THE HIGH COURT

[2024] IEHC 461

RECORD NO. 2024 198 HP

IN THE MATTER OF B, A MINOR, BORN IN 2009,

IN THE MATTER OF THE CHILD CARE ACT 1991 (AS AMENDED),

IN THE MATTER OF ARTICLES 40.3, 41, AND 42A OF THE CONSTITUTION,

IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003 (AS AMENDED)

BETWEEN:

B.(A MINOR)

SUING BY HIS MOTHER AND NEXT FRIEND Y.

PLAINTIFF

-AND-

THE CHILD AND FAMILY AGENCY

DEFENDANT

T, Q, THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM, THE MINISTER FOR HEALTH, THE MINISTER FOR CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH, IRELAND, AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Mr. Justice Jordan delivered on the 4th of July 2024.

1. This judgment deals with the issue of costs in the above entitled proceedings and should be read alongside the main judgment delivered on the 3rd day of April 2024. The proceedings brought by the plaintiff were dismissed on procedural grounds

in circumstances where the Court held that plenary proceedings were not appropriate insofar as the relief claimed was concerned. The plaintiff was invoking the contempt jurisdiction of the High Court and the Court held that the appropriate way to proceed in such circumstances is by way of motion for attachment and committal.

2. The issue of alleged contempt by the Child and Family Agency (CFA) arises in peculiar circumstances. The Child and Family Agency applied for and obtained a special care order in respect of B. The special care order was granted but the Child and Family Agency did not give effect to the order. The Child and Family Agency has, in the Special Care List, articulated as an explanation for not giving effect to special care orders a systemic problem in the special care system of being unable to employ and/or retain sufficient staff in the special care units to allow all of the beds in the three special care units in the State to be made available for use. Of note in these proceedings is the fact that the Child and Family Agency did not deliver an affidavit setting out its explanation for not giving effect to the Court order.

3. At the time of the writing of this judgment there are five children in respect of whom special care orders have been granted and which orders are not being given effect because beds which are available in the special care units are not in use.

4. It is the position that the Child and Family Agency is entitled to the presumption of innocence insofar as the alleged contempt is concerned. Not in doubt either is the fact that the Child and Family Agency has failed to give effect to the special care order granted in respect of B. The history of special care orders in respect of B. is as follows; -

Firstly, an interim care order was made in December 2021. The first special care order was made for B. in January 2022 and it was extended twice. This Court made a

further special care order in December 2022, again extended twice. B. remained in special care in Ballydowd Special Care Unit until October 2023 when he was discharged. A third special care order was granted for B. in December 2023 but on this occasion he was not allocated a bed in special care. A fourth special care order was made in March 2024 and again no bed was made available for B. The latest special care order was made on the 20th of June 2024. B. has not yet been admitted to a special care unit.

5. Acting with expedition when a special care order is granted is critical. Delay in giving effect to a special care order will inevitably lead to the child in question suffering harm – as has happened to B.

6. In these proceedings the Child and Family Agency brought a motion seeking a trial of a preliminary issue and seeking the removal of the father and guardian *ad litem* (GAL) as notice parties. That application was not successful and that judgment was delivered on 13th day of March 2024. The fact that the Child and Family Agency was ultimately successful insofar as the preliminary point/procedural defence is concerned does not detract from the judgment on the motion and the reasons given in that judgment.

7. The plaintiff in this case has throughout made it abundantly clear what the objective was. It was an understandable, desirable and somewhat critical objective in light of the manifest failings on the part of the Child and Family Agency. The objective was to get B. admitted into a special care unit.

8. The CFA failed to engage with the plaintiff in relation to the substance of her concerns and complaints. In all the circumstances of the case there is a curious assertion by the CFA that the function of the Court was to protect the fair procedure rights of the CFA and that the case was not about the rights of the child. While the

case was not about the rights of the child as such it was about a special care order obtained by the CFA to protect the life, health, safety, development and welfare of B. in circumstances where his precarious position was deteriorating. The apparent desire by the CFA to airbrush the plight of B. – and indeed that of his mother – from the picture is wrong.

9. While the CFA did raise valid procedural issues, the following observations are pertinent; -

(a) No application for attachment and committal or for a declaration that the Child and Family Agency was in contempt of Court, or for any other relief in respect of the special care order, would arise but for the failure of the CFA to give it effect;

(b) The Court must in the interests of justice have regard to all of the circumstances of the case including the cause of and reason for the proceedings;

(c) The plaintiff chose the wrong route in launching plenary proceedings – insofar as the alleged contempt is concerned – but the plaintiff did act *bona fide* and had good reason to pursue a remedy and route which she considered worthwhile and open to her.

10. The defendant was not successful in the motion for the trial of the preliminary issue/removal of notice parties - for the reasons given in the judgment concerning that motion. On the face of it the plaintiff has a good argument that she is entitled to the costs of that motion. Such an award of costs in her favour would however ignore the fact that the preliminary point did avail the defendant at the hearing and the Court found in favour of the CFA on that point. All of the circumstances must be considered

by the Court when dealing with costs – including those set out in s.169(1) of the 2015 Act.

11. Insofar as s.169(1) is concerned, the Court is satisfied that; -

(a) The CFA caused these proceedings by not giving effect to a special care order which it sought and obtained. Furthermore, it failed to engage in a constructive way with the substance of the complaints and concerns of the plaintiff and others in respect of a bed not being provided to B. whose situation was deteriorating by the day. This conduct on the part of the CFA is unacceptable.

(b) The plaintiff was entitled in all of the circumstances to pursue any option considered available and worthwhile – and she did so. That she failed in her efforts was a noble defeat - after a valiant effort to help her son.

(c) The Court is satisfied that the plaintiff conducted her case with considerable decorum and restraint. The CFA was robust in its conduct of its defence. These were contempt proceedings with a difference which was very clearly explained by the plaintiff at the earliest stages – insofar as the objective was concerned. The plaintiff was agitating for a finding of contempt against the CFA in the hope that the proceedings and any such finding would get or help to get a bed for her son who was/is in grave danger. If ever there was a situation that required a conciliatory and measured response this was one. It would have been apt for the CFA to adopt a "kind hands – kind words" approach with meaningful engagement in relation to the substantive issues. Relying on and advancing a robust defence – and relying on the preliminary/procedural defence – did not rule out the option of collaborative and calibrated engagement with the plaintiff. The failure on the part of the

CFA to communicate properly in terms of the substantive issues and its explanation for the unacceptable situation was unfortunate as it portrayed the CFA as uncaring about the complaints and concerns of the mother – and more importantly uncaring about the appalling plight of B, her son.

(d) While the relief claimed in the general endorsement of claim of the plenary summons and in the prayer for relief in the statement of claim which was delivered runs to ten paragraphs and seeks various relief – including a claim for damages – the focus of the proceedings was throughout on the issue of alleged contempt. Indeed, at the outset of the proceedings on 25 January 2024 Senior Counsel for the plaintiff indicated that the plaintiff was attempting to bring measured and focussed proceedings which sought a declaration that the Child and Family Agency was in contempt of Court because of its failure to comply with the special care order granted on 14 December 2023. It was clearly stated at that time that no application was being made to arrest or detain any representative of the Child and Family Agency. Prior to the hearing of the motion seeking the trial of the preliminary issue/removal of notice parties the plaintiff had withdrawn the damages claim in the proceedings without prejudice to B's right to seek damages on reaching the age of majority and the focus was then on the alleged contempt and the plaintiff's desire to obtain a "Declaration of Contempt". It was from an early stage apparent precisely what the plaintiff's objective was. The plaintiff wanted to get B. into a special care unit and clearly considered that agitating the matter in proceedings and hopefully obtaining a declaration from the Court that the Child and Family Agency was in contempt of Court would assist in that regard.

12. A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the Court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties (s.169-1). However, the general discretion of the Court in connection with the ordering of costs is preserved.

13. A point made by the Child and Family Agency in addition to the proceedings being misconceived is that they were being brought to bring public *obloquy* on the CFA. This latter protest is interesting given that the Child and Family Agency has in this case and several others sought and obtained special care orders which it has not given effect to. Does this incontrovertible fact not of itself sooner or later bring public *obloquy* on the Child and Family Agency? The situation existing is completely unacceptable.

14. While the plaintiff did, after failing in the Plenary proceedings, indicate an intention to proceed by way of motion she has held her hand. The CFA argue that no order for costs in these proceedings would be inappropriate particularly when the Child and Family Agency might face a motion to attach and commit. The Child and Family Agency has offered an undertaking not to seek to execute on foot of an order for costs in its favour unless and until the plaintiff gets an order for costs in fresh proceedings. The CFA asserts that to pursue reliefs twice against it where the plaintiff is fully aware of the underlying issues is vexatious. This assertion ignores that important issues of fact were not agreed and were not addressed by evidence from the CFA - and were not decided.

15. B. is a child of 14 with the cognitive ability of a child of 9. His behaviour and position in life is frighteningly precarious. He should be in a special care unit.

16. Since October of 2023 – and indeed before then – B. has been placing his life, health, safety, development and welfare at very serious risk by, for example; -

(a) Ongoing and serious incidents of drug dealing – occasionally transporting crack cocaine in his mouth,

(b) Taking drugs with a risk of addiction,

(c) Absconding from care,

(d) Engaging in criminality,

(e) Sleeping rough,

(f) Mixing with people – mostly older people – some of whom have seriously assaulted him and threatened him,

(g) Being exposed to sexual and physical abuse,

(h) Fire setting in his accommodation, and

(i) Showing a complete lack of insight into the risks of his behaviour.

17. There is and has been a general consensus amongst the adults and professionals who know and are involved with B. over the last six months in particular that his life and health are at significant risk. Importantly, the Child and Family Agency is aware of the current plight of B. since October 2023.

18. As pointed out by Hogan J. in *M & B v the Child and Family Agency* [2024] IESC 6, when speaking of special care orders, *"In a democratic State governed by the rule of law, all organs of the State are obliged to comply with court orders of this kind."*

19. Here a mother brings proceedings not for personal advantage but literally to save her son. And the Child and Family Agency, not having him in a special care unit where he ought to be pursuant to a special care order which it obtained, seeks an order for costs against her. This in circumstances where it succeeded on a procedural point

having failed to engage with her on the substantive or core issue and legitimate complaints.

20. The Court does agree with the substance of the concluding submission on behalf of the mother ; -

> *"To award costs against the plaintiff herein would have a chilling effect on parents who are trying to vindicate the rights of their children where those rights are being violated by the Agency. It would be detrimental to the rule of law to allow the Agency seek costs against impecunious parents or guardians in an attempt to dissuade them from future bona fide litigation where the rights of vulnerable children, including the right to life, are unquestionably at issue."*

21. The Court considers that it would in all the circumstances be unjust to award costs to the defendant against the plaintiff – even noting the undertaking offered. This Court is not minded to fetter the plaintiff pursuing a remedy which she is entitled to pursue. The Court considers it must decide the costs issue in these proceedings without regard to what may or may not happen in possible future proceedings.

22. In all of the circumstances, and for the reasons outlined above, the Court will make no order for costs against the plaintiff.

23. The Court will make no order for costs in favour of the father who sensibly and commendably has not sought costs.

24. The state notice parties have agreed to bear their own costs.

25. Insofar as the costs of the guardian *ad litem* are concerned, her position is different. The Court has already expressed its view on her involvement at para. 33 of the judgment delivered on 13 March 2024.

26. In its judgment in H. and K. delivered on 4th day of July 2024 this Court deals with the costs of the guardians *ad litem* in relation to motions for attachment and committal which they brought in circumstances where special care orders were not being complied with. The Court will not repeat here all of what is stated in that judgment concerning the position and roles of the guardians *ad litem* and in relation to the award of costs in their favour in respect of those two applications - but much of that reasoning in terms of the award of costs in their favour applies equally in this case. This case is different of course as the GAL is a notice party in plenary proceedings which failed.

27. The decision in *AO'D -v- Judge O'Leary* [2016] IEHC 757 is instructive where, despite specifically affirming that the award of costs made in favour of the guardian in that case should not have a universal application to all other cases involving a guardian *ad litem* seeking to vindicate a child's rights, Baker J. also stated at para. 21 :-

> *"Another factor that must bear on my discretion in considering the costs application by the guardian ad litem against the CFA is that a particular injustice will be visited upon the guardian who is a professional person, the extent and nature of whose role in the District Court proceedings was determined by an order made in the District Court with the support of the CFA if she had to bear herself the costs of defending that role which she undertook in a professional capacity and where her client, if the child can be termed a "client" for these purposes, is not and could never be in a position to pay her costs."*

28. It is the position that the guardian's joinder in these plenary proceedings arose from her appointment (on the application of the Child and Family Agency) pursuant

to s.26 of the Child Care Act 1991 in the special care proceedings. Moreover, this Court did consider that the guardian was a necessary notice party in the proceedings. The guardian *ad litem* and her legal team did not waste the time of the Court but did assist and were part of the discussions which assisted in streamlining the proceedings. The GAL should not have to bear her own costs. The mother should not have to bear the costs of the GAL – and leaving aside the worth of any such order to the GAL.

29. The GAL was a necessary party because of her important role and in circumstances where the child was entitled to have her as his Advocate and his voice in the proceedings – even if he was suing by his mother and next friend. Having regard to the reasons outlined above and the interests of justice in all of the circumstances of the case the Court will award to the guardian *ad litem* her legal costs against the CFA – same to be adjudicated in default of agreement.