Neutral Citation [2016] IEHC 757

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 420 JR]

BETWEEN

AO'D

APPLICANT

AND

JUDGE CONSTANTINE G. O'LEARY

RESPONDENT

AND

COLUM CAWLEY

THE CHILD AND FAMILY AGENCY

VAL KERR (GUARDIAN AD LITEM)

NOTICE PARTIES

JUDGMENT of Ms. Justice Baker delivered on the 30th day of November, 2016.

1. This judgement deals with the application for costs by a notice party against another notice party.

2. The third notice party is the guardian *ad litem* appointed to represent the interests of a child in care proceedings under the Child Care Act, 1991 as amended ("the Act of 1991") in the District Court and who was one of three notice parties in the judicial review in which I gave judgment on 14th October, 2016 [2016] IEHC 555.

3. The applicant is the mother of the child and she had the benefit of legal aid under the Civil Legal Aid scheme. No application is made for her costs.

4. The respondent took no part in the case, but the guardian *ad litem* has fully engaged with the proceedings, served a notice of grounds of opposition dated 16th November, 2015, two supporting affidavits and substantial legal submissions.

5. The application for judicial review concerned the correctness of an order made by Judge O'Leary in the District Court on 13th May, 2015, by which he ruled that the guardian *ad litem* be entitled to instruct a solicitor or solicitor and counsel who might, with leave of the District Court, act as advocate for the child in the same way as an advocate of any party in the proceedings under the Act of 1991.

6. The CFA supported the application in the District Court by which the guardian *ad litem* was appointed, and the impugned order of 13th May, 2015 by which Judge O'Leary identified the role and functions of the guardian so appointed. It took the opposite approach in the application for judicial review, and argued that the guardian ought not to be permitted to engage in the manner envisaged by the District Judge having regard to the statutory scheme under which she was appointed.

7. The CFA at an early stage identified that it did not propose to adopt an active role in the proceedings, and did not adopt any position on any factual matter. The written and oral legal submissions were tendered "to provide assistance" to me in my deliberations "by identifying and addressing certain aspects of the order" that may have implications for the conduct of other proceedings involving a guardian *ad litem*. The submissions, which were very helpful, addressed the relevant legal authorities and principles, and were made with a view to arguing that the statutory scheme did not permit the order as framed.

8. The application for judicial review was refused, and no application for costs is made by any party against the applicant. As a practical matter the guardian argues that the ongoing nature of the role she engages in respect of the child, and the need for close contact with the mother of the child, is inconsistent with the making of an order that would put her in a position of conflict with the mother. Of itself that would not be a ground that would suggest that a court ought not to make an order for costs against a parent in those circumstances, but it is a factor that must weigh to some extent in my discretion.

9. The guardian *ad litem* has applied for her costs against the CFA on a number of grounds relating to the nature of the child care proceedings, and because important interests of a child were sought to be protected in the course of the litigation.

10. To some extent the application by a notice party for costs against another notice party does not readily fit within the general characterisation of a costs application, and therefore it is difficult to determine the matter by the application of O. 99 of the Rules of the Superior Courts, or s. 14(2) of the Courts (Supplemental Provisions) Act 1961. No issue arose in any pleadings between the two relevant notice parties, and the guardian *ad litem* is seeking her costs against a party who did not participate fully in the proceedings.

The first argument: the interests of the child

11. This application for costs raises a troublesome question of when or whether costs can be awarded against a notice party with a statutory function of protecting the rights of children, where that body for perfectly sensible reasons may have opted not to support in High Court proceedings an order that it had actively supported in the District Court. Clearly the CFA took the view that the interest and welfare of the child in issue in the District Court proceedings warranted the order made by Judge O'Leary. Its approach to the High Court judicial review was one tempered by its desire to achieve clarity with regard to the proper interpretation of s. 26 of the Act of 1991, and the answer to the general question of statutory interpretation posed in the judicial review was anticipated to assist the Agency in its future approach to applications by a guardian *ad litem* in child care proceedings that he or she be granted legal representation for some or all of the District Court hearings.

12. The general proposition advanced by the guardian *ad litem* that she be awarded her costs because the issue was one where the

interests of a vulnerable child were to be protected is not a proposition that finds favour in the authorities. In *Curtin v. Dáil Éireann* [2006] IESC 27 (Unreported, Supreme Court, 6th April, 2006) the Supreme Court said that:

> "It would neither be possible nor desirable to lay down one definitive rule according to which exceptions are made to the general rule. For the discretionary function of the Court to be exercised in the context of each case militates against such a definitive rule of exception and it is also the reason why previous decisions on such a question are always of limited value."

13. MacMenamin J. giving judgment in the Supreme Court in *Child and Family Agency v. O.A.* [2015] IESC 52 made it clear that the fact that what was in issue was the vindication of family rights, or those of children or vulnerable persons, could not import a rule that costs would always be awarded, and the formulation of such a general principle was one ultimately for the Oireachtas. MacMenamin J. refused to accept that there existed a general rule that parents be automatically entitled to their costs as this might involve a judge implicitly "making a pre-determination as to the distribution of State funds, thereby calling into question the principle of the separation of powers".

14. I consider that the fact that the interests of a child already in the care of the State were in issue of itself does not warrant the award of costs in favour of the guardian against the CFA.

The second argument: matter of general public and legal importance

15. The guardian *ad litem* argues that the issues raised in this litigation were legal matters of general and particular legal importance, and in the course of the argument in the substantive case a number of observations regarding the uncertainty of the role of a guardian *ad litem* in child care cases were opened to me. Geoffrey Shannon in the 2nd edition of his book Child Law raised the point at para. 8.50. A judgment of the President of the District Court referred to at para. 103 of my judgment also raised the question.

16. The application for judicial review raised the question of how to characterise the role engaged by a guardian *ad litem*, whether the guardian could properly be described as a "party", or could be represented by solicitor and/or solicitor and counsel for some of the litigation, and were in my view matters of general legal concern as shown by those two illustrations. That the matter was one of general legal importance is apparent from the submissions filed by the CFA in the proceedings. At para. 3 of the written submissions counsel identified the purpose of making the submissions was:

> "… to provide assistance to this Honourable Court by identifying and addressing certain aspects of the Order made that may have implications for the conduct of other proceedings involving a guardian *ad litem*."

17. I consider that this case did raise an issue of substantial and general legal importance, and the guardian *ad litem* found herself in a position where she was arguing a point that came not to be argued by any of the other parties to the proceedings. The point of law was not one which concerned merely the interests and rights of the child the subject matter of the District Court proceedings, but the CFA in its submissions to the Court, and the guardian herself and the applicant, all in their own ways, made general arguments with regard to the proper interpretation of the statutory regime.

18. The principles governing the award of costs to unsuccessful parties where the litigation raises an issue of special and general public importance was considered in *Dunne v. Minister for the Environment, Heritage and Local Government & Ors.* [2008] 2 I.R. 775. The Supreme Court, however, held that these factors were not the determining factors in identifying "public interest litigation", and stressed that it was the legal issues raised rather than the subject matters themselves which were of special and general public importance.

19. Because of the approach the CFA opted to take to the application by Ms. O'D, and because it chose not to support the order the making of which it had actively supported in the District Court, the guardian *ad litem* did require to fully engage with and support the impugned order and make arguments regarding the legal question of general and public importance identified in the legal submissions. Had she not, the application for judicial review would have been effectively unopposed, and the question would not have been fully argued and determined.

20. The particular features in this case which bear on my discretion are the public and general points of legal importance were raised in the proceedings.

Discretion

21. Another factor that must bear on my discretion in considering the costs application by the guardian *ad litem* against the CFA is that a particular injustice will be visited upon the guardian who is a professional person, the extent and nature of whose role in the District Court proceedings was determined by an order made in the District Court with the support of the CFA if she had to bear herself the costs of defending that role which she undertook in a professional capacity and where her client, if the child can be termed a "client" for these purposes, is not and could never be in a position to pay her costs.

22. It cannot be the case, nor do I consider it to be correct, that a guardian *ad litem* in a judicial review concerning child care proceedings must always be entitled to recover the costs against the CFA. The "event" in this case is that the applicant failed to obtain the declaratory and other orders sought in the judicial review. The event was "lost" to that extent by the applicant, and one could, although I think it would be stretching language, say that the issue was also "lost" by the notice party. That analysis stretches language because the notice party opted not to file a notice of opposition and therefore not to engage in the litigation. But it did support the order it then chose to challenge in the application for judicial review. That factor also suggests that the CFA must bear the costs of the guardian ad litem.

Conclusion

23. The guardian *ad litem* is to be awarded her costs against the CFA in the unusual and complex circumstances giving rise to this application for costs, and I propose making an order in those terms.