APPROVED **[2023] IEHC 175**

THE HIGH COURT
JUDICIAL REVIEW

2021 No. 635 JR

BETWEEN

L.H.

APPLICANT

AND

CHILD AND FAMILY AGENCY

RESPONDENT

M.H.

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 17 April 2023

INTRODUCTION

1. This judgment addresses the allocation of costs in judicial review proceedings which have become moot. The proceedings concern the care and custody of two minor children. The dispute between the parties in relation to costs centres on how the outcome of related District Court proceedings should be analysed for the purpose of the allocation of the costs of the High Court proceedings.

2. On the applicant's argument, the outcome of the District Court proceedings vindicates the position adopted by him in the judicial review proceedings before the High Court. It is said, therefore, that the outcome of the District Court proceedings can be treated as an "*event*" for the purpose of the allocation of the costs of the High Court proceedings. Conversely, the Child and Family Agency submits that the judicial review proceedings were misconceived and have become moot as a result of the District Court having made interim care orders in August 2021. It is said that there has been no unilateral action on the part of the Child and Family Agency which rendered the judicial review proceedings moot.

LEGAL PRINCIPLES GOVERNING COSTS IN MOOT PROCEEDINGS

3. The legal principles governing the allocation of costs in moot proceedings have been summarised as follows by the Court of Appeal in *Hughes v. Revenue Commissioners* [2021] IECA 5 (at paragraphs 31 to 34):

> "First, where the mootness arises as a result of an event that is entirely independent of the actions of the parties to the proceedings, the fairest outcome will generally be that the parties should bear the costs themselves. Neither is responsible for the mootness, and neither should have to pay for costs rendered unnecessary by an event for which they bear no responsibility.
>
> Second, however, where the mootness arises because of the actions of one of the parties alone and where those actions (a) can be said to follow from the fact of the proceedings so that but for the proceedings they would not have been undertaken, or (b) are properly characterised as '*unilateral*' or – perhaps – (c) are such that they could reasonably have been taken before the proceedings, or before all of the costs ultimately incurred in the proceedings were suffered, the costs should often be borne by the party whose actions have resulted in the case becoming moot. In the first of these situations, it can be fairly said that there was an *event* which costs can and should follow in accordance with conventional principle. In the second, it will frequently be proper that the party who is responsible for the unilateral action which

results in the mootness should bear the costs. In the third, it might be said that where a party who could reasonably have acted so as to prevent the other party from incurring costs failed to do so, it is proper that they should have to discharge those costs.

The third general proposition addresses the particular position of statutory bodies. Agencies with obligations in public law cannot be expected to suspend the discharge of their statutory functions simply because there are extant legal proceedings relating to the prior exercise of their powers. They must be free to continue to exercise those powers in accordance with their legal obligations. At the same time, it would be wrong if under the guise of exercising their powers in the normal way, the statutory authority both effectively conceded an extant claim, and avoided the legal costs that would otherwise attend such a concession. The cases strike a balance between these two considerations by suggesting that where the mootness arises because a statutory body makes a new decision in the exercise of its legal powers, the court should look at the circumstances giving rise to that new decision in order to decide whether it constitutes a '*unilateral act*' for these purposes. If the new decision is caused by a change in the relevant circumstances occurring between the time of the first decision, and of the second, the Court might not treat the new decision as a '*unilateral act*' and may accordingly make no order as to costs. If, however, there has been no such change in circumstances so that the body has simply changed its mind, costs may be awarded against it. If the respondent wishes to contend that there has been a change in circumstances it is a matter for it to place before the court sufficient evidence to allow the Court to assess whether and if so to what extent it can fairly be said that this is so. This requires the respondent to establish that there was a change in the underlying circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances. In conducting this analysis, the Court should not embark upon a determination of the merits of the underlying case.

Each of these three propositions – it must be stressed – present a general approach rather than a set of fixed, rigid rules. The starting point is that the Court has an over-riding discretion in relation to the awarding of costs, and the decisions to which I have referred are intended to guide the exercise of that discretion. They are thus properly viewed as presenting a framework for the application of the Court's discretion in the allocation of costs in a particular context and should not be applied inflexibly or in an excessively

> prescriptive manner (*PT v. Wicklow County Council* [2019] IECA 346 at paras. 18 and 19)."

PROCEDURAL HISTORY

4. These judicial review proceedings were instituted on 7 July 2021. The immediate trigger for the judicial review proceedings had been the fallout of an earlier application made to the District Court on 2 July 2021. On that date, the District Court had refused an application for an emergency care order, pursuant to Section 13 of the Child Care Act 1991, made at the suit of the Child and Family Agency.

5. Following the refusal of the emergency care order, the expected outcome would have been for the children, who had been in voluntary foster care, to return to the custody of their father. However, it appears that the children refused to return to the custody of their father and remained instead in the care of the Child and Family Agency. The father instituted these judicial review proceedings seeking, *inter alia*, the return of the children to his custody. The reliefs sought in the judicial review proceedings went much further however; and the applicant sought to reagitate an *earlier* complaint to the effect that the Agency had failed to make a finding of "*parental alienation*" on the part of the children's mother. This aspect of the judicial review proceedings would appear to have been out of time as it relates to actions taken by the Agency more than three months previously. Order 84, rule 21 of the Rules of the Superior Courts provides that an application for leave to apply for judicial review should be made within three months from the date when grounds for the application first arose.

6. In the event, the father did not pursue the judicial review proceedings and same were adjourned generally on 27 July 2021 to await the outcome of further

District Court proceedings. More specifically, the Child and Family Agency had made an application for an interim care order in early July 2021. The substantive application for an interim care order was ultimately heard by the District Court in August 2021. The District Court granted an interim care order. It seems to be accepted by the parties that the effect of this order was to render moot the dispute in respect of the legal basis for the children remaining in the care of the Child and Family Agency in the days following the refusal of the emergency care order on 2 July 2021.

7. The District Court also appointed an expert pursuant to Section 27 of the Child Care Act 1991. The expert prepared a report in December 2021. The report found, *inter alia*, that there had been "*parental alienation*" by the children's mother.

8. The interim care orders had been extended until 14 February 2022. On that date, a settlement was reached in the family law proceedings whereby the children returned to the care of their parents under arrangements recommended by the expert.

DISCUSSION AND DECISION

9. It is apparent from the procedural history that the judicial review proceedings became moot as a result of the District Court making orders in relation to the care and custody of the minor children. It would appear, therefore, that these judicial review proceedings have become moot as the result of an *external event*, and not the unilateral action of either of the parties to the judicial review proceedings. On this analysis, the normal position would be that each party should bear its own costs.

10. This is the analysis put forward on behalf of the Child and Family Agency. The Agency goes further and submits that the fact that the judicial review proceedings have been rendered moot as a result of the orders of the District Court serves to underscore the point made throughout by the Agency to the effect that the District Court, and not the High Court, represents the proper forum in which the issues of the care and custody of minor children should be determined.

11. The applicant for judicial review, i.e. the father, seeks to put forward a different analysis. The applicant says that if one considers the rationale for the decision of the District Court, it emerges that the position adopted by the applicant has been vindicated. More specifically, it is said that the District Court determined that there had been "*parental alienation*" on the part of the children's mother. This had been the complaint made by the applicant throughout his dealings with the Child and Family Agency and ultimately formed a major plank of the judicial review proceedings. Put otherwise, the applicant submits that the High Court can rely on the District Court's findings of fact in order to reach the conclusion that the applicant's position in the judicial review proceedings was justified and has now been vindicated. It is expressly submitted that this represents an "*event*" for costs purposes.

12. With respect, this analysis rather misses the point. The true significance of the outcome of the District Court proceedings is that it confirms that the District Court was the appropriate forum within which to have all of these matters determined. The fact that the District Court found in favour of the applicant on the merits of his complaint, i.e. that there had been "*parental alienation*" on the part of the children's mother, does not speak to the *reasonableness* of his having instituted judicial review proceedings before the High Court. The stark reality

is that the institution of the judicial review proceedings did not bring about a result which would not otherwise have occurred. Indeed, it is at least arguable that the institution of the judicial review proceedings may have delayed matters unnecessarily: the applicant had, at one stage, threatened to restrain the Child and Family Agency from pursuing an application for an interim care order. The crucial point, for the purpose of the allocation of the High Court costs, is that the outcome of the District Court proceedings would have been the same irrespective of whether the judicial review proceedings had been taken or not.

13. This is not a case where an applicant, by instituting judicial review proceedings, has achieved some practical benefit. It cannot be said that the judicial review proceedings informed or expedited the outcome of the proceedings before the District Court. It is incorrect, therefore, to say that the outcome of the District Court proceedings represents an "*event*" in the judicial review proceedings. There is no causal connection between the institution of the judicial review proceedings and the outcome of the District Court proceedings.

CONCLUSION AND FORM OF ORDER

14. For the reasons set out above, the fair and just result in the present case is that there should be no order in relation to costs. The Child and Family Agency has not sought an order for costs in its favour.

Approved