**THE HIGH COURT**

**[2014 No. 9187 P]**

**IN THE MATTER OF C.M., A MINOR**

**AND IN THE MATTER OF ARTICLE 56 OF COUNCIL REGULATION (EC) NO. 2201/2003 OF 27 NOVEMBER 2003 CONCERNING JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN MATRIMONIAL MATTERS AND MATTERS OF PARENTAL RESPONSIBILITY**

**AND IN THE MATTER OF ARTICLE 40.3 AND ARTICLES 41, 42 AND 42A 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 INHERENT JURISDICTION OF THE HIGH COURT**

**BETWEEN**

**CHILD AND FAMILY AGENCY**

**PLAINTIFF**

**AND**

**C.M., A MINOR REPRESENTED BY HER GUARDIAN AD LITEM CLAIRE QUINN**

**AND U.M. (THE MOTHER) AND J.F. (THE FATHER)**

**DEFENDANTS**

**AND**

**HEALTH SERVICE EXECUTIVE**

**NOTICE PARTY**

**JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 7th day of April, 2017**

1. This judgment concerns an application for costs on behalf of U.M., the mother of the young person the subject matter of these proceedings.

**Background**

2. This case has an extensive history. C.M. exhibited concerning behaviours from a very young age that escalated to a point where her mother agreed to place her in voluntary care on or about 5th December, 2012 when C. was 14 years old. C. was placed in a residential care facility and continued to deteriorate. In May 2014, C. was psychiatrically assessed and there was a recommendation that she be placed in a private residential facility where the necessary psychiatric supports could be provided.

3. In circumstances where C.'s behaviours were placing her life at risk, proceedings were issued by the mother in the High Court on 28th August, 2014 seeking orders compelling the Child and Family Agency to provide a bed in an approved centre for C. With the assistance of the Court, a bed was found for C. in Linn Dara, an approved centre for the purposes of the Mental Health Act 2001 operated by the HSE, on 2nd September, 2014. By judgment delivered on 18th December, 2014, this Court made an order for costs in favour of the mother, on the basis that costs should follow the event, this court exercised its discretion to provide a just and equitable result with reference to the particular facts of the case at that stage.

4. The Child and Family Agency felt that Linn Dara was not an appropriate place for her and identified a secure placement in the United Kingdom at Huntercombe Hospital where C. was transferred on 3rd November, 2014 by High Court order. While C. was being treated in Huntercombe she was diagnosed with high functioning autism pathological demand avoidance subtype which is a rare diagnosis requiring a careful and specialised clinical response. By the summer of 2015 Huntercombe Hospital was clearly stating that C. was ready for discharge but there was a difficulty in finding a suitable placement in Ireland. It is accepted by the Court that there were significant efforts made including interagency meetings and assessments and Nua Healthcare was identified as potentially appropriate.

5. The mother issued a motion on 27th July, 2015 seeking to compel the Child and Family Agency and/or the Health Service Executive to provide an appropriate placement within the State for C. A placement was identified in the State in partnership between two private organisations, Studio III and Positive Futures. The independent expert, Dr. McCreadie had concerns about the Nua Healthcare plan. This Court heard evidence on a number of occasions between October 2015 and April 2016 from these organisations and from a number of medical experts.

6. Following consideration of a number of options, an agreement emerged between the various parties that Studio III would be invited to participate, that documentation would be provided to them and that they would be asked to prepare a report indicating the position regarding the provision of a placement. It became apparent that there was a necessity for coordination with the HSE as the lead statutory agency in relation to the provision of mental health services. This Court heard evidence from expert witnesses called by the HSE; Professor Louise Gallagher, Dr. Brendan Doody and Brendan McCormack. The HSE did not believe that the Studio III proposal was appropriate and they continued to advocate for the Nua Healthcare proposal.

7. The relevant order of this Court dated 15th March, 2016 directed:-

> "That the Child and Family Agency the HSE and all parties herein do forthwith take all necessary steps to give effect to a proper transition plan and a proper after care package plan and place for the said CM the minor in the title hereof."

8. After a protracted process of identifying a placement, recruiting staff and identifying suitable accommodation, C. was ultimately returned to this jurisdiction on 13th April, 2016.

**Legal Submissions on behalf of the Mother**

9. This is an application on behalf of the mother for her costs in relation to the motion brought by her to secure C.'s return to this jurisdiction to an appropriate placement within the State in accordance with the clinical recommendations of Dr. McCreadie, independent expert. It was somewhat unusual for the mother to be the one to bring this motion. Her legal team made extensive efforts to identify appropriate experts and services in order to assist the court in making such directions as were necessary to ensure that there was an appropriate placement in this jurisdiction.

10. The application for costs was brought against the Child and Family Agency and/or the Health Service Executive. However, during the hearing of this application, counsel for the mother clarified that the application was against the HSE as they are the providers of mental health services in Ireland. Counsel for the mother also noted that the HSE were always involved in this case, they were the original applicants prior to the foundation of the Child and Family Agency and they remained "in the frame" although not officially joined as a notice party until approximately October, 2015.

11. The fundamental rule in relation to costs is that costs follow the event as expressed by Order 99 of the Rules of the Superior Courts 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.
>
> (…)
>
> (4) The costs of every issue of fact or law raised upon a claim or counterclaim shall unless otherwise ordered follow the event."

12. Owing to the lack of a suitable placement in this jurisdiction for C. to return to her discharge from Huntercombe was delayed notwithstanding the absence of an ongoing therapeutic benefit and this necessitated the bringing of the motion by the mother. This motion ultimately led to a placement for C. in this State deemed appropriate to the unique circumstances of her presentation. It was submitted on behalf of the mother that it was her proposition that was followed and that the costs should follow this.

13. The mother obtained legal representation from the Legal Aid Board under the provisions of the Civil Legal Aid Act 1995. The relevant provision in relation to costs is s. 33 which provides as follows:-

> "33.—(1) In this section "costs" includes all outlays including solicitors' and witnesses' costs and expenses and barristers' fees.
>
> (2) 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.
>
> (3) Subject to subsection (8), an applicant for legal aid or advice shall take all possible steps to ensure that any right he or she possesses to be indemnified either in whole or in part in respect of expenses which would, but for this Act, be required to be incurred by him or her in the matter, will, in respect of expenses incurred by the Board on his or her behalf in the matter and not yet reimbursed to the Board, inure for the benefit of the Fund.
>
> (4) A solicitor of the Board nominated for the purpose or a solicitor engaged by the Board under section 11 to provide legal aid or advice to a person in a matter shall take all necessary steps to recover any costs recoverable by such person whether by order of any court or tribunal or by virtue of any settlement reached to avoid or bring an end to any proceedings or otherwise, and shall pay any costs so recovered into the Fund.
>
> (5) A person in receipt of legal aid or advice under this Act shall not agree with any party not so in receipt to forego any costs or to meet any costs of any such party or to accept any sum in satisfaction of his costs or the costs of the Board in the matter, save with the prior approval of the Board, and the Board may make it a condition of such approval that any or all of its costs shall be paid out of any property or sum recovered by the said person by virtue of the agreement."

It was submitted on behalf of the mother that she should not be treated differently in an application for costs merely because she obtained legal aid. Counsel for the mother stated that there is no legislative preferential treatment of one state body over another in terms of granting costs and that the Court should not decline to grant costs on any basis of preference between state bodies.

14. Counsel for the mother cited the case of *Health Service Executive v. O.A.* [2013] IEHC 172 where the High Court rejected the contention of the HSE that there was a policy position that favoured the protection of its resources as follows:-

> "67. The HSE has advanced as a rationale that public policy favours the protection of its resources. This argument, however, depends on the assumption that s. 33 of the Civil Legal Aid Act 1995 is to be regarded as a dead letter and I have already said that I am not prepared to accept that as a matter of law.
>
> 68. (…) Costs are an aspect of the right of access to the Courts per Finlay P. in *Hennehan v. Allied Irish Banks* (unrep. 19th Oct., 1985)
>
> > "Jurisdiction to award costs is part of the ancillary machinery associated with access of citizens to the Courts [and] should be construed in the light of the constitutional origin of that right of access."

It was submitted that this aspect of the High Court decision was not disturbed by the Supreme Court. It was further submitted that this Court, in determining the issue of costs in this application must have regard to s. 33, the broader constitutional context and the usual rules of court applicable to costs. Counsel for the mother submitted that an application for costs by someone who is legally aided should be treated by the court hearing the application in the same manner as that for any other applicant and there are no exceptions.

15. Counsel for the mother submitted that the court has a discretion in relation to an order for costs as set out in *W.Y.Y.P. v. P.C.* [2013] IESC 12 as follows:-

> "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."

16. It was further submitted that the Court should take into account the very recent decision of Abbott J. in *Health Service Executive v. M.J.* (unreported, 27th January, 2017) where he made an order for costs in favour of the parents against the HSE in child care proceedings. Counsel for the mother submitted that this case was part of a clear line of authority in relation to costs in proceedings such as these.

**Legal Submissions on behalf of the Child and Family Agency**

17. The Agency is opposing the application for costs against it. Counsel for the Agency stated simply that they are of the view that they do not owe these monies to the Legal Aid Board and they should not be ordered to pay their costs in the circumstances.

18. It was submitted on behalf of the Agency that it was common case that C. needed to be placed in a suitable step down residential facility where her extensive and complex mental health needs could be met.

19. It was submitted that all the relevant authorities make it clear that the discretion of the court in respect of costs in cases of this type will be guided by certain general principles but ultimately are very fact dependent.

20. Counsel for the Agency submitted that there is no event for costs to follow in this case as the logic presented on behalf of the mother that because ultimately the provision made for the return of C. to this jurisdiction was in line with her preferences it follows that she should obtain an order for costs against the Agency was misplaced. The motion brought by the mother was listed for hearing on 31st July, 2015 although it did not proceed on that day as the parties, following discussions, reached an agreement reduced to writing to the effect that the parties would invite Studio III to prepare a proposal to provide care for C. in Ireland, which would then be considered by all parties. It was submitted that the Agency should not have been the subject of any further applications as the Agency was supporting the plan and the only remaining issue was the stance of the Health Service Executive. It was further submitted that it was the role of the HSE was central to any proposal to return C. to this jurisdiction as it was the public body with statutory and practical responsibility for the provision of the mental health services required by C. It was also submitted that it cannot be said that the delay in C.'s return could be attributed to the Agency. In terms of the application of Order 99 principles, there was no controversy between the Agency and the mother and there is a difficulty in identifying an "event" which the costs might follow. It was submitted that there is not a clear basis for the Court to find that, in effect, one party succeeded and the other party lost.

21. It was submitted by counsel on behalf of the Agency that, as in all such applications of this type, the Court is entitled to consider the respective roles and stances of the parties. It was submitted that the court should take into account that the Agency does not have statutory powers to establish a once off specialised child psychiatric high support step down placement. The Child and Family Agency Act 2013 and the Health Act 2004 expressly provide for the statutory powers of the two statutory bodies. It was further submitted that the Agency supported the type of provision of services that the mother was seeking. Counsel for the Agency stated that the Agency could never have complied with any order granted to the mother on foot of the original motion as it would not have been within its statutory remit. It was submitted that the Court and the parties embarked on a common sense approach and used the inherent jurisdiction in a way to vindicate the rights of the child and ensure a safe and effective transition home.

22. Counsel for the Agency set out that, while the fact that the mother is legally aided does not preclude the Court from awarding costs, it can and should consider the fact that all costs in this case ultimately are funded from the public purse. There is no question of the mother suffering any personal prejudice or loss if the application for costs is refused. The Agency acknowledges that the existence of the s. 33 of the Civil Legal Aid Act 1995 requires the legal team acting on behalf of a legally aided client to apply for costs where appropriate. Counsel for the Agency submitted that while the Supreme Court decision in *Child and Family Agency v. O.A.* [2015] IESC 52 addressed the question of how costs should be awarded in District and Circuit Court child care proceedings it can also apply to the instant case. MacMenamin J. noted that there is an inherent frailty in seeking to devise and apply inflexible principles of general application in cases of this nature and outlined as follows:-

> "39. I pause here to observe that, the use of the term "the event", as in "costs follow the event" is not always, in itself, a satisfactory criterion, in the context of child care cases, where, as here, there may be a number of "events", and there are different orders made as part of a continuum. The term "outcome" may be more apposite approach when considering such applications, thereby allowing a Judge to take a more all encompassing view."

The Supreme Court addressed the issue of legal aid as follows:-

> "many parents will, in fact, be represented by lawyers retained under the Civil Legal Aid system. As a consequence, courts may occasionally refrain from awarding costs on a practical basis but the funding ultimately emanates from the same ultimate source (that is, the State itself), even though there is a duty on lawyers employed by the Legal Aid Board, representing legally aided parties to make application and fulfilment of their duties under section 33 of the Civil Legal Aid Act 1995."

23. It was also submitted that it would be impossible to separate out the costs involved with the particular motion as sought by the mother.

24. Counsel for the Agency highlighted the Supreme Court case of *M.D. v. N.D.* [2015] IESC 66 where Clarke J. considered the allocation of costs in matrimonial cases which were substantially concerned with the division of assets and other financial resources. He held that where a court is minded to divide available financial resources on a broadly equal basis between the parties the default position should be that the court makes no order as to costs. Clarke J. further stated that a court should consider whether there was any "unmeritorious action" which increased the costs of litigation. It was submitted that this Court should apply the default position in this case.

**Legal Submissions on behalf of the Health Service Executive**
25. It was submitted on behalf of the Health Service Executive that the HSE was not served with any of the proceedings by the Legal Aid Board until 2nd October, 2015 at which point the HSE was joined as a notice party. It was submitted that the function of a notice party generally is to assist the court in giving clarification by way of information in its control and the party joining the notice party is normally required to indemnify it for costs although the HSE is not seeking an order for its costs against the mother.

26. It was submitted that it would be invidious for costs to be awarded against the notice party in the absence of *mala fides* or manifest lack of cooperation with the court. Counsel for the HSE submitted that they contributed to the solution sought by the court and that the teasing out of evidence and legal propositions cannot be misconstrued as oppositional conduct.

27. Counsel for the HSE highlighted the portion of this Court's order dated 15th March, 2016 that set out that all parties will take the necessary steps to give effect to a proper transition plan. It was submitted that the court took a neutral view and did not single out any particular party as having singular responsibility for the placement of C. but rather it directed a collaborative approach as is appropriate in such an inquisitorial hearing. In the evolving circumstances of a child welfare case, no one solution necessarily triumphs over another so as to suggest for the purposes of costs that there are winners and losers, or indeed that there is an event for costs to follow. It was noted by counsel for the HSE that, as it transpires, none of the proposals offered by any of the parties ultimately held sway as C. decided to live with family members upon reaching her majority.

28. It was submitted on behalf of the HSE that, in applying the concept of the conduct and outcome favoured by the Supreme Court in child care cases as set out in *Child and Family Agency v. O.A.* [2015] IESC 52, it could not be said that the conduct of the HSE was anything other than helpful. In terms of overall outcome, it was submitted that the HSE participated in the process by which solutions were investigated. Counsel for the HSE cited the Supreme Court decision as follows:-

> "But the fact that it is not suggested that costs will be awarded in favour of the Agency where a Care Order or Supervision Order is granted, or some other successful application is made, shows that one is not dealing here with the normal or established rules. For example, if the traditional approach was taken in this case, then either the CFA would be said to be "successful", (and entitled to its costs because it obtained Supervision Orders) or, if a more nuanced approach were taken, it might be said that no order for costs should be made because the Agency succeeded in part, but did not obtain the Care Order it sought initially. Hypothetically, an order for costs in the discontinued full Care Order proceedings might have been set off against an order for the costs in supervision proceedings. But this situation might result in a serious financial detriment to the mother, as well as other complexities in measuring and balancing costs."

It was noted that the *O.A.* case was about child care proceedings although it referred to secure care inherent jurisdiction proceedings as follows:-

> "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 cases in that category address situations where there is no direct precedent, where the same statutory considerations do not come into play; and where the CFA acknowledges that due to the nature and complexity of the case it will be unduly burdensome for parents or other parties to bear their own costs."

29. It was accepted on behalf of the HSE that a parent should not burden the cost of special care proceedings, however, in the instant case, the mother would not be bearing the costs as she is legally aided. It was submitted that the State has calibrated the distribution of its funds in such a way as to ensure that the State agency bringing the application bears its own costs and is properly funded to discharge its statutory functions. Equally, the State allocates funding under the Civil Legal Aid Scheme by statute to ensure that eligible persons are properly legally represented before Courts and Tribunals. It was submitted that, how it is decided to distribute those funds to provide proper representation and fairness at hearings is a decisions for the Executive and not for the Courts. It was accepted that this does not mean that the HSE enjoys an immunity from an award of costs. It was further submitted that it is ultimately a decision for the court whether, in the circumstances of the present case, its discretion would be properly exercised in awarding costs. It was also noted that, pursuant to s. 56 of the Adoption Act 2010 where the natural parents are refused legal aid, the Child and Family Agency must pay their court costs if not paid by another party to the proceedings. It was submitted that it would be necessary for the Court to set out special circumstances that arose from the facts of the particular case to indicate why it is necessary to award costs against a notice party.

30. Counsel for the HSE submitted that the Supreme Court has commented on the necessarily non-adversarial nature of the proceedings where child welfare is the primary concern. Measured against this concept of inquiry and mutuality it is difficult to reconcile "winners" and "losers" where one side must inevitably pay the legal costs of the case.

**Conclusions**
31. It is accepted by all parties that the ordinary rule is that costs follow the event. However, child care proceedings that come before the High Court under the inherent jurisdiction in extreme circumstances such as those present in this case require a less strict approach. The unusual approach required was highlighted by MacMenamin J. in his judgment in the *O.A.* case where he rightly asserted that the orders made in these cases are part of an ongoing continuum whereby all the parties involved collaboratively seek the solution that is in the best interests of the child. Rather than focusing on any particular "event" it may be more useful to follow MacMenamin J. and identify the "outcome" that costs may follow. The positive outcome of this case must not be forgotten. C. was safely returned to Ireland from Huntercombe Hospital in the UK. This was as a result of the assistance of all parties working together in a cooperative and investigative fashion including the Child and Family Agency, the HSE, the mother, the Guardian *ad Litem* and their respective legal teams.

32. The Child and Family Agency cannot be seen as being at risk of an order of costs against them. The mother and the Agency were in agreement and were working together towards the goal of returning C. to Ireland through the assistance of the Studio III organisation from an early stage. It must also be noted that the Agency are not the body with statutory responsibility for the provision of mental health services.

33. It could not be said that the HSE acted improperly when they sought to put forward the case for C. to be transitioned to a Nua Healthcare Facility. The HSE, as providers of mental health services in the State, helpfully put expert evidence before this Court in order to assist the Court in coming to a decision. The HSE were excused from attending court on a number of occasions in order to keep costs down although this cannot be used as a complete argument for them to avoid an order for costs.

34. The mother in these proceedings is represented by the Legal Aid Board and while this cannot be the deciding factor it is worth noting that the mother herself will not suffer any prejudice or gain any advantage from any order that this Court may make in relation to this application.

35. The Supreme Court has indicated that, in proceedings such as these, the default position should be to make no order as to costs. This Court does not see a reason to depart from that position and therefore makes no order as to costs in relation to this motion. This Court emphasises the distinct nature of this particular case and the important role of the mother and her legal team in attempting to find an innovative solution although the HSE cannot be criticised nor penalised through an order for costs for putting their case as far as they could and for advocating a different solution that may or may not have been more effective for C.M. at the end of the day.