bruising or redness.

37. The social worker in question then interviewed N. regarding this allegation and found her to be very distressed as a result. Judge Staunton found that this allegation was unfounded and that it had been concocted by the parents as part of an endeavour to present the HSE in a bad light. In this respect, this finding was also consistent with the finding which he also made that the boys were being coached by the parents not to co-operate with the HSE social workers.

38. One may accept that the circumstances presented here do not fit into the standard categories of emotional abuse (such as, for example, persistent sarcasm and hostility towards the child) which are identified in paragraph 2.3 of *Children First: National Guidelines for the Protection and Welfare of Children* (Dublin, 2011) published by the Minister for Children and Youth Affairs. It is nonetheless clear that, on any view, such conduct was gravely wrong and amounts to an improper exploitation of the two children concerned. A parent who makes a false allegation of this kind involving their children is plainly guilty of an objective failure of duty towards those children such as would trigger the potential application of Article 42.5. It is, if anything, worse when one child is deliberately pitted by the parents against another child by the making of false allegations of this very serious kind.

Conclusions

39. By reason of effluxion of time, the interim care order has lapsed in the period taken for the preparation of this judgment. When the matters returns to the District Court, it will be matter for that judge to evaluate what, if any steps, he should take with regard to the two boys in view of the terms of this judgment.

40. It is important to recall, however, that any removal of a child from its parents can only be in compliance with the requirements of Article 42.5 itself. A positive failure on the part of the parents, measured objectively, must always be established and the children cannot be removed from the home environment save for weighty reasons. Yet where such failure has been established and the best interests of the child so require, Article 42.5 expressly requires the courts to act in the manner which will best safeguard the constitutional rights of the child.

41. For the reasons I have just stated, the District Court has no authority to embody conditions imposing personal obligations on third parties (such as parents), such as those directing that they attend parental assessment courses or submit to a course of psychotherapy. Insofar as the interim care order was premised on the fact that the parents had shown that they had no intention to complying with such directions, then the order was to that extent invalid and cannot stand.

42. There remains the fact that the District Court found that at least one of the parents had quite improperly exploited the children by making a false allegation that an older girl had sexually interfered with one of the younger boys and that she had done this with a view to embarrassing the HSE and its social workers. It seems implicit in the judge's findings that Mr. H. had stood over the conduct of his wife in this regard.

43. Viewed objectively, this was plainly conduct which amounted to a grave moral failure on the part of the parents within the meaning of Article 42.5. In these circumstances, it will be a matter for the District Court now to consider what steps are immediately required to safeguard the "natural and imprescriptible rights of the child" within the meaning of Article 42.5. Here the District Court may also wish to bear in mind that the principle of proportionality also comes into play, so that the fact that the parents have been found to be guilty of a grave moral failure within the meaning of Article 42.5 does not necessarily mean that in every case the children must be taken into some form of care, although it may, of course, do so. I stress, however, that this assessment is entirely a matter for the District Court.

44. It follows, therefore, that the interim care order must be quashed. I will accordingly remit the entire matter to the District Court in accordance with O. 84, r. 27(4).