Neutral Citation [2014] IEHC 697

THE HIGH COURT

Record No: 7661P/2014

IN THE MATTER OF C. MCE, A MINOR BORN ON THE 19TH OF APRIL,1998

AND IN THE MATTER OF ARTICLE 40.3 OF THE CONSTITUTION AND ARTICLES 41 AND 42 OF THE CONSTITUTION

AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964(AS AMENDED)

AND IN THE MATTER OF THE CHILD CARE ACT, 1991(AS AMENDED)

AND IN THE MATTER OF THE MENTAL HEALTH ACT, 2001(AS AMENDED)

BETWEEN:

U.MCE

Plaintiff

-and-

THE CHILD AND FAMILY AGENCY AND HEALTH SERVICE EXECUTIVE

Defendant

-and-

J.F

Notice Party

-and-

CQ, GUARDIAN AD LITEM

Notice Party

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 18th of December, 2014.

Introduction

1. These proceedings concern the plaintiff's application for costs arising from childcare proceedings against the Child and Family Agency and the Health Service Executive (hereinafter referred to as the "HSE").

2. The plaintiff is the mother of "C", a minor born on the 19th of April, 1998. "C" has exhibited challenging behaviours from an early age. On reaching adolescence, "C's" behaviours escalated to engaging in serious violence against family members and damaging the property of third parties.

3. On the 5th December, 2012, the plaintiff agreed to place "C" in voluntary care, so as to obtain a sound diagnosis of the challenging behaviours exhibited by "C", and in turn, receive the appropriate therapeutic care and support structures. "C" was placed at The Orchard Residential Care Facility.

4. In January 2014, an application was issued before the District Court pursuant to s.47 of the Child Care Act 1991, seeking directions from the Court in order to secure "C's" welfare. In May 2014, the Child and Family Agency obtained a psychiatric assessment of "C" from Dr. Sean O'Domhnaill, Consultant Psychciatrist. Dr. O'Domhnaill recommended that "C" be placed in a private residential facility, where the necessary psychiatric supports could be obtained. On these recommendations, the Child and Family Agency sought a residential placement for "C". During this time, "C" behaviours continued to deteriorate. These behaviours placed "C" and other individuals at significant risk of harm. From January 2014 to August 2014, "C" continued residential placement at The Orchard.

5. On the 28th August, 2014, the plaintiff issued proceedings in the High Court seeking orders compelling the Child and Family Agency to secure a bed for "C" at an approved residential centre. These proceedings were issued as "C's" behaviours were now manifesting in a manner that were placing her life at risk. On the 29th August, 2014, the plaintiff made an emergency application to the High Court, as a bed in an approved residential centre had not been identified nor obtained for "C". The High Court was notified that "C" would be placed at the Acorn unit in Mullingar, County Westmeath, for the forthcoming weekend. On conclusion of the submissions by the parties, MacEochaidh J. made the following orders:

> (i) An order directing the clinical directors of a number of hospitals to meet in order to seek to identify a bed for "C".
>
> (ii) An order that the care staff at the Acorn Lodge be provided with input from an appropriately qualified psychiatrist over the weekend in order to assist them in managing "C's" extremely difficult behaviours over the weekend.

6. On the 1st September, 2014, there was still no bed secured for "C". The matter was reviewed by Cross J. in the High Court. On the 2nd September, 2014, the parties informed the District Court that a bed was secured for "C" at Linn Dara, which is an approved centre for the purposes of the Mental Health Act 2001. The District Court granted an order detaining "C" pursuant to s.25 of the 2001 Act, on foot of an application by the HSE.

7. On the 30th October, 2014, this Court heard an application for costs on behalf of the plaintiff. At the hearing, the Child and Family Agency indicated that they would be seeking orders pursuant to Article 56 of Council Regulation (E.C) No. 2201/2003, to place "C" in a therapeutic facility outside the State.

8. These proceedings have been adjourned generally, and the plaintiff seeks an order for costs arising from the said proceedings.

Submissions of the Plaintiff

9. The first point raised by the plaintiff is the general principle of Irish litigation that "costs follow the event". Order 99 of the Rules of the Superior Courts 1986 governs the procedures and protocols to be adopted by the High Court when awarding costs in legal proceedings. The plaintiff submits that Order 99 rule 1, sub rules 1-4 of the 1986 Rules provides pertinent guidance to the Court in determining the issue of costs. Order 99 rule 1, sub rules 1-4 state as follows:

> *"1. Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by these Rules:*
>
> *(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.*
>
> *(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.*
>
> *(3) Subject to sub-rule (4A), the costs of every action, question, and issue tried by a jury shall follow the event unless the Court, for special cause, to be mentioned in the order, shall otherwise direct.*
>
> *(4) Subject to sub-rule (4A), the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."*

10. Counsel for the plaintiff concedes that the defendant commenced the initial proceedings in the District Court pursuant to s.47 of the Child Care Act 1991. However, the plaintiff points out that, notwithstanding the defendant commencing proceedings, the defendant failed to secure placement and treatment for "C". Thus, the plaintiff commenced emergency proceedings in the High Court to seek the necessary orders in respect of care and provision of services to "C". The plaintiff submits that their emergency application was successful in the High Court on the grounds that the aforesaid orders and directions were made by the Court and in turn, costs should follow the event.

11. The second point proffered by the plaintiff is that this Court, in determining the final award of costs, should not consider the fact that the plaintiff is in receipt of legal aid. The plaintiff highlights the Court's attention to s.33(2) of the Civil Legal Aid Act 1995, which states as follows;

> *"A court or tribunal shall make an order for costs in a matter in which any of the parties is in receipt of legal aid in like manner and to the like effect as the court or tribunal would otherwise make if no party was in receipt of legal aid and all parties had respectively obtained the services of a solicitor or barrister or both, as appropriate, at their own expense".*

12. In support of the applicability of s.33(2) of the 1995 Act to the current proceedings, the plaintiff relies on the decision of O'Malley J. in *Health Service Executive v OA* [2013] IEHC 172. *OA* concerned a consultative case stated from the District Court to the High Court. The District Court sought guidance on two points (at para 4);

> *"(i) In exercising my discretion [as a District Court judge] as to whether or not to grant costs to the Respondent [can I] take into account that the Respondent may have been entitled to receive legal aid and has access to legal aid.*
>
> *(ii) In exercising my discretion as to whether or not to grant costs to the Respondent [must I] take into account that the Respondent may have been entitled to legal aid and has access to legal aid."*

The learned High Court judge answered these two questions in the negative.

13. In *OA*, the HSE advanced the argument that their financial resources required protection and in light of this policy obligation, the Courts should refrain from granting an order of costs against the HSE in childcare proceedings, especially where the opposing parent/party could avail of legal aid. The HSE proffered that the Court only had power to award costs in two instances under the Child Care Act 1991, namely in applications brought pursuant to s.25 and s.26 of the 1991 Act respectively. O'Malley J. rejected the proposition that policy considerations required the Court to refuse to grant costs against the HSE in childcare proceedings. The learned judge held that such a proposition was contrary to the legislative policy of the Civil Legal Aid Act 1995, in particular s.28(3) and s.33(2) of the said Act. Counsel for the plaintiff in the present proceedings draws the Court's attention to the judgment of O'Malley J., which states(at paras 41-44):

> *"41. By contrast, the rule now contended for by the HSE not only has no authoritative basis but is, it seems to me, plainly contrary to the explicit statement of legislative policy in the Civil Legal Aid Act. That Act postdates the Child Care Act. It is clearly applicable to child care proceedings, given the reference in s.28(3) to proceedings concerning "the welfare of (including the custody of or access to) a child". It requires, in s.33, that an application for costs should be made on behalf of the legally aided party and that the court should treat the application as it would that of a party without legal aid. There is no exception to this requirement for cases involving children. It follows that there is no statutory basis for the assertion that the legislative policy is that costs should not be awarded and indeed the contrary appears to be the case.*
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> *42. In Dunne v The Minster for the Environment, Heritage and Local Government [2008] 2 I.R 775, the Supreme Court reversed a High Court decision to award costs to an unsuccessful plaintiff. The award had been made on the basis that particular considerations applied to cases where (1) the plaintiff was acting in the public interest in a matter that involved no private personal advantage and (2) the issues raised were of sufficient general importance to warrant an order for costs being made in the plaintiffs favour. Giving the judgment of the Court, Murray CJ said (at p.783): "The rule of law that costs normally follow the event, that the successful party to the proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis. As a counterpoint to that general rule of law, the court has a discretionary jurisdiction to vary or depart from the rule of law if, in special circumstances of a case, the interests of justice require that it should do. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of costs did not apply that would be a matter for legislation since it is not for the courts to establish a cohesive code according to which costs would always be imposed on certain successful defendant for the benefit of certain unsuccessful plaintiffs.*
>
> *The principle expounded here seems to me to be equally applicable to the contention that there are certain types of*

defendant against whom an award of costs should never be made. If the general rule, combined with the court's discretionary power to ensure that justice is done, is to be set aside it would, in my view, require legislative intervention.

43. It may well be that a practice has grown up of not awarding costs where the relevant party is legally aided, as happened in the Supreme Court in HSE v A.N (unrep. Fennelly J, 14TH April, 2010). It may also be that in many cases that is a proper exercise of the court's discretion. However, I have not been directed to any judgment on the point where s.33 had been considered. I am therefore not prepared to endorse such a practice as having the status of a legal principle.

44. I therefore conclude that the District Court does have a jurisdiction, based on statute and on the District Court Rules, to award costs in proceedings under the Child Care Act, 1991 and that it is not disbarred from doing so by policy consideration relating to the function of the HSE under that Act."

14. The plaintiff submits that this Court should follow the decision of O'Malley J in *Health Service Executive v OA* [2013] IEHC 172 as an authoritative statement of the law.

15. The final point raised by Counsel for the plaintiff is that this Court holds an ultimate discretion to award costs in a manner that it believes just and equitable. In supporting this proposition, the plaintiff cites the decision of *W.Y.Y.P v P.C* [2013] IESC 12, where the Supreme Court held (at paras 39-40:

"39. The award of costs is an exercise of discretion of the trial judge, who has considered all the circumstances of the proceedings before her or him, and decided the issues. This Court is very reluctant to interfere with the exercise of such discretion.

40. In this case, the learned High Court judge had regard to the general rule and the discretion afforded to him not to follow the general rule when the interests of justice required it, especially in the context of matrimonial proceedings. The High Court exercised its discretion within jurisdiction".

Submissions of the Defendant

16. The first substantive submission of the defendant is that in child care proceedings, if a parent/party is in receipt of legal aid under the provisions of the Civil Legal Aid Act 1995, the Courts should not award costs against the HSE. In support of this proposition, the defendant relies on the *Health Service Executive v A.N* (Unreported, Supreme Court, Fennelly J. 14th April, 2010). *A.N* concerned the welfare of a minor in secure care. Orders were issued by the Court under the Irish Constitution, the Child Care Act 1991 and under the inherent jurisdiction of the High Court. The issue of the period of detention of the minor came before the Supreme Court. The order of detention issued by the High Court outlined that the minor was to be detained for eighteen months, where the HSE and the other parties before the Court had agreed that said detention should not exceed four weeks. On appeal, the Supreme Court substituted the said order. Counsel for the defendant in the current proceedings directs the Court's attention to the judgment of Fennelly J., where he states (at pg 2):

"The Court is satisfied that the guardian ad litem is entitled to the costs of the appeal as against the Health Service Executive. No doubt the Health Service Executive was not the originator of the problem but nonetheless the just order is to award the costs against the Health Service Executive. On the other hand, the Court will not grant costs to the mother. She has legal aid. Of course, it is true that the application must be made because of the provisions of the Act but this Court has a discretion to deal with it in exercise of its discretion and in the exercise of its discretion will make no orders as to the costs".

17. The defendant submits that the above passage provides clear guidance, that in circumstances where an opposing parent/party is already legally aided in childcare proceedings, the HSE should not be condemned in costs a second time and that the Court's discretion, properly exercised, would favour, no order as to costs being made with regard to that legally aided party.

18. Counsel for the defendant submits further that a refusal of an award of costs against the HSE, where an opposing parent/party is legally aided, would not hinder the legally aided party's access to the Courts. The defendant seems to raise the point that the very fact that a party is legal aided vindicates that party's right to access the Courts, as guaranteed under Article 40.3 of the Irish Constitution 1937 and Article 6 of the European Convention on Human Rights.

19. The second substantive submission proffered by the defendant addresses the dicta of O'Malley J. in *Health Service Executive v. OA* [2013] IEHC 172. The defendant recognises that the learned judge held that the discretion of the District Court judge cannot be guided and informed by the fact that a party would have been entitled to receive legal aid and/or has access to legal aid, when deciding the issue of costs. However, the defendant submits that in OA, the High Court merely ruled out the fact that a party's receipt of legal aid cannot inform the Court's discretion on awarding costs. Counsel for the defendant asserts that the High Court's decision in OA did not establish an authority permitting legally aided parties to obtain their costs in minor or secure care cases before the High Court.

20. The defendant raises the point that an ancillary consultative case stated has been issued from the Circuit Court to the Supreme Court on the cost issues in the OA proceedings. It is submitted by the defendant that it is unreasonable for this Court to adjudicate on the present issue of costs where the Supreme Court will provide further guidance on this topic in due course.

Conclusion

21. This Court has considered the submissions of both the plaintiff and the defendant extensively. On the 29th August 2014, the plaintiff brought an emergency application to the High Court, seeking orders compelling the defendants to provide a bed for "C" in an approved therapeutic centre, as stipulated under the Mental Health Act 2001. This Court is of the view that the plaintiff's actions, in seeking the aforementioned orders, were necessitated by "C's" deteriorating behaviour at The Orchard Residential Care Facility. Ultimately, the plaintiff was successful in their application to the High Court. This Court takes cognisance of the general procedural principle that "costs follow the event" as provided by Order 99 of the Rules of the Superior Courts 1986.

22. The plaintiff was in receipt of legal aid when she issued the aforesaid emergency application. Counsel for the defendant submits that an order of costs should not be awarded against the HSE as the plaintiff was in receipt of legal aid. Section 33(2) of the Civil Aid Act 1995 obligates any court or tribunal to make an order for costs in a matter in which any of the parties are in receipt of legal aid.

Thus, the fact that a party is in receipt of legal aid should not prejudice their entitlement to an order of costs where appropriate. This point was reiterated by O'Malley J. in *Health Service Executive v OA* [2013] IEHC 172 (at para 41).

23. Counsel for the defendant claims that this Court should follow the *ex-tempore* decision of Fennelly J. in *Health Service Executive v AN* (Unreported, Supreme Court, Fennelly J.,14th April, 2010), where the learned judge exercised his discretion in refusing an order of costs in favour of a party already legally aided. In his judgment, Fennelly J. states (at pg. 2):

> *"The Court is satisfied that the guardian ad litem is entitled to the costs of the appeal as against the Health Service Executive. No doubt the Health Service Executive was the originator of the problem but nonetheless the just order is to award the costs against the Health Service Executive. On the other hand the court will not grant costs to the mother. She has legal aid. Of course, it is true that the application must be made because of the provisions of the Act but this Court has a discretion to deal with and in the exercise of its discretion will make no order as to costs".*

It is the opinion of this Court that the Act referred to by the learned judge in the above passage is the Civil Legal Act 1995. In his judgment, the learned judge outlines that the mother in *AN* was obliged to make an application for costs even though she was in receipt of legal aid. It should be noted that s.33(4) of the 1995 Act obligates a party who is receipt of legal aid to seek their costs on the conclusion of legal proceedings. It is the opinion of this Court that, in *AN*, the learned Supreme Court Judge exercised his discretion to refuse an award of costs against the HSE with regard to the particular facts raised in that case. Fennelly J's recognition of a judicial discretion in awarding costs is of the utmost importance. It is this very discretion that facilitates justicable fluidity and permits the judicial branch to engage in a pragmatic consideration of the circumstances of each case so as to ensure that a just and equitable result is reached in all cases before the Courts. This proposition is supported by the dicta of Murray C.J. in *Dunne v The Minster for the Environment, Heritage and Local Government* [2008] 2 I.R 775 (at pg. 783).

24. Under Order 99 rule 1(4) of the Rules of the Superior Courts 1986, this Court holds a discretion to award cost as it sees fit. This discretion is guided by the general procedural principle that "costs follow the event" as prescribed under Order 99 rule 1(4) of the aforesaid rules.

25. In the present proceedings, it is the view of this Court that the plaintiff was obligated to bring an emergency application before the High Court. It is the opinion of this Court that the said application was motivated by a lack of effective affirmative action by the HSE in securing placement for "C" in an approved therapeutic centre as stipulated under the Mental Health Act 2001. This Court recognises that the plaintiff was successful in her application before the High Court and this experience has been both distressing for herself and her daughter.

26. For these reasons, this Court in both following the general principle that "costs follow the event", coupled with this Court's discretion to provide a just and equitable result with consideration to the particular facts of this case, makes an order of costs in favour of the plaintiff.