APPROVED

THE HIGH COURT
WARDS OF COURT

[2024] IEHC 47

[WOC 10970]

IN THE MATTER OF M.C., A WARD OF COURT

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 108 OF THE ASSISTED DECISION MAKING (CAPACITY) ACT 2015 (AS AMENDED)

BETWEEN

HEALTH SERVICE EXECUTIVE

APPLICANT

AND

M.C. (A WARD OF COURT REPRESENTED BY HER COMMITTEE, S.C. AND B.C.)

RESPONDENT

JUDGMENT of Mr. Justice David Barniville, President of the High Court, delivered on the 1st February, 2024

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1. Introduction

1. The Assisted Decision-Making (Capacity) Act 2015 (as amended) (the "Act" or the "ADMCA") came into force on 26th April 2023. The Act has given rise to a number of difficult legal issues concerning the detention of persons who were wards of court at the time the Act came into force as well as those who are not wards of court but whose decision-making capacity was, and continues to be, in question.

2. Some of those legal issues were determined by Hyland J. in judgments she delivered on 7th June 2023, and 6th October 2023, in *In the Matter of KK* [2023] IEHC 306 and [2023] IEHC 565 (referred to as *"K.K. (No. 1)"* and *"K.K. (No. 2)"* respectively). Those judgments (which I understand are the subject of an appeal) concerned an application made after the Act came into force to detain a person who was a ward of court, at the time, and who was not suffering from a *"mental disorder"* and was not the subject of any detention order when the Act came into force. Hyland J. held in *K.K. (No. 1)* that, following the coming into force of the Act on 26th April 2023, the court no longer had jurisdiction in wardship under s. 9 of the Courts (Supplemental Provisions) Act 1961 ("s. 9 of the 1961 Act") as continued by s. 56(2) of the ADMCA to make an order detaining a ward where the ward was not the subject of a detention order at the time the Act came into force. Hyland J. held, however, that the court did have jurisdiction to detain such a person under its inherent jurisdiction.

3. In *K.K. (No. 2)*, Hyland J. considered whether to exercise the court's inherent jurisdiction to detain the ward the subject of that case. She decided that certain additional medical evidence was necessary before the court could exercise its inherent jurisdiction to grant the detention order sought on the facts of that case.

4. While some of the issues decided by Hyland J. in *K.K. (No. 1)* and *K.K. (No. 2)* are relevant to the application with which this judgment is concerned, somewhat different issues arise in this case.

5. This case involves a person who is and was a ward at the time the Act came into force on 26th April 2023, and who was the subject of a detention order in her current placement, which is not an "*approved centre*" under s. 2 of the Mental Health Act 2001 (the "2001 Act"), made by the High Court on 9th December 2021. The detention order was reviewed by the court on 10th March 2022, 13th October 2022 and again on 27th April 2023, the day after the ADMCA came into force. Orders were made continuing the ward's detention in her placement on 27th April 2023 and again on 13th July 2023. Those orders were made by me in exercise of my wardship jurisdiction under s. 9 of the 1961 Act, as continued by s. 56(2) of the ADMCA. A further general wardship review was fixed for 3rd October 2023. In addition, a review under s. 108 of the Act of the order detaining the ward in her placement was also listed for the same date, 3rd October 2023.

6. In advance of the hearing of both of those reviews that day, the parties exchanged written submissions raising various legal issues. This judgment addresses those legal issues.

7. Pared down to the core, the essential issue raised by the Health Service Executive (the "HSE"), which is the body which is responsible for operating the placement in which the ward is detained, was that the court is not required to conduct a review under s. 108 of the Act of the order detaining the ward in her placement, in circumstances where the ward is not suffering from a *"mental disorder"* within the meaning of that term in s. 3 of the 2001 Act, and does not have a consultant psychiatrist who is responsible for her care or treatment for the purposes of s. 108(5) of the Act. The HSE contended that the

court is not required to conduct a review under s. 108 as that section applies only to persons who have a *"mental disorder"* and who were detained in the relevant placement at the time the ADMCA came into force on 26th April 2023 and who continue to be detained at the time of the review. Various further and alternative submissions were also advanced by the HSE.

8. The HSE's position was that the court should not, therefore, proceed with the review under s. 108 but that it should review the ward's placement (including the detention order) under the wardship jurisdiction vested in the court by s. 9 of the 1961 Act as continued by s. 56(2) of the ADMCA. The HSE applied to the court to continue the existing orders (including the detention order and other restrictive orders) under the court's wardship jurisdiction.

9. Ms. Aileen Curry, the independent solicitor appointed to represent the interests of the ward on the s. 108 review, fundamentally disagreed with the position adopted by the HSE as to whether s. 108 of the Act required the court to carry out a review of the ward's detention order on the particular facts of this case. She argued that the court was obliged to conduct the review under s. 108 as the ward is a person who was the subject of a detention order made by a wardship court at the time s. 108 came into force on 26th April 2023, and continues to be the subject of that detention order. She argued that the s. 108 review should be conducted by the court irrespective of the fact that the ward does not have a *"mental disorder"* and does not have a consultant psychiatrist responsible for her care or treatment. While the HSE and the independent solicitor were in total disagreement on this fundamental issue, they were both in agreement that the court continues to have jurisdiction in wardship (as vested in the court by s. 9 of the 1961 Act and continued in force by s. 56(2) of the ADMCA) to continue the existing orders in respect of the ward, including the detention order and the other restrictive

orders made in her case. The HSE applied to continue the existing orders, the continuation of which is strongly supported by the independent solicitor.

10. Therefore, while the HSE and the independent solicitor were in disagreement on the fundamental issue as to whether the requirement to carry out a review of the detention order applied in this case, they agreed that the court has jurisdiction in wardship and should exercise that jurisdiction to continue the existing orders in respect of the ward. Both parties agree that a continuation of the orders (including the detention order and the other restrictive orders) would not be inconsistent with the judgment of Hyland J. in *K.K. (No. 1)*.

11. This judgment, therefore, addresses the legal issues raised by the parties with the respect to the scope of s. 108 of the ADMCA and seeks to resolve some issues of interpretation arising from that new provision. It then addresses the separate and non-controversial issue of whether I should continue the orders made to date under the court's wardship jurisdiction.

2. Summary of Decision

12. I have concluded that, 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.

13. The words used in s. 108(1) are, in my view, clear in their own terms, as is their meaning when construed within the overall context of the Act. If the Oireachtas had intended that a review was not required in the case of wards who did not have a *"mental disorder"* and did not have a consultant psychiatrist responsible for their treatment and

care, it could have expressly so provided in s. 108 (1). However, it did not. The fact that the ADMCA, when enacted, did not include a provision expressly providing for the detention of persons lacking decision-making capacity who do not have a *"mental disorder"* cannot, in my view, affect the proper interpretation of a section which the Oireachtas did enact, namely, s. 108.

14. Nor, in my view, does the fact that the ward does not have a consultant psychiatrist responsible for her care or treatment mean that the court cannot or should not carry out a review of the detention order under s. 108. The court can clearly do so in circumstances where it has evidence from an independent consultant psychiatrist selected by the court under s. 108(5) as well as evidence from another medical practitioner who has reviewed the ward, albeit that that medical practitioner is not a consultant psychiatrist, still less one who is responsible for the ward's "*care or treatment*", within the meaning of that term in s. 108(5). To hold that the court cannot carry out the review under s. 108(1) on the basis that she does not have a consultant psychiatrist responsible for her treatment or care would be a classic case of the tail wagging the dog.

15. In my view, therefore, I am 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"*. I am 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 me to order the discharge of the ward from detention under that subsection.

16. Since I 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, as I have found that I am required to do, I 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, and that, on the evidence, it is necessary and appropriate, and very much in the ward's best interests, that I continue the existing regime and the existing suite of orders applicable to the ward, including those providing for her continued detention in her placement together with the other restrictive orders that are in place and which regulate that detention.

17. I am satisfied that in doing so I am merely continuing the detention and other restrictive orders which were in place on the date the ADMCA came into force on 26th April 2023. I am not making a *"new"* or a *"fresh"* detention order as those terms are used (interchangeably) by Hyland J. in *K.K. (No. 1)*.

18. I should add that, even if I were not satisfied that I could continue to exercise my wardship jurisdiction to continue the detention and other orders made in respect of the ward, I would have concluded that I should, in any event, make the same orders under the court's inherent jurisdiction, the existence and continued relevance of which is expressly recognised by s. 4(5) of the ADMCA.

19. In those circumstances, therefore, and for the reasons set out in greater detail later in this judgment, I propose to make the following orders:

(1) Having conducted a review of the order detaining the ward in her placement under s. 108 of the ADMCA, I make no order on foot of that review.

(2) In the exercise of the wardship jurisdiction vested in the court by s. 9 of the 1961 Act, as continued by s. 56(2) of the ADMCA, I continue the existing orders made in respect of the ward most recently on 13th July 2023, and 3rd October 2023 (and subsequently while this judgment was being finalised) and before that on 27th April 2023, 13th October 2022, 10th March 2022, and 9th December 2021, and direct that a further review of those orders in wardship take place within three months from the date of delivery of this judgment. Further reviews (until the ward is discharged from wardship under s. 55 of the ADMCA) will take place from time-to-time in accordance with the court's wardship jurisdiction.

3. Relevant Factual and Procedural Background

20. The ward is a woman in her late 60s who has a diagnosis of severe dementia as a consequence of a right medial temporal lobe intraparenchymal haemorrhage (stroke) in 2014 and a prior traumatic brain injury in 1981. She was admitted to a hospital in South County Dublin in September 2019 following a fall and remained there until December 2021. An order providing for her detention, treatment and care in the hospital was made by Irvine P. on 25th August 2021 on the application of the HSE. Ms. Aileen Curry, Solicitor, was appointed as her guardian *ad litem* in the proceedings. Those orders were reviewed by Irvine P. on 8th September 2021 and continued to 9th December 2021.

21. On 9th December 2021, Irvine P. declared the ward to be of unsound mind and incapable of managing her person or property and, consequently, admitted her to wardship. Her brother and sister were appointed as the committee of her person and of her estate. On the same date, Irvine P. made an order providing for the ward's transfer to her current placement, a community nursing unit in Dublin, and made further orders providing for

her detention, treatment, and care in that placement. The court also appointed Ms. Aileen Curry as the ward's independent solicitor in the wardship proceedings, in circumstances where the ward's committee consisted of lay people and where the ward was being detained in her placement. The ward was transferred to her current placement on 14th December 2021.

22. The detention and other orders were reviewed and continued by Irvine P. on 10th March 2022. They were then reviewed and continued by me on 13th October 2022, where a review date of 27th April 2023 was fixed which, entirely coincidentally, was the day following the enactment of the ADMCA on 26th April 2023. Those reviews all took place under the court's wardship jurisdiction. I reviewed the ward's placement on that date and was satisfied that the various orders, including the detention order and other restrictive orders which applied to the ward's placement, should continue, and should be further reviewed on 13th July 2023. Those orders were again reviewed by me on 13th July 2023, and were continued until further order with a further review being listed on 3rd October 2023. In addition, a motion which had been issued by the HSE on 27th April 2023, which sought a review of the ward's detention under s. 108 of the ADMCA, was listed for hearing by me also on 3rd October 2023 on the same day as the wardship review. On 18th May 2023 Ms. Aileen Curry was also appointed as the independent solicitor for the ward for the purposes of the s. 108 review.

23. I was informed in July 2023 that the s. 108 review was considered by the parties to give rise to a number of legal issues which would have to be determined by the court. In those circumstances, I directed the exchange of written submissions, which were provided on behalf of the HSE and on behalf of Ms. Aileen Curry, the independent solicitor. I heard further helpful oral submissions from both parties on 3rd October 2023.

24. Before addressing the legal issues raised in those submissions, I should refer, first, to the relevant statutory and other procedural provisions applicable to the s. 108 review and, second, to the evidence provided by the parties for the purposes of that review (as well as the general wardship review which was heard on the same date).

4. Statutory and Other Provisions Relevant to Section 108 Review

25. Section 108 of the ADMCA is to be found in Part 10 of the Act, which is entitled *"Detention Matters"*.

26. Section 107, *"Review of detention orders in certain circumstances (approved centres)",* and s. 108, *"Review of detention orders in certain circumstances (non-approved centres)",* are drafted in similar terms. Section 107 imposes a requirement to carry out reviews of detention orders in the case of persons who were detained in an *"approved centre"* on the order of a wardship court immediately before the commencement of that section, on 26th April 2023, and who continue to be so detained. Section 108 requires reviews of detention orders to be conducted in respect of persons who were detained in an institution other than "*approved centres"* on the order of the wardship court as of that date and who continue to be so detained. These latter centres are referred to in the heading to s. 108 as *"non-approved centres"*. Section 104 provides that the term *"approved centre"* has the meaning assigned to it by s. 2 of the 2001 Act. S. 2 of the 2001 Act defines the term *"approved centre"* by reference to s. 63 of that Act. Reading ss. 62 and 63 of the 2001 Act together, an *"approved centre"* is a *"hospital or other in-patient facility for the care and treatment of persons suffering from mental illness or mental disorder"* which is registered in "*the Register of Approved Centres"* established by the Mental Health Commission under s. 64 of the 2001 Act. Therefore, a *"non-approved centre"* for the purposes of s. 108 of the

ADMCA is a centre or place at which a person is detained which is not an *"approved centre"* within the meaning of that term in the 2001 Act. The placement in which the ward is detained is a non-approved centre, therefore, s. 108 is the relevant provision for the purpose of the statutory review provided for in the ADMCA.

27. Section 108(1) of the ADMCA states:

> *"Where, immediately before the commencement of this section, a person is detained in an institution other than an approved centre on the order of a wardship court and, from that commencement, continues to be so detained, that order shall, as soon as possible, be reviewed by the wardship court in accordance with subsection (2)."*

28. On the face of it, therefore, if a person is detained in a place which is not an *"approved centre"* immediately before the Act came into force on 26th April 2023, on foot of an order made by a court in the exercise of its wardship jurisdiction, and from the date of commencement of the Act continues to be so detained, the detention order *"shall, as soon as possible, be reviewed"* by the wardship court *"in accordance with subsection (2)"*. The correct construction of this provision is at the heart of the dispute between the HSE and the independent solicitor in this case.

29. Section 108(2) states:

> *"Where, on a review of a detention order, the wardship court is satisfied that the person concerned is suffering from a mental disorder, it may direct that the detention of the person concerned in the institution, or in such other place, being an approved centre, as may be determined by the wardship court having obtained the views of the clinical director for that other place, shall continue for such further period, not exceeding 3 months, and not exceeding 6 months in*

the case of any subsequent review carried out by the wardship court under subsection (3), as the wardship court may determine."

30. It can be seen from s. 108(2) that the critical issue in determining whether the court can direct the continuation of the detention of the person detained in his or her current placement or in another place (which other place has to be an *"approved centre"* in accordance with that provision) is whether the court is satisfied that the person detained *"is suffering from a mental disorder"*. If he or she is *"suffering from a mental disorder"*, then the court may direct that the detention shall continue, in accordance with that provision, for a further period not exceeding three months (on the first review) and not exceeding six months (on any subsequent review).

31. The term *"mental disorder"* is defined in s. 104 of the ADMCA by reference to s. 3 of the 2001 Act. Section 3(1) of the 2001 Act provides that the term *"mental disorder"* in that Act *"means mental illness, severe dementia or significant intellectual disability"* where certain other conditions are met. Those other conditions are set out in s. 3(1)(a) and in s. 3(1)(b). The condition set out in s. 3(1)(a) requires that *"because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons"*. The conditions set out in s. 3(1)(b) require that:

"(i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and

(ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent."

32. Section 3(2) provides a more detailed definition in respect of the terms *"mental illness", "severe dementia"* and *"significant intellectual disability"*, one or more of which must be satisfied in order for there to be a *"mental disorder"* within the meaning of s. 3(1)(a) or s. 3(1)(b) of the 2001 Act.

33. If, on foot of a review under s. 108, the court is not satisfied that the person detained *"is suffering from a mental disorder"*, then it may not order the continuation of the detention for a further period in accordance with s. 108(2).

34. Section 108(4) provides for what is to happen where the wardship court determines that the person concerned *"is no longer suffering from a mental disorder"*. If the court so determines, the subsection states that *"it shall order the discharge of the person concerned from detention"*. Both of the parties to this case, the HSE and the independent solicitor, agree that, in order for a person to be *"no longer suffering from a mental disorder"*, that person must have been suffering from such a disorder in the past which is relevant to the person's detention but is no longer suffering from it. As I explain below, I agree that that is the correct construction to be given to that term. A person who is not suffering from a *"mental disorder"* but who never suffered from such a disorder could not, in my view, be said to be a person who is *"no longer"* suffering from that disorder. Therefore, if a person is not suffering from a "*mental disorder"* and never suffered from such a disorder, that person is not a person who is *"no longer"* suffering from that disorder and the condition in s. 108(4) requiring the court to order to discharge of the person concerned from detention is not satisfied. There are other

complicated issues of interpretation arising under s. 108(4) which were referred to by Hyland J. in *KK (No. 1)* (see: paras. 55 to 59).

35. All of the evidence in this case demonstrates that the ward is not suffering from a *"mental disorder"* and that she never suffered from such a disorder. The consequence of the findings which must be made on the basis of that evidence is addressed later in this judgment.

36. The evidence which the court is required to hear when reviewing a detention order under s. 108 is set out in s. 108(5). That subsection states:

> *"The wardship court, when reviewing a detention order, shall hear evidence from the consultant psychiatrist responsible for the care or treatment of the person concerned and from an independent consultant psychiatrist selected by the wardship court."*

37. On the face of it, therefore, the court, when reviewing a detention order, must hear evidence from (a) the consultant psychiatrist responsible for the care or treatment of the detained person, and (b) an independent consultant psychiatrist selected by the court (from the panel of suitable consultant psychiatrists who are willing and able to carry out independent medical examinations for the purposes of Part 10 of the ADMCA as established by the Mental Health Commission pursuant to s. 105 of the ADMCA). However, what falls to be determined in this judgment is the position of a detained person who does not have a consultant psychiatrist who is responsible for his or her care or treatment, and whether the absence of evidence from such a consultant psychiatrist prevents the court carrying out the s. 108 review or whether it can proceed to carry out that review in the absence of such evidence.

38. Section 108(6) describes the function of the independent consultant psychiatrist referred to in s. 108(5). The function of that psychiatrist is *"to examine the person*

concerned and report to the wardship court on the results of the examination, in particular whether, in the opinion of the psychiatrist, the person concerned is suffering from a mental disorder." The ward does not have a consultant psychiatrist who is responsible for her care or treatment.

39. In this case, the court had the benefit of evidence from: (a) the independent consultant psychiatrist, who expressed the opinion that the ward is not suffering from a *"mental disorder"* and (b) a consultant physician in geriatric medicine who has reviewed the ward and reported, on several occasions, to the court in relation to the ward, who has also expressed the opinion that the ward is not suffering from a *"mental disorder"*. Neither medical practitioner fulfils the role of *"consultant psychiatrist responsible for the care or treatment"* of the ward in this case.

40. Section 139(1) and (2) (which is contained in Part 12 of the ADMCA, *"Miscellaneous"*), when read together, provide that an application for a s. 108 review shall be heard in the presence of the relevant person the subject of the application unless, in the opinion of 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 other good and substantial reason, to attend the hearing, or

(d) the relevant person is unwilling to attend.

41. The independent solicitor, Ms. Aileen Curry, addressed compliance with this provision in her affidavit sworn on 2nd October 2023 and in the report exhibited to that affidavit. The independent solicitor encouraged the ward to attend the hearing either in person or remotely. However, the ward was adamant that she did not wish to attend court. Her

position was that she was in court after her accident several years ago and intended never to be in court again *"as long as she lived"*.

42. I was satisfied to proceed with the s. 108 review in the ward's absence, on the basis that this would not, in my view, cause any injustice to the ward given her unwillingness to attend court and given that she was represented by an independent solicitor and by senior and junior counsel instructed by the independent solicitor on her behalf.

43. I have outlined the statutory provisions directly relevant to the s. 108 review. For completeness, I should also note that the Rules of the Superior Courts (Assisted Decision-Making (Capacity) Act 2015) 2023 (S.I. No. 261 of 2023) deal with the procedure applicable to reviews under ss. 107 and 108. These rules, among other things, inserted O. 67A into the Rules of the Superior Courts. O. 67A, r. 18 provides that any application to the court under s. 107 or s. 108 of the Act *"shall be commenced by notice of motion and supported by such affidavit or affidavits and other documents as are for the time being specified by practice direction."*

44. Practice Direction HC 121 *"Wards of Court Review Pursuant to S. 107 or S. 108 ADMCA"* was signed by me and came into force on 11th May 2023. It provides for the procedure for the bringing of applications for the hearing of s. 107 and s. 108 reviews. Those applications must be brought by notice of motion grounded on an appropriate affidavit or affidavits sworn on behalf of the applicant (para. 1). There is also provision for the appointment by the court of an independent solicitor to represent the interests of the detained ward (para. 2). The Practice Direction provides that the Registrar of Wards of Court must appoint an independent consultant psychiatrist from the panel established pursuant to s. 105 of the Act to examine the ward of court and report to the court on the results of the examination, and, in particular, whether, in the opinion of the psychiatrist, the ward of court is suffering from a mental disorder (para. 3). The Practice Direction

requires that the report of the independent consultant psychiatrist be provided to the ward or to his or her independent solicitor (where one is appointed), to the ward's committee, to the consultant psychiatrist responsible for the care or treatment of the ward and to any other party directed by the court (para. 4). The report of the responsible psychiatrist must be exhibited to an affidavit sworn by that consultant psychiatrist which must include an averment verifying the contents of the report which must be lodged in the Wards of Court Office within a specified period (para. 5). The Practice Direction requires the independent solicitor or, if no independent solicitor has been appointed, the ward's committee to swear an affidavit which must include averments (i) confirming that an explanation of the application and its implications have been provided to the ward; (ii) the response and reaction of the ward; and (iii) the efforts undertaken to arrange for the ward to be present for the application in accordance with the provisions of s. 139 of the Act (para. 8). There are also directions within the Practice Direction as to the documents which must be provided to the court in the form of a hearing booklet (paras. 9 and 10).

45. I mention the Practice Direction as it refers to the report of the consultant psychiatrist responsible for the care or treatment of the ward and the need for that psychiatrist to swear an affidavit verifying the contents of his or her report. One of the points made by the HSE in support of its contention that the court is not required to and, indeed, cannot carry out a s. 108 review where the ward does not have a *"mental disorder"* or a consultant psychiatrist responsible for his or her care or treatment, is that it would not be possible for the applicant in a s. 108 review to comply with the provisions of the Practice Direction.

46. However, if it is possible to proceed with the s. 108 review on the basis of a proper construction of the provisions of that section of the Act and the documents and evidence

normally required (as I find to be the case), then non-compliance with the Practice Direction could not prevent the court from proceeding with the review. While the Practice Direction is undoubtedly important in terms of setting out the conduct on a s. 108 review, it is always open to the court to depart from the provisions of the Practice Direction where, for whatever reason, compliance is not possible and where it is otherwise necessary and appropriate to proceed with the review.

5. Evidence before the Court on the Section 108 Review

47. In addition to being provided with the medical reports from consultant physicians involved in the ward's care, dating back to April 2021, I was also provided with a report from the independent consultant psychiatrist, Professor Matthew Sadlier, and a series of reports from Dr. Caoilfhionn O'Donoghue, a consultant physician in geriatric medicine who is attached to the hospital from which the ward was transferred to her current placement in December 2021.

(a) Evidence from the independent consultant psychiatrist

48. Professor Sadlier was appointed the independent consultant psychiatrist by the Registrar of Wards of Court from the panel established by the Mental Health Commission pursuant to s. 105 of the ADMCA. As noted earlier, the function of the independent consultant psychiatrist on a s. 108 review is, according to s. 108(6), to examine the person concerned (who is detained in a *"non-approved centre"*) and to report to the court on the results of that examination, in particular, whether, in their opinion, the person concerned is suffering from a *"mental disorder"*.

49. Professor Sadlier reported to the court on 29th May 2023. Having set out relevant background from clinical notes in relation to the ward, he reported that the ward's will and preference was to return home in circumstances where she would have a *"large*

degree of independence and autonomy". (She had been living alone in an apartment prior to her admission to the hospital in September 2019). Professor Sadlier noted that the ward requires full nursing care and a wheelchair and cannot mobilise without the assistance of two staff. While the ward regularly asks to go home, she is described as being settled in her placement and is often also visited by her brother.

50. Professor Sadlier carried out a mental state examination and a cognitive assessment in relation to the ward. He reported that she showed significant deficits with regard to insight into her own condition. She was unable to acknowledge that she has significant mobility deficits despite clear evidence of same. The ward minimised, to a large degree, her current level of disability as well as the circumstances of her admission to the hospital back in 2019.

51. In carrying out a capacity assessment, Professor Sadlier adopted the test set out in s. 3(2) of the ADMCA. Section 3 of the Act makes clear that a person's capacity is to be assessed on a functional basis. Section 3(1) states that, subject to s. 3(2) – (6), for the purposes of the Act, "*a person's capacity shall be assessed on the basis of his or her ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that time."*

52. Section 3(2) reads as follows:

> *"A person lacks the capacity to make a decision if he or she is unable—*
>
> *(a) to understand the information relevant to the decision,*
>
> *(b) to retain that information long enough to make a voluntary choice,*
>
> *(c) to use or weigh that information as part of the process of making the decision, or*

> *(d) to communicate his or her decision (whether by talking, writing, using sign language, assistive technology, or any other means) or, if the implementation of the decision requires the act of a third party, to communicate by any means with that third party."*

53. Applying that test, Professor Sadlier expressed the opinion that the ward does lack capacity to make relevant decisions in relation to her care needs and where she should live.

54. Professor Sadlier's opinion is that the ward's diagnosis is that of a major neurocognitive disorder, secondary to an acquired brain injury (as referred to in the Diagnostic and Statistical Manual of Mental Disorders (Version 5)). He expressed the opinion that the ward's cognitive, emotional, and mental state is *"very unlikely to improve"* and that she *"may suffer deterioration over time"*.

55. On the critical issue as to whether the ward is suffering from a *"mental disorder"* within the meaning of that term in s. 3 of the 2001 Act, Professor Sadlier expressed the opinion that the ward is not suffering from a *"mental disorder"*. He explained that this was for two reasons: First, the ward's diagnosis of major neurocognitive disorder does not fall under any of the three categories of *"mental disorder"* referred to in s. 3 of the 2001 Act (namely, *"mental illness, severe dementia or significant intellectual disability"*); Second, and, in any event, the ward does not satisfy the criteria set out in either s. 3(1)(a) or s. 3(1)(b) of the 2001 Act.

56. With respect to s. 3(1)(a), he expressed the view that there is not a *"serious likelihood"* of the ward *"causing immediate and serious harm"* to herself or to other persons. While the ward is at risk of harm, that is due to neglect and acts that she would omit to do, as opposed to positive acts which would pose a direct risk of harm to herself or others.

57. With respect to s. 3(1)(b), Professor Sadlier expressed the view that, while it is correct that the ward's mental state impairs her judgement, he did not believe that an admission to an *"approved centre"* would either alleviate or benefit the ward's condition to a material extent.

58. In those circumstances, and having carried out an assessment of the ward for the purposes of s. 108 of the ADMCA, Professor Sadlier expressed the opinion that the ward does not have a *"mental disorder"* or satisfy the criteria for admission to an *"approved centre"* under the 2001 Act.

59. Professor Sadlier is of the view, however, that the ward does lack capacity and that, if she were to return home to her apartment, she would be *"at severe risk of harm to herself from either neglect, fall or misadventure"*. He described her as having *"poor insight into her care needs"* and noted that she *"overestimates her ability"*. He felt that such *"inability to correctly synthesise information is secondary to her acquired brain injury"*. He expressed the opinion that the ward is not likely to regain capacity at any time.

60. Professor Sadlier concluded that the ward's current place of residence is serving her mental and physical health needs well and, in his view, it is *"the ideal placement for her at this time"*. While the ward has expressed a will and preference to return home, her desire to do so is predicated on her belief that she would be able to cope at home and enjoy a good quality of life. In Professor Sadlier's view, that is very unlikely due to her significant physical disabilities.

61. In summary, therefore, Professor Sadlier's opinion for the purposes of the s. 108 review, is that the ward is not suffering from a *"mental disorder"*.

(b) Evidence from other practitioner

62. The court also had evidence from Dr. Caoilfhionn O'Donoghue, a consultant physician and geriatrician at the hospital, who is very familiar with the ward's situation. Dr. O'Donoghue confirmed that, in her view, the ward does not suffer from a *"mental disorder"* and that she has no consultant psychiatrist responsible for her care and treatment. Dr. O'Donoghue has prepared reports for the several reviews of the ward's case by the court over the years dating back to April 2021. For the purposes of the s. 108 review and the wardship review, Dr. O'Donoghue prepared two reports, dated 26th June 2023 and 28th September 2023, which she verified on affidavit. It is sufficient to refer to her most recent report.

63. In that report, Dr. O'Donoghue stated that she had assessed the ward in her room in her placement on 20th September 2023. The ward was comfortable and did not remember meeting Dr. O'Donoghue before, which she had on 15th June 2023. She initially reported that she was quite content and comfortable. However, she quickly informed Dr. O'Donoghue that she was only in her placement to obtain an electric wheelchair. She told Dr. O'Donoghue that she could manage everything for herself and that, if she had the wheelchair she required, she would be able to go home. The ward became upset and emotional and spoke in a raised voice, but was quick to return to a settled state and did inform the doctor that she liked some of the staff in the placement. The nursing staff on duty informed Dr. O'Donoghue that they were finding the ward to be more cooperative and settled. She also allows a certain amount of personal care to be provided to her if she is familiar and comfortable with the member of staff involved. However, she continues to inform members of staff of her wish to return home. Dr. O'Donoghue noted that the ward remained medically and cognitively very stable and that she is receiving excellent care in the placement.

64. Dr. O'Donoghue noted that the ward remains of unsound mind and is unable to manage her affairs due to significant cognitive impairment following an acquired brain injury and a stroke. However, in her view, the ward does not suffer from a "*mental disorder*". The ward was assessed on her admission to the hospital in October 2019 by the liaison psychiatry team in the hospital. She was not diagnosed with any *"mental disorder"* at that stage and had no previous diagnosis of such a disorder.

65. Dr. O'Donoghue expressed the opinion that the promotion and protection of the ward's best interests and fundamental rights is contingent on the ability of her current placement lawfully to detain and otherwise restrict the ward, in circumstances where she is fully dependent on the placement staff to fulfil her care, cleanliness, and nutritional needs. Dr. O'Donoghue explained that, if the placement did not have the power lawfully to detain or otherwise to restrict the ward, she would be at high risk of harm from a fall or from neglect of her care needs or consequent to her leaving the placement. Dr. O'Donoghue expressed the opinion that the continued placement of the ward in her current placement is appropriate in order to meet her extensive care needs. In those circumstances, it is not possible to fulfil the ward's desire to return home which she has consistently expressed since she was first admitted to hospital in 2019.

(c) Evidence from the independent solicitor

66. The court also had evidence from Ms. Aileen Curry, the independent solicitor. Ms. Curry swore two affidavits for the purposes of the s. 108 review, on 5th July 2023 and 2nd October 2023.

67. In her affidavit of 5th July 2023, Ms. Curry reported on her visit with the ward on that same day. While she attempted to explain to the ward the nature of the order which then existed in respect of the ward's placement and detention, Ms. Curry did not believe that the ward had even a superficial understanding of what was being discussed. The

ward expressed a wish to return home without any care staff once she obtained a motorised wheelchair. Ms. Curry described the ward as appearing to be more settled and reported that she was building a rapport with some of the care staff. The ward requires assistance in all areas of her life and Ms. Curry does not believe that there is any prospect of her being able to reside independently, even with significant support.

68. In her affidavit of 2nd October 2023, Ms. Curry provided details of her visit to the ward on 29th September 2023, just prior to the hearing of the s. 108 application on 3rd October 2023. Ms. Curry attempted to explain the nature of the s. 108 review but, as before, she noted that the ward's response was superficial, and she was unwilling or unable to discuss the impending application in detail or to engage substantively with the evidence set out in Professor Sadlier's report. However, the ward did not accept Professor Sadlier's opinion that she lacks capacity or his view that, if she were to return to independent living, she would place herself at severe risk of harm. Ms. Curry did note that during her visit the ward was in very good form and described it as *"the best I've ever seen her to be"*. She noted that the ward laughed a great deal throughout the visit despite speaking about difficult events in her past. Ms. Curry reiterated her view that she does not believe that there is any prospect of the ward being able to reside independently even with significant support.

(d) Summary of the evidence

69. In summary, the factual position is that the ward was detained in an institution other than an approved centre on the order of a wardship court immediately before the commencement of s. 108 of the ADMCA and she continues to be so detained. The ward has a diagnosis of a major neurocognitive disorder secondary to an acquired brain injury which she sustained in 1981. The ward also suffered a stroke in 2014. The ward has been in her current placement, which is a non-approved centre since December

2021. Her placement in this non-approved centre has been reviewed on a number of occasions since then. The ward is not under the care of a consultant psychiatrist and does not, therefore, have a consultant psychiatrist who is responsible for her care or treatment. The ward has been assessed for the purposes of the various reviews that have taken place in the course of her wardship by a consultant geriatrician. The ward was examined for the purposes of the s. 108 review by an independent consultant psychiatrist, Professor Sadlier, who is of the opinion that the ward does not suffer from a *"mental disorder"* as that term is defined in s. 3 of the 2001 Act. The consultant geriatrician, Dr. O'Donoghue agrees.

70. It is clear, therefore, on the evidence that the ward does not have a *"mental disorder"*. Nor is there any evidence that the ward once had, but no longer has, such a disorder.

71. Both Professor Sadlier and Dr. O'Donoghue are agreed that the ward lacks capacity to make relevant decisions including as to where she should live. Both are of the opinion that the ward continues to meet the test of wardship and remains a person of unsound mind who is incapable of managing her person and property. Both are agreed that her current placement is appropriate in order to meet her significant care needs and that she should continue to be placed there. I accept that that is the case and that the ward is appropriately placed where she is, notwithstanding her wish to return to the apartment in which she resided prior to her admission to the hospital in 2019.

72. Those then are the facts which form the context for the s. 108 review and the associated wardship welfare review, and against which the submissions advanced by the HSE and by Ms. Curry, the independent solicitor, must be considered.

6. The Position of the Parties

(a) The HSE

73. Although the HSE is the applicant and has brought the application under s. 108 of the ADMCA to review the detention order in respect of the ward, its fundamental position is that the provisions under Part 10 of the Act, which require the court to review detention orders made in respect of persons detained in the circumstances described in ss. 107 and 108, do not apply to persons who lack capacity and who do not have, and never had, a *"mental disorder"*. While it might be said that this is a curious position to adopt by the party applying for the review, I appreciate that it is both worthwhile and necessary to obtain clarity on the scope of the review provisions of a very far-reaching piece of legislation, such as the ADMCA.

74. In summary, the HSE's position is set out below:

(1) Section 108(1) review does not require a review of all detained wards

75. The HSE submits that s. 108(1) of the Act cannot be read as requiring the court to conduct a review of all detained wards, as this would give rise to a conflict with s. 108(5) which requires that the court, when conducting a review under s. 108(1), hear evidence from the consultant psychiatrist responsible for the care or treatment of the person concerned as well as from an independent consultant psychiatrist. The HSE submits that it is necessary, therefore, to read down either s. 108(1) or s. 108(5) so as to give a harmonious interpretation to those provisions in such a way as best to give effect to the purpose and objective of the legislation. The HSE maintains that that is best achieved, and the least amount of violence done to the section overall, by reading down the terms of s. 108(1) so as to limit the scope of the s. 108 review to persons detained in non-approved centres who have a responsible consultant psychiatrist, rather

than construing s. 108(5) as applying only where compliance with its terms is "possible".

76. The HSE relies on the principles of interpretation discussed by Murray J. in the Supreme Court in *Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43, [2022] 2 ILRM 313 (*"Heather Hill"*) and the decision of the Supreme Court in *Nestor v. Murphy* [1979] I.R. 326, in submitting that the apparently clear language of s. 108(1) must be departed from in favour of the more restricted meaning it urges on the court. In the latter decision, the Supreme Court adopted a purposive approach in holding that certain conveyances of a family home did not require the prior written consent of a spouse, notwithstanding that a plain or literal interpretation of the relevant statutory provision (s. 3 of the Family Home Protection Act, 1976) appeared to require that all conveyances be subject to that requirement. As regards adopting a purposive approach in this case, the HSE maintains that the intended purpose of s. 108 is to ensure that all persons who are detained in non-approved centres on foot of orders made by a wardship court have their detention orders reviewed by the court as soon as possible with a view to identifying whether those persons have a *"mental disorder"* and, if they do, applying to those persons a regime for reviews which closely mirrors or tracks the regime under the 2001 Act, as that is the regime which would have applied to those persons if they were not subject to the court's wardship jurisdiction.

77. The HSE maintains that that purpose is apparent from the Act as a whole, and from the provisions of s. 108 itself, including: Section 108(4) which refers to a person who is *"no longer suffering from a mental disorder"* and, the HSE contends, assumes that the detained ward the subject of the review did, at one stage, suffer from a *"mental disorder"* from which the ward is no longer suffering at the time of the review; Section 108(5) which mandates that the court hear evidence from the responsible consultant

psychiatrist, and, the HSE contends, assumes that the detained ward is receiving psychiatric treatment (this language also mirrors the language of the 2001 Act); and s. 108(6) which refers to the function of the independent consultant psychiatrist, which is to report to the court on whether, in his or her opinion, the detained person is suffering from a *"mental disorder"*.

78. As regards the context of s. 108 within Part 10 of the ADMCA, the HSE relies on the fact that, while it was originally intended to include a part in the Act (Part 13) to provide for review and procedural safeguards in the case of the deprivation of liberty of persons lacking capacity but not suffering from a *"mental disorder"*, that part was ultimately not included in the ADMCA, when enacted.

79. On the basis of the foregoing, it contends that the purpose of s. 108 was to ensure that wards who were detained on foot of orders made by a wardship court and who suffer from a "*mental disorder"* could avail of the same safeguards as person with such a disorder who are detained under the 2001 Act. That purpose, it is contended, is best achieved by construing s. 108(1) as applying solely to persons who are or were suffering from a "*mental disorder"* and whose review can be conducted in conformity with s. 108(5).

80. The HSE contends that it would not be permissible or consistent with the proper purpose of the Act for the court to read down the terms of s. 108(5) so as to excise the mandatory requirement that the court hear evidence from the responsible consultant psychiatrist, as a means of resolving the conflict between ss. 108(1) and 108(5) (an approach adopted by the High Court (Barrett J.) in *Adoption Authority of Ireland v. A.B. (A Minor)* [2021] IEHC 829 (*"A.B."*) in respect of a different statutory regime).

81. The HSE further contends, in its written submissions, that to construe s. 108(5) as meaning that the court could proceed with the review in circumstances where the ward

had no responsible consultant psychiatrist would, in effect, amount to the court rewriting the section in a way which was contrary to the purpose of the provision when read in the context of the legislation as a whole.

82. The HSE also sought, in its written submissions, to pray in aid the provisions of s. 5 of the 2005 Act, in urging the court to depart from the literal interpretation of the statutory words at issue which if such a reading would be absurd or fail to reflect the plain intention of the Oireachtas. In such circumstances, the court should construe the provision in a way which reflects the plain intention of the Oireachtas where that can be ascertained from the Act as a whole. It did note in its written submissions, however, that s. 5 only applies in limited circumstances and that the court cannot be asked to rewrite legislation (citing in that respect the decision of the Supreme Court in *S.E. v. Minister for Justice and Equality* [2018] IESC 20, [2018] 3 I.R. 317, and *Irish Life and Permanent plc v. Dunne* [2015] IESC 46). The HSE did not develop its argument in respect of s. 5 of the 2005 Act in its oral submissions, though it would seem that by invoking this statutory provision, the HSE is submitting that to construe s. 108(5) as applying to all persons (and not just those whose review would be in conformity with s. 108(5)) would be absurd or fail to reflect the plain intention of the Oireachtas.

83. Finally, the HSE sought to distinguish the judgment of Hyland J. in *K.K. (No. 1)* insofar as the court in that case stated that the review process under s. 108(1) is a *"door through which all Wards detained at the date of commencement of the ADMCA must pass"* (at para. 53, original emphasis). The HSE sought to distinguish that case from the present, in that *K.K. (No. 1)*, Hyland J. was dealing with the issue as to whether the court had jurisdiction to make a *"new"* or *"fresh"* detention order in circumstances where no such order was in existence at the time Part 10 of the ADMCA came into force on 26th April 2023. It also notes that the relevance of the absence of a responsible consultant

psychiatrist and the impact of that on the ability of the court to carry out a review under s. 108 was not an issue raised by the parties or considered by Hyland J. in *K.K. (No. 1).* For those reasons, the HSE contends that the court can distinguish the present case from *K.K. (No. 1).*

84. On the basis of the foregoing, the HSE contends that the review provisions contained in s. 108 do not apply to the ward in this case as she is not a person who is or was suffering from a *"mental disorder"* and does not have a responsible consultant psychiatrist.

(2) In the alternative, if s. 108 review is required, the review should be "discharged"

85. The HSE advances the alternative argument that, if the court were to conclude that s. 108 requires a review to be carried out in respect of all wards who are detained in non-approved centres on foot of orders made by a wardship court, the court should make a direction *"discharging"* the review in circumstances where the review cannot take place in the way provided for in s. 108, in that the ward in this case does not have a responsible consultant psychiatrist and where evidence from such psychiatrist is expressly required under s. 108(5). It submits that, in those circumstances, it would be impossible for the court to carry out a review in the manner provided for in s. 108, and the court should, therefore, "discharge" the review (i.e., order that the review would not proceed and should be dispensed with).

(3) The court retains wardship jurisdiction to detain and regulate the detention of persons such as the ward in this case.

86. In the event that the court were to proceed with a review of the ward's detention under s. 108, the HSE contends that the court cannot, on the evidence, make either of the findings referred to in s. 108(2) or s. 108(4). The evidence is clear that the ward is not suffering from a "*mental disorder*", nor is she a person who is *"no longer suffering*

from a mental disorder". While noting that in *K.K. (No. 1)*, Hyland J. referred to two potential interpretations of s. 108(4), ultimately, she did not find it necessary to resolve that issue. The HSE submits that the proper interpretation of the term *"no longer suffering from a mental disorder"* in s. 108(4) is that the person had, at some point in the past, suffered from a *"mental disorder"* relevant to the person's detention but, at the time of the s. 108 review, is no longer suffering from that disorder.

87. The HSE cited a number of authorities on statutory interpretation in support of its contention in that respect including *Heather Hill*. It submits that the plain and ordinary meaning of the term *"no longer suffering from a mental disorder"* is, at the very least, that the person was, at one time, suffering from such a disorder, from which they are no longer suffering as of the time of the review, noting that the court must be satisfied of both of those matters. While accepting that it is not necessary to decide the point, the HSE also contends that, in order to compel the court to order the discharge of the ward from detention under s. 108(4), the reference to *"mental disorder"* in s. 108(4) must be to such a disorder that is relevant to or connected with the detention of the ward.

88. The HSE asserts that since, in its submission, the ward is not currently suffering from a *"mental disorder"* nor is she a person who is *"no longer suffering from a mental disorder"*, as there is no evidence that she ever suffered from such a disorder in the past, the court cannot make an order under s. 108(2) directing that the detention of the ward shall continue for a further period. Nor can the court make an order under s. 108(4) discharging the ward from detention.

89. In those circumstances, the HSE submits that the court may continue to exercise the wardship jurisdiction vested in the High Court by s. 9 of the 1961 Act (as saved and continued by s. 56(2) of the ADMCA), to continue the orders (including those providing for detention) made in respect of the ward most recently (at the time of the review) on

13th July 2023 and on various earlier dates since December 2021 (well prior to the commencement of s. 108). The HSE submits that a continuation of those orders would be in accordance with the best interests of the ward.

(b) The Independent Solicitor

90. While there is significant disagreement between the independent solicitor, Ms. Curry, and the HSE as to how the court should approach the review under s. 108 of the ADMCA, ultimately, the independent solicitor agrees with the HSE that the wardship jurisdiction vested in the High Court by s. 9 of the 1961 Act (and saved and continued by s. 56(2) of the ADMCA) continues to exist and should be exercised by the court in continuing the orders, including the detention order, made in relation to the ward, on the basis that those orders are necessary appropriate and in the ward's best interests, in light of the evidence before the court. The fundamental difference between the parties is whether the court is required to carry out a s. 108 review at all in the case of a ward who is detained in a non-approved centre and who does not have a responsible consultant psychiatrist.

91. In summary, the independent solicitor's position is set out below:

(1) <u>The s. 108 review in respect of the ward's detention should proceed</u>

92. The independent solicitor contends that the review of the ward's detention should proceed under s. 108. She contends that the absence of a responsible consultant psychiatrist does not dispense with the requirement for the review. She submits that the court cannot be satisfied that the ward *"is suffering from a mental disorder"* for the purpose of s. 108(2) and may not, therefore, direct that the ward's detention in her existing placement or in an approved centre be continued in accordance with that section. Nor, the independent solicitor contends, is there any basis on which the court could determine that the *ward "is no longer suffering from a mental disorder"* for the

purpose of s. 108(4) and is not, therefore, obliged to order her discharge from detention under that provision. The independent solicitor agrees that the court can and should continue to exercise its wardship jurisdiction to continue the orders providing for the detention and care of the ward in her existing placement.

93. In submitting that the court should proceed with the s. 108 review, the independent solicitor points out that the ward is a person who is now, and was on the commencement of s. 108 on 26th April 2023, the subject of a detention order made by a wardship court. The ward is being detained in her placement which is not an *"approved centre"* as that term is defined in s. 104 of the ADMCA. As noted earlier, the evidence is that the ward does not have a *"mental disorder"* as that term is defined in s. 3 of the 2001 Act. Nor is there any evidence that the ward ever suffered from such a *"mental disorder"*, and she is not, therefore, a person who is *"no longer suffering from a mental disorder"*. The independent solicitor contends that the Ward's lack of capacity derives not from any "*mental disorder*" but from an acquired brain injury which may have been exacerbated by a stroke.

94. The independent solicitor submits that Part 10 of the ADMCA does not enact any new jurisdiction to detain wards. The power to do so derives from the court's wardship jurisdiction which was vested in the High Court by s. 9 of the 1961 Act and preserved by s. 56(2) of the ADMCA. She contends that what Part 10 does is regulate (and significantly confine) the court's wardship jurisdiction in the case of detained wards with a *"mental disorder"*. It does so in two respects: (a) by providing them with reviews of their detention, which incorporate clinical evidence obtained independently from those responsible for their detention at such intervals as would have applied had those persons been detained under the 2001 Act, and (b) by limiting the places at which they can be detained. For example, where the court conducts a s. 108 review in respect

of a ward detained in a *"non-approved centre"* and the requirements of s. 108(2) are met, the court can only transfer the ward to an *"approved centre"* where the ward's detention is to continue somewhere other than in his or her existing placement.

95. The independent solicitor submits that Part 10 of the ADMCA does not provide a statutory basis for detention, but rather regulates the court's s. 9 wardship jurisdiction and extends to wards with mental disorders the type of oversight and regulation provided for in the 2001 Act which was previously disapplied in the case of wards by s. 283 of the Mental Treatment Act, 1945 (the "1945 Act"). She submits that, while Part 10 reviews (provided for in ss. 107 and 108) must be carried out in respect of all qualifying detention orders, the restrictions imposed on the court's s. 9 wardship jurisdiction arise only in respect of (a) wards who are *"suffering from a mental disorder"* and who may only be detained in their current setting or in an approved centre, and (b) wards who are *"no longer suffering from a mental disorder"* and, consequently, must be discharged from their detention by order of the court. In the latter case, the independent solicitor contends that the *"mental disorder"* from which the ward *"is no longer suffering"* is not any previous historic disorder but rather the disorder which gave rise to the detention order. The independent solicitor agrees with the HSE's contention that where the ward is not suffering from a *"mental disorder"* and has never suffered from such a disorder (and cannot, therefore, be a person who "*is no longer suffering*" from such a disorder), the court should exercise its s. 9 wardship jurisdiction and continue the existing orders, including the detention order, made in relation to the ward.

96. On the issue as to whether the s. 108 review should proceed, the independent solicitor disputes the interpretation of s. 108 advanced by the HSE. She submits that s. 108(1) requires the review to proceed. The obligation to carry out the review arises, the

independent solicitor maintains, on the basis that the ward is (and was on the date of commencement of s. 108) detained in a *"non-approved centre"* on foot of an order made by a wardship court. The obligation does not arise on the basis that the ward has a "*mental disorder*" or that she has a responsible consultant psychiatrist. She submits that the language of s. 108(1) is clear. Even if it were not, the independent solicitor relies on the dicta of Hyland J. in *K.K. (No. 1)* in which she said that the section applies to all detained wards, and not merely those who have a *"mental disorder".* The independent solicitor further maintains that the mischief which s. 108 seeks to cure does not require the evidence of a responsible consultant psychiatrist where a ward does not have a *"mental disorder".*

97. The independent solicitor relies not only on the statutory language used in s. 108 but also on the principles of statutory interpretation discussed by the Supreme Court in *Heather Hill* and more recently in *A, B and C v. Minister for Foreign Affairs* [2023] IESC 10, [2023] 1 ILRM 335 *("A, B and C").* While noting the desirability of precision and clarity as to how detention procedures operate, the independent solicitor submits that neither of those ends requires that in the case of a detained ward who does not have a *"mental disorder",* a responsible consultant psychiatrist must give evidence. That might only be the case where a detained ward has such a disorder. She submits that to interpret s. 108 as not to require a review in the case of a detained ward who does not have a responsible consultant psychiatrist, would hollow-out an important safeguard contained in s. 108 to the point of non-existence.

98. The independent solicitor submits, contrary to the view of the HSE, that the requirement under s. 108(5) for the court to hear evidence from a responsible consultant psychiatrist in conducting a s. 108 review <u>can</u> be excised or disapplied. To that end, she seeks to distinguish the role of the responsible consultant psychiatrist under the 2001 Act and

the role of such a person under the ADMCA. In the case of a person detained under the 2001 Act, there will always be a consultant psychiatrist responsible for the detainee's care or treatment and that person has a fundamental role in the procedures under the 2001 Act. The independent solicitor submits that that is not necessarily the case under Part 10 of the ADMCA. Where there is no responsible consultant psychiatrist in the case of a detained ward, the independent solicitor submits that the statutory requirement of s. 108(5) may be read down to address the impossibility of hearing evidence from such a person in the review. However, the review can still take place and the court will have evidence from an independent consultant psychiatrist whose function is to express an opinion as to whether the detained ward is suffering from a *"mental disorder"* as expressly provided s. 108(6). The independent solicitor also relies on the decision of Barrett J. in *A.B.* to the effect that the law does not compel an impossibility. In addition, the independent solicitor relies on what she calls *"the deliberate legislative writing down"* of the role of the responsible consultant psychiatrist in Part 10 and notes that the absence of such a psychiatrist will not deprive the court carrying out the review of clinical evidence on the issue as to whether the detained ward has a *"mental disorder"*.

99. The independent solicitor submits that s. 108, when properly interpreted in its statutory context, makes clear that a review can proceed and achieve its purpose without the evidence of a responsible consultant psychiatrist.

(2) <u>The court should not "discharge" or dispense with the s. 108 review</u>

100. It follows from the submission summarised above that it is the view of the independent solicitor that the court is required to proceed with the s. 108 review and should not "discharge" or dispense with the requirement to carry out that review nor terminate the review by reason of the absence of evidence from a responsible consultant psychiatrist.

(3) The court should exercise its s. 9 wardship jurisdiction to continue the existing orders

101. The independent solicitor submits that the court cannot be satisfied that the ward is a person *"suffering from a mental disorder"* for the purpose of s. 108(2). Nor is the ward a person who is "*no longer suffering*" from such a disorder. She agrees that the proper interpretation of that latter term is that the person must have suffered from a "*mental disorder*" at some point so as to be *"no longer suffering"* from the disorder. The independent solicitor notes that, on the evidence, the ward is not a person who suffered from a "*mental disorder*" at any stage in the past. While accepting that it is not an issue that needs to be decided in this case, the independent solicitor agrees with the submission of the HSE that, properly interpreted, s. 108(4) does not require the court to carry out a "whole of life" review and to consider whether, at some point in the past, the person suffered from a *"mental disorder"* but rather requires the court to determine whether the making of the detention order under review was predicated on the existence of a *"mental disorder"* from which the ward *"no longer suffering"*, such that the ward would have been discharged under the review and discharge provisions of the 2001 Act had the ward been subject to the 2001 Act regime and not excluded from its provisions by s. 283 of the 1945 Act.

102. Since the ward in this case is not a person who is *"no longer suffering"* from a mental disorder, the court is not compelled to discharge the ward from detention under s. 108(4). In those circumstances, the independent solicitor submits that the court is not constrained in the exercise of its wardship jurisdiction by s. 108 and is at large, having carried out the review, to make such orders as it considers to be in the ward's best interests, including orders providing for her detention, care and welfare. The independent solicitor submits that the court's wardship jurisdiction, vested in the court

by s. 9 of the 2001 Act and preserved by s. 56(2), confers jurisdiction on the court to continue the ward's detention. She submits that a continuation of the orders in this case would not fall foul of the decision of Hyland J. in *K.K. (No. 1)* where the court held that the jurisdiction to detain a ward under its wardship jurisdiction was trammelled by Part 10 of the ADMCA, on the basis that the court in *K.K. (No. 1)* was concerned with the making of a *"new"* or *"fresh"* detention order and not the continuation of an order or orders which had been made and reviewed prior to the commencement of the ADMCA on 26th April 2023.

103. The independent solicitor agrees with the HSE that, on the evidence, the court should continue the existing orders, including the detention order, on the basis that such continuation is necessary and appropriate and in the ward's best interests. This conclusion is supported by all of the evidence including that of Professor Sadlier, Dr. O'Donoghue, and the independent solicitor herself.

7. Decision

104. The main issue of principle which I have to decide is whether s. 108 of the ADMCA requires the court to review a detention order made in the case of a person who is a ward and who was detained in an institution which is not an approved centre when that section was commenced on 26th April 2023 and who continues to be so detained, where that person does not have a *"mental disorder"* as that term is defined in s. 3 of the 2001 Act, or a responsible consultant psychiatrist.

105. I am satisfied that the court is required to carry out such a review. The obligation to do so arises from the clear wording of s. 108(1), when construed in accordance with the guiding principles of statutory interpretation discussed recently by the Supreme Court in *Heather Hill* and in *A, B and C*. That is the view which Hyland J. took of s. 108(1) in her judgment in *K.K. (No. 1)*, although that was not an issue which directly arose in

that case. Nonetheless, I agree entirely with the dicta of Hyland J. concerning the scope of the obligation to conduct a review under s. 108(1).

106. I have set out the provisions of s. 108(1) and the other relevant subsections of s. 108 earlier in this judgment. On their face, the clear words of s. 108(1) would appear to require the court to carry out such a review and to do so "*as soon as possible*". The issue which arises is whether the HSE is correct in its contention that, notwithstanding the clear words of s. 108(1), the court is not obliged to conduct a review in respect of a detained ward who is (a) not suffering from a *"mental disorder"* and, (b) does not have a responsible consultant psychiatrist. The basis on which it is contended by the HSE that the words of s. 108(1) should not be given their plain or literal meaning is that (a) the plain meaning would not give effect to, or reflect, the intention of the Oireachtas in circumstances where those words bear a different meaning when construed in the context of the ADMCA as a whole and, in particular Part 10 thereof, and (b) in circumstances where the requirement under s. 108(5) for the court to hear evidence from the responsible consultant psychiatrist cannot be met owing to the fact that the detained ward is not under such a person's care.

107. I am not satisfied that either of these features has the effect or consequence put forward by the HSE.

108. In my view, it is very clear from the plain or literal meaning of the words used in s. 108(1), when construed in accordance with the context of the s. 108 itself, Part 10 of the Act, and the Act as a whole, that the court is required to carry out a review under s. 108(1) notwithstanding the fact that the detained ward in question does not, and appears never to have had, a *"mental disorder"* and does not have a consultant psychiatrist responsible for her care or treatment. I have arrived at this conclusion by applying the principles discussed in detail by the Supreme Court (Murray J.) in *Heather Hill,* and

helpfully summarised by Murray J. in his judgment for the Supreme Court in *A, B and C*. In his judgment in the latter case, Murray J. summarised those principles as follows:

> *"In answering these questions, it is to be remembered that the cases – considered most recently in the decision of this court in Heather Hill Management Company CLG and anor. v. An Bord Pleanála [2022] IESC 43, [2022] 2 ILRM 313 – have put beyond doubt that language, context and purpose are potentially in play in every exercise in statutory interpretation, none ever operating to the complete exclusion of the other. The starting point in the construction of a statute is the language used in the provision under consideration, but the words used in that section must still be construed having regard to the relationship of the provision in question to the statute as a whole, the location of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute. The court must thus ascertain the meaning of the section by reference to its language, place, function and context, the plain and ordinary meaning of the language being the predominant factor in identifying the effect of the provision but the others always being potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning of those words."* (para. 73)

109. Murray J. stressed that the *"starting point"* in construing a statutory provision is the language used in that provision and that the *"plain and ordinary meaning"* of the language used is the *"predominant factor in identifying the effect of the provision"*. However, he stressed that the other factors identified in the above passage, such as the other words in the relevant section and in the statute itself, as well as the legal context in which the statute was enacted, and the objective of the statute, are all potentially

relevant to *"elucidating, expanding, contracting or contextualising the apparent meaning"* of the words used in the section at issue. Murray J.'s summary of the general principles in *A, B and C* is a distillation of the principles which he himself discussed in detail in *Heather Hill*. It is, therefore, unnecessary for me to analyse, in any great detail, the discussion in *Heather Hill*. I would, however, stress a few statements of principle identified by Murray J. in his judgment in that case which are directly relevant to the issue of principle which I have to decide.

110. Murray J. noted, in deciding what legal effect to give to the words of a statutory provision under consideration, that *"their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it."* (per Murray J. at para. 115).

111. At the same time, he observed:

> *"... the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in Brown* [*People (DPP) v. Brown* [2018] IESC 67, [2019] 2 I.R. 1]. *However — and in resolving this appeal this is the key and critical point — the 'context' that is deployed to that end and 'purpose' so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language."* (para. 116)

112. Later, Murray J. described the words of a statute as being the *"first 'port of call'"* in the formal exercise of statutory interpretation (at para. 124).

113. I have followed the guidance given by the Supreme Court in *Heather Hill* and *A, B and C*, in construing s. 108 of the ADMCA and, in particular, the scope of the obligation to carry out a review of the detention of detained wards under that section. I have been unable to find anything in the other subsections of s. 108, in Part 10, in the ADMCA, in the context in which the Act was enacted or in the objective of the ADMCA to displace the plain or literal meaning of the words used in s. 108(1).

114. With respect to the context in which the ADMCA was enacted and the objective of the Oireachtas in its enactment, it is notable that the long titles of both the 2015 Act and the Assisted Decision-Making (Capacity) (Amendment) Act 2022 do not make any reference to the detention of wards or the need to review such detention.

115. Section 4(5) of the ADMCA does refer to detention in that it makes clear that *"[n]othing in this Act* [the ADMCA] *shall affect the inherent jurisdiction of the High Court to make orders for the care, treatment or detention of persons who lack capacity"*. It is well-established, and not in dispute, that the High Court, in the exercise of its wardship jurisdiction, has the power to order the detention of a person who meets the test for wardship where such detention is necessary and appropriate: see, for example, *A.M. v. HSE* [2019] IESC 3, [2019] 2 I.R. 115 ("*A.M.*") (per MacMenamin J. at para. 15, p. 124) and *K.K. (No. 1)* (per Hyland J. at paras. 14 – 32).

116. The court's wardship jurisdiction was vested in the High Court by s. 9 of the 1961 Act. Section 56(2) of the ADMCA makes clear that, pending a declaration under s. 55(1) discharging the ward from wardship, the High Court's wardship jurisdiction shall continue to apply.

117. I have set out earlier in this judgment the relevant provisions of Part 10 of the ADMCA which include ss. 107 and 108. That part is headed "*Detention Matters*". While this case is concerned with s. 108, the preceding section, s. 107, contains equivalent provisions in respect of wards detained, in similar circumstances, in approved centres. Both s. 107 and s. 108 impose a requirement on the wardship court to review the detention order as soon as possible in the circumstances mentioned in those sections. There is nothing in either section, or indeed in Part 10, on its face, to limit the circumstances in which the review of the detention order in respect of a detained ward must be conducted by the court. Nor is there anything in the context in which the legislation was enacted or the underlying purpose or objectives of its enactment to confine or displace the court's obligation to carry out the review in the manner suggested by the HSE. While the statutory basis for continuing a detention order, under both s. 107 and s. 108, is that the detained ward is suffering from a "*mental disorder*" (within the meaning of that term in s. 3 of the 2001 Act), I am not prepared to hold that the existence of such a disorder is a prerequisite for the court conducting such a review. Many, if not most, wards the subject of detention orders made by the High Court before the enactment of the ADMCA, who met and continue to meet the test for wardship, do not have a "*mental disorder*" within the meaning of that term in s. 3 of the 2001 Act. Again, I can find nothing in the ADMCA itself, or in the context in which it was enacted, or in the objectives promoted by its enactment, to displace the obligation of the court to carry out a review as prescribed by s. 108(1). In other words, there is nothing, in my view, which displaces the obligation to carry out a review of the detention of a detained ward in a non-approved centre (or indeed in an approved centre in the case of a s. 107 review) where the ward is not suffering from a *"mental disorder"*.

118. I note that while it might originally have been intended that the ADMCA would include a specific part dealing with the detention of persons lacking capacity but not suffering a *"mental disorder"* (which was to be Part 13), that part was not included in the ADMCA as enacted. While the foregoing may be relevant in terms of the context of the legislation's enactment, I do not accept that it meets the required test of clarity and specificity outlined by Murray J. in *Heather Hill* (at para. 116) so as to displace the clear wording of s. 108(1).

119. It cannot be the case that s. 108(1) is confined to the review of the detention of wards who suffer from a *"mental disorder"* since that is the very issue which must be determined by the court before making an order to continue the detention of the person concerned, under s. 108(2), or to discharge the person concerned from detention, under s. 108(4). I am of the view that confining the scope of the s. 108 review to wards suffering from a *"mental disorder"* would be to put the cart before the horse, and to introduce a precondition to the obligation imposed on the court by s. 108(1), which I do not believe would be justified by either the clear wording of the subsection or by any of the other matters relevant to its construction.

120. I now turn to consider whether the fact that a detained ward does not have a responsible consultant psychiatrist means that the court should either (a) confine the scope of the s. 108 review to detention orders in respect of wards who do have a *"mental disorder"* and a responsible consultant psychiatrist, or (b) terminate or "discharge" the review on the basis that it cannot be conducted in conformity with the statutory mandate under s. 108(5) in the absence of a responsible consultant psychiatrist.

121. I do not accept the HSE's contention that the court, when reviewing a detention order, should give primacy to the requirement to hear evidence from the responsible consultant psychiatrist, as well as from the independent consultant psychiatrist, over

what I consider to be the fundamental and principal obligation imposed on the court by s. 108(1) to review the detention order at issue. I do not accept that the absence of a responsible consultant psychiatrist absolves the court of its obligation to review the detention of the relevant ward or compels the court to take the view that it cannot carry out the review. To conclude otherwise would, as I have stated earlier in this judgment, be a classic case of the tail wagging the dog.

122. As I have already observed, many, if not most, wards who are detained in non-approved centres will not be suffering from, and may never have suffered from, a *"mental disorder"*. They are unlikely, therefore, to have a responsible consultant psychiatrist. I accept that the role of a responsible consultant psychiatrist is a critically important one in the context of the 2001 Act. That is evident from a review of the provisions of that Act including, for example, s. 15 (which concerns renewal orders) and s. 17 and s. 18 (which concern the referral of admission orders and renewal orders to a mental health tribunal and the review of such orders by a tribunal) and from a consideration of the case law, including *M.M. v. Clinical Director of Central Mental Hospital* [2008] IESC 31, [2008] 4 I.R. 669, and the *A.M.* case. The role of the responsible consultant psychiatrist in the context of s. 108 of the ADMCA is, by contrast, not quite so crucial given that many, if not most, of such detained wards will not have a responsible consultant psychiatrist and will not be detained on foot of any admission or renewal order or on foot of any step taken by such a psychiatrist because those persons will not be suffering from a *"mental disorder"* (as is the case with the ward the subject of this case).

123. While s. 108(5) mandates that the court "*shall*" hear evidence from the responsible consultant psychiatrist as well as from the independent consultant psychiatrist when conducting a s.108 review, the court cannot hear evidence from the responsible

consultant psychiatrist if the ward is not under the care or treatment of such a person. This begs the question: Does that mean that the court cannot carry out the review of the detention at all? I am of the view that it does not. I accept the submission advanced on behalf of the independent solicitor that the court can, and must, nonetheless, proceed with the review.

124. It is, in my view, open to the court to adopt an approach similar to that adopted by the High Court (Barrett J.) in *A.B*. In that case, Barrett J. held that the Adoption Authority could not be compelled to provide counselling to the child's mother or guardian in the context of a proposed adoption, as mandated by s. 30(4) of the Adoption Act, 2010, in circumstances where the mother or guardian of the child is dead at the time when the counselling would otherwise have had to be done. Barrett J. considered that the maxim *lex non cogit ad impossibilia* ("the law requires nothing impossible") applied. It seems to me that that is also the position here. The court cannot, and therefore cannot be compelled to, hear evidence from the responsible consultant psychiatrist when reviewing the detention of a ward where there is no such person. Otherwise, the court would be required to do the impossible. That impossibility cannot, in my view, affect the proper interpretation of s. 108(1) and the scope of the obligation on the court to review the detention of a ward in the circumstances provided for in that subsection. Nor, in my view, does the absence of a responsible consultant psychiatrist in the case of a detained ward mean that the court, having commenced the review, must "discharge" or terminate the review. I do not see a particular difficulty with this approach in circumstances where it is the clear view of the independent consultant psychiatrist, Professor Sadlier, that the ward in this case is not suffering from a *"mental disorder"*.

125. As I noted earlier, the HSE has also relied on s. 5 of the 2005 Act in support of its submission that to construe the words literally or in accordance with their plain meaning would give rise to an absurdity or would fail to reflect the plain intention of the Oireachtas. I do not accept that there is any scope for the application of s. 5 of the 2005 Act in this case. In my view, neither a plain or literal interpretation of s. 108(1) would give rise to any absurdity or fail to reflect the plain intention of the Oireachtas. I have reached my conclusions in relation to the proper interpretation of s. 108(1) and the other relevant subsections of s. 108, such as s. 108(5), by applying the legal principles applicable to statutory construction, as explained by the Supreme Court in *Heather Hill* and *A, B and C*.

126. I am further of the view that the conclusion I have reached as to the proper interpretation of those provisions is consistent with the conclusions reached by Hyland J. in *K.K. (No. 1)*, although her conclusion on that issue was *obiter*. The issue to be decided in *K.K. (No. 1)* was whether the court could make a detention order in the case of a ward after the commencement of the ADMCA, on 26th April 2023, under its wardship jurisdiction or whether it could only do so, in an appropriate case, under its inherent jurisdiction. The court in *K.K. (No. 1)* was not dealing with a review of an existing detention order under s. 107 or s. 108 of the Act. Nonetheless, in the course of her judgment, Hyland J. carefully analysed the provisions of Part 10 of the Act and set out her views and conclusions as to the proper interpretation of a number of the provisions therein.

127. At para. 52 of her judgment in *K.K. (No. 1)*, Hyland J. observed that, while Part 10 of the Act approaches the question of the detention of wards *"largely through the lens of mental disorder"*, there is an exception to that approach in s. 108(1). She explained that s. 108(1) does not approach the detention of wards through the *"lens of mental disorder"* by virtue of the fact that it requires that where, immediately before the

section's commencement, a person is detained in an institution other than an approved centre on the order of a wardship court and, from that commencement, continues to be so detained that order shall, as soon as possible, be review by the wardship court in accordance with subsection (2). She observed that:

> *"This section applies to all detained wards. There is no threshold test of whether they have a mental disorder."* (original emphasis).

128. At para. 53 of her judgment, Hyland J. stated that the *"review process under s.108(1) is a door through which all wards detained at the date of commencement of the ADMCA must pass."* (original emphasis). Those observations reflect what I have found to be the correct construction of s. 108(1) of the Act.

129. The HSE has asked that I distinguish this case from *K.K. (No. 1)* on various grounds: First, it is said that *K.K. (No. 1)* concerned the issue as to whether the court had jurisdiction to make a *"new"* or *"fresh"* detention order where none was in existence on the date of commencement of that section on 26th April, 2023, which is not the case here; Second, it observes that the court in *K.K. (No. 1)* did not have to consider the requirement, under s. 108(5), to hear evidence from the responsible consultant psychiatrist as part of the review process under s. 108, or how the absence of such evidence would impact the court's ability to conduct that review.

130. I do not believe that it is necessary to distinguish *K.K. (No. 1)* from the present case. While it is correct that the issue which Hyland J. had to decide in *K.K. (No. 1)* was quite different to the issue which I have to decide in this case, Hyland J. was perfectly entitled to set out her views as to the proper interpretation of s. 108(1). I have concluded that those views are completely consistent with the proper interpretation of that section, reached by the application of the relevant principles of statutory construction set out in the case law of the Supreme Court. Nor is it significant that Hyland J. was not asked

to consider, and therefore, did not consider, the significance of the absence of a responsible consultant psychiatrist in a s. 108 review. I have addressed earlier in this judgment how the absence of such a clinician can be properly addressed. I do not accept that the fact that that issue did not arise in *K.K. (No. 1)* detracts, in any way, from the correctness of the conclusion reached by Hyland J. as to the proper interpretation of s. 108(1) of the Act.

131. In summary, therefore, I am satisfied that the proper interpretation of s. 108(1) of the Act requires me to carry out a review of the ward's detention in her placement notwithstanding that (a) she is not a person who suffers from a *"mental disorder"* and, (b) there is no consultant psychiatrist responsible for her care or treatment.

132. It follows that having commenced the review of the ward's detention, I should proceed to carry out that review and that I should not "discharge", terminate or dispense with it, as contended by the HSE.

133. The critical questions to determine, in carrying out the review of the ward's detention under s. 108 of the Act, are whether:

(a) the ward "*is suffering from a mental disorder*" (s. 108(2)), or

(b) the ward is *"no longer suffering from a mental disorder"* (s. 108(2)).

134. If the ward *"is suffering from a mental disorder*", then the court may direct that the ward's detention (either in his or her current place of detention or in an approved centre) shall continue for a further period not exceeding three months (on the first such review) or a term not exceeding six months (in the case of subsequent reviews). It should be stressed that, if the court is satisfied that the ward "*is suffering from a mental disorder*", and, if it decides to continue the ward's detention, it is doing so in accordance with s. 108(2).

135. I agree with the submission of the independent solicitor that Part 10 of the ADMCA does not create any new jurisdiction to detain wards. That jurisdiction continues to derive from s. 9 of the 1961 Act, as preserved by s. 56(2) of the ADMCA.

136. I also agree with the submission of the independent solicitor as to what Part 10 does, and, in particular, what s. 108 does, in the case of a ward who is detained in a non-approved centre in the circumstances provided for in that subsection. It serves to regulate the court's s. 9 jurisdiction in respect of detained wards suffering from a *"mental disorder*", rather than create a new jurisdiction to detain wards. It does so by extending to wards who are suffering from a *"mental disorder"* a similar type of oversight and review regime to that provided for under the 2001 Act, which was disapplied in the case of wards by s. 283 of the 1945 Act.

137. The second order which the court can make in carrying out a review of a ward's detention under s. 108 is to order the discharge of the ward from detention under s. 108(4). Where the court determines that the detained ward "*is no longer suffering from a mental disorder*" s. 108(4) provides that, in those circumstances, the court *"shall"* order the discharge of the ward from detention.

138. Those are the two orders which can be made pursuant to s. 108 on foot of a review of a ward's detention under that section. The question then arises as to what the court can do if, having carried out a review of the ward's detention in accordance with s. 108, it were to conclude that the ward:

(a) is not suffering from a *"mental disorder"* (s. 108(2)), and

(b) is not a person who is *"no longer suffering from a mental disorder"* (s. 108(4)).

139. On the basis of all the evidence, the ward in the present case is clearly not suffering from a *"mental disorder"* for the purposes of s. 108(2). This begs the question as to

whether the ward in this case is a person is who is "*no longer suffering from a mental disorder*". There is no evidence to suggest that the ward is a person who once suffered from a "*mental disorder*" from which she no longer suffers. Indeed, the evidence is that the ward was not, at any stage, diagnosed with a "*mental disorder*" either before or after her admission to the hospital in October 2019.

140. The HSE and the independent solicitor have advanced submissions as to the correct meaning of the term "*no longer suffering from a mental disorder*" in s. 108(4). Both agree that the correct interpretation of that term is that the person concerned must once have suffered from a "*mental disorder*", which is directly relevant to or gave rise to the detention of the ward, from which she no longer suffers. Hyland J. in *K.K. (No. 1)* referred to two potential interpretations of s. 108(4) (at para 57 of her judgment) namely:

> (a) that s. 108(4) requires the discharge of the detained ward from detention where the ward is not suffering from a "*mental disorder*"; and
>
> (b) that s. 108(4) only applies to require the discharge of a detained ward from detention where the ward is "*no longer*" suffering from a "*mental disorder*" where that disorder could either be that which led to the detention of the ward the subject of the review or might include any "*mental disorder*" from which the ward has, at some point in the past, suffered.

141. Ultimately, Hyland J. decided that it was not necessary to reach a conclusion on the correct interpretation of s. 108(4), and that that issue should be left to a case where its resolution was absolutely required (see: paras. 58 and 59). This is such a case, and I am satisfied that it is necessary to interpret s. 108(4) in the narrower sense identified by Hyland J. in *Re KK (No. 1)*. I am satisfied that both the HSE and the independent solicitor are correct in their respective submissions that, in order for a person to be *"no*

longer suffering from a mental disorder", he or she must have, at one point, suffered from a "*mental disorder*" from which he or she is no longer suffering. That much is clear from the literal or plain meaning of the words, and there is nothing which displaces that plain meaning. As I have mentioned, there is no evidence in this case that the ward was a person who once suffered from, but is no longer suffering from, a "*mental disorder*". The ward is, therefore, not a person who is *"no longer suffering from a mental disorder"* for the purpose of s. 108(4).

142. I should add that, in my view, there is considerable force to the submission, advanced by both the HSE and the independent solicitor, that the "*mental disorder*" from which the ward must, at one point, have suffered must be one which gave rise to or, at least, which is relevant to, or connected with, the detention of the ward which is under review. I agree, therefore, that in considering whether the ward is a person who "*is no longer suffering from a mental disorder*", the court is not required by s. 108(4) to carry out a "whole of life" review, and to consider whether, at some stage in the past, the detained ward suffered from a "*mental disorder*" from which he or she is no longer suffering at the time of the review. There must, in my view, be a more direct and immediate connection between the disorder and the detention. It should be said, however, that this issue does not, in fact, require resolution in this case as there is no evidence that the ward at any time suffered from a "*mental disorder*" from which she is no longer suffering at the time of the review.

143. The upshot of all of this is that having carried out the review of the ward's detention under s. 108, and having concluded that the ward is not a person who "*is suffering from a mental disorder*" for the purpose of s. 108(2), I cannot, therefore, continue the ward's detention in accordance with that subsection. Nor can I order a discharge of the ward from detention in accordance with s. 108(4) as she is not a person who is *"no longer*

suffering from a mental disorder" for the purpose of that subsection. Since those are the only orders open to the court having conducted a review under s. 108, and since neither of those orders can be made for the reasons I have outlined, it seems to me I should make no order on foot of the review other than an order providing for the costs of the independent solicitor.

144. Although the parties reached the same position by different routes, both the HSE and the independent solicitor agree that the court does have jurisdiction to continue the ward's detention in her placement under its wardship jurisdiction. Both agree that the wardship jurisdiction vested in the court by s. 9 of the 1961 Act has been preserved by s. 56(2) of the ADMCA. They also agree that there is nothing in the judgment of Hyland J. in *K.K. (No. 1)* which precludes, or calls into question, the court's continued entitlement to exercise its wardship jurisdiction, including by continuing existing detention orders in the case of this ward. I agree.

145. Since there is no controversy between the parties on this issue, I can state the position very briefly. As noted earlier, it is clear that, as part of the court's wardship jurisdiction as vested in the High Court by s. 9 of the 1961 Act, the court has the power to order the detention of a ward where it is necessary and appropriate to do so: see, for example, *A.M.* (per MacMenamin J. at para. 15) and *K.K. (No. 1)* (per Hyland J. at paras. 41 and 42). Section 56(2) of the ADMCA provides that the wardship jurisdiction of the High Court as set out in s. 9 of the 1961 Act continues to apply in the case of a ward until the ward is discharged from wardship on the making of a declaration under s. 55(1). No such declaration has been made in the case of the ward the subject of these proceedings and she has not been discharged from wardship. Therefore, the court can continue to exercise its wardship jurisdiction in relation to the ward.

146. On the assumption that Hyland J. is correct in concluding as she did in *Re. KK (No. 1),* that it is not open to the court in exercise of its wardship jurisdiction to make a "*new*" or "*fresh*" detention order in the case of an existing ward, no such issue arises in this case where the court is, instead, being asked to exercise its wardship jurisdiction to continue an existing detention order (and related care and treatment provisions) which long predates the commencement of the ADMCA. I am satisfied, therefore, that there is nothing in *K.K. (No. 1)* which would preclude the court from continuing the detention order in exercise of the wardship jurisdiction vested in the court by s. 9 of the 1961 Act and continued by s. 56(2) of the ADMCA, provided it considers that order to be necessary and appropriate in the case of the ward. There is no dispute between the parties that the evidence demonstrates that a continuation of the orders pertaining to the detention, treatment, placement and care of the ward are necessary and appropriate and in her best interests. I am completely satisfied on the evidence of Professor Sadlier, the independent consultant psychiatrist, Dr. O'Donoghue, the consultant physician and geriatrician, and Ms. Curry, the independent solicitor, that that the continuation of these orders is necessary and appropriate and in the ward's best interests.

8. Conclusion

147. For all of the reasons set out in this judgment, I have decided that the court was obliged to proceed with a review of the ward's detention under s. 108(1) of the ADMCA, notwithstanding that the ward:

(a) does not have a "*mental disorder*" and

(b) does not have a responsible consultant psychiatrist.

148. Having proceeded with a review of the ward's detention under s. 108, I have concluded that it is not open to me to continue the ward's detention in the accordance with s. 108(2) on the basis that the ward is not suffering from a "*mental disorder*". I have also

concluded that it is not open to me to make to make an order under s. 108(4) discharging the ward from detention on the basis that she is not a person who is "*no longer suffering from a mental disorder*" since there is no evidence that she ever suffered from such a disorder from which she is no longer suffering. Having carried out the review under s. 108, I am satisfied that it is appropriate for me to make no order on the review apart from an order providing for the costs of the independent solicitor, Ms. Curry.

149. I have also concluded that the court retains its wardship jurisdiction in the case of the ward, that jurisdiction being vested in the court by s. 9 of the 1961 Act and continued by s. 56(2) of the ADMCA. I am satisfied that there is nothing in the judgment of Hyland J. in *K.K. (No. 1)* which would preclude the court from continuing the existing detention order in exercise of the court's wardship jurisdiction as this would not amount to the making of a *"new"* or "*fresh"* detention order. As stated, I am satisfied that it is necessary and appropriate and in the ward's best interests that I continue the detention order and the other aspects of the order providing for the ward's ongoing treatment and care in the placement, subject to further review by the court in the normal way under its wardship jurisdiction. I suggest a further review within three months of the delivery of this judgment.

150. I will hear counsel further as to the appropriate form of order to give effect to the terms of this judgment and as to the appropriate date on which to further review the ward's detention in her current placement.