In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 321 and 2017: No 230

BETWEEN:-

(1) THE HUMAN RIGHTS COMMISSION
(2) K F
(3) O (a minor) (by her next friend Tiffanne Thomas)
(4) R W

Plaintiffs

-and-

(1) THE ATTORNEY GENERAL AND MINISTER OF LEGAL AFFAIRS
(2) THE MINISTER OF SOCIAL DEVELOPMENT AND SPORTS
(3) THE DIRECTOR OF THE DEPARTMENT OF CHILD AND FAMILY SERVICES

Defendants

AND

BETWEEN:-

(1) CHILDWATCH
(2) CITIZENS UPROOTING RACISM IN BERMUDA
(3) COALITION FOR THE PROTECTION OF CHILDREN
(4) FAMILY CENTRE
(5) SCARS
(6) WOMEN'S RESOURCE CENTRE

Plaintiffs

-and-

(1) THE ATTORNEY GENERAL AND MINISTER OF LEGAL AFFAIRS
(2) THE MINISTER OF SOCIAL DEVELOPMENT AND SPORTS
(3) THE DIRECTOR OF THE DEPARTMENT OF CHILD AND FAMILY SERVICES

Defendants

JUDGMENT
(In Court)

Children Act 1998 section 35 – specified proceedings – duty of Family Court regarding appointment of litigation guardian and counsel to represent child – whether Minister and/or Director of Child and Family Services under duty to fund any such appointments

Date of hearing: 20th June 2018
Date of judgment: 28th June 2018

Mr Saul Dismont, Marshall Diel & Myers, for the Plaintiffs
Ms Wendy K Greenidge, Attorney General's Chambers, for the Defendants

Introduction

1. This is a ruling on the application of the Plaintiffs in both actions for declaratory relief in relation to section 35 of the Children Act 1998 ("the 1998 Act"). They seek declarations as to the obligations of the Family Court and others regarding the appointment of a litigation guardian and counsel to represent the child during "*specified proceedings*" as defined in that Act. They also seek a declaration that the Minister and/or the Director of Child and Family Services ("the Director") have a duty to fund any such appointments.

Statutory scheme

2. Section 5 of the 1998 Act provides that the purposes of the Act are to protect children from harm, to promote the integrity of the family and to ensure the welfare of children. Section 6 of the 1998 Act provides that in the administration and interpretation of the Act the welfare of the child shall be the paramount consideration. These sections provide a legislative steer for the interpretation of section 35.

3. Section 35 of the 1998 Act provides:

"***Representation of child and of his interests in certain proceedings***

(1) For the purpose of any specified proceedings, the court shall appoint a litigation guardian for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests.

(2) The litigation guardian shall be under a duty to safeguard the interests of the child.

(3) Where—

(a) the child concerned is not represented by counsel; and

(b) any of the conditions mentioned in subsection (4) is satisfied,

the court may appoint counsel to represent him.

(4) The conditions are that—

(a) no litigation guardian has been appointed for the child;

(b) the child has sufficient understanding to instruct counsel and wishes to do so;

(c) it appears to the court that it would be in the child's best interests for him to be represented by counsel.

(5) Counsel appointed under or by virtue of this section shall be appointed, and shall represent the child, in accordance with rules of court.

(6) In this section 'specified proceedings' means any proceedings—

(a) on an application for a care order or supervision order;

(b) in which the court has given a direction under section 30(1) and has made, or is considering whether to make, an interim care order;

(c) on an application for the discharge of a care order or the variation or discharge of a supervision order;

(d) on an application under section 33(4);

(e) in which the court is considering whether to make a custody order with respect to a child who is the subject of a care order;

(f) with respect to contact between a child who is the subject of a care order and any other person;

(ff) under Part IVA (custody jurisdiction and access);

(g) under Part V (protection of children);

(h) on an appeal against—

(i) the making of, or refusal to make, a care order, supervision order or any order under section 28;

(ii) the making of, or refusal to make, a custody order with respect to a child who is the subject of a care order;

(iii) the variation or discharge, or refusal of an application to vary or discharge, an order of a kind mentioned in sub-paragraph (i) or (ii);

(iv) the refusal of an application under section 33(4); or

(v) the making of, or refusal to make, an order under Part V; or

(i) which are specified for the time being, for the purposes of this section, by rules of court.

(7) The Minister may establish panels of persons from whom litigation guardians appointed under this section must be selected."

4. The Plaintiffs submit that in "*specified proceedings*", which are always public law proceedings, the Court should generally appoint: (i) a litigation guardian, who is usually a social worker, to safeguard the child's best interests; and (ii) counsel to represent the child. This is known as the tandem model. They say that this is what happens in England and Wales under section 41 of the Children Act 1989 ("the UK Act"), upon which section 35 is modelled. However the Plaintiffs submit that in Bermuda this rarely happens, and that the legislative scheme – which was intended to protect the child's best interests – is thereby frustrated. This was not disputed by the Defendants.

5. As I noted in a previous interlocutory ruling given in 2017 No 321:

"*10. Sara Clifford, in an affidavit sworn on behalf of the First Plaintiff as Acting Executive Officer in support of the claim for declaratory relief, states that it was not until*

2014 that a litigation guardian was appointed under section 35, and that since then a litigation guardian or lawyer has only been appointed in some 14 cases. She adds that this is in the context of some 20 to 40 cases to which section 35 would apply coming before the Family Court each week.

11. Ms Clifford states that the absence of the section 35 safeguards is of particular concern as the Family Court has extensive powers to remove children from their families and place them in the care of the Third Defendant. She further states this may then cause a child to be placed in foster care, police custody, a secure treatment facility or inside a prison.

12. Ms Clifford draws the Court's attention to what she describes as a 'disturbing practice' in the Family Court whereby children are sent to secure facilities in the United States, where some have been forced to take medication and have been denied contact with family and friends. She states that none of the children visited with these very serious consequences had the benefit of a litigation guardian or counsel.

13. Section 36 of the 1998 Act provides that a litigation guardian has the right to examine and make copies of records held by the Third Defendant with respect to the child concerned. Ms Clifford suggests that this is a valuable safeguard."

6. I cite these passages to show that the decisions made by the Family Court in specified proceedings may have very serious consequences for the child concerned. I make no findings as to the alleged practice of the Family Court of sending children to secure facilities in the United States and express no views about it. The present proceedings would not have been an appropriate vehicle for a fact finding process in relation to those allegations and it is not necessary to resolve them in order to determine the matters in issue.

Duties of the Family Court

7. There are two main aspects to this problem. As I noted in the previous ruling mentioned above:

"*Tiffanne Thomas, who acted as litigation guardian for the Second through Fourth Plaintiffs in the Family Court, has sworn an affidavit in support of the claim for declaratory relief expressing concern at what she sees as the Second and Third*

Defendants' lack of understanding of how section 35 is supposed to work and frustration at their refusal to fund litigation guardians or counsel appointed under section 35."

8. The first aspect is that the Family Court has reportedly been unclear as to its duties under section 35. By way of context, Mr Dismont, who appeared for the Plaintiffs, cited a passage at page 742 of a legal textbook titled Children – The Modern Law[1] illustrating how, by analogy with the UK Act, the Legislature may reasonably be taken to have intended section 35 to operate:

> "*Section 41(6) of the Children Act 1989 and the accompanying rules of court specify a long list of proceedings in which the court must appoint a children's guardian for the child 'unless satisfied that it is not necessary to do so in order to safeguard his interests'. It was envisaged by the Lord Chancellor, during the passage of the Children Bill, that an appointment would need to be made in the vast majority of cases falling within the specified proceedings. The wording of the legislation is a reformulation of the former statutory language and was designed to remove the wide discretion which the courts previously had in deciding whether to appoint a children's guardian. The small minority of cases in which a children's guardian is not appointed are likely to be mainly those in which the child wishes to instruct his own solicitor and is found to be competent to do so. In 'specified proceedings' the child is automatically entitled to be a party and may instruct a solicitor where he has sufficient understanding and wishes to do so.*"

9. I agree that section 35 of the 1998 Act was intended to operate like section 41(6) of the UK Act. This conclusion is bolstered by section 6 of the 1998 Act, which provides that in the administration and interpretation of that Act, "*the welfare of the child shall be the paramount consideration*" ("the welfare principle"), and section 8 of the Interpretation Act 1951, which provides:

> "*'shall', in relation to any statutory provision whereby a duty is imposed, shall be construed as imperative*".

10. I therefore take this opportunity to clarify the Family Court's duty under section 35 by making the following declarations:

[1] Fourth Edition, Andrew Bainham and Stephen Gilmore, Family Law.

(1) For the purpose of any specified proceedings, the court shall:

(i) Consider whether to appoint a litigation guardian for the child concerned;

(ii) Appoint a litigation guardian for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests;

(iii) Give reasons for its decision.

(2) Where, in the case of any specified proceedings, the child concerned is not represented by counsel, the court shall:

(i) Consider whether any of the conditions mentioned in section 35(4) is satisfied;

(ii) If it finds that any of the said conditions is satisfied, consider whether to appoint counsel to represent the child concerned;

(iii) Give reasons for its decision.

(3) An order appointing a litigation guardian or counsel to represent the child concerned is made subject to sufficient funds being available to fund such appointment.

11. The availability of sufficient funding is the rub and I shall address it shortly.

12. The Plaintiffs also sought declaratory relief that the Minister and the Director each have a duty to enforce section 35, which I took to mean ensuring that the Family Court is aware of its duties under that section. Section 8 of the 1998 Act provides that the Minister has responsibility "*for the general supervision of the administration*" of the Act "*and may give such directions as he considers necessary in the public interest*"; and section 9 provides that the Director shall "*arrange for the delivery of child care services for the benefit of the child*". Neither section, in my judgment, imposes a duty to enforce section 35 in this sense.

13. The Plaintiffs also sought declarations in relation to the duties of counsel and the litigation guardian to ensure that section 35 was enforced. As the 1998 Act does not impose any specific duties on them in this regard, I do not propose to make any declarations on the subject. Counsel always has a duty to advise the court of any relevant statutory provisions, including section 35, but that duty is so well established that it does not require clarification by a declaration from this Court.

14. The duty to give reasons does not derive from the 1998 Act but from the general duty of judicial decision makers, including magistrates, to give reasons for their decisions where fairness so requires. This flows from the right to a fair hearing under section 6(8) of the Constitution. The duty was established by a line of cases in the European Court of Human Rights concerning the analogous right to a fair hearing under article 6 of the European Convention on Human Rights. See English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409 EWCA *per* Lord Phillips MR, giving the judgment of the Court, at paras 7 and 13.

Funding

15. This was the real point of controversy. In the UK there are statutory mechanisms independent of the UK Act which provide for the funding of litigation guardians and counsel appointed under that Act. In Bermuda there are no such statutory mechanisms. As the Director stated in his Second Affidavit:

> "*The Director is also bo[u]nd by Financial Instructions as an accounting officer and is not permitted to approve the payment of any funding if it is outside of the rules and regulations as outlined in Financial Instructions. Prior to the approval of any expenditure, the accounting officer must obtain three quotes from any service provider. That provider must be vetted by all Ministries responsible for collecting funds for the Government to ensure the vendor does not have outstanding debt with the Government. The vendor must then be entered into the Government accounting system (E1) with all of the proper documentation related to that vendor. Every accounting officer must have a*

contractual agreement in place that is approved by the Attorney General before any services can be provided.

. . . . .

The Act is silent on any kind of compensation related to section 35, and Parliament has not at any time approved funding in the budget of the Department of Child and Family Services related to this section. It would therefore be a violation of Financial Instructions for me to distribute any funding for payment of services related to section 35."

16. Mr Dismont advanced three main arguments to overcome these difficulties. In making them, he relied by way of statutory context upon the welfare principle in section 6 of the 1998 Act and the provisions in sections 8 and 9 mentioned above.

17. First, Mr Dismont submitted that, having willed the end, the Legislature should be taken to have willed the means. Thus the 1998 Act impliedly authorised the funding of litigation guardian and counsel appointments. Otherwise the legislative intent that they should be appointed would be defeated. This counter-intuitive result would offend against the statutory presumptions that a statute should not be construed so as to produce an absurd result and that an enactment should be given a purposive interpretation. See Bennion on Statutory Interpretation, Seventh Edition, sections 12.1 and 11.1.

18. Second, if there is a lacuna in section 35, then the Court should exercise its inherent jurisdiction to fill it. In so doing the Court would be affecting the procedural and not the substantive rights of the parties. Mr Dismont suggested a metaphor: the Legislature has built a house: the Court through the exercise of its inherent jurisdiction was merely being asked to provide the key to unlock the door to the house.

19. Third, fair hearing standards had evolved in Bermuda, as in England and Wales, to the point where representation by a litigation guardian and counsel was an essential ingredient to the child's right to a fair hearing under section 6(8) of the Constitution. As Sir James Munby, President of the Family

Division, stated extra-judicially in the fifteenth View from the President's Chambers, 19th September 2016:

"*Common law principles of fairness and justice demand, as do Articles 6 and 8 of the Convention, a process in which both parents and the child can fully participate with the assistance of representation by skilled and experienced lawyers.*

The tandem model is fundamental to a fair and just care system. Only the tandem model can ensure that the child's interests, wishes and feelings are correctly identified and properly represented."

20. Recognising that the child has a constitutional right to representation would be consistent with Bermuda's international obligations, as expressed in the United Nations Convention on the Rights of the Child ("the UNCRC"), which the United Kingdom extended to Bermuda on 7th September 1994.[2] Article 12 of the UNCRC provides:

"*1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

21. Mr Dismont submitted that if the child has a constitutional right to representation, then the Court should construe section 35 so as to comply with the Constitution and give effect to that right.

22. These arguments were made with passion and eloquence. But Ms Greenidge has persuaded me that they are all fundamentally flawed.

23. The courts will not construe a statute as authorising public expenditure merely by implication. As Lord Bridge stated when giving the leading judgment in Holden & Co v CPS (No 2), a case which concerned whether in

[2] See http://treaties.fco.gov.uk/treaties/treatyrecord.htm?tid=3398.

the absence of express statutory authority the court in criminal proceedings had power to order the payment of solicitors' costs from central funds:

"*But still more important, in the present context, is the special constitutional convention which jealously safeguards the exclusive control exercised by Parliament over both the levying and the expenditure of the public revenue. It is trite law that nothing less than clear, express and unambiguous language is effective to levy a tax. Scarcely less stringent is the requirement of clear statutory authority for public expenditure. As it was put by Viscount Haldane in Auckland Harbour Board v. The King [1924] A.C. 318 , 326:*

> *'it has been a principle of the British Constitution now for more than two centuries . . . that no money can be taken out of the consolidated Fund into which the revenues of the state have been paid, excepting under a distinct authorisation from Parliament itself.*'"

24. This principle is of general application and therefore applies to family cases. Eg see In re K (Children) [2015] 1 WLR 3801 EWCA *per* Lord Dyson MR at para 28 and HB v A Local Authority [2017] 1 WLR 4289 Fam D *per* MacDonald J at para 85.

25. In HB v A Local Authority, MacDonald J held that the High Court had no power under its inherent jurisdiction to make a costs funding order against a local authority requiring it to fund legal advice and representation for a parent in wardship proceedings brought by the local authority. He stated at para 112:

"*Within this context, I am satisfied that the limits that are properly imposed on the exercise of the inherent jurisdiction for the sake of clarity and consistency, and of avoiding conflict between child welfare and other public advantages in this case are those that must be applied when considering the nature and extent of the court's jurisdiction to order a public authority to incur expenditure. As Lord Sumption JSC pointed out in* Prest v Prest [2013] 2 AC 415 *, para 37, courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different.*"

26. I agree. It would be wrong in principle for this Court to use its inherent jurisdiction to authorise statutory expenditure where the Legislature has not expressly done so. Further, as Mr Dismont recognised, the Court's inherent

jurisdiction relates to procedural not substantive matters, which must be governed by the general law and rules. See Wicks v Wicks [1999] Fam 65 EWCA *per* Ward LJ at 76H – 77F and Peter Gibson LJ at 88H. Requiring the Defendants to fund representation under section 35 would interfere with the Government's substantive right to allocate public monies as it sees fit and the substantive rights of the Minister and the Director to do likewise within their budgetary constraints.

27. There is a further objection to the use of the inherent jurisdiction in relation to section 35. If the court appointing a litigation guardian or counsel had inherent jurisdiction to require the appointment to be publicly funded, then it would be for that court to so direct. The appointing court is the Family Court. Both the Family Court, and the Magistrates' Court of which it forms a part, are inferior courts (a technical, not a pejorative, term). They do not have an inherent jurisdiction, save possibly (indeed probably) to regulate their own procedures. See Bennion on Statutory Interpretation, Fifth Edition, at page 111. The possibility of the Family Court exercising an inherent jurisdiction in relation to section 35 therefore does not arise.

28. Turning to the Constitution, I agree that fair hearing principles have evolved to the point where the child has a constitutional right to participate meaningfully in specified proceedings. The tandem model satisfies this constitutional requirement. However, where, pursuant to the right to a fair hearing, the Constitution confers a right to representation it does not also confer a right to have that representation publicly funded.

29. This is apparent from section 6(2)(d). This provides that every person who is charged with a criminal offence:

> "*shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice or, where so provided by any law, by a legal representative at the public expense*".

30. The right of a person who is charged with a criminal offence to have legal representation is therefore guaranteed by the Constitution. It is so important

that it is not merely implied as part of a more general right to a fair hearing, as is the case under section 6(8) with the right to legal representation regarding the determination of a civil right or obligation, but is expressly enumerated. Even so, section 6(2)(d) provides that a person charged with a criminal offence is only entitled to legal representation at the public expense "*where so provided by any law*". The Constitution does not require that any such law be enacted. By parity of reasoning, there is no constitutional requirement to enact a law providing for legal representation in any other area where the constitutional right to a fair hearing is engaged.

31. The Plaintiffs' application for declarations regarding the funding of representation under section 35 is therefore dismissed. This leaves a deeply unsatisfactory situation where, pursuant to its statutory duty, the Family Court will make orders for the appointment of litigation guardians and counsel which will in many cases not be complied with for want of public funding. For the present at least, the legislative intent in enacting section 35 will continue to be frustrated and children's constitutional right to meaningful participation in decisions which may be of vital importance to their lives and wellbeing will often remain unrealized.

32. I shall, if need be, hear the parties as to costs. The Defendants were the successful parties in the contested part of the applications. However, the Human Rights Commission, which was the lead Plaintiff, has the benefit of a protective costs order; RW is legally aided; and I cannot see that any of the other Plaintiffs in either action added materially to the cost of the hearing. The parties may think that no order as to costs would be appropriate.

DATED this 28th day of June, 2018

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Hellman J