

Neutral Citation no. [2003] NIFam 1

Ref: **GILC3855**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **22/01/2003**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
FAMILY DIVISION

**IN THE MATTER OF N AND L (CARE ORDER: INVESTIGATIONS BY
GUARDIAN AD LITEM OUTSIDE NORTHERN IRELAND)**

GILLEN J

[1] The judgment in this case is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and in particular the anonymity of the children and the adult members of their family must be strictly preserved.

[2] The applicant in this case is a guardian ad litem appointed by the court under Article 60(1) of the Children (Northern Ireland) Order 1995 and Rule 4.11 of the Family Proceedings Rules (Northern Ireland) 1996 in the course of specified proceedings namely an application by a Health and Social Services Trust which I do not propose to identify ("the Trust") for a Care Order under Article 50 of the Children (Northern Ireland) Order 1995. The children who are the subject of this application are named N and L for the purposes of this application. They are currently the subject of an Interim Care Order. Subsequent to the making of a Interim Care Order, in May 2002, the parents of the children M and W, absconded with the children to Donegal and the children have been residing in Donegal since that time. Thereafter the Trust sought and obtained in the High Court in Dublin a Return Order under the Hague Convention which was made on 9 October 2002. Thereafter M and W sought and obtained from the High Court in Northern Ireland an order restraining the Trust from receiving the children from the Republic of Ireland back into the jurisdiction of Northern Ireland. The Trust appealed that order to the Court of Appeal in Northern Ireland. On 7 January 2003 the Court of Appeal dismissed the appeal and affirmed the order of the court below. Appended to that order was a schedule outlining a number of undertakings given by M and W making provision inter alia for assessment of the children and the parents whilst in Donegal.

[3] At a hearing before this court on 13 January 2003 the Trust consented to an extension of the order made by the High Court in Northern Ireland until the 10 of February 2003 in order to facilitate further investigations.

[4] At this hearing, Ms Walsh QC, who appears on behalf of the Guardian ad Litem with Ms Murnaghan, sought a direction from the court as to the powers of the Guardian ad Litem Agency to visit the children outside the jurisdiction of Northern Ireland in Donegal for the purposes of making appropriate investigations pursuant to Rule 4.12(10) of the Family Proceedings Rules (Northern Ireland) 1996 ("FPR") and to enable her to prepare a report to the court advising on the interests of the child. The issue therefore that the court has to determine is whether or not the Guardian ad Litem has power to interview persons outside the jurisdiction of this court. I was informed that this was a matter of some importance to the Northern Ireland Guardian Ad Litem Agency ("NIGALA") in that the issue has arisen in a number of cases and requires determination.

[5] The court invited the Official Solicitor to act as amicus curiae to provide the court with an independent assessment of this issue pursuant to Order 110 of the Rules of the Supreme Court (Northern Ireland) 1980.

[6] At the outset of this application, I received skeleton arguments from Ms Walsh QC on behalf of the Guardian ad Litem, Mr Long QC on behalf of the first-named respondent M and from Ms Loughran on behalf of the Official Solicitor. I pay tribute to the conspicuous care which was clearly invested in all of these documents. They have made my task immeasurably easier in arriving at a conclusion.

The role of the Guardian ad Litem

(1) Under Article 60 of the Children (Northern Ireland) Order 1995 ("the 1995" Order) where specified proceedings (which includes an application for a Care Order) have been commenced, the court must appoint a Guardian ad Litem for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests. A children's guardian, once appointed, is under a duty to safeguard the interests of the child in the manner prescribed by the rules. It is important to appreciate that the order does not define the appointment of a children's guardian as an appointment to "represent" the child, but as an appointment "for the child". Accordingly the children's guardian (while having as one of his duties the responsibility to establish the child's views and place them before the court) does have a wider role - namely to place before the court anything which he considers to be in the best interests of the child.

(2) Under his general duty to safeguard the interests of the child the guardian ad litem, pursuant to Rule 4.12 of the FPR, must:

- Give such advice to the child as is appropriate, having regard to his age and understanding. He must instruct the solicitor representing the child in all matters relevant to the child's interest, including possibilities for appeal, arising in the course of the proceedings.
- Notify all persons where practicable whose joinder as a party would be likely to safeguard the interests of the child (and the view of the children's guardian) and of the right to apply to be joined. He must inform the court of any such notification given and if anyone he believes may wish to be joined and if anyone he has attempted to notify but has been unable to contact.
- Attend all hearings, unless excused by the court and give advice to the court.
- Prepare a written report where ordered to do so and in any event prepare a written report for the final hearing advising on the interests of the child and, unless the court directs otherwise, file and serve it upon the parties not less than 7 days before the date fixed for the final hearing of the proceedings.
- Serve and accept service of documents on behalf of the child and, where the child has not himself been served and has sufficient understanding, advise the child of the contents of those documents so served.

When consideration is being given to the attendance of the child at court hearings, the child's guardian and solicitor for the child must be given the opportunity to make representations.

[7] Importantly, the children's guardian is also empowered and obliged to carry out an investigation as may be necessary for him to carry out his duties and in particular –

- (a) To contact or seek to interview such persons as he thinks appropriate or as the court directs (see Rule 4.12(10)).
- (b) If he inspects records of the kinds referred to in Article 61, bring to the attention of the court or such other persons as the court may direct all such records and documents which may, in his opinion, assist in the proper determination of the proceedings, and

(c) Obtain such professional assistance as is available to him which he thinks appropriate or which the court directs him to obtain.

[8] In addition to his duties under other paragraphs of the rules, the guardian ad litem shall also provide to the courts such other assistance as it may require. It is also of significance in this context that any party to the proceedings may cross-examine the children's guardian to the same extent as any witness although the court may limit the issues upon which the children's guardian may be cross-examined.

[9] In carrying out his duties, the children's guardian must have regard to the principles set out in Article 3(2) of the 1995 Act that any delay in determining the question before the court is likely to prejudice the welfare of the child and the matters set out in Article 3(3)(a) to (f) of the 1995 Order (ie the threshold criteria) as if for the word "court" in that section there were substituted the words "guardian ad litem". Consequently, inter alia, the guardian must have regard to the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding), the physical, emotional and educational needs of the child, the likely effect on the child of any change in the circumstances, the age, sex, background and any characteristics of the child which he considers relevant and any harm which the child has suffered or is at risk of suffering.

[10] I have set out in extenso the duties and powers of the guardian ad litem in order to illustrate the heavy responsibilities cast on the guardian and the extensive powers which have been granted in order for those responsibilities to be met. It is important to appreciate that the guardian ad litem is an officer of the court and may be relied upon to be well aware of his or her primary duty to safeguard the interests of the child. In particular the guardian is required to investigate the case and to contact or seek to interview such persons as he thinks appropriate or as the court directs. In my judgment Parliament could not have made its intentions clearer. The guardian must make an independent and unfettered appraisal of the issues to be put before the court and both principle and pragmatism combine to emphasise that no artificial impediment should be placed in the way of that task. In construing the powers of the guardian, this court does not close its eyes to the fact that the responsibilities given to the guardian did not spring fully formed from the legislative head but were built on the concerns raised in the Field Fisher report in 1974 which looked into the circumstances leading to the death of Maria Colwell. That report had emphasised the crucial need for the court to have the benefit of social work views independent of the local authority and parents. The Children Act 1975 had made provision for the establishment of panels of guardians ad litem and reporting officers in adoption and freeing proceedings and in care and related proceedings where there might be a conflict between the child and her parents. In November 1976 that part of the Act which amended the Children and Young Persons Act 1969 was partially

implemented to provide for the appointment of a Guardian ad Litem where there was an unopposed application for the discharge of a Care Order. It was not until May 1994 that the remainder of the section was brought into effect and panels of guardians ad litem and reporting officers were established. The advent of the Children Act 1989 and the Guardians ad Litem and Reporting Officers (Panels) Regulations 1991 finalised the important change of emphasis to a point where there is now a presumption that a guardian ad litem will be appointed by the court (under Section 41 in the 1989 Act and Article 60 in the 1995 Order) thus making it more difficult to justify the non appointment of a guardian ad litem. All of this serves to emphasise the pivotal role that the guardian ad litem plays in specified proceedings and the reliance which the court places upon the agency. That in itself in my view makes it inconceivable that Parliament ever intended that there should be any geographical artificial fetter on the investigation of the guardian ad litem in Children Order cases so as to obstruct the guardian carrying out tasks during an investigation which required travel outside this jurisdiction.

[11] If there ever existed any warrant for reading restriction into the exercise of those far reaching powers by the guardian ad litem, which I doubt, then the advent of the Human Rights Act 1998 and the European Convention for the Protection of Human Rights and Fundamental Freedoms becoming part of domestic law have served to dilute such a restriction. The need to ensure that children should be seen and heard is now very much to the fore in child cases. Article 12 of the United Nation Convention on the Rights of the Child (UNCRC) 1989 requires states to provide children with "the opportunity to be heard" in judicial or administrative proceedings affecting them on the basis that children capable of forming views have a right to express these freely. Article 6 of the European Convention on Human Rights entitles a child to a fair trial. If a child is to be denied direct access to the person who in fact is speaking for her at the trial, namely the guardian ad litem, by virtue of the fact that the guardian must interpose some agent in another country for the purpose of ascertaining her views, then a possible infringement of that child's rights could conceivably arise. At a time when a child becomes the subject of legal proceedings, it can be difficult and stressful for that child to meet a number of strange and unknown people, especially if that person is not the social worker or guardian ad litem allocated to the case. If the guardian ad litem, because the child is outside the jurisdiction, has to rely on some parallel agency or communication by telephone or letter, then an inaccurate or misleading impression may emerge. I consider that it is vital that the guardian ad litem should have the discretion to ascertain that child's wishes and feelings by seeing him in all aspects of his environment including perhaps with the natural parents, the foster parents and in the school or nursery. It is the guardian who must make a judgment about how wide-ranging this aspect of the investigation should be and geographical restrictions in my view constitute unreasonable fetters.

[12] Ms Walsh QC properly highlights that since there is obviously no restriction in the rules prohibiting the solicitor appointed to represent the child from travelling outside the jurisdiction to interview his client, it would be incongruous to suggest that the guardian could not. The guardian does have her own specialist professional expertise which is quite different from that of a solicitor. In any event, under Rule 4.12(12) any party may question the guardian about oral or written advice tendered by him to the court. It is difficult to see how a guardian could realistically meet this obligation if for example he had personally been unable to interview the child. It might prove difficult or highly inconvenient to have present in court the agent who had acted on behalf of the guardian ad litem. In the Republic of Ireland there is no parallel agency to that of the Guardian Ad Litem Agency and of course if the guardian was obliged to find a substitute in a European country, then it is not difficult to conceive of a number of practical linguistic and logistical problems that could arise.

[13] The problem is not confined to interviewing children. Under Rule 4.12(10) the guardian is empowered to interview such person as he thinks appropriate. The rule makes no mention of any geographical constriction on the guardian and whilst in some circumstances the guardian could carry out her duties by means of written correspondence, email or telephone, there may be many cases where the guardian properly concludes that a face to face interview is vital. Had Parliament intended to confine the activities of the guardian ad litem to Northern Ireland then it could easily have said so.

[14] It may be that where a guardian ad litem wished to carry out a task during an investigation which incurred extraordinary expenditure, for example overseas travel, it might be prudent to apply to the court for a direction that this step should be taken or to seek an indication from the court that such action would be considered appropriate pursuant to Rule 4.12(10) if for no other reason than to place the guardian in a position to justify public expenditure. However I consider this would be the exception rather than the rule and where short inexpensive trips would be involved for example to the Republic of Ireland or to Scotland then in most cases the guardian is entitled to exercise her own discretion as to whether or not it is necessary to do so in order to carry out appropriate investigations.

[15] My attention has been drawn to the judgment of Higgins J in Re K (a minor) (Adoption: child born outside the jurisdiction) [1997] NIJB 212 where the court was dealing with the powers of a guardian ad litem appointed under Article 66 of the Adoption (Northern Ireland) Order 1987 (as amended) and the powers and duties specified in Order 94 of the Rules of the Supreme Court (Northern Ireland) 1980 (in particular Rule 6 and 18). In the course of that judgment Higgins J said:

“The guardian ad litem means guardian to the action and is a pointer for the child concerned. The guardian ad litem’s duties are prescribed by the Adoption (Northern Ireland) Order 1987 and the rules and regulations made thereunder. The guardian ad litem is appointed by the court and acts under the court’s direction. The powers of the court and the guardian ad litem are limited by the court’s jurisdiction, that is within Northern Ireland. It does not seem to me that a guardian ad litem appointed by this court has the right or a power to carry out any investigations outside Northern Ireland. If such be the practice then it should cease forthwith. If the investigations are required outside Northern Ireland, then it is customary to request a corresponding agency in the other jurisdiction to consider the matter and report in writing. Such requests are invariably complied with in a spirit of comity and mutuality of interests and respect.”

[16] I consider that that decision is confined to the facts of that case and more particularly to the Adoption (Northern Ireland) Order 1987. There are clear distinctions to be drawn between the powers of a guardian ad litem under that legislation and under the Children Order (Northern Ireland) 1995. Accordingly I am unconvinced that the reasoning in that judgment should apply to the wholly different circumstances of this case which is governed by the 1995 Order. Re K was of course decided before the advent of the Human Rights Act 1998 and it may be that in an appropriate case the reasoning therein may have to be revisited but the narrow circumstances of this case do not provide a suitable vehicle for a fresh consideration.

[17] I have come to the conclusion therefore that in the present case there is no reason why the guardian ad litem should not travel to the Republic of Ireland to make such investigations as she considers necessary to carry out her duties and in particular to interview such persons as she thinks appropriate. I do not consider that the approval of the court is necessary and that in this instance the guardian ad litem’s discretion to act should remain unfettered.