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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

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IN THE MATTER OF OP

IN THE MATTER OF AN APPLICATION FOR COSTS FOLLOWING WITHDRAWAL OF PROCEEDINGS

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Ms Hughes (instructed by Rafferty & Co Solicitors) for the Plaintiff
Mr Fee KC with Ms O'Reilly (instructed by Reid Black & Co Solicitors) for the fifth Defendant
Mr Potter (instructed by DLS) for the Sixth Defendant
Ms Murphy KC with Ms Sloane (instructed by the Official Solicitor's Office) for the seventh Defendant

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KINNEY J

Introduction

[1] The plaintiff is the daughter of a patient, OP. The second, third and fourth named defendants in the action are siblings of the plaintiff and children of the patient. The fifth named defendant, CH, is a care home in which the patient resided at the time the proceedings were brought. The sixth defendant is the relevant Health and Social Services Trust.

[2] The patient was placed into the care of CH in July 2024. She had been in hospital earlier that year when she required inpatient treatment. In May, the patient declined any further medication and was assessed by hospital medical staff as having the capacity to make this decision. The patient then exhibited a reluctance to eat or drink. She moved to CH as it was a nursing home with the facilities to meet her needs.

[3] The patient had a psychiatric assessment at the end of August 2024 in which it was determined that she had capacity and in particular the capacity to make a

decision around the withdrawal of food and liquids. The patient told her children that it was her plan to stop eating and drinking entirely from 9 September 2024. The plaintiff in her affidavit acknowledged that the patient understood from 9 September 2024 that CH would be obliged to offer her food and that she would need to decline that offering. From then onwards CH continued to offer food, fluids and medication. The patient took some of her medications and some small fluids to assist.

[4] The plaintiff in her affidavit asserted that the patient started showing some signs of confusion in the last week of September. On 3 October 2024, they were advised the patient had eaten a yoghurt and had drunk some orange juice and some cranberry juice. In the following weeks there was some distinction between the family, advices from the GP and the concerns of the staff of the CH about the level of confusion demonstrated by the patient. The plaintiff averred in her affidavit that it was clear that the staff of CH had taken the view that the patient had now reversed her decision. On 28 October, the plaintiff visited her mother and was told that she had taken a bowl of porridge that morning and that the GP had advised the home that they should feed small portions of food to the patient if she asked again. From 29 October 2024 the patient was being fed on instruction from the doctor and the family were not allowed to be in a room with her at meal times. The plaintiff in her affidavit acknowledged the difficult position that CH was placed in but maintained that the patient's wishes were clear when she was assessed as having capacity.

[5] As a result the family determined to seek declaratory relief from the court seeking, amongst other orders, an order permitting CH and the Trust to withdraw food and liquids from the patients in accordance with her stated wishes and feelings along with an order preventing CH and the Trust from the administration of any and all life-sustaining medication for the patient other than that which had the purpose of maintaining her comfort.

[6] A letter was provided by the consultant psychiatrist who had previously seen the patient. This letter was dated 11 November 2024. He noted the patient's attempt at voluntarily stopping eating and drinking (VSED). The psychiatrist noted that he was told by the home that the patient had started eating approximately 10 days before, slowly initially and then almost normally. The staff did not see signs of depression or episodes of agitation. The psychiatrist completed an assessment. He noted that the patient had no recollection of the VSED attempt and was unable to provide an understanding of that. He said that the patient reported she was happy that she was eating again. The psychiatrist noted that the patient was presently confused, likely due to the effects of starvation, and that she did not have the capacity to decide upon "a further VSED attempt on the basis of cognitive impairment as she is not able to understand, retain nor weigh up the relevant information." The psychiatrist also noted that the patient was aware that her cognition was impaired and he explained to her that it was probably due to the effect of starvation and would likely improve with nutrition.

[7] The matter came before the court on 12 November 2024. I was encouraged by all the parties to listen to the court recording of that case management hearing. A number of features arose from that hearing. First the parties all acknowledged that this was a difficult and complex case. The family wished to have their mother's wishes honoured. The Trust remained largely neutral and CH was concerned that the family did not want CH to offer the patient food and drink. CH took the view that they had to make this offer unless a court ordered otherwise. The judge observed at that point that it could be a criminal offence to withhold food unless there was a court order in place. CH also asked at that stage that no family members should be present at mealtimes as this was causing a perceived difficulty.

[8] Counsel for the plaintiff indicated during this hearing that in the course of discussions there was a general consensus amongst all the parties that litigation was required. No one demurred from that comment. There were issues regarding the patient's capacity at the time she had changed her mind. They were issues about the patient's future capacity should she continue to take food. The family were anxious that the case be listed as soon as possible. The judge at that time indicated that the case had to be set up appropriately with affidavits, skeleton arguments and an opportunity for the Official Solicitor to take instructions and provide a report. The judge observed that the application was "in some respects groundbreaking." The judge noted that it was not a straightforward issue and that this was a request relating to force-feeding someone lacking capacity in the context of the ongoing debate around assisted dying. He said he understood the complexities of the case.

[9] CH sought a direction regarding the presence of the family at mealtimes. An undertaking was provided regarding the behaviour of the family and that they would not interfere at mealtimes. Counsel for CH indicated that if there were difficulties with this arrangement then the nursing home may no longer be available to the patient.

[10] In circumstances which are not entirely clear to me, the placement was, in fact, lost and the patient moved to another nursing home. The patient moved home on 11 December 2024 and at the next court review on 17 December 2024, the plaintiff discontinued her action against CH. CH then sought costs against the plaintiff.

Arguments of the parties

[11] The plaintiff contends that the proceedings were necessary and that they were conducted in a balanced and reasonable fashion. They were discontinued against CH as soon as practicable. There is a general principle that there should be no order as to costs in applications brought under the inherent jurisdiction of the High Court. The court retains a discretion on costs. The plaintiff attempted to resolve matters informally and only issued proceedings when those had failed. As the patient's capacity was unknown in November when proceedings were issued the proceedings remained necessary.

[12] CH was aware of the patient's stated wish to end her own life through VSED. The issue of loss of capacity at some stage in this journey was almost inevitable. Where the capacity of an individual is an issue then a determination by the court is required. The issue of treatment by CH was reasonably a matter which required the input of the court. In cases of this nature, which are centred around end-of-life care, the court is often asked to authorise an act which would otherwise be considered unlawful, for example, withdrawing ventilation and feeding tubes. Issues such as the withdrawal of treatment in the absence of capacity requires the authorisation of the court. The plaintiff argued that there was a more developed framework for patient cases in England and Wales and the case law there makes it clear that an order for costs is rare and the exception rather than the rule. The Court of Protection rules applicable in England make it clear that the general rule is for no order as to the cost of proceedings.

[13] CH argued that the application by the plaintiff was misconceived and without merit. The application sought to compel CH to withdraw food and water from a patient in circumstances where she had asked for and was accepting and consuming that food and drink. It was noted that the judge at the case management hearing had described the order sought as being "groundbreaking." CH argued that it was difficult to conceive of a situation where the court would compel a care home to deprive a patient lacking capacity of food and water in circumstances where she was asking for that food, was consuming it and had told her psychiatrist that she was happy she was eating again. The proceedings had caused significant financial detriment to CH and had detrimentally affected the daily running of the home. CH contended the application had little merit or prospect of success and that costs should follow the event. That is the normal position and the principal should be followed if the court considers it appropriate. The court retains a discretion not to follow the principle but the exercise of the discretion must be done judiciously and not on the basis of sympathy. The onus is on the person seeking the discretion on costs to present appropriate reasons to the court.

Consideration

The law

[14] The undoubted starting point acknowledged by all the parties is that the court rarely orders costs in declaratory relief proceedings. However, the court retains the discretion to do so.

[15] In *KW* [2020] NIFam 11, Keegan J said at para [17]:

> "(i) As is recognised in the arguments, these are family proceedings. They were brought under the auspices of the Office of Care and Protection. They involved consideration of sensitive issues in relation to a vulnerable adult. They are not akin to proceedings where

> the normal rule of costs following the event apply, see Re S. Costs orders are rare in proceedings involving children and I consider that the same principle applies in declaratory applications perhaps with even greater force."

[16] The reference to *Re S* is to a Supreme Court decision where the judgement was given by Lady Hale. It is reported at [2015] UKSC 20. It is a case involving the care and upbringing of children and related to an application for costs brought by a parent who had successfully appealed against public law orders. In considering the costs issue the court said at para [26]:

> "All the reasons which make it inappropriate as a general rule to make costs orders in children's cases apply with equal force in care proceedings between parents and local authorities as they do in private law proceedings between parents or other family members. They lead to the conclusion that costs orders should only be made in unusual circumstances. Two of them were identified by Wilson J in *Sutton London Borough Council v Davis (No 2)*: 'where, for example, the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable: *Havering London Borough Council v S* [1986] 1 FLR 489 and *Gojkovic v Gojkovic* [1992] Fam 40, 60C-D' (p 1319). Those were also the two circumstances identified in *In re T*, at para 44."

[17] Again, in the jurisdiction of England & Wales the High Court recently considered costs when relief was sought under the High Court's inherent jurisdiction. In *Re K* [2021] EWHC 2147, Cobb J considered an application for costs made by two defendants against the patient. This was not a case involving a public authority or Trust. At para [35] the court said:

> "Fifthly, and finally, it is my view that no order for costs is likely to be the appropriate starting point in welfare – oriented proceedings under the inherent jurisdiction concerning a vulnerable adult. In this type of litigation, as with proceedings concerning children, there are generally no winners or losers and costs orders are therefore likely to be "unusual." This is such a case – a rather depressing tale of which I suspect K, if he knew the full facts, would be profoundly distressed."

[18] I acknowledge the differing rules of procedure between the two jurisdictions but I am satisfied that the same principles ought to apply. The declaratory jurisdiction is often utilised in pursuance of the interests of vulnerable parties where there are apparent gaps in the law and the common law is required to provide a

remedy. The guiding principle is of necessity in the best interests of the patient. Thus, proceedings under the inherent jurisdiction share many of the characteristics of proceedings relating to children, a factor identified in *Re S* and emphasised in this jurisdiction in *Re KW*.

[19] The appropriate starting point therefore in cases involving the inherent jurisdiction of the court is that there should be no order for costs unless there are unusual or exceptional circumstances which warrant the making of a costs order by the court.

[20] Having considered the facts and the arguments in this case, I am satisfied that there should be no order as to costs made against the plaintiff for the following reasons:

(a) This is not a case where the court has made any determination of the issues and to that extent there is no identified winning party. CH makes the case that the proceedings were without merit. Without adjudicating on the matter I am not satisfied that this is an appropriate characterisation of these proceedings. As I have already noted, at the first case management hearing the court was told that there was general consensus by all parties that litigation was necessary. No one at that hearing made a contrary submission. There were clearly complex points of law on which the court was invited to adjudicate. The judge did use the word "groundbreaking" in relation to the task being put before the court but I did not discern that to be in any pejorative sense. Having listened to the recording, I am satisfied that the judge used the term in recognising the magnitude of the task facing the court and the societal context and timing for this application. There was much debate on the topic of assisted dying at around this time.

(b) On the information before me I do not consider that the plaintiff has acted unreasonably during these proceedings and indeed has endeavoured to be proportionate and cooperative. The proceedings against CH were discontinued at the earliest opportunity.

(c) I am equally satisfied that it was understandable and appropriate for the plaintiff to bring these proceedings, acting out of a sense of duty and in a desire to support and implement the stated desires of the patient when she had capacity to express them. The plaintiff attempted to avoid litigation by raising concerns directly with CH but no resolution was possible without resort to litigation.

(d) I am satisfied that it was reasonable to join CH as a party to the litigation as it was the care provider at the relevant time for the patient. There were clearly factual disputes between the parties as to the precise role of CH and what in fact occurred in October and November 2024 which ultimately would have to have been resolved by the proceedings.

[21] Accordingly, I refuse the application for costs and will not make any order against the plaintiff.