THE HIGH COURT

JUDICIAL REVIEW

[2015 No590JR]

BETWEEN

B.W.

APPLICANT

AND

THE CHILD AND FAMILY AGENCY.

RESPONDENT

JUDGMENT of Mr. Justice White delivered on the 13th of October, 2017

On the 2nd November 2015, the Applicant was granted leave to bring judicial review proceedings for the following reliefs,

> (i) An Order of *Certiorari* quashing the District Court Order refusing to grant the Applicant costs, on 28th July, 2015, in respect of Interim Care Order proceedings.
>
> (ii) A declaration that District Judge Gearty erred in law and in jurisdiction by failing to cite reasons for refusing to grant the Applicant's costs in respect of the Interim Care Order proceedings on 28th July, 2015.
>
> (iii) An order of Certiorari quashing the District Court order refusing to grant the applicant costs made by District Judge Hamill on 17th September, 2015, in respect of the Interim Care Order proceedings.
>
> (iv) A declaration that District Judge Hamill erred in law and in jurisdiction by refusing to grant the Applicant costs in respect of Interim Care Order proceedings on 17th September, 2015.
>
> *(v) A Declaration that it was in the best interest of the children and in the interest of justice that the Applicant was represented in the Interim Care Order proceedings given the gravity and complexity of the allegations in issue.*

1. The statement grounding the application for judicial review was dated 13th November, 2015, although the order granting leave to bring the judicial review proceedings was dated 2nd November, 2015. Dermot Monaghan, Solicitor, on behalf of the Applicant deposed an affidavit on 13th November, 2015. The Applicant deposed an affidavit on 13th November, 2015. The motion was issued on 13th November, 2015, originally returnable for 12th January, 2016. The Statement of Opposition was filed on 12th January, 2016, accompanied by a verifying affidavit of Louise McDarby solicitor sworn on 12th January, 2016. Dermot Monaghan deposed a replying affidavit on 29th April, 2016.

2. The background to the application for judicial review relates to care proceedings issued by the Respondent pursuant to the provisions of the Child Care Act 1991.

3. The Applicant's daughter, J, in an interview with representatives of the Respondent on Friday, 24th July, 2015, alleged she was sexually abused between the ages of 7 and 18 by the Applicant with sexual intercourse commencing at approximately 11 years of age. J alleged that she bore a child, D, born on 5th April, 2005, and that the father of the child was the Applicant. J made further allegations that other grandchildren of the Applicant were children of her female siblings.

4. It is useful to set out the principles in the Supreme Court decision of the *Child and Family Agency v. O.A,* [2015] IESC 52 as these are the guiding principles for the award of costs in care proceedings. The practice is that the Respondent does not seek a costs order against the parent, guardian or person in *loco parentis* of a child when an application for a care order is made. The relevant extracts from the judgment are as follows:-

> "I think the starting point should be that there should be no order for costs in favour of parent respondents in District Court care proceedings unless there are distinct features to the case which might include:
>
> > (i) A conclusion that the CFA had acted capriciously, arbitrarily or unreasonably in commencing or maintaining the proceedings;
> >
> > (ii) Where the outcome of the case was particularly clear and compelling;
> >
> > (iii) Where a particular injustice would be visited on the parents, or another party, if they were left to bear the costs, having regard to the length and complexity of the proceedings;
> >
> > (iv) In any case in which a District Court seeks to depart from the general default position, and to award costs, it is necessary to give reasons. These reasons must identify some clear feature or issue in the case which rendered the case truly exceptional. It is true all cases are distinct, but not all cases are exceptional. The reason for the distinction rendering a costs order justified must go to whether or not there was some unusual or unprecedented issue, or issues, which required determination or whether the case properly, and within jurisdiction, determined a point that had application to a range of other cases.
>
> Were a District Court to adopt this approach, a Circuit Court Judge on appeal should be slow to interfere with a decision of the District Court, especially when the Circuit Court Judge has not engaged in a full hearing. The effect of these general guidelines would be to accord, perhaps, greater leeway for the exercise of the District Court's discretion, but within jurisdiction. Different considerations would often apply in relation to child care proceedings in the High Court where the Court is exercising its inherent jurisdiction. Very frequently the cases in that category address situations where there is no direct precedent, where the same statutory considerations do not come into play; and where, frequently, the CFA

> acknowledges that due to the nature and complexity of the case it would be unduly burdensome for parents or other parties to bear their own costs." (Para 49)

5. On 27th July, 2015, at Monaghan District Court by *ex parte* application, the Respondent sought and was granted an Emergency Care Order pursuant to the provisions of s. 13(1) of the Act. The application was made returnable for the following day, 28th July, 2015, to Dundalk District Court. The children taken into care by way of emergency care order were D and G females and T male. G's date of birth was 9th January, 1999 and was a person with profound special needs. T. also had special needs.

6. At Dundalk District Court, the Applicant was initially unrepresented but then instructed Ms Adelle Carolan of Monaghan and Company Solicitors who, in turn, instructed counsel, Ms. Irene Sands, B.L. Ms. Louise McDarby of McGovern Solicitors was acting for the Respondent. There were discussions between the parties. A private care arrangement had been arranged for T. which was acceptable to the Respondent. In the course of the negotiations during the day at Dundalk District Court on 28th July, 2015, the Applicant agreed to give a sample for DNA testing.

7. The application proceeded for an interim care order pursuant to the provisions of s. 17 of the Act in respect of D. and G. Evidence was given to the court by Ms. Deborah Conlon, a senior social worker. Once the learned judge had granted the interim care order for a period up to 13th August, 2015, counsel for the Applicant applied for the costs of the hearing. The costs application was opposed by the solicitor for the Respondent.

8. Detailed submissions were made to the judge on the costs issue. The principles in the Supreme Court judgement *Child and Family Agency v. O.A.*, were opened to the Court. The learned judge refused to grant an order for costs in favour of the Applicant.

9. The proceedings came before the District Court on a number of subsequent dates, when the Interim Care Order was renewed. Those dates were 13th 20th 27th August, and 1st and10th September.

10. On 17th September, 2015, the Applicant through counsel made an application for the costs of all the interim hearings which had been reserved to that date. Written submissions had been furnished in advance to District Judge Hamill. It was acknowledged at this hearing by the Applicant that he was the father of the child, D., as DNA testing had established this.

11. The principles in the *O.A.* judgment were argued before Judge Hamill. He decided not to award costs. According to the affidavit of Louise McDarby sworn on 12th January, 2016, Judge Hamill stated:-

> "From the decision of the Supreme Court in giving consideration to all the ingredients, particularly the examples given by Mr. Justice MacMenamin, not everything has been stated but there are a number of themes in these cases. In relation to Mr. W this is not a category where the legal team came on record before the O.A. decision. There was no element of a lack of basic understanding of the whole matter. Mr. W knew that he was potentially the father. Mr. W had intercourse with his child. I refuse the application to award costs."

Submissions on Failure to give reasons for refusal of costs order on 28th July 2015.

12. The Applicant has submitted that the refusal of the costs order of 28th of July 2015. was made in breach of fundamental legal principles as the learned judge did not give any reasons. The court accepts there was no opportunity on the part of the Applicant's counsel to clarify the costs order as the case was last on the list on that date. The learned judge was a movable judge at the time and was not returning to that jurisdiction.

13. The Applicant relies on the decision of the Supreme Court in *Oates v. Browne & Anor* [2016] IESC 7, a judgment of the Supreme Court of 29th February, 2016, set out from paras. 41 – 54 of the judgment. Counsel for the Respondent drew the court's attention to a further Supreme Court judgment, that of *Kenny v. District Judge Coughlan & Anor*, a judgment delivered by Denham C.J. on 5th March, 2014.the Respondent firstly relied on a passage from the learned High Court Judge's decision that of O'Neill J. Denham C.J. dealt with the matters at para. 20 to 24 of the judgment.

Submissions on potential prejudice to the Applicant because of DNA test.

The submission on behalf of the Applicant common to both applications for costs on 28th July, 2015 and 17th September, 2015, related to the position of the Applicant who was potentially facing criminal prosecution for incest. It was submitted this was a crucial factor in the consideration of "exceptional" within the terms of the *O.A.* decision of the Supreme Court.

The Applicant relied on the decision of the Supreme Court in *DPP v. Gormely & Anor* [2014] 2 I.R. 591 and opened paras 54, 82, 94 – 100, and 104 of the judgment.

14. It was submitted that this judgment was applicable by analogy to a person such as the Applicant whom it was alleged had fathered a child with his daughter. It was submitted that he was entitled to the provision of legal representation in the course of the process of the interim care application as he exposed himself to self incrimination in respect of the crime of incest, when he consented to a DNA test.

15. There is no evidence to suggest in the affidavits that this submission was made to either learned judges on the application for costs.

16. The Respondent has submitted that judicial review is inappropriate in respect of the costs orders as they were made on the merits applying the principles in O.A. and if the Applicant had a difficulty with the refusal to grant costs, he had a right of appeal to the Circuit Court.

17. The Respondent relied on the judgment of the High Court in *AMC v. Child and Family Agency*, a judgment of Noonan J. delivered on 27th January, 2017, in respect of a similar application in respect of costs of care proceedings and further relied on the judgment quoted in that judgment in *Sweeney v. District Judge Fahy* [2004] IESC 50.

Conclusion

18. The principles in *O.A.* were opened to the Court on 28th July, 2015. The

19. default position was that costs should not be awarded in favour of a parent, guardian or person *in loco parentis* against the

Respondent. There are exceptions. If an order for costs is to be awarded against the Respondent, there is a responsibility on the learned judge to give reasons why costs are being awarded.

The decision in *Oates* did not overturn *Kenny*. The decision of the learned judge on 28th July, 2015, was obvious. She did not consider the exceptional circumstances as laid down in O.A. applied and the default position was that she should not grant costs. In those circumstances, the principles in Kenny apply and I do not consider that there is a ground for judicial review.

20. The proceedings before Dundalk District Court were proceedings pursuant to the Childcare Act 1991, considering the welfare and best interests of children. These were not criminal proceedings. The Applicant was not in custody, and had not been charged with any criminal offence. He was not obliged by law to consent to the provision of any sample for DNA purposes. It was not submitted to either judge that this was an exceptional reason pursuant to the principles in *O.A.* These proceedings were not analogous to criminal proceedings and the principles in *DPP v. Gormley* and *White* do not apply.

21. There was a full hearing before the learned judge on 17th September, 2015, when written submissions had been received in advance. Submissions were made on behalf of the Applicant and the Respondent and the learned judge decided not to award costs. He was entitled to take the conduct of the Applicant into consideration in deciding if he was going to decide costs and he decided same on the principles in the O.A. case and gave reasons. His decision has no deficiency in law or jurisdiction. It was based on the merits and if the Applicant was dissatisfied he had a right of appeal to the Circuit Court but he is not entitled to judicial review.