THE HIGH COURT

[2024] IEHC 174

RECORD NO. 2024 198 P

IN THE MATTER OF B, A MINOR, BORN IN 2009,

IN THE MATTER OF THE CHILD CARE ACT 1991 (AS AMENDED),

IN THE MATTER OF ARTICLES 40.3, 41, AND 42A OF THE CONSTITUTION,

IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003 (AS AMENDED)

BETWEEN:

B. (A MINOR)

SUING BY HIS MOTHER AND NEXT FRIEND Y.

PLAINTIFF

-AND-

THE CHILD AND FAMILY AGENCY

DEFENDANT

T, Q, THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM, THE MINISTER FOR HEALTH, THE MINISTER FOR CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH, IRELAND, AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Mr. Justice Jordan delivered on the 13th day of March 2024.

1. The Plaintiff is the mother of B. and she is acting as his next friend in these proceedings. He is 14 years of age and was born in 2009. He was previously in the care of the Child and Family Agency pursuant to an interim special care order made on 29

December 2021 and which was followed in January 2022 by a special care order (which order was extended twice). He was later the subject of a special care order which was made on 21 December 2022 and which was again extended twice. B. has a diagnosis of ADHD and other medical conditions associated with child trauma. Notwithstanding his period in special care, he has remained a very troubled and vulnerable boy. Another special care order was made by this Court on 14 December 2023.

2. A recent report of the guardian *ad litem*, Q, dated 27 February 2024 indicates in stark terms how the situation has worsened since 14 December 2023. Although the special care order sought by the Child and Family Agency was granted it has not been given effect and B. has not been admitted to special care. It seems clear that he is at very serious risk of death or serious injury and of committing serious crime. He is apparently suffering ongoing abuse at the hands of adults and continuing on a path of criminality and drug addiction in the drugs underworld which he now appears to inhabit. The Plaintiff contends that, despite the passage of time since 14 December 2023, the Child and Family Agency has not complied with the special care order - and it is asserted that this is a systemic breach of the High Court order to which there is no end in sight.

3. According to the Plaintiff, these proceedings are an attempt to bring measured and focussed proceedings in which a declaration is sought that the Child and Family Agency is in contempt of Court because of its failure to comply with the special care order dated 14 December 2023. It has been clearly stated, and is repeated in the written submissions of the Plaintiff, that no application is being made to arrest or detain any representative of the Child and Family Agency. The Plaintiff submits that a declaration that the Defendant is in contempt of Court is something worthwhile – and is of itself

something of utility because it would be a matter of the utmost seriousness for a public body to be held in contempt.

4. Although acknowledging the different constitutional order that exists in the United Kingdom, the Plaintiff does place reliance, as illustrative only, on a House of Lords authority *M. v Home Office* [1994] 1 A.C. 377.

5. The Plaintiff asserts that the decision and what is stated in it, although it concerns a different constitutional order, does appear consistent with the approach of the Supreme Court in showing respect to other branches of government. It is submitted that, for example, in *T.D. v Minister for Education* [2001] 4 I.R. 259, the Supreme Court made it clear that mandatory orders would not normally be required against the Executive because a declaratory order should be sufficient.

6. The Defendant in its written submissions dated 04 March 2024 does acknowledge that there has been a failure to comply with the Court order in respect of providing a special care bed to the Plaintiff. However, the Defendant disputes the Plaintiff's entitlement to seek the declaration sought in plenary proceedings.

7. By Motion returnable to 21 February 2024 the Defendant seeks an order that preliminary issues of law be tried in these proceedings pursuant to O.25 or in the alternative O.34, r.2 of the Rules of the Superior Courts. The Plaintiff is opposed to this.

8. This Court has conducted a hearing in relation to whether or not a preliminary issue ought to be tried as contended for by the Defendant. At the hearing of this application concerning the trial of a preliminary issue, the Defendant hones in on the issue of "whether the Plaintiff is entitled to pursue a claim of contempt of Court as against the Defendant herein having failed to comply with the Rules of the Superior Courts in that regard and in particular Orders 43, 44 and 84". In closing submissions on

11/3/24 Senior Counsel for the Defendant summarized the preliminary issue which the Defendant wishes to have tried as in essence whether you can go by Plenary Summons.

9. As appears from the title of the proceedings a number of notice parties are named in the proceedings. They are T. (the father of the child), Q. (the guardian *ad litem* appointed in the childcare proceedings), the Minister for Public Expenditure and Reform, the Minister for Health, the Minister for Children, Equality, Disability, Integration and Youth, Ireland and the Attorney General. In its Motion returnable to the 21 February 2024 the Defendant seeks an order setting aside the order granted on 18 January of 2024 insofar as the Court, *ex parte*, joined as notice parties, T. and Q. It is to be noted that the Defendant in the Motion did not seek an order setting aside the order which was granted on 18 January 2024 joining the State parties as notice parties.

10. The Court has considered the written and the oral submissions of the parties and the authorities referred to.

11. The Defendant challenges the jurisdictional basis concerning the relief which is claimed and challenges the entitlement of the Plaintiff to seek the relief which has been sought in plenary proceedings. The Defendant asserts that contempt is not a cause of action - and that the Plaintiff has brought proceedings which are misconceived.

12. Essentially, the Defendant asserts that "a contempt application" ought not to be the subject matter of plenary proceedings.

13. It is readily apparent from the pleadings, the affidavits, the written submissions and the oral submissions of the parties that these proceedings are somewhat novel in terms of the relief sought and they appear to be without precedent in this jurisdiction.

14. It is also apparent from the written and oral submissions of the parties that considerable reliance is placed by the parties on the synopsis of the law in this area contained in Delaney & McGrath (4th Edition 2018) at paras. 14-03 to 14-36.

15. Order 25, r.1, provides that, by the consent of the parties, or by order of the Court, on the application of either party, any point of law may be set down for hearing and disposed of at any time before the trial. Order 25, r.2 goes on to provide that if, in the opinion of the Court, the decision on a preliminary issue substantially disposes of the action, or any distinct cause of action, ground of defence, counterclaim or reply, the Court may dismiss the claim or make such order as may be just.

16. Order 34, r.2 further provides that if it appears to the Court that any question of law arises which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, it may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court may deem expedient and such further proceedings as the decision of such question of law may render unnecessary can be stayed.

17. According to Delaney & McGrath (para. 14-05) in *McDonald v Bord na gCon* [1964] I.R. 350, Lavery J. stated that these two rules "*cover the same ground*". In his view the only relevant difference between them is that O.34, r.2 expressly provides that it should appear to the judge to be convenient to have the particular issue decided before any evidence is given or any question of fact tried, whereas O.25, r.2 is more general in its terms. However, in *R.N. v Refugee Appeals Tribunal* [2007] IESC 25, Denham J. suggested that the procedure under O.25, r.2 might be more appropriate for the trial of preliminary issues than that under O.34, r.2.

18. Insofar as the application before the Court at present is concerned, this Court is deciding whether or not there should be a trial of a preliminary issue (and leaving aside the issue concerning the joinder of the notice parties for the moment).

19. Occasionally cases will arise where a strong case can be made for the trial of an issue as a preliminary issue. The obvious example is where there is a plea that a claim

is statute barred. In such a case a favourable decision for a Defendant on that issue will by definition mean an end to the case in so far as the claim is concerned. But even in such instances the factual circumstances in which the assertion that a claim is statute barred arises may be such as to militate against the just disposal of that issue as a preliminary issue. It might well be that a decision on the issue would require evidence in relation to a course of dealing between the parties and/or representations made in the course of communications between both sides concerning the cause of action.

20. In the instant case, a core issue of fact is not in dispute between the Plaintiff and the Defendant - *i.e.*, that the special care order has not been complied with (B. has not been received into special care because no bed is available). The Defendant thus contends that a trial of a preliminary issue presents no obstacle and is a sensible way to proceed in circumstances where there would be a significant saving in time and cost if the Defendant is successful insofar as the preliminary issue is concerned – since such a finding would dispose of these plenary proceedings. In this regard, the point can also be made that the trial of the preliminary issue would add to the costs of the proceedings and cause a delay in the event that the Defendant was unsuccessful insofar as the decision on the preliminary issue (if tried) is concerned.

21. The Court considers that a resolution of the "preliminary issue" identified by the Defendant will or may require an analysis of the factual situation within which the issue arises. McKechnie J. explained in *Campion v South Tipperary County Council* [2015] 1 I.R. 716 that, when deciding whether to order the trial of a preliminary issue *"the Court will always be obliged to have regard to the issues involved, to the contextual setting in which these issues are pleaded and to the overall evidential footprint in which they are, at that point in the case, then positioned."*

22. It seems also to the Court that oral evidence is likely to be required in relation to the wider factual situation.

23. It does appear that the Courts have traditionally been somewhat cautious in exercising the jurisdiction to order the trial of preliminary issues. However, the Supreme Court decision in *L.M. v Commissioner of An Garda Síochána* [2015] IESC 81 does point to the sense of using this procedure. It points out that the decision to direct a trial of a preliminary issue is one which requires careful consideration by trial judges. Modern litigation is extraordinarily expensive, stressful and time consuming. It is often the position that Plaintiffs are not a mark in the event of an order for costs being made against them. If, on analysis, a Court is satisfied that the trial of a preliminary issue can be conveniently held without doing an injustice to either party, then it should not shy away from directing the trial of a preliminary issue.

24. To state the obvious, what is fair, proper, and just in the circumstances must weigh heavily in the consideration which is required when deciding whether or not to direct the trial of a preliminary issue.

25. When matters are urgent and novel issues arise, as here, and when there is scope for protracted hearings and appeals, the wisdom of a unitary trial is brought sharply into focus. That focus will bring to the fore the old adage touched upon by Lord Evershed M.R. in *Windsor Refrigeration Co. Limited v Branch Nominees* [1961] 2 W.L.R. 196 to the effect that the longest way round is often the shortest way home.

26. The Court does not propose to repeat the principles outlined in Delaney & McGrath and in the submissions made – nor will it repeat the summary of the relevant principles by McKechnie J. in *Campion v South Tipperary County Council*. The Court has considered these principles.

27. It is the view of the Court that: -

(a) The issue which the Defendant has identified as a preliminary issue is inextricably linked with and immersed in the overall evidential footprint in which it is, at this point in the case, now positioned. It would not be just - nor would it be convenient - to try that issue without delving into the facts and without considering the evidence as a whole.

(b) The case and the relief sought by the Plaintiff raises novel issues. The Court is of the view that the overall justice of the case requires a full hearing. That full hearing will afford fair procedures for all parties.

(c) There is a real danger that directing a trial of the issue which the Defendant says is a preliminary issue as a preliminary issue would result in an attempt to try that issue in a vacuum without hearing and having regard to important and relevant evidence.

(d) Directing the trial of the issue which the Defendant has identified as the "preliminary issue" would likely run the risk of bringing the administration of justice into disrepute in circumstances where there would not be a unitary and full hearing, with evidence, in a case where the core issue is that a special care order made by the Court on the application of the Child and Family Agency has not been complied with by it. The Court has an important interest in the effect and effectiveness of orders made by it. Not allowing a full unitary hearing on an important issue where a complete picture is required and where oral evidence is likely to be important could suggest disinterest on the part of the court regarding the effect and effectiveness of its court orders.

28. There is another fundamental contraindicator in terms of directing the trial of the issue which the Defendant has identified as a preliminary issue. It is that these are proceedings in relation to an urgent childcare matter. There is no doubt that the life and

wellbeing of B. is at serious and probably escalating risk. The trial of a preliminary issue is not appropriate in circumstances where the entire proceedings ought to be disposed of expeditiously. In *H.I. v M.G.* [Supreme Court 19/2/1999] there was an application pursuant to the Child Abduction and Enforcement of Custody Orders Act 1991. This gave effect in Ireland to the convention on the civil aspects on international child abduction (The Hague Convention). In the case the parties agreed that the question as to whether the removal at the child at issue was "wrongful" within the meaning of Article 3 of the Convention should be determined as a preliminary issue. While this suggestion was acceded to by the trial judge, on appeal Keane J. expressed reservations about it. It should be said that he did so in circumstances where the alleged wrongful removal was effected on 3/2/97 and the proceedings were not heard by the High Court until 28/10/98 - and Article 1(a) of the Convention states that one of its two objects is "*To secure the prompt return of children wrongfully removed to or retained in any contracting state*". Having regard to the nature of the proceedings, he took the view that it was essential that they be dealt with as rapidly as was convenient with their just resolution and this underlined the desirability of the entire case being dealt with in the High Court at the same time. Given the likelihood of an appeal from the determination by the High Court of what he regarded as a novel and important issue which was not the subject of an authoritative decision, he expressed concern that the course adopted was capable of producing delay and indicated that it should not be adopted in the future. Although this was a Hague case it is the position that Special Care matters are by their nature urgent and require to be dealt with comprehensively and expeditiously. Similar reasoning must apply in this case and in Special care cases in general as did in *H.I. v M.G.* because the Court is usually dealing with extra-ordinary vulnerable children in high risk situations – as here.

29. This Court is satisfied that the justice of the case requires a full and expeditious hearing of the case in its entirety. It would not be convenient to direct the trial of a preliminary issue. In fact, the Court considers that it would be unwise, inconvenient and would give rise to unnecessary delay. Directing the trial of a preliminary issue in all of the circumstances of this case would not be in accordance with the requirements of fairness and justice to all parties.

30. Turning then to the Defendant's request to remove T. and Q. as notice parties. In this regard, and in order to put matters in context, as previously stated the Plaintiff is the mother of B. The first named notice party is his father. The parents of B. do not get along and are estranged from one another.

31. The father is the first named respondent in the childcare proceedings and the mother is the second named respondent. In these circumstances it is difficult to see the logic of the position of the Child and Family Agency insofar as it seeks to have the father removed as a notice party in these proceedings. He is named as a respondent in the childcare proceedings for good reason. He is the father of B. The Court has considered the submissions made on the law and the authorities referred to -including the decision of the Supreme Court in *BUPA Ireland Limited v the Health Insurance Authority* [2006] 1 I.R. 201 and the decision of the High Court in *N.L. v the Health Service Executive* [2014] IEHC 151.

32. The Court is entirely satisfied that the father of B. has a vital interest in the outcome of the case - or is vitally interested in the outcome of the proceedings. He is a person who will be very clearly affected by the result of the proceedings in circumstances where the proceedings concern attempts made to further the enforcement or effectiveness of the special care order which has as its objective the protection of the life and welfare of his son B. It is difficult, if not impossible, to see how the Child and

Family Agency can logically assert that the father of B. should be removed as a notice party in these proceedings.

33. Equally, the guardian *ad litem* appointed by the Court in the childcare proceedings is a necessary notice party in the proceedings. Her interest is not the same as the father's interest but it is a vital interest in the outcome. The guardian *ad litem* is vitally interested in the outcome of the proceedings as she represents the child in the childcare proceedings. She is also a conduit insofar as the voice of the child is concerned - if not the actual voice of the child. Again, there does not appear to be a logic to the position of the Child and Family Agency in seeking her removal as a Notice party. The guardian *ad litem* was appointed as such in the childcare proceedings in which the special care order was granted – and at the request of the Child and Family Agency.

34. How could it be that the father and the guardian *ad litem* – considered to be necessary parties in the childcare proceedings – can be considered to be unnecessary notice parties in these proceedings? This position of the Child and Family Agency makes no sense.

35. The Court refuses the reliefs sought by the Child and Family Agency in the notice of Motion. It declines to direct the trial of a preliminary issue for the reasons stated above. It declines to direct the removal of the father of B. and the guardian *ad litem* as notice parties. However, insofar as they are notice parties, and subject to any further or other orders that may be made in the case, the father and the guardian *ad litem* are bound by the Plaintiff's pleadings in the case and they will not be allowed to call evidence or to examine witnesses at the hearing. They will of course be entitled to give evidence in the case if called as witnesses and they will be afforded the opportunity to make submissions to the Court.