THE HIGH COURT

SPECIAL CARE

[2024] IEHC 460

RECORD NO. 2024 72 MCA

IN THE MATTER OF:

H, A CHILD

BETWEEN;

THE CHILD AND FAMILY AGENCY

APPLICANT

-AND-

L.

RESPONDENT

-AND-

S.

GUARDIAN AD LITEM

AND

RECORD NO. 2024 69 MCA

IN THE MATTER OF:

K, A CHILD

BETWEEN;

THE CHILD AND FAMILY AGENCY

APPLICANT

-AND-

D.

RESPONDENT

-AND-

R.

GUARDIAN AD LITEM

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

1. These two cases relate to two vulnerable children who were assessed by the Child and Family Agency (CFA) as being in urgent need of special care. The CFA applied for a special care order for each child and the orders were granted - but the CFA failed to give effect to the orders. At the time of the issuing of the motions no bed in a special care unit was provided for the minors.

2. The two cases raise similar issues and arguments concerning the costs of the motions. For that reason, one judgment is being delivered to cover both.

3. On the 26th of February 2024, the Supreme Court in *M & B v the Child and Family Agency* [2024] IESC 6 delivered its decision in the CFA's appeal of the High Court orders of Heslin J. and of this Court. That decision upheld the decisions in the High Court. At paragraph 128 of the judgment of Hogan J, the question of enforcement of special care orders was discussed. He stated ; -

> *"There remains the question of the enforcement of any such special care order. As Dunne J. said when delivering the judgment of the Court in the Judicial Appointments Commission Bill (at paragraph 11) the "entire structure of the Constitution presupposes the existence of a state governed by the rule of law. Article 5 describes the State as a democracy, yet with without the appropriate rule of law guarantees, the essential democratic character of the State could not be assured." In a democratic state governed*

by the rule of law, all organs of the State are accordingly obliged to comply with court orders of this kind."

4. It was against this backdrop that the guardians brought the motions.

5. **Brief timeline of significant events – H ;**

28/7/23 – H. was made the subject of an emergency care order in the District Court.

3/8/23 – The guardian *ad litem* (GAL) was appointed to H. in the District Court under section 26 of the Child Care Act 1991.

8/2/24 – A special care order (s.23H) was granted in respect of H. - although no bed was available for him. The GAL was appointed to H. in the High Court under section 26 of the Child Care Act 1991.

5/3/24 – H. still had no bed in secure care. A letter was sent to the CFA outlining a course of action - H's GAL indicated that she would reluctantly seek to have the CFA held in contempt to coerce it into procuring a special care bed for H.

14/3/24 – Short service was granted with an accelerated timeline for the hearing of a motion seeking to hold the CFA in contempt of the Court's order of five weeks earlier.

19/3/24 – A motion was issued seeking to hold the CFA in contempt of the High Court order granted on the 8th of February 2024.

20/3/24 – The motion booklet was filed with the Court - together with a booklet of authorities to accompany the skeleton submissions supporting a finding of contempt.

21/3/24 – The motion was listed for hearing – the applicant's lawyers were ready for a hearing and all booklets had been prepared. An application was made by the CFA on the morning seeking an adjournment. This application had been mentioned in Court the previous day by Counsel for the CFA on the conclusion of another hearing - but was not notified to the

applicant's advisors. The Court granted the adjournment. The motion was adjourned to the first day of term (8/4/24) to ascertain whether there was an earlier date during that first week than the date actually fixed. A further affidavit timeline was given to the CFA. No affidavit was filed by the CFA in relation to the substantive application. After the adjournment was granted by the Court, counsel for the applicant indicated that although they had been ready to proceed they would use the period of the adjournment to issue a new motion, seeking the same reliefs, in circumstances where it had not been possible to personally serve the CEO of the Child and Family Agency and the order with the penal indorsement had been left with an employee of the CFA who had accepted service.

22/3/24 – An application for substituted service was heard and orders were granted by the Court to facilitate service in circumstances where the Tusla CEO was apparently not making herself available to accept service upon her of an attested order with a penal endorsement on it.

27/3/24 – The second motion issued on this date.

4/4/24 – A further letter was sent from the applicant's solicitors to the CFA outlining just how dire the situation had become and seeking a timeline for the admission of H. to special care.

8/4/24 – For mention date – the Court was updated and told that an hour and a half would be required for the hearing of the motion on the 11/4/24.

11/4/24 – The CFA indicated that it was ready to oppose the motion. The GAL's counsel updated the Court and indicated that it was his understanding that a bed may be imminent - although the child had by this stage had graduated to three bags of heroin a day - although not on heroin prior to the granting of the special care order.

12/04/2024 – The SCOAP meeting of the CFA [the Special Care Prioritisation Meeting] agrees that H. will have a bed in Crannóg Nua by the 18th of April but will require a medical detox under the care of a Consultant Psychiatrist. *The Court will here observe that it is but one of the*

current indicators of the state of crisis in the Special Care system that meetings now take place on a seemingly routine basis so that a decision can be made as to which of the children in respect of whom a special care order has been made but who is not in a Special Care Unit is to be allocated a bed which has become or soon will be available.

18/04/2024 – It is indicated to the Court by counsel for the CFA that H. is "*first in priority"* for the bed in Crannóg Nua but counsel stops short of confirming that the bed will go to H. Apparently, final discussions needed to be had around the admission of the child under a medical detoxification programme.

19/4/24 - It is confirmed that H. is the recipient of the bed in Crannóg Nua and he is finally taken into special care late that night.

02/05/24 –CFA written submissions are filed/circulated confirming it will seek its costs against the guardian *ad litem*. A three-month extension of the special care order is also granted to the CFA.

7/5/24 – The written submissions of the guardian *ad litem* are filed and circulated.

9/5/24 – The two motions are listed for the issue of costs to be resolved.

6. <u>Brief timeline of significant events K ; -</u>

18/12/23 – The GAL appointed to K. in the District Court under section 26 of the Child Care Act 1991.

8/2/24 – A Special care order (s.23H) was granted in respect of K, although no bed is available for him. The GAL was appointed to K. in the High Court under section 26 of the Child Care Act 1991.

7/3/24 – The minor still not placed in secure care. A letter was sent to CFA outlining a course of action from K's GAL indicated he would reluctantly seek to hold the CFA in contempt to coerce it into procuring a special care bed for K.

14/3/24 – Short service granted to progress with an accelerated timeline for the hearing of a motion seeking to hold the CFA in contempt of the Court's order of five weeks earlier.

19/3/24 – Motion issued seeking to hold CFA in contempt of the High Court order granted on the 8th of February 2024. A further letter sent to CFA to explore whether the CFA was exploring creative solutions such as a placement out of State.

20/3/24 – Motion booklet filed with the Court together with booklet of authorities to accompany skeleton submissions supporting a finding of contempt.

21/3/24 – Motion listed for hearing – applicant's lawyers were ready for hearing and all booklets in place before the Court. An application by the CFA was made on the morning seeking to adjourn the hearing. This had been mentioned in Court the previous day - but was not notified to the applicant's advisors. The Court granted the adjournment. The motion was adjourned to the first day of term (8/4/24) to ascertain whether there was an earlier date that first week than the date fixed. A further affidavit timeline was given to the CFA. No affidavit was ever filed by CFA in relation to the substantive application. After the adjournment application was granted by the Court, counsel for the applicant indicated that although they had been ready to proceed they would use the period of the adjournment to issue a new motion, seeking the same reliefs, in circumstances where it had not been possible to personally serve the Chief Executive Officer (CEO) of the CFA and the order with penal indorsement had been left with an employee of the CFA who had accepted service.

22/3/24 – The motion for substituted service was heard and orders were granted by the Court to facilitate service in circumstances where the Tulsa CEO was apparently not making herself available to accept service upon her of an attested copy order with a penal endorsement on it.

27/3/24 – Letter from CFA to indicate that K. is to be admitted to special care with an application to amend the order of the 8/2/24 the following day to reflect the specific unit involved. The second motion had issued on this date.

28/3/24 – Application moved by CFA to amend the order made some 50 days previously.

4/4/24 – Letter from applicant's solicitors clearly outlining that the motion listed for hearing on the 8/4/24 will be discontinued as the outcome/event sought to be pursued has been achieved – i.e. the placement of K. in special care.

5/4/24 – Query from the CFA as to which motion is being withdrawn.

8/4/24 – For mention date – Court is updated that the time is no longer required for the hearing of the motion on the 11/4/24.

19/4/24 – Receipt of CFA submissions which reflect that it will seek its costs as against the guardian *ad litem*.

24/4/24 – Submissions of the guardian *ad litem* circulated.

25/4/24 – Motions listed for the issue of costs to be resolved.

7. It is submitted on behalf of the GAL that the accepted practice which has developed for guardians *ad litem* appointed under section 26 of the 1991 Act in a District Court context, and / or in special care proceedings in the High Court, reflects the imposition of a dual pronged duty – both to appraise the Court of the child wishes and also to inform the Court what the GAL believes in their professional opinion is in the best interests of the child.

Section 26(1) of the Child Care Act 1991 states :-

> *"**26.**—(1) If in any proceedings under Part IV or VI the child to whom the proceedings relate is not a party, the court may, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, appoint a guardian ad litem for the child."*

8. The Court need hardly point out that the GAL for each child is indispensable in the work of the Special Care List. The Court would be at a significant disadvantage without the input of the GAL and the child in question would in most instances be without a professional independent advocate and voice if there was no GAL acting for him/her.

9. In *HSE v DK* [2007] IEHC 488 the parameters of the role and duties of the GAL were explored. McMenamin J. listed the various duties and obligations of a guardian *ad litem* in proceedings relating to a child. At paragraph 59 (b) to (e), he stated as follows:

> *"(b) The function of the guardian should be twofold; firstly to place the views of the child before the court, and secondly to give the guardian's views as to what is in the best interests of the child.*
>
> *(c) A guardian ad litem should bring to the attention of the Health Service Executive any risks which he or she believes may adversely affect the best interests of the child, and if not satisfied with the response may bring the matter to the attention of the court. The guardian ad litem should take steps where necessary to co-operate with, and where possible share relevant information with, other care professionals engaged with the minor.*
>
> *(d) A duty of a guardian ad litem is to ensure compliance with the constitutional rights of a minor. For this purpose, the guardian should ensure that there is provided to the minor a means of making his or her views known.*

(e) A guardian ad litem may fulfil the dual function of reporting to the court regarding the child's care and also by acting as the child's representative in any court proceedings and thereby communicating to the court the child's views."

10. Finally, at paragraph 59 part (m) the Court stated :-

"(m) Where a divergence of opinion as to the care of the minor exists between the Health Service Executive and the guardian ad litem, the guardian should first attempt to resolve this issue with the H.S.E. However, where this is not possible, the guardian ad litem should inform the court as soon as practicable of their concerns."

11. The Court agrees that the GAL in each case did have a duty to seek to vindicate the rights of the child and had an obligation to avail of such remedies as appeared to be worthwhile pursuing in the mission to safeguard the child's welfare.

12. The Court agrees that the decision in *AO'D -v- Judge O'Leary* [2016] IEHC 757 is also 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."

13. In that case, there was an award of costs because the issues raised by the guardian were related to statutory interpretation and involved questions of public importance. These cases may not be in that specific category but it is the position that the CFA's failure in these cases is a matter of very great importance to the children and those concerned for them – literally life and death importance. Importantly also is the fact that these are not isolated incidents – and they are a bleak illustration of a childcare system failing the most vulnerable. We are here dealing with children at significant, immediate and escalating risk. They are dependent on an Agency which is failing them and they are fortunate to have professional GALs working to help them.

14. On the facts of each case the guardian *ad litem* was quite properly seeking to vindicate the child's rights. This was clearly within the role and responsibility of each GAL.

15. Insofar as the CFA contends that the guardian had no role in bringing contempt proceedings this Court is quite satisfied that this is not so and that the GAL was correct to move in each case having regard to the professional obligations that existed.

16. The CFA rely on the decision of Baker J. in *AOD v Judge O'Leary* [2016] IEHC 555 in support of its contention that the guardian had no standing to bring the motion for contempt. This submission is misconceived. The CFA itself quotes from para. 114 of Baker J's decision where she expressly stated that "*the role of the guardian ad litem may depend on the context of the appointment and the extent of authority vested by an order.*"

Of relevance to these proceedings is para. 57 of her judgment where she states:

> *"…I consider that the function of the guardian ad litem appointed under s.26 is to represent the child in the litigation, and to promote the interests of the child and the interests of justice. The furtherance of the interests of justice by the appointment of the guardian ad litem would suggest that the Oireachtas had in mind that the guardian ad*

litem would take a role consistent with the furtherance of the interests of justice, and therefore will take a role in the proceedings not merely as a witness."

17. The CFA submits that nowhere in the 1991 Act is there a provision that "*permits*" a guardian *ad litem* to pursue a contempt motion. On that, it is pointed out in reply that there is no provision in the Act for anyone to pursue such a motion but that there is a clear procedure contained in the Rules of the Superior Courts to pursue such a motion and the guardian, who has a defined "*role consistent with the furtherance of the interests of justice and who must take a role in the proceedings not merely as a witness"*, is entitled to do so. On this the Court is satisfied that the GAL in each case was entitled to pursue the motion in circumstances where it was clearly a remedy believed to be worthwhile pursuing in the interest of the welfare of each child. The GAL was entitled and indeed obliged to agitate on behalf of the child in each case and the motion was an option available to be pursued in that regard.

18. As is noted in Delany & McGrath on Civil Procedure (5th ed. 2023) at para 24-02, *"the legislative basis for the awarding of legal costs appears in ss.168 and 169 of the Legal Services Regulation Act 2015 (the "2015 Act") and the recast Order 99 of the Rules of the Superior Courts. These provisions replace the general discretion of the court that was provided for by the former Order 99."* The overarching principle remains that the award of costs should follow 'the event'.

19. Section 168 of the Legal Services Regulation Act 2015 provides:

> *"(1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings—*
>
> *(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, or*

(b) where proceedings before the court concern the estate of a deceased individual, or the property of a trust, order that the costs of or incidental to the proceedings of one or more parties to the proceedings be paid out of the property of the estate or trust.

(2) Without prejudice to subsection (1), the order may include an order that a party shall pay—

(a) a portion of another party's costs,

(b) costs from or until a specified date, including a date before the proceedings were commenced,

(c) costs relating to one or more particular steps in the proceedings,

(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and

(e) interest on costs from or until a specified date, including a date before the judgment."

20. Delany & McGrath note at para.24-05: *"The general principles that apply to the awarding of legal costs, having regard to ss.168 and 169 of the 2015 Act and the recast Order 99 of the Rules of the Superior Courts, were summarized by Murray J in Chubb European Group SE v Health Insurance Authority [2020] IECA 183 as follows:*

(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and Order 99, rule 2(1)).

(b) In considering the awarding of costs of any action, the Court should "have regard to" the provisions of s.169(1) (Order 99, rule 3(1)).

(c) In a case where the party seeking costs has been "entirely successful in those proceedings", the party so succeeding "is entitled" to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).

(d) In determining whether "to order otherwise" the court should have regard to the "nature and circumstances of the case" and "the conduct of the proceedings by the parties" (s.169(1)).

(e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s.169(1)(a) and (b)).

(f) The Court, in the exercise of its discretion may also make an order that where a party is "partially successful" in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).

(g) Even where a party has not been "entirely successful" the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (Order 99, r.3(1)).

(h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a))."

21. Section 169(1) of the 2015 Act provides that a party who is entirely successful is entitled to an award of costs unless the Court orders otherwise. It is accepted by the GAL that the burden is on the party contending that the entirely successful party is not entitled to an award of costs to satisfy the Court that it should depart from the general rule having regard to the particular nature and circumstances of the case and the conduct of the proceedings by the parties,

including those matters set out in s.169(1)(a)–(g). The Court has considered those matters as will be apparent from this judgment.

22. In *Fyffes plc v DCC plc* [2006] IEHC 32, [2009] 2 IR 417 at p.679. Laffoy J. articulated the overarching test as being "*whether the requirements of justice indicate that the general rule should be displaced".*

23. As per Finlay Geoghegan J. in *Benloulou -v- Minister for Justice and Equality* [2016] IECA 181, an *event* occurs: "*in circumstances where it can only be reasonably understood as being a direct response to the proceeding*".

24. And in relation to the meaning of an event, McMenamin J. held in *CFA v OA* [2015] 2 IR 718 and at para 39 thereof:

> *"I pause here to observe that, 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."*

25. Though the submissions of the CFA reflect its interpretation of the event or outcome in question in this case – that of a finding of contempt – which the CFA says is still not met, the GAL in both cases makes two points in response :-

Firstly, though a finding of contempt was being pursued as a relief within the guardian *ad litem's* motion, the CFA has also been clear in submissions to the Court that it accepts that it is indeed in contempt of the orders of the 8th of February 2024. It asserts through its counsel that there is a basis and rationale for why the CFA finds itself in the position of contemnor, however,

this does not take away from the fact that the contempt is clear and inescapable. As such, it is arguable that the progression to a formal Court finding of contempt is ancillary and unnecessary in the face of this incontrovertible and admitted fact by the said contemnor.

The Court does not accept this submission. The CFA has robustly denied being in contempt of Court although it does accept, as it must, that the orders were not being given effect. This case is but one of several where special care orders have not had effect because the CFA asserts it cannot open up available beds by reason essentially of staffing issues.

Secondly, as has been continually asserted on behalf of each guardian *ad litem*, the *event* sought by the applicant to be achieved was never a formal finding of contempt or the imprisonment of an officer of the CFA. The desired outcome from the start was that the CFA would comply with the order it had sought and obtained and thus provide a special care bed to a vulnerable child whose level of risk was escalating beyond all control. This point was reinforced throughout in affidavit evidence and in oral submissions as each guardian *ad litem* sought to bring the motions to hearing.

This is the truth of the matter. The Court accepts that the GAL in each case was simply doing all that was possible to get the child into a Special Care Unit. And the route decided upon with the benefit of the advice of the legal team was an obvious and understandable road to travel - and probably the only one available.

26. It is also submitted on behalf of the GAL in each case that it cannot seriously be contended by the CFA that in order for the applicant to be capable of obtaining an order for costs the GAL would have had to proceed with the first part of the motion, that is seeking to

hold the CFA in contempt, even though the CFA had by this time finally managed to comply with the order and where the CFA has now accepted it was, in fact, in contempt.

27. On this the Court will repeat that the CFA has not admitted contempt nor has that been established. But the logic of the submission is nonetheless obvious. The fact is that the GAL agitated on behalf of the child in each case by pursuing the remedy which appeared to be worthwhile pursuing and had no reason to pursue it further because the objective was achieved. Whether or not that happening – the bed in special care – is completely unrelated to the motion in each case is beside the point.

28. The applicants in each case were ready to proceed with the initial motion on the 21st of March 2024. The unexpected adjournment granted to the respondent facilitated a second motion to issue as a belt and braces approach - to ensure that no argument could be advanced concerning service and which would delay the applicant progressing the contempt motion to vindicate the child's rights. It was submitted at the hearing of the motion for substituted service that it was being maintained by the applicant that service had been sufficient to have service deemed good up to that point.

29. There has been much in the submissions concerning the fact of two motions in each case. The situation is that a belt and braces approach was adopted by the GAL for fear that a procedural defence might arise which could be guarded against by issuing a second motion. The second motion really added nothing to the substance of the remedy being pursued and the GAL in each case had reason to be cautious. A procedural defence in Plenary Proceedings in respect of another child in a similar position had succeeded as this Court found that it was correct. The decision in that case no doubt escalated any anxiety concerning procedural correctness in respect of the motions.

30. The motions were not heard or determined and the substance of the issues was not ventilated in Court by the parties. Each GAL decided for good reason that it was no longer

necessary to pursue the motions. In all of the circumstances the Court considers that the justice of the situation requires that it consolidate both motions in each case and that they be treated as one in so far as costs and any adjudication of costs are concerned.

31. The CFA has referred to the helpful decisions in *Cunningham v The President of the Circuit Court* [2012] IESC 39 and in *Hughes v The Revenue Commissioners* [2021] IECA 5. While these decisions arose in circumstances and litigation very different to these two cases they are of assistance as they set out the law on the issue of costs in moot cases. The continuum involved in child care proceedings and the importance of a focus on the outcome illustrates some difficulty in fitting the two cases the Court is dealing with neatly into the category of proceedings which have become moot due to entirely external events, on the one hand, or due to the unilateral action of one of the parties, on the other hand. In these two cases the objective of each GAL was to get each child a bed. The motions issued because the CFA was not giving effect to the special care orders and was not complying with its statutory duties. The motions became redundant or moot when this changed and beds were provided to both children. The CFA provided the beds and its actions in doing so meant that the motions did not need to proceed. While the CFA was free to exercise its powers in accordance with its legal obligations and did so in providing the beds to the two children, this represented a seismic shift in its position. If it had done so when the orders were made or before the motions issued then the motions would not have been necessary.

32. The Court must also be careful to avoid treating the legal position as illustrated in the above cases, and referred to in them, as a set of fixed or rigid rules. The case law emphasises that the Court has an over-riding discretion in relation to the awarding of costs. The framework provided in the decisions is a guide to the exercise of the Court's discretion when dealing with costs - and should not be applied inflexibly or in an excessively prescriptive manner.

33. The CFA in its written submissions states that "*Since the event in both cases has gone the way of the Agency, it should not be necessary to address the frailties in both motions but should it be necessary counsel will explain to the Court why both motions were on a substantive basis bound to fail".* On this it is necessary to say ; -

(a) The Court gave adequate time for the preparation and circulation of written submissions. The inclusion of such a paragraph is unacceptable as it is unfair to the other parties preparing for the hearing - and lacks the precision required and expected.

(b) The assertion that the event in both cases has gone the way of the Agency is an opinion not shared by the Court and is over simplistic. As already pointed out the GALs objective in each case was to agitate for a bed for each child until a bed was provided.

(c) The CFA was, when the motions were issued, not giving effect to the special care order in each case. It is not known what the Court would have decided if the motions did proceed to hearing. It is the position that the Court would have expected an explanation for the special care orders not being given effect in each case. Whether or not the CFA would have been successful in defending the motions in each case is an unanswered question - but the fact that the special care orders were not given effect when they should have been is clear. Both children should have been received into a special care unit once the order was made and as soon as they were located. To assert that the motions were bound to fail is an argument which is untested.

(d) The "*frailties in both motions*" referred to would likely have generated considerable argument in the event of the motions having proceeded. Perhaps the CFA arguments would have prevailed – perhaps not. Perhaps the CFA would have been partially but not fully successful.

(e) It seems to the Court that a debate as to the likely outcome and merits of the motions is neither wise nor warranted - as the focus should really be on the cause of the mootness.

(f) The actual circumstances in each case are such that the issue remains one to be decided by reference to the requirements of justice.

34. On behalf of the GAL in each case it is asserted that the allocation of the beds to the children in which contempt motions were being brought was not an occasion of coincidence or happenstance.

35. On this the evidence of the CFA in the affidavit of Mr. Y sworn on 8/5/24 is that the fact that a contempt motion or motions had been issued in the proceedings or in any other proceedings did not play any role whatsoever in the allocation of the beds. This is the sworn evidence before the Court on this specific issue. Notwithstanding the coincidence referred to by each GAL the Court will proceed on the basis of this sworn evidence.

36. The matter does not end there. The Court must have regard to the particular nature and circumstances of each case. It is worthwhile reflecting on certain aspects common to each case;-

(a) These children were in such a vulnerable and dangerous place in life that they both needed a bed in special care – and the CFA applied for special care orders for that reason.

(b) The CFA did not give effect to the orders.

(c) The reason for non-effect appears to be or is said to be staffing issues in the Special Care Units – and they are long standing. While no affidavit on the substantive issue was filed in these proceedings by the CFA this difficulty concerning staffing has been mentioned many times by the CFA in the Special Care List.

(d) The situation of each child continued to deteriorate while the order ran with no effect. It is clear that both children suffered harm as a result of no bed being provided to them in special care when it should have been.

(e) The CFA offered no light at the end of the tunnel in terms of bed availability - thus compelling each GAL to act decisively – by pursuing a remedy which appeared to be worthwhile pursuing – and which was probably the only remedy in sight.

(f) Each GAL was entitled to feel duty bound to so act.

(g) Each child was entitled to have a fearless advocate.

(h) Each child needed and needs a fearless advocate.

(i) The CFA was entitled to decide how to defend the motions. However, the Court constantly requests a level of collaboration between all participants in the Special Care List. This is essential when all should have the one objective – safeguarding the welfare of children in significant need. The Court reminded the parties at an early stage of this need and has frequently emphasised the desire for a "kind hands – kind words" approach by all in the interests of the welfare of the vulnerable children involved. The Court considers that the CFA did not give adequate weight to this need in responding to the complaints, concerns, and motions of the guardians. The Court is not blind to the fact that the CFA had to take a serious view of the "Contempt applications" but doing so surely did not eliminate the option of a more conciliatory and measured approach than that adopted - particularly when each GAL had been very clear in the objective being pursued. A consequence of the highly combative defence strategy was that both sides became polarised and any opportunity for desirable collaboration was lost. Another was the delay which might and probably would have been avoided if the substance of the complaints and escalating concerns were addressed at an early stage by communication/correspondence and affidavit evidence. The Court has been left without any good explanation as to why the substance of the complaints and concerns – no bed being made available for each child – was not addressed early on

in the motion history in each case in circumstances where the CFA has in several other cases and instances aired its explanation to the Court for the beds not being available.

(j) Each GAL acted *bona fide* and responsibly throughout.

(k) Parity or Equality of arms is a consideration in the Special Care list. When dealing with extremely vulnerable children - often from chaotic family backgrounds, from impoverished homes and abounding neglect - a Court should be slow to hinder or discourage the existence and availability of any scaffolding that may assist the child. The resulting cost is no more than a fair and just effort by a civilised society to give a chance to children born into homes where there is none. The stuff of the Special Care List is largely helpless traumatised children often with no one to speak up for them and who are usually slow to trust anyone.

It should be acknowledged that not all of the children in the Special Care List are from dysfunctional backgrounds although the majority usually are.

And in any event, all of these vulnerable children deserve every chance that can be provided to them – including the availability of a GAL willing and able to act tenaciously in their best interests. A GAL so acting should not have an order for costs made against him/her. On the contrary, a GAL so acting should have his/her costs.

(l) This Court would be leaving something that needs to be said unsaid if it did not compliment the extra-ordinary work of the CFA staff in the Special Care Units in the state – Coovagh House, Ballydowd and Crannóg Nua. As the parties are aware the Court makes a point of visiting these Special Care Units and the children in

them who wish to meet. Children in need of special care who get it almost always benefit from it - and at least are normally kept safe. Children in respect of whom special care orders are made which orders are not given effect immediately are suffering as a result. The Court cannot comprehend the view that the efforts of the guardians in each of these cases to alleviate that suffering and to help these children should be criticised or in some way penalised.

(m) It is also true that Section 26 of the 1991 Act pursuant to which the guardian was appointed in these proceedings makes no provision for the award of costs against a Court appointed guardian. The section allows for the payment of those costs by the Agency [s.26(2)] or on application by the Agency for those costs to be paid by another party to the proceedings [s.26(3)]. It is true that the situation in these cases is probably something never contemplated by the legislature in the sense of action being taken by a guardian by reason of the CFA not giving effect to a special care order. Yet, there is some force in the submission that it must be the case that the legislative intention in drafting the section was to prevent the scenario arising here - whereby the Agency might seek an award of costs against a Court appointed guardian and thus potentially grossly inhibit the role of such a Court appointed professional in cases such as these. It might however be conceivable, albeit unlikely, that a case would arise where a GAL appointed for a child in respect of whom a special care order is made might expose himself or herself to an order for costs against him/her [e.g. a person so appointed after completely and deliberately misrepresenting his/her qualifications and experience - or perhaps a GAL making wholly unmeritorious applications or duplicating applications/proceedings]. Whatever of such possibilities, these are not such cases.

37. The position of the Child and Family Agency is that it is seeking an order for costs in each case against the Court appointed guardian of the child – each of whom the Court is satisfied acted properly and professionally.

38. The GAL submits that "*this has a chilling effect. The message that this sends to persons seeking to vindicate the rights of children suffering real and actual harm as a consequence of the Agency's inaction is that they may be subject to sizeable financial risk. This entirely and unequivocally serves to fetter the discretion of the independent voice of the children in these cases, or indeed parents who may wish to bring about the same outcome for their very vulnerable children assessed by the very same Agency as being in need of special care.*"

39. It is obviously of great concern to the Court when the CFA does not give effect to special care orders. Of concern also is the CFA decision to seek an order for costs against each GAL in the circumstances we are dealing with here. That decision suggests a fundamental and ominous failure to realise, or worse perhaps a decision to ignore, how completely unacceptable the CFA failure to give effect to special care orders actually is – this in a country where the rule of law is expected to prevail and when the life, health, safety, development and welfare of children is at risk.

40. The Court will not award costs against the guardians. In all of the circumstances the Court will instead make an order for costs in favour of each GAL as doing so is appropriate and just for all of the reasons outlined above. The Court will also direct that the two motions in each case be consolidated and treated as one and that the costs be adjudicated in default of agreement.