THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 225

Record Number: 2020/59

Whelan J.
Faherty J.
Collins J.

IN THE MATTER OF [A]

AND IN THE MATTER OF THE LUNACY REGULATION

(IRELAND) ACT, 1871 AS AMENDED

BETWEEN

[S] LIMITED

Respondent

AND

[A]

Appellant

AND

[F]

Notice Party

On 10 March 2020 the Court of Appeal made an Order pursuant to Section 27 of the Civil Law (Miscellaneous Provisions) Act 2008 prohibiting the publication or broadcast of any matter relating to these proceedings which would, or would be likely to, identify A or F.

JUDGMENT of Mr. Justice Maurice Collins delivered on 5 August 2020

1. The Court today gives its detailed reasons for allowing the appeal of the appellant (referred to in this judgment as "*A*") from the decision of the then President, Kelly P, declining to adjourn a wardship inquiry in respect of him. The decision of the President was given on 4 February 2020. The inquiry was listed for hearing (before McDonald J) on 12 and 13 March 2020 and A's appeal, given its obvious urgency, was given an early hearing date and was heard by the Court on 10 March 2020. At the conclusion of the hearing the Court indicated that it was allowing the appeal, subject to certain terms specified by Whelan J in her *ex tempore* ruling with which the other members of the Court agreed.

2. I have read in advance the judgment delivered by Whelan J today and I agree with its analysis and conclusions. I wish to add some observations of my own in recognition of the importance of this matter to those involved. In doing so, I gratefully adopt Whelan J's account of the evidence and facts.

3. This was an acutely difficult application. A is an adult man with Down syndrome. The Respondent (referred to in this judgment as "*S*"), which is the institution which has had responsibility for the care of A for the past five years (and which A previously attended on a non-residential basis) and which clearly knows him well, is of the view that A needs the protection of wardship. A's sister and brother both attended the appeal hearing (A's brother having travelled from Australia to do so, as

he had done for previous hearings also). Their commitment to the welfare of their brother was palpable. They are clearly concerned that A is being exploited. They were invited to address the Court (without objection from any party) and each said that their brother was not making his own decisions. It is clear that their relationship with A – which was very close – has been put under severe strain. Each strongly and sincerely believes that their brother is not in a position to make a free and informed decision to marry and both are of view that it is in his bests interests that he should be brought into wardship immediately. On any view, these are powerful considerations in favour of allowing the wardship proceedings to proceed.

4. As against that, if A is made a ward (as seems very likely, if not inevitable, given the applicable statutory test and the nature of the available evidence as to his capacity), a consequence will be that, by virtue of the Marriage of Lunatics Act 1811 ("*the 1811 Act*"), he will not be able to marry the Notice Party (referred to in this judgment as "*F*"), and any marriage he might purport to enter with her would be void.

5. That, in the event that he is made a ward, A will not be able to contract a valid or lawful marriage as long as he is a ward and as long as the 1811 Act remains in force was fairly accepted by Counsel for S. The prohibition on marriage in the Act was, he accepted, absolute and unqualified and the powers of the High Court in wardship did not extend to permitting a ward to marry. That is so even if – as authority from England and Wales suggests is the case – the test for capacity to marry is different

to (and less exacting) than the test for admission to wardship and even if A is capable of satisfying that less exacting threshold. [1]

6. In December 2019 A brought proceedings challenging the constitutionality of the statutory wardship regime, as well as its compatibility with the European Convention on Human Rights (ECHR). Those proceedings impugn (*inter alia*) the 1811 Act. The essential purpose of those proceedings, as I understand it, is to establish that A is entitled to marry or, at least, that he is entitled to have his capacity to marry assessed and determined by a fair and appropriate procedure.

7. The question of whether, and in what circumstances, persons whose intellectual capacity is, for whatever reason, impaired should be permitted to marry raises complex issues. What may be said with some confidence, however, is that societal attitudes to that question have changed significantly since the enactment of the Marriage of Lunatics Act in 1811, eight years before the birth of Queen Victoria. If that proposition requires proof – and if the very title of the 1811 Act is not considered proof enough – it is demonstrated by the fact that in 2015 the Oireachtas enacted the

[1] A "*person of unsound mind and incapable of managing their own affairs*" is liable to be made a ward of Court under the Lunacy Regulation (Ireland) Act 1871. In *Sheffield City Council v E* [2004] EWHC 2808 (Fam), [2005] Fam 326 and again in *X City Council v MB* [2006] EWHC 168 Fam, [2006] 2 FLR 968, Munby J considered in detail the proper approach to assessing the capacity of vulnerable adults to marry. In *Sheffield City Council v E*, he emphasised that the question of capacity was "*issue-specific*". Capacity to marry involves the capacity to understand sufficiently the nature of the marriage contract, including the mutual duties and responsibilities of marriage. It "*is not the same as capacity to look after oneself or one's property*. *Often, of course, someone who lacks the capacity to do the one will also lack the capacity to do the other. <u>But not necessarily</u>*." at paragraph 105 (my emphasis). See also the discussion in the Law Reform Commission's *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) at paragraph 6.48.

Assisted Decision-Making Capacity Act 2015, section 7(1) of which repeals the 1811 Act.[2]

8. The 2015 Act provides for a quite different approach to deciding questions of personal capacity. As well as repealing the 1811 Act, it also repeals the Lunacy Regulation (Ireland) Act 1871. Section 3 of the 2015 Act provides that a person's capacity is to be assessed functionally, "*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."* That is in contrast to the existing wardship regime, where a ward is treated as lacking decision-making capacity generally.

9. Section 8 of the 2015 Act also sets out important guiding principles governing interventions under the Act. Section 8(6) provides that:

> *"(6) An intervention in respect of a relevant person* [a person who lacks capacity or whose capacity is in question] *shall—*
>
> *(a) be made in a manner that minimises—*
>
> *(i) the restriction of the relevant person's rights, and*

[2] The Law Reform Commission had recommended its repeal in 2005, regarding it as *"anachronistic and out of step with modern views of mental disability and a functional approach to capacity issues."* The Commission also expressed a concern that the Act might breach the right to marry under Article 12 of the ECHR: Consultation Paper at paragraph 6.50.

(ii) the restriction of the relevant person's freedom of action,

(b) have due regard to the need to respect the right of the relevant person to dignity, bodily integrity, privacy, autonomy and control over his or her financial affairs and property,

(c) be proportionate to the significance and urgency of the matter the subject of the intervention, and be as limited in duration in so far as is practicable after taking into account the particular circumstances of the matter the subject of the intervention."

10. Section 143 of the 2015 Act amends various provisions of the Civil Registration Act 2004 (as amended) so as to make capacity (within the meaning of section 3 of the 2015 Act) a statutory requirement for a valid marriage. Absence of such capacity will be an impediment to marriage under the 2004 Act.

11. Regrettably, none of these provisions of the 2015 Act have yet been commenced. Despite the decision of the Oireachtas in 2015 that it should be repealed, the 1811 Act remains in force, as does the Lunacy Regulation (Ireland) Act 1871. It is uncertain when the substantive provisions of the 2015 Act may be brought into force. That is hardly a satisfactory state of affairs, given the vital importance of the issues that the 2015 Act addresses.

12. As is evident from the judgment of Whelan J, there is significant dispute as to A's capacity to marry. F also has Down syndrome but her capacity to marry is not in question. As Whelan J explains, arrangements were made for A's marriage to F in June 2019. It appears that there is a long-established relationship between A and F, the wedding arrangements were made openly and S was fully aware of them for a considerable time in advance of the scheduled wedding date. However, S did not seek the intervention of the High Court until the eve of the wedding when, on its *ex parte* application, the President made an order restraining A from participating in any ceremony of marriage. It is a matter of real concern that such an order should have been made on an *ex parte* basis. The order clearly had an immediate and profound impact on both A and F. The arrangements that had been made for their marriage (including all of the steps necessary to comply with the requirements of the Civil Registration Act 2004 (as amended)) were effectively set at nought (though a celebratory ceremony without legal effect was permitted to proceed), without A – or F – being heard. The lateness of the application put Kelly P in a very difficult position. He was effectively presented with an unattractive binary choice of either permitting the marriage to proceed in the teeth of the concerns being pressed on him by S or making the order sought without hearing A or F. The timing of the application meant that there was no time for the President to carry out any form of inquiry into A's capacity to marry. That situation could and should have been avoided by S. It is also a matter of concern that information presented to the High Court by S regarding A's estate – which appeared to add significantly to the urgency of the application – turned out to be at best incomplete and, arguably, materially inaccurate.

13. In my opinion, orders such as that made by the former President here should not be made on an *ex parte* basis save in circumstances of the most exceptional urgency and necessity. The urgency here was created by the fact that S only brought its application on the day before the wedding. While it is understandable that S may have regarded litigation as an option of last resort, and wished to other explore other options before bringing the matter to the High Court, it nonetheless ought to have moved sooner so that those affected by the order it sought – and in particular its own charge, A – would have an opportunity to be heard before any such order was made.

14. The stated jurisdictional basis for the order made by Kelly P in June 2019 was the intended wardship of A. That order remains in place. F – who is, in substance, affected by the order to the same extent as A – has brought an application to set it aside but, although her Counsel described the jurisdiction to make such an order as *"murky at best*", he made it clear on his client's behalf that she would not seek to have that application determined in advance of the determination of A's proceedings. Further interim orders, including orders restraining A from leaving the State and regulating where he resides, were subsequently made by the President in exercise of the same jurisdiction.

15. The fact that these orders are in place, as well as the possibility that, if circumstances require, further such orders can be made in advance of any determination that A should be made a ward, is, in my view, a significant factor in weighing the balance of justice here.

16. As I have explained, in the event that A is made a ward, he will be excluded from marrying. Whether or not he has the capacity to marry is, as I have said, a matter of intense dispute. There was a significant body of material before the Court suggesting that he does not have such capacity. However, one of the reports put before the Court – that of Dr O' L – suggests that, while A meets what he refers to as the "*narrowly defined criteria*" for wardship, he has a sufficient "*level of understanding of the nature of marriage and the marital contract for him to be deemed to have capacity in respect of the decision to marry [F]*." It is clear from Dr O' L's report that this opinion was premised on a particular understanding of the applicable legal test for capacity, which he articulates in his report. He may be right or wrong in that respect but I do not think he is to be criticised for it. Any expression of opinion as to the capacity of a person to marry is necessarily premised on some understanding, whether or not articulated, as to what is the applicable test for capacity. In addition to Dr O' L's, report, the point is also made on A's behalf that the solemniser engaged to solemnise the marriage was clearly satisfied that A understood the nature of the wedding ceremony and the declarations to be made by him: see section 51(1)(d) of the Civil Registration Act 2004 (as amended).

17. Whether or not A has capacity to marry is not an issue that this Court is asked to express any view on nor could it do so in an application such as this. The fundamental point made on A's behalf (and echoed by F) is, rather, that he is entitled to have his capacity appropriately assessed but that, because of the effect of the 1811 Act, such an assessment will be foreclosed if he is admitted to wardship. In other words, if admitted to wardship, A will never have a hearing about his capacity to marry and

that issue will effectively be determined by default. A will not have an opportunity to argue as to what the applicable test for capacity is (whether as set out in the caselaw from England and Wales or otherwise) and/or that he satisfies that test such that he is free to marry F.

18. A says further that, if made a ward, another consequence will be that he will not be able to pursue proceedings he has brought to vindicate his right to marry – and which impugn (*inter alia*) the validity of the 1811 Act. There is clearly a question as to A's capacity to bring those proceedings in the first place but I do not think that, in an application such as this, the Court can or should enter into this question. Leading Counsel appearing on A's behalf has told the Court that he and his instructing solicitors (FLAC) are satisfied that A can and has instructed them sufficiently to allow the proceedings to be brought on his behalf. There was considerable discussion, much of which in rather theoretical terms, as to the effect on the proceedings of an order admitting A to wardship. The starting point is that, if made a ward, A will lose control of the proceedings. The decision as to whether the proceedings should be pursued further or abandoned will be one not for A but for his committee, subject to the supervisory role of the President of the High Court. It was suggested by Counsel for S that any decision of the committee would be subject to appeal but, on further discussion, it seems to have been accepted that in reality no appeal or right of review would be available to A.

19. Counsel for S understandably emphasises that, even if A is admitted to wardship (which, Counsel says, is not to be assumed), the composition of the committee is a

matter for the Court and the approach that the committee might take to the proceedings cannot properly be assumed either. That may well be correct as a matter of abstract principle. In reality, however, it seems very unlikely that the committee would be prepared to pursue the proceedings which have been brought on A's behalf. As already noted, A's family are strongly opposed to his marriage, which they consider would be contrary to his best interests and consider that his welfare will best be served by being made a ward. It appears quite unrealistic to think that, in the event that either or both of A's siblings are made A's committee (as seems likely), they might decide to pursue the proceedings. Equally, S has taken a position on these issues. Finally, it was suggested that the General Solicitor might be the committee or a member of the committee but again, I think it is unrealistic to think that the General Solicitor could or should be expected to pursue litigation the basic premise of which is that the wardship regime, in which the General Solicitor is an important actor, is unlawful.

20. In any event, I do not think that A has to go so far as to establish as a matter of probability that, if admitted to wardship, his proceedings will lapse. For the purposes of this application, it is in my view sufficient to establish – as the material before the Court clearly establishes – a real risk that such will be the case. In other circumstances, it might be possible (and prudent) to adopt a wait and see approach but that does not appear to be open to the Court here. In the event that A is made a ward, and his committee decide not to pursue the proceedings, there appears to be no basis on which A (or F) could challenge that decision or seek its review at that stage.

21. For the purposes of this appeal, therefore, the Court must, I believe, proceed on the basis that, if admitted to wardship, A will thereby be precluded from marrying F (by virtue of the 1811 Act) and that there is a real and significant risk (at least) that the proceedings brought by him will not be pursued further. The effect of that would be that (as it was put in the course of argument), A "*is shut out for all times under the present regime from ever marrying or having that question decided.*"

22. The Court is told that A wishes to marry F. A is an adult. *Prima facie*, he has a right to marry. The right to marry is a fundamental right in our Constitutional order: *Zappone v Revenue Commissioners* [2006] IEHC 404, [2008] 2 IR 417. The subsequent adoption by the people of the Thirty-Fourth Amendment to the Constitution, extending the right to marry to same-sex couples, demonstrates in a very concrete way the important value attached to that right in this jurisdiction. The right to marry is also expressly protected by Article 12 ECHR.

23. Of course, the right to marry is not absolute. Section 2(2) of the Civil Registration Act 2004 (as amended) sets out a number of statutory "*impediments*" to marriage which reflect various policy judgments on the part of the Oireachtas as to the circumstances in which marriage should not be permitted. Capacity is a fundamental requirement for any valid marriage. A has no right to get married if he lacks sufficient capacity to understand, and commit to, the mutual ties that marriage involves. But

authority suggests that, as an adult, A is presumed to have capacity to marry and that the burden of proof is on those who assert the contrary. [3]

24. What A says here is that, if admitted to wardship, his *prima facie* right to marry will be extinguished without any proper assessment of his capacity to marry, still less any showing that, as a matter of fact, he lacks such capacity.

25. As well as the fundamental right to marry, core values of personhood and personal autonomy are manifestly engaged in the circumstances here. Closely bound up with A's putative right to marry is his right of access to the courts in order to vindicate that right. The importance of access to the courts in our constitutional order was recently re-iterated in *Brandley v Deane* [2017] IESC 83, [2018] 2 IR 741, where McKechnie J (with whose judgment the other members of the Supreme Court agreed) stated:

> *"[48] .... However, there can be no doubting but that access to the courts, an aspect of which is the right to sue, to litigate or to bring proceedings, is an unenumerated personal right guaranteed by Article 40.3.1° of the Constitution (Murphy v. Minister for Justice [2001] 1 I.R. 95): accordingly, such is a fundamental right of every person, citizen or not, within this jurisdiction (Murphy v. Greene [1990] 2 I.R. 566 at p. 578). Furthermore, as acknowledged in Byrne v. Ireland [1972] I.R. 241 at p. 292, <u>it is the</u>*

[3] This proposition was described by Munby J in *Sheffield City Council v E* as not "*in any way controversial*": at paragraph 18.

> *primary vehicle by which both personal and all fundamental constitutional rights can be articulated and given effect to. Thus it is the ultimate route to this end. Therefore it must be positioned in its rightful place in our constitutional order. Nothing short of that will suffice."* (my emphasis)

26. The evidence before the Court establishes a very significant risk (at least) that A's admission to wardship at this stage would prevent his marriage to F, effectively foreclose inquiry into his capacity to marry, bring to a premature conclusion the proceedings in which he seeks to assert and vindicate that right and effectively condemn him to remaining unmarried for the foreseeable future: all of this without any hearing whatever as to A's capacity to marry. That would involve such a manifest and serious potential injustice to A – and F – that I find it difficult to envisage circumstances in which the Court could contemplate making an order having such effect. Certainly, exceptional countervailing factors would have to be present before it should do so.

27. I do not disregard or discount the countervailing factors present here. Significant weight must of course be given to the concerns expressed by S and by A's sister and brother as to the welfare of A. However, as I have indicated, I attach significant weight in this context to the fact that the interim orders made by Kelly P will continue in force. If necessary, further such orders may be sought and, as the Court made clear in its *ex tempore* observations on 10 March 2020, in the event of any significant change of circumstance and/or any delay on the part of A in prosecuting his proceedings, the application for an inquiry may be renewed.

28. As Clarke J observed in *Okunade v Minister for Justice* [2012] IESC 49, [2012] 3 IR 152 decisions such as that the Court was required to make here are necessarily made on the basis of imperfect information. Any decision to grant or refuse a stay (which is, in substance, the issue before the Court here, though presenting as an application for an adjournment) or to grant or refuse an injunction carries with it a risk of injustice. The Court's task is to identify the outcome that "*minimises the overall risk of injustice.*"[4] Even so, as Clarke J goes on to observe, all such cases "*involve the risk that, when the dust has settled, it will be seen that some person or body has suffered either by the intervention of the court or, equally, by its non-intervention.*" That risk arises in acute form here. At a human and familial level the issues could hardly be more important. Whatever decision the Court made on this appeal, it was certain to cause anguish. Ultimately, however, this Court's duty is to reach a decision. For the reasons set out above, the outcome that, in my view, minimised – though it most certainly did not avoid – the risk of injustice in the circumstances presented here was to allow the appeal and give A the opportunity to pursue his proceedings, at least to the point where his application for a protective costs order (PCO) is determined by the High Court. It was on that basis that I agreed with the decision of the Court announced by Whelan J at the conclusion of the hearing of the appeal.

[4] At paragraph 67.

29. The decision of the Court to allow the appeal should not be taken as calling into question the powers of the President of the High Court to manage the wardship list or inviting appeals from decisions made in that context. While taking the form of a decision on an adjournment, the decision under appeal here involved, in substance, the refusal of a stay. Even so, decisions of that kind are not lightly reviewed by this Court. However, on the very particular facts presented here, it appeared to the Court that the order made by Kelly P gave rise to a serious risk of injustice to A. In those circumstances, the Court was clearly entitled – and obliged – to intervene.