AN CHÚIRT UACHTARACH
THE SUPREME COURT

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S:AP:IE:2020:000132

O'Donnell J.
McKechnie J.
Dunne J.
O'Malley J.
Baker J.

In the Matter of J.J.

Judgment of Ms. Justice Marie Baker delivered the 22 day of January, 2021

1. I would like to take this opportunity to make some observations separate from the joint judgment just delivered ("the Principal Judgment") regarding the jurisdiction of the court in minor wardship matters as for the reasons I will here explain I am of the view that the jurisdiction is capable of being exercised in a flexible and limited way so as to preserve the essential rights and obligations of the parents, of the minor and of the family generally in the constitutional order.

2. Section 9 of the Courts of Justice Act 1961 transferred to the High Court the jurisdiction in lunacy and minor matters, and had the procedural or jurisdictional function to vest the powers theretofore exercised by the Lord Chancellor. The section does not create or define the power: see MacMenamin J. in *AM v. Health Service Executive* [2019] IESC 3, [2019] 2 IR 115 at para.

53. That recent judgment of this Court reviews and analyses the historical evolution of the jurisdiction and it is not necessary to further consider it in this judgment.

3. No distinction is made in the section with respect to adult persons or minors, nor does the section define the basis, nature or extent of the jurisdiction, save by reference to the historic powers of the Lord Chancellor.

4. Most of the reported cases concern the exercise of the jurisdiction in regard to adult persons who lack capacity, and the authorities concerning the wardship of minors are more concerned with the types of orders that may be made than with the basis of the jurisdiction itself. There is, as will appear below, some suggestion in the authorities, arising perhaps from its origins in the Courts of Chancery, that the wardship jurisdiction in regard to minors is different from that in regard to adult persons lacking capacity.

Fairness and constitutional justice

5. While the jurisdiction of the President of the High Court in wardship has been variously described as "special" or "unique" (p. 111) *per* Denham J. in *Eastern Health Board v. M.K.* [1999] 2 I.R. 99, and "set … in a place apart" (p. 110), it is well established that due and fair process is essential to vindicate and protect the constitutional rights of the ward, or others affected, including those of a parent and child to the care and company of the other. Lynch J. in his concurring judgment in *Eastern Health Board v. M.K.* recognised that administrative issues could arise in the course of conducting and administering the wardship of minors after they had been made wards of court, but that the order taking a minor into wardship is not an administrative act. Because of the consequences of the making of an order taking a person into wardship, that seems to me to be correct, albeit the procedures and practices in wardship are not those in a true *lis inter partes* and are inquisitorial.

6. The requirements of fairness in the process leading to the taking of a person into wardship were considered by this Court recently in the judgment of O'Malley J. in *AC v. Cork*

University Hospital [2019] IESC 73 at para 370 *et seq.* and from that and the earlier authorities can be discerned the proposition that, having regard to the profound consequences for the rights and freedoms of a person, the taking into wardship is not a mere administrative matter, but is rather one made after affording constitutional and fair process.

7. Order 65 r.4 of the Rules of the Superior Courts provides the procedures to be followed in minor wardship and for the commencement of the process by originating summons grounded on affidavit, and the rule makes provision for certain matters that must be included in the affidavit evidence. The procedure is fundamentally different from that in adult lunacy where there are two ways by which the wardship process is initiated: the sending out of a medical visitor to examine the person under section 11 of the Lunacy Regulation (Ireland) Act 1871; or the alternative commencement by petition under section 12. O'Malley J. in *AC v. Cork University Hospital,* quoting from a decision of Kelly J. (as he then was) in *F.D (an Infant) v. Registrar of Wards of Court* [2004] 3 IR 95, regarded the sending out of the medical visitor as a judicial act and "part and parcel of the judicial process" (para. 232).

8. In the course of her judgment she criticised the absence of procedural safeguards and the lack of clarity regarding the threshold requirements for admission to wardship or the scope of the jurisdiction which had in her view cumulatively denied Mrs. C (the Ward) her voice in the proceedings. But she held that, whilst the order taking Mrs. C into wardship was invalid, it did not necessarily follow that every order made within the rubric of the jurisdiction was itself unlawful (para. 364) and that the jurisdiction to make protective orders exists once the wardship proceedings have commenced. As she said: "[t]he breadth of the wardship jurisdiction permits protective measures to be taken when such proceedings are in being" (para. 378).

9. The same principles apply in regard to minor wardship in my view. In the present case the wardship process concerning John commenced with the summons of the Hospital, and

thereafter the President was entitled to invoke the processes and procedures available in the wardship jurisdiction, and to treat the proceedings as not wholly adversarial or *inter partes*. For that reason the President was competent to appoint a guardian *ad litem* to separately represent John's interests, to reopen the inquiry in October when fresh evidence emerged that John's dystonia had improved in response to treatment, and to herself raise questions of the medical witnesses.

10. The evidence over the course of the hearing showed, for the reasons more comprehensively analysed in the Principal Judgment, that the invocation of the wardship jurisdiction was justified and that the process and procedures engaged by the President were permissible, albeit the order taking John into wardship was not one that properly could have been made on 15 September 2020 before his parents and the guardian *ad litem* had had an opportunity to fully address the evidence and arguments. The evidence, and the necessity to make orders for the protection of the person of John, in my view justified the making of an order taking him into wardship, and the fact that the order was made too early in the process does not require that this Court make an order *simpliciter* vacating the wardship order as the basis of criticism was the time the order was made and not the reasons therefor.

***Parens patriae*: the source of the jurisdiction?**

11. The foundation of the jurisdiction was described by Lord Eldon in *De Manneville v. De Manneville* (1804) 10 Ves. 52 as one "delegated to the Court by the Sovereign, who as *parens patriae*, has the care of all persons who are unable to take care of themselves". Lord Eldon recognised that, whilst doubts might exist as to the origins of the jurisdiction, it arose from the absolute necessity that such a jurisdiction should exist, albeit it was one "subject to the most scrupulous and conscientious conviction of the judge": *Wellesley v. Duke of Beaufort* (1827) 2 Russ 1.

12. The detailed treatment of this Court in *Re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 IR 79 did consider that the jurisdiction to give directions in regard to medical treatment derived from the *parens patriae* jurisdiction of the Lord Chancellor but the Court did not there require to consider whether the jurisdiction continued to exist in the same form as theretofore, or whether any constitutional restrictions were to be implied, whether in regard to minors or adult persons of unsound mind.

13. While Finnegan P. in *J.M. v. Board of Management of St. Vincent's Hospital* [2003] 1 I.R. 321, did rely on his *parens patriae* jurisdiction because of the urgency he perceived in the medical needs that arose for consideration, the source of the jurisdiction in the Crown prerogative has been doubted, and may not properly reflect the rights-based approach of modern legal discourse and sufficiently protect constitutional and ECHR rights.

14. In *O'Farrell v. Governor of Portlaoise Prison* [2016] IESC 37, [2016] 3 IR 619 at p. 709 McKechnie J. observed that the decision of Murray C.J. in *N. v. Health Service Executive* [2006] IESC 60, [2006] 4 IR 374 "can be regarded as an exercise of a *parens patriae* jurisdiction [but also] as the implementation of the constitutional obligation on the courts to vindicate, as far as practicable, the welfare and personal rights of a child."

15. Some doubts have been expressed as to whether the Crown prerogative and the *parens patriae* survived the enactment of the Constitution, particularly by O'Neill in *Wards of Court in Ireland* (First Law 2004) at paras. 1.5 *et seq*, and also by Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (5th Ed. Bloomsbury Professional 2018), who, in the footnote discussion of *Re a Ward of Court (withholding medical treatment) (No 2)* (footnote 83 to para. 7.3.3), thought it difficult to see how this ruling and the similar one in *JM v. Board of Management of St Vincent's Hospital* could be reconciled with the decisions in *Byrne v. Ireland* [1972] IR 241, *Webb v. Ireland* [1988] IR 353, [1988] ILRM 565 and *Howard v.*

Commissioners of Public Works [1994] 1 IR 101, [1993] ILRM 665 that none of the royal prerogatives survived the enactment of the Constitution of the Irish Free State.

16. Barrington J. in his judgment in *Eastern Health Board v. M.K* described the jurisdiction of the President as a "venerable and useful jurisdiction which is directed to protecting wards of court and which is largely administrative in character". But he too thought that decisions which affect constitutional rights such as those concerning whether a person should be admitted into wardship are not purely administrative. He regarded the proposition that the Sovereign is a "*parens patriae*" as one which has no place in a modern democratic republic, and that the court should be slow to trespass upon the rights reserved to the parents of a child, so that under Article 42 the State can supply the place of the parents only in exceptional cases.

17. Precisely how the jurisdiction evolved does not need to concern us in the present case but I prefer the approach of Finlay C.J. in *Re D.* [1987] I.R. 449, that this power derives from Article 40.3.2 of the Constitution, and the power to protect both the property and person of every citizen, and I agree with the more complete observations of McKechnie J. in his separate judgment.

18. What is of importance however is that a review of the case law shows that the jurisdiction in wardship was once exercised by the Courts of Chancery, and after the Supreme Court of Judicature Act (Ireland) 1877 became exercisable in all courts without distinction. This source of the jurisdiction is useful for the purposes of ascertaining its nature, and in what manner it is to be exercised, and its origins in the Courts of Chancery would suggest that the power is equitable in the broad sense both as regards the procedures that may be invoked and the powers that may be exercised. In *Re D* Finlay C.J. regarded the jurisdiction as discretionary (at p. 456), and more recently MacMenamin J. in *AM v. HSE* at para. 30 said "Admission to wardship is a discretionary order. The President was exercising a judicial discretion in an area where he should have had some latitude."

19. Later in the same judgment MacMenamin J. said at p. 140, para. 60:

> "The jurisdiction is, undoubtedly, a wide one, albeit to be read in light of the Constitution, ECHR jurisprudence, and the rights guaranteed and outlined there. A court is empowered to make such *ex parte* or interlocutory orders as are necessary to give effect to this broad jurisdiction, and for the protection of the rights, interests, and welfare of the person involved, as well as property."

20. As with any equitable jurisdiction, its purpose is to achieve a just or fair result by the exercise of a flexible and principle-based approach, one by which the court may itself fashion a remedy that most appropriately meets the interests of the parties and the facts. The jurisdiction therefore could be said not to be rule-based, but to have as its starting point the search for a solution that is just.

Different from adult lunacy

21. The most common circumstance in which the wardship jurisdiction is invoked with regard to a minor is where what is sought to be done is protect his or her property interests. This was explained in *Re J.S. (an infant)* [1976] 111 I.L.T.R. 146. But many of the old reported cases concern directions as to the education, place of residence or religious upbringing of minors, and not the protection of property: see for example *Re Westby (Minors) (No.2)* [1934] I.R. 311

22. The first modern written judgment of the Irish courts concerning the nature of the jurisdiction of the High Court or Circuit Court in minor matters is the judgment of Keane J., in the *State (Bruton) v. MacDermott Fawsitt* [1984] IEHC 8, a judicial review challenging the jurisdiction of the Circuit Court where the minor did not have property to be protected.

23. Keane J. considered that the jurisdiction in minor wardship did not depend on the possession of property by the minor. The desirability that an infant would have property or other financial resources arose from the concern that the absence of property might make the

court reluctant to exercise its jurisdiction if financial resources might be required to supervise or put in place the arrangements it might direct on a wardship. This approach is consistent with earlier authorities: Lord Eldon in *Wellesley v. Beaufort*.

24. Keane J. found the jurisdiction to exist in any case where "it appears to be in the interests of the infant's welfare", and also that the statutory limits in s. 22(1)(a) of the Courts (Supplemental Provisions) Act 1961, by which the Circuit Court was given concurrent with the High Court jurisdiction in proceedings "for the wardship of infants and the care of infants' estates", were concerned with the limited and local jurisdiction of the Circuit Court and did not limit the broader original jurisdiction of the High Court.

25. Keane J. viewed the purpose of the jurisdiction to be the protection of the welfare of the minor. That may in my view support an approach that admits the making of limited orders within that sphere where matters of welfare call for protection. This approach is found in the leading reported cases from the Irish Chancery Courts.

26. The old Irish Chancery Courts treated the jurisdiction of the Court over minors as different or separate from that in lunacy. This is apparent from *Re Edwards* (1879) 10 Ch.D 605 where the question was whether, if a minor ward became incapacitous, the further exercise of the protection of the Court of Chancery was precluded, or whether the jurisdiction and procedures of the Court of Lunacy under the Lunacy Regulation Act 1862 were then to be invoked. James L.J. on appeal held that the minor remained under the protection of the Court of Chancery as guardian of the welfare of minors generally, the jurisdiction being one "over an infant as such" and that the lunacy jurisdiction was not engaged notwithstanding the "state of mind" of the minor.

27. In the old Irish Chancery case of *In re Meades, Minors* (1871) 5 I.R. Eq. 98, on a petition by the maternal aunt of the minors that the minors be made a ward of court for the purposes of directing their religious education, the Lord Chancellor, O'Hagan L.C., considered

that the court did have the jurisdiction to take the children into wardship, although it is to be noted that there was no substantial controversy concerning that jurisdiction, and the real area of dispute was the grounds on which the jurisdiction should be exercised. The Lord Chancellor noted the reciprocal relationship between parent and child and that the intervention of the court could be justified only for the "most coercive reason". What is worthy of comment is that the Lord Chancellor identified the power of the court as twofold: to restrain any abuse of the duty of a parent towards a child, or for the purpose of ensuring that the interests of the child are "legitimately guarded", and when the court is satisfied that those interests cannot otherwise be secured. The authorities identified by the Lord Chancellor in *Re Meades, Minors* all concerned interference by the court where the behaviour of the parent was immoral or improper, but he considered that the jurisdiction did not require improper behaviour as its purpose is the protection of the welfare of the child. That approach is consistent with the purpose of Article 42A as dealt with in the Principal Judgment.

28. It is especially useful that the Lord Chancellor regarded that the flexible nature of the power to guard the interests of a minor could be achieved by the absolute suspension of the authority of the parent or the imposition of conditions on its exercise, (at page 103), and this latter approach is one that may meet the constitutional position of parents more readily in some cases. The power thus formulated may be said to have the indicia of the equitable jurisdiction and may usefully be compared to an approach that mandates all matters relating to the minor ward to require direction by the court.

29. From this brief review of the case law can be discerned two principles that guide the approach to minor wardship: its flexible nature is equitable and the jurisdiction may permit of the making of directions regarding welfare without an absolute suspension of the legal rights and duties of parent and child.

30. I return later to this approach which I consider can meet the requirements of a constitutional and proportionate response to the medical concerns regarding John's treatment.

31. But first I wish to examine the broad reach and consequence of the order made by the President taking John into wardship.

The broad reach of the order

32. In *Re Westby (Minors) (No.2)*, it was considered that once a minor was made a ward of court, all matters concerning his or her welfare became the responsibility of the court, and even matters such as directions regarding holidays and education came to be dealt with under its direction.

33. The role of a Committee appointed by the President of the High Court is well understood in the authorities, and derives from the power under ss. 12 and 15 of the Lunacy Regulation (Ireland) Act 1871. The duties and powers of the Committee of the Person of the ward are described in some detail in Chapter 3 of the text by O'Neill, *Wards of Court in Ireland* as involving the duty to "see to the ward's care, treatment and wellbeing" and requires the Committee to visit the ward from time to time and report on his or her needs and special requirements and the Committee is required to make returns periodically to the Registrar of Wards of Court. What is evident is that the Committee of the ward, while he or she has day-to-day duties and powers in relation to the ward, acts at all times under the supervision of the High Court through the Registrar of Wards of Court, and for example, a change of residence could not be arranged without leave of the Registrar. The Committee does not have an inherent or independent power.

34. But the duty of a guardian of the person appointed in respect of a minor ward is much less clear. In *Re J.S. (an infant)* and in *Re J.L. (a minor)* (Unreported, High Court, March 1978), it was considered that the power of the court to give directions regarding the welfare of a minor ward is not restricted by statute, and is more extensive and flexible than those under

the Guardianship of Infants Act, 1964. Thus, notwithstanding that when a minor is taken into wardship the rules of court provide for the appointment of a guardian of the person of the ward, it would seem that the court continues to exercise a continuing supervisory function and it is the court and not that guardian who issues directions as to all aspects of welfare. The guardian of the person is not a guardian or the person with the primary decision-making power and duties regarding the minor, save and insofar as they are expressly vested by the order. The taking of a child into wardship therefore must be seen as more far-reaching or overreaching than the making of an order taking a child into care under the Child Care Act 1991.

35. MacMenamin J. in *AM v. HSE* observed at para. 9 that the deprivation of the power to make many choices integral and fundamental to everyday life may sometimes be "over-broad in their effect and disproportionate in their scope".

36. The loss of parental power and autonomy crystallised in the perceived need for a routine operative procedure administered to John in early December. The parents had no objection to this medical intervention which was clearly for his benefit and did not involve any additional risk to his health or welfare. Nonetheless, because of the broad sweep of the order made by the President of the High Court, her authority was required before the operative procedure could be conducted and the parents' normal right to consent to what was regarded by all parties as fairly routine treatment was abrogated.

37. This retention by the court of all decision making and of power to give directions over all aspects of the ward's welfare can seem to lie uneasily with the constitutional, ECHR and statutory recognition of the right and corresponding duty of parents to make choices and decisions regarding the welfare of a child, and indeed the rights of the child that those decisions be made by his or her parent. Barrington J. in *Eastern Health Board v. M.K,* while he accepted that the jurisdiction was ancient and had as its concern the welfare of children, considered that the wardship jurisdiction could be said to have survived the enactment of the Constitution only

and insofar as it is not inconsistent with its provisions. A constitutional approach to the wardship jurisdiction of the High Court in regard to minors must have regard to the balance of interests between the powers and duties of the court in wardship and those of parents deriving from their rights and duties as parents. It would seem for that reason that whilst the jurisdiction in wardship over so-called lunatics or adults who are of unsound mind may justifiably be seen as "all-or-nothing" and to have the profound consequences for the autonomy of the person described *in AM v. HSE* and most recently by O'Malley J. in *AC v. Cork University Hospital,* that by reason of the fundamental protections for the parent/child relationship and of the family in the constitutional order the wardship of a minor may in some circumstances have to take a different approach, as there does exist a constitutionally recognised decision maker with capacity.

38. It follows that, insofar as the power exists to take a minor into the wardship of the High Court for the purposes of protecting its welfare, it more properly must be seen as limited for that purpose and as a power to be exercised in a constitutional and proportionate manner and which should not unnecessarily overreach the power and duty of parents. In the present case it seems to me that the use of the wardship jurisdiction by which John was taken into wardship for all purposes was an overreach which was not justified in the circumstances, and the appointment of the mother of the boy as the guardian of his person did not sufficiently recognise or protect her constitutional and other rights and duties to her son, or John's right to have decisions about his welfare made by his parents and those who love and know him.

39. The High Court was in my view justified in invoking its wardship jurisdiction because it was faced with a challenge as to the welfare of the minor and where the guardian *ad litem* appointed by the court to act as the voice of and on behalf of the minor took a view quite different from that of his parents regarding the medical treatment that was warranted and justified in the light of the pain from which he was then suffering. However, I do not consider

there was any imperative that the High Court make the wardship order on an absolute basis and it was competent in my view to limit the scope of the wardship by giving directions as to the medical treatment of the minor without taking or vesting in the court all authority over John. A more appropriate and constitutionally acceptable approach could have been to exercise jurisdiction in the limited area in which the dispute arose, namely the administration of pain-pain-relieving medication and ancillary directions should his condition worsen as a result of the administration of the medication or otherwise. There was no requirement that the wardship jurisdiction extend beyond that limited area of John's medical care and welfare, albeit it can be said at the present time that all, or almost all, questions concerning the boy's welfare do hinge on the immediate need to treat his injuries and his pain. That fact, and the narrow factual matrix in which decisions are now made on behalf of John, admit of a variation in the order to respect the rights of John and the rights and duties of his parents towards him, which it is hoped will come to be called upon should his condition further stabilise.

40. In the circumstances and because the jurisdiction must be seen as flexible from its origins in the Courts of Chancery, I am of the view that the order taking John into wardship ought to have been limited for the purpose of giving directions regarding the administration of pain-relieving medication and life supporting treatment should a dystonic episode require. I accordingly prefer the approach suggested by the Lord Chancellor in *Re Meades Minors* that in lieu of the removal of all parental autonomy, conditions may be imposed on the exercise of parental authority in the medical treatment of John's dystonia and emergency medical care in the manner suggested in the Principal Judgment.

41. The parents of John are entitled to retain their other substantive rights and duties as parents, and John to retain and have respected the right that other decisions regarding his welfare and happiness be made by his parents. That approach properly protects and vindicates

their respective constitutional rights and duties and is proportionate and just in the circumstances.