OUTER HOUSE, COURT OF SESSION

[2009] CSOH 43

OPINION OF LORD BRODIE

in the cause

S.

Pursuer;

A491/04

against

ARGYLL & CLYDE ACUTE HOSPITALS NHS TRUST

Defenders:

Pursuer: MacAulay, QC; Drummond Miller, LLP

Respondents: No Appearance

20 March 2009

Introduction

[1] The Children (Scotland) Act 1995 provides:

"1.-(1) .... a parent has in relation to his child the responsibility - (a) to safeguard and promote the child's health, development and welfare ...; and (d) to act as the child's legal representative, but only in so far as compliance with this section is practicable and in the interests of the child.

(2) 'Child' means ... a person under the age of sixteen years ...

(4) The parental responsibilities supersede any analogous duties imposed on a parent at common law....

2.-(1) .... a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right - ... (d) to act as the child's legal representative ...

(5) The parental rights supersede any analogous rights enjoyed by a parent at common law ....

(7) In this section, 'child' means a person under the age of sixteen years ...

13.-(1) Where in any court proceedings a sum of money becomes payable to, or for the benefit of, a child under the age of sixteen years, the court may make such an order relating to the payment and management of the sum for the benefit of the child as it thinks fit.

(2) Without prejudice to the generality of subsection (1) above, the court may in an order under this section - (a) appoint a judicial factor to invest, apply or otherwise deal with the money for the benefit of the child concerned; (b) order the money to be paid - (i) to the sheriff clerk or the Accountant of Court; or (ii) to a parent or guardian of that child, to be invested, applied or otherwise dealt with, under directions of the court, for the benefit of that child; or (c) order the money to be paid directly to that child.

(3) Where payment is made to a person in accordance with an order under this section, a receipt given by him shall be a sufficient discharge of the obligation to make payment ....

15.-...(5) Any reference ... to a person acting as the legal representative of a child is a reference to that person, in the interests of the child - (a) administering any property belonging to the child; and (b) acting in, or giving consent to, any transaction where the child is incapable of so acting or consenting on his own behalf."

[2] In this action S. on behalf of her son J. sued the defender for damages in respect of negligence in the management of the delivery of J. J. suffers from cerebral palsy and is severely disabled. He is now nine years of age. The action was set down for proof in January 2009 but prior to that was settled extra-judicially on the basis of payment to the pursuer of a sum of damages which I was advised amounted to £5.25 million.

Application to the Court
[3] The action called before on 10 March 2009 in respect of a motion for the pursuer in the following terms:

"On behalf of the pursuer, and in respect that this action has settled and the pursuer has received a capital sum in her capacity as mother and guardian of the child [J.] for directions as to the future administration of the award for the benefit of the child in terms of section 13 of the Children (Scotland) Act 1995; and in particular to approve the purchase and adaption of [a specified property] as a suitable property for the child; and further to approve the purchase of computer equipment for the child as recommended in [a specified report]."

[4] Mr MacAulay who appeared on behalf of the pursuer explained that the terms of the motion were not entirely apposite. What he wished to move for was, first, a remit to the Accountant of Court to report on what arrangements would be most suitable for the future management of the award and, second, to approve payment of the sum of £500,000 to the pursuer with a view to her applying it to the purchase and adaptation of a residential property in which she would live with J. A remit to the Accountant of Court to report on the future management of the award was a course of action which had been taken by Lord Carloway in *I.* v *Argyll & Clyde Health Board* 2003 SLT 231 to which Mr MacAulay referred me. Mr MacAulay went on to confirm, as appeared from the terms of the written motion, that the defender had paid the sum of £5.25 million to the pursuer's solicitors who, in turn, had deposited it into accounts on behalf of the pursuer. There was no suggestion that the pursuer was not a suitable person to have responsibility for this money but she had no experience of or interest in the management of a large fund. Her only concern was for the best interests of J. With these best interests in view, she had identified a suitable residential property in which he and she might live together. It was available at a price of £230,000. An architect had been instructed to report on suitable adaptations to the property, the adaptations being costed at £82,000. The architect's fee in relation to this report was £3,725. Further reports had been obtained from a suitably qualified expert as to various items of computer equipment which would significantly improve the quality of J.'s life. The cost of this was £50,000. Conveyancing fees in relation to the acquisition of the property would amount to £4,382. Mr MacAulay submitted that this was an appropriate case for an exercise of the Court's jurisdiction in terms of section 13(1) of the 1995 Act.

Discussion and Decision
[5] The history and nature of the jurisdiction conferred by section 13 is discussed by Lord Carloway in *I.* v *Argyll & Clyde Health Board supra*. The expedient adopted in that case of a remit to the Accountant of Court to report on the circumstances of the case and to prepare a future scheme of management of the fund is clearly useful and, indeed necessary, if the Court is to have the benefit of independent information as to circumstances and authoritative advice as to how the fund should be best managed. Mr MacAulay was able to inform me that such remits have been made in a number of cases to his knowledge and that, accordingly, the Accountant of Court would readily understand what the Court required, notwithstanding the fact that the remit might appear to be stated in rather general terms. The Accountant of Court makes no charge for an initial report although there is statutory authority to charge fees in respect of the administration of funds. The Accountant is prepared to carry out investigations, including the interview of relevant parties.

[6] It appeared to me that the application before me had been made with the best of intentions. The pursuer proposes to incur quite significant expense which she has been advised will benefit J. She wishes to be reassured that this is a proper thing to do. She has therefore come to the Court to invite it to exercise what Lord Carloway identified as "a wide discretionary power": *I.* v *Argyll & Clyde Health Board supra* at 233G. I have, however, entertained some doubts as to my jurisdiction in the present case and, further, whether I am in a position to make a rational decision on the matters brought before me. As far as jurisdiction is concerned, the Court's power is conferred "where in any court proceedings a sum of money becomes *payable*" (emphasis added). Here, the sum of damages has been *paid*. Mr MacAulay did not suggest otherwise. The money was paid to the pursuer's agents who have deposited it in two bank accounts on behalf of the pursuer. These monies therefore belong to the pursuer, albeit that she holds them as trustee for J. It seemed to me that Mr MacAulay was correct when he accepted that "the horse has bolted". Looking at matters very broadly, the purpose of section 13 is to safeguard a number of interests: to allow a defender to obtain a good discharge, to relieve a pursuer of a responsibility which he or she may not wish to undertake, and, most importantly, to provide that monies received as damages are put into the hands of the person best suited to administer them for the benefit of the child whose damages they are. In this case the stage of paying over the damages has passed and, on at least one reading of section 13(1), so has the opportunity for the Court to exercise the jurisdiction. That said, I can see that fuller consideration of the issue might lead to a different conclusion on the question of jurisdiction and because it is desirable that full information should be available, I acceded to the proposal that I should remit the matter to the Accountant of Court to report. I do not, however, propose to make an order approving payment to the pursuer, either for the specified purposes or otherwise. On the basis of the information before me, the pursuer is entitled to apply the whole sum of damages paid by the defender for the benefit of J., without any further authorisation from the Court. She is, of course, acting in a trustee capacity and therefore will have to consider what expenditures are appropriate and, where they are substantial, take professional advice. She will need to balance the need to spend against the need to invest in order to provide funds for future expenditure. Nothing has been brought to my attention which would suggest that she does not understand that and, although she herself is not interested in the administration of the fund, through her legal advisers, she has engaged suitably qualified professionals to advise her, at least in respect of what is immediately necessary to improve J.'s quality of life. I do not see it as being open to me to give the directions sought first, because the funds have been paid over to the pursuer and therefore she is fully entitled to administer them as she considers to be in the best interests of J. and, second, because the information put before me was insufficient to allow me to make any fully informed decision. I do not mean that as a criticism and I do not wish to suggest that the very brief verbal summary of the circumstances that was provided by Mr MacAulay was other than absolutely accurate. However, Mr MacAulay was simply relaying the opinions of the pursuer and her advisers. No doubt these opinions are sound but that observation merely underlines how little I have to add to the decision making process. I can see that there may be circumstances where the Court might be in a position to come to a meaningful decision, for example, in relation to the purchase of a motor car required as a matter of urgency which was one of the issues for Lord Carloway in *I.* v *Argyll & Clyde Health Board*, but in the case of the application before me I consider that I would have been quite unable to come to any sort of sensible decision as to the appropriateness of the proposed courses of action, even if it were my decision to take, which I doubt.

[7] As I have already said, I am prepared to remit to the Accountant of Court to report. How matters will go forward when that report comes to hand is a question for another day but it would seem appropriate that the case be brought out by order for the Court to be advised as to what, if anything, is proposed.