THE HIGH COURT

[2022 IEHC 623]

[Record No. 2021 17M]

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964, AS AMENDED

AND IN THE MATTER OF THE INFANTS, J AND K

BETWEEN

L, M, AND N

APPLICANTS

– AND –

A

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 10th November 2022.

SUMMARY

This is a failed application by two discretionary trustees to be joined as notice parties to proceedings in which two maternal aunts and an uncle of certain orphaned children are seeking to have the testamentary guardian of those children (a paternal sister) removed from that position and one of the maternal aunts substituted in her stead.

1. Mr X married, divorced, re-married, had children with each of his two wives, was predeceased by his second wife, then died unexpectedly. On his death Mr X left a large estate behind him, as well as a number of infant children from his second marriage whose guardianship he entrusted by will to his sister. Unhappy differences have since arisen between, on the one hand, this sister, and, on the other hand, two maternal aunts and a maternal uncle. Those differences concern the degree of access and interaction that the orphaned children now enjoy with their late mother's extended family.

2. It is hard not to feel for everyone in a situation in which clearly loved infant children have been orphaned and a new regime has had to be put in place for their upbringing. It is almost to be expected that differences would arise as that new regime 'beds down' and everyone gets accustomed to the fact that, sadly, things will never again be as they once were. In fact no little acrimony has arisen between Mr X's sister (whom I shall refer to as Ms A) and the maternal aunts and uncle as to how matters have been proceeding in terms of the infant children's upbringing. So much so that the maternal aunts and uncle have latterly commenced these proceedings in which they seek to have Ms A ousted as guardian and one of the maternal sisters substituted in her stead. In the grounding affidavit in those proceedings, one of the maternal aunts avers that in her view Ms A is seeking to alienate the children from their mother's family and has acted in a manner that is, to borrow from the pleadings, "*erratic, abusive, and confrontational*". The sister who swore the grounding affidavit never mentions any financial issues and in her closing averment makes clear that "[T]*he* [maternal]*...family simply want to maintain and nurture the close and loving relationship that* [the infant children previously]*...had with us. I say and believe that, no more than ever, this relationship is entirely critical to their welfare*". So the application brought by the maternal aunts and uncle, on its own terms and when one has regard to their pleadings, is one that springs from a desire for, and aims at achieving, greater closeness with the orphaned children, a closeness which is motivated by what I do not doubt is a well-intentioned sense that such closeness is in the infant children's best interests. It is not an application that is in any way concerned with money matters.

3. By his will Mr X established two discretionary trusts for his various children. Trust 1 is for the benefit of all of his children. Trust 2 is for the benefit of the infant children of his second marriage. The trustees of those trusts have come before me at this time asking to be joined as

notice parties to these proceedings. Though I spent the better part of two days listening to their application, I do not believe that matters ever advanced much beyond what those trustees stated in their grounding affidavit, to which I turn in a moment. Yes, as matters became fleshed out in the exchange of affidavits between the parties, it became clear that there was more in dispute between the testamentary guardian and the trustees than appeared at the outset. However the trustees' core concerns remain the same: they do not believe that Ms A has a proper appreciation of how the monies of the trusts are to be applied and they profess to be concerned by some of her requests for funding and certain related behaviours.

4. Ms A accepts (for it is the truth) that there have been disputes between her and the trustees as to how trust monies ought to be applied. However, she sees this as no more than the to-be-expected differences bound occasionally to arise between a testamentary guardian placed as she is, and trustees placed as they are.

5. In the affidavit grounding the joinder application, one of the trustees avers, amongst other matters, as quoted hereafter (though I cannot over-emphasise that the trustees' point of view is keenly disputed by Ms A):

> "*14 ...*[I]*t is of the utmost importance from our point of view that the guardian understands the nature of...her position. More specifically, it is important that the person acting as guardian (i) understands that funds can only be used for the benefit of [the infant children], (ii) understands their role and legal duties, and in particular that trust funds cannot be used for their own personal benefit, (iii) generally understands what funds can and cannot be legitimately used for and what expenses the trust funds can legitimately cover, and (iv) understands our obligation to administer the trust funds prudently and according to law.*
>
> *15. It is also important that we have a good, open, forthright ongoing relationship with the testamentary guardian, and that whosever is so appointed is diligent in preparing budgets and submitting receipts and invoices etc to myself and* [the other trustee]*....*
>
> *16. The trust (and the trustees) accordingly have a legal and pecuniary interest in this application as to who is going to be the guardian. We also consider*

that we have a duty in the circumstances to bring the matters set out in this affidavit to the attention of the court.

17. *Since Mr X died,* [the other trustee]*…and I have been corresponding with Ms A in relation to numerous matters, but in particular to agreeing a budget for annual expenditure on behalf of* [the infant children]*.…There has also been a lengthy exchange of correspondence in relation to agreeing a budget, and we have also had meetings with Ms A.…*

18. *From these discussions* [the other trustee] *and I have become very concerned about Ms A's…understanding of her role as testamentary guardian. She has made it clear that she considers that she has an entitlement to be reimbursed out of the trusts for a number of items in her suggested budget, which are clearly not items for the benefit of* [the infant children]….

19. [The other trustee]*…and I have reviewed Ms A's budget expectations for various items relating to* [the infant children], *including holidays and clothing. We believe that Ms A's budget in this regard as well as her current level of spending is excessive and goes far beyond what is required in order to fully and properly care for* [the infant children].

20. *We are also concerned because Ms A has suggested that certain payments received by her from the State in respect of* [the infant children]*…were being used by her to fund personal expenditure.*

21. *Ms A appears to be under the impression that the estate of Mr X has a responsibility to meet her costs of accepting the position of* [the infant children's] *testamentary guardian….*

22. *Against that background…*[the other trustee] *and I have concerns about paying very significant sums of money over to* [the infant children] *when Ms A is their testamentary guardian.*

23. [The other trustee] *and I as trustees feel that it is important that this Court be aware of the foregoing issues in the context of this application.*

24. *We also believe it is appropriate that we be joined as notice parties in this application, in circumstances where the discretionary trusts in Mr X's estate have a legal and pecuniary interest in the identity and suitability of the person appointed legal and pecuniary interest in the identity and suitability of the person appointed legal guardian.*"

6. There are typically at least two sides to every story and Ms A has a very different view of how matters have transpired to this time. She has concerns as to how the trustees have acted, and her overall view, as I understand it, is that she considers the trustees to have been (she avers) "c*haotic and unprofessional*" in their actions and also, as I understand her evidence, to have been miserly in their decisions. I do not see that it is necessary in this judgment to get into great detail about the particulars of the ongoing tussles between Ms A and the trustees about what is to get paid and when, beyond noting that those tussles are ongoing. Principal among them are a dispute about the costs of a nanny who was engaged to assist in looking after the infant children, potential litigation on the part of Ms A's father who has incurred costs in this regard, a sense on Ms A's part that there is a willingness on the part of the trustees to dissipate the assets available exclusively to the infant children in order to protect the interests of the adult children, and a possible dispute concerning the family home.

7. The reason I do not consider it necessary to explore these tussles further is because, even if I take at its very height the case that the trustees have advanced for being joined to this case, my respectful sense is that they have failed to establish any sound basis for joinder.

8. At the closing of argument in this case, counsel for the maternal aunts and uncle indicated that going forwards it may be necessary for the pleadings to be amended. Counsel for Ms A rose to her feet and indicated that be that as it may, this application falls to be decided on the pleadings as they are at this time. (Otherwise I would be deciding a case by reference to amended pleadings that might or might not exist at some future time). When I look to the pleadings as they now stand, what is before me is a set of pleadings in which the maternal aunts and uncle have come to court with concerns about the emotional and pastoral well-being of their late brother's infant children. They do not seem concerned, expressly or impliedly, with any financial issues presenting. The case as set out in their pleadings is all to do with access, alleged alienation, and a clear and understandable sense that children blessed with loving relatives on their mother's side should have the fullest level of interaction with those relatives. In fact the trustees seem to take a similar view, one of them averring in a replying affidavit that "*the detail of the matters in contention between* [Ms A and] *us should not be relevant*". In such circumstances I just cannot see the merit of joining the trustees (essentially the 'money men') as notice parties to proceedings where it is the emotional welfare of the children that has been pleaded and placed in issue and where anything the trustees may have to say about money matters can be addressed in evidence (on affidavit and/or in the witness box).

9. I respectfully do not see that the trustees' involvement in the case as pleaded at this time (or the value that they would bring to the proceedings as pleaded at this time) will ever get beyond giving evidence of the kind just described. In truth it seems to me that the trustees are seeking to be joined as notice parties in proceedings the pleadings of which would require to be amended for them justifiably to be joined as notice parties. Were the pleadings different – had the maternal aunts and uncle pleaded in effect that 'And we also have concerns about how Ms A is handling the children's affairs from a financial perspective' – then perhaps the trustees might have stood a better chance of being joined, assuming they could satisfy the court before which they brought that imagined application that the trustees of a discretionary trust do in fact have a legal/pecuniary interest in the identity and suitability of the person appointed legal guardian of the children. (For the purposes of this application I have assumed that the trustees do have such an interest, taking their case at its height and finding that even when I do so their application to be joined must still fail).

10. There was suggestion by counsel for Ms A that it could cause an unnecessary depletion in the trust assets if the trustees were to be joined to these proceedings and if any costs they incurred were to be ordered to be paid from the trust funds. In this regard, I note that although Mr X was a wealthy man when he died, he was not, if I might put matters so, 'outrageously wealthy', *i.e.* it would not take very protracted proceedings to see even his significant estate significantly depleted. Counsel for the trustees indicated in effect that 'a stitch in time saves nine' and that if the trustees are not joined to these proceedings at this time it is possible that further proceedings will at some stage be commenced between the trustees and Ms A that could see the estate depleted in a way that likely will not occur if Ms A is ousted from the role of guardian at this time.

11. I accept that there appears at this time to be a chance of further proceedings between Ms A and the trustees, given the continuing, even mounting tensions between them. However, I do not see that this yields a need for the trustees to be joined to these proceedings when whatever they may have to say to the actual case that has actually been pleaded by the maternal aunts and uncle can be sworn to by the trustees in an affidavit and/or recounted by them in the witness box. Moreover, I respectfully do not see how in the absence of any evidence as to the anticipated costs of the within (commenced) proceedings and the anticipated costs of (un-commenced and perhaps still some way off, if ever started) proceedings I can engage in any

level of meaningful cost-benefit analysis in this regard, if any level of such analysis is in fact possible: it would seem to involve an assessment of speculation upon speculation. In truth, all I am being told in this regard is that a guaranteed increase in costs in these proceedings could yield (though there is no evidence to this effect) a saving in costs in terms of possible future proceedings. Even taking the trustees' case at its height that seems to me to be, with all respect, a weak contention.

12. The trustees' notice of motion does not mention what rule of court they are moving on. However, the consensus at the hearing of this application was that they appear to be proceeding on the basis of O.15, r.13 RSC. So far as relevant to this application that rule provides as follows:

> "*The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that…the names of any parties, whether plaintiffs or defendants…whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.*"

13. There was suggestion in *Re CTO Greenclean Environmental Solutions Ltd* [2017] IEHC 246, para.20, that the word "*necessary*" is not used in an absolute context, that the phrase used is "*may be necessary*". With respect, I am not sure that I agree with that analysis. It seems to me that the word "*may*" is used because the judge before whom a joinder application is made is necessarily engaged in a predictive task, trying to decide now what "*may be necessary*" when much may happen between the 'now' and hearing-end. In that sense what "*may be necessary*" may prove not to have been necessary…but the focus is on necessity. Any liberality of approach (if liberality there is to be) comes in what a judge (sitting in the 'now') considers "*may be necessary*" in the future.

14. In passing, I note that even if a party seeking joinder cannot quite bring herself within the terms of O.15, r.13 RSC, the High Court always has that residual discretion to which Hardiman J. makes reference in *T.D.I Metro Ltd* v. *Delap (No. 1)* [2000] 4 I.R. 337, 354, "*to allow a party to be joined in…proceedings…where this is considered to be necessary in the interest of justice*

and where there is no specific rule of law excluding the additional parties at that stage of the proceedings".

15. The problem that the trustees face in this case is that, for the reasons already stated above, whether one brings O.15, r.13, to bear (reading it through the *CTO Greenclean* prism *or* as I have suggested it falls properly to be read) and/or the discretion identified by Hardiman J. in *TDI Metro*, I just do not see that the trustees have satisfied the test that would enable them to be joined now as notice parties to the within proceedings.

16. In reaching my conclusions I have had regard to the best interests of those children. To my mind those interests *are* at play, even in this procedural application. This is because these are guardianship proceedings and so, when the substantive proceedings come on for hearing, s.3(1) of the Guardianship of Infants Act 1964, as amended, will apply and the court in deciding the issues before it will have to regard "*the best interests of the* [infant] *child*[ren] *as the paramount consideration*". I do not see that those interests will in any way be adversely impinged upon if the trustees are not joined as notice parties (and are called instead, if they are called – though I expect that they will be called – to give evidence as to their dealings with Ms A). Costs-wise, the children's financial interests, it seems to me (a) may stand to be adversely affected by the joinder of the trustees (certainly if the trustees' costs are eventually met from the trust monies), albeit that (b) there might perhaps be a possible saving if there were to be future proceedings (and there may not be future proceedings) commenced between Ms A and the trustees, assuming those proceedings would not come about (or fewer or less extensive proceedings would come about) if Ms A were evicted as guardian at this time. When I weigh the possible costs in scenario (a) against the possible savings in imagined scenario (b) (imagined because there is no certainty as to the commencement of future proceedings) the best interests of the children do not incline me further to join the trustees, though I am not in any event, and for the reasons stated, minded to join them.

17. For the various reasons identified above, the trustees' application to be joined to these proceedings is respectfully refused. Their presence as notice parties, it seems to me, will not be necessary in order to enable the trial court effectually and completely to adjudicate upon and settle all the questions involved in the proceedings as brought and pleaded by the maternal aunts and uncle. Nor do I see that joining the trustees as notice parties is otherwise or at all necessary in the interests of justice. If it is thought that the trustees have something of use to

state about their dealings with Ms A or some other aspect of matters that may impact upon the emotional/pastoral-welfare focus of the proceedings brought by the maternal aunts and uncle they can be called upon to give evidence in this regard.