

**THE HIGH COURT**

**WARDS OF COURT**

[WOC 4404]

**IN RE A WARD: GENERAL SOLICITOR (MW)**

**RESPONDENT**

**Ex tempore ruling by Mr. Justice Mark Heslin delivered on 21<sup>st</sup> February, 2024**

**Introduction**

1. I am very grateful to Ms. Butler, Deputy General Solicitor, who moves the application today. As I now turn to give a ruling. I want to repeat how glad we all are that [Mr. W] could join us today 'online' and I want to repeat a welcome to him.

2. This application is about [Mr. W] leaving wardship. During this ruling I will refer to him as the "respondent".

**The 2015 Act**

3. This application is brought under s.55 of the Assisted Decision-Making (Capacity) Act 2015 which I will call "the 2015 Act" and the respondent is the "relevant person" under that Act.

**Declarations**

4. The court's job today, having considered the evidence before it, is to make certain declarations. For example, to declare that a relevant person:

- (i) does not lack capacity with respect to certain decisions; or
- (ii) lacks capacity unless the assistance of a suitable co-decision maker is made available to them; or
- (iii) lacks capacity even with the assistance of a suitable co-decision maker.

In the latter scenario, a decision-making representative or "DMR" is to be appointed.

5. The Act also provides for the appointment of a DMR where there is no suitable person in a position to act as co-decision maker.

**Facts**

6. Turning to certain basic facts, the respondent is a single gentleman in his thirties. According to the evidence before the court, his diagnoses comprise of an acquired brain injury and obsessive-compulsive disorder. He was admitted to wardship on the 5<sup>th</sup> March, 2008 and the General Solicitor is his committee. The respondent currently resides in a group supported home.

### **Application**

**7.** The committee has brought the present application by way of motion which issued on the 24<sup>th</sup> August, 2023. That motion, or application, is grounded on (i.e. supported by) an affidavit (i.e. a sworn document) provided by Ms. Fionnuala Burke, who is an Executive Officer with the General Solicitor's office. Her affidavit sets out the relevant background including the respondent's diagnosis; his admission to wardship; and his current living situation and needs.

### **Correspondence**

**8.** In the manner explained by Ms. Burke at paras. 5 to 11 of her affidavit, correspondence relating to this application was sent to the respondent and to relevant parties, namely, to the respondent himself; his 'key worker' [Mr. DW]; his mother [Ms. B]; his sister [Ms. J]; and his brother [Mr. A]. The nature of this communication is set out in some detail and it included a 'reader friendly leaflet' about leaving wardship.

**9.** Turning to the medical evidence before the court, Dr. H is a consultant psychiatrist and he carried out an assessment of the respondent on the 23<sup>rd</sup> August, 2023.

### **Capacity**

**10.** In relation to the nature of the respondent's medical issues and capacity in relation to decision making in specific areas, this is addressed in Dr H's report of the 29<sup>th</sup> October, in which he states that the respondent was involved in a road traffic accident in 1997, as a result he suffered severe neurological sequelae, Dr. H goes on to detail same. In relation to whether the illness is permanent or likely to improve, Dr. Hilary states among other things "*[Mr W's] vulnerabilities are due to an acquired brain injury in childhood, from which he had rehabilitation and special education and, thus, his current presentation is unlikely to improve*".

### **Personal Welfare**

**11.** It is clear from the report that Dr. H carried out a 'functional' capacity assessment in relation to decisions in the area of health, including care and treatment. Under that heading of decision-making, Dr. H's views can be summarised as follows: the respondent is unable to understand relevant information; unable to retain it; and unable to weigh information as part of a decision-making process; but he is able to communicate decisions.

**12.** In relation to decision making under the heading of welfare including supports required for activities of daily living Dr. Hilary's views are similar and can be summarised as follows: in his opinion the respondent appears not to fully understand information relevant to welfare or supports; he can retain information, but this is insufficient for complex daily decisions; and he is unable to weigh information as part of the process of decision-making; but he is able to communicate decisions.

### **Property and affairs**

**13.** In relation to decisions under the headings of property and financial affairs, Dr. Hilary's view is that the respondent appears not to fully understand relevant information; he cannot retain information; and he is unable to weigh information as part of the decision-making process even as regards simple financial transactions or plans regarding property; but he is able to communicate decisions.

### **Discharge recommendations**

**14.** Dr. H makes specific recommendations in relation to discharge from wardship and states (and I quote):

*"It is my professional opinion that [the respondent] lacks capacity unless the assistance of a suitable person as a co-decision maker were made available to him as regards decisions of health and welfare.*

*However it is my opinion that [the respondent] lacks capacity as regards property and financial decisions even if the assistance of a suitable person as co-decision maker were made available to him."*

### **Assets**

**15.** Returning to Ms. Burke's affidavit, at paras. 18 to 21 she makes averments in relation to the respondent's assets, and these are detailed in a schedule which is exhibited.

### **No contrary evidence**

**16.** It is also clear from the affidavit evidence that the respondent was notified of Dr. H's views and recommendations. It is sufficient to say that no opinion differing from Dr. H's has been furnished or indeed sought by, or on behalf of, the respondent.

### **The respondent's views**

**17.** In the manner averred by Ms. Fiona O'Dwyer solicitor, at paras. 6 and 7 of her affidavit of service sworn on the 30<sup>th</sup> January of this year, the expressed wish of the respondent is for his mother and siblings not to act as DMR regarding property and financial decisions.

**18.** Furthermore, it is averred that the respondent wished for a DMR to be appointed from the panel maintained by the Decision Support Service, or "DSS". Ms. O'Dwyer further avers, at paras. 8 and 9 of that affidavit, that the respondent expressed wish was for someone from "WALK" (being a certain association for people with intellectual disabilities) to be appointed as co-decision maker in relation to health and personal welfare decisions.

### **Somebody Independent**

**19.** Ms. O'Dwyer explained to the respondent why this was not possible, in light of the very long-term nature of such a role and the provisions of the 2015 Act. On this important topic she also avers the following (and I now quote from the end of para. 8 of her affidavit):

*"[The respondent] understood the reason why someone from WALK could not be appointed. I asked [the respondent] again if there was anybody he could think of who he would like to be his co-decision maker. [Mr W] advised that there was not. I asked him if he would be happy for the court to appoint somebody independent to look after his health and personal welfare decisions. [The respondent] advised that this would be ok."*

### **The future**

**20.** Remaining with Ms. O'Dwyer's affidavit, on the very important issue of the respondent's views and preferences including his hopes for the future, Ms. O'Dwyer states the following at para. 11:

*"Before I finished my conversation with [the respondent] I asked him how he felt about his future and how he felt about being discharged from wardship. [He] advised that his goal was to become a DJ. I asked him what type of music he likes to play and he advised that he enjoyed country and western such as Garth Brooks and Taylor Swift as well as a bit of Elvis."*

**21.** I want to wish the respondent every success with that endeavour, and I am sure that he will 'fill floors' very quickly if he plays the type of music he enjoys.

### **DSS Panel**

**22.** In the last two paragraphs of Ms. O'Dwyer's affidavit, she swears the following: *"I say and believe that it is [the respondent's] will and preferences for somebody independent from a panel maintained by DSS to be appointed as his decision-making representative"* and she concludes her affidavit by swearing that [Mr W's] reaction to being served with copies of the application was one of interest.

**23.** She goes on to aver: *"I say and believe [Mr. W] did understand most of what I was explaining to him regarding the discharge process. [Mr. W] reiterated to me that he would like things to stay as is, as he is happy with how everything is going presently."* I want to assure Mr. W that nothing will change in relation to his day-to-day circumstances. It is clear that he is living in a residency he is happy in and enjoys and that will not change as a result of today's decision.

#### **Independent Social Worker**

**24.** It is also appropriate to note that, as averred by Ms. Burke at para. 16 of her 16<sup>th</sup> January 2024 affidavit, the applicant (i.e. the committee) engaged an independent social worker, [Mr. M] who met with the respondent, on the 14<sup>th</sup> July of last year, and who noted in particular the trusting relationship between the respondent and his care staff. Again, that underlines how things are going well in terms of the respondent's residence. Today's decision will not change that for him, and I want him to be reassured on that score.

#### **No EPA**

**25.** At para. 24 of the same affidavit, Ms. Burke avers that there is no enduring power of attorney or advanced healthcare directive known to exist.

#### **Nomination of DMR**

**26.** In circumstances where, for the reasons outlined, there was no DMR identified and no suitable person in a position to act as co-decision maker, the nomination of [Ms. V] to act as DMR has been approved by the High Court President. In terms of her qualifications [Ms. V] is an experienced barrister who has worked closely with vulnerable persons and who has a particular interest in mental health law.

#### **The respondent's contribution today**

**27.** I am now going to turn to the appropriate declarations which the court must make, having considered the evidence very carefully. Before doing so I want also to add that [Mr. W]'s contribution today focussed on his desire for somebody independent to look after his finances and that is precisely what is now going to happen.

#### **Declarations**

**28.** Therefore, in light of the evidence, it is appropriate to make a declaration, pursuant to **s.55.1 (b) (i)** of the 2015 Act, that the respondent lacks capacity in the areas of health and welfare decisions unless the assistance of a suitable co-decision maker is made available to him.

**29.** It is also appropriate to declare, pursuant to **s. 55.1 (b) (ii)** of the 2015, Act that the respondent lacks capacity with respect to decisions concerning his property and affairs even if the assistance of a suitable co-decision maker is available to him.

**30.** It is also appropriate to declare that, as contemplated by **s.55.4A** of the 2015 Act, there is no suitable person available to act as co-decision maker, in which case **s.55.4 (ii)** applies. That section entitles the court to discharge someone from wardship upon the appointment of a DMR in circumstances where there is no suitable person to act as co-decision maker.

#### **Orders**

**31.** Turning to appropriate orders, I am very grateful to the applicant who has provided a comprehensive draft and, having carefully considered it in advance, and having had the benefit of Ms. Butler's submissions today, I am satisfied that orders in those terms are appropriate. In summary they are:-

- to make an order, as I mentioned at the outset of the application, pursuant to **s.27** of the Civil Law (Miscellaneous Provisions) Act of 2008 prohibiting publication which would be likely to identify the respondent;
- it is appropriate to make an order appointing [Ms. V] as the respondent's DMR;

- the court is also making an order that the respondent be discharged from wardship and remitted to the management of his affairs with the assistance of his DMR, [Ms. V], pursuant to **s.55.4 (ii)**, and subject to the provisions of **s.41(3)** of the 2015 Act;
- section **41 (3)** requires the DMR to ensure insofar as practicable that she makes decisions jointly with the respondent;
- it is also appropriate that the DMR be entitled to receive a copy of the pleadings and documents in this application;
- the court is also ordering the DMR be authorised to receive the respondent's various assets, as detailed in the application;
- the court is ordering that the DMR account to the director of the DSS in accordance with **s.46 (6)** of the 2015 Act;
- I also note the draft orders at paras. 10 and 11 and these are entirely appropriate. They concern the accountant of the Courts of Justice carrying out the directions in the payment schedule which accompanies this application and also concern arrangements for the respondent to receive, directly, his Department of Social Protection payment;
- in accordance with **s.42 (1) and (2)** of the 2015 Act, an order will provide that the DMR is not entitled to reimbursement of expenses or to payment out of the respondent's assets. That is a departure from the 'default position' in the 2015 Act which is appropriate, so as to ensure that a professional DMR in this case is appropriately reimbursed, via another means; and
- having regard to the evidence in relation to the respondent's condition, notwithstanding his relatively young age, and taking account of the very clearly expressed views of Dr. H, I think it is more appropriate to make orders, in accordance with s.55.1 of the 2015 Act, that the respondent's capacity be reviewed no later than three years from the date of this order;
- finally, I note the applicant is not seeking costs in relation to today's application and has the court's gratitude in that respect.

I want to record that it was a pleasure speaking to you today, [Mr. W], and I wish you all the very best for the future. Congratulations on leaving wardship.