THE HIGH COURT

IN THE MATTER OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACTS, 1961- 1991

2012 SS 1568

BETWEEN/

HEALTH SERVICE EXECUTIVE

Applicant

-and-

O.A.

Respondent

Judgment of Ms. Justice Iseult O'Malley delivered the 12th of April, 2013

Introduction

1. This is a consultative case stated by District Judge Toale pursuant to the provisions of s. 52 of the Courts (Supplemental Provisions) Act, 1961. The issue on which the determination of the court is sought concerns an application by the respondent ("the mother") for her costs at the conclusion of care proceedings brought by the applicant ("the HSE"). In brief, the HSE contends, firstly, that the District Court has no power to order costs in proceedings of this nature; secondly, and in the alternative, that if it has such power, it may or must take into account the mother's possible eligibility for legal aid in considering whether to grant an order for costs.

2. The Attorney General, on application, was joined as a notice party in the court to make submissions on the constitutional issues.

The case stated

3. The circumstances in which the issue arose are set out in the case stated, which is set out here in full. (The Applicant is the HSE and the Respondent, the mother.)

> *(i) At a sitting of the District Court held on Thursday, the 28th April, 2011, the District Court granted an Emergency Care Order under s. 13 of the Child Care Act, 1991 [the CCA] in respect of a child of the Respondent herein, the said Emergency Care Order to expire on 5th May 2011. The respondent did not have the benefit of legal assistance on this occasion, nor was she present in Court. Thursday, the 28th April, 2011 was immediately prior to the May Bank Holiday which fell on Monday, 2nd May, 2011.*
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> *(ii) Subsequent to the granting of the said Emergency Care Order, the Applicant issued an application for an Interim Care Order under s.17 of the CCA, returnable to Thursday, 5th May, 2011. The Respondent was notified of the said application by registered post and attended at Dolphin House, Courthouse on the 5th May, 2011. On the 5th May, 2011 the Respondent was legally represented by Mr. Eamonn Bennett, Solicitors, who thereafter represented her interests before the Court on the following occasions;*
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> *11th May, 2011*
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> *2nd June, 2011*
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> *28th June, 2011*
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> *12th September, 2011*
>
> *6th October, 2011*
>
> *1st November, 2011*
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> *and on each of those dates the Interim Care Order was extended.*
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> *(iii) On the 28th November, 2011 and on the 12th December, 2011 the Applicant applied under s19 of the CCA for Supervision Orders in respect of the child, which were granted. The later Supervision Order expired on the 5th March, 2012. The Respondent was represented on each occasion by Eamonn Bennett Solicitors.*
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> *(iv) On the 5thMarch, 2011 the Respondent's legal advisers sought their costs as against the Applicant with regard to the said proceedings.*
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> *(v) It was contended by the Applicant that it believed the respondent would have been entitled to receive legal aid from the Legal Aid Board and therefore should have applied for legal aid with regard to the proceedings in issue. It was further contended by the Applicant that if the Respondent had retained private legal representation with regard to the Child Care Proceedings before the Court in circumstances where she might have been entitled to receive legal aid, she was not therefore entitled to her costs in this matter.*
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> *(vi) It was contended on behalf of the Respondent that it was not within the remit of the Applicant to enquire into the*

Respondent's means. Furthermore, it was contended on behalf of the Respondent that it may be a breach of the separation of powers doctrine if the Court were to treading into the area of policy making and this was the function of the executive or legislature.

(vii) It was further contended by the Respondent that section 33 of the Civil Legal Aid Act, 1995 specifies that 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 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.

(viii) Therefore, it was the Respondent's contention that, as the Legal Aid Board is obliged to seek its costs in all matters which come before the Court in which it represents clients, the Court is not entitled to consider whether or not a person was entitled to receive legal aid, and the issue as to whether or not the Respondent may have been entitled to legal aid should not be considered by the Court when exercising judicial discretion in respect to granting or not granting costs to the Respondent

(ix) AND WHEREAS I, the said judge, am of the opinion that questions of law arise in the foregoing case and do hereby refer the said questions to the High Court for determination.

QUESTION

The questions upon which the opinion of the High Court is required upon the above statement of facts are: -

(i) In exercising my discretion as to whether or not to grant costs to the Respondent [can I] take into account that the Respondent may have been entitled to receive legal aid and has access to legal aid.

(ii) In exercising my discretion as to whether or not to grant costs to the Respondent [must I] take into account that the Respondent may have been entitled to legal aid and has access to legal aid.

4. It is immediately obvious that the questions asked by the learned District Judge are predicated upon the assumption that he has a discretion to grant costs and that the issue, as far as he is concerned, is the exercise of this discretion in the light of the mother's potential eligibility for legal aid. However, and notwithstanding that the matter was not canvassed in the District Court at all, Counsel for the HSE has in this court advanced an argument that there is in fact no power to award costs to parents in proceedings under the Child Care Act, 1991.

5. The consultative case stated procedure is meant to be a method whereby a District Judge can, where he or she considers it desirable, seek the assistance of this court on a legal question arising in proceedings before him or her. In this case the Judge has asked a question concerning the exercise of a jurisdiction, the existence of which nobody had challenged before him. Where a case has been stated in such circumstances, and a party then makes the case that in fact the jurisdiction does not exist, difficulties may arise in relation to the preparation of the case by the other side. It may also be seen as unfair to the District Judge. In this case, not surprisingly, the written submissions filed on behalf of the mother dated two weeks before the hearing in this court do not deal with the issue.

6. However, in the event counsel for the Attorney General helpfully referred the court to the relevant statutory provisions by way of counter-submission on the issue. I have also had regard to the judgment of Finlay C.J. in *Dublin Corporation v Ashley* [1986] I.R. 781where, dealing with a case stated from the Circuit Court, he said:

"Although if this were an appeal the ordinary principle of this court would be that it would not entertain any issue or point which had not been argued and decided in the court below, that principle does not, in my view, apply to a consultative case stated from the Circuit Court. The purpose and effect of a consultative case stated by a Circuit Court judge to the Supreme Court is to enable him to obtain the advice and opinion of the Supreme Court so as to assist him in reaching a correct legal decision. Having regard to that purpose and the relationship which exists between the two courts, it would, in my view, be quite inappropriate for the Supreme Court, for any reason of procedure, to abstain from expressing a view on an issue of law which may determine the result of the case before the learned Circuit Court judge."

7. I accept that this principle also applies to consultative cases stated from the District Court to the High Court. It was so applied by Laffoy J. and Charleton J. in *National Authority for Occupational Safety and Health v O'K Tools Hire* [1997] 1 I.R. 534 and DPP v Buckley [2007] 3 I.R. 745 respectively. However, it is worth bearing in mind that what had happened in *Ashley* was that the court itself was aware of a point which was dispositive of the matter and raised it in the hearing. I am not convinced that the judgment is to be read as giving *carte blanche* to the parties to introduce substantive issues that were never canvassed below and which in fact undermine the entire basis of the case stated.

The HSE's submissions on the jurisdiction to award costs

8. The first point made by the HSE is that the District Court is a creature of statute and therefore its powers and duties are defined by and limited to statutory provisions. There is no inherent power to award costs and it is said that there is no provision for costs in the context of child care cases. It argues further that there is a positive legislative policy that costs should not be awarded in child care proceedings.

9. Counsel relies on the judgment of the High Court (Hedigan J) in *Southern Hotel Sligo Ltd v Iarnrod Eireann* [2007] 3 I.R. 792 and in particular the following passage (at p. 803):

"... in my view its is well established that there is no inherent power in the District Court to award costs. This follows from the fact that the jurisdiction of the District Court is defined and limited by statute. In Attorney-General v Crawford [1940] I.R. 335 as submitted by the respondent, a divisional court of the High Court decided that in proceedings for the recovery of a penalty under s. 186 of the Customs Consolidation Act, 1876 brought at the suit of the Attorney General the District justice in dismissing the matter had no jurisdiction to award costs specifically, the divisional court found that there was no inherent jurisdiction in the District Court to award costs in the absence of express statutory power. Maguire C.J. observed at p. 342:-

'It is well established that there is no inherent power or jurisdiction to grant costs and that costs can only be granted under the provisions of some statute or rules; Garnett v Bradley; O'Connor's Justice of the Peace 2nd ed.,

Vol. 1 p. 198; *Paley* on Summary Convictions, *7th ed.*, *p.227*.

The District Court was established by the Courts of justice Act, 1924, and is the creature of that statute.'

This finding that the District Court has no inherent jurisdiction to award costs in the absence of an expressed statutory power was affirmed by Finlay P. in The State (Attorney General) v. Shaw [1979] I.R. 136."

10. The *Southern Sligo Hotel* case concerned a complaint made by the applicant under s.108 of the Environmental protection Agency Act, 1992 in relation to noise caused by the respondent. The section provides that the District Court may make an order, on the application of the local authority, the Environmental Protection Agency or a person in the neighbourhood, directed to the person or body responsible for the noise complained of to reduce the level of noise or to take specified measures for the prevention or limitation of the noise. There is no reference to costs in relation to this particular section, although costs are expressly provided for in respect of other proceedings under the Act. The case stated asked for the opinion of the High Court as to whether there was a jurisdiction to order costs.

11. The applicant submitted, *inter alia*, that there was an inherent jurisdiction in the court to award costs arising out of O. 51, r. 1 of the District Court Rules, 1997. This provides as follows:

Save as otherwise provided by statute or by Rules of Court, the granting or withholding of the costs of any party to civil proceedings in the court shall be in the discretion of the Court.

12. Hedigan J. held that the rule did not (and could not) confer a power in relation to costs but governed the exercise of any power otherwise conferred. Furthermore it related only to "civil proceedings". He considered that proceedings under s. 108 were not a claim in private law but were more in the nature of a public law complaint-

"The relief provided by s. 108 is an order to take measures which is of general interest; there is no provision for damages as in private law proceedings."

13. Hedigan J. considered that this reflected the nature of the s. 108 procedure as a "public watchdog" charter, in that an applicant could act in either the public or private interest without being deterred by the prospect of an order for costs against him or her.

14. Counsel submits that this is analogous to the functions of the HSE in child care cases. This is, he says, a public body fulfilling a public duty under statute, not a private proceeding. It does not, therefore, come within the definition of "civil proceedings" for the purposes of 0. 51, r. 1.

15. It is worth noting the facts in *Crawford* and *Shaw*. *Crawford* was a case stated from the District Court arising out of an unsuccessful prosecution by the Attorney General under the Customs Consolidation Act, 1876. The District Justice had dismissed the summons on the merits and wished to order the Attorney General to pay the defendant's costs. The problem for the defendant was that the only relevant provision of the then-extant District Court Rules, 1926 was r. 37. Paragraph (a) of the rule empowered a District Justice to award costs against a prosecutor in summary cases but it specifically exempted the Attorney General. Paragraph (b) provided that (a) did not apply to proceedings dealing with duties under the care and management of the Revenue Commissioners - a category into which this case fell. In the circumstances, paragraph (b) nullified the whole of paragraph (a) and there was therefore no rule under which costs could be awarded.

16. The defendant attempted to fall back on the provisions of the Customs, Inland Revenue and Savings Bank Act, 1877. Section 5 of that Act provided that in all proceedings at the suit of the Crown under the Customs Acts, the same rule as to costs shall be observed as in suits and proceedings between subject and subject. However, there had been no adaptation of that Act and as the proceedings in question were clearly not at the suit of the Crown, the result was a finding by the High Court that there was no jurisdiction to award costs to either party in such a prosecution. The decision in *Crawford* was affirmed in *AG v. Shaw*.

17. The HSE argues that there is no statutory provision conferring on the District Court power to award costs to a parent under the Child Care Act, 1991.

18. It is submitted by the HSE that the power to award costs arises in only two instances under the Child Care Act. These are, firstly, where the court decides to join the child as a party under s. 25, in which case a solicitor is to be appointed to represent the child. The HSE is to pay the costs and expenses of the solicitor unless, on the application of the HSE, the court directs any other party to pay them (pursuant to s. 25(4) and (5)). Secondly, under s. 26 the court may, as an alternative to the power under s. 25, appoint a *guardian ad litem* to a child who is not represented. Again, the HSE will be responsible for the guardian's costs unless the court directs that another party meet them (s. 26(3)).Since, in reality, the "other party" envisaged can only be a parent or other person *in loco parentis*, the HSE argues that the legislature must have made a deliberate decision to provide for the possibility that these particular costs could be awarded against the HSE or against the parent, without making similar provision for a parent to claim their own costs.

19. I am told that the HSE does not in practice make applications to have such costs ordered against parents but that it would have a right and a duty to do so if the person concerned was in a position to pay.

20. The HSE says that the Act therefore establishes a policy decision that costs should not be awarded against it (other than in the two specified instances) and that this policy decision is appropriate given the nature of the functions exercised by it under the Act. Counsel points to, *inter alia*, s. 3 of the Act (which sets out the general principle that it is the function of the HSE to promote the welfare of children who are not receiving adequate care and protection) and s. 16 (the duty to apply to court for a care order or supervision order in respect of a child who requires care or protection and is unlikely to receive it without such an order). It is submitted that proceedings of the sort in question are "inquisitorial" or "investigative" rather than adversarial, with the objective being the promotion of the best interests of the child. In the circumstances it is wrong to see the process involving "winners" or "losers" and there is no "event" for costs to follow.

21. Reliance is placed by the HSE on the judgment of the Supreme Court of the United Kingdom in Re *T (Children)* [2012] 1 WLR 2281 as support for the proposition that a body such as itself, carrying out child protection functions pursuant to a statutory duty, should in general not be liable for costs.

22. In *T.*, the issue was whether the children's grandparents should recover their costs against the local authority which had brought

proceedings under the UK care legislation. Allegations of abuse had been made against six men and the grandparents were alleged to have colluded. For the purpose of the fact-finding hearing into the allegations the grandparents and five of the men had the status of "interveners" although, as noted in the Court of Appeal judgment ([2010] EWCA Civ 1585), it is not clear whether this was on their own application or otherwise. Four of the five men had legal aid. (The fifth represented himself.) The grandparents, who were in their sixties and who had a combined income of £25,000, seem not to have been eligible for legal aid and borrowed over £50,000, repayable over 15 years, to pay for legal representation. After a hearing that lasted more than five weeks they were cleared of all allegations. They were refused their costs on the basis that it was a policy not to award costs against local authorities in child care cases. They succeeded in the Court of Appeal, where it was held that this rule should not apply to fact-finding hearings, but lost in the UK Supreme Court. Before considering the judgment it is worth noting the remarkable fact that the Supreme Court appeal was conducted on a *pro bono* basis by all counsel involved and was argued without prejudice to the result in the Court of Appeal.

23. The court observed that since the Children Act, 1989 came into force costs had not been awarded against local authorities in cases where no criticism could be made of the manner in which they had performed their duties. It considered that the principle in question did not depend on the nature of the hearing. Judicial notice was taken of the potential impact that costs orders might have on the activities of local authorities and, further, of the fact that such bodies were financially hard pressed. In its conclusions the court said (at para. 42):-

> *"In the context of care proceedings it is not right to treat a local authority as in the same position as a civil litigant who raises an issue that is ultimately determined against him. The Children Act, 1989 imposes duties on the local authority in respect of the care of children. If the local authority receives information that a child has been subjected to or is likely to be subjected to serious harm it has a duty to investigate the report and, where there are reasonable grounds for believing that it may be well founded, to instigate care proceedings. It is for the court, and not the local authority, to decide whether the allegations are well founded. It is a serious misfortune to be the subject of unjustified allegations in relation to misconduct to a child, but where it is reasonable that these should be investigated by a court, justice does not demand that the local authority responsible for placing the allegations before the court should ultimately be responsible for the legal costs of the person against whom the allegations are made."*

The Attorney General's submissions on jurisdiction

24. The Attorney General is of the view that the District Court does indeed have jurisdiction to award costs, derived from the Courts of Justice Act, 1924 as extended by the Courts (Supplemental Provisions) Act, 1961.

25. Section 91 of the Act of 1924 governs the powers of the rule-making authority of the District Court. In the relevant part it provides: -

> *In particular rules may be made for all or any of the following matters [including] the practice and procedure of the District Court generally including questions as to costs.*

26. Section 34 of the Courts (Supplemental Provisions) Act, 1961) provides as follows: -

> *The jurisdiction which is by virtue of this Act vested in or exercised by the District Court shall be exercised as regards pleading, practice and procedure generally, including liability to costs, in the manner provided by rules of court made under s. 91 of the Act of 1924, as applied by s. 48 of this Act.*

27. Section 17 of the Interpretation Act, 1937 is also relevant:-

> *Whenever an Act of the Oireachtas confers any new jurisdiction on a court of justice or extends or varies an existing jurisdiction of a court of justice, the authority having for the time being power to make rules or orders regulating the practice and procedure of such court shall have, and may at any time exercise, power to make rules or orders for regulating the practice and procedure of such court in the exercise of the jurisdiction so conferred, extended or varied.*

28. The currently applicable rules are contained in O. 51 of the District Court Rules. Rule 1is set out in para. 11 above.

Relevant provisions of the Civil Legal Aid Act. 1995

29. The original, non-statutory Scheme of Civil Legal Aid and Advice was introduced in 1979. It was put on a statutory footing by the 1995 Act. The general criteria for the grant of legal aid and advice are set out in s.24 as follows: -

> *Without prejudice to the other provisions of this Act a person shall not be granted legal aid or advice unless, in the opinion of the Board-*
>
> > *(a) a reasonably prudent person, whose means were such that the cost of seeking such services at his or her own expense, while representing a financial obstacle to him or her would not be such as to impose undue hardship upon him or her, would be likely to seek such services in such circumstances at his or her own expense, and*
> >
> > *(b) a solicitor or barrister acting reasonably would be likely to advise him or her to obtain such services at his or her own expense.*

S 33

> *(1) In this section "costs" includes all outlays including solicitor' 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 recovered by the said person by virtue of the agreement.

30. Sub-section (6) provides for recovery of the Board's costs as against the client, whether by agreement, measurement by the court or tribunal or determination by the Taxing Master.

31. The Act requires applications to be considered by reference to, *inter alia*, a merits test (roughly, whether there is a prospect of success, or whether it is reasonable to litigate) and a means test. However, the merits test does not apply to children cases and, by virtue of s. 29 (as amended by s. 80 of the Civil Law (Miscellaneous Provisions) Act, 2008) the Board has a discretion to provide legal aid or advice without reference to the applicant's means.

Conclusions on jurisdiction

32. Counsel for the HSE argues that none of the above provisions expressly confer a power in relation to child care proceedings. The simple answer to that is that they do not have to. The combined effect is clear- the District Court Rules Committee has a general power to make rules providing for costs in civil proceedings and it has done so. The outcome of *Crawford* and *Shaw* demonstrates this. Those defendants failed in their claim for their costs because the relevant rules excluded them.

33. Counsel further says that the constitutionality of s. 91 is doubtful. That is an argument too far in the context of this particular case stated and I do not propose to embark upon it.

34. I do not think that the two provisions in the Child Care Act relied upon by the HSE - relating to the costs of the child and the *guardian ad litem* - are of assistance. These provisions clearly create a new power in the court to grant a right to be represented and to participate to persons who would not otherwise have had such a right, because as a matter of legislative policy it was thought appropriate that they should. It then became necessary to make provision for their costs. It does not follow that they are the only participants who should be entitled to their costs.

35. The next question then is whether child care proceedings are "civil proceedings" for the purpose of 0. 51.

36. It is not clear to me whether the Courts Acts were opened to the court in the *Southern Sligo Hotel* case. In any event, without attempting to second-guess Hedigan J. in relation to the particular procedure under the Environmental Protection Act and the provisions of that Act, it seems to me that the only distinction made in the Rules is between civil and criminal proceedings. There does not seem to be, for the purposes of the question of costs, a distinction between public and private civil proceedings.

37. The final issue under this heading is whether policy considerations require the court to refuse to grant costs against the HSE in child care proceedings.

38. There is no Irish authority that supports the HSE on the point. The decision of the UK Supreme Court in the *T*. case is certainly persuasive but I feel that I should not follow it for a number of reasons.

39. The grandparents in the case were not parties and do not appear to have been eligible for legal aid. With respect, I have to say that in my view the result of the application of the rule to them would be better described as an injustice than, to use the court's term, a "serious misfortune", were it not for the fact that the local authority concerned ran the appeal to the UK Supreme Court as a moot. In this regard I would prefer the approach of the Court of Appeal.

40. The general policy set out in *T*. is, I accept, a legitimate one and not unlike that considered by the Supreme Court here in *Dillane v Ireland* [1980] ILRM 167. In that case, the provision in the District Court Rules preventing a successful defendant from recovering costs against a member of An Garda Siochana acting as a common informer was in issue. (In contrast, costs could be awarded against an "ordinary" common informer.) The discrimination was held not to breach the equality guarantee of Article 40.1 because it related to the difference in social function between the two categories in a manner that was not arbitrary or capricious. Significantly, Henchy J. said in relation to the rule: -

"What matters is whether it could reasonably have been arrived at as a matter of policy by those to whom the elected representatives of the people delegated the power of laying down the principles upon which costs are to be awarded."

41. By contrast, the rule now contended for by the HSE not only has no authoritative basis but is, it seems to me, plainly contrary to the explicit statement of legislative policy in the Civil Legal Aid Act. That Act post-dates the Child Care Act. It is clearly applicable to child care proceedings, given the reference in s. 28(3) to proceedings concerning "the welfare of (including the custody of or access to) a child". It requires, in s. 33, that an application for costs should be made on behalf of the legally aided party and that the court should treat the application as it would that of a party without legal aid. There is no exception to this requirement for cases involving children. It follows that there is no statutory basis for the assertion that the legislative policy is that costs should not be awarded and indeed the contrary appears to be the case.

42. In *Dunne v The Minister for the Environment, Heritage and Local Government* [2008] 2 I.R. 775 the Supreme Court reversed a High Court decision to award costs to an unsuccessful plaintiff. The award had been made on the basis that particular considerations applied to cases where (1) the plaintiff was acting in the public interest in a matter that involved no private personal advantage and (2) the issues raised were of sufficient general importance to warrant an order for costs being made in the plaintiffs favour. Giving the judgment of the court, Murray C.J. said (at p. 783)

"The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis. As a counterpoint to that general rule of law, the court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of costs did not apply that would be a matter for legislation since it is not for the courts to

establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs."

The principle expounded here seems to me to be equally applicable to the contention that there are certain types of defendant against whom an award of costs should never be made. If the general rule, combined with the court's discretionary power to ensure that justice is done, is to be set aside it would, in my view, require legislative intervention.

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

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

The questions posed in the case stated
45. The court is asked whether the potential eligibility of the mother for legal aid should be a factor in the court's exercise of its discretion in relation to costs.

Submissions on behalf of the HSE

46. The HSE interprets this case as being, in reality, a claim for the funding of the mother's legal representation other than through the provision of civil legal aid under the Act. On this aspect the HSE argues that the establishment of the civil legal aid system is the mechanism chosen by the State to vindicate the right of access to the courts in cases of this nature. It is submitted that the mother is "manifestly" entitled to legal aid and should have applied for it. Counsel says that if she chooses not to, she should not expect "the public purse" to fund her choice. It is argued that underlying her claim for costs must be an assertion of a constitutional right to legal aid, on the basis that she must be taken to be maintaining that the legal aid system is inadequate to protect her right of access to the court. The assumption is that she considers the limitation of choice in relation to legal aid solicitors to be an impermissible restriction.

47. Following through on this line of argument, counsel for the HSE then cites a number of authorities for the proposition that there is no constitutional right to legal aid in civil matters, while also pointing to features of the Legal Aid Board's operation which do in fact facilitate the exercise of choice by a legally aided person. Such limitations as there exist are, it is submitted, not unreasonable.

48. It is submitted that "a party is not at liberty to have unlimited choice of legal representation in all circumstances". Concern is expressed that "were it otherwise the entire system for the provision of legal aid would be undermined".

49. The HSE says that it does not seek to limit the mother's choice of representation. "It merely seeks to avoid being fixed with liability for the costs of her choosing representation which is not funded by the legal aid scheme. In fact, the [HSE] merely asks that, in the event that [the mother] does so choose and seeks to recover the costs which flow from that choice that the District Judge in considering the question should have regard to the fact that the costs exposure has arisen as a result of [her] choice."

50. The further submission is made that the separation of powers is in issue. To require the District Court to disregard the availability of legal aid would be to disregard the policy decision of the Oireachtas in determining how such representation should be funded "especially where the effect of such a restriction would be to impose the burden of the cost of such representation on the HSE". This, it is said would be contrary to the principles espoused in *Sinnott v Minister for Education* [2001] 2 IR 545 and *T.D. v Minister for Education* [2001] 4 IR 259.

Submissions on behalf of the Attorney General
51. Counsel for the Attorney General says that the mother is attempting to turn her right to be legally represented into a right to costs. If this were to be accepted it would be tantamount to establishing a privatised legal aid system. There could be no such right in absence of a constitutional right to legal aid in civil cases and it has been definitively established by the Supreme Court in *Magee v Farrell* [2009] IESC 60 that there is no such right.

52. Counsel refers to the child-centred nature of the jurisdiction and says that in these proceedings there are no winners or losers and no "event" for costs to follow. That being so, the only basis on which a right to costs can be asserted is by virtue of the simple fact that the mother is involved in the case. However it was accepted that the District Judge does have some discretion in relation to costs- while there is no "event", the judge can have regard to the run of the case.

53. On the possible availability of legal aid, it is submitted that it is relevant because the core question in relation to costs is the reasonableness of legal representation, and applying for legal aid is a manifestation of reasonableness. If a parent had difficulty in getting legal aid the judge could take that into account.

54. The court was informed that the Attorney General is expressing these views only in relation to child care cases and not as a general proposition. The concern is, apparently, that the availability of costs would make proceedings more adversarial because private practitioners would see an opportunity to get costs, which is not a motivation for solicitors of the Legal Aid Board.

Submissions on behalf of the mother
55. Counsel for the mother submits that this was a matter in which it was reasonable for her to seek legal representation; that her constitutional right of access to the court entitles her to choose her own lawyer; that a corollary of that right is the right to seek costs; that the right to seek costs cannot be fettered by questioning as to her means and that, in any event, legal representatives instructed under the legal aid scheme would have been obliged by s. 33 of the Act to seek costs in the same manner. It is not, therefore, open to a District Judge to decide the issue of costs on the basis of the identity of the legal representative.

56. The mother, too, relies on the principle of the separation of powers and the same authorities in relation thereto. The submission in this regard is that the court would be engaged in policy making were it to decide to embark on enquiries as to the mother's eligibility for legal aid.

57. Counsel says that he is not asserting either a constitutional right to legal aid or a right to be paid costs regardless of the outcome of a case. He does assert a constitutional right to choose one's own lawyer, which includes the choice of whether to apply for legal

aid or not where one may be eligible for it. He relies on the comments of O'Neill J in the case of *Law Society of Ireland v Competition Authority* [2006] 2 I.R. 262. In that case, the Competition Authority had attempted to limit the choice of legal representation of persons summoned to be examined on oath before it.

> *"Firstly, the legal representation is not State funded: it is the result of contracts freely entered into between the legal representatives in question and persons under investigation by the respondent or witnesses. Needless to remark, the fees of these legal representatives must be paid by the persons under investigation or by witnesses if they avail of legal representation. Thus there can be no question of the respondent having a discretion similar to that afforded to a court under reg. 7(1) of the Criminal justice (Legal Aid) Regulations 1965.*
>
> *Notwithstanding the specific discretion given to a court under the above regulations, Barr]. nonetheless held in The State (Freeman) v. Cannel/an {1986} l.R. 433 that freedom of choice of solicitor, from the legal aid panel, should not be denied save for good and sufficient reasons. The conclusion of Barr]. in that regard would appear to me to be similar to that reached by the United States Supreme Court in Wheat v. United States (1988) 486 U.S. 153, namely that a presumption in favour of choice of lawyer must be recognised."*

58. At p. 281 he says:-

> *"That leaves me to conclude that in civil proceedings, such as the type conducted by the respondent, there must be a strong presumption in favour of freedom of choice of representation. Although it is the case that in these proceedings the clients will invariably be paying for their own lawyers, this factor does not in my view add significantly to the weight or strength of this presumption. Regardless of who is paying for the representation the principle must in my view remain essentially the same.*
>
> *It could not in my view be said that a person availing of the criminal free legal aid scheme should have less autonomy or control over the conduct of their defence and in particular what lawyers were selected to conduct that defence, than would be the case if they were contracting for the services and paying for them themselves."*

59. In conclusion, O'Neill J. held as follows:-

> *"I am satisfied that a person facing a tribunal in respect of which it is appropriate to have legal representation does, as an incident or aspect of the right to fair procedures, have a constitutional right, pursuant to Article 40.3 of the Constitution of Ireland 1937, to freely select the lawyer that will represent him or her from the relevant pool of lawyers willing to accept instructions.".*

60. The entitlement to costs is a separate matter that may or may not arise on the facts of an individual case as determined by the judge. Reasonableness is a key consideration - costs may be awarded in favour of the HSE if a parent defends a case unreasonably. There is, however, nothing unreasonable in deciding not to apply for legal aid when one has a right not to. The District Court has, therefore, no right to take into account how a litigant chose his or her representative. The protection of the resources of the HSE cannot defeat this right.

61. On the nature of child care proceedings, it is agreed that the judge's role is inquisitorial but, it is contended, the process itself is adversarial. Parents who contest the application made by the HSE can only do so by challenging the HSE's evidence and adducing their own. There are always issues to be determined, the primary one being whether the HSE was justified in making the application. Going to a private lawyer does not, as such, make the process more adversarial.

Conclusions

62. There is of course no doubt about the constitutional status of the right of access to the courts. The HSE does not dispute that and nor does it dispute the right, in general, to a choice of lawyer. However, what it is trying to establish here is a principle that the choice of lawyer should in cases of this sort be limited to the extent provided by the Legal Aid Board, in order that its own resources not be exposed.

63. I accept that child care proceedings under the Child Care Act, 1991 may not be directly analogous to most other forms of litigation. It is certainly the case that the judge's function is different, in that he or she must adopt a more inquisitorial role and reach a conclusion based on the welfare of the child beyond all other considerations.

64. However, that is not to say that it is wholly unlike other litigation. The concept that "there are no winners or losers" is an appropriate one for the attitude of the professional staff of the HSE and its lawyers but it asks a degree of detachment that is very unlikely to be shared by a parent. The procedure is, as a matter of fact, adversarial. Furthermore, although the proceedings may often be more accurately described as a process than a unitary hearing, there may well be individual issues decided along the way in favour of one side or another.

65. I agree with counsel for the mother that this case is not about legal aid or an attempt to indirectly establish a right to legal aid in civil cases. It is, in my view, about the right of an individual litigant who is not on legal aid and has not applied for legal aid to be treated in the same way as any other litigant who is not on legal aid - without arbitrary, capricious or invidious discrimination that, on the arguments mounted by the HSE and the Attorney General, could be based only on her supposed lack of means. The applicant is not seeking to have her representation "funded from the public purse". She chose her representative, as I accept she was entitled to do as a matter of right, and now seeks what any litigant who has succeeded in litigation is entitled to seek- her costs. I know nothing about the merits of the claim or whether in the normal course of events, having regard to all the normal factors taken into account by a judge, she would be entitled to an order for costs. All that appears from the case stated to have been put up by way of opposition to her claim is, in effect, the proposition that she is poor.

66. I realise that putting it in this way may seem invidious and that the HSE and the Attorney General would, with complete sincerity, disclaim any such discriminatory intent. However, there is no way around the fact that the consequence of their submissions would be that persons of limited means would have to justify their choice of advocate, in a way that wealthier individuals would not, despite the fact (or because of the fact) that they are not seeking State assistance. The principle they contend for would mean that judges could or should subject litigants to a sort of reverse eligibility test, enquiring into their income and assets and perhaps, if someone appeared to be over the means threshold, considering to what extent the Legal Aid Board might have used its discretion. This sort of enquiry is understandable when a person applies for a State-funded service but I can see no justification for such an intrusive process when the individual has chosen not to so apply.

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. The Attorney General would apparently prefer that child care cases be dealt with by the practitioners of the Legal Aid Board. I should perhaps state here that I have no doubt that the body of solicitors working for the Board, whether as employees or on the panel of private solicitors, have amassed an impressive expertise in this area of law. However, there is simply no precedent for the proposition that a judge can use his or her discretion in the matter of costs to compel, or even encourage, litigants to abandon their choice of advocate. To do so would, I believe, amount to an impermissible interference with that choice. Costs are an aspect of the right of access to the courts- *per* Finlay P. in *Henehan 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."*

69. I conclude that the mother was entitled to choose her own representative, that she was not in any way obliged to apply for legal aid and that her eligibility for legal aid, whether established or presumed, has no bearing on her entitlement to apply for her costs. I will therefore answer both of the questions posed in the negative.