

**THE HIGH COURT**

**SPECIAL CARE**

**[2023] IEHC 632  
RECORD NO: 2023 353 MCA**

**IN THE MATTER OF:**

**B, a child**

**BETWEEN:**

**THE CHILD AND FAMILY AGENCY**

**APPLICANT**

**AND**

**B.B.**

**FIRST NAMED RESPONDENT**

**AND**

**B.B.B.**

**SECOND NAMED RESPONDENT**

**AND**

**F.O'C.**

**THIRD NAMED RESPONDENT**

**RECORD NO: 2023 354 MCA**

**IN THE MATTER OF:**

**M, a child**

**BETWEEN:**

**THE CHILD AND FAMILY AGENCY**

**APPLICANT**

**AND**

**M.M.**

**FIRST RESPONDENT**

**AND**

**M.M.M.**

**SECOND RESPONDENT**

**AND**

**H.T.**

**THIRD RESPONDENT**

**RECORD NO: 2023 355 MCA**

**IN THE MATTER OF:**

**F, a child**

**BETWEEN:**

**THE CHILD AND FAMILY AGENCY**

**APPLICANT**

**AND**

**F.F.**

**FIRST RESPONDENT**

**AND**

**F.MCK.**

**SECOND RESPONDENT**

**EX TEMPORE JUDGMENTS of Mr. Justice Jordan delivered on the 25<sup>th</sup> day of October 2023.**

**Child B.**

1. This is an application in respect of a child B. It is an application under the Child Care Act, 1991 which is brought to the Court by the Child and Family Agency. It is an application which seeks a Special Care Order in respect of this child who was born in 2007.
2. The application comes before the Court with some history of litigation in that an application was made in the judicial review list for orders compelling the Child and Family Agency to bring this application before the Court. That application was successful in the judicial review list and has resulted in a written judgment of Heslin J. cited as *M v The Child and Family Agency, B v The Child and Family Agency* [2023] IEHC 559.
3. The somewhat novel feature of this application is that it is an application by the Child and Family Agency in circumstances where they are compelled by Court order to bring the application before the Court. It is an application which comes before the Court in the ordinary procedural way in terms of the originating notice of motion and grounding affidavit - but with more comprehensive affidavits and exhibits due in part at least to the history of litigation in the judicial review proceedings.
4. Thus, I am dealing with this application as an application by the Child and Family Agency for a Special Care Order. The unusual feature of the application is that it is an application for a Special Care Order by the Child and Family Agency and yet it is asking me not to make the Special Care Order because it would have difficulty providing a bed. In fact, I am told that there are two more applications, not dissimilar to this one, to be heard after this one and that the Child and Family Agency is of the

view that one of the children is in greater need than the other two and the Child and Family Agency considers that the order ought to be made in that case but not in the others.

5. That is an unfortunate position for the Child and Family Agency to be in in terms of its presentation to this Court. It is also an unacceptable presentation or an unacceptable approach to its obligations.

6. I have considered the evidence before the Court *i.e.*, the grounding affidavits of E.B. and of M.G. and the documentation exhibited with them. I require to be satisfied of certain matters before I make an order under s.23H of the Child Care Act, 1991 and the matters which I require to be satisfied of are those set out in s.23H(1) (a)-(h) inclusive;

“23H.— (1) Where the High Court is satisfied that –

(a) the child has attained the age of 11 years,

(b) the behaviour of the child poses a real and substantial risk of harm to his or her life, health, safety, development or welfare,

(c) having regard to that behaviour and risk of harm and the care requirements of the child—

(i) the provision, or the continuation of the provision, by the Child and Family Agency to that child of care, other than special care, and

(ii) treatment and mental health services under, and within the meaning of, the Mental Health Act 2001,

will not adequately address that behaviour and risk of harm and those care requirements,

(d) having regard to paragraph (c), the child requires special care to adequately address—

(i) that behaviour and risk of harm, and

(ii) those care requirements,

which the Child and Family Agency cannot provide to the child unless a special care order is made in respect of that child,

(e) the Child and Family Agency has carried out the consultation referred to in section 23F(3) or, where the Child and Family Agency has not carried out that consultation, the High Court is satisfied that it is in the best interests of the child not to have carried out that consultation having regard to the grounds provided in accordance with section 23F(9),

(f) in respect of the family welfare conference referred to in section 23F(5)—

(i) the Child and Family Agency has convened the family welfare conference and the Child and Family Agency has had regard to the recommendations notified in accordance with section 12 of the Act of 2001, or

(ii) it is in the best interests of the child that the family welfare conference was not convened having regard to the information and grounds provided in accordance with section 23F(10),

(g) for the purposes of protecting the life, health, safety, development or welfare of the child, the child requires special care, and

(h) having regard to paragraphs (a) to (g), the detention of the child in a special care unit, as it is required for the purpose of providing special care to him or her, is in the best interests of the child,

the High Court may make a special care order in respect of that child.”

7. I have gone through each of these requirements and indeed have gone through the comprehensive detail on each in the grounding affidavit of E.B. and the position is that each of the criteria are met. I am satisfied, in fact I could not but be satisfied in respect of each of the ingredients. This young child is at very serious risk by reason of the matters detailed on affidavit and rather than improving with time the situation is disimproving it would appear with time.

8. It is urged upon the Court that it ought not to make the Special Care Order which the Child and Family Agency has applied for in the application which is before the Court. It is urged upon the Court that the Court should not do so because a bed is not available. This Court is familiar with difficulties in staffing special care units. The Court is familiar with the special care unit at Coovagh House in Limerick, Ballydowd near Lucan and at Crannóg Nua in Portrane. I have visited these special care units on a number of occasions going back over the years. The position is that the total capacity of the three units is twenty-six if fully staffed. The current capacity is fifteen and was I am told until very recently fourteen. I am told, and again this has featured in applications made in this list in recent years as a problem, that there is a problem staffing the units and that there is a problem arising by reason of public service agreements. I am told, paraphrasing somewhat what was said by Mr Harty SC, that the issue is staffing.

**9.** If the issue is staffing as it appears to be, as I am told now and have been previously, that is a matter to be sorted out by the Child and Family Agency - and the relevant departments if there is an issue in relation to public service agreements - and if the difficulty is in whole or in part making working in special care units sufficiently attractive for appropriately qualified staff to get them to fill the vacancies which will bring the special care units up to capacity.

**10.** It is urged upon me that there is something of a discretion afforded to the Court by the last line in para. 23H(1) which reads “.... the High Court may make a special care order in respect of that child.”

**11.** It is urged on the Court by Mr. Lynn on behalf of the father, that the word “may” ought to be interpreted as “shall” in certain circumstances and in that regard Mr. Lynn has relied on the decision of the Supreme Court in *O’Donnell v South Dublin County Council* [2015] IESC 28, a judgment delivered by McMenamin J. The judgment speaks for itself, but separate and apart from that authority it does not seem to me that it would be correct having regard to the evidence – and having regard to the submission on behalf of the Child and Family Agency, a frank admission and submission by Mr. Harty that the position of the Child and Family Agency is that a Special Care Order is in fact required - it does not seem to me that it would be appropriate for this Court to engage in this attempt to work around the difficulties which the Child and Family Agency has by reason of a shortage of appropriately qualified staff and decline to make an order in the teeth of the evidence before the Court, simply because the word used at the end of the paragraph is “may”.

**12.** Even if the Supreme Court decision in *O’Donnell v South Dublin County Council* was not relied upon, if I was unaware of it, even if I was unaware of the body of jurisprudence that supports the submission that “may” ought to be interpreted as

“shall”, in certain instances, even if I was not of the view that that is the preferred interpretation of the word “may” in the section, I am not prepared or I would not be prepared, to hold that I would be justified and correct in refusing to make a Special Care Order in this instance simply because the word “may” might be seen to afford a discretion to the Court.

**13.** If there is a discretion afforded to the Court by the section, it is a discretion that would have to be exercised having regard to the evidence presented and having regard to the paramount consideration which is the welfare of B. There is no reasonable basis upon which this Court could refuse or should refuse to grant the order which the Child and Family Agency has sought and which it says is in fact required.

**14.** I am granting the Special Care Order as sought in accordance with the draft order which is in the booklet before the Court with the addition of the omitted paragraph - a draft of which should now be forwarded to the registrar.

**15.** In relation to the application for a stay, I am declining to grant any stay on this order. This matter is urgent. It does not seem to me, having regard to the decision I have made, having regard to the peril this child is in, that it would be appropriate to grant a stay on the order.

**Child M.**

**16.** This is an application for a Special Care Order in respect of a child M. who was born in 2007. It is an application brought by the Child and Family Agency for the Special Care Order, the appropriate procedure having been gone through before this

application was made to the Court. Not alone is the application brought by the Child and Family Agency for a Special Care Order, but the view of the Child and Family Agency is that a Special Care Order is in fact required.

**17.** The application is grounded on the affidavits of E.R. and M.G. which I have considered. The affidavit of E.R. sets out the precarious position in life that this young girl now occupies. She is in imminent peril and she is at great risk. It is not necessary to recite the behaviour and risk of harm which is detailed in the affidavit. It is obvious why this Special Care Order application is being made - and the urgency is striking.

**18.** Notwithstanding its view that a Special Care Order is in fact required in the application which it is making to the Court and the overwhelming evidence which is presented on affidavit - and in circumstances where there is enthusiastic support on behalf of the guardian and the parents for the making of the order - it is curious that the Child and Family Agency is asking this Court not to make the order because it has no bed available. I don't intend to repeat what I have said in an earlier application which was very similar and which I have dealt with just now and where the position of the Child and Family Agency was on all fours with their position in this case. However, I will say - because I have to look at each case individually notwithstanding the similarities - I will say that it does seem to me that this Court would be failing in its obligations if it did not grant the Special Care Order which is sought.

**19.** I appreciate, as I said in the earlier case, that there is a word used in s.23H(1) of the Child Care Act, 1991 suggesting in the ordinary course of events that a discretion exists when the Court looks at the evidence coming before it in applications of this nature. The Court requires to be satisfied of the various matters recited at paras. (a) through to (h) inclusive of 23H(1) and if it is satisfied the section goes on to say that the Court may make a Special Care Order in respect of the child.



**20.** In the first instance, as I have said earlier, there is a body of authority to the effect that when used in statute the word “may” really means “shall” in certain instances. There is support for that view in a number of cases and in the decision of the Supreme Court in *O’Donnell v Dublin South County Council* [2015] IESC 28 which has been cited to the Court. It does seem to me in the context of the welfare considerations that exist in childcare cases and having regard to those matters which a Court has to be satisfied of before making a Special Care Order, it does seem to me that if the Court is so satisfied then the word “may” at the end of that section ought to be interpreted as “shall”. I say that having regard to the welfare principles and having regard to the body of authority in relation to the appropriate interpretation of the word “may” in certain circumstances. But even if I am entirely wrong in that regard, I am entirely satisfied that it would be completely wrong of the Court to decline to make the order in this case or to put it in another way to exercise its discretion in any way other than granting the Special Care Order.

**21.** This legislation exists for the protection of vulnerable children in hopeless positions in life where their life, health, safety, development, or welfare is at risk. This Court would be incorrect in my view if it took any view other than that the Special Care Order must be granted having regard to the evidence before it and in those circumstances I am granting the order as sought in accordance with the draft which is in the booklet before the Court. I will fix the review dates as specified in the penultimate paragraph of the draft order with the addition of the extra omitted paragraph a draft of which should now be sent to the registrar.

**22.** I will refuse to grant any stay on this order as it seems to me that it would be entirely inconsistent with the findings I have made in terms of the predicament and situation of this child to grant any stay on the order.

**Child F.**

**23.** This is a special care application in respect of F. who was born in 2009. She is a 14-year-old girl who has had a very troubled history from a very early stage in life and who is in a very vulnerable position in life at the moment.

**24.** The Child and Family Agency recognising the risk which she is at, has brought this application for a Special Care Order before the Court. The application is grounded on the affidavit of T.L. in addition to which the affidavit of M.G. also grounds the application, although the former is more relevant in terms of the plight of this young girl, the risk at which she is at and the behaviour involved. It is recited in stark terms in the affidavit of T.L. and does not need repetition -sexual exploitation, violence, self-harming behaviour, a plethora of problems and difficulties which make obvious the requirement that she be taken into special care and looked after for the sake of her life, safety, health, development and welfare.

**25.** In order to grant the application, I have to be satisfied of the various matters which are recited at paras. 23H(1) (a) to (h) of the Child Care Act, 1991 as amended. The guardian *ad litem* supports the application. The mother does not have custody of F. and although notified of the application did not contact her solicitor.

**26.** The Child and Family Agency is of the view - without any form of reservation - that the Special Care Order ought to be made. I am satisfied on the evidence, I could not but be satisfied on the evidence, that all of the statutory requirements are met. There is a comprehensive body of exhibits with the affidavits in addition to the assertion by the Child and Family Agency that the Special Care Order is required. There is overwhelming evidence that that is so. I am granting the order as sought.

**27.** I will grant the order in the form of the draft in the booklet but with the addition of the omitted paragraph concerning Gardaí accompaniment, the draft of which has been or will be provided now by email to the Registrar.