THE HIGH COURT

WARDS OF COURT

[2024] IEHC 438

[WOC 11729]

IN THE MATTER OF AN APPLICATION TO TRANSFER A RESPONDENT FROM A RESIDENTIAL PLACEMENT

RESPONDENT

Ruling of Mr. Justice Mark Heslin delivered on 8th May 2024

1. To begin with, I want to express my thanks to Mr Brady BL for the Child and Family Agency (or "CFA", "Agency", "Tusla") who moves today's application; to Ms Hill BL for the HSE who supports it; and to Ms Mulligan BL for the respondent. The respondent is someone who has had the benefit of independent advice from a solicitor. The respondent is supportive of today's application insofar as the transfer is concerned. His expressed wish is to move to his mother's home. With regard to the inquiry, and I will presently return to that issue, he does not make any objection to the declaration aspect. I am also very grateful to Ms Smith BL, standing in today for Mr Mooney BL and representing the respondent's mother who is also supportive of the application insofar as the transfer is concerned. I am grateful, also, to Mr Lynn SC and Ms Kirby BL for the guardian ad litem (or "guardian") who oppose the transfer application, as does Mr Cross BL, to whom I am also grateful. He represents the respondent's father and adopts in large measure the submissions made by Mr Lynn.

Wardship application

2. The respondent is someone who was born in [redacted] 2005. He is now a young adult, aged 19. He came into voluntary care in October 2021. A care order was made in June of 2022. Beginning with the question of capacity, I have the benefit of evidence from Dr G, a consultant psychiatrist, who assessed the respondent on the 5th of April of last year as the Court's medical visitor. Dr G states, *inter alia*, the following as regards capacity: "*I carried out a functional capacity assessment. It is my opinion* that [the respondent] *is unable to manage his affairs due to his intellectual disability and Attention Deficit Hyperactivity Disorder. These conditions are* irreversible" and he concludes his report by stating: "[the respondent] *is of unsound mind and unable to manage his affairs.*" In the manner I will presently come to, that is uncontroverted evidence.

3. By order made on the 19th of April of last year, the President directed an inquiry and, on the 22nd of November last, a 'section 12' notice issued. On the 30th of November, the respondent was personally served with the section 12 notice. That is averred in an affidavit sworn on the 7th of December last by Mr Gerard Field.

4. In another report from a different consultant psychiatrist, a somewhat earlier report of the 3rd of February 2023, Dr M, a consultant child and adolescent psychiatrist who assessed the respondent on that date at the behest of the Child and Family Agency, stated, *inter alia,* on the question of capacity, that the respondent "*had an excessively positive view of his capacity to manage across a range of life skills.*" It was clear to Dr M that the respondent was not competent as an assessor of his own ability. Dr M described the respondent as "*very vulnerable*" and opined, *inter alia*, that he does not have capacity to care for himself as an independent adult and will require support from the relevant services after attaining the age of 18. Dr M put matters as follows: "[the respondent] *is by virtue of his intellectual disability and ADHD, in particular the effect of his behaviour and decision-making and its impact on his capacity to care for himself, considered to be a person of unsound mind and incapable of managing himself or his* affairs" and he goes on to say: "*I would support the planned application for wardship.*"

5. The most recent order made by this Court in respect of, up to now a proposed Ward, was an order made on the 23rd of April. It provides that the respondent's place of residence shall continue to be a certain Nua Healthcare placement, pending further order. The respondent is not detained at that placement. The existing order, which also provides for access with family to be supervised, amounts to a continuation, up to today's hearing, of orders which have been in being for some time.

Change of residence

6. I now turn to the substantive application, which is the Agency's application that the respondent's residence be changed from the Nua Healthcare placement, which is in [location A] to his mother's home, which is in [location B]. As we are all aware, the background is that funding for this Nua placement expires in a matter of days. This is not a transfer application which the guardian ad litem feels able to support and, in 'net' terms, she regards the transition plan as inadequate, in particular, given the absence of a risk assessment. She also urges that the HSE and the CFA would agree to further funding so that the placement could continue.

7. In relation to the very important issue of [the respondent]'s own views, the guardian reports the following in her 17th of April 2024 report, and I quote: "*When I visited with* [the respondent] *on the 29th of March 2024, he indicated that he now wants to go to* [location] *to his mother's home.* [The respondent] *indicated that he wanted to complete his housing forms for* [location] *and not* [location] *and wanted me to communicate this request to all parties. Additionally,* [the respondent] *advised that he did not want me to raise anything in the High Court for him*."

8. A clear sense of the guardian's independent view can be ascertained from section 10 of the same report where she states, *inter alia*, the following:

> "*Whilst* [the respondent] *has been in placement with Nua Healthcare he has made some progress. However, I continue to believe that he is not at a level to safely transition to his*

mother's home or care in [location] *at this juncture. The onus and focus should be on maximising* [the respondent's] *capacity and building on his progress instead of acting prematurely and putting him at risk of significant harm.* [The respondent] *has experienced consistency and stability over the last 19-month period while living in Nua Healthcare and he should be given the opportunity for further growth and development by this service continuing or a service akin to this service in* [location] *continuing. Additional to the social care team,* [the respondent] *has benefitted from ongoing support from the multidisciplinary team and I remain fearful if this safety net is no longer available to him. It continues to be evident that* [the respondent] *needs prompting, scaffolding and support in terms of every aspect of his daily life and, in particular, with his emotional and psychological wellbeing, along with all the other reasons as outlined in previous reports. To that end, I am supportive of the wardship application and urge agreement on the future placement service provision for* [the respondent]."

Fears

9. I pause to say that it does not seem unfair to characterise the guardian's fears for the *future* as based, not on specific evidence of a *current* risk presented by the home environment of the guardian's mother, but on *past* events such as (i) a social admission to hospital in childhood, as well as the respondent being (ii) someone who was placed voluntarily in State care as a child and (iii) the views expressed in late 2021 by the Child and Adolescent Mental Health Service that he was a vulnerable person and (iv) a view expressed that the respondent was receiving appropriate care in the Nua Healthcare placement. I say this in circumstances where all of those are the matters referenced at paragraph 7(c) of the same report by the guardian. However, and it is a theme I will return to, it does not seem to me that, taking full account of these historic matters, I can make the leap by assuming that, as matters currently stand, the family home of his mother is *not* a safe place for him to reside being, as I say, where he wishes to reside.

10. Similar views are expressed by the guardian in her addendum report, which I have also carefully considered, and that is a report of the 8th of May. In saying that, I do not want in any way to take away from the very diligent and professional way which the guardian ad litem has discharged the twin roles of ensuring that [the respondent]'s view has been heard by this Court as well as setting out what she regards as being in his best interests. I want to make crystal clear that this Court has nothing but gratitude to, and respect for, the guardian ad litem and the manner in which, so *bona fide*, she has discharged her twin duties.

Art 40.3

11. In relation to legal submissions made on behalf of the guardian, I must again express my sincere thanks to Mr Lynn and Ms Kirby. I have carefully considered the detailed written submissions furnished, which were supplemented by oral submissions made with such skill. A key theme in those submissions is to emphasise Article 40.3 rights and the role of this Court in vindicating personal rights. The guardian also emphasises the constitutional underpinnings of

this Court's preserved jurisdiction in Wardship, *per* section 9 of the 1961 Act. In this regard, I have noted the principles upon which the guardian relies with reference to various authorities, including *In Re D* [1987] I.R. 449 at p. 455-456; *HSE v AM* [2019] 2 I.R. 115; *In Re A Ward (Withholding Medical Treatment) (*No. 2) [1996] 2 I.R. 79, at 106; as well as the recent decision by Hyland J in *KK* [2023] IEHC 306; and the decision in *HSE v AJ* [2024] IEHC 166.

The Health Act, 2004

12. It is also important to note the provisions of the Health Act 2004, in particular, section 7. That section is, helpfully, replicated at paragraph 12 of the HSE's written submissions and I am very grateful to Ms Hill in that regard. Section 7 begins in the following terms:

> "*(1) The object of the HSE is to use the resources available to it in the most beneficial, effective, and efficient manner to improve, promote and protect the health and welfare of the public… (4) The HSE shall manage and shall deliver or arrange to be delivered on its behalf health and personal social services in accordance with this Act… (5) In performing its function, the HSE shall have regard to…(d) the resources, wherever originating, that are available to it for the purposes of performing its functions, (e) the need to secure the most beneficial, effective and efficient use of those resources and (f) any standards set by the Health Information and Equality Authority insofar as practicable and subject to the resources available to the HSE.*"

The significance of that is something which will presently become clear.

The Child and Family Agency Act, 2013

13. I have also had the benefit of written submissions from the Agency and I want to thank Mr Brady for those. The Agency is, like the HSE, a creature of statute. It was established by the Child and Family Agency Act of 2013 and, at paragraph 6 of the Agency's written submissions, section 8 of the 2013 Act, which sets out the agency's functions, is, very helpfully, replicated. S.8 (8) and (9) state:

> "*(8) The Agency shall facilitate and promote enhanced interagency co-operation to ensure that services for children are co-ordinated and provide an integrated response to the needs of children and their families. (9) In the performance of its functions the Agency shall use the resources available to it in the most beneficial, effective and efficient manner.*"

14. The Agency's submissions emphasise, among other things, that the Agency's after-care functions, in light of section 45 of the 1991 Childcare Act and as interpreted by Gilligan J's decision in *Enguye v HSE* [2011] IEHC 507, are discretionary. It is also pointed out that there is no stand-alone basis upon which the Agency is concerned with the provision of services to adults and the respondent is now an adult.

Evidence from the Agency

15. In terms of evidence, Ms D, after-care worker with the Agency, makes the following averments

at paragraph 4 of her 8th of April 2024 affidavit, which grounds today's application to transfer and I quote:

> "*I say that since he turned 18 on the 24th of March 2023* [the respondent] *has been accommodated at an after-care placement with Nua Healthcare in* [location]. *The Agency has consulted with the HSE, which is a notice party to the within proceedings. I say that this case was discussed between the parties and it was agreed that it came within the remit of the joint protocol for inter-agency collaboration between the HSE and Tusla, the Child and Family Agency, to promote the best interests of children and families. At that time it was agreed that as a child in care* [the respondent's] *placement would be 50:50 funded between the HSE and the Agency until his 19th birthday. At the most recent level three joint protocol meeting the HSE advised that they do not assess* [the respondent] *to require the level of service being provided by Nua Healthcare and will consequently not be funding a continuation of his placement. Based on this advice received from the HSE, as the lead agency in the matter, the Agency will also be ceasing funding on his 19th birthday.*" (emphasis added)

Assessment

16. I pause to say that this Court does not have the jurisdiction or expertise to *assess* the respondent in the manner in which the HSE has done as regards the level of service he requires.

Funding

17. Nor does this Court have the jurisdiction to make *funding* decisions of the type which have, obviously, been made in this case in accordance with the operation of the joint protocol as between the Agency and the HSE. That is, it seems to me, an important point and one which speaks directly to the very sincerely held wish by the guardian, and expressed at paragraph 10 (c) of her report, that there would be a future placement agreed between the HSE and the Agency. That clearly is a sincerely held wish, but it is not something which can be given effect to by this Court, for the reasons I have just outlined.

Transition plan

18. At paragraph 5, Ms D avers that Nua Healthcare have provided a transition plan and I have noted the contents of that exhibited transition plan. Although a central concern on the part of the guardian ad litem is the absence of the risk assessment in relation to the respondent returning to the home of his mother - and that is something which comprises part of the Nua Healthcare transition plan - I also note that, of the safeguarding concerns disclosed by the respondent to Nua staff in his current placement (and these are referred to on internal pages 7 to 9, inclusive, of the same transition plan) *none* relate to the respondent's mother.

19. Furthermore, internal page 10 of this 14-page transition plan states that the respondent's safeguarding plans should be submitted to the HSE and to Aftercare and it is noted that this *was* sent to the Aftercare worker on the 4th of March 2024.

Disclosures

20. It is also clear that such disclosures - and they relate to historic events - as made by the respondent to Nua Healthcare related to persons the respondent would *not* be returning to live with, be that an older brother or a father who does not reside in that home (with also, it is fair to say, reference made to peers). The question of difficulties encountered by the respondent in relation to engagement with peers is a theme I will return to, because it is certainly an issue which has arisen, despite the fact that the respondent has resided in the full-time placement with Nua Healthcare.

Evidence from the HSE

21. Ms Katherine Kelleher, solicitor for the HSE, swore an affidavit on the 29th of February. She exhibits, at para.28, the February letter authored by Mr M, HSE Disability Services Manager. Mr M's letter states, *inter alia*, that the respondent's placement in Nua Healthcare had a specific remit of independent skills development and preparation for community living over the past 12 months. Mr M expresses the view that, were the respondent to remain in the Nua Healthcare placement where "*well-meaning staff provide for basic daily activities, where* [the respondent's] *inability is not indicated*", this would "*act to ultimately de-skill and hinder achievement of potential rather than build independence over time.*"

22. Mr M also states explicitly and, again, I quote: "*HSE disability services are not in a position to continue to fund* [the respondent's] *placement post April 2024.*" His letter goes on to explain, *inter alia,* that the annual discretionary budget for emergency funding of residential placement in disability services in 2023 amounted to some €1.88 million, whereas the combined cost to the HSE and the CFA of the respondent's residential placement in 2023 was in excess of €345,000.

23. Elsewhere in his letter Mr M details what he describes as a "*deeply regrettable landscape*" for people with disabilities in [location] and [location] where challenges concerning the appropriate distribution of limited resources are certainly a factor. Later, he confirms that some 1,083 records of individuals having unmet needs in relation to disability services have been identified, with 176 people identified as being in a high-risk emergency or crisis situation.

24. He goes on to confirm that he is actively seeking appropriate residential placements and/or additional supports for the highest priority cases in the context of what he describes as "*very limited budgetary scope*". He also goes on to state that, "*in the unlikely event of a significant increase in the available budget*", the respondent's case "*would not likely be prioritised over any of these indicative cases by comparison on the basis of presenting disability need*."

25. It is appropriate to pause to say that the Oireachtas has tasked the HSE, *not* this Court, with making what must be very difficult funding-decisions of the type Mr M has alluded to. It is fair to say that the evidence before the Court makes very clear that these are funding decisions made in a situation where there are a number of variables, including, very obviously, (i) the

level of need in the relevant population as assessed by the HSE at a given point, (ii) the funds available from time to time; and (iii) the tension between these two things, given that public resources are finite and the context, of course, is a need to 'triage' and prioritise.

Separation of powers

26. The fact that it is the HSE, not this Court, which is vested with the authority to make funding decisions speaks, very obviously, to a separation of powers issue. It is a statement of the obvious that this Court would be breaching that fundamental separation of powers issue or principle if, for example, it were to direct that the HSE spend limited public funds in a manner which, according to the HSE's own assessment, was not appropriate.

27. The same comment obviously applies in relation to the impermissibility of telling the Child and Family Agency that it should spend money in a particular way, which it does not regard as appropriate. It seems to me that I should make the point that it also means this Court could not make, or refuse to make, an order if the natural consequence was to cause the HSE and/or Tusla to have to expend finite public resources contrary to assessments and decisions made by those agencies within their remit.

Safety, supports and services

28. The question of the respondent's safety going forward, as well as certain supports and services which will be available to him in the community, and the question of his own views, are also referred to in after-care reports of the 15th of April and 2nd of May prepared by Ms D. Turning to the most recent of those, Ms D confirms the following. Under the heading of Health:

> "*The after-care service has contacted the adult safeguarding team in* [location] *regarding the process of the transferring of information from one CHO area to another in relation to adult safeguarding cases. The safeguarding officer in* [location] *advised that the current disability service, Nua Healthcare, have the responsibility to share their concerns with the incoming disability service in* [location], *NLN*" - that is the "National Learning Network" and the address is given - "*Nua Healthcare have been advised of this*."

29. Under the heading of Education, Ms D states:

> "*Nua Healthcare have recently submitted a referral to the adult safeguarding team in* [location] *in relation to ongoing concerns regarding suspected bullying by female peers in the NLN. In response to the alleged bullying,* [the respondent] *reported suicidal ideations to the NLN. The NLN advised Nua Healthcare of their policy on suicidal risk. A student's attendance is paused until their safe return is approved by a psychiatrist. Nua Healthcare arranged a meeting to specifically discuss this policy. However, during the meeting the co-ordinator of services gave an overview of* [the respondent's] *placement and outlined that the service is not suitably meeting his needs as he requires one to one support. NLN have taken the decision to suspend his placement in the interim and gave recommendations on more appropriate services, such as rehab care. Regarding the YAP Ability programme, the after-care worker submitted a referral to YAP, following* [the respondent's] *consent.* [The

respondent] *will be offered 15 hours of service each week for a period of 12 months. 50:50 funding is agreed by Tusla and the HSE. This can include evenings and weekends, depending on the advocate's availability."*

30. Under the heading of *Access,* Ms. D continues:

"The After-care worker sourced an alternative supervised access service. [The respondent] *would like access to recommence. The supervisor identified two days which were sent to* [the respondent's] *mother. To date the supervisor has not received a response from* [the respondent's mother]."

Wardship

31. On the question of Wardship, Ms D reports that [the respondent] is in receipt of free legal aid and his solicitor, Mr Mc, has advised that [the respondent] is not opposing wardship. The conclusion of the report is as follows: "[the respondent] *is in agreement with respect to his return home*". The address is given in [location]. "*Once moved, the after-care worker will offer to meet* [the respondent] *weekly in his day programme for the first six weeks and will review and adjust as needed with* [the respondent] *following this period.*"

32. Although I will return to the topic in the context of oral evidence given, it is plain that there is, on any analysis, a significant amount of support and services which will be available, provided by professionals, upon any transfer home to the respondent's mother's house.

Evidence from the Independent Solicitor

33. The wish of the respondent to move just there is also clear from the contents of the affidavit sworn on the 19th of April by his independent solicitor, Mr Mc, with whom he met on the 7th of March and the 10th of April.

Protective duty

34. The central contention by the guardian ad litem is that this Court, exercising its protective duty towards the respondent, must refuse the transfer application. And in this context the guardian stresses the absence of a risk assessment as part of the transition plan.

Risk assessment

35. On the question of a risk assessment, the guardian ad litem's understanding, as she notes at paragraph 6 (b) of her latest report, is that it is *not* general practice that either Nua Healthcare or Tusla would carry out a risk assessment in circumstances where children who have had care experiences and are in after-care services choose to return home. And it is, undoubtedly, the position that a young adult is now choosing to return home.

Safeguarding

36. In addition to the statements made in the 2nd of May report by Ms D on the question of safeguarding, she makes the following averments at paragraphs 6 and 7 of her grounding

affidavit and it is appropriate to note these.

> "*I say that* [the respondent] *came into care relatively late in his childhood. I say that as he is now an adult, child protection concerns do not arise. I further say that insofar as* [the respondent] *is an adult whose capacity is in question and who has certain vulnerabilities, these will fall under HSE safeguarding into the future."*

Supervision

37. She also avers at paragraph 7*:*

> *"During the time that he was a child in care and for most of his time under interim wardship orders, he has been the subject of orders providing for the supervision of access with his mother,* [named]. *I say that it is the view of the Agency that the orders providing for the supervision of access are no longer required*." (emphasis added)

38. These are averments to the effect that, irrespective of the situation in the *past*, the Agency is now satisfied at this point in time that the proposed transfer is not unsafe. That is clear from the Agency's view that the up to now required supervision orders concerning access between the respondent and his mother are no longer required. The averments I have quoted from Ms D's affidavit are to the effect that, if a safeguarding issue were to arise in the *future,* the HSE's adult safeguarding team, and the relevant policy, is there to address same.

Oral evidence on behalf of the Agency

39. I have also had the benefit of extensive oral evidence and it is appropriate to turn to it. Ms R is an after-care manager with the Child and Family Agency. Her role in this particular case is managerial in that she has not met with the respondent. But she referred to the rationale for his residential placement up to now, making clear that the purpose was to provide a secure base and to provide an opportunity to build on skills so that the respondent would be more prepared for independent living.

40. Her testimony included to say that if the Court were to refuse today's transfer application, there is no alternative accommodation. There is no transitional accommodation available and the support available would be in relation to other services. She confirmed, also, that the respondent is already on the relevant city council housing list and that, in this context, his needs and profile have been identified. Such is the waiting list, she agreed, that insofar as the Agency is aware, the respondent will be housed somewhere between his 20th birthday and his 30th birthday.

41. She also outlined the supports which will be available to the respondent following a move to his mother's home, in particular, the YAP support. She described this as between 12 and 15 hours per week supporting the respondent in his home regarding a range of matters, be that education, or skills, or living in the community, or otherwise. She made clear that it is a disability-based service. She also made clear that he has been referred to the National Learning Network (the "NLN") in [location B]. It will be recalled that this is in circumstances where attendance at the NLN in [location A] is currently 'paused' for the reasons given.

42. Ms R anticipates that if the Court accedes to the transfer application the respondent would avail of the NLN education and training day programme upon his move to [location]. She described it as being flexible and being based on a young person's ability and made clear that it can be up to a full-time, 5 days a week, 9 am to 4 pm engagement. She also made clear that the respondent will have significant exposure to professionals and this would be, effectively, on a daily basis as a result of the services which will be available to him in the community. That seems to me to be of central importance to the present application.

43. This is not a situation where, going forward, and on foot of any move to the respondent's home that he would not be exposed to a range of professionals day in, day out. This, of course, has a direct relevance to what would happen if, in the future, a safeguarding concern were to present, be that a reasonable ground to believe that the respondent is suffering any abuse - and I use that term in the broadest sense - or if it was, in the future, to be the case that the respondent expressed self-harm, or worse, ideations.

44. On the question of a risk assessment, Ms R outlined the Agency's position and that was to the effect that in her experience a risk assessment has *never* been conducted in respect of an adult by the Child and Family Agency. She also made clear that the Agency would not have a mechanism for this. She was aware of, and she referred to, the HSE's policy in relation to safeguarding vulnerable persons at risk of abuse and it is common case that this HSE policy exists and applies to the respondent. In the manner I will presently return to, there is no suggestion that any of those professionals who, going forward, will be engaging with the respondent are not aware of the policy and in a position to invoke its terms should the need arise.

45. On the question of access between the respondent and his mother, Ms R confirmed that the decision to supervise access was made when the respondent was underage, when he was a minor. She went on to indicate that it was continued into adulthood in circumstances where access visits were intermittent. In this regard, it is common case - and it is something Ms R was aware of - that the respondent's mother was quite ill for a period.

46. At this juncture, it seems appropriate to note that what emerges from the evidence is the following chronology in relation to access, at least in recent times. (i) Going back to the period from March to October of 2023, there would not appear to have been any access and this was a result of the significant illness of the respondent's mother, (ii) from November, December and into January there was some supervised access; and (iii) the last of the supervised face-to-face meetings took place in January 2024.

47. Speaking to the *reason* why the Agency was satisfied that access no longer needs to be supervised, Ms R gave evidence to the effect that there is nothing to indicate that there was a pattern of distress or significant behaviours which would warrant concern in relation to the respondent's meetings with his mother.

48. Ms R confirmed that [the respondent's mother] refuses to communicate with Ms D, the after-care worker, but Ms R did indicate that she has had engagement with the respondent's mother. Ms R referred to phone calls, although described those as very brief.

49. In response to Mr Lynn's questions, Ms R's evidence included to say that communication was very limited by [the respondent's mother]'s unwillingness to engage. Ms R could not say for certain when the last visit with the respondent's mother occurred. As I say, it appears to be common case that this was in January of this year. Ms R agreed certainly that direct contact was very limited over the last year, though she did refer also to phone calls as well as face-to-face visits. Ms R also agreed that the Agency had not visited [the respondent's mother]'s home but made very clear that this would not be at all unusual.

50. The reason why the Agency is now of the view that access does not need to be supervised was returned to again when she was cross-examined. The thrust of her evidence was to say that, from Nua's reporting, it does not seem that contact between the respondent and his mother has negatively impacted him.

51. In relation to the 8th of April 2024 affidavit by Ms D, Ms R confirmed that she could speak to its contents and she was familiar with the transition plan. Mr Lynn pointed out that this Nua transition plan refers to a risk assessment and Ms R accepted that this was so and indicated that Nua had assigned that responsibility to the HSE. She gave evidence, to the effect that a concern by the Agency about a young person would prompt contact to the HSE's safeguarding team.

52. Mr Lynn referred Ms D to an affidavit by Ms K of the Agency on the 10th of March 2023 in the context of the wardship process and she accepted that this had been sworn and was part of the evidence before the Court. He referred to paragraph 17, which he opened, and that includes reference to the respondent's mother on occasion being confrontational as well as reference to an aggressive incident of behaviour in 2022.

53. It is not in dispute that these averments were the basis for an application made at that stage in the context of supervised access. But it is appropriate to note that we are now at some distance from those events and there is more up-to-date evidence before the Court, in particular, that the Child and Family Agency now take a different view and have expressed their reasons for that view on the question of access being supervised.

54. Ms R went on to give evidence to the effect that, in terms of the Agency's experience of the respondent after contact with his mother, there has not been a report of anything untoward in relation to access while the respondent was an adult. She clarified that the reporting she is relying on arises in the following circumstances. A separate agency was contracted to supervise the access. That agency reported to Nua and Nua reported to the Child and Family Agency. Ms R acknowledged, of course, that a view had been expressed by Ms K somewhat

over a year ago, namely: "*this senior social work practitioner would not support the respondent's return to his mother's care*". And while taking nothing away from the averment made at that stage, as I say, this is not where the evidence ends. There is current evidence which, it seems to me, this Court is required to engage with.

55. On the question of risk assessment, Ms R agreed that in the transition plan Nua recommended it. But when pressed, Ms R did not accept the proposition put to her by Mr Lynn that the Agency had been 'pushing for' a risk assessment. Ms R made clear that she had ensured that Nua communicate any concerns to HSE disability services.

56. In response to Mr Mooney's question, Ms R's evidence was to the effect that it is the Agency's view that it is no longer necessary for access between the respondent and his mother to be supervised. Ms R also confirmed that the Agency has had a period of time to come to this view, or to form that view. She also made clear that it is a view formed by the Agency in recent weeks. She said it was very recent. It might have been as little as two weeks. She did not have her notes and was not specific about the exact date, but it does not seem to me that anything in particular turns on that. She was pressed, understandably perhaps, by Mr Mooney as to why, having formed such a view, unsupervised access had not yet taken place. Ms R indicated that, firstly, it was a Court directed position and that to the best of her knowledge the Agency was awaiting a date from the respondent's mother, and that also seems to be uncontroversial.

57. In response to some re-examination by Mr Brady, Ms R confirmed that the recommendation by Nua of a risk assessment also referenced *"peers"* as well as family and that is, without doubt, the position. I pause to say that this also reflects the safeguarding issues raised by the respondent with Nua and that is clear from the contents of the transition plan, and I have already given the page references. Peers are mentioned in the contents of safeguarding issues. Peers also feature as the reason for the respondent's current difficulties in the [location] NLN, resulting in the service being suspended in circumstances where, as a result of perceived behaviour by peers, expressions of self-harm were made.

58. At the risk of repetition it is important to note, looking at the question of safeguarding, that even when living in this *current* residential placement, as opposed to his mother's home where he now wishes to live, safety concerns have arisen, in particular, as regards peers.

59. Ms R also gave evidence to the effect that both the YAP and the NLN in Cork, with whom the respondent would have *daily* contact, would be aware of the HSE's safeguarding policy.

Oral evidence from Guardian ad Litem

60. I was also very grateful to have the benefit of evidence directly from the guardian ad litem, Ms B, and she spoke to her written reports. It is entirely to her credit that the guardian regards it as incumbent on her, as she put it, to talk about safety. And on that topic her evidence

included to say that there were numerous reports in relation to safeguarding concerns when the respondent was a child. That is so and, again, that speaks to historical issues. She went on to give evidence to the effect that: there are very real risks to his safety; these need to be mitigated; and, from her perspective, the issue was to identify and then to respond to these. But it is fair to say, that in relation to the specifics of *current* risks, her evidence included to say there are a lot of unknowns in relation to the home, including in relation to the health of the respondent's mother and her capacity in that regard and whether there be any ongoing issues arising out of that. Ms B also added that there are suggestions of incidents of violence previously. And, again, that speaks to historic issues. The guardian summarised her view by saying there are many issues at play in relation to the respondent's safety.

61. I want to say again that I take nothing away from the sincerity with which these views are offered, but they do seem to me to be a combination of references to the past, rather than current specific issues. And as well as past events, there is a very heartfelt concern for what might happen in the future. But it seems to me that there is no concrete evidence of, for example, a specific risk to the respondent from his mother or from the home environment in his mother's home to which he wishes to move.

62. In relation to the National Learning Network, Ms B made clear that the NLN in [location] appear to say that the respondent needs one-to-one support which they cannot provide. And the guardian's worry was that, if the 'set-up' in [location B] is similar to [location A], what would the repercussions be for the respondent in terms of difficulties, were they to be encountered? That, again, is an understandable concern but it does seem to me to be a fear of potential *future* events rather than concrete evidence of lack of safety as things *currently* stand, insofar as the proposed transfer 'at play' is the subject of today's application.

63. The guardian's view - and she made this clear in her evidence - is that the HSE safeguarding team do not deal with anticipated risks as opposed to harms actually suffered by an individual. While I note that this was the view expressed in evidence, I have to say that a careful consideration of the HSE's safeguarding policy seems to me to paint a more nuanced picture. I have read it in its entirety, I did so overnight, and it emphasises intervening at the earliest stage when there are reasonable grounds for concern. In other words, a central theme in the policy is to prevent harm, not simply to react to harm suffered.

64. Continuing with the guardian's evidence, she indicated that - and it reflects the reporting - when the respondent gets distressed, he says to others that he will self-harm, or worse. And the guardian had a concern that the service providing support in the community may not have a specific remit in relation to self-harm or suicidal ideation or specific training in that regard. But, again, it seems to me that the policy of which all professionals will be aware is a mechanism for responding in an appropriate way in the future should there be, for example, an expression in the future of self-harm.

65. The guardian made clear in her evidence that there was a significant period from March to October of last year when the respondent did not have contact with his mother, and that is common case. She also referred to certain dysregulated behaviours reported in the wake of the November 2023 visit, but made clear that those behaviours were said to have decreased. Recalling that it is common case that the last face-to-face visit took place in January of this year, there is no evidence before this Court that in the wake of the January visit there were behaviours of concern reported which would cause the Agency to have reasonable grounds for taking a different view to the one they formed. That is not for this Court to set itself up as a 'quasi-judicial review' decision maker. This is *not* judicial review where a decision, plainly made by the Agency, is being subject to challenge on a rationality or reasonable grounds or on the basis of reasons. My point is that reasons have been given and there is no evidence to the effect that those reasons were not evidence-based.

66. The thrust of the guardian ad litem's evidence was to say that we do not have a very clear picture of the response of [the respondent] to access. Again, this reflects a point I have just made. Respectfully, I disagree in circumstances where the Agency, very obviously, take a different view and have formed that view for reasons given.

67. The guardian expressed concerns about what would be available in practical terms in his mother's home. And this again does not seem to me to be evidence of a safety concern which would ground the submission that this application must be refused through the 'lens' of Article 40.3 in the context of this Court's duty to protect the vulnerable individual, the subject of the application.

68. The guardian made clear that she regards the respondent's intellectual disability as presenting itself as 'mild to moderate' rather than 'mild'. In response to Mr Brady's questions, the guardian's evidence included to accept the contents of certain reporting which indicated that the respondent met the majority of the criteria for mild and some of the criteria for moderate. Nothing seems to me to turn on this for the purposes of what the Court has to decide today, and I accept entirely that, as Mr Lynn submits, Dr M refers to the respondent as someone with mild to moderate intellectual disability.

69. Of more relevance is that in terms of YAP support, Ms B confirmed that the majority of YAP workers in her experience would be social care-trained. She also agreed that she expected that YAP workers would be 'alive' and attuned to any safeguarding concern. She commented in that context that engagement by the respondent with YAP support would be voluntary but, again, nothing seems to me to turn on that. That is entirely commonplace in that it is the nature of such services that they are voluntary. There is no question of an adult being forced to avail of these services.

70. More relevant is that the guardian confirmed very readily that YAP workers would be *au fait* with the HSE's safeguarding policy. And she accepted that the respondent would also be

entitled to a service from the [location B] NLN, albeit that she expressed the view that those attending the NLN are perhaps more independent than the respondent. Again, this seems to me to speak to very genuinely held *bona fide* concerns about what might be the case for the future. But that again, with respect, is a far cry from concrete evidence of lack of safety insofar as the proposed transfer sought today is concerned.

71. In the event of the Court granting the application, the guardian ad litem agreed that there is a wide range of potential services in [location B] and, indeed, likely a greater range than those available for the respondent in [location A]. The guardian confirmed that she was not familiar with precisely what was available or how quickly it would be available in the event of, for example, in the future the NLN in [location B] not being able to provide an ongoing service. But she openly acknowledged that all potentially available services would be likely to be aware of and in a position to, as she said, 'plug in' to HSE safeguarding.

72. In response to Ms Hill's question, the guardian's evidence included to say that she was certainly aware of the purpose and function of the residential placement, namely, the remit for skills development. And it is through her involvement that she became aware of the respondent's inability to make progress. Ms B wondered about the evidence to support the opinion expressed by Mr M in relation to the placement inhibiting the respondent's progress. What I took from her evidence is that she would not share that view. Ms Hill put to the guardian, who accepted, the 19th of March 2024 report by Ms D wherein it is stated that the team in the placement noted that the respondent's progression had plateaued and that he had shown signs of regression in certain areas. That is uncontroverted evidence. The guardian was also hopeful that in the event of the NLN service in [location] not being suitable in the future that Mr M would be in a position to identify an alternative. And it seems that I can safely take from the evidence that were any service available in the community not to work out that there would be an alternative service sourced.

73. The guardian was fully aware of the funding issues and the demands on the HSE and her focus was, as she made very clear, not on the needs of others in the context of financial constraints, but rather on what she regards as the best interests of the respondent. That, of course, is to her great credit.

74. She confirmed that she had not had any discussions with Ms D in relation to the Agency's view that access no longer required to be supervised. Although she spoke with Ms D last Thursday, this was confined to the NLN issue. It was not a planned meeting. It lasted some 30 minutes and access was not discussed. In response to certain questions by Mr Lynn, the guardian confirmed that the risk assessment issue was raised with Mr M who, subsequently, indicated that the HSE would not be conducting a risk assessment.

75. Returning to the evidence in the form of affidavits, I also have the benefit of a 22nd of April affidavit, sworn by Ms Kelleher, who exhibits a 19th of April letter from Mr M of HSE disability

services. As well as clarifying the 'Disability Services Assessment Management Tool' (or "DSAMT") process, his letter states, among other things, that it would neither be appropriate nor apposite that HSE disability services would conduct a risk assessment on the respondent's proposed return to his mother. The letter goes on to state that the outcome of an assessment of the risk posed by return home is not of influence to a determination of support requirements secondary to disability needs. Later, the same letter clarifies the role of HSE disability services and HSE safeguarding and protection teams in adult safeguarding. Mr M also explains the role played, in each HSE community healthcare organisation area, of the safeguarding and protection of vulnerable persons team and makes clear that this team can be contacted by, among others, neighbours; family members; members of the public; as well as all relevant service providers. In the manner canvassed in the evidence, there will be up to daily interaction going forward between the respondent and professional service providers. The letter from Mr M concludes in the following terms:

> "*I feel the most effective course of action at this juncture in order that* [the respondent] *would be supported to meet his potential and in line with his level of ability and in line with best practice for people with a mild intellectual disability presentation such as his, is to provide outreach and day services, community services through a disability service provider. You will be aware I have progressed NLN and YAP, the Youth Advocacy Project ability*."

76. The Child and Family Agency and the HSE, as I say, are creatures of statute and their roles are set out in the legislation I have referred to. It is fair to say that, between them, these agencies have come to the following views.

- First, the transfer is not unsafe.
- Second, supervision of access is no longer required.
- Third, and this is in particular for the HSE, a risk assessment is not required.
- Fourth, the safeguarding and protection team is available should there be any issue in the future; and
- Fifth, at this point, day and community services, rather than a residential placement, is the most effective course of action to support the respondent to reach his potential in light of the needs as assessed by the agencies.

Second guess

77. It seems to me that it would be for this Court to usurp the roles of the Agency and the HSE were this Court to 'second-guess' these views formed by these statutory bodies. I say this in the absence of evidence of a *current* safety issue in the respondent's home environment (as opposed to a reference to *past* issues and a concern about what the *future* might hold). In short, this Court has no jurisdiction to second-guess those decisions.

78. It is a statement of the obvious that these are *not* judicial review proceedings in which, in a purely theoretical example, a challenge might be made to views formed by Tusla or the HSE on the basis of, as I say (i) irrationality or (ii) alleged unreasonableness or (ii) alleged

inadequacy of reasons for the views formed. But on the topic of reasons, the oral evidence given by Ms R, on behalf of Tusla, discloses cogent reasons for the views formed by the Agency within the last short period of weeks, as opposed to the views expressed over a year ago. And by that I mean the reason on which the Agency bases its current view is that there is nothing to indicate a pattern of distress, or which signalled behaviours by the respondent, which would warrant concerns in respect of contact which has taken place between himself and his mother.

79. In that respect, the 'landscape' of the evidence has moved on significantly from the averment which, very understandably, Mr Lynn put some emphasis on in relation to a view taken over a year ago. In short, based on reporting to the Agency, it formed the view that contact between the respondent and his mother has not negatively impacted him. And let me say there was no issue taken with Tusla's reliance on the reporting which came originally from the subcontracted agency to Nua, to Tusla. Nor was any issue taken with the accuracy of that reporting, or how Ms R summarised it.

Findings

80. In carefully considering the entirety of the evidence before the Court today, I do not believe that I can safely reach a finding that the proposed transfer is *unsafe.* Nor could I reach a finding that the transfer would give rise to *degrading treatment,* and that is also a written submission made on behalf of the guardian.

81. I also have to have regard to the range of authorities relied on in the HSE's submissions, including the decision of Finnegan P. in *CK v Northern Area Health Board* [2002] 2 I.R. 545. Having considered this Court's wardship jurisdiction, the then President went on to state from page 557 of the reported judgment: "*The jurisdiction extends to the persons of wards. I can find nothing in that jurisdiction which will enable me to compel a third party to make provisions for a ward unless an obligation to make such provision can be found in the Constitution by statute or at common law.*" Earlier, I quoted section 7 of the Health Act 2007 which makes clear that the HSE is obliged by statute to manage its resources in a beneficial manner and in an efficient manner. The contents of Mr M's correspondence reflect the challenges faced by the HSE in that regard.

82. The important point, for present purposes, is that this Court cannot usurp the role of the HSE or Agency. There is no statutory obligation on the HSE or on Tusla to continue to provide the current placement. Doing so, would breach the separation of powers principle. It would also very plainly prejudice others, whose needs the HSE is attempting to meet from finite resources.

83. As the Agency submits, with reliance on the decision *In Re D* and in subsequent cases such as *A.C. & Ors v Cork University Hospital & Ors* [2020] 2 IR 38, someone subject to the Court's wardship jurisdiction by reason of lack of capacity does not enjoy constitutional rights 'over

and above' the rest of the population. A quote from the decision of McDonald J in *Re Appropriate Care of a Ward of Court* [2019] IEHC 393, is apposite: "*A decision of a Court in an individual case could have the potential to seriously skew the fair allocation of available resources in a manner which would undermine and destabilise the equitable provision of health services in accordance with the needs of the community.*" In other words, as the Agency submits, this Court is not entirely 'at large' in the exercise of its wardship jurisdiction and it certainly does not extend to placing positive obligations on a statutory authority which conflict with its own assessments. I make this point not because Mr Lynn has suggested that this is a 'resource case'. He has made it 'crystal clear' that it is not. But I have to be conscious that this Court cannot, by a refusal of an application, bring about a situation where it would *de facto* place positive obligations on a statutory agency contrary to the assessments it has made, within jurisdiction.

84. If this Court were to order - impermissibly - that the placement continue, it is fair to say that it would definitely reflect the views expressed by the guardian ad litem, so *bona fide* and so forcefully, as to what she would regard as the respondent's best interests. But it would, be, in substance, for the Court to make an order of *mandamus* outside of judicial review proceedings without any finding that the decisions made, not to fund the continuation of a placement, were unsafe or unlawful. And it would also ignore the decisions, 1 to 5, which I previously referred to, which have been made by these statutory agencies.

Consequences

85. Furthermore, although the guardian asks this Court to *refuse* the transfer application, it has to be asked what the consequences of such a refusal would be? It seems to me that there is at least a material risk that the consequence would be to compel an agency to expend monies in the manner in which it had assessed was not appropriate. Even if I am wrong in that, what is the answer to the following question posed in the Agency's submission, i.e. how would a refusal of the application better vindicate the respondent's rights? The answer, in my view, having very carefully considered the entirety of the evidence, is that it would not better vindicate the respondent's rights; and that is because the evidence does not support a finding that the respondent's constitutional rights would be violated by acceding to the transfer. And there is no evidence which would allow for a finding that the HSE or the Child and Family Agency has failed in any statutory duty.

Unfair

86. To draw this ruling towards a conclusion, focusing directly on the 'Article 40.3 point', there is no specific evidence that the home of the respondent's mother is an unsafe environment for him. The 'height' of the evidence is a fear on the part of the guardian ad litem that in light of past events - in particular, when the respondent was a child - he may be unsafe in the future. But it seems to me that it would be entirely unfair to the respondent's mother to attribute to her *now* a failing of some unspecified kind in the *future*. And it would be all the more impermissible for this Court to take such an assumption of a future failure and regard it as

evidence on which to base a refusal of the current application.

87. Furthermore, the evidence safely allows for a finding that, going forward, the respondent will have access, very regularly if not daily, to services provided by healthcare professionals familiar with the HSE's safeguarding policy for vulnerable persons and in a position to invoke its terms were the need to arise in the future. Ms Kelleher's affidavit of the 8th of May exhibited a copy of that policy. As I say, I have read it in full and it is fair to say that a key theme in the policy is also not just the possibility, but the importance, of invoking it not after harm has been established as caused, but there is a focus on taking action pre-emptively where there are grounds for reasonable concern. Following a move home the respondent will be interacting with professional service providers familiar with the policy. In the absence of any concrete evidence of any current act or omission by the respondent's mother, for example, which would render the move home unsafe for the respondent, it seems to me that the provision of services in the community, coupled with the terms of the policy and the familiarity of individual healthcare workers with it, *is* a vindication of the respondent's personal rights within the meaning of Article 40.3.

88. Therefore, and, finally, to draw this ruling to a close, the Court is being asked simply to permit the respondent's transfer from a residential placement for which funding is about to run out to the home of his mother where he has not resided for some time since he was 16, but where he wishes to reside. The Court has detailed evidence of the services which will be available to him upon such a move, including the NLN and YAP. The evidence also safely allows for a finding that he will have very significant input from professionals well versed in dealing with vulnerable persons and well aware of the HSE safeguarding policy. And there is simply no evidence that were any 'frontline' personnel to have reasonable grounds for a safety concern in the future - be that in relation to the home or from peers or in respect of any future expression of self-harm - that frontline staff could not and would not respond appropriately.

89. I say that also taking account of the fact that frontline staff and their duties is specifically addressed at section 14 of the policy itself. It is not necessary to read it out entirely, but s.14(1) deals with the role of frontline personnel and the very first element is *to promote the welfare of vulnerable persons in all interactions*. And at the risk of repetition, the evidence safely allows for a finding that all of those who will be working with the respondent so closely following a move to his mother's home are aware of this policy. *Welfare* plainly encompasses harms of all sort, be that from the respondent or to the respondent.

90. Again, at the risk of repetition, it is fair to say that the evidence allows for a finding that as well as a wide range of services being available to the respondent in the community, were it to be the case in the future that, for example, the NLN service broke down, there is the potential for alternatives and there is simply no evidence which would allow for a finding that they would not be appropriately sought.

91. Although the guardian's 'distilled' position is that matters cannot move forward without a risk assessment, I simply cannot take the view that a decision by the Agency - which, to Ms R's knowledge, has never carried out a risk assessment for an adult - not to do so in this case constitutes a breach of Article 40.3 rights. Nor can I second-guess the HSE's view not to carry out a risk assessment in this particular situation.

92. Leaving aside that this is plainly a decision the HSE has made within the HSE's remit and it is a decision not challenged in the 'JR' context, I simply cannot hold on the evidence that the absence of a risk assessment by the HSE constitutes a breach of the respondent's constitutional rights because, as I say, there are fears expressed but there is no concrete evidence which would allow for a finding that the transfer home is unsafe.

93. It is also fair to say that, going forward, the respondent will have the protections of Wardship. This is in circumstances where there is uncontroverted evidence that he meets the criteria for admission and I propose to make the relevant declaration in that regard. We can presently come to the question of Committee. I do so conscious that the respondent has had the opportunity to participate today but plainly decided not to. He has also had the benefit of legal advice and makes no objection to the Wardship application.

94. Finally, it is appropriate to say that the respondent is, undoubtedly, someone with significant needs and vulnerabilities, and this move home may well come with significant challenges. But, having carefully considered the matter, I am satisfied there is no valid basis upon which the Court exercising its wardship jurisdiction and viewing matters through the 'lens' of Article 40.3 could refuse to grant the relief sought. That is the Court's decision and the reasons for it.