[2019] IEHC 917

THE HIGH COURT
SPECIAL CARE

[2019 No. 378 MCA]

BETWEEN

CHILD AND FAMILY AGENCY

APPLICANT

AND

M.O'L. AND BILL HAMILL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 27th day of December, 2019

1. On the 20th December, 2019, the Child and Family Agency moved on foot of an *ex parte* docket headed "*Originating Motion* Ex Parte" seeking an interim special care order under s. 23(l) of the Child Care Act 1991, as amended. As in the judicial review context, such *ex parte* dockets are not filed in the Central Office but are lodged with the registrar, a procedure that is envisaged specifically in this context by O. 65A r. 3(3) of the Rules of the Superior Courts, as inserted by the Rules of the Superior Courts (Special Care of Children) 2018.

2. On the same date the Agency also filed an affidavit of Sinéad Murphy, which was given a record number by the Central Office, being the record number listed above in these proceedings. On foot of these papers, the Agency obtained the requested *ex parte* Interim Special Care Order from Jordan J. under s. 23L of the 1991 Act.

3. Following Jordan J.'s order on 20th December, 2019, the Agency filed an *"originating notice of motion*" for an Interim Special Care Order on notice under s. 23L, also entitled in the existing proceedings. On 23rd December, 2019, Owens J. made that order.

4. Immediately after that order the Agency served on the first-named respondent an unfiled originating notice of motion for a "*full*" (that is, of 3 month duration) Special Care Order under s. 23H of the 1991 Act. That unfiled document had a blank record number.

5. That "*originating*" notice of motion was formally filed the following day 24th December, 2019, but in the same proceedings (so not in that sense "*originating*"). The motion as so filed was returnable for 27th December, 2019, and that is what the court is concerned with in the present application.

6. I have received helpful submissions from Mr. Cormac Hynes B.L. for the Agency and from Ms. Bernadette Kirby B.L. for the guardian *ad litem*, the second-named respondent. There was no appearance by the first-named respondent.

7. The aspect of the application that is of interest from a procedural point of view is whether it was correct to describe the motion at this stage of the proceedings as being an "*originating*" notice of motion.

8. On the one hand, O.65A r. 3(2) says that: "*An application for a Special Care Order or an application made on notice for an interim Special Care Order, shall be made by originating*

motion on notice". Rule 3(3) says that: "*An application for an Interim Special Care Order made ex parte shall be made by originating motion* ex parte …"

9. The question that arises here is whether, there having already been an earlier originating notice of motion for the interim special care order, there then needs to be a subsequent "*originating*" notice of motion in relation to the care of the same child. What I am told has been a practice in some cases, as illustrated by the way that this matter has proceeded in the present series of applications, is that what has been described as an "*originating notice of motion*" has been issued for the full care order notwithstanding that there has already been an "*originating notice of motion*" for the interim order on notice.

10. However, that is problematic for a number of reasons, of which I will identify the ones that seem most pertinent here:

    (i). if the second "*originating*" motion is issued in the same proceedings under the same record number then it is by definition not an "*originating*" notice of motion, and it is a misuse of language as well as being simply confusing to call it "*originating*";

    (ii). alternatively if the second "*originating*" notice of motion is given a different record number there is then an unhelpful and indeed one might dare say unnecessary proliferation of record numbers to no tangible benefit; that again lays the ground for confusion;

    (iii). the present motion assumes that the "*proceedings*" instituted by the earlier "*originating*" notice of motion have run their course and asks for an order striking out those proceedings; however this is incorrect if we are talking about the same proceedings, and unnecessarily duplicative and confusing if we are not;

    (iv). likewise the present motion seeks the appointment of the (existing) guardian *ad litem* for the purposes of the present proceedings – however he has already been appointed in these proceedings, so again if we are talking about the same proceedings this is illogical and duplicative, if different proceedings it is unnecessarily complex and confusing. At best an order continuing the appointment of the existing guardian could be made for the avoidance of doubt but even that may be stating the obvious.

11. The Rules Committee has anticipated this problem by the provisions of O. 65A r. 3(9) which says that: "*Save where otherwise provided by this Order or directed by the Court, all subsequent applications to the Court in relation to the care of the child who is the subject of the originating notice of motion shall be brought by motion in the proceedings commenced by the originating notice of motion, on notice to all other parties to the special care proceedings."* Thus, what would otherwise be an "*originating notice of motion"* under r. 3(2) becomes simply a "*motion in the proceedings*" under r. 3(9) if there has already been an originating motion. To put it even more simply, the system envisaged by Order 65A r. 3 is that there should only be one "originating" notice of

motion in relation to the care of any particular child. Once that is issued, any subsequent motions, for example for a full special care order, should be a "*motion in the proceedings"*, as envisaged by r. 3(9) and not an "*originating*" notice of motion.

12. So if (as here) there has already been an originating notice of motion for an interim special care order, a further motion for a full care order should be a notice of motion in the same proceedings, not an originating notice of motion (as the present motion was incorrectly headed). What is to happen if there is an *ex parte* application first before the filing of any notice of motion? That happened here also. Should the next motion issued (in the present case, one for an interim special care order on notice) be headed "*originating*" notice of motion or just "*notice of motion*"? Admittedly the wording of r. 3(9) does not expressly answer that, and when giving the *ex tempore* ruling in this case I couldn't quite see why. But having reflected on it further for the purposes of the present written version of the ruling I think that possibly some confusion in terminology has entered into the picture, because instead of calling the document lodged with the registrar an "*ex parte* docket", which is what it is, r. 3(3) calls it an "*originating motion* ex parte". But it isn't a motion in any meaningful sense and it isn't filed in the Central Office but simply lodged with the registrar. The analogy is with judicial review, where filing the papers (no notice of motion involved) gets you a record number, the *ex parte* docket is then lodged with the registrar and not filed, and if leave is granted, a notice of motion, which is the document that initiates the claim for substantive relief, is subsequently issued under the same record number. Maybe in some kind of theoretician's universe the *ex parte* docket whether in the judicial review or care order context should be given an IA (Intended Action) record number with a record number proper granted only later when the originating pleading is filed. Thankfully strict logic is tempered by practical convenience, and the same record number should be used throughout. On such a reading, a motion seeking an interim special care order on notice after the making of an interim order *ex parte* can properly be called an "*originating*" notice of motion, even though it uses the same record number as the *ex parte* application. This is because that notice of motion is filed in the Central Office whereas the *ex parte* docket (the so-called motion *ex parte*) is not. But a motion issued after a first "*originating*" motion should not be called originating. Perhaps it is worth recording my view that there may be merit in the rules committee considering using the term "*ex parte* docket" rather than "motion *ex parte"* to make this distinction clearer.

13. Leaving that semantic quibble aside, the intention of the rules is that whatever record number is assigned at the *ex parte* stage should continue to be used thereafter. The first formal filed Notice of Motion thereafter should be headed "*Originating Notice of Motion*", but any subsequent motion should simply be headed "N*otice of Motion*" rather than "O*riginating Notice of Motion*". That has, as I say, the advantages implicit in what I have said above, namely;

    (i). it avoids the illogicality and indeed incorrectness of describing something as originating when it is not originating and when it is issued under the same record number as existing proceedings;

(ii). it avoids the alternative approach of a multiplicity of record numbers;

(iii). it avoids the cumbersome and questionable practice of asking to strike out previous proceedings; and

(iv). it avoids having to ask to "*appoint*" a guardian *ad litem* who has already been appointed.

Order

14. The appropriate order is:

(i). an order to correct a minor typo in the wording of the perfected order of 23rd December, 2019 of Owens J., which referred to a notice of motion of 20th November, 2019, which should have been 20th December, 2019;

(ii). an order restricting the reporting of information tending to identify non-professional persons concerned in the proceedings;

(iii). an order deeming the service actually affected good (in the context where the service on the first-named respondent was of an unfiled motion with a blank record number as opposed to the formal filed version which was otherwise identical);

(iv). an order allowing the application by counsel for the applicant to amend the notice of motion by deleting the word "*originating*" from the notice of motion and dispensing with the need for formal service of an amended motion paper;

(v). an order granting the reliefs sought in the current notice of motion (as so amended) at paras. 1, 2 and 4, namely, the full care order under s. 23H of the 1991 Act and related directions and review dates;

(vi). the order that the appointment of the guardian *ad litem* should continue for the duration of the Special Care Order; and

(vii). an order reserving costs.