

Family Law Conference

21 June 2011

Address by Chairperson

1. Introduction

Guests, Ladies and Gentlemen

Firstly, I would like to say how delighted I am to see the extent of the attendance for today's conference. I feel it reflects both the interest in and the relevance of the topic. It is one that passes to a large extent beneath the radar of a great percentage of the public's attention. It is, though, a difficult, traumatic and challenging area for all those involved in such proceedings: the parties, the children, the judiciary, court officials, HSE officials and lawyers.

My objective today is to outline the Legal Aid Board's responsibilities and experience in the area of childcare proceedings. Colm Roberts who is one of our most experienced and committed solicitors in the child care area will be speaking later in the day and offering his perspective as a practitioner in such cases.

2. Legislative and court framework

Part IV of the Child Care Act 1991 imposes a duty on the HSE to make application for a care order or a supervision order in respect of a child who requires care or protection which he or she is unlikely to receive in the absence of such an order being made. A care order results in a child being placed in the care of the HSE. A supervision order authorises the HSE to have the child visited periodically for the purpose of satisfying itself in relation to the welfare of the child and giving any necessary advice to the parent(s) as to the care of the child. Emergency care orders can be made where there is an immediate and serious risk to the health or welfare of a child while interim care orders can be made if an application for a full care order has been made or is about to be made and a full hearing has yet to take place.

The District Court is the Court with jurisdiction to make the aforementioned Orders (and the Circuit Court on appeal from the District Court). Thus, all applications are heard, in the first instance in any event, in the District Court. There are differing practices in different District Court areas in terms of how these cases are listed and heard. In the Dublin Metropolitan District there are at the moment two Family Courts that focus exclusively on child care proceedings.

3. Legal Aid

The vast majority of respondents (parents) who have been served with applications on foot of Part IV of the Child Care Act 1991 are financially eligible for legal aid as per the eligibility provisions set out in the Civil Legal Aid Act 1995 and the Civil Legal Aid Regulations 1996 – 2006 i.e, they have a disposable income of less than €18,000 and minimal assets. This is not entirely surprising as persons served with proceedings generally have serious problems

such as drug or alcohol dependency, social isolation and mental health concerns which contribute to the additional problem of poverty. They are advised by the HSE and / or the court of their entitlement to seek legal aid for the purpose of the proceedings.

The process for getting legal aid is that a person applies to a law centre for legal services and they are financially assessed. While the Board unfortunately has waiting lists for many of its services, child care proceedings are prioritised and law centres deal with these cases as a matter of urgency. Once the person has been assessed as financially eligible, paid a small contribution (almost always €10) and been seen by a solicitor a legal aid certificate is applied for and the person is asked to pay the financial contribution assessed for their legal aid. The contribution is generally assessed at the minimum, €50, meaning a further payment is required. This is a one off payment regardless of the duration of the proceedings. It can be waived on hardship grounds if necessary.

4. Prioritisation

The Board endeavours to ensure that persons who apply for legal aid for the purpose of child care proceedings have legal representation on the next date that the case is before the court. This has not always proved possible and to alleviate concerns expressed in this regard in the Dublin area, the Board has, since December 2010, assigned solicitor staff to an office in Dolphin House (where the District Family Court sits) specifically for the purpose of ensuring that persons in need of urgent legal advice or representation for child care matters get that advice and representation as quickly as possible.

The Board recognises the importance of trying to ensure that respondents in child care proceedings get legal advice and representation at the earliest opportunity. It is aware that child care proceedings are exceptionally traumatic events for the parents and children and that the outcome of early stages of the legal process can have a determinative impact on the ultimate outcome of the proceedings. It is continually reviewing its processes and procedures to try and ensure that there are no delays in providing service in these cases. This is against a backdrop of a very significant increase in demand for its services generally. While in 2007 approximately 10,000 persons sought legal services from the Board (other than in the area of asylum), this figure rose to over 17,000 in 2010. The figures for the first five months of 2011 indicate that the increase in demand for services continues unabated. The increase in demand, combined with the more constrained environment resource wise in which the Board, like other public bodies, operates, makes it a challenge to ensure that a high level of prioritisation can be maintained.

5. Demand for services and other statistical information

In terms of the demand for child care services from the Board the figure has fluctuated to some extent. In 2008 there were 420 new applications for legal services for child care proceedings. This figure increased to 567 in 2009 but fell back to 517 in 2010. The Courts Service's Annual Report for 2009 (the most recently published) states that in 2009 there were 941 care orders made and 627 supervision orders while in 2008 there were 1,044 care orders made and 804 supervision orders. It is difficult to relate these figures to the Board's figures in terms of determining whether the Board is providing representation in all cases in which it has a potential involvement. This is because the number

of orders made relates to the number of children the subject of proceedings while the Board's figures refer to the number of persons to whom it provided legal services. In many, if not most, cases the Board provides separate representation to each parent where both parents are involved in the proceedings. This is because the parents may have different interests in the proceedings. The behaviour of one parent (and the failure of the other parent to take steps to address those concerns) may give rise to the HSE's concerns in the first place.

The Courts Service report does not give information in relation to the number of applications that were refused. It has, though, kindly provided some information over and above what is in its Annual Report. Perhaps one of the most striking pieces of information is that in the Dublin area in 2009, 109 applications for Emergency Care Orders were made, all of which were granted. In 2010, 207 such applications were made (almost doubled from 2009) but only 193 of them were granted.

6. Preparation for the full hearing

Once a person is legally aided for the purpose of child care proceedings they get legal representation for the duration of those proceedings i.e. up to the time that a final determination is made in relation to the application for a care order and/or a supervision order. The Board solicitor receives material from the HSE's lawyer, which material sets out the grounds for the HSE's application. The solicitor considers that material in detail and discusses it with the client. The solicitor also looks for background information and any other information that can assist in building a better picture of the family's circumstances. The solicitor considers whether further reports should be

obtained on behalf of the client and whether any assessments of the client should be sought (with the client's consent) e.g. mental health evaluations, drug free status etc.

One aspect of the case that the solicitor has to consider carefully with the client is the merit or appropriateness of seeking to have a Guardian ad Litem appointed to represent the interests of the child or children the subject of the proceedings. If it is considered appropriate, contact is made with the HSE with a view to trying to agree an appointment. Application is then made to the court for the appointment (with or without the agreement of the HSE). Freda McKittrick from Barnardo's will be discussing the role of the GAL later today.

It is likely that the full hearing of an application will not occur for a number of months after the application has been made and that, in the meantime, applications will be made on or about every 28 days for the renewal of any interim care orders that are in existence. Consideration may have to be given to the merits of contesting these applications on an ongoing basis if a clear judicial determination has been made that the children will be remaining in the HSE's care pending the full hearing of the case. Issues of the parents' ongoing contact with the children may also need to be addressed on foot of the interim applications.

7. Conduct of the full hearing

In many cases there is, ultimately, an agreement in relation to the outcome of the application. This may involve the parent(s) giving their consent to orders on certain conditions. Other cases are contested and go into evidence. It is the solicitor's role to test the evidence that is given on behalf of the HSE and also to put any issues that will be raised by or on behalf of the parent(s) to the

relevant witnesses on behalf of the HSE. The solicitor will then lead the parent(s) through their evidence and will likewise lead any other evidence that may be given on behalf of the parent(s). The solicitor may also question the Guardian ad Litem in the event that one has been appointed and has reported to the court. A practice that has developed on occasion is for the court to appoint legal advisers to represent the Guardian ad Litem, who is not a party to the proceedings. The legal basis of the appointment is not entirely clear nor is it clear what role the legal adviser should play. For example, it is not clear what their entitlement is to cross examine any witnesses who may be giving evidence on behalf of the HSE. If a child is joined as a party to the proceedings (on foot of which he or she can be afforded legal representation) the appointment of any Guardian ad Litem ceases to have effect. At the conclusion of the evidence the solicitor may make a submission to the court based on the evidence that has been adduced.

8. Clients of limited capacity

As mentioned above, a significant number of persons seeking legal aid to defend child care proceedings will have issues in relation to their capacity, including their capacity to understand and deal with the court proceedings. They may for instance have a mild intellectual disability. The Board has in place arrangements to fund the engaging of appropriate persons (e.g. those with qualifications / experience in social work, psychology, and psychiatry) to provide assistance and support to such clients i.e. where their capacity may be impaired. The purpose of such an appointment is to assist in ensuring the provision of an effective legal aid service to the client. The solicitor must be of the opinion that the capacity is so impaired that it is essential that the solicitor

have professional assistance to communicate effectively with the client in relation to the subject matter of the proceedings. Regard is had to the particular circumstances of the client and the case and also to the availability of a suitably qualified/experienced person to assist.

The role of the person appointed is to provide assistance and support to the client. The person does not act as a Guardian ad Litem and does not give instructions to the solicitor. If there is any disagreement between the person so appointed and the client, the solicitor is obliged to act in accordance with the client's instructions. The person's specific duties will be:

- to explain to the client the nature of the proceedings and the potential outcomes;
- to relay information from the solicitor to the client and from the client to the solicitor;
- to attend the court with the client when it is considered essential by the solicitor; and
- to discuss with the client the options that might be available and to assist the client in giving instructions to the solicitor in relation to those options.

To enable the person appointed to perform their functions effectively s/he will need to sit in on at least some consultations with the client.

9. A challenge

Child Care cases are heard in the District Court and rarely stray outside this jurisdiction as few are appealed. This is in spite of the far greater focus that is now being put on the rights of the child than heretofore (*"Where once the*

relationship between husband and wife prevailed as the focus of most attention, the centre of gravity in family law globally has moved to the child.” - ‘Child Law’ - Geoffrey Shannon). It also contrasts with the level of attention that the High Court has, in the past, given to a category of troubled children who came to its attention as being in need of secure placements although not having committed any offence.

Due to the limited number of lawyers providing representation, the fact that outside Dublin cases come before the same Judge, and that the proceedings are heard *in camera*, there may be relatively little cross fertilisation of ideas and experiences. The same people are involved in the decision making process time and time again, often without significant or sufficient outside guidance. This is not to, in any way, suggest that the persons engaged in the process at the moment do not perform their functions effectively, but in reality there is relatively little public scrutiny of the process and rationale for taking children into care.

It is noted that section 29 of the Child Care Act 1991 (as amended) effectively enables child care proceedings to be reported on in accordance with rules of court, provided that the report or decision does not contain any information which would enable the parties to the proceedings or any child to which the proceedings relate to be identified and it allows access to the court to certain persons for the purpose of preparing such reports. While it is not immediately apparent that rules of court have been introduced to enable reporting it is noted that the *Family Law Matters* journals published by the Courts Service between 2007 and 2009 and edited initially by Dr. Carol Coulter, included reports on a number of child care cases. There is nevertheless a strong argument that not enough has been done to promote transparency and to

establish a body of jurisprudence that can give guidance and inform decision making in relation to these cases.

A further challenge we face is that there is an imbalance between the resources of the LAB and those of the HSE in relation to spending on legal services. In 2009 €12.9m was spent by the HSE on legal fees in child care cases, including fees paid to senior counsel appearing in these cases in the District Court. This is in stark contrast to the funds available to legally aid the parents against whom these cases are taken by the HSE, most of whom are represented by the Board. The context for the Board is that our total funding in 2009 from our State Grant in Aid was approximately €26m, now however considerably reduced like all other state bodies. Of the total cases dealt with in that year by the Legal Aid Board however, a very small number would have concerned public child care matters, but such cases demand a disproportionate amount of our solicitors' time and attention and this has a significant impact on the waiting times for other persons awaiting legal aid or advice. Moreover, I think that State funded agencies must have regard to the impact of their operational decisions on other similarly funded bodies, particularly in this era of accountability and transparency.

I hope that this has given you an overview of the Legal Aid Board's involvement in the area of public child care law. I know that the conference agenda and the speakers who have kindly agreed to speak here today will stimulate discussion and greatly enlighten us and I trust that we will all leave here with a greater knowledge of this area of law.

Thank you.