

# THE HIGH COURT

## WARDS OF COURT

[2024] IEHC 239

[WOC 10011]

### IN RE A WARD: GENERAL SOLICITOR (M.S.)

RESPONDENT

#### Discharge Ruling by Mr. Justice Heslin delivered on 10<sup>th</sup> April 2024

1. This is an application about Ms S. leaving wardship and I want to echo what Ms Butler said at the outset. In other words, to say, that Ms S. who joins us online is very welcome indeed, as is her interpreter. During this ruling I will refer to Ms S. as “the respondent”.

#### **The Court’s role**

2. This is an application brought under s.55 of the Assisted Decision Making Capacity Act of 2015. The respondent is the “relevant person” under that Act. The role of the court, today, is to consider the evidence before it which Ms Butler has summarised so professionally and, having done so, to declare that the respondent either (i) does not lack capacity or (ii) lacks capacity unless the assistance of a suitable person to act as co-decisionmaker can be made available or (iii) lacks capacity even with the assistance of a co-decisionmaker. That declaration has to be made in relation to a range of decision making areas. If the evidence establishes that the third scenario arises, namely, lack of capacity even *with* the assistance of a co-decisionmaker, the Court’s role is to appoint a decision making representative or “DMR”.

3. The respondent is someone who was born in 1991 and came to Ireland in 2016 as part of a UNHCR settlement programme. Tragically, it is reported that at a very young age the respondent sustained a head injury as a consequence of an explosion. It is reported that following this injury she developed epilepsy as well as a change in her cognitive abilities, personality, and behaviours. Her formal diagnosis is that of acquired brain injury, dysexecutive syndrome, as a result of brain damage.

4. The respondent was admitted to wardship in December 2019 and the General Solicitor is her committee in respect of her person and estate in wardship.

#### **Inherent jurisdiction**

5. On 1st March of this year, certain orders were made under this Court’s inherent jurisdiction regarding the regulation of her detention and general management in her current residence, which is a Nua Healthcare placement, as well as in the community. This arose in circumstances where, to provide for her safety, the respondent has not been given access codes to doors in the placement.

## **Placement**

**6.** In this regard, I want to acknowledge the presence of Mr McGuinness, counsel for the HSE, and I am very grateful to him. The evidence before the court on 1st March of this year was also to the effect that the respondent is receiving appropriate care to a very high standard in her Nua Healthcare placement and I want to acknowledge the efforts of all those involved in that.

## **Today's application**

**7.** The present application was issued by the Committee, the General Solicitor. Her motion is grounded, or based, on an affidavit sworn by Ms Fiona O'Dwyer, solicitor, who sets out relevant background as well as the respondent's current situation.

**8.** In the manner explained in Ms O'Dwyer's affidavit, from paras. 8 to 11, correspondence in relation to this application was sent to the respondent herself and to relevant parties, being the person in charge of the placement; the respondent's sister; and legal representatives of the respondent. Communication to her included a 'reader friendly' leaflet about leaving wardship.

## **Medical evidence**

**9.** In terms of the medical evidence before the court, Dr K., who is a consultant psychiatrist, carried out an assessment of the respondent on 09 October 2023. In relation to the nature of the respondent's illness and her capacity to make decisions in particular areas, Dr K. states, among other things, the following:

*"The diagnosis is acquired brain injury with frontal lobe symptoms, episodes of challenging and erratic behaviour, liability of mood, impulsiveness and difficulty concentrating, with impaired cognition."*

**10.** Dr K. goes on to state that:

*"The respondent has lived in the current residence for over five years and her behaviour has become gradually more settled, in particular, since she was given her own separate accommodation. She has a staff member with her at all times. She has a good relationship with staff and enjoys spending time with them."*

**11.** Later still, Dr K. makes clear that the respondent's condition is a permanent one.

## **Health, care and treatment**

**12.** In relation to decision-making in the areas of health, including care and treatment, Dr K. states, among other things:

*"The respondent does not show understanding of health related issues or use information offered to make related decisions. She does not have capacity to manage her healthcare needs without support and supervision. When the interpreter attends to assist in the provision of information and in communicating her decisions, he finds it difficult to make sense of her conversation."*

### **Welfare including activities of daily living**

**13.** In relation to decision-making in the area of welfare, including supports required for activities of daily living, Dr K. states:

*"Her understanding of information related to everyday activities is limited to simple issues and activities. She does not retain or use information to make decisions other than for basic tasks. She does not have capacity to manage her welfare needs without support."*

### **Property and finance**

**14.** With regard to decisions in the area of property and finance, Dr K. states that the respondent has no concept of money or any related issues and that she does not show understanding of information related to financial issues, or the ability to manage any financial or property issues.

**15.** In relation to recommendations for discharge from wardship, Dr K. states:

*"The ward does not have capacity to manage her affairs in any of the above areas. She is provided with the necessary interpreting support to facilitate understanding and communication. She remains very limited due to her impaired cognitive ability as a result of the acquired brain injury. She lacks capacity even if the assistance of a suitable person to act as co-decisionmaker were made available to her."* (emphasis added)

**16.** That is evidence which speaks to the appropriateness of a declaration under s.55(1)(b)(ii) and the appointment of a DMR.

### **Great care**

**17.** It is also appropriate to note that, in the context of the orders sought and made under the court's inherent jurisdiction, Dr D., Consultant Psychiatrist, produced a report of 21 February 2024 and his views on the respondent's capacity are consistent with those of Dr K. In addition, the contents of Dr D.'s report speak to the great care which is being provided to the respondent, who is reported to have very supportive relationships with staff and to be settled in her placement.

**18.** In the manner averred by Ms O'Dwyer, at para. 14 of her affidavit, the respondent was notified of the discharge recommendations and it is appropriate to say that no second opinion was sought by the respondent or by anyone on her behalf and no issue has been taken with Dr K.'s views, despite the opportunity having been given to the respondent to do so. From para. 21, Ms O'Dwyer makes averments in relation to the respondent's assets, and these are detailed in a schedule which is exhibited.

### **DMR**

**19.** On the topic of the identification of a suitable DMR, it is clear from the detailed affidavit, sworn by Ms O'Dwyer on 2nd April of this year, that every effort was made to engage with the respondent on the issue but that, due to her presentation, meaningful engagement was simply not possible. Relevant evidence on the question of DMR includes the fact that the respondent's family are rarely in contact. Furthermore, as confirmed by the deputy manager of the placement, there

have been numerous attempts to contact the respondent's family, but to no avail. In addition, funds have been offered for the respondent's sisters to travel to see her, but this offer has not been taken up as yet. The evidence makes clear that there is no suitable DMR who has been identified and it simply has not been possible, due to her presentation and condition, for the respondent to engage meaningfully in expressing any view on the topic of DMR.

**20.** It is in this scenario that, at para. 25 of her affidavit, Ms O'Dwyer avers that in the absence of a suitable person to act as DMR, the DSS (i.e., the Director of the "Decision Support Service") should make nominations. That is something facilitated by the 2015 Act and has been done in the manner which I will presently come to.

### **Sections 8(7) and (8) of the 2015 Act**

**21.** Ms O'Dwyer avers, at para. 26, that in the present case it would be appropriate for a DMR to make decisions concerning the respondent's personal welfare, her healthcare, and her property and affairs subject to the obligations set out in ss. 8 (7) and (8) of the 2015 Act, and the evidence entirely supports that application. Those particular sections require that a DMR encourage and facilitate input from the respondent insofar as possible as well as entitling the DMR to consider the views of those caring for, or having a *bona fide* interest in, the welfare of the respondent and that includes healthcare professionals.

### **Service**

**22.** It is also clear from the evidence before the court that no issue with service arises. It is perfectly clear from Ms O'Dwyer's averments in her 2nd April affidavit, that service was properly effected, but equally clear that, due to the respondent's challenges and vulnerabilities, it was not possible for the respondent to understand the nature of what was being explained to her. In other words, despite having explained today's application in simple language, in the company of the respondent's support worker and with the aid of an interpreter, Ms O'Dwyer goes on to aver:

*"While [the respondent] was physically present throughout the meeting, [the respondent] did not display any understanding of the documentation or application that was being made or the effect of any order that would be made by a judge in respect of same. I say that [the respondent] appeared distracted and had reduced concentration and attention throughout the whole of our meeting."*

**23.** That evidence is, of course, entirely consistent with the medical evidence to which I have referred earlier.

**24.** At para. 27 of the grounding affidavit, it is averred that there is no enduring power of attorney or advanced healthcare directive known to exist with relation to the respondent, and, in circumstances where there was no DMR identified, the nomination of Ms Edel O'Connor to act as DMR has been approved by the court. Ms O'Connor is someone who is not only a qualified nursing professional but also a qualified and experienced solicitor and mediator and someone with extensive experience of the law, with a particular interest in advocacy for vulnerable persons.

## **Declaration**

**25.** Drawing this ruling to a conclusion, given the evidence that I have referred to and which was summarised so well by Ms Butler in her application, the appropriate declaration for the court to make today is: pursuant to s.55(1)(b)(ii) of the 2015 Act to declare that the respondent lacks capacity to make decisions regarding her health, her personal welfare, her property and her affairs even if the assistance of a suitable co-decision maker were made available to her.

## **Orders**

**26.** In relation to orders, Ms Butler has very helpfully provided a draft. Orders in terms of the draft are appropriate, subject to any comment I now make. In summary, these are:

- to make an order under s.27 of the Civil Law (Miscellaneous) Provisions Act of 2008 prohibiting publication which would or would be likely to identify the respondent;
- an order appointing Ms Edel O'Connor as the respondent's DMR in relation to decision-making in all of the areas covered by the 2015 Act and which I referred to in the declaration;
- to order that the respondent be discharged from wardship pursuant to s.55(5)(b) and remitted to the management of her affairs with the assistance of her DMR, subject to the obligations set out in ss. 8(7) and (8) of the 2015 Act;
- to order that the DMR be entitled to receive a copy of the pleadings in this application;
- to order that the DMR be authorised to receive the respondent's various assets as detailed in the application;
- to direct that the respondent continue to receive her Department of Social Protection payment, directly, as she currently does but with this arrangement, together with the levels of funds in the relevant account, to be reviewed by the DMR no later than twelve months from now;
- to order that the DMR account to the Director of the DSS in accordance with s.46(6) of the 2015 Act, and
- in accordance with ss. 42(1) and (2) of the 2015 Act, to order that the DMR, who is a professional being retained, is not entitled to reimbursement of expenses, or to payment of remuneration, out of the respondent's assets.

## **Review of capacity**

**27.** Having regard to the evidence, including the permanent nature of the respondent's condition, I take the view that it's more appropriate to make an order, per s.55(a)(i) of the 2015 Act, that the respondent's capacity be reviewed no later than three years from the date of this order. I note that the applicant is not seeking costs and I am grateful for that.

**28.** Insofar as the inherent jurisdiction orders are concerned, Ms Hilda Clare O'Shea, as guardian, now represents the respondent. In the hope that it is of comfort to the respondent, I want to say that nothing the court has decided today will affect anything 'day to day' in terms of her continuing to enjoy and benefit from the support in the placement where she has lived for some time and where she benefits from very positive relationships with those staff caring for her.

**29.** Finally, I simply want to thank those involved and congratulate the respondent on leaving wardship.