**THE HIGH COURT**

[2022] IEHC 381

**[2015/59M]**

**IN THE MATTER OF SECTION 194 OF THE CIVIL PARTNERSHIP AND CERTAIN RIGHTS AND OBLIGATIONS OF COHABITANTS ACT, 2010**

**BETWEEN**

**C.D.**

**APPLICANT**

**AND**

**B.B.**

**RESPONDENT**

**JUDGMENT of Ms. Justice Emily Egan delivered on the 23rd day of June, 2022**

**Introduction and structure**

1. The applicant, a 77-year-old woman, brings these proceedings ("the main proceedings") against the respondent, as executor of the estate of H.T. ("the deceased"), with whom she contends she was cohabiting in an intimate and committed relationship for in excess of 33 years. In the main proceedings, the applicant seeks an order for provision out of the estate of the deceased pursuant to s. 194 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010.

2. The main proceedings have been at hearing for several weeks and now stand adjourned to enable the present application to be determined. In circumstances more fully explained below, a concern has arisen on the part of the applicant's legal representatives as to her capacity to meaningfully participate in the proceedings and they are desirous of appointing a next friend to conduct the main proceedings on her behalf. The present application concerns an order sought by the applicant's legal representatives that, if a next friend is appointed, any costs liability that might arise in favour of the respondent as and from the date of such appointment will be discharged by the applicant personally, and not by the next friend. Essentially, what is sought is an order pre-emptively determining that the applicant, and not the next friend, would be liable for any future costs in the main proceedings, irrespective of the outcome or conduct thereof. I shall refer to this as a pre-emptive costs order.

3. I refuse this application for a pre-emptive costs order. To explain why this is so, this judgment will consider: first, the factual background and procedural history to the present application; second, the court's jurisdiction to make the pre-emptive costs order sought; third, the nature of the next friend jurisdiction; fourth, the usual rules applying in relation to costs in proceedings conducted by a next friend; and fifth, the applicant's right of access to justice and the exercise of this court's discretion.

**History of the present application**

4. The main proceedings, which commenced on 21 October, 2015 were listed for a ten-day hearing in June, 2021. This has proved to be a significant under estimation of the time needed to hear the main proceedings, which presently stand adjourned after 21 days of hearing. The majority of that hearing has been taken up with examination, cross examination and re-examination of the applicant. The applicant's solicitor avers that

during her direct evidence she became concerned about the competency of the applicant, with such concerns intensifying following several discussions with the applicant on the conclusion of her cross examination. These concerns were shared by junior and senior counsel for the applicant.

5. On the application of the applicant's legal representative, the trial judge granted an adjournment of the proceedings to allow for a professional assessment of her competency. Professor Harry Kennedy, consultant forensic psychiatrist and executive clinical director at the Central Mental Hospital Dundrum, was instructed by the applicant's legal representatives to provide an opinion in relation to her functional capacity to give instructions, to receive advice and to participate in the litigation. Professor Kennedy conducted an examination of the applicant on 24 July, 2021 and is of the opinion that the applicant lacks such capacity. In material part, his report states as follows:

> *"In my opinion Ms.[D] lacks the functional mental capacity to give instructions because of her impaired ability to understand and retain, to reason comparatively and consequentially regarding choices and to appreciate the importance of the decisions she is required to make.*
>
> *In my opinion Ms. [D]lacks the functional mental capacity to receive advices because of her impaired ability to understand and to believe advice particularly in the rapidly changing context of a live trial.*
>
> *In my opinion Ms. [D] lacks the functional mental capacity to participate in litigation more generally. I am not in a position to say how this has changed in recent years. I believe that it is more likely than not that she has an early process of declining cognitive abilities and related functional mental capacity in relation to litigation and specifically in relation to trial."*

6. On the basis of this report, the applicant's legal representatives concluded that it would be necessary to appoint a next friend to conduct the litigation on her behalf. The applicant's solicitor avers that, having investigated the matter, she has been unable to identify any professional person who would be prepared to act as next friend. Although she has identified three family members or close friends who would be appropriately qualified to act in the role, they have concerns regarding the time commitment required and any personal costs exposure, should they assume the position of a next friend. The next friend's potential costs exposure is of particular concern because it seems that the applicant does not have sufficient financial resources to fully indemnify the next friend in this respect should the proceedings be unsuccessful. As a consequence, the applicant's solicitor states that she will be unable to secure a next friend to conduct the litigation if the court does not grant the pre-emptive costs order sought.

7. The respondent not only resists the pre-emptive costs order sought but reserves the right, in due course, to resist the appointment of a next friend *per se*. The respondent has grave misgivings about the conclusions arrived at by Professor Kennedy in relation to the applicant's capacity and, if necessary, wishes to procure his own assessment by a

commensurate expert. As the applicant lacks legal capacity, her legal representatives determined that they cannot either seek her consent to further psychiatric assessment or furnish consent on her behalf. In any event, they contend that the respondent has no entitlement to object to the appointment of a next friend, still less, to require that the applicant undergo further psychiatric assessment in connection therewith.

8. The respondent also objects to the present application on the grounds that, although he had requested details of the identity of the proposed next friend from the applicant's legal representatives, the latter were not in a position to identify any such person. The respondent therefore reserves his position in relation to the suitability of any potential next friend identified. This, of course, is likely to lead to further dispute between the parties as to whether the respondent has any role in the selection or approval of a proposed next friend.

9. During the course of the hearing before this court, the respondent queried whether the applicant's legal representatives are acting with her authority in relation to the potential appointment of a next friend or indeed the present pre-emptive costs application. In response, the applicant's legal representatives stated that whilst the applicant had been provided with Professor Kennedy's report and appeared to be supportive of the application, they nonetheless entertained serious concerns as to whether she fully appreciates or understands the report, the application being made or the consequences thereof. In light of Professor Kennedy's conclusion that the applicant lacks functional mental capacity to give instructions and receive advice in the context of litigation, the applicant's solicitor avers that she has been unable to properly provide instructions regarding the present application. This causes the court serious concern. In addition, this explains why I must refer to the present application as having been brought, not by the applicant, but by her legal representatives.

10. The respondent's position is that, if as is contended, the applicant lacks capacity, then the appropriate procedure to protect her interests is for a petition to be made to take her into wardship. The applicant's legal representatives do not share this view and maintain that there is insufficient evidence that the applicant is a suitable person to be taken into wardship.

11. It is therefore apparent that, in addition to the issue currently before this court concerning the pre-emptive costs order, there are several other procedural issues in dispute in relation to the potential appointment of a next friend; namely whether, and to what extent, the applicant lacks capacity; whether or not the respondent has any entitlement to challenge the appointment of a next friend; and if so, whether the court ought order that the respondent may arrange for additional psychiatric evaluation of the applicant. However, as it appears that, absent a pre-emptive costs order, no application to appoint a next friend will be advanced, the most logical manner in which to proceed is to first determine whether the court will grant such an order. It was agreed that, in considering this question, the court should assume that the applicant is a person of

unsound mind not so found within the meaning of O. 15 r. 17 of the Rules of the Superior Courts ("the Rules").

**The High Court's jurisdiction to make the pre-emptive costs order sought**

12. The respondent submits that this court has no jurisdiction to make the pre-emptive costs order sought and refers to s. 168 and s. 169 of the Legal Services Regulation Act, 2015 ("the 2015 Act") and Order 99 (O. 99) of the Rules. Section 168 of the 2015 Act provides that a court may, at any stage during proceedings, order that a party pay the costs of one or more other parties to the proceedings or may order payment of a portion of another party's costs, from or until a specified date. The court may order a party to pay the costs relating to one or more particular steps in the proceedings or may order that a party recover the costs relating to the successful element or elements of the proceedings. O. 99, r. 2(3) provides that the court upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application. O. 99, r. 3(1) provides that the High Court, in considering the awarding of the costs of any action or step in any proceedings in respect of a claim or counterclaim, shall have regard to the matters set out in s. 169(1) of the 2015 Act where applicable. Section 169(1) provides that a party who is entirely successful is entitled to an award of costs, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties. The section then lists a number of factors to which regard may be had, none of which are of immediate relevance to the present application.

13. In essence, therefore, the governing principle is that costs *inter partes* follow the event and that the court should make an order in respect of costs of any interlocutory application save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.

14. There are two difficulties with the proposition that the 2015 Act or O. 99 contemplate the kind of pre-emptive costs order sought in this application. First, the 2015 Act and O. 99 relate primarily to *inter partes* costs and not to costs such as those in issue in this application which is of a hybrid nature, involving both *inter partes* and *intra partes* aspects. (I will return, in due course, to the treatment of *intra partes* in the specific context of the next friend jurisdiction). Second, although the 2015 Act and O. 99 confirm that the court has jurisdiction to make an award of costs at any stage of the proceedings, the factors to which it shall have regard as set out at s. 169 (1) strongly suggest that the litigation, or the module of litigation in issue as appropriate, has already been conducted. It is essentially the conduct of the litigation which might disentitle a party who is entirely successful in proceedings and otherwise entitled to obtain their full costs. Such an assessment is best made at the conclusion of the proceedings (or the relevant module thereof). Therefore, even assuming that the 2015 Act and O. 99 applied to *intra partes* costs, it is hard to see how this court is presently in a position to *"justly…adjudicate"* upon whether the respondent should recover costs of future proceedings as against the next friend or the applicant. Not only has the relevant part of the litigation yet to unfold, but only the respondent and the applicant's current legal representatives have been heard on

the issue. The applicant's legal representatives have not been able to even obtain her instructions on the present application. I have not had the benefit of submissions from a disinterested party acting on the applicant's behalf. As no next friend has been identified, I have heard no submissions from that quarter either.

15. The applicant's legal representatives concede that the 2015 Act and O. 99 do not confer jurisdiction on this court to make the pre-emptive costs order sought. Rather, they submit that the court possesses inherent jurisdiction, in an appropriate case, to make the pre-emptive costs order sought if such is necessary to vindicate a party's right of access to the courts.

16. I would have some hesitation in accepting that this is so. In addition to the 2015 Act and O. 99, I am conscious that the legislature has expressly provided for *inter partes* pre-emptive costs orders in the context of environmental law proceedings. In the presence of detailed legislative provisions and rules of court on costs, the court must be extremely cautious in discerning the existence and extent of an inherent jurisdiction in relation to costs.

17. On the other hand, the unenumerated right of access to the courts is an important right in our constitutional order. It is part of the court's function to vindicate and defend that right and the courts have the jurisdiction to do all things necessary to vindicate such rights.

18. I am prepared to assume, therefore, for the sake of argument that, if this court were satisfied that absent the pre-emptive costs order sought, the proceedings would inexorably lapse, then it would possess inherent jurisdiction to make such an order. However, any such jurisdiction should be used sparingly, and only where there is no other alternative. This would therefore arise only if the court were satisfied that there is no other more appropriate avenue by which to adjudicate upon the issue at hand and by which to potentially facilitate the continuation of the proceedings. In light of both the wardship regime and the Assisted Decision Making Capacity Act 2015, ("the ADCA, 2015") I am not satisfied that this is the case in respect of the present application.

19. In any event, it seems to me that, save in the most exceptional circumstances of urgency and necessity, the kind of pre-emptive costs order sought here should not be granted without hearing representations on behalf of the applicant. In the present case, the applicant herself has not had the benefit of such separate legal representation by a party not otherwise involved in the dispute.

20. Further, before granting such an order, the court should have a sufficient appreciation of the merits of the claim to conclude that the interests of justice require such a course to be taken. Unlike the position that pertains for example, when an application is made to the President of the High Court to authorise that litigation is commenced (or progressed) by the committee of a ward or by the General Solicitor, this court has no appreciation of the merits of the present proceedings.

21. Further, as will appear below, the pre-emptive costs order sought would represent a fundamental departure from the usual practice of the courts in relation to costs as between a next friend and the person on whose behalf they act. Even assuming therefore that the court has jurisdiction to make such an order, there is no doubt but that the order sought would be appropriate only in the most exceptional circumstances. In the present case, I am far from being satisfied that such exceptional circumstances have been made out.

**The next friend jurisdiction**

22. O. 15, r. 17 of the Rules ("O. 15, r. 17") provides:

> *"A person of unsound mind may sue as plaintiff by his committee or next friend, and may defend by his committee or guardian appointed for that purpose."*

23. Pursuant to O.15, r.17, a person of unsound mind may bring proceedings as plaintiff (or applicant) by two methods. First, if they are a ward of court they may do so by their committee with the authority of the President of the High Court. Second, if such a person is not a ward of court, proceedings are brought on their behalf by a next friend appointed for that purpose. In the former case, the "litigation interests" of the ward are protected by the wards of court jurisdiction. In the latter case, the exposure to costs of the plaintiff of unsound mind is protected by the invariable practice of the court that it is the next friend and not the plaintiff who will be liable for costs in the proceedings if unsuccessful (subject to a potential right of indemnity as against the plaintiff which is in turn supervised by the court).

24. Pursuant to O. 15, r. 17, a person of unsound mind sued as defendant (or respondent) also defends proceedings by two methods. First, if they are a ward of court they do so by their committee. Second, if such a person is not a ward of court, proceedings are defended on their behalf by a *guardian ad litem* appointed for that purpose. In the latter instance, it is common case that the position, in relation to costs, of the *guardian ad litem* who defends proceedings on behalf of a defendant of unsound mind is different to that of a next friend appointed to prosecute proceedings on behalf of a plaintiff of unsound mind. Rather than such costs being borne by the *guardian ad litem*, I understand it is the party of unsound mind sued as defendant party who is responsible for the costs of the proceedings.

25. The applicant's legal representatives ask the court to depart from the approach to costs generally applying in relation to a next friend appointed to prosecute proceedings and to follow that applying to a *guardian ad litem* appointed to defend proceedings. The applicant's legal representatives submit that the appointment of the next friend to prosecute this litigation would be entirely distinguishable from the circumstance in which a next friend is usually appointed to act on behalf of a plaintiff and that it is more akin to the appointment of *guardian ad litem* to defend proceedings. This is said to be the case for two main reasons.

26. First, O. 15 r. 17 contemplates a person agreeing to act as next friend on behalf of a plaintiff of unsound mind prior to the commencement of the proceedings. The next friend is involved from the outset, takes the decision to commence the proceedings and, as counsel pithily put it, is the *"trigger puller"* in respect of the litigation. There is therefore no unfairness in fixing such a next friend with the costs of the proceedings, should they be unsuccessful. In contrast, it is argued that here, any potential next friend's involvement will not be the result of their own decision to bring forward the main proceedings, but will arise because, having been appointed by the court for that purpose, they feel a moral responsibility so to do. In contrast to the "usual" next friend contemplated by O. 15 r. 17, who acts entirely voluntarily, the role here is one of compulsion. It is submitted that a next friend appointed to facilitate the continuance of proceedings which are already underway (and indeed, at hearing) does not invoke the jurisdiction of the court and ought to be treated differently, as regards costs to a next friend appointed at the commencement of the proceedings.

27. I do not see any particular reason to distinguish between a next friend who agrees to act prior to the commencement of the proceedings from a next friend who agrees to act because of supervening unsoundness of mind after their commencement. Why should the costs position of a next friend acting on behalf of a plaintiff of unsound mind differ so fundamentally on account of the particular milestone reached in the proceedings at the time of their appointment? Why should costs exposure depend upon whether the next friend is appointed before or after service of the proceedings, before or after service of the statement of claim, before or after interlocutory applications or, indeed, prior to or in the course of trial? In all such circumstances, the next friend is responsible only for the future conduct of the proceedings and for the future costs of such proceedings and not for any of the costs accrued up to the date of their appointment.

28. Like any other next friend or indeed any responsible litigant, a next friend appointed at the commencement of the proceedings has important decisions to make, on legal advice, in relation to whether the proceedings ought to be commenced. This obligation continues throughout the proceedings. If the applicant's incapacity had presented itself prior to the commencement of the proceedings, any potential next friend suing on her behalf would have been faced with precisely the same dilemma as now arises as regards what instructions ought to be given in relation to the proceedings. Indeed, one could argue that a next friend appointed when the action is in train is in a position to make a significantly more informed assessment as to what instructions ought to be given.

29. Although a next friend appointed to act for a plaintiff who becomes of unsound mind during the currency of proceedings does not invoke the jurisdiction of the court, he or she assumes precisely the same role in relation to the future conduct of the litigation. Irrespective of whether they were next friend from the start of the proceedings or from the date of any subsequent appointment, the next friend acts voluntarily and comes into the proceedings with their eyes open.

30. Second, the applicant's legal representatives emphasise that in general, a next friend appointed pursuant to O. 15 r. 17 is appointed without any involvement, intervention or oversight on the part of the court.

31. O. 15 r. 20 provides:

> *"Before the name of any person shall be used in any cause or matter as next friend of any infant or other party, .. such person shall sign a written authority to the solicitor for that purpose, and the authority shall be filed in the proper office."*

Generally therefore, no court order is required for the appointment of a next friend. Indeed, this is axiomatic because a next friend is usually appointed prior to the commencement of the proceedings. By contrast, the general practice is that an application for the appointment of a *guardian ad litem* to defend proceedings on behalf of a person of unsound mind is made by way of motion to the Master of the High Court on an *ex parte* basis. The application is supported by an affidavit containing sufficient detail about the defendant's state of mind and showing that the proposed guardian is a fit and proper person to act and that there is no conflict of interest between them and the person for whom they are to act.

32. This matter has been brought before the court, and because there is dispute between the parties on a range of issues, a court order is required. However, it does not seem to me that this fundamentally changes matters or necessarily means that the appointment of a next friend to prosecute this case is to be treated in like manner to the appointment of a *guardian ad litem* to defend a case (and who benefits from "costs protection" in the sense that the costs are borne by the defendant of unsound mind). The particular route chosen in relation to the appointment of a next friend in this case does not alter the essential nature of the appointment any more than the essential nature of a *guardian ad litem* is altered by the method of their appointment. The point, surely, is that a plaintiff decides to prosecute proceedings, whereas there is no exercise of choice in relation to involvement in the proceedings of a party sued as defendant. This applicant chose to initiate the main proceedings. Both the applicant and the next friend therefore act voluntarily, and neither is compelled to act by being named in the proceedings or by dint of any court order.

33. It seems to me therefore, that from the perspective of the potential next friend, there is no valid distinction in principle to be made between a next friend who agrees to act on behalf of a person of unsound mind at the commencement of the proceedings and a next friend who agrees to so act due to supervening incapacity at a later stage in the proceedings.

34. Looking at matters from the perspective of this particular applicant, her legal representatives contend that the proceedings will lapse if the pre-emptive costs order is not made to enable the appointment of a next friend. I do not accept that this is necessarily so. For example, although I cannot determine whether or not this may be so, if the applicant satisfies the criteria for entry into wardship, then the proceedings may be progressed by her committee with the authority of the President of the High Court.

Likewise, if the applicant does not satisfy the criteria for entry into wardship, but nonetheless suffers from a functional incapacity to participate in the litigation, then she will have access to the far more nuanced scheme to be very shortly provided for under the ADCA, 2015.

35. However, even if the proceedings were to lapse, this would not be a consequence of the fact that the applicant's unsoundness of mind has only arisen at this stage of the proceedings. No evidence or argument has been made to me that a next friend would have been any more willing to act without costs protection if appointed at the commencement of the proceedings. The same difficulty would therefore have confronted the applicant and her legal representatives regardless of the time at which her unsoundness of mind had presented itself.

36. Similarly, the same difficulty in securing a next friend to act on behalf of a person of unsound mind absent costs protection, could, in theory, arise in any other case. As a matter of principle, there is nothing peculiar about the current dilemma. Equally, as a matter of principle, the same potential avenues for pursuing the litigation are open to this applicant as to any other person of unsound mind who wishes to pursue litigation but cannot secure a next friend willing to act (i.e. wardship or, when commenced, recourse to the ADCA, 2015).

37. On the other hand, I accept that, from the perspective of this particular applicant, there is a *practical* distinction to be made flowing from the timing of the onset of her incapacity. The applicant chose to commence proceedings and has brought these proceedings forward to an advanced stage. She made certain decisions, entered into certain commitments and incurred certain liabilities, at a time prior to her incapacity. Thereafter, through no fault of her own, incapacity has supervened. If, as a result of this supervening incapacity and the unwillingness of any party to act as next friend without costs protection, the applicant was automatically, irremediably and permanently deprived of the opportunity bringing forward her proceedings, then, in practical terms, she could potentially be in a worse position than a person of unsound mind who had not been able to commence proceeding in the first place. I am not, however, at all convinced that this is, or needs to be, the consequence of declining to grant the pre-emptive costs order sought.

**Costs as between next friends and the parties for whom they act**

38. The respondent submits that this court has no jurisdiction to make an order that the applicant and not the next friend would bear the costs of the proceedings. The respondent observes that such authority as exists expressly holds to the contrary and refers, in particular, to two Supreme Court decisions.

39. In *McHugh v. Phoenix Laundry Ltd* [1966] IR 60, the plaintiff was an infant suing by his father and next friend. He was awarded damages for personal injuries in the High Court, and his next friend appealed unsuccessfully against the level of the award. The Supreme Court reserved the question of the costs of the appeal and Lavery J. delivering judgment (*nem diss*), after an extensive summary of the jurisprudence, concluded:

> *"(A)n infant plaintiff, suing by his next friend, as he must do, is not liable to the defendant for costs. If costs are given they must be given against the next friend. The next friend may be given an indemnity out of the estate of the infant and is indeed prima facie entitled to such indemnity, but this is not a matter inter partes."*

40. The respondent submits that this passage does not appear to admit of any judicial discretion and that where the defendant is awarded costs, they are the liability, *inter partes*, of the next friend. Whether the next friend is ultimately given a right of indemnity against the plaintiff is a separate matter that does not arise *inter partes.*

41. In *Sheridan v. McCartan* [1968] IR 7, the plaintiff, suing by his father and next friend, appealed unsuccessfully against a damages award made in the High Court, and the costs of the appeal were awarded in favour of the defendant. The defendant applied for an order that the costs be paid by the infant, not the next friend (it apparently, being more expedient to execute against the infant).

42. The Supreme Court followed *McHugh*, O'Dálaigh CJ. stating that the judgment of Lavery J. in that case:

> *"shows that it was an established proposition, as long ago as the year 1584, that an infant plaintiff is not liable to pay costs…"*

43. O'Dálaigh CJ. considered an earlier decision (*Turner's Case*), in which the next friend had died on the day of the trial and the infant, reaching majority shortly thereafter, elected not to proceed with the action. The matter was set down purely on the question of costs, and the court refused to award costs against the plaintiff. Of this decision, O'Dálaigh CJ. noted as follows:

> *"The registrar informed the Chancellor that he had never known an infant liable in that court and the Chancellor… himself observed that he did not find that any case had been cited where an infant plaintiff had been obliged to pay costs either at law or in equity. Turner's Case is cited as good law in Halsbury's Laws of England… and in the third edition and also in Simpson on Infants."*

44. On the above authority, the respondent therefore contends that this court has no jurisdiction to make an order that the plaintiff as opposed to the next friend would bear the costs of the proceedings.

45. However, it does not seem to me that the cases cited are entirely on point. The cases cited involve infant plaintiffs and not persons of unsound mind (although this may be a distinction of limited weight). More importantly, in the present application, the party ostensibly seeking a special costs order is the applicant herself (although, as stated, I am concerned that her specific instructions have not been taken in this regard), rather than the opposing party in the litigation. The cases cited do not govern the approach of the court to the present application or foreclose an argument that the court has jurisdiction, in an appropriate case, to make the pre-emptive costs order sought.

46. These authorities do, however demonstrate that such an order would be entirely exceptional. The applicant's legal representatives have cited no authority whatsoever, whether involving an infant plaintiff or a person of unsound mind, in which the court has ever awarded costs against the plaintiff personally rather than the next friend.

47. Still less does the applicant's legal representatives cite any authority in which such an order has been made pre-emptively. The respondent submits that the court's practice is not to consider the issue of costs *intra partes* as between the party and the next friend until the conclusion of the proceedings (or until the conclusion of the relevant module). The entitlement of the next friend to be indemnified by the plaintiff in respect of an adverse costs order is only considered at the conclusion of the proceedings when the court is in a position to adjudge the manner in which the proceedings have been conducted.

48. Thus, in *Tanner v. Ivie* (1752) 21 ER 233 proceedings by a next friend on behalf of an infant were dismissed with an order for costs against the next friend, who thereafter presented a petition seeking to recover those costs from the infant's estate. The Lord Chancellor acceded to the application (noting that the action, although ultimately unsuccessful, had received interlocutory approval by the Master) and held:

> *"As to the grounds insisted upon to shew the costs ought to be borne by the prochain amy or the receiver, who swears he paid the, for the prochain amy, the dismissing of the bill with costs as against Hull does not prove that there was not a probable cause of litigating…The court does not in that case inquire whether there was a probable cause of litigating. It is a different question between the prochain amy and the infant, in whose behalf he has brought the suit; for then the question is whether he was sufficiently warranted to bring it; whether it was brought and carried on in a reasonable manner without laches.."*

49. In *Steeden v Walden* [1910] 2 Ch. 393 an infant plaintiff's claim was dismissed, and costs were awarded against the next friend, along with damages arising from an interim injunction he had succeeded in procuring (on the usual undertaking as to damages). In a separate action, the next friend sued the infant plaintiff for an indemnity, the claim having been brought properly on the advice of counsel. The infant's counsel argued that the proceedings ought never to have been brought and accordingly, that no indemnity should be allowed.

50. Eve J. after a review of several additional authorities, made the following observations:

> *"These and other decisions, whereby property of an infant under the control of the Court has been made available to recoup the next friend, proceed upon the footing that the infant is prima facie liable to indemnify the next friend against costs properly incurred on his behalf, and they show that such liability ought to, and will, be enforced in all cases where the court is satisfied that the litigation has been prompted by motives of benevolence towards the infant, and has been conducted in his interest and with diligence and propriety."*

51. This decision was approved by Lavery J. in *McHugh*. I pause to observe that in *Steeden*, the plaintiff was separately represented in opposition to the next friend's application. This has not been the case in respect of the present application.

52. In light of these authorities, I agree with the respondent's submissions that there is difficulty in requesting the court to make such an order fixing the applicant with costs before the litigation is run and before the relevant decisions in the litigation have been made by the next friend.

53. In short, the above authorities demonstrate that the practice of the courts is not to award costs as against parties who are represented by next friends. No instance has been cited to me on which the court has acceded to such an application. Further, for good reason, even costs indemnity is not considered on a pre-emptive basis. Therefore, even if these authorities are distinguishable in certain respects from the present application, they nonetheless suggest that the pre-emptive costs order sought must be approached with significant caution.

**The applicant's access to justice and the court's discretion**

54. As stated, I will assume, for the sake of argument, that the court possesses the inherent jurisdiction in an appropriate case to make the pre-emptive costs order sought if and to the extent that such is absolutely necessary to vindicate the applicant's right of access to the courts.

55. The respondent contends that even if this court has jurisdiction to make the order, it ought not be made in this case. The respondent argues that fear of costs is a universal feature of all litigation and has a controlling effect, rendering the conduct of litigation more responsible. The rules as to costs are well known to have an obvious equitable basis and are entirely justifiable. The respondent maintains that a party who is not at risk in relation to costs, irrespective of outcome, is likely to behave more recklessly or aggressively in relation to the proceedings. The respondent argues that if the order sought in these proceedings is granted in the interests of protecting the applicant's right of access to justice, then same could be made in any other case and this would effectively result in the displacement of the general costs rule in a wide variety of cases.

56. If the only way that the applicant could potentially bring forward her proceedings would be by this court now granting the pre-emptive costs order sought, these arguments would not prevent me from doing so. I am not prepared to assume that a next friend appointed in these proceedings would behave irresponsibly merely because the usual rule as to costs did not apply.

57. The applicant's legal representatives asked the court to compare the potential consequence for each party of the court declining to make the order sought. From the respondent's point of view, it is said there is no prejudice to making the conditional order sought because had incapacity not supervened, any order for costs would have been as against the applicant only. Likewise, even if the applicant were to be taken into wardship (as the respondent contends should occur), any order for costs would likewise be met

only by recourse to the ward's assets. The applicant's legal representatives therefore argue that the respondent will be in exactly the same position as regards recoupment of any order for costs as he would always have been. In contrast, if the court does not make the order sought, the applicant would be placed in a catastrophic position in which she would be unable to bring forward her litigation and yet would presumably be at risk of an order for costs in respect of the litigation thus far, in addition, presumably to bearing her own legal costs.

58. The difficulty with this argument is that it takes a rather narrow view of what may be considered a catastrophic outcome for the applicant. If a next friend is to be appointed on the terms sought, then the applicant (who has no capacity to give instruction or understand advice) will lose control of the proceedings and yet her assets will be fully at risk in relation to the costs thereof. Furthermore, although I am not for one moment assuming that the applicant will fail in these proceedings, the essence of the application before me is to attempt to fashion a remedy which best meets the possibility that the applicant will not in fact prevail. If this were to occur and if the applicant's assets are to be the first point of recourse for any award of costs to the respondent, together, of course with her own legal costs, then one can quite appreciate that this situation might equally be called catastrophic.

59. The respondent contends that if the applicant lacks capacity, then she ought to be taken into wardship. Thereafter the proceedings could, if appropriate, be continued with the imprimatur of the President of the High Court.

60. I am asked by both parties to assume, on the basis of Professor Kennedy's report, that the applicant is of unsound mind for the purposes of O. 15 r. 17. This does not necessarily mean that she is suitable to be taken into wardship. Pursuant to the 1871 Act and O. 67 of the Rules, in order to be made a ward, a person must be of unsound mind and must be incapable of managing his or her person and property, and as the wardship jurisdiction is a discretionary one, it must also be *'necessary and appropriate'* that the person be received into wardship: see *In re D* [1987] IR 449 and *HSE v AM* [2019] 2 ILRM 119.

61. In *Wards of Court v Catherine Keogh* [2002] 10 JIC 1504, Finnegan P. stated:

> *"The very long established practice in relation to wards of court has been to treat the word 'and' as conjunctive and to make orders only where both the requirements of unsoundness of mind and incapacity of managing one's person or affairs are satisfied. It is inappropriate for this court to review at this late stage the interpretation of the 1871 Act which it has for so long adopted."*

62. Professor Kennedy's opinion is that the applicant suffers from functional incapacity of an issue of a specific nature, i.e. the capacity to engage in litigation, rather than unitary or total capacity. In and of itself, this certainly does not mean that the applicant is generally of unsound mind or otherwise incapable of managing her own person or property. The applicant's legal representatives emphasise that there is no evidence whatsoever that she is unable to manage her affairs.

63. The applicant's legal representatives argue that, as the only evidence presently to hand is that the applicant lacks specific functional capacity to engage in the litigation, she should not be forced to petition for wardship in order to continue her proceedings. They argue that the current wardship regime treats wards as lacking capacity generally, rather than in relation to specific matters.

64. Undoubtedly, this court must bear in mind the basic right of the applicant to manage her own person, property and affairs. On the other hand, the position is that the applicant's wider capacity has simply not been considered, presumably because Professor Kennedy was not instructed so to do. The applicant's legal representatives could not reject the suggestion that the applicant may well be an appropriate person to be taken into wardship. Professor Kennedy's view is that the applicant has an early process of declining cognitive abilities and a related functional mental incapacity in relation to litigation. Although of course, I make no findings whatsoever in relation to the applicant's general capacity, I would have thought that a person's ability to properly manage their affairs may require an ability to make decisions and communicate. It may require the mental ability to recognise a problem, obtain, understand and weigh information and advice, reach a decision and communicate that decision. Yet, in light of her declining cognitive condition, Professor Kennedy's report states that the applicant lacks many of these abilities in the litigation context. He also finds that the applicant has demonstrated signs of cognitive impairment including impaired and delayed recall and impaired executive functioning. Although Professor Kennedy's report concludes solely that the applicant is suffering from an issue specific - unsoundness of mind, he states that some of the features he identified are typical features of a more global nature. One could not therefore assume that, if a petition were brought to bring the applicant into wardship, it would not be granted. Nor, incidentally, am I convinced that wardship applications are now invariably dealt with on an "all or nothing basis" and that it would not be possible to facilitate a more nuanced or targeted application.

65. Furthermore, it would be unrealistic not to observe that although Professor Kennedy's report does not reference the ADCA, 2015, his report is precisely the kind of review of functional capacity required to be carried out under that Act. The entire premise of the ADCA, 2015 is that a person's capacity is assessed functionally on the basis of their ability to understand, at the time that a decision is to be made, the nature and consequences of a particular decision or set of decisions in the context of the available choices at that time. In contrast to the existing wardship regime, the ADCA, 2015 does not treat persons as lacking capacity generally.

66. At risk of repetition, Professor Kennedy's conclusion is that the applicant lacks functional capacity in relation to the litigation. When commenced, the ADCA, 2015 contemplates that a decision-making assistant, a co-decision maker or a decision-making representative would assist the applicant to make the relevant decisions in the litigation or would make the relevant decisions on her behalf, as required. Further, pursuant to the ADCA, 2015, any intervention would minimise restrictions on the applicant's rights, have due regard to her right to dignity, bodily integrity, privacy and autonomy and be

proportionate to the significance of the matter and of as limited duration as practicable. Although the ADCA, 2015 is in the process of amendment and has not yet been commenced, it is expected to be commenced imminently and would provide a number of avenues by which the applicant could be assisted or supported in making decisions in the litigation.

67. The effect of the order which I am asked to make would be to deny the applicant the protection of the Wards of Court regime or the supports offered by the 2015 Act in circumstances where she might well be a person who needs the protection of the former and has been found to lack the relevant functional capacity in issue for the purposes of the latter. In addition, the effect of the order sought would also be to deny the applicant the protection on costs usually afforded to persons of unsound mind who prosecute proceedings through a next friend. It seems to me that, for this applicant, such a scenario might well be the worst of both worlds.

68. The crux of the matter, it seems to me, is that the applicant is a person who has demonstrated signs of cognitive impairment which prevent her from engaging in the litigation or providing instructions to her legal representatives, either in general, or in relation to the present application. Furthermore, although of course, the applicant's last known will and preference was for the proceedings to commence and take their course, unsoundness of mind has now supervened and, unless some mechanism is found to give expression to the applicant's voice, her legal representatives will henceforth be unable to rely on her instructions. In these circumstances, I decline to make an order that would so radically impact upon the applicant's interests, particularly when the applicant herself has not had the benefit of separate legal representation by a party not otherwise involved in the dispute. In the circumstances, I am further not satisfied that the present application is such as to merit radical departure from the usual rule that pertains in relation to the appointment of a next friend. The applicant's counsel notably, has been unable to cite any authority whatsoever, from Ireland, the United Kingdom or elsewhere, of either ancient or modern origin, which supports the costs order sought.

69. Although it is a matter for the parties, it seems to me that the applicant's legal representatives should explore whether wardship would be appropriate, or in due course whether the applicant might benefit from the supports available under the 2015 Act, particularly when the applicant herself has not had the benefit of such separate legal representation by a party not otherwise involved in the dispute.

70. The applicant's legal representatives argue that they will be on the horns of a dilemma, should it be found that the applicant is not a suitable person to be taken into wardship and should the supports offered by the 2015 Act not have commenced. There is however no reason to assume that this would occur, particularly as the ADCA, 2015 is due to commence imminently. If, in the aftermath of an application to the wardship list (and should the ADCA, 2015 not have commenced), it appears that there is to be no other available alternative, then it is open to the applicant's legal representatives to renew their current application. In such circumstances, the applicant's legal representatives will

nonetheless have the benefit of a more fulsome capacity assessment concerning the applicant. They will also, have the benefit of the experience gained in the context of the wardship application. Both of these developments are likely to be of relevance to the approach of the court to a renewed application. Any such renewed application would be entirely fact specific and it would not be helpful to speculate in the abstract as to how such an application might be presented or decided. For the avoidance of doubt, however, I should say that I cannot envisage an application of this nature being granted without separate legal representation on behalf of the applicant.

71. For the moment, suffice it to say that even assuming that this court has jurisdiction to make the order sought, as presently advanced, it would not seem to me to meet the interest of justice.