



THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 52

Record Number: 2018/167

**Whelan J.
Haughton J.
Murray J.**

**IN THE MATTER OF A. A MINOR BORN IN 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/RESPONDENT

- AND -

**A. A MINOR REPRESENTED BY ORDER OF HIS SOLICITOR AND NEXT FRIEND
GINA CLEARY**

FIRST DEFENDANT

- AND -

C.

SECOND DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 28th day of February 2020

Introduction

1. This is an appeal against a judgment given in the High Court on the 21st February, 2018 making no order in respect of the costs of the appellant (C.) incurred in a substantive plenary hearing. The proceedings had been heard over five days in December 2017. A written judgment on the substantive issue was delivered in February 2018. The matter was adjourned for redaction of the judgment and further adjourned in respect of the costs of the appellant.
2. The appellant, C., is the mother of A. who at the time of the commencement of the proceedings before the High Court was a minor and the subject of a care order. C. was joined as defendant to the proceedings by the respondent, the Child and Family Agency (the "CFA") from the commencement of the proceedings.

3. As appears from the substantive judgment ([2018] IEHC 112), the central issue was whether a doctor was entitled to disclose the HIV status of her patient, A., a minor, without his consent and against his wishes to a person with whom the doctor believed he was having unprotected sex and who, as such, was believed to be at risk of contracting HIV. C. throughout the litigation had supported the position adopted by her son and opposed the reliefs being sought by the respondents. The Court held, in light of the evidence before it, that no basis had been established in the circumstances to justify a breach of A.'s confidentiality. The Court concluded on the evidence, that the risk of HIV infection was not such as to justify breaching A.'s right to confidentiality which should only occur in exceptional circumstances. C., a successful defendant, sought her costs against the CFA.

Costs hearing

4. On the 21st February, 2018 an order for costs was made by consent in favour of A., the CFA having conceded that such costs should be awarded against it. The CFA disputed the entitlement of C. to an order for costs contending that there should be no order against the CFA in respect of her costs in circumstances where she was the beneficiary of civil legal aid under the Civil Legal Aid Act, 1995.
5. In argument the CFA relied on the Supreme Court decision in *The Child and Family Agency v. O.A.* [2015] 2 I.R. 718. The trial judge had noted that although the facts of the latter case had involved child care orders and legal costs in the District Court and on appeal in the Circuit Court, he could: -

“...see no reason why the principles as set down by MacMenamin 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.”
6. Having cited extracts, including paragraph 52, from the aforesaid judgment the trial judge concluded: -

“Applying these principles to the present case, the starting point, per MacMenamin J. is 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. The trial judge in his costs determination concluded at para. 7: -

“...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.”

The Court refused C.’s application seeking an order for costs against the CFA in her favour.

Appeal

8. The appellant contends that the trial judge erred in law in failing to grant her the costs of the High Court proceedings for the following reasons: -

- (a) He erred in describing her as “a witness as to fact”.
- (b) He erred in finding that C. did not require legal representation.
- (c) He failed to recognise that the CFA had named C. as a party to the proceedings.
- (d) He failed to take due account of the fact that C. was a named defendant who had filed a full defence together with legal submissions and therefore was entitled to be treated as a full party to the proceedings.
- (e) He failed to have due regard to Order 99 Rule 1(1) of the Rules of the Superior Courts.
- (f) He failed to correctly apply Section 33 of the Civil Legal Aid Act, 1995.
- (g) In determining that C. was in receipt of legal aid and fell into a category of case that was entitled to her costs the High Court judge failed to correctly apply the decision in *Dunne v. The Minister for the Environment* [2007] I.E.S.C. 60.
- (h) In taking into account that C. was entitled to legal aid and using that as a consideration in refusing the order as to costs the High Court judge failed to correctly apply the decision in *The HSE v. O.A.* [2013] I.E.H.C. 172.
- (i) The High Court judge failed to recognise that the appellant C. was a successful party in defending the claim and therefore the High Court judge incorrectly applied the decision in *The Child and Family Agency v. O.A.*

9. The CFA opposed the appeal on all grounds contending that the High Court judge was correct and had not erred either in law or in fact in determining that C.’s primary role at the trial was as a “witness as to fact” and that the Legal Aid Board should therefore have been actively considering whether and to what extent it was justified in expending further legal costs on behalf of the appellant which would ultimately have to be funded by the taxpayer. The CFA contended that the High Court judge exercised his discretion in departing from the normal rule that costs follow the event for the specified reasons set forth in his judgment. Further, it asserted that he properly identified specified reasons for

his decision to exercise his discretion and depart from the general rule that costs follow the event. The CFA argued that the High Court judge acted within jurisdiction and properly exercised his discretion in respect of an adjudication of costs as between two state funded agencies.

Discussion

10. The ordinary rule is that costs follow the event and an order for costs is normally made in favour of a successful party as against the unsuccessful party in litigation. If this rule is operative and to be applied to the facts of the instant case then C. is undoubtedly entitled to an order for costs as against the CFA. This is so because the CFA unilaterally made a litigation decision at the outset to join C., the mother of the minor A., as a defendant in the proceedings. After a lengthy and contentious hearing lasting over five days in December 2017 and with further listings in the High Court on the 6th, 12th, 19th and 20th of February, 2018 the Court made a formal order refusing all orders sought by the CFA. That substantive order was perfected on the 6th April, 2018. The CFA did not appeal against it.
11. The High Court retained its discretion to make a different order as to costs having regard to O.99, r. 1 of the Superior Courts, 1986 (as amended) which provides: -

“(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.

....

(4) Subject to sub-rule (4A), the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event.”
12. The exercise of judicial discretion in the context of departing from the normal rule as to costs was considered by the Supreme Court in *Dunne v. Minister for the Environment* (no. 2) [2008] 2 I.R. 775 which confirmed that in the exercise of such discretion a court is not wholly at large but must act on a reasoned basis and identify the factors which in the circumstances and having regard to the facts of the case warrant a departure from the normal rule that costs follow the event. The Supreme Court also reiterated that whether the proceedings seek a private personal advantage and whether the legal issues raised were of a special and general public importance are factors which are potentially relevant to such a determination but are not necessarily determinative.
13. It is clear as a result of the *Dunne* decision that, in the absence of any express legislative provision, there is no pre-determined category of case which falls outside the full ambit of the discretionary costs jurisdiction vested in the trial judge.
14. Further, there is no identifiable basis for applying any kind of “bright line” rule to the approach as to costs in cases involving the CFA. Had it been the intention of the legislature that special criteria or factors ought to be taken into account in circumstances where costs are sought against the CFA or in circumstances where there is a dispute between two state agencies regarding liability for costs which would warrant a deviation

from the normal principles and rules as to costs and the normal parameters governing the exercise of its discretion by the court, then same ought to have been addressed in the relevant statutory scheme.

Civil Legal Aid Act, 1995

15. Indeed section 33(2) of the Civil Legal Aid Act, 1995 provides: -

"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."

16. O'Malley J. in *HSE v. O.A.* [2013] 3 I.R. 287 at para. 41 in considering the operation of the provisions of the Civil Legal Aid Act, 1995 in relation to costs observed: -

"That Act post-dates the Child Care Act, 1991. 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."

17. O'Malley J. in the High Court in *HSE v. O.A.* considered *Dunne v. Minister for the Environment* [2008] 2 I.R. 775 and in particular the *dicta* of Murray C.J. 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 law on 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."

18. It is clear from the decision in *The Child and Family Agency v. O.A.* that the authority had withdrawn child care proceedings ultimately from before the District Court. As a result, there never was a full hearing although the issue of costs was the subject of an appeal to the Circuit Court. The Supreme Court noted that "...there had been no full hearing on the issue before [the Circuit Court] on appeal" (para. 41). With regard to elements of the

proceedings, particularly the making of supervision orders in regard to children by the District Court, MacMenamin J. observed: -

"It cannot be convincingly asserted that the mother was a 'successful party' in the latter instances. Nor can it be said that the District Court Judge's award of costs had, to apply the well-established phrase, 'followed the event', or 'established principles'.

In fact, the ruling does not set out a rationale for the award of costs, nor does it seek to distinguish the full care proceedings from the supervision orders made, which were clearly unsuccessful from the respondent's [mother's] point of view."

The event

19. MacMenamin J. then observed at para. 42 of the judgment: -

"... the use of the term 'the event', as in 'costs follow the event' is not always, in itself, a satisfactory criterion, in the context of child care cases, where, as here, there may be a number of 'events', and there are different orders made as part of a continuum. The term 'outcome' may be a more apposite approach when considering such applications, thereby allowing a judge to take a more all-encompassing view. Whether it was appropriate to deny a successful party their costs because of the existence of legal aid, simply does not arise as an issue here."

In dealing with the criteria which may appropriately be adopted by the District Court in dealing with a costs application, he said at para. 52: -

"...the approach to be adopted by the District Court, in dealing with statutory child care proceedings, should normally be predicated on whether, in the first instance, it was proper to commence the proceedings...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..."

Application of the principles to the instant case

20. The instant case concerns an issue of child welfare rather than constituting a child care application. Furthermore, unlike the state of affairs as obtained in O.A., the orders made by the High Court on the 21st February, 2018 were not as part of a continuum but conclusively determined the proceedings and indeed the CFA did not appeal that determination. As MacMenamin J. noted, a key issue in the case before him was when, if at all, it would be appropriate to award costs to a party for whom the outcome has been largely unsuccessful. In the instant case it is the CFA which has been wholly unsuccessful, and C. has been entirely successful in resisting the proceedings and supporting her son in his litigation.

21. The decision in *The Child and Family Agency v. O.A.* provides clarity and certainty regarding costs in District Court child care proceedings and appeals from such determinations to the Circuit Court. The instant case, by contrast, was novel and the outcome was by no means predictable. The Supreme Court in *The Child and Family*

Agency v. O.A. at para. 52 acknowledges the material distinction in substance of litigation where the inherent jurisdiction of the High Court is invoked in regard to a child. In contrast to child care proceedings which are instituted before the District Court, MacMenamin J. observes: -

“Different considerations would often apply in relation to child care proceedings in the High Court where the Court is exercising its inherent jurisdiction. Very frequently the cases in that category address situations where there is no direct precedent, where the same statutory considerations do not come into play; and where, frequently, the CFA acknowledges that due to the nature and complexity of the case it would be unduly burdensome for parents or other parties to bear their own costs.”

22. In the instant case the CFA, understandably, sought to place reliance on the Supreme Court decision of MacMenamin J. in *The Child and Family Agency v. O.A.* However, that decision is distinguishable in a number of material respects. Firstly, it was a judgment in relation to the issue of costs and the principles and criteria applicable to determining costs applications in District Court child care proceedings brought pursuant to the Child Care Act, 1991 and where sections 13, 17 and/or 19 of the said Act were engaged.
23. By contrast, the instant case was instituted by way of plenary summons in the High Court invoking the inherent jurisdiction of the High Court and the provisions of *Bunreacht na hÉireann*; Articles 34.3.1 and Article 40.3. C. is a guardian and mother of A. As such she had an immediate, direct and compelling interest in the proceedings, particularly in light of the identified potential risks to her son’s welfare should the CFA succeed in its application. Further, far from being a routine application to the District Court pursuant to the statutory remit of the Child Care Act, 1991 as the trial judge himself noted: -

“This case is unprecedented in the Irish courts since it seeks an order to breach patient confidentiality for the benefit of a third party” (para. 2 of the substantive judgment).

The unprecedented, exceptional and ground-breaking nature of the proceedings in the instant case sets them apart from routine applications which originate in the District Court pursuant to the provisions of the Child Care Act, 1991.

24. It is clear from the history of the proceedings outlined by *MacMenamin J. in The Child and Family Agency v. O.A.* that the matters at issue between the parties there were the subject of ongoing interim orders including a supervision order, interim care order, renewals of such orders from time to time, applications for directions seeking to discharge an interim care order and various directions of the District Court including orders for review of a supervision order. Hence, the litigation was ongoing in nature, the subject of sundry interim orders which were varied from time to time, which were the subject of review from time to time and the subject of an application to be set aside.

25. By contrast in the instant case, the substantive issue was progressed with a significant level of expedition by way of plenary proceedings to a final and unequivocal determination embodied in the order of the High Court dated the 20th February, 2018 refusing the CFA the reliefs claimed based on a written judgment. Thus there was a clear "event" wherein C. fully and successfully opposed the application for the reliefs sought by the CFA. The Agency failed on all grounds and hence the order represents a clear and finite event in respect of which the CFA did not appeal the orders of the High Court refusing the reliefs sought.

Conclusions

26. O.99 r.1 (3) and O.99 r.1 (4) provide that costs are to "follow the event". In the instant case the determination of the trial judge as to costs was in the context of a final and conclusive outcome and an order being made following the event of the litigation. The order was not appealed against. In the event, the CFA had been unsuccessful and failed to obtain any orders from the Court and C., the second named defendant in the litigation, had successfully resisted the application concerning her child.
27. The facts in *The Child and Family Agency v. O.A.*, which concerned statutory child care proceedings in the District Court, are wholly distinguishable from the facts of this case. There was no "continuum" arising in the instant case. The said decision does not assist the CFA.
28. There was clarity and finality attendant on the order of the court made at the conclusion of the hearing and the order made refusing the reliefs sought by CFA was not the subject of an appeal. As such therefore, the instant case was clearly and significantly distinguishable from the facts which presented themselves to the Supreme Court in *The Child and Family Agency v. O.A.* These proceedings were substantial, novel and complex requiring argument over approximately five days before the High Court.
29. By any measure these were unusual proceedings. This was illustrated by the fact that there was difficulty encountered in finding any precedent for such an application across common law jurisdictions. I am satisfied that given the exceptional nature of the issues this case falls within the ambit of the circumstances adverted to by MacMenamin J. when he expressed the view that "different considerations often apply in relation to child care proceedings in the High Court where the Court is exercising its inherent jurisdiction."
30. A potential injustice would be visited on the appellant mother if an order for costs was not made in her favour in all the circumstances of the case. The outcome of this case was a matter of great importance to her child and to her. This did not cease to be so merely because he attained the age of majority in the course of the litigation. The welfare of A. was a matter of paramount consideration in the proceedings. The vindication of his constitutionally protected rights necessitated that his mother and guardian be made a full party to the proceedings, a step CFA quite correctly took from the outset. That step was taken with full knowledge of the existence and import of s.33(2) of the Civil Legal Aid Act, 1995. A. was entitled to have his mother's views heard on an issue that touched and concerned his constitutionally protected rights, his welfare and best interests. C. was

entitled to exercise her parental rights as she did to have the court appraised of her views concerning her child's welfare. Her engagement in the litigation was, on the evidence, a practical vindication of her constitutionally protected rights as parent and guardian of A.

31. I am satisfied that the trial judge fell into error in characterising the appellant C. as being reduced to merely "a witness as to fact" in relation to her "adult" child, "something which does not require legal representation". In fact, C. had a clearly recognised constitutional right to be engaged in litigation in circumstances where at the date of the institution of the proceedings her child A. was a minor. She actively engaged with the litigation and put before the Court comprehensive submissions directed to the child's welfare in circumstances where real and significant concerns were identified and articulated to the Court as to the potential risk of harm or injury that might befall the minor A. were the orders sought by the CFA to be made by the High Court.
32. C. sought no private or personal advantage from her engagement with the litigation. The legal issues raised were of a special and general public importance as appears to have been accepted by the parties.
33. C.'s thoughtful and thorough submissions played a significant part in satisfying the Court that the breach of A.'s patient confidentiality sought by the CFA ought not to be granted. Further, she convincingly argued that the CFA had failed to identify the exceptional circumstances which were required before a breach of patient's right to confidentiality could be breached. Thus, I am satisfied that C.'s primary role at the trial of the action was far more significant and far more central than a mere "witness as to fact". Her presence was necessitated by virtue of the constitutional framework and the articles of the Constitution invoked by the CFA itself in the context of the litigation, and further by the very measure of the CFA in making a decision *ab initio* that C. be constituted a full defendant in the proceedings.
34. I am satisfied that notwithstanding that the trial judge alludes to s.33(2) of the Civil Legal Aid Act, 1995 he erred in failing to have proper regard to its principles. To suspend the operation of a statutory provision in such a manner resulted in the trial judge illegitimately interposing himself between the Oireachtas and the Executive. If the operation of the general rule as to costs found in Order 99 as combined with the court's discretionary power to ensure that justice is done, is to be set aside, suspended or varied in respect of certain cohorts of litigants it would, in my view, require legislative intervention.
35. It is clear that the trial judge accorded significant weight to the fact that the dispute as to costs as between the appellant and the CFA was in substance "A dispute between two State agencies, the Legal Aid Board and the CFA, as to who should be liable for C's legal costs." Furthermore, he erred in his reasoning at para. 6 in stating: -

"...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.”

36. The learned judge erred in his approach at para. 7 of his judgment where he observed: -

“...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 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.”

37. Such an approach amounts to a clear disregard of s.33(2) of the Civil Legal Aid Act, 1995 as well as the constitutionally protected rights of A. and his mother and supplants the statutory direction embodied in that provision in a manner which inappropriately enlarges the Court’s own constitutional role such as to amount to an error of principle.
38. I am satisfied that in the instant case there is no *O.A.* type continuum and the fundamental principle that costs follow the event applies in accordance with the tenor of O. 99. There is no legitimate basis to deviate from that principle in circumstances where the trial judge was mandated by Statute to make an order for costs in the matter in like manner and to like effect as the Court would otherwise make had C. not been in receipt of legal aid and rather had obtained the services of a solicitor and barrister at her own expense. Further, the order of the Court amounts to a clear and definitive event. The issues were significant, complex and novel. The decision of MacMenamin J. in *The Child and Family Agency v. O.A.* is distinguishable for the reasons outlined above.
39. I would accordingly reverse the order of the High Court and grant C. the costs of the proceedings, including all reserved costs, when ascertained, against the CFA.