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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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RE: JAMES, A CHILD: APPOINTMENT AND DISCHARGE OF GUARDIAN AD LITEM

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O'HARA J

All of the parties in this judgment have been anonymised so as to protect the identity of the child to whom the proceedings relate. Nothing must be disclosed or published without the permission of the court which might lead to the identification of the child or adult relatives.

Introduction

[1] The issue in this case is one of some general importance. It concerns the circumstances in which guardians ad litem should be appointed to represent children and their interests in proceedings which are about them and their future. The Northern Ireland Guardian Ad Litem Agency ("the Agency") is under extreme pressure in terms of resources and for some time has not had the capacity to assign a guardian to each case in which the court has appointed one. It has therefore adopted a policy in what are known as Article 56 cases of not appointing a guardian, notwithstanding the court's order, until the court has received the Article 56 report. Whether that approach is the correct one has come to a head in this case.

Background

[2] In order to put the issue in context it is necessary to explain the circumstances of the immediate case. James is 10 years old. His parents who are now in their mid to late 40s separated in 2017 with much acrimony which has damaged James. In November 2018 following valuable work by the Court Children's Officer a contact order was made by agreement in the Family Proceedings Court. Under that order James spent 3 nights in week 1 with his father and 2 nights with him in week 2.

[3] By the following spring matters had deteriorated again. The father alleges that the mother has alcohol problems, that she is violent and volatile and that he was

physically attacked by the partner of her adult daughter. For her part the mother alleges that the father is controlling, threatening and physically abusive. Each parent applied for a residence order. The new applications were transferred to the Family Care Centre.

[4] In the Family Care Centre on 5 September 2019 the judge exercised her powers under Article 56(1) of the Children (NI) Order 1995 which provides:

> "Where, in any family proceedings in which a question arises with respect to the welfare of any child, it appears to the court that it may be appropriate for a care or supervision order to be made with respect to him, the court may direct the appropriate authority to undertake an investigation of the child's circumstances."

[5] It is also relevant to note the following provisions of Article 56:

> "(2) Where the court gives a direction under this Article the authority concerned shall, when undertaking the investigation, consider whether it should –
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> (a) apply for a care or a supervision order with respect to the child;
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> (b) provide services or assistance for the child or his family; or
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> (c) take any other action with respect to the child.
>
> (3) Where an authority undertakes an investigation under this Article, and decides not to apply for a care or a supervision order with respect to the child concerned, the authority shall inform the court of –
>
> (a) its reasons for so deciding;
>
> (b) any service or assistance which the authority has provided, or intends to provide, for the child and his family; and
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> (c) any other action which the authority has taken, or proposes to take, with respect to the child."

[6] In addition to directing an Article 56 report the judge decided to appoint a guardian ad litem, a power given to her by Article 60(1) which provides:

> "For the purpose of any specified proceedings, the court shall 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."

[7] Article 60(2) then provides:

> "The guardian ad litem shall –
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> (a) be appointed in accordance with rules of court; and
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> (b) be under a duty to safeguard the interests of the child in the manner prescribed by such rules."

[8] The term "specified proceedings" in Article 60(1) is defined in Article 60(6). That definition includes proceedings in which there is an application for a care or supervision order and also proceedings "in which the court has given a direction under Article 56(1) and has made, **or is considering whether to make**, an interim care order."

[9] The Trust provided the Article 56 report on 4 November 2019. It runs to 36 pages and makes depressing reading, making clear that James has been exposed to hugely inappropriate behaviour by both parents. The report states that this is psychologically damaging to him and that the threshold of significant harm has been established. (This is the pre-requisite for consideration of a public law order, whether a care order or a supervision order.) The report concludes as follows (with the names of the parents, the child and the Trust having been anonymised):

> "The Trust have carefully considered whether to request a care order in this case given the concerns for James' wellbeing. However the Trust has to balance the risks towards James with the needs of James and the ability of both parents to manage these risks within their current home environments. At this time a care order is not necessary to safeguard James and this case can be managed under child protection procedures.
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> At present the threshold of significant harm has been evidenced and concerns remain in relation to both parents due to the levels of acrimony between them both. The Trust will continue to work with the father and mother in supporting them to reduce parental acrimony and put James' needs and wishes first.

> Should there be any change in circumstances and the Trust feel that the risks to James become too great to manage at home an application will be placed before the court for a care order at this point."

[10] In summary therefore the Trust's view is that there are reasonable grounds for believing that James has suffered or is likely to suffer significant emotional harm attributable to the care given to him by his parents. Notwithstanding that view it has not asked the court to make an interim care or supervision order at this time. Instead it recommends a contact order be made for James to have contact with both parents. As matters stand he lives with his father and has some contact with his mother on foot of an interim order dated 7 November 2019. All of this is a far cry from the 2018 agreement between the parents.

[11] The judge's direction that the appointed guardian file a report by 4 November 2019 has not been complied with. The Agency has appointed a solicitor but not a guardian. On receipt of the Article 56 report the solicitor submitted to the judge on 7 November 2019, on instructions from the Agency, that the guardian should be discharged because the Trust was not seeking a public law order. She suggested that the Official Solicitor might usefully be approached to represent the child instead. This indicates a recognition that the interests of the child do in fact warrant representation.

[12] The judge refused to discharge the guardian and directed a report for the next sitting of the Family Care Centre which was to be on or about 3 December. Instead of complying with that direction the solicitor appointed by the Agency for the still unidentified guardian applied again for the order appointing the guardian to be discharged. That application was heard on 18 November at which point the case was transferred to the High Court because of the importance of this issue generally. The judge was told that the Agency had a backlog in excess of 30 cases in which guardians had not been appointed and was declining to assign guardians to Article 56 cases even when judges had appointed them. In the course of the hearing before me I was told that the backlog is now in excess of 55 cases.

[13] In the High Court I directed written submissions from the parties. Mr Ritchie of counsel represents the Agency. Ms Suzanne Simpson QC, with Ms McCausland, presented a written submission on behalf of the father. By agreement this represented the joint position of the father, the Trust represented by Ms Martina Connolly of counsel and the mother represented by Ms Noelle McGrenera QC and Ms Overing. In light of the contents of these submissions which were developed orally on 15 January I then invited the Official Solicitor to make a written submission. This was received on 27 January from the Official Solicitor who instructed Ms Louise Murphy of counsel. I am grateful to all representatives for their contributions, written and oral.

Submissions

[14] For the Agency Mr Ritchie advanced two main arguments:

(1) In the present case and in every Article 56 case in which the court has not made an interim public law order it should not appoint a guardian until it has received the Trust report. Only then should a decision to appoint be taken.

(2) In James' case, since the Trust has decided not to seek a public law order, the proceedings are no longer "specified" within the meaning of Article 60(6). The proper course is therefore to invite the Official Solicitor to represent James, a course which is open to the court under Article 60(3).

[15] In advancing his submission Mr Ritchie relied heavily on the Children Order Advisory Committee Best Practice Guidance which he invited me to approve. In particular he referred to paragraph 3.8.4 which is in the following terms:

> "(i) If an interim care or supervision order is made when directing an Article 56(1) investigation, it is more likely that the court will determine that the immediate appointment of a guardian ad litem would be appropriate.
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> (ii) In those cases where the court is considering making an order it is more likely that a guardian ad litem will not be appointed and the court will await the outcome of the Article 56 investigation."

Mr Ritchie referred to other provisions of the guidance and in particular paragraph 3.8.9 which states:

"In the event that the proceedings cease to be `specified' and revert to private law proceedings, it may be that the court is of the view that there is a continuing need for the child's interests to be represented. Consideration should be given to the appointment of the Official Solicitor to act on the child's behalf and transfer, if appropriate to the Family Care Centre or the High Court."

[16] The Agency's submission concluded with the following contentions:

> "26. The Guardian Ad Litem Agency therefore argues that appointment of a guardian should be reserved for those cases where, at the conclusion of their investigation after 8 weeks, the Trust is recommending a care or supervision order.

> 27. The Agency, where a court has appointed a guardian simultaneously with the initial direction of an Article 56 investigation will not allocate a guardian until the outcome of the Trust report on investigation.
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> 28. Where a guardian has been appointed and the Trust is not seeking a care or supervision order but the matter remains before the court the court will be asked to discharge the guardian immediately.
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> 29. In this case for James, the Guardian Ad Litem Agency is asking that the guardian appointed be discharged and that Her Honour Judge McCormick QC, or indeed the High Court, can exercise the powers under Article 60(3) to invite the appointment of the Official Solicitor to represent James if this is felt to be necessary in the best interests of James.
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> 30. The court is asked to approve the COAC guidance in respect of the specific role and approach to the appointment of a guardian in Article 56 cases."

[17] Ms Simpson's response to this approach by the Agency was direct. In respect of the first proposition she contended that the Agency was simply wrong – Article 60(1) requires the court to appoint a guardian in specified proceedings "unless satisfied that it is not necessary to do so in order to safeguard his interests". Since specified proceedings include those in which the court is considering whether to make an interim care order the court will most probably find it difficult to conclude that a guardian is not necessary. Notwithstanding the wording of the guidance, which is only guidance, the court has to follow the wording of Article 60(1). Accordingly, the appointment of the guardian was entirely appropriate and justified, especially in the circumstances of the present case.

[18] On the second point she contended that the fact that the court is still considering whether to make a care order means that the proceedings are still specified. The fact that at this stage the Trust is not seeking a care order is not the end of the matter. As cases like James' illustrate, the court can properly ask for input from two important but distinct sources - the Trust and the guardian. Unless it has received both it cannot form a final view on the appropriate way forward. The view of the guardian might encourage a change of approach by the Trust, one way or another.

[19] Ms Simpson also challenged the legality of the Agency's policy, in the face of court orders, of not appointing guardians in Article 56 cases until after it sees the Trust report. She submitted that this policy is both indefensible and contrary to the very rationale of the establishment of the Agency.

[20] She also highlighted the issues which the Trust has to consider by reason of Article 56(2). The Trust is not confined to considering whether it should apply for a care or supervision order - it also has to consider whether other services or assistance might be provided for either the child or the family. This means that a guardian might well agree that a public law order is not required but might identify services or assistance greater than or different to what the Trust has referred to which would benefit the child or family. On the Agency's current approach in Article 56 cases a court would not have the advantage of the guardian's input on those issues if the Trust did not conclude its Article 56 report with an application for a public law order.

[21] Ms McGrenera supported this case and added that recent experience in a number of especially complex Article 56 cases has illustrated the "added value" for children of guardians being involved. These cases include some in which at times the Trust and the guardian took different views on whether and why public law orders might be necessary but the guardians' input made a substantial difference to the flow of the proceedings.

[22] For the Trust Ms Connolly agreed generally with the submissions of Ms Simpson and Ms McGrenera and added two further points of note:

(i) Sometimes Trusts do not seek any interim orders and agree that Article 56 cases can proceed without any order until the very end when a final order is made. If the Agency's approach is correct, it would effectively never have a role to play in such cases, a proposition which cannot be right.

(ii) More fundamentally, if the Agency approach is correct the Trust becomes the gatekeeper for whether a guardian is appointed in Article 56 cases. If it does not seek a care order there is no role for a guardian. Ms Connolly challenged the very idea of the Agency advancing such a proposition.

[23] In their written submissions the Official Solicitor and Ms Murphy concurred with the submissions advanced against the position of the Agency. They referred, quite correctly, to the different roles and skills of guardians who invariably have social work qualifications and expertise and the solicitors within the Office of the Official Solicitor who do not. Over many years the current and former solicitors of the Official Solicitor have made valuable contributions in a variety of cases but they are not guardians in the sense that Article 60 envisages. Moreover, under the Family Proceedings Rules (NI) 1996, which apply to the High Court and the Family Care Centre, the Official Solicitor can only be appointed to represent a child in family proceedings provided that she consents to this course of action and there is no provision at all for the Official Solicitor to be appointed in cases in the Family Proceedings Court.

[24] It is also relevant to note by way of background that the Official Solicitor is no less over stretched than the Agency. In recent years solicitors from her office have repeatedly accepted requests to represent children despite their extremely heavy workload. It would be wrong to take that willingness to assist courts for granted.

Discussion

[25] The Agency's guardians have the potential to exercise an important influence on the direction in which cases develop. Very often they have something extra to add or different to say compared to what the court has heard from the Trust. Even if they align themselves with the Trust's position the fact that they do so is or may be significant. I have every sympathy with the difficulties facing the Agency but the contentions which those difficulties have driven the Agency to make are little short of bizarre. There has never been greater emphasis on hearing the voice of the child than there is now. The Agency itself promotes this concept, quite rightly. If it needed to be re-emphasised the 2017 report of the Review Group on Family Justice led by Sir John Gillen has done just that in chapter 16. The best and most common way of hearing that voice is through the court appointed guardian. That should continue to be the case.

[26] I accept that in some cases judges might pause to consider more closely whether it is necessary to appoint a guardian, or more likely to appoint one at an early stage, but the wording of Article 60(1) is clear - the court shall appoint a guardian unless it is satisfied that it is not necessary to do so.

[27] The Agency's guardians will generally have a contribution to make to Article 56 investigations. They may take a different view from the Trust and make the Trust and court reconsider the proper approach. They may identify services or assistance which have been overlooked. The present case is a vivid example of such possibilities. It appears that the Trust was influenced not to seek any order because of recent evidence of some signs of improvement by the parents. But such signs as there are only emerged during the Trust's investigation. Given the long history of discord there is a real risk that these improvements will not be maintained. A guardian's report would most probably assist in this analysis and is urgently required because of James' age and the significant harm which he has already suffered.

[28] The COAC guidance is only that - it cannot and does not alter the wording of the statute. In my view the wording of paragraph 3.8.4(ii) might be improved to accord more clearly with the statute if it read along the following lines:

"In those cases where the court is considering the making of an order, it may consider whether to defer the appointment of a guardian ad litem until it receives the report of the Trust's Article 56 investigation if it is of the view that the immediate appointment of a guardian ad litem is not necessary."

[29] As has been noted elsewhere the COAC guidance is overdue for review and updating. It is hoped that with the restoration of the Executive funding will be secured for that exercise which would be in the interests of everyone. For the present it remains valuable and when adhered to closely it can assist in speeding up the progress of cases. It is not however an alternative or substitute for the statutory provisions.

[30] So far as the Agency's second point is concerned, these proceedings are specified for so long as the court is considering whether to make an interim care order. That possibility remains in James' case because on any reading it is a bad case. The Trust recognises the possibility that an interim order might yet be required. James needs protection - indeed his name has been added to the Child Protection Register for that very reason.

[31] For the reasons set out above I reject the Agency's submissions and I decline to discharge the guardian. I direct a report from the guardian within six weeks. I am concerned that the court's directions have been disregarded by the Agency to date. That must stop forthwith. If necessary this judgment can be used in any requests for more resources.

[32] I conclude by dealing with one final matter. During the course of submissions I enquired from counsel whether the Agency could have appealed against the order of the Family Care Centre appointing a guardian. I have received helpful written submissions on that issue from Mr Ritchie and Ms Simpson. The Agency suggests that it is unclear whether the appointment of a guardian can be appealed. For her client (and in effect all of the other parties) Ms Simpson submits that it can be. Her contention is that while directions made under the Family Proceedings Rules cannot be appealed, the guardian was appointed under Article 60(1) of the Order and such an order can be appealed. As matters have developed I do not need to decide this issue for the purposes of this judgment but I am inclined to think that Ms Simpson's approach is probably the correct one.