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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.

March 2024 V4

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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CIRCUIT COURT CASES

Joan Doe V Health Service Executive and John Doe.

Dublin Circuit Record Number: 2023.DUBL.ADMC/0000002 pdf (courts.ie)

Written Judgment of His Honour Judge John O'Connor, delivered on 8 December 2023. For the purposes of the judgment, the parties were allocated fictional names.

The Facts
The Health Service Executive ("HSE"), as the Applicant, sought a declaration that the Relevant Person lacked capacity to make decisions regarding long-term accommodation, medical treatment decisions and financial decisions, and to appoint a Decision-Making Representative ("DMR") from a panel managed by the Decision Support Service ("DSS").

The Doe family, mainly siblings of the relevant person, stated that they managed to look after their sister for many years throughout her adult life, and know her will and preferences. While they accepted that their sister lacked capacity to make decisions regarding her long-term care and accommodation, medical treatment decisions and financial decisions, they believed that representatives from their family were best placed to be appointed DMRs.

On 19 July 2023, the HSE filed a Capacity Application in the Circuit Court Office. An application of the siblings was not technically before the court when the case was heard. However, out of deference to the family, and also, considering section 38(5) of the Assisted Decision-Making (Capacity) Act 2015 as amended ("the ADMC Act"), the Court considered the application of the siblings made after the hearing, but before the delivery of the judgment.

The Relevant Person is a widow aged in her late sixties without issue. Her parents are deceased, and her siblings applied to become her DMRs. She is cared for full-time in an acute HSE hospital. The relevant person has substantial assets; comprising of her principal primary residence, an apartment, some savings and is in receipt of 3 pensions.

The court considered in detail the extensive affidavits, exhibits and documents furnished, comprising of approximately 1,000 pages and the evidence of professionals and her siblings.

Judge O'Connor stated:

1. *The Circuit Court has exclusive jurisdiction under the Act save for specific matters reserved for the High Court as outlined in section 4 of the Act. In addition, the ADMC Act does not confer on the Circuit Court jurisdiction for making orders in relation to the detention of persons who lack capacity. Presently such an application can be made under the inherent jurisdiction of the High Court.*
2. *The Guiding Principles outlined in section 8 of the Act are considered throughout the court's analysis.*
3. *Section 139 of the Act states that an application to court under Part 5 of the Act shall be heard in the presence of the relevant person the subject of the application unless, in the opinion of the court or the High Court, as the case may be -*
   (a) the fact that the relevant person is not or would not be present in court would not cause an injustice to the relevant person,
   (b) such attendance may have an adverse effect on the health of the relevant person,
   (c) the relevant person is unable, whether by reason of old age, infirmity or any good and

substantial reason, to attend the hearing, or
(d) the relevant person is unwilling to attend.
The court dispensed of the requirement for the Relevant Person to attend the hearing on the grounds that her lack of attendance would not cause an injustice to her as her voice was represented throughout by an independent solicitor.

4. *The court must be mindful of the fact that a person not having the ability to make a decision on a particular matter does not mean that their wishes are to be totally disregarded. Also, where there is a risk from a third party for example a family member, it is preferable that any legal measures are taken against that party, rather than restricting the rights of the Relevant Person.*
5. *It is self-evident that when someone lacks capacity, they are vulnerable. So, while the court has to be very respectful of respecting the past will and preferences of persons who lack capacity, it has to also be conscious of the need for effective safeguards to prevent abuse.*

The Findings

The Court notes that any arrangements for the Relevant Person need to be proportionate and least restrictive in accordance with the Guiding Principles of the Act as outlined in Section 8. Her past will and preferences are important and should be respected.

1. *Firstly, the Court is satisfied that, pursuant to section 37(1)(b) of the Act, the Relevant Person lacks capacity, even if the assistance of a suitable person as a co- decision-maker were made available to her, to make the following decisions.*
2. *In respect of personal welfare, the Court is satisfied the Relevant Person lacks capacity, even if the assistance of a suitable person as a co-decision-maker was made available to her, to make decisions regarding her long-term accommodation and to make decisions regarding any medical treatment, save for medical decisions coming within the remit of section 4(3) and section 4(5) of the Act, to which this Court does not have jurisdiction to make.*
3. *In respect of property and financial affairs, the Court is satisfied the Relevant Person lacks capacity, even if the assistance of a suitable person as co-decision-maker was made available to her, to make decisions regarding her finances, specifically, the management of her properties, her house and apartment, the management of her bank accounts and the management of her pensions. Furthermore, the court makes a declaration that the Relevant Person lacks capacity to apply for Ancillary State Support under the Nursing Home Support Scheme Act, should it be required.*
4. *The management of her properties shall not be interpreted as permitting the disposal of any of her properties. For the purpose of clarity, disposal means sale but not short-term letting e.g., 12 months. If the DMR deems this necessary, a further application to court will be required. The rationale for this is set out in section 44(3)(a).*
5. *The court is of the view that despite good intentions* [the family] *do not have the financial expertise to deal with complex financial matters.*
6. *In relation to medical care decisions, this court has power to deal with medical care decisions but not deprivation of liberty.*
7. *The Court would like to draw the parties' attention to Section 44(1) of the Act wherein it states, "nothing in this Part shall permit a decision-making representative for a relevant person to be given the power to prohibit a particular person from having contact with the relevant person".*

Order

In these circumstances and for the reasons outlined, it is the Court's view that an independent DMR be appointed from the panel to make financial decisions, to make medical treatment decisions and to make decisions regarding the Relevant Person's long-term care and accommodation.

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 pdf (courts.ie)

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."*

In the matter of The Estate of EF deceased [2023] IEHC 720 pdf (courts.ie)

Written Judgment of Ms Justice Stack, delivered on 18 December 2023.
Note – This is not a decision which addresses the provisions of the Assisted Decision-Making (Capacity) Act 2015 (as amended) ("2015 Act").

The Facts
This case concerned an application pursuant to s.27(4) of the Succession Act, 1965, ("the 1965 Act") to appoint an administrator ad litem in the estate of E.F., deceased ("the Deceased"), who died on 11 November, 2020, having made a Will on 19 February, 2014. According to that Will, the Deceased appointed her daughter, G., as sole executrix and sole beneficiary of the main asset in the estate, which was a substantial dwelling house situate in a major city.

The key issue in the case was whether it was necessary or expedient within the meaning of s. 27 (4) of the 1965 Act that an independent solicitor be appointed to administer the estate. The application was brought on the basis that the nominated executrix lacked the capacity to administer the estate of the Deceased.

The reason why the application was brought was that the applicants intended to challenge the Will of the Deceased and for that purpose they were seeking to appoint an administrator ad litem to defend those proceedings.

The Findings
Justice Stack determined as follows:

1. G. lacked the capacity to give instructions regarding the court proceedings;
2. Given G. alone was the person who stood to lose if the validity of the will was not upheld, someone needed to be appointed to look after her interests; and
3. It was not necessary to appoint two parties, i.e., a solicitor as administrator ad litem to administer the estate and defend any challenge to the will, and separately someone to look after the interest of G. regarding any application to challenge the will.

Justice Stack stated as follows:

In my view, the appointment of the proposed person pursuant to s. 27 (4) would, in these circumstances, merely increase the costs by introducing another party to the proceedings, when a person would in any event have to be appointed to represent G. in those proceedings. This is neither necessary nor expedient within the meaning of s. 27 (4) of the 1965 Act, and I therefore refuse the application.

The next step should be, in my view, an application for a declaration as to G.'s capacity in the Circuit Court pursuant to the 2015 Act, followed, if that is found to be appropriate, by the appointment of a decision-making representative who should then apply pursuant to s. 27 (4) of the 1965 Act to take out letters of administration or, prior to the extraction of a grant, should defend the challenge to the 2014 Will on behalf of G. or take such other steps as are necessary in G.'s best interests.

Order
Application refused.

BB v CC [2024] IEHC 123 pdf (courts.ie)

Written Judgment of Mr Justice Bradley 23 February 2024.

The Facts

This case concerned a man of 90 years of age (" the Donor") who had been living in a nursing home since October 2020 and had since expressed a wish to return home. An Enduring Power of Attorney ("EPA") was executed by the Donor on 27 May 2016 and registered by the Registrar of Wards of Court on 26 February 2020, pursuant to the Powers of Attorney Act 1996 (the 1996 Act"). The central issue in this case was whether or not the meaning and effect of the EPA was such as to give the Attorney, who in this instance was the Donor's son, the authority to make personal care decisions for the Donor, including where he should live.

The EPA stated as follows:

"***Part B***

I, [AA], of [Address set out] born on the [Date of Birth set out] hereby appoint [CC] [Name and Address set out] to act as my attorney for the purposes of Part II of the Powers of Attorney Act, 1996, with general authority to act on my behalf in relation to all my property and affairs subject to the following restrictions and conditions:

(1) I wish to reside in my home at [Address set out] for as long as possible and therefore if I become incapable of living independently and managing my own affairs, in the first instance I direct that my Attorney is to make arrangements for me to be cared for at home by suitably qualified persons.

My daughter, [BB] should be consulted for her views as to my wishes and feelings and as to what would be in my best interests..."

The Findings

The Court stated that the central question in the application arose pursuant to section 12(1)(a) of the 1996 Act which provides that the court may determine any question as to the meaning or effect of the EPA. He concluded that the EPA did not give the Attorney the authority to make personal care decisions including where the Donor should live.

The Court held that the EPA confers a general authority on the Attorney to act on the Donor's behalf in relation to all of his property and affairs *"subject to" what is further described as "the following restrictions and conditions*." The reference to "subject to the following restrictions and conditions" is a reference to the qualification on that general authority provided at paragraph "1" of the EPA.

The Court went on to state that the EPA "*does not contain a provision (or provisions) requiring or making provision for a decision to be made as to (a) where the donor should live and (b) with whom the donor should live with……. The EPA is silent as to a personal care decision…… The only decision to be made is whether or not the Donor at some point will need to be cared for at home by suitably qualified persons".*

Referring to the inclusion in the EPA of a provision requiring the Donor's daughter to be consulted for her views as to the Donor's wishes, feelings and best interests, the Court stated that, this does mean

that the decisions provided for in the EPA are personal care decisions. He went on to state that the correct interpretation of this provision is when making arrangements for the Donor to be cared for at home by suitably qualified persons that his daughter is to be consulted for her views as to the Donor's wishes and feelings and as to what would be in his best interests.

Order

The Court made an order pursuant to section 12(2)(a) of the 1996 Act, determining that the meaning or effect of the EPA is not such as to give the Attorney the authority to make personal care decisions, including where the Donor should live.

In the matter of M.C., a Ward of Court [2024] IEHC 47 pdf (courts.ie)

Written Judgment Mr Justice Barniville on 01 February 2024.

The Facts

This case concerned a woman in her late 60's who had a diagnosis of a major neurocognitive disorder secondary to an acquired brain injury. She was a ward of court at the time the matter came before the court, and, when the Assisted Decision-Making (Capacity) Act 2015 (the "2015 Act") came into force on 26 April 2023. She was also the subject of a detention order made by the High Court on 9 December 2021 in a facility which is not an "*approved centre*" under section 2 of the Mental Health Acts 2001 - 2018 (the "2001 Act").

Orders were made continuing the ward's detention and the date of the next wardship review was listed for hearing on 3 October 2023. A review of the order detaining the ward in her placement, pursuant to section 108 of the 2015 Act was listed for hearing on the same date.

The main issue raised by the HSE was that the court was not required to conduct a review of the order detaining the ward in her placement, under section 108 of the 2015 Act, in circumstances where (a) the ward does not have a consultant psychiatrist responsible for the her care and treatment for the purposes of section 108 (5) of the 2015 Act and (b) the ward is not suffering from a 'mental disorder' within the meaning of s.3 of the 2001 Act.

The Independent solicitor, who was appointed to represent the interests of the ward, disagreed with the HSE, however both parties agreed the orders made continued to have jurisdiction in wardship (as vested in the court by s.9 of the Courts (Supplemental Provisions) Act, 1961 (the "1961 Act) and continued in force by s. 56(2) of the 2015 Act to continue the existing orders in respect of the ward, including the detention order and the other restrictive orders made in the ward's case.

The Court heard evidence from an independent consultant psychiatrist and a consultant physician who had reviewed the ward on multiple occasions, both of whom expressed the opinion that the ward was not suffering from a 'mental disorder'. They were also both in agreement that the ward lacked capacity to make relevant decisions as to her care.

The Findings

The President concluded as follows:

1. *Properly interpreted, s.108(1) of the Act requires the court to carry out a review of the detention order made in respect of the ward and the fact that the ward does not have a "mental disorder" and does not have a consultant psychiatrist who is responsible for her care or treatment does not displace that requirement or otherwise render it unnecessary or inappropriate to carry out the review.*
2. The Court is … *required to carry out a review of the detention order made in respect of the ward under s. 108(1) of the Act. Having carried out that review, it is clear on the evidence, both from the independent consultant psychiatrist and from the other medical practitioner who has assessed the ward, that the ward is not suffering from a "mental disorder".* The Court is *not permitted, therefore, to direct that the detention of the ward in her existing placement continue for a further period in accordance with s.108(2) of the Act. Nor does the evidence permit me to determine that the ward is "no longer suffering from a mental disorder"*

*for the purpose of s. 108(4) of the Act, which would require…*the Court… *to order the discharge of the ward from detention under that subsection.*

3. The Court …*can neither direct that the detention shall continue under s. 108(2) nor order the discharge of the ward from detention under s. 108(4), it seems to me that, having conducted the review, …*that the Court is required to do, the Court … *must make no order under s. 108 of the Act. However, I agree with both the HSE and the independent solicitor that I retain my wardship jurisdiction under s. 9 of the 1961 Act, as continued by s. 56(2) of the ADMCA*,

Form of Order

The Court made no order on foot of that review, but instead continued the existing orders under s.9 of the 1961 Act, with a further review of those orders to take place in 3 months, and subsequent reviews (until the ward is discharged from wardship under s. 55 of the 2015 Act) to take place from time-to-time in accordance with the court's wardship jurisdiction.

In the matter of T.P., A Ward of Court [2024] IEHC 175 pdf (courts.ie)

Ex-Tempore ruling of Mr Justice Mark Heslin delivered on 15 March 2024

The Facts

This case concerned a young man in his 30s who had a diagnosis of a general learning disability and autism spectrum disorder. He was made a ward of Court on 8 November 2017. He had been transferred to his current placement on foot of an Order made by the High Court on 22 November 2023 which is not an "approved centre" under section 2 of the Mental Health Act 2001 (the "2001 Act"). A review of the man's detention under s.108 of the Assisted Decision-Making Capacity Act 2015 (as amended) (the "2015 Act") was carried out by the Court, however, no Order was made as the man did not suffer from a mental disorder within the meaning of s.3 of the 2001 Act. As a result of this the Health Service Executive brought an application under the court's inherent jurisdiction.

The Findings

The Court heard evidence from two consultant psychiatrists. This evidence was consistent in stating that the respondent was appropriately placed in his current accommodation. The Court agreed that the continuation of the respondent's detention in his current placement was in the "best interests" of the patient and ensures that "he can receive the high levels of supervision and support which he needs …". The Court also heard evidence from the multidisciplinary team at the respondent's current placement and from the respondent's social worker, both of whom agreed that the respondent's current placement has had a positive effect on the respondent.

The Court was satisfied based on the evidence presented that the continuation of the respondent's detention in his current placement "…represents a necessary and a proportionate response by the court so as to ensure that the fundamental rights of a vulnerable person who lacks capacity to make relevant decisions, including with regard to his place of residence and the care he needs, are vindicated, and protected".

Order

In exercising its inherent jurisdiction, the Court ordered the continuation of the patient's detention in his current placement, with a further review to take place in three months' time.

APPENDIX A

1.RE A WARD: GENERAL SOLICITOR (J.C.) – ex tempore judgment delivered by Justice Heslin 6 December 2023 - discharge from wardship and panel DMR appointed.
2.RE A WARD: GENERAL SOLICITOR (L.M) - ex tempore judgment delivered by Justice Heslin 28 February 2024 - discharge from wardship.
3.RE A WARD: GENERAL SOLICITOR (MC) - ex tempore judgment delivered by Justice Heslin 28 February 2024 - discharge from wardship and DMR appointed.
4.RE A WARD:GENERAL SOLICITOR (MW)-ex tempore judgment delivered by Justice Heslin 21 February 2024- discharge from wardship and DMR appointed.
5.RE A WARD:GENERAL SOLICITOR (GW)- ex tempore judgment delivered by Justice Heslin on 21 March 2024-discharge from Wardship and DMR appointed.