THE HIGH COURT

WARDS OF COURT

[WOC 10494]

[2025] IEHC 112

IN THE MATTER OF [A] A WARD OF COURT AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 55 OF THE ASSISTED DECISION MAKING CAPACITY ACT 2015 (AS AMENDED) AND

IN THE MATTER OF A DISPUTE CONCERNING THE APPOINTMENT OF A DMR

RESPONDENT

Ex Tempore Ruling of Mr. Justice Heslin delivered on the 13th day of February 2025

1. I am grateful to Ms. Duffy who moves today's application, to Mr. Brady who represents the respondent's father [Mr B], to Mr. Farrell who represents his mother [Ms C] and to Ms. Hill for the H.S.E.

Background

2. The backdrop to this application as the parties are well aware is that a young man, now aged [given], is currently residing temporarily in the United Kingdom in order to receive specialist treatment of a kind not currently available in this jurisdiction.

Complexity

3. Indeed, such was the complexity of his needs and the seriousness of his presentation that he was admitted to minor wardship in October 2020 in order to facilitate treatment in England and the general solicitor for minors and wards of court was appointed as guardian in that context.

Inherent Jurisdiction proceedings

4. The respondent continued to be treated abroad after attaining his majority, in [month and year]. In anticipation of his turning 18, an application was made by the H.S.E. under the court's inherent jurisdiction as a result of which orders were made in proceedings which are ongoing to ensure his placement, detention, and care abroad.

5. In those proceedings the respondent is represented by a *guardian ad litem*, Mr. Niall McGrath, solicitor. His parents, who love him dearly but are estranged from each other, have been intimately involved in those proceedings. Orders made under the court's inherent jurisdiction trespass significantly on the respondent's liberty and autonomy, in order to ensure that he receives necessary care, in vindication of his fundamental rights.

Discharge

6. Today's application concerns the respondent's discharge from wardship under the Assisted Decision-Making Capacity Act, 2015 ("the 2015 Act") and, as Ms. Duffy has pointed out, she swore an affidavit 'underpinning' the application, on 21 November. Of principal relevance is the medical evidence and this comprises of a functional capacity assessment prepared by Dr. D, which is dated 9 November last.

Medical evidence

7. Dr. D is satisfied that the respondent lacks capacity to understand, or to retain, or to use or weigh information relating to personal welfare decisions and has a very limited capacity to understand, retain, use, or weigh information concerning property and affairs decision making. She opines that the respondent lacks capacity in both of these areas even if the assistance of a suitable person as co-decision maker were made available to him.

8. As all parties involved in the proceedings to date are well aware, this latest assessment of capacity reflects many others by a range of consultant psychiatrists and clinicians, both here and in the United Kingdom who have been involved in the respondent's care.

Assets

9. In terms of assets, they are not substantial. The general solicitor does not hold any committee account and there are no funds held in court. The respondent's assets comprise primarily an entitlement to disability benefit as well as certain relatively limited funds. It is also averred that there is no enduring power of attorney known to exist and no advanced health care directive.

DMR

10. It is further averred by Ms. Duffy that in light of the evidence it would be appropriate for a decision-making representative, or "DMR", to be appointed to make decisions concerning both the respondent's personal welfare and his property and affairs, subject to the obligations set out in s. 8(7) and (8) of the 2015 Act.

Section 8 (7) and (8)

11. Those sections are particularly important in this case, in that they require a DMR to encourage and facilitate input from the respondent insofar as possible and entitle the DMR to consider the views of those caring for or having a *bona fide* interest in the welfare of the

respondent and that includes health care professionals, of which there are a large number involved in the respondent's care.

The respondent's views

12. Although, in the manner I will come to, there is a level of disagreement in relation to in particular the choice of DMR, there is consensus that the views and the voice of the respondent are of paramount concern when it comes to the identification of a suitable DMR for appointment. That is of course reflective of the 2015 Act's provisions [See S. 38 (5) (a)]. In this regard, I have the benefit of an affidavit of service sworn by Ms. Katherine Kelleher, Solicitor for the H.S.E. on 14 January. She exhibits a very detailed note of her meeting with the respondent which took place in his placement in England on the 13th January and it is appropriate to quote as follows from same. Ms. Kelleher states:-

> *"I was aware that the respondent had indicated already in writing that <u>he wanted his mother and father</u> to be the decision-making representatives.* [A] *said yes when I said that to him."* (emphasis added).

13. She proceeds to refer to certain types of decisions a DMR might make and went on to state *inter alia*:

> *"I again, indicated to him that I believed <u>he wanted his parents</u> to be his decision-making representatives and he nodded his head in consent."* (emphasis added).

14. Later, Ms. Kelleher states *"I advised him of the contents of the notice of motion and I then went through Christina Duffy's affidavit and explained to* [A] *the various documents that were exhibited to it and what the affidavit was explaining, and I also gave him an overview of the contents of Dr.* [D]*'s report and the consequences of her recommendations, that is that she was recommending that the decision making representative would be appointed to him".*

Parents

15. Ms. Kelleher then explained to the respondent the difference between today's application and those orders which are in being placing him in [the named hospital] and the fact that those orders would continue to be the subject of regular reviews by this Court. In the final paragraph of her attendance Ms. Kelleher details how she returned to the topic of DMR, yet again, and it is clear that for a *third* time the respondent indicated that his wish is for his "*parents"* (and I emphasis plural) to be his DMRs.

Participation

16. In relation to the respondent's participation today it is clear that when asked if he wished to attend he made no response. Furthermore, Ms. Duffy swore an affidavit on 27th January 2025 averring that Ms. E, social worker and care lead in [the named] placement in the U.K., advises that to attend today's hearing even remotely is likely to be overwhelming for the respondent.

17. Ms. Duffy also exhibits an email from Ms. E of 24th January 2025 in which the social worker states *inter alia*: "[A] *has repeatedly stated that he wishes for his parents to act as decision makers*" (emphasis added). It is also indicated by Ms. E that no injustice would arise "…*as* [A] *has been able to share his views for consideration during the hearing*" and his views are very plainly, consistently and repeatedly, that he wishes his parents (plural) to be his decision-making representatives.

S. 139

18. In light of the evidence I have just touched on, there is clearly no injustice with proceeding in the respondent's absence and I say that having regard to s. 139 of the 2015 Act.

Welfare decisions in light of Orders made under the Court's Inherent Jurisdiction

19. Each of A's parents have sworn affidavits in relation to the question of a DMR and, before looking at the evidence in those affidavits, it is important to refer to the role envisaged under the welfare heading, in light of the existing inherent jurisdiction proceedings. A key question which arises is whether it is envisaged that a DMR or DMRs would 'step into' the role of, effectively, respondent to those proceedings, a role which up to now Mr. McGrath has performed in his capacity as *guardian ad litem,* just as he did in the previous minor wardship proceedings. On that specific topic [the respondent's father] Mr. B makes the following averments, at para. 9 of his 10 February 2025 affidavit:-

> *"I am satisfied that* [A] *is receiving a high standard of treatment and that Mr. McGrath has done an excellent job of conveying his will and preference and safeguarding his rights in the inherent jurisdiction proceedings*. *Given the complexity and delicacy of those proceedings it is my strong preference that those proceedings would continue in their current form undisturbed until such time as out of State orders ceased to be necessary."*

20. On that topic, I note in a 4 February letter, the solicitors of the H.S.E. confirm their intention that the inherent jurisdiction proceedings would continue in the current format, that is with Mr. McGrath continuing to represent the respondent as *guardian ad litem* and I also note from the communication exchanged between the respective firms of solicitors that O. 15 r. 17(6) would appear to allow this court to make orders which would facilitate what is envisaged, notwithstanding the appointment of a DMR or DMRs.

21. I also understand from the correspondence and indeed from the very helpful submission by Mr. Farrell that the respondent's mother Ms. C takes a similar view as to the appropriateness of the inherent jurisdiction proceedings continuing with Mr. McGrath acting as the respondent's *guardian ad litem*, rather than that role being performed by any DMR.

22. Therefore, this application is proceeding on the basis that both of A's parents agree that the role of DMR will be limited to matters falling outside of the existing inherent jurisdiction proceedings.

Consensus

23. On the topic of consensus, it is also important to say at this stage that, regardless of the differences between them, both of A's parents share the wish for an appropriate placement in this State to be put in place in order that A can receive necessary care and treatment safely in Ireland. Lest it be thought otherwise, I would stress that this is the clearly expressed wish of the H.S.E. and of Mr. McGrath as *guardian ad litem* and, indeed, something the committee has always supported.

The choice of DMR

24. Turning them to the choice of DMR, Mr. B makes the following averments at para. 16 of his affidavit:-

> *"I say and believe that* [A] *has expressed his view to have his parents appointed as his DMR's for him. However, I say that* [A] *is not fully aware of the past and ongoing complexities and difficulties involved between us. Unfortunately, my relationship with Ms.*[C] *has been very challenging since our divorce and we struggle to agree on very much."*

25. Later, he refers to ss. 39 and 40 of the 2015 Act and his affidavit contains an averment that he is the subject of a personal insolvency arrangement. He further avers that as a result he is not currently eligible to act as DMR given that this role would involve some element of dealing with finances.

26. Mr. Brady (who does not act in those separate financial-related proceedings) has received instructions which clarify that Mr. B is not in fact in such an arrangement, even though it may well be something that occurs. There is no need for a clarifying affidavit, I am entirely satisfied to accept instructions conveyed through Mr. Brady which clarify matters. Mr. B's affidavit concludes with the averment that the DMR should be an independent person appointed from the panel maintained by the decision support service, or "DSS".

27. Turing to the evidence proffered by the respondent's mother, Ms. C swore an affidavit on the 27th January in which she makes *inter alia* the following averments:-

> *"Personal welfare*
> *(a) Decision on where he is currently placed – I appreciate that his decisions in this regard are subject to the order of this honourable court exercising its inherent jurisdiction.*
> *(b) Decisions on agreeing to medical treatment - I again appreciate that his decisions on* [A]*'s treatment are subject to the order of the court exercising its inherent jurisdiction."*

28. However, and subject to the foregoing, it is clear from Mr. C's averments that her "*fervent wish*" is to be appointed as DMR for the respondent in respect of both personal welfare and property and affairs decision making. In support of her wish to be sole DMR, Ms. C makes a range of averments which focus on and emphasise her close involvement in the respondent's life, and a selection of these comprises the following:

> *"I speak to* [A] *by videocall every day when he also speaks to his brothers.*
> *I am his primary care-giver and the person he turns to for any of his needs.*
> *I take part in his weekly multi-disciplinary team meeting on Tuesday by video link during which meeting I am able to help the staff at his new placement understand* [A] *how to deal with him and what needs he is communicating.*
> *My estranged husband also speaks to* [A] *by telephone and also travels to the U.K. to see him but not as often as I do. He also attends weekly MDT meetings.*
> *I am the person who has sole custody of* [A] *as a minor and who is the person mostly intimately involved in his care."*

29. On these issues Mr. B's affidavit contains averments which include:-

> *"I have been* [A]*'s joint primary carer with Ms.* [C] *and* [A] *relies on me significantly every day. In addition to my daily contact with* [A] *I attend all of his weekly medical MDT meetings including many other meetings arranged periodically throughout the year."*

30. Mr. B also avers that he and Ms. C are independently involved in buying items of clothing and purchasing day to day items for A on their visits to him in hospital. Later, he avers that he and Ms. C entered the personal insolvency system, and he avers that in circumstances where Ms. C has existed albeit in October of last year it would not be appropriate for her to act as DMR, given that she was so recently in a personal insolvency arrangement.

31. I pause to say that no weight in my view is to be given to the fact that Ms. C was previously but is not now in a personal insolvency arrangement. It does not seem to me that this issue is to play any role in the decision I have to make.

The dispute concerning DMR

32. More important is, as touched on earlier, Mr. B maintains that it is appropriate for a wholly independent person from the DSS panel to be appointed, whereas his estranged wife maintains that she should be appointed as sole DMR in both areas.

33. Ms. C swore a further affidavit on 11 February 2025. Whilst she acknowledges that A has a good relationship with his father and that Mr. B maintains contact with A she does not agree that he is A's joint primary carer. She goes on to make averments in relation to the purchase of clothing, food, drink, footwear, computer games and personal items, as well as averring to the

cost of same which she has discharged in the last three months. She avers among other things that Mr. B is unaware of the many items that are purchased by her for the respondent in between her visits every two weeks. She expresses disappointment at his mention of the personal insolvency arrangement and she exhibits her certificate to the effect that she completed her insolvency process on [date in] October 2024. She also takes issue with the suggestion contained in Mr. B's affidavit that the matter might be reviewed in twelve months' time, suggesting that there is no reality to this given what Mr. B has averred in relation to their failure to agree on very much. She also makes averments to the effect that clinicians have recommended the appointment of family and she refers to correspondence which is exhibited.

Views of clinicians

34. The first is a letter of the 22nd January 2025 in which the solicitors for the H.S.E. state *inter alia* that they have received instructions from Mr. [F] Head of Services and Dr. [G] Consultant Psychiatrist and Clinical Director of the relevant H.S.E. mental health services that they would be "*supporting the appointment of* [A]*'s parents as DMR's for* [A]" and I pause to say that the appointment of A's parents (plural) as DRM's is exactly the respondent's wish. It is also the recommendation of the those caring for A day-to-day in [named placement] and as this letter makes clear it is the recommendation of H.S.E. clinicians.

Not possible to give effect to the respondent's wish

35. However for the reasons just given it is not possible, given the differing views held by A's estranged parents. In other words, this is not simply a situation where both parents wish to be DMR's jointly but because one is disqualified from acting at this point both are currently happy for only one parent to perform the role. Were that the case it would come close, indeed as close as possible, to reflecting A's expressed views but that is not the factual position which emerges from the evidence.

36. The second item of correspondence is an email of the 11th February sent by Dr. [H] of [the named placement] to Mr. Niall McGrath, solicitor, being of course A's guardian *ad litem* in the inherent jurisdiction proceedings and in it Dr.[H] states *inter alia: "I can confirm that it is in the best interests of* [A] *for <u>his parents</u> to be appointed as his DMR*" and I pause to say that the letter again refers to "*parents*", plural. The letter goes on to say:-

> "[A] *shares a healthy relationship with his parents and they are actively involved in his current therapy plan and very supportive of him. I agree it is better to appoint his family member as the DMR rather than an independent professional."*

To prefer one over another

37. I pause to say that nowhere does any professional involved in A's care suggest that one parent should be preferred over the other in the event of a lack of consensus between them. Rather, it is clear from the evidence that all relevant professionals believe it is in A's best interests for *both* his parents to be appointed as his decision-making representatives.

38. I am very grateful to Mr. Brady and Mr. Farrell who have made submissions on the basis of the evidence which I have just summarised. It is not necessary to set out the submissions which I have had so recently had the benefit of.

Summary of submissions

39. In short, Mr. Brady has received very clear instructions that his client, A's father believes a panel DMR should be appointed in all areas. By contrast Mr. Farrell has plainly received clear instructions that A's mother wishes to be appointed as sole DMR in both areas and, among the submissions made, is that one could image a situation arising where welfare decisions which fall outside those covered by the inherent jurisdiction proceedings need to be made and, although they may be accurately described as 'peripheral', the submission is that because of the regular and intimate contact as primary carer, the respondent's mother is best placed to do that.

40. In fairness, it was also acknowledged explicitly that the respondent's father is "*very invested*" in the respondent's care. It was also acknowledged explicitly that the panel nominee whom I will come to is eminently qualified to act as DMR is all areas and in all matters, but it was also submitted that it would be overly burdensome, in effect, for the panel DMR to take on the role in this case.

41. As I hope is obvious, I have spent many hours with the papers wrestling with the issue, and I have come to the following decision.

Decision on DMR

42. First, it is not possible to give effect to A's expressed preference which is for both his parents to act as decision making representatives and the 'north star' in terms of guiding this Court must be the expressed preference of someone existing wardship.

43. Without intending any disrespect, it does not seem to me that in the particular facts of this case a decision on the appointment of a DMR can 'hinge' on the proposition that one parent is more involved than the other when, in fact both, are actively involved in care and there has never been any doubt about the fact that both parents love A dearly and, doubtless, vice versa.

44. While it is not a criticism, it is certainly a fact that the unhappy differences between A's estranged parents have prevented them from reaching a consensus in relation to the choice of DMR at this stage.

45. I acknowledge that the general solicitor is supportive of Ms. C being appointed as DMR for property and affairs, although urges a panel DMR be appointed in welfare, whereas Ms. C wishes to be appointed in both areas.

46. Again, without intending any disrespect I do feel obliged to reject the proposition that appointing the respondent's mother as DMR in both areas, despite the objections of the respondent's father, reflects or comes close to reflecting the respondent's will. In my view, there is nothing whatsoever in the evidence which would allow this court to find that this vulnerable young man wishes *one* parent to be appointed if the other did not agree. His clear and repeated wish is for *both* to act.

47. In my view, having very carefully considered the evidence, it is not serving the aim of preserving relationships in the manner envisaged in the Act [see s.38 (5) (b)] to prefer one parent where the other does not support this and, instead, submits that an independent panel member should be appointed.

48. I take the view, in these particular circumstances, that the court should avoid doing anything which has the potential to increase discord between the respondent's parents for the very important reason lest it affect A negatively.

49. Other factors in this decision include, first, for the foreseeable future all significant and material decisions concerning personal welfare are likely to flow from orders made by this Court in exercise of its inherent jurisdiction.

50. Second, A has limited financial assets and, therefore, the role of the decision-making representative in that realm is likely to be limited.

51. Third, there is nothing which needs to be done - be that managing financing day to day, renewing a passport, opening a bank account or applying for disability welfare - which an independent DMR could not readily do.

52. Fourth, no decision I have made will prevent either parent from acting day- to-day in the manner have acted up to now.

53. In addition, ever since A's admission to minor wardship, there has been an independent party playing a role, namely, the general solicitor and, latterly, including the *guardian ad litem*. Whilst it is not envisaged that the DMR would take over the role of Mr. McGrath, it does seem to me to add something materially for the benefit of the respondent that there would be single and entirely independent DMR appointed for him, someone who doubtless will be kept up to date and possibly involved in having a view in relation to care going forward, including the question of advocating for a return to Ireland to a suitable placement.

Independent DMR from DSS panel

54. For these reasons having carefully considered the evidence and submissions for which I am grateful, I am satisfied it is most appropriate to appoint an entirely independent person from the DSS panel to fulfil the role of DMR in both areas.

55. In relation to nominations the approval of Ms. Sinead Maguire has been made in relation to both personal welfare and property and affairs decision making. As to qualifications, Ms. Maguire is an experienced solicitor as well as a qualified mediator. She has particular expertise in public health and mental health law. She has experience of representing a range of clients with severe mental health issues and acting for vulnerable persons. As well as lecturing on mental health law, she is a board member of the Disability Consultative Committee, among others. Being a solicitor, she is also an officer of this court and, in these particular circumstances, the experience and expertise of such an independent professional has in my view the potential to be of benefit to A. [Her appointment] will certainly avoid any situation where a decision is made by this court which contributes to unhappy differences as between A's estranged parents.

56. I want to emphasis also that the decision made today takes nothing away from the enormous love which both of A's parents have for him and for their commitment to him, year after year, day after day, with the objective of securing the shared [aim] of having him receive care at home in Ireland.

The future

57. I am also very conscious that in the course of Mr. Farrell's submissions, it was made clear that if at a future point there was no question of Mr. B being disqualified by virtue of a provision in the 2015 Act, there would be an openness to joint appointment. It seems to me that as soon as both parents are eligible to be appointed jointly that this issue can and should be revisited but for the moment I now turn to the formalities of a declaration which emerges from the evidence.

Declaration

58. I am declaring pursuant to **s. 55(1)(b)(ii)** of the Act that Mr. A lacks capacity in the areas of personal welfare and property and affairs even if the assistance of a suitable person as co-decision maker is made available to him.

59. Having made a '**s. 27 order**' at the outset, the balance of the orders in summary are as follows

- to formally discharge Mr. A from wardship in light of **s. 55(5)(b)** and to remit him to the management of his affairs with the appointment of a suitable DMR;
- to order the appointment of Ms. Sinead Maguire as DMR pursuant to **s. 55(5)(b)** in the areas of both personal welfare and property and affairs decision making;
- to order that the DMR be authorised to take custody, control and management of the assets of the respondent, if any, held in the particular account referred to in the application;'
- to order the DMR account to the director of the DSS as required by **s. 46(6)** of the 2015 Act;

- having regard to **s. 42(1)** and **(2)** the DMR is not entitled to be reimbursed from the respondents' assets in respect of either expenses or renumeration in the performance of the role of DMR;
- the DMR is also authorised to liaise with the Department of Social Protection for the purposes of an application for disability allowance or any other benefit to which the respondent may be entitled;
- given A's young age and the medical evidence I touched on earlier, it is appropriate to order that his capacity be reviewed by the Circuit Court no later than one year from the date of this order; and
- the applicant is authorised to share a copy of the application papers with the DMR.