THE HIGH COURT

[2021] IEHC 812

Record No. 2021/863 JR

BETWEEN:

C.G.

APPLICANT

AND

CHILD AND FAMILY AGENCY

RESPONDENT

AND

JF & BREDA BUCKLEY

NOTICE PARTIES

Judgment of Mr Justice Barr delivered extempore on 17th December, 2021

Introduction.

1. These proceedings were heard jointly with another set of proceedings entitled CFA v CG & JF (2021/996 JR). The connection between the two sets of proceedings will be set out later in the judgment. This judgment will deal with the issues arising in both sets of proceedings.

2. The applicant is the mother of an infant child, who was born on 22nd April, 2021 (hereinafter "the child").

3. The respondent is the Child and Family Agency (hereinafter "CFA"). The first named notice party (hereinafter "JF") is the father of the child. The second named notice party was appointed guardian *ad litem* to look after the interests of the child.

4. In this application, the applicant seeks an order quashing part of an order made by Her Honour Judge Alice Doyle in the Circuit Court on 21st July, 2021, wherein she gave a direction that JF was not to have unsupervised access with the child; the application is made on the basis that the learned Circuit Court judge did not have jurisdiction to make such an order.

5. In essence, the CFA does not object to the order sought by the applicant in respect of that direction. The main point of contention between the parties, is whether, as a consequence of that part of the order being struck down, the entire of the order made in the Circuit Court should be set aside and the matter remitted to the Circuit Court for a rehearing of the appeal.

6. The applicant argues that it is appropriate for this court to sever the impugned part of the order made by the Circuit Court judge, while leaving the remainder of the order in place. Thus, the issue of severance, is the key issue for determination in these proceedings.

7. The CFA submits that this court cannot sever the impugned part of the Circuit Court order, while leaving the remainder of the order in place, as to do so would distort the meaning and effect of the order entirely; would mean that this court was substituting its order for that of the Circuit Court judge and would not be in the best interests of the child.

8. The first named notice party, JF, supports the application made by the applicant. The second named notice party, the guardian *ad litem*, supports the argument made by the CFA and urges the court to set aside the entire of the order of the Circuit Court and remit the matter back to the Circuit Court for a rehearing of the appeal.

9. The second set of proceedings was instituted by the CFA seeking to quash the entirety of the order of the Circuit Court made on 21st July, 2021. It brought those proceedings, because the applicant had asserted that the issue of whether those provisions of the Circuit Court order, other than the impugned portion, could not be determined in the proceedings brought by the applicant, as the reliefs in her statement of grounds only referred to the impugned part of the order; so the court did not have jurisdiction to strike down the remaining parts of the Circuit Court order.

10. Without conceding that that argument was correct, the CFA instituted the second set of proceedings to ensure that the entire order of the Circuit Court would be reviewed by this court.

11. In response to the second set of proceedings, the applicant argued that the CFA was out of time to institute those judicial review proceedings and on this basis she urged the court to refuse their application.

Background.

12. As this is an application that involves the consideration of the welfare of a child, it is necessary to set out some details of the background to this case.

13. In an affidavit sworn on 17th November, 2021, Ms. Pauline Costello, a social work team leader in the Child Protection and Welfare team in the CFA, outlined the personal background of the parents of the child. She stated that the applicant experienced significant childhood trauma in the form of chronic neglect, physical abuse, and sexual abuse. The applicant was known to the social work department in her area when she was a child. The applicant and her siblings were abandoned by their mother and left in the sole care of their father.

14. In 2014, concerns were raised with respect to the applicant, who was then aged 16 years, being in a relationship with an adult male (not believed to be the first named notice party). In December 2015, further concerns were reported with respect to the applicant being in a relationship with JF. It was reported that they were engaged and that the applicant was pregnant. The CFA was aware that the applicant suffered two miscarriages, one in 2015 and one in 2019.

15. The first named notice party, JF, also came to the attention of the respondent. This was initially in relation to his daughter, who had moved in with him after he had separated from her mother and following the daughter making allegations of child sexual abuse against her mother's partner. On 25th March, 2013, a supervision order was granted by the District Court with respect to the girl. That supervision order was not renewed, due to the fact that the girl had met with her social worker on a number of occasions and was

able to articulate an understanding of the concerns of the social work department. She had also met with the judge and she had refused to return to the care of her mother, due to allegations of sexual abuse against her mother's partner. In addition, she was attending secondary school and had been seen regularly by professionals.

16. It was also recorded on the social work file that on 17th June, 2013, as part of family law proceedings in the case of the notice party's younger son (then aged four years), the District Court directed that there could be no unsupervised access between the JF and his son. JF was asked to engage in a risk assessment, but he refused to do so.

17. Also of relevance was the fact that on 13th October, 2009, JF was convicted of one count of false imprisonment and one count of sexual assault of a 14 year old female. A three-year prison sentence was imposed and he was placed on the sex offenders register indefinitely. The DPP appealed the leniency of the sentence and it was increased to 4 years, with JF remaining subject to the requirements of the Sex Offenders Act 2001.

18. In advance of the birth of the child, the respondent carried out a pre-birth assessment. It is the respondent's case that the applicant and JF failed to fully cooperate with it in respect to the pre-birth assessment. JF advised the respondent that he would not engage in any conversations regarding his conviction for sexual assault of a minor. According to the respondent, JF was found to be dishonest in his engagement with the pre-birth assessment and the applicant cooperated with his dishonesty. It is alleged that JF gave misleading information with respect to one of his children and refused to engage in full discussion with respect to his relationship with his other children. The outcome of the pre-birth assessment identified that JF posed a risk of sexual abuse to the child. It also identified concerns with respect to the applicant's capacity to protect the child from sexual abuse, given her lack of insight into the risk posed by JF. The applicant believed that JF was convicted in the wrong and refused to accept that he may pose a risk to the child.

19. On the day following the birth of the child, an application for an interim care order pursuant to s. 17 of the Child Care Act 1991 and an application for a care order pursuant to s. 18 of the Act was served on the applicant and on JF. On 26th April, 2021, the application for an interim care order was heard before the District Court in County Tipperary. The District Court refused the application for an interim care order. The court granted a supervision order pursuant to s. 18 (5) of the 1991 Act for a period of 12 months and listed the matter for review on 10th June, 2021.

20. That order was appealed by the respondent to the Circuit Court. The appeal came on for hearing before the Circuit Court on 21st July, 2021. Evidence was given by two social workers, who had had dealings with the case and evidence was given by a member of An Garda Síochána in relation to JF's prior criminal convictions. The court also heard evidence from the applicant and from a neighbour of JF. JF did not give evidence to the court. Counsel for JF informed the court that he had exhausted all options with respect to an appeal of his conviction for sexual assault of a minor and that he was pursuing a miscarriage of justice case. Counsel informed the court that while JF was agreeable to

engaging in a risk assessment with an identified assessor, he had received legal advice that he should not engage in the said risk assessment.

21. According to Ms. Costello, the judge noted that it was a sad and difficult case. She accepted that it would be sufficient that the applicant would engage in a community-based parenting capacity assessment. The judge went on to note that she had great difficulty with respect to JF. She expressed concern in respect of him. She noted that he had been requested to engage with the risk assessment in 2013 and had failed to do so. The judge noted that he had not been pursuing a miscarriage of justice case at that stage and that he could have engaged with the risk assessment then. The court stated that it was satisfied that if JF engaged in the risk assessment, it would be of benefit to him.

22. The judge stated that she saw no reason why he would not engage in such a risk assessment. The judge noted that she was satisfied that JF should not be left alone with the child unless he engaged in a risk assessment. She stated that the child could not remain in the care of both the applicant and JF, as a couple. She explained that the applicant could not seek to live with JF. The court noted that it did not have jurisdiction to direct that JF engage with the risk assessment, but indicated that the notice party could not have unsupervised access with the child unless he engaged in a risk assessment.

23. The judge directed a question to the representatives of the respondent who were in court, enquiring as to where the applicant and the child would live. The court rose to allow the respondent to identify alternative suitable accommodation for the applicant and the child. When the judge returned, counsel on behalf of the respondent indicated that the social work department had identified possible temporary accommodation at a woman's refuge. Counsel on behalf of the applicant informed the court that the applicant and the child could reside with a neighbour. The court ruled that the applicant and the child could reside with the neighbour.

24. The formal order which was made by the circuit court judge was in the following terms:

"The court doth order

1. *Make a supervision order for the child [BF] in respect of the first named respondent for a period of six months from this date.*

2. *That the second named respondent is not to have unsupervised access with the said child.*

3. *The court doth note that the first named respondent agreed to a community-based parental capacity assessment.*

4. *The court doth refuse the application for an interim care order.*

5. *Liberty to re-enter in the District Court."*

25. It is only fair to point out that in a detailed affidavit sworn on 25th November, 2021, the applicant took issue with the evidence that had been set out by Ms. Costello in her affidavit and with the matters pleaded in the statement of opposition. In summary, the applicant made the case that, while she had been the subject of sexual abuse in her family, which she described as being "dysfunctional", she stated that she had had the courage to confront the issues that arose from the sexual abuse and to report the matter to the relevant authorities. She stated that she had engaged in counselling and had become a stronger person as a result of receiving it. She stated that because of her past experience, she was acutely aware of the risks posed to young children. She stated that she would never allow anything of that nature to happen to her child.

26. The applicant stated that she had been in a long term, loving relationship with JF. She had been aware of all his previous convictions, including the conviction for sexual assault on a minor. She stated that she accepted his assertions, that he was not guilty of the offences charged, despite his conviction.. She stated that he was pursuing the matter to the European Court of Justice in an effort to rectify what he saw was a miscarriage of justice. The applicant stated that JF was a good father to their child. She stated that he had never at any time mistreated either her or the child in any way.

27. The applicant stated that she had cooperated at all times with the relevant authorities. She had only objected to doing the in-house assessment in Bessborough House, because that would have entailed her going away for 12 – 16 weeks immediately after her discharge from hospital. She stated that she had at all times been willing to engage in a parental assessment course on a non-residential basis, as soon that could be arranged by the relevant authorities. The applicant denied that she had ever misled the CFA in the course of the pre-birth assessment.

28. The applicant further pointed out that after the order had been made by the District Court, the child had resided with the applicant and JF. During that time they had received visits, both announced and unannounced, from social workers. There had never been any cause for concern seen by the social workers during those visits. No application had been made to the court for any variation of the supervision order, or for any form of care order.

29. The applicant stated that it was not true to say that she lacked any insight into the potential risks surrounding her child. She stated that on the contrary, due to her past experiences of child sexual abuse in her own family, she was acutely aware of the risks that could be posed to her daughter. She was determined to ensure that her daughter would remain safe at all times.

30. A number of the assertions that had been made by the applicant in her replying affidavit, were contested in a further replying affidavit sworn by Ms. Pauline Costello on 7th December, 2021. The court has had regard to the content of all the affidavits filed in this matter. It is not necessary to go further into the conflicts of evidence between the applicant and witnesses for the respondent, as those matters fall more properly for consideration by a court dealing with the substantive matter, rather than this court on a judicial review application.

Submissions of the parties.

31. The parties were agreed that the Circuit Court judge did not have jurisdiction to make the direction at paragraph 2 of the order. The only real issue between them, was that of the severability of that portion of the order, from the remainder of the order.

32. Counsel for the applicant, Mr. Coleman FitzGerald SC, submitted that the only issue that had been raised by the applicant in her statement of grounds was that the order of the Circuit Court was bad due to the inclusion therein of the direction given at paragraph 2 of the order. As the parties were effectively in agreement that the court lacked jurisdiction to make that order, that particular offending provision could be excised from the order, leaving the remainder of the order intact. It was submitted that that was the course which this court should take.

33. Counsel submitted that it was possible for a court to sever one offending part of an order, while leaving the remainder of the order intact. In this regard he referred by analogy to the case of *Maher v Attorney General* [1973] IR 140, where the Supreme Court had considered the issue of severability of a statutory provision that had been held to be contrary to the provisions of the Constitution. It was held that it was possible in certain circumstances for the court to declare one part of an Act to be inconsistent with the Constitution, while leaving the remainder of the statute intact.

34. Counsel submitted that in this case both the District Court and the Circuit Court on appeal, had refused to make care orders pursuant to sections 17 and 18 of the 1991 Act. On this basis, it was submitted that if this court were to strike down paragraph 2 of the order, but leave the remainder of the order in place, which refused to grant care orders in respect of the child, that would be consistent with the wishes and direction of both courts.

35. In response to that argument, counsel for the respondent, Ms. Sinead McDonagh BL, submitted as follows: firstly, that once part of an order had been impugned in judicial review proceedings, this meant that the entire of the order could be considered by the court. It was submitted that the court was not confined to considering only the part of the order challenged by the applicant in isolation from the remainder of the order.

36. Secondly, counsel submitted that there was, in effect, only one order made by the Circuit Court in this case. It was submitted that it was not possible to sever parts of a single order. Insofar as the applicant had referred to case law which allowed for the severability of part of a statute, when it had been found to be inconsistent with the provisions of the Constitution, counsel pointed out that Art. 15.4.2 of the Constitution provided that every law enacted by the Oireachtas which was in any respect repugnant to the Constitution or to any provision thereof, but to the extent only of such repugnancy, be invalid.

37. It was submitted that that provision of the Constitution and the cases thereon, were dealing with a specific power of the court to strike down part of a statute when it was found to be inconsistent with the Constitution. It was submitted that such case law was not applicable to the circumstances of a judicial review application involving an examination of the validity of an order of the court.

38. Thirdly, it was submitted that if the court were to strike down paragraph 2 in isolation, that would run contrary to the clear intention of the Circuit Court judge. It was clear that the Circuit Court judge had an intention that JF should not have unsupervised access to the child. It was submitted that she only refused to make a care order, because she had put in the direction that he could not have unsupervised access, as contained at paragraph 2 of the order.

39. It was submitted that if the court were to strike down paragraph 2 alone, but leave the rest of the order in place, it would in effect mean that the court would be permitting the very thing which the Circuit Court judge had directed should not happen, namely, that the applicant and JF could live together, thereby giving JF unsupervised access to the child.

40. Fourthly, it was submitted that having regard to the provisions of Art. 42A of the Constitution and sections 3 and 24 of the 1991 Act, it was clear that the welfare of the child was of paramount importance. It was submitted that having regard to the circumstances of this case, and in particular, to the fact that JF had a number of convictions, including a conviction for false imprisonment and sexual abuse of a 14 year old girl and the fact that he refused to attend for psychological assessment; the court, having regard to the welfare of the child, should not accede to the application made by the applicant and supported by JF, that only paragraph 2 of the order of the Circuit Court should be struck down.

41. It was submitted that the welfare of the child clearly warranted that the entire matter should be remitted to the Circuit Court for a rehearing.

42. Mr. McGrath, on behalf of JF, adopted the arguments of the applicant. Mr. Lyons BL on behalf of the guardian *ad litem*, supported the argument made by the respondent. He stated that while the guardian had not completed her assessment of what was in the best interests of the child, having regard to the background to the relationship between the parents and the refusal of JF to undergo assessment, the guardian's view was that the entire matter, including the question of the necessity of making a care order, should be remitted to the Circuit Court.

Conclusions.

43. Having considered the papers in this matter, and the submissions of counsel, including the authorities cited by them, the court has reached the following conclusions in this matter. Firstly, the court is satisfied that the Circuit Court judge did not have jurisdiction to make the direction that she did at paragraph 2 of the order dated 21st July, 2021.

44. The court is satisfied that both the applicant and the respondent are correct in their assertion that there is a want of jurisdiction to make such a direction in the circumstances of this case. While s. 18 (5) of the 1991 Act authorises the court to make a supervision order pursuant to s. 19 of the Act, where the court is satisfied that (a) it is not necessary or appropriate that a care order be made, and (b) it is desirable that the child be visited periodically in his home by or on behalf of the CFA; the court is satisfied that the Circuit Court judge did not come to the conclusion that it was "not necessary or appropriate" that

a care order be made. It is clear that she only declined to make a care order, because she had made the direction that was set out at paragraph 2 of the order.

45. The court is satisfied that the jurisdiction of a court hearing an application under the 1991 Act to make orders in relation to access to a child, which jurisdiction is set out in sections 37 (1); 37 (2); 13 (7) (a) and 17 (4), is only intended to apply where a care order has been put in place. The fact that such jurisdiction has been expressly stated to arise in such circumstances, indicates that such jurisdiction does not exist in other circumstances.

46. While s. 19 (4) provides that where a court has made a supervision order, it can give "*such directions as it sees fit as to the care of the child*", it goes on to state that those directions *"may require the parents of the child or a parent acting in loco parentis to cause him to attend for medical or psychiatric examination, treatment or assessment at a hospital, clinic or other place specified by the court."* The court is satisfied that the jurisdiction to give such directions under that subsection, does not include directions in relation to custody or access to the child. In this regard, the court notes the opinion of Dr. Geoffrey Shannon SC in his book *Child and Family Law*, 3rd edition, where he states at page 336: "*Section 19 (4) is obviously not an appropriate avenue for making an order that would upset prevailing custody arrangements*".

47. In reaching this conclusion the court has also had regard to the dicta of Hogan J. *in FH & Others v Staunton* [2013] IEHC 533. Accordingly, the court is satisfied that the order of the Circuit Court made on 21st July, 2021 is unlawful as the direction given at paragraph 2 therein, was made in excess of jurisdiction.

48. The court accepts the submission made by Ms. McDonagh BL that once a part of an order has been challenged in judicial review proceedings, the entirety of the order falls for consideration. It would be absurd to suggest that because an applicant only challenged one part of an order or decision, that the court hearing the judicial review application, could only have regard to that particular part of the order or decision.

49. The court is satisfied that on this application, it has jurisdiction to consider all aspects of the order, both in its consideration of the validity of the impugned portion of the order and in relation to the remedy or order that it can make in the case.

50. Turning to the severability point, the court is of the view that it is not appropriate to sever paragraph 2 of the order of the Circuit Court made on 21st July, 2021, and to leave the remainder of the order intact. The court has reached that view for the following reasons: firstly, the court is satisfied that the order of the Circuit Court is a unitary entity that cannot be split into separate parts. It is contained in one document. There is only one order of the court made on that date. While it has a number of parts, it is not appropriate to excise parts of the order, because to leave other parts of the order in place, would mean that the order could, and in this case would, end up with the order providing something materially different to what was intended by the court that made the order.

51. It is not the function of this court to remake an order that has been made by another court. On a judicial review application, this court can only, either allow the application made by the applicant and strike down the order, or refuse the application for judicial review and uphold the order. There is no halfway house. This is not a court of appeal.

52. Secondly, the court is satisfied that if it did excise paragraph 2 from the order, but leave the rest of the order in place, it would mean that the extant order would be the very opposite of what the Circuit Court judge had intended and had ordered.

53. The court is satisfied from the affidavits sworn by Ms. Costello and from reading the entire of the order made by the Circuit Court judge, that the Circuit Court judge only refused to make a care order because she had put in place a direction that JF must not have unsupervised access to the child.

54. If this court were to remove that direction, but leave the refusal to make a care order in place, it would in effect achieve the opposite of what the Circuit Court judge had intended and had ordered. It would be inappropriate for this court on a judicial review application, to make an order that would have such effect.

55. Finally, the court is satisfied that taking the welfare of the child as the paramount consideration, which the court is obliged to do, remitting the entire matter for reconsideration to the circuit court is the appropriate course to take.

56. In *A Foster Mother v The Child and Family Agency* [2018] IEHC 762, Simons J. considered that the obligation to consider the best interests of the child as a paramount consideration, extended to judicial review proceedings. He stated as follows at paras. 66-67:

> *"I fully recognise my obligation as a judge of the High Court to ensure that the Constitution is upheld, and to seek to grant an effective remedy in the event of a breach of a person's constitutional rights. However, this court must also recognise that the best interests of the child are the paramount consideration. In this regard, I take the view that the within judicial review proceedings are subject to Article 42A of the Constitution and/or section 19 of the Adoption Act 2010.*
>
> *…*
>
> *If I am incorrect in thinking that the within judicial review proceedings are of a type which attracts Article 42A and/or section 19 of the Adoption Act 2010, there can be no doubt that the court is entitled to take into account the best interests of the child in the exercise of its discretion in judicial review proceedings. It is well established that judicial review is a discretionary remedy, and that one of the factors which a court can consider in the exercise of its discretion is whether the proceedings serve any useful purpose. It must follow a fortiori that a court is entitled to consider whether the proceedings, far from serving any useful purpose, might actually have a detrimental effect on the interests of a child."*

57. For the reasons set out herein, the court will make an order of certiorari quashing the entire of the order of the Circuit Court made on 21st July, 2021. The court will remit the matter back to the Circuit Court for a rehearing of the appeal brought by the CFA against the order made by the District Court on 26th April, 2021.The court will hear the parties on what further orders, if any, it should make in the matter.

58. As the court's judgment herein effectively renders moot the reliefs sought by the CFA in their application bearing record number 2021/996 JR, it is not necessary for the court to give a detailed judgment on that application.

59. The court is satisfied that it is appropriate in the circumstances of this case to extend time for the bringing of the judicial review application by the CFA. The court accepts the submission that, once the CFA was satisfied that the order of the Circuit Court adequately catered for the interests of the child, it was not under a duty to challenge the legality of that order. It was only when the applicant chose to challenge the lawfulness of paragraph 2 of the order and consequent upon the refusal by the applicant to consent to the entire of the order being struck down, that the CFA, had no option but to institute their own judicial review proceedings, so that the entire of the order could be considered by the court.

60. While the court has determined in the judicial review application brought by the applicant, that the entire of the order under challenge could be considered by the court, it was nevertheless prudent and necessary for the respondent to institute its own judicial review proceedings to ensure that the court could consider the entirety of the order made in the Circuit Court on 21st July, 2021. The court is satisfied that there is good and sufficient reason in the circumstances of this case to extend the time for the bringing of the judicial review application by the CFA; in particular, because the court is satisfied that it is in the best interests of the child that all matters were brought before the court for consideration.

61. The court is further satisfied that the delay on the part of the CFA in bringing the application was due to circumstances that were beyond its control; namely, due to the fact that the applicant had delayed until almost the expiry of the limitation period to institute her own judicial review proceedings. Thereafter, the CFA acted promptly in bringing its own judicial review proceedings. Taking all of these matters into account, the court is satisfied that it is appropriate to make the order extending time for the bringing of these judicial review proceedings by the CFA.

62. Having regard to the fact that the court has struck down paragraph 2 of the order of the Circuit Court dated 21st July, 2021 as having been made without jurisdiction, and in the event that the court was wrong in holding in the proceedings brought by the applicant that the entire of the order could be set aside; the court in these proceedings, being the proceedings brought by the CFA, is satisfied that it is appropriate to make an order of certiorari quashing the entire of the order dated 21st July, 2021 for the reasons set out earlier in this judgment.

63. Accordingly, in the proceedings brought by the CFA, the court will grant the reliefs sought by the CFA as set out at paragraphs 1 – 7 of its *ex parte* docket dated 17th November, 2021.

64. The court will hear the parties in relation to any further order that should be made in those proceedings.