



Re M, A MINOR CHILD
Royal Court
15th March 2018

JUDGMENT
23/2018

Application for guardianship of a child

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

IN THE MATTER OF THE GUARDIANSHIP Re M, A MINOR CHILD

Before Sir Richard John Collas, Bailiff and S M Jones,

D PL Hodgetts LVO, J G Hooley and D J Robilliard, Jurats

Thursday 15 March 2018

The Applicant appeared in person without an Advocate

1. On Thursday 15 March 2018, the Royal Court heard and granted an application for a guardian to be appointed to a minor child (“the Application”). The Application was unusual in that it was the intention of the family concerned that the guardianship should apply whilst the child was a minor and should continue in place after the child attains her majority at the age of 18 years. The remainder of the judgment is written in anonymised form so that it may be published without identifying the child concerned or her family. We refer to the child as “M”.
2. The Application was presented by the mother of M seeking her appointment as the sole guardian. It was supported by a family council comprising M’s maternal grandfather and grandmother who attended the court hearing. M’s sister, her only sibling, had written a letter in support of the appointment of her mother as guardian of M but was unable to attend because she is currently a student studying at an English university.
3. Also attached to the Application was a letter from the father of M who said that he had regular contact with M and was on good speaking terms with his ex-wife, M’s mother. He wrote that as the mother was M’s “main day to day carer any decisions that are to be made in M’s best interests should come directly from her”.

4. Medical evidence was provided in an affidavit sworn by M's general practitioner who had reviewed her most recently on 20 February 2018. He advised that she has typical autism and is at the severe end of the autism spectrum. He described how the condition is manifested in M and how it affects her understanding and comprehension of everyday life and her behaviour to the extent that he said "she will have a life-long need for somebody to be a Guardian".
5. The family council members confirmed that they supported the Application for their daughter to be appointed as guardian of M. They confirmed that they are aware that M's sister also supported the Application and informed the Court that M's sister is very supportive of her and assists greatly in providing the day to day care that M needs.
6. The Applicant explained to the Court that the Application had been brought in anticipation of M attaining the age of majority next year. She is currently in full time education and will be able to continue at school whilst she makes the transition into adult life. It is important for M to have routine and consistency in her life and it is the mother's wish to ensure that the changes which will inevitably happen in adulthood should have the least possible impact in order to achieve the smoothest transition possible in the circumstances. She will remain the principal carer for M and as part of the planning to enable her to continue in that role, she wishes to apply for guardianship in advance of M's 18th birthday.
7. In legal terms the Application was unusual in that it sought to combine in a single Order of the Court the guardianship of a minor continuing into adulthood. Under the customary law of this island, the two are treated differently. In the English language, both are called 'guardianship' but in the original French, guardianship of a minor was known as 'tutelle' and in respect of an adult as 'curatelle'.
8. Laurent Carey in his "Essai sur Les Institutions, Lois et Coûtumes" set out the law under the heading "Des Mineurs, et de Leurs Tuteurs et des Curateurs" at pages 171 to 177. Although the Essai was published in 1889, Laurent Carey had held the office of Juré-Jusiticier de la Cour Royale from 1765 to his death in 1769 at the age of 46 years. What he describes is therefore the customary law predating the Code Civil in France. He makes reference to Terrien whose Commentary on the customary law was first published in 1574.
9. The customary law relating to guardianship of both minors and adults has continued to develop and evolve; such development being a feature of the customary law which can adapt to sociological changes reflecting changes in society and everyday life of the community, without statutory interference. In matters concerning children, the Children (Guernsey and Alderney) Law, 2008, as amended (the "2008 Law") has introduced a completely new statutory regime. Rather than attempting to modify the customary law, it has borrowed heavily from Scottish Law. Where the customary law has not been expressly repealed, it must now be interpreted in the light of the new statutory regime. In particular the law relating to tutelle must be considered in the new context.

10. The 2008 Law has not expressly removed the power of the Royal Court to grant an Order of guardianship in respect of a minor child although it has introduced the concept of “parental responsibility” which consists of duties which may be considered to have replicated what the customary law would have required of a tuteur. Section 5(a) provides that:

a. *“5. Parental responsibility in relation to a child consists of –*

the duties –

- (i) *to safeguard and promote the child's health, education, development and welfare,*
- (ii) *to provide care, direction, guidance and control, in a manner appropriate to the age and understanding of the child,*
- (iii) *to determine all aspects of the child's upbringing,*
- (iv) *to provide a home for the child or otherwise regulate where the child shall live,*
- (v) *to maintain regular relations and direct contact with the child, if not living with the child,*
- (vi) *to act as the child's legal representative, and*
- (vii) *to safeguard, preserve and otherwise deal with the child's property,”*

11. Sections 6, 7 and 8 set out how parental responsibility for a child is acquired which, depending on the circumstances, may be by either or both of the parents, by the Committee for Health and Social Care or by any person in whose favour the Court may make a residence order or a parental responsibility order. Whilst the duty imposed on them under the 2008 Law replicate what the customary law required of a tuteur or guardian, the 2008 Law has not abolished the post of guardian for a minor child. Indeed, section 8(c) provides that parental responsibility may be acquired by *“A guardian, when his appointment as such takes effect under section 13”*. Section 13 is to be found in Part III of the 2008 Law entitled *“Guardians Appointed to Fulfil the Role of a Parent in Place of a Parent Who Has Died”*. That Part of the 2008 Law details the formalities that enable a parent to nominate in writing a person to be appointed guardian after their death subject to specified conditions including that the appointment must be given effect by court order.

12. The scope of the duties of the person with parental responsibility is such that there should no longer be any need for the Court to appoint a guardian under the customary law of tutelle. It might be argued that the 2008 Law has by implication repealed the law of tutelle but on this occasion no one was arguing against the Application. Consequently, the Bailiff directed the Jurats that as a matter of law they could grant the Application to appoint the mother as M’s guardian if they were so minded.

13. In the decision of the Jurats, the medical evidence supported the family's wish to ensure continuity in the interests of the welfare of M to help her to make the difficult transition into adulthood. Notwithstanding that the Court was exercising its customary law powers it was required to have regard to the matters that are included in the child welfare checklist in section 4 of the 2008 Law. The most relevant of those matters in the present case was "*the child's physical, emotional and educational needs*". The Jurats agreed with the submission of the mother, supported by the family council, that it would be in M's best interests to do everything possible to make the transition to adulthood as smooth as possible.
14. The Court took into account that if it were to make an order of guardianship with immediate effect, the order would not affect M's contact with her parents because the father and mother both have parental responsibility. Whilst the father supports the mother's Application, he has not agreed to relinquish parental responsibility and he will therefore retain the rights and responsibilities attaching thereto notwithstanding the appointment of the mother as guardian.
15. In such exceptional circumstances, the Court was satisfied that it was in the best interests of M's welfare to appoint her mother as guardian in advance of her 18th birthday. The Court directed that the order will continue to have effect after M attains the age of majority. It is only after that date that it will have real effect because prior to then the mother and father continue to have parental responsibility for M and will have to fulfil the duties thereby imposed on them.