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SUMMARY OF JUDGMENTS - THE ASSISTED DECISION-MAKING (CAPACITY) ACT 2015 – 2022 (AS AMENDED)

This paper is provided as an overview and a brief guide to the key issues in the judgments delivered to date. This paper should not be relied on as a legal interpretation of the 2015 Act. It is not intended to be a complete or authoritative statement of the law and is not intended as legal advice or advice of any type.

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Introduction

The Act was signed into law by the President on 30 December 2015. Parts of the Act were commenced to allow for implementation. The Act was amended by the Assisted Decision-Making (Capacity) (Amendment) Act 2022 which was signed by the President on 17 December 2022. The Acts were commenced on 26 April 2023 save for a few provisions.

The Acts establishes a modern legal framework to support decision-making by adults who may have difficulty making decisions without help.

This paper is a summary of case law relating to the 2015 Act.

Statute by way of assistance, are available.

- 2015 Act
- 2022 Act

Commencement Orders by way of assistance, are available below:

https://https://decisionsupportservice.ie/about-us/legislation

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HIGH COURT CASES

In the Matter of KK [2023] IEHC 306 pdf (courts.ie).
Written Judgment of Ms Justice Niamh Hyland delivered on 7 June 2023.
See also: **In the Matter of KK [2023] IEHC 565.**

The Facts
This case concerned a young woman who was made a Ward of Court on 27 July 2020. Before she turned 18, wardship proceedings were instituted and interim detention orders were secured providing, *inter alia*, that she could be returned to her placement in the event she absconded. She was taken into wardship on 27 July 2020. She had been in her current placement since July 2021 and at that time, there was a reduced level of concern as regards her potential to abscond and as such the detention orders were discharged. Following this, in December 2021, a man KK met online attended at her placement and she was put at risk, the man displayed aggressive behaviour and staff had to resort to calling the Gardaí.

In June 2022 the Child and Family Agency ("CFA") secured a further detention Order which order was extended in October 2022. The matter returned before the Court in February 2023 and no extension was granted to the detention order. A fresh application for a detention order was made on the 22 May 2023 and was heard on the 25 May 2023 after the commencement of the Assisted Decision-Making (Capacity) Act 2015 (the "ADMCA").

The CFA sought detention orders to ensure KKs return to her placement by the Gardaí if she were to abscond or fail to return from leave. This application raised the net question as to whether a detention order can be made for an existing Ward of Court post the commencement of the ADMCA and, if so, the appropriate legal basis for same.

Three alternative bases were put forward upon which KK could potentially be detained –

1. under the wardship regime (being the jurisdiction under section 9 and/or section 56(2) of the ADMCA),
2. under the inherent jurisdiction of the Court (the existence of which in this context is confirmed by section 4(5) of the ADMCA) and/or
3. pursuant to common law.

The CFA and Health Service Executive argued that it was still permissible to make a detention order under section 9, while accepting that there was a power to make one under the inherent jurisdiction of the Court if the section 9 jurisdiction was no longer available. The General Solicitor, on the other hand, argued that there was no longer a power to make a detention order for KK under section 9, but that such an Order may be made under the inherent jurisdiction of the Court.

Hyland J. stated that section 56(2) of the ADMCA is a transitional provision, providing that the jurisdiction of the wardship court as set out in sections 9 and 22(2) of the Courts (Supplemental Provisions) Act 1961 shall continue to apply pending the discharge of a ward. Only the continuation

of an existing detention order, as opposed to the making of a new order, is provided for under the ADMCA. In this case no application was made for a detention order under the terms of the ADMCA. She noted that a difficulty which presented in this case was that sections 107 and 108 only applied to detention orders that were in existence on the date the ADMCA commenced i.e., 26 April 2023. Therefore, if the court were to make the detention order sought, KK could not have her detention reviewed under the new regime. Justice Hyland noted that KK was deemed to lack capacity because she had a borderline intellectual disability, low adaptive functioning and a history of self-harm and unlikely to meet the criteria of suffering from a mental disorder.

The Findings

Hyland J. outlined *that the jurisdiction vested by section 9 must be read in light of the ADMCA, in particular Part 10 of that Act. Sections 107 and 108 of Part 10 introduce important new rules in relation to the detention of Wards of Court, inter alia by requiring a review of all wards detained by Order of a Wardship Court as soon as possible from the commencement of the ADMCA and by providing for the detention of wards with mental disorders under certain conditions and the discharge from detention of wards that no longer have a mental disorder. The jurisdiction vested under section 9 must be treated as having been altered by Part 10 of the ADMCA, given the changes effected by that Part to existing detention orders.*

Section 56(2) of the ADMCA- the transitional provision that continues the section 9 jurisdiction pending the discharge of a person from wardship altogether – does not describe the jurisdiction of the Wardship Court under section 9. Nothing in section 56(2) precludes the possibility of the section 9 jurisdiction being affected by the ADMCA.

Moreover, the section 9(1) jurisdiction now derives from Article 40.3.2° of the Constitution i.e., where action is necessary to defend and vindicate the personal rights of incapacitated citizens. That same constitutional imperative can be achieved through the inherent jurisdiction of the High Court to make orders in respect of persons lacking capacity in order to vindicate their personal rights, including detention orders where necessary. The continuation of this jurisdiction is expressly confirmed in section 4(5) of the ADMCA. In those circumstances, the reference in section 56(2) to section 9 means section 9 as read in the light of the ADMCA, ***and as so read, section 9 no longer includes a power to make detention orders in respect of existing wards post the commencement of the ADMCA****.*

Referring to section 106 of the ADMCA Justice Hyland stated that *the import of this section is that a person lacking capacity who potentially has a mental disorder should be treated in the same way as any other person who may require detention under the Mental Health Act 2001, whether they are already a Ward of Court or otherwise.*

Form of Order

Hyland J. concluded that the correct construction of section 56(2) of the ADMCA and section 9 post the commencement of the ADMCA, is that a Wardship Court no longer has the power to make a new detention order in respect of an existing ward. An application for a detention order may be made on the basis of inherent jurisdiction.

The matter was adjourned for submissions in relation to the appropriateness of making the

Order sought on the basis of the inherent jurisdiction of the Court.

In the matter of CF WOC 11755 [2023] IEHC 321 pdf (courts.ie)

Written Judgment of Mr Justice David Barniville, President of the High Court, delivered on 13 June 2023. **Note – This is not a decision which addresses the provisions of the Assisted Decision Making Capacity Act 2015 (as amended).**

The Facts

This case concerned an application by the HSE for various orders providing for the proper care and treatment of CF. CF a 75-year-old patient in a HSE hospital, suffered from dementia, together with a number of serious underlying medical issues and lacked capacity at the time of the hearing.

Ex parte hearing: President Barniville, on hearing the HSE's *ex parte* application on 3 April 2023, seeking an order for a declaration that it be lawful for the hospital, to proceed with proposed treatment plans in CF's best interests, including by attending to his immediate medical needs, but applying *"ceiling of care"* in not amputating his right leg, made such a declaration. In addition, President Barniville made certain orders, in particular an order pursuant to section 11 of the Lunacy Regulation (Ireland) Act 1871, directing that the medical visitor visit CF to carry out an assessment of his capacity, and an order appointing a guardian *ad litem*.

Substantive hearing: At the hearing on 9 and 11 May 2023, the HSE sought directions from President Barniville as to whether CF should have his right leg amputated above the knee, in order to try to prevent an imminent life-threatening haemorrhage and other very serious complications.

CF remained adamant at the hearing that he did not wish to have his right leg amputated, despite advice from his surgical/medial treating team that that was his only option at that time. CF's consistent position was that he was prepared to die rather than having his leg amputated. The dilemma was that, while the medical/surgical view was that CF needed to have his right leg amputated, there was strong evidence that if this was done against CF's wishes, it was likely to cause him "*considerable psychological distress"* (according to his consultant geriatrician) or *"catastrophic mental distress"* (in the view of the hospital consultant psychiatrist).

A provisional plan was presented to court on 11 May 2023, following discussions between the palliative consultant and CF's family that would allow CF to return home, where he would be cared for by his family and supported by the palliative care team and CF's GP as necessary.

Jurisdiction: President Barniville stated that;

> "*although my decision in this case was given on 11 May 2023, after the* [Assisted Decision Making (Capacity) Act 2015 (as amended) ("the 2015 Act")] *2015 Act came into operation, the jurisdiction which I am exercising is the wardship jurisdiction formerly exercised by the Lord Chancellor of Ireland and which is now vested, by section 9 of the Courts (Supplemental Provisions) Act 1961, in the President of the High Court, by virtue of section 56 of the 2015 Act.*

and went on to state that the orders made on the 3 April 2023 were

> *"sufficient to invoke the court's wardship jurisdiction which, by virtue of section 56 of the 2015 Act, continues to apply to these proceedings. I am exercising my wardship jurisdiction, therefore, and not the inherent jurisdiction of the court. …… where a*

patient lacks capacity to accept or refuse medical treatment, as in this case, the court may intervene, on foot of its wardship jurisdiction, to make such order as it considers to be in the patient's best interests in deciding whether to give its consent to a particular form of treatment, having regard to all the circumstances of the case."

The Findings

In making his decision President Barniville relied upon the factors set out in In *Re: A Ward*, by Denham J. who *identified several factors to be taken into account in determining the best interests of a patient who lacks capacity when deciding whether substituted consent should be given for a particular course of treatment (*see paragraph 156 for non-exhaustive list).

President Barniville listed further principles for consideration, as follows:

1. An adult person with full capacity must provide consent if medical treatment is to be provided, subject to some very rare exceptions and as noted by Kelly P. in In *Re: J.M*. *"the right to refuse medical treatment extends to treatment which is necessary in order to protect or sustain that person's life".* Since CF did not have capacity to give or to refuse his consent to the amputation, the court had to make that decision for him, taking into account what the court believed to be in his best interests;

2. The fact that a person has lost capacity does not meant that they have lost the benefit of the personal rights guaranteed under the Constitution;

3. There is a strong presumption in favour of maintaining life, and of taking all necessary steps to do so. However, it is clear that that presumption can be rebutted, and the court may not be obliged in all cases to take such steps;

4. As is clear from the authorities, including *In Re: A Ward*, several other constitutional rights are engaged in a case such as this, apart from the constitutional right to life. The court must, as best it can, respect and vindicate all of these constitutional rights enjoyed by CF while at the same time acknowledging the strong presumption in favour of taking such steps as may be necessary to preserve CF's life; and

5. The clearly and consistently expressed wishes of CF must be given considerable weight, notwithstanding his lack of capacity and the views of CF's family are also important and considerable weight should be attached to those views.

Order

Consent to the amputation was refused; consent was given to the alternative form of treatment proposed, namely CF's discharge home with the palliative and other care arrangements outlined in evidence.

The application the subject of this judgment was determined in accordance with the court's wardship jurisdiction, which continues to apply in the circumstances having regard to section 56 of the 2015 Act.

Governor of A Prison v X.Y. [2023] IEHC 361 Link

Written Judgment of Mr Justice David Barniville, President of the High Court, delivered on 22 June 2023.

The Facts

The case concerned a prisoner serving a custodial sentence following a conviction in 2022. In early May 2023, the prisoner began to refuse to consume food or fluids. The prisoner had similarly refused food and fluids for brief periods on four or five previous occasions between December 2022 and April 2023. From 5 May 2023 onwards, the prisoner made numerous statements to the prison authorities that they did not wish to consume any food or fluids. This time, apart from a few occasions on which the prisoner took some (sips of) fluids, the prisoner maintained their refusal to consume food or fluids up to the date of the hearing of the proceedings on 18 May 2023. The stated intention of the prisoner was to end their life.

The prisoner executed two advance healthcare directives. The first was executed on 12 May 2023 (it did not contain the prisoners date of birth nor state that it applied to life-sustaining treatment) and the second on 13 May 2023 (rectified the previous omissions and is the relevant directive for the purpose of the proceedings) referred to as the "*AHD*".

In the AHD, the prisoner made clear:

I. his or her wishes:
    a. not to receive any medical intervention and medication, and
    b. if actively dying, a preference to do so in a clinical setting, such as a hospital or hospice.

II. That those wishes were to be respected, should the prisoner become incapacitated or unconscious; and

III. That the AHD was to apply to life sustaining treatment and even if the prisoner's life was at risk.

At the time of the making of the AHD, and at the time of the hearing, the prisoner had full capacity.

The Governor of the prison, *inter alia*, sought orders which included the giving effect to the prisoner's AHD, in accordance with the provisions of Part 8 the Assisted Decision Making Capacity Act (as amended) (the 2015 Act) and in particular Section 89(2). The Governor required guidance and directions from the court as to how to manage the prisoner's situation in the event that the prisoner was to lose capacity or to become unconscious. The Governor therefore, required clarity and certainty in the administration of treatment and care to the prisoner in the event of such incapacity or unconsciousness. The Governor also felt it necessary to seek directions from the court, to ensure that the prisoner could be transferred to an appropriate clinical facility for end-of-life treatment, if that were to arise, while respecting the terms of the AHD made by the prisoner.

In evidence various documents published by the Decision Support Service (the "DSS") in relation to the 2015 Act were referred to. Particular attention was given to para. 2.7.3 of the Code of Practice on Advance Healthcare Directives for Health Professionals published by the DSS which states that:
"…if there is an issue with regard to life-sustaining treatment a court application must be made to the High Court."

The Findings

The Court considered the relevant Prison Rules, the Inherent Jurisdiction of the Court and the 2015 Act. For the purposes of this note we have focused on the decisions made in relation to the 2015 Act.

Justice Barniville considered Section 92(2) of the 2015 Act, which provides that an application to the court under Part 8 of the 2015 Act *"shall not be made unless the person making the application has received the consent of the court to the making of the application, which consent may be sought by way of an ex parte application"*. Consent was provided to the Governor to bring the application.

Justice Barniville also considered whether the case should be heard *in camera* and concluded that it should and relied on Section 92(7) of the 2015 Act.

The court considered in detail whether the AHD complied with the formal requirements contained in Part 8 of the 2015 Act paragraphs 86-102 and found the AHD to be valid.

Justice Barniville also considered "*basic care"* pursuant to Section 85(4) of the 2015 Act – *the AHD itself did not expressly contain a directive as to the provision of food and fluid. The AHD contained the prisoner's wishes with respect to medical intervention and a desire to die in a clinical setting. On the face of it, therefore, the AHD would not apply to the provision of oral nutrition or oral hydration*. However, whilst the prisoner retained capacity, the provision of food or fluids against the prisoner's clearly expressed decision and wishes, would breach the prisoner's constitutional rights.

Justice Barniville stated that while "*it is unnecessary to express a concluded view on the issue here, I would tend to the view that force-feeding or forcibly providing hydration to a person would probably amount to "artificial nutrition" or "artificial hydration" as those terms are used in s. 85(4)(b). A definitive decision on that point should await a case on which the issue directly arises."*

Form of Order

A number of declarations were made by Justice Barniville which consisted of:

I. A declaration pursuant to the inherent jurisdiction of the court that the prisoner had capacity to make a decision to refuse food and fluids and further that the prisoner had the capacity to refuse all forms of medical intervention should the necessity for such intervention arise.

II. A declaration pursuant to the inherent jurisdiction of the court that the Governor's decision not to feed the prisoner against his or her wishes, namely, not to force-feed the prisoner or to provide any medical intervention, for so long as the prisoner has capacity, is lawful.

III. A declaration pursuant to the inherent jurisdiction of the court that for so long as the prisoner has capacity, the Governor is entitled to give effect to the prisoner's wishes not to be fed or to receive fluids or to receive any medical intervention against his or her wishes.

IV. A declaration that pursuant to s. 89(2) of the 2015 Act, the prisoner's AHD is valid.

V. A declaration pursuant to the inherent jurisdiction of the court that the Governor is entitled to give effect to the prisoner's AHD insofar as same is applicable to the matter set out in that directive.

VI. A declaration pursuant to the inherent jurisdiction of the court that the prisoner's decision to refuse food and fluids and to refuse medical intervention in the event that the prisoner loses capacity or becomes unconscious, as expressed in the prisoner's AHD should remain operative in the event that the prisoner becomes incapable of making a decision to accept food or fluids or medical treatment; and

VII. A declaration pursuant to the inherent jurisdiction of the court that the Governor's decision not to feed the prisoner against his or her wishes, namely, not to force-feed the prisoner or to provide any medical intervention, in the event that the prisoner becomes incapacitated or unconscious, is lawful.

In addition, an order was made that the prisoner could be transferred to a hospital or other clinical facility if that was required for end of life of treatment, while continuing to adhere to the prisoner's AHD and the wishes of the prisoner regarding food and fluids refusal and medical intervention.

In the Matter of KK [2023] IEHC 565 pdf (courts.ie)

Written Judgment of Ms Justice Niamh Hyland delivered on 6 October 2023.

Prior Judgment: (In the Matter of KK [2023] IEHC 306) pdf (courts.ie)).

This judgment follows Ms Justice Hyland's judgment dated **7 June 2023**, where it was decided that the correct construction of section 56(2) of the Assisted Decision-Making (Capacity) Act 2015 ("ADMCA") and Section 9 of the Courts (Supplemental Provisions) Act 1961 ('the 1961 Act'), post the commencement of the ADMCA, is that a Wardship Court no longer has the power to make a new detention order in respect of an existing ward. An application for a detention order may be made on the basis of inherent jurisdiction. The matter was adjourned for submissions in relation to the appropriateness of making a detention order under the inherent jurisdiction power.

The Facts

This case concerned a young woman who was made a Ward of Court on 27 July 2020. Before she turned 18, wardship proceedings were instituted and interim detention orders were secured providing, *inter alia*, that she could be returned to her placement in the event she absconded. She was taken into wardship on 27 July 2020. She had been in her current placement since July 2021 and at that time, there was a reduced level of concern as regards her potential to abscond and as such the detention orders were discharged. Following this, in December 2021, a man KK met online attended at her placement and she was put at risk; the man displayed aggressive behaviour and staff had to resort to calling the Gardaí.

In June 2022 the Child and Family Agency ("CFA") secured a further detention order, which was extended in October 2022. The matter returned before the Court in February 2023 and no extension was granted to the detention order. A fresh application for a detention order was made on the 22 May 2023 and was heard on the 25 May 2023, after the commencement of the ADMCA.

In June 2022, the CFA sought detention orders, from the court. The court decided that an application for a detention order may be made on the basis of inherent jurisdiction and adjourned the matter.

The Findings

In the intervening period between the adjourned date and this matter coming back before the court, RSC Order 67A Rule 19 and Practice Direction on Inherent Jurisdiction (Capacity) Applications HC123, were adopted. The Practice Direction sets out the procedural requirements in relation to such applications and emphasises that such applications are entirely distinct from wardship applications and should be made through the Central Office, not the Office of the Wards of Court by way of an originating Notice of Motion.

Ms Justice Hyland held that "*the current application, brought by way of Notice of Motion of 22 May 2023 prior to the entry into force of Order 67A Rule 19, is one made through the Office of the Wards of Court in the context of the wardship of KK. The applicant cannot therefore pursue the reliefs sought*

under the inherent jurisdiction in these proceedings and must start again by issuing a Notice of Motion in the Central Office."

Form of Order
Ms Justice Niamh Hyland refused the reliefs sought as the application was made through the office of the Wards of Court rather than through the Central Office.

Note
The decision of the High Court is under appeal to the Supreme Court.

Supplemental commentary in decision -
Ms Justice Hyland proceeded in this judgment, having considered the principles established by the High Court and Supreme Court, which identified "*approaches that will, subject to exceptions and the particular circumstances of any given case, apply to the exercise of inherent jurisdiction when used to detain persons lacking capacity. I should emphasise that this judgment only addresses the instant fact situation i.e., a person alleged to lack capacity by reason of her medical conditions."*

Those approaches are set out in brief below:

1. Referencing the capacity test set out in the ADMCA, in comparison with the test identified in the Lunacy Regulation (Ireland) Act 1871 ('the 1871 Act'), to decide whether a person lacked capacity Ms Justice Hyland stated: "*the parties agree that the approach identified in the ADMCA is the appropriate way to assess capacity, certainly where no capacity analysis has previously been carried out. ……..It seems to me there is sufficient flexibility within the inherent jurisdiction regime to accommodate people who have already been deemed to lack capacity using a different method of analysis i.e., that prescribed by the wardship regime."*

2. Once a court determines a lack of capacity, the circumstances in which detention might be deemed necessary to defend and vindicate a person's constitutional rights were considered, whereby Ms Justice Hyland states: "*at its simplest, that requires an identification and analysis of:*
    A. *the type of restrictions on the liberty of the person proposed;*
    B. *the constitutional rights negatively impacted by the proposed detention under threat;*
    C. *the constitutional rights sought to be protected by the proposed detention;*
    D. *the carrying out of a balancing exercise to identify what rights ought to prevail; and*
    E. *a consideration of the proportionality of the measure proposed".*

3. *"Once the Court has decided which rights are to prevail, it is necessary to consider the nature of the detention proposed and to decide whether it is the least restrictive and most proportionate way of vindicating the constitutional rights requiring protection".*

4. *"It is necessary to consider the safeguards that a court is required to put in place when exercising this jurisdiction".*

5. *"The Court must have medical evidence in relation to (a) the capacity of the person and the decisions in respect of which the person lacks capacity (unless that has already been provided to the Court in the context of wardship and the Court is satisfied with same) and (b) the necessity of the restrictive measures proposed. Where an application is brought to detain a person, the applicant for the detention orders will be required to put forward such evidence……I agree that it is not appropriate to establish immutable rules in the context of inherent jurisdiction given the flexibility of the jurisdiction. Nonetheless, the optimum approach appears to me to be that a court would usually be presented with medical evidence from two separate sources in respect of any application to detain."*

6. Making reference to the detailed provisions in the ADMCA in relation to the will and preferences of the person, Ms Justice Hyland states "*the voice of the person sought to be detained should be heard loud and clear in any such application."*

Considering the balancing of one's constitutional rights, Ms Justice Hyland states that "*the Constitution is a living document and is interpreted having regard to the context, including the legislative context, in which it is invoked. That context now includes the ADMCA, which reflects a clear change in the approach of society to the autonomy of persons lacking capacity".*

She also refers to the ADMCA, stating "***an application to detain under inherent jurisdiction is not an application under the ADMCA*** *[emphasis added] and not subject to the regime prescribed by the ADMCA; but nonetheless, as discussed above, the principles that inform the ADMCA may appropriately be taken into account when considering what is required to defend and vindicate a person's constitutional rights, including the procedures to be followed when an application to detain is made."*