THE HIGH COURT

FAMILY LAW

[2023] IEHC 413

[2023 No. 3 HLC]

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991

AND

IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

AND

IN THE MATTER OF ALICE, A MINOR

(CHILD ABDUCTION: COSTS, ONE PARTY LEGALLY AIDED)

BETWEEN:

B.E.

APPLICANT

AND

R.E.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 6th of July, 2023

1. Introduction

1.1 The Applicant mother in this case seeks that the Respondent father pay the costs of the summary proceedings in which she successfully applied for the return of her daughter, Alice, from the Respondent's home in Ireland to Alice's habitual residence in Northern Ireland.

1.2 The Applicant had the benefit of a publicly funded legal aid scheme for her application, while the Respondent retained lawyers privately. The Applicant made an open offer, on the hearing date, to agree to a return order which would be stayed until Alice finished her school year here in Ireland. This was the order made by the Court after a contested, one-day hearing. In those circumstances, the Applicant argues, the Respondent should pay all the costs of the proceedings, including the costs of the Legal Aid Board who provided her legal assistance and representation at the hearing.

1.3 The Applicant relies on S.169 of the Legal Services Regulation Act 2019 [the 2019 Act]. In short, this provides that costs follow the event, or the winner takes it all. If a different costs order is made, according to the Act, a court must set out reasons as to why it has so ruled. It was submitted that there is no basis on which the Respondent can suggest that costs should not follow the event in this case. She adds that the open offer to settle the case should also weigh heavily in the Court's exercise of its discretion as to costs.

1.4 The Respondent argues that in family law proceedings, the most usual order is to make no order as to costs, ensuring that each party pays her own costs. It was submitted that family law cases have always been treated as an exception to the general rule, for a number of reasons including that it is usually impossible to identify which party has succeeded in the case. Family law cases invariably involve a certain amount of compromise and often include directions in relation to custody and access, calculations in relation to maintenance and division of assets and orders which may be revisited when the circumstances of the parties change. In such cases it is certainly difficult, and often impossible, to identify an outright winner.

2. The Relevant Law: Costs

2.1 Order 99 Rule 2(1) of the Rules of the Superior Courts provides: "*The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.*" In *Veolia Water UK Plc and Others v. Fingal County Council* [2006] IEHC 137, Clarke J. explained that if the party who brought proceedings secured an entitlement which could not have been obtained without the hearing concerned, then that party was to be regarded as successful and "*[t]he proceedings… will have been justified by the result.*" In other words, where a claimant, by virtue of her success, has shown that her claim did not waste the Court's nor the parties' time nor money, it is reasonable to 'reward' her by giving her the costs incurred in bringing her claim.

2.2 Conversely, the defendant who successfully fends off a claim against her has shown that her stance was justified, making it unfair that she should pay any of the costs incurred in meeting that claim. Insofar as only some aspects of a claim are successful, a court will usually reflect this in an order of costs, awarding costs from a certain date or a portion of the costs to reflect the amount of time taken in preparing or presenting the distinct issue in which the result favoured one party. Apart from the justice of the case at hand, most of the relevant cases also refer to the purpose and effect of such rules in discouraging unnecessary, unmeritorious or vexatious litigation.

2.3 These general rules in relation to costs have not been affected by s.169 of the 2019 Act but the various cases outlined above explain the rationale for the section and how the rules had been applied in practice and can help to predict how they will, under the section, continue to be applied. Section 169(1) requires the Court to consider, amongst other issues, the conduct of the parties before and during the proceedings, the question of whether it

was reasonable for a party to raise, pursue or contest one or more issues and any settlement offers made.

2.4 The High Court Practice Direction number 51, 'Family Law Proceedings', provides, at paragraph 25, that a court in exercising its discretion as to whether or not to make an order for costs shall consider an open offer made to the other party and the general reasonableness of each party's behaviour in the conduct of the litigation in question.

2.5 Section 33(2) of the 1995 Civil Legal Aid Act [the 1995 Act] makes it clear that the fact that a party is legally aided is effectively irrelevant in considering costs. It reads:

> "*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. Costs in Family Law Proceedings

3.1 Despite what appear to be definitive statements that costs usually follow the event and the 1995 Act provision confirming that legal aid should not affect this position, it is clear that in at least two types of case this rule is almost invariably set aside. One is the criminal prosecution, which does not arise here, and the other is in family law proceedings.

3.2 *D. v. D.* [2015] IESC 66 is authority for the proposition that the parties should usually bear their own costs in family law proceedings. There, Clarke and MacMenamin JJ pointed out that family law proceedings often involve a decision in which there is no winner. There is, rather, future

provision made for the parties or, as they still are, the family. This complicates the task of locating what exact 'event' costs are to follow (leading MacMenamin J. in *CFA v. O.A.* [2015] IESC 52 to adopt the phrase 'costs follow the outcome' in childcare proceedings).

3.3 In *D.*, the judgment in *M.K. v J.P.K. (No. 3) (Divorce: Currency)* [2006] 1 IR 283 was cited with approval. There, McCracken J. described the issues vividly, remarking that:

> "*These are family law proceedings in which the court must have regard to the interests of both parties. This is not a case in which damages have been awarded to the applicant for some wrongdoing or injury caused to her by the husband. In family law cases there is a pool of assets, comprising those of both the husband and the wife, which assets are to be used both to make future provision for the spouses and any dependant members of the family and to pay the costs of both parties. There is no question of either party having further assets which could be used to pay costs. In my view, therefore, the general rule does not necessarily apply in family law proceedings … In the circumstances of family law cases the court must look at the effect of the award of costs on both parties*."

3.4 MacMenamin J., in *D.*, emphasised that "*there is a vital distinction between what is reasonable and what is unreasonable conduct by an opposing party*", and that a trial judge was particularly well-placed to determine whether conduct had gone beyond reasonable parameters, for example where a party had set their sights too high. In each individual case, it was:

> "*the duty of the Court to make such order is just in the circumstances. In some circumstances, this may warrant a court ordering each party to bear its own costs. This may be particularly so where (in circumstances envisaged by the High Court Practice Direction), there has been a meaningful and constructive pre-trial engagement by way of Calderbank letters. In other cases, especially*

where there has been serious misconduct, obstruction or hindrance of court orders, as a result of which significant further proceedings are necessary, a full order for costs may be both just and fair without it becoming a sanction."

3.5 According to McMenamin J., in *CFA v. O.A.*, [2015] IESC 52, the normal rule that costs follow the event should inform the District Judge's decision on costs, but in a childcare case there will normally be no order for costs unless there were distinct features to the case justifying such an order.

3.6 McMenamin J. noted that different considerations should apply in relation to childcare proceedings in the High Court where the Court is exercising its inherent jurisdiction. Frequently, he noted, 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*." These scenarios differ from the current case, however, which is typical of Hague list cases and in which there are multiple precedents and clear guidance from the superior courts.

3.7 *CFA v. A.* [2020] IECA 52 involved entirely different circumstances in which the applicant mother was successful in obtaining costs from the Agency in a case about whether a doctor was entitled to disclose without consent the HIV status of her patient, a minor, to the minor's sexual partner. The minor's mother was joined as a party to the action. Whelan J. held that the Agency had invoked the inherent jurisdiction of the High Court and the provisions of Bunreacht na hÉireann in a case of an "*unprecedented, exceptional and ground-breaking nature*" which set it apart from routine applications. A clear 'event' had occurred in the High Court, and an order followed that event. The case of A., as such, "*[fell] within the ambit of the circumstances adverted to by MacMenamin J. per curiam in his concluding*

comments in O.A. when he took 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'". That parent was entitled to her costs.

3.8 By contrast, in *D.K. v. P.I.K.* [2023] IECA 7 a retrial had been ordered by the High Court in relation to a relocation application. The question in the Court of Appeal was whether an order as to costs should be made in relation to the original High Court proceedings, which were argued by the Appellant to have not, essentially, resulted in a determination of the matter in issue. Whelan J began by setting out that "*The proper allocation of costs in the context of family law proceedings calls for an approach that accords due regard to the importance of the family and the rights of children under our constitutional order in cases such as the present where both aspects are engaged.*"

3.9 Whelan J. held that, in the circumstances of that case, the *Veolia* principles were not engaged. The wife had failed to identify facts or omissions on the part of the husband in the course of conduct of the proceedings which materially added to the costs of the proceedings on any basis.

4. Conclusions

4.1 The childcare analogy should be approached with some care, given that in cases under the Hague Convention, it is the left-behind parent who institutes proceedings rather than a state agency. Nonetheless, the cases cited in argument contain very helpful guidelines for this Court.

4.2 The facts in this case have much in common with the situation of the parties in *O.A.* where MacMenamin J considered the circumstances in which a District Court judge may award costs against the Child and Family Agency to a parent's privately retained lawyer in childcare proceedings. He

considered the potential burden on parents of making such costs orders and set out the factors which might persuade a court to depart from the general rule in family law proceedings that there should be no order as to costs. These included arbitrary or capricious behaviour on the part of the Agency or a case in which the particular outcome was clear and compelling, or where it would be unjust to expect a party to bear her own costs.

4.3 This Applicant relies on her open offer to the Respondent to settle the case as a factor (which the Court must consider under s.169(1) of the 2019 Act) and the conduct of the Respondent in facilitating the move of their daughter and in refusing that offer, which she submits prompted these proceedings and materially added to the costs. The Respondent submits that this is essentially a family law matter comparable to the childcare cases referred to in the authorities reviewed above. He argues that he received the open offer with only minutes to consider it and he submits that he otherwise conducted the case without adding unduly to its complexity or length.

4.4 It is, in my view, a significant factor that Hague Convention cases are family law proceedings. The orders sought are for the summary return of children to their homes and always involve at least one, and usually both, of the child's parents or guardians. These cases involve complicated and challenging situations, human emotions and preferences, and numerous factors affect the final outcome of the cases. While one party may feel that she has succeeded, as in many such cases, it is usually true to say that there has been no winner. All of these general comments apply to the present case. No party is satisfied by the outcome and its aftermath.

4.5 Cases in the Hague list tend to settle, quite often, which is testament to most parents' ability to look beyond the facts of the application for a return and consider how the welfare of the child is served by a binary order; to return

or not to return the child. In many cases, the parents or guardians can set aside (or at least temporarily ignore) their differences and agree a custody and access plan, or even a relocation plan, that they can operate without undue difficulty and that is in the interests of their child. This is not to underestimate the effect of such an agreement on the parent who is left behind. Often a settlement agreement causes great distress to the latter party, but they agree to implement a new arrangement in the interests of the child as a dispute or ongoing conflict between her parents is recognised as one of the most traumatic events or episodes in the life of a child. It can be equally difficult for a parent who has moved jurisdiction to accept that it is not in the child's interests to move with that parent.

4.6 In a case brought under the Hague Convention, while a winner appears to be much more easily identified due to the binary nature of the relief sought, the proceedings retain their character as family law proceedings. The return of a child in circumstances which are, by definition, contentious (the family would not be in court otherwise) is an outcome which cannot be described as a 'win' without doing some disservice to the word's usual meaning. The Convention creates an urgent mechanism to restore the status quo ante where children have been removed from home, allowing a better-informed court to address the substantive issues. The mechanism does not provide a definitive and final answer to the issues raised by the parties and obtaining the return of a child cannot be equated with winning, unlike a case in which a permanent injunction is obtained or damages awarded.

4.7 Indeed, using the language of winning and losing does not just do a disservice to the aims of the Convention, it is unduly provocative in a case where the best interests of the children at the heart of these cases usually requires a conciliatory approach by both sides rather than a contentious, combative or competitive approach in which one side hopes to defeat the

other as comprehensively as possible. To use the language of Whelan J., the principles in *Veolia* do not appear to be engaged in such cases.

4.8 In this case, while the Respondent could not prove unequivocal consent on the part of the Applicant mother at the time of removal, or indeed before that time, Alice had made clear her objections to being returned and was of an age that her objections had to be, and were, considered very seriously by the Court. In all the circumstances of the case, including the primary objectives of the Convention and her separation from her siblings, it was necessary to return Alice to her habitual residence where a relocation application has been made to the appropriate court. There, her home situation can be considered by a court with access to all the relevant facts. Given the Alice's age and objections, this was not a case in which the outcome could be said to be an obvious or clearly compelling one, nor was it a case in which the Respondent's defence to the claim could be said to have been vexatious, spurious or one which unduly prolonged the case.

4.9 The Respondent did nothing arbitrary or capricious during the course of the proceedings. While he rejected a reasonable offer to settle the case, it was made minutes before the hearing began at which stage it may have been difficult to consider what was best for his daughter or even to involve her in that decision or explain it to her before accepting it. While this did add to the length of the proceedings, given the exception to the general rule, namely, that no order for costs should usually be made in family proceedings, given that the family provisions will come (at least in part, and probably in large part) from the assets of the Respondent and given that other factors which commonly attract an order for costs in family proceedings are not present here, the offer to settle, made on the morning of the hearing, is not sufficient reason to depart from the usual order.

4.10 This Respondent contested the case but not in unreasonable terms, and to impose an order for costs against him might appear in the nature of a sanction, which is not a necessary measure in this case. The comments in the case law to the effect that in imposing such an order the Court may be depleting the common pool of resources for the family are also applicable. Applying s.33 of the 1995 Act in respect of legal aid, the question of costs must be approached as though the Applicant had funded her own case.

4.11 The reason legal aid is afforded in such a case is to make sure that parents are assisted in applications for the return of an abducted child. These applications involve complicated principles, detailed analyses of facts and careful consideration of the applicable law at a time when the litigant is under severe personal pressure. Legal advice is usually essential in these cases, both for the expertise of the lawyers and for the assistance of the distressed parent. Every litigant has a right to access to the courts and is entitled to argue these cases without a lawyer, but this Court has never dealt with a case in which the applicant was not legally represented. It is vital that such applicants be afforded legal assistance, and this must be publicly funded if children's rights are to be protected and vindicated. Such is the importance of the issues at stake that most of the respondents in this list are also afforded legal aid so that they can be legally represented if their circumstances would otherwise prevent them from obtaining legal advice.

4.12 The general rule is that costs follow the event. The nature of these Hague Convention proceedings, which belong under the general umbrella of family law, demands a different approach to costs. There is no sufficiently weighty reason in this case which compels me to depart from the usual approach in family law cases and I will make no order as to costs.