THE HIGH COURT

[2017 No. 9908P]

IN THE MATTER OF A. A MINOR BORN ON 2000 AND IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT AND IN THE MATTER OF THE CHILD CARE ACT, 1991 (AS AMENDED) AND IN THE MATTER OF ARTICLE 34.3 AND ARTICLE 40.3 OF THE CONSTITUTION

BETWEEN:

THE CHILD AND FAMILY AGENCY

PLAINTIFF

-AND-

A. A MINOR REPRESENTED BY ORDER BY HIS SOLICITOR AND NEXT FRIEND GINA CLEARY (No. 2)

AND

C.

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 19th February, 2018.

1. The CFA has conceded that costs should be awarded against the CFA in favour of A in this case, since the CFA referred A to a solicitor when it became apparent that he did not want to disclose his HIV status to B, as he claimed they were not having sex.

2. However, there is a dispute regarding the legal costs for A's mother, C, and the CFA argue that there should be no order as to costs between the CFA and C.

3. Since C received legal aid, there is thus a dispute between two State agencies, the Legal Aid Board and the CFA, as to who should be liable for C's legal costs. It is clear that C herself will not suffer any prejudice or gain in any way by the order that the Court makes regarding legal costs.

4. In determining this issue, this Court is guided by the Supreme Court case of *The Child and Family Agency v O.A.* [2015] IESC 52. It is relevant to note that in that the case the Supreme Court made reference to, *inter alia*, s. 33(2) of the Civil Legal Aid Act, 1995 which requires legally-aided litigants to be treated the same as other litigants:

> "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."

5. Although the facts of that case involved child care orders and legal costs in the District Court (and on appeal in the Circuit Court), this Court can see no reason why the principles as set down by MacMenamim J. in that case would not be equally applicable to legal costs incurred in the High Court in a child welfare case, such as the present case. This is particularly so, since it is clear that MacMenamin J. intended these principles to be of general application and not just applicable to the 'costs event' before him in that case, which was a part-award of costs on a withdrawn care order application in the District Court. At para. 52 of his judgment he states:

> "The interests of the child, and the interests of justice, should be ensured in accordance with the following general principles in District Court proceedings. 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; and
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> (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."

6. Applying these principles to the present case, the starting point, *per* MacMenamin J. is that that there should be no order as to costs in favour of C in this case. As regards the exceptions to this general rule, first it is clear that the CFA did not act capriciously, arbitrarily or unreasonably in commencing or maintaining the proceedings in this case, since it was motivated by a genuine desire to protect B from harm, based on expert medical opinion. Secondly, it is clear that this was not a case where the outcome was clear and compelling, particularly as there was no precedent in this country and little if any precedent abroad on the legal points at issue. Thirdly, this Court can see no injustice being visited upon C if her legal costs are discharged by the Legal Aid Board rather than by CFA. In addition, this Court does not see any injustice being visited on the Legal Aid Board, if it, rather than the CFA discharge the costs.

7. Indeed, when one is ultimately dealing with taxpayers' money (whether the CFA or the Legal Aid Board foots the legal bill), this Court sees one particular advantage attaching to the default rule set down by MacMenamin J. whereby the Legal Aid Board ends up paying its own legal costs. It is that, in a case a such as this, where a child is represented (and his legal costs are being paid for by the taxpayer) and where he is as close to adulthood as makes no difference, the Legal Aid Board, with its limited budget, has to give very active consideration, whether, and to what extent, it is justified in expending further legal costs which will ultimately have to be

paid for by the taxpayer on behalf of C, when C's primary role at the trial was as a witness as to fact in relation to her 'adult' child, something which does not require legal representation.