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

JUDGMENT of Ms. Justice Máire Whelan delivered on the 5th day of August 2020

Introduction

1. At the conclusion of the hearing of this appeal on 10 March 2020, in light of the exigencies arising, the court allowed the appeal against the refusal of the President of the High Court to grant an adjournment of a wardship inquiry in relation to A. There follows the detailed reasons for the order granted.

2. In the course of this appeal, an order was made pursuant to s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008 prohibiting the broadcast or publication of anything that would, or would be likely to, identify either A. or the notice party, F.

3. A. is an adult man who has a confirmed assessment of Down Syndrome and a moderate learning disability. His parents are both deceased. He is illiterate. The respondent, S., is a registered charity. It is funded annually to an amount in excess of €50M. by the Health Service Executive for the purposes of delivering a range of health and personal social services in respect of education, wellbeing, dignity, health and happiness of persons with an intellectual disability. The services provided by S. include residential centres which operate as designated centres pursuant to Part 8 of the Health Act 2007, as amended.

From shortly before the death of his mother in 2015, A. went to reside in facilities operated by S.

4. A. has at all material times had a close relationship with his brother and sister. His brother resides in Australia. His sister resides in Ireland. It is a testament to the deep familial bonds between A. and his siblings that his brother travelled from Australia in respect of virtually all applications before the High Court concerning A. Both his siblings attended the hearing of this appeal.

5. The notice party, F., is also a person who has a diagnosis of Down Syndrome and a learning disability. She too is provided with services by S. under a self-directed independent living arrangement. She is said to function at a higher intellectual level than A. It appears that A. has been acquainted with the notice party for some years prior to the death of his mother in 2015.

Proposed Marriage

6. Over a period of approximately one year prior to 21 June 2019, arrangements were made for the solemnization of a marriage between A. and F. There is a significant degree of dispute between S. and A.'s siblings, on the one part, and the notice party, F., and members of her family, on the other, as to whether A. has capacity to enter into and sustain a marital relationship. It appears that there is also a dispute between medical experts on the issue. It is asserted that duress, undue influence and other pressures have been brought to bear on the mind of A., which he is incapable of withstanding, to enter into such a ceremony of marriage with F., including his alleged alienation from his siblings and S. It is claimed that he lacks the capacity to give his full, free and informed consent to such a marriage.

Wardship Application

7. On 20 June 2019, the very eve of the proposed marriage between A. and F., S. applied *ex parte* to the President of the High Court in wardship and obtained an injunction restraining A. from participating in a ceremony of marriage until further order of the court. Proceedings were initiated in respect of A. seeking that he be brought into wardship as a person of unsound mind. The injunction is continuing. The said wardship proceedings have been progressing before the High Court since 20 June 2019.

8. The Courts (Supplemental Provisions) Act 1961 is the statutory basis for the jurisdiction vested in the High Court in relation to matters of wardship. The Supreme Court in *In re F.D.* [2015] IESC 83, [2015] 1 I.R. 741 clarified that such jurisdiction as the High Court enjoys is wholly dependent upon statute; Laffoy J. reaffirming the earlier decision in *In re D.* [1987] I.R. 449.

9. Since no marriage was solemnised between A. and F. the provisions of s. 13 of the Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870 are not engaged. That section empowered the High Court to "proceed and act and give relief on principles and, rules which, in the opinion of the said court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts of Ireland have heretofore acted and given relief."

10. The proposed wardship of A. takes on particular significance in the context of the dispute as to his capacity to enter into a valid marriage in the first instance. As the statutory framework stands, the issue of whether A. has capacity to marry is subsumed into the issue of whether he is incapable of managing his person or property so as to warrant his being taken into wardship in light of the Marriage of Lunatics Act 1811 which provides that the marriage of a ward shall be void. A person who has been taken into wardship, as an individual whose person and estate have been committed to the care and custody of trustees or a committee pursuant to any Statute, is incapable of marrying until declared sane by virtue of the 1811 Act. The operation of the 1811 Act upon a ward of court is absolute and automatic. The marriage of such a person is absolutely void even if it takes place during a lucid interval. The position was first established in English Law by the Statute 15. GEO. 2., C. 30. and the decision in *Turner v. Meyers, falsely calling herself Turner* (1808) 1 Hag. Con. 414 so clarified.

Likely outcome of pending wardship application

11. There is medical consensus that A. is a person of unsound mind and incapable of managing his person and property. Dr. O'L., consultant psychiatrist, prepared a report based on an interview in November 2019 on behalf of A. which concluded with regards to his capacity: -

> "In my view he appears largely unaware of the support he requires in meeting his personal care needs."

It also states: –

> "He appeared not to have an awareness of his assets or their worth. In my opinion [A.] would not be capable of managing large sums of money. He could not estimate his weekly income, allowance or expenses and could not tell me if he had any savings. [A.] appeared unable to communicate his financial needs. In this respect I would have concerns about his ability to recognise situations of potential financial exploitation should they arise and his ability to respond accordingly in such situations.
>
> Therefore, [A.'s] ability to manage his personal care and finances without support is in question. I am therefore of the opinion that [A.] does meet the narrowly defined criteria for wardship, *i.e.*, that he is of unsound mind and incapable of managing his person or property."

12. On the other hand, while accepting that A. met the "narrowly defined criteria for wardship", with regard to the capacity of A. to make a decision to marry, Dr. O'L. concluded that A. "demonstrates a basic, but 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.]"

Plenary proceedings

13. In December 2019 plenary proceedings were instituted by A. against the Minister for Health, the Minister for Justice and Equality, Ireland and the Attorney General which *inter*

alia sought to impugn the validity, constitutionality and compatibility with provisions of the European Convention on Human Rights ("ECHR") of the Marriage of Lunatics Act 1811, the Lunacy Regulation (Ireland) Act 1871 and the wardship jurisdiction vested in the President of the High Court. An order is also sought to compel the bringing into force of s. 7 of the Assisted Decision-Making (Capacity) Act 2015.

14. On 27 January 2020, within the plenary proceedings, a motion issued seeking an order pursuant to O. 99 of the Rules of the Superior Courts ("RSC") relieving A. of any liability to pay costs to any party to the proceedings irrespective of the outcome – a protective costs order ("PCO"). The motion was returnable before the High Court for hearing on 17 February 2020.

Application for adjournment of wardship inquiry

15. An application was made to the President on 28 January 2020 on behalf of A. and supported by F. to adjourn the wardship inquiry pending determination of the PCO motion in the plenary proceedings. In an *ex tempore* decision delivered on 4 February 2020, the President refused to adjourn the wardship inquiry, directing that it proceed to a hearing on 12 and 13 March 2020. This appeal is against that refusal.

Judgment

16. In his judgement refusing the adjournment and directing that the inquiry into wardship proceed, the President of the High Court noted that A.'s brother and sister were fully supportive of the application to have him brought under the protection of the court "from both at the point of view of his own welfare and control being exercised over his substantial estate." The court noted that F. "functions at a higher intellectual level than" A. The court noted the medical evidence which had concluded that A.:-

> "…did not display the requisite capacities to make informed balanced decisions, in order to manage his finances nor indeed, to formally marry. He failed all components of the capacity tests… He required extensive supports in order to function at his current maximum level and that the arrangements in place or very similar would need to continue for the long-term in order to sustain the best levels of progress."

17. The President considered a joint report of psychologists commissioned by A.'s siblings, which concluded that A. felt:-

> "…under pressure to please a number of different parties and subjugates his own wishes in service of others. The wedding, together with the tension and conflict surrounding it, are a significant source of stress to him. He would like to celebrate his relationship with [F.] …[A.] does not understand what marriage means, and therefore cannot understand the legal ramifications that result from it. The level of his intellectual disability precludes him from being able to grasp these concepts and so it is highly unlikely that any attempt to provide educational input on these matters would be successful."

The court noted that the report found that A. could not "provide informed consent to marry. As such he has been deemed not to have functional decision-making capacity in respect of marriage."

18. The President observed that S. believe that A. is under undue influence in relation to the intended marriage and that his inheritance requires to be protected. They also believe that A. does not have capacity to enter into the contract of marriage. The court reviewed a substantial corpus of medical evidence that had been put before it; all of it *ad idem* that A. met the criteria for wardship, was functionally of unsound mind and incapable of managing his person or property.

19. The court noted the assessment of Dr. O'L. concerning capacity to marry referred to at para. 12 *ante*.

20. The court noted that the application to adjourn the inquiry in wardship had been strenuously opposed by A.'s siblings and by S., observing that A.'s brother and sister were:-

> "…extremely distressed at the change which has been brought about in the former, warm and close relationship with their brother as a result of the intervention of influences which they do not regard as being beneficial to him, and in respect of which he is both vulnerable and easily led. It goes without saying that both [A.'s] personal status and personal estate are, in the absence of a wardship determination, in question. Who has legal authority to decide issues concerning his health or medical treatment, to say nothing of his assets? Indeed his estate is already potentially jeopardised as a result of the institution of proceedings… in his own name. I note that in the plenary proceedings which have been instituted [A.] is named as a sole plaintiff with no next friend. He therefore runs the risk of being condemned in costs in respect of some or all of those proceedings. One would very much doubt if his parents, who made generous provision for him, would wish to see his assets being jeopardised by the possibility of a legal costs order being made against him. I have no idea as to how instructions for the institution of High Court proceedings were made by [A.] in the light of the unanimous medical view from all medical professionals, including his own expert, who have prepared reports in respect of him. They all conclude that he is of unsound mind and incapable of managing his person and property."

21. Regarding delay, the President observed at p. 7 of the judgment:-

> "…Even the determination of the protective costs motion in the plenary proceedings will not be disposed of for a period of months. Regardless of outcome, it is likely then that the matter will proceed on appeal to the Court of Appeal or the Supreme Court, or both. If he succeeds in that application and this action goes to trial, then it will not be disposed of for years… Meanwhile, the legal status of [A.] will remain unresolved, to say nothing of the position concerning his substantial estate."

22. The trial judge concluded:-

> "…the interests of justice require that the next step in the wardship procedure, namely the conduct of the inquiry in the light of [A.'s] objection to wardship should proceed, notwithstanding the recently commenced plenary proceedings… To defer the conduct of the inquiry would, for all practical purposes, be to, in effect, behave as if the constitutional claims now in their infancy were concluded in his favour and to deprive him of the court protection sought, both by his carers and siblings, for a lengthy period of time. He may have his objection upheld… and then there will be no wardship. He may fail in his objection, and he will then be taken under court protection and in such cases, constitutional proceedings remain in being, as indeed does [F.'s] application.
>
> …to delay the wardship process leaves both his person and his estate without legal protection for perhaps years to come. That would be wholly undesirable and would be, in my view, unjust to him, and in these circumstances, I decline to adjourn further, the conduct of the inquiry…"

Grounds of appeal

23. Key issues amongst the extensive grounds of appeal of A. were that the President erred on the various grounds identified by him in refusing to grant the adjournment sought, considered irrelevant matters, failed to have regard to relevant matters and failed to have regard to the prejudice which would accrue to A. were the wardship proceedings determined prior to the determination of the plenary proceedings. The respondent opposed the appeal.

Submissions on behalf of A.

24. A. contended that the interests of justice favour the granting of an adjournment. It was asserted that there was no credible evidence adduced before the President of the High Court in relation to several crucial factors central to his decision to refuse the adjournment.

25. It was accepted that if the inquiry proceeds there is a high degree of likelihood that A. will be admitted to wardship since the unanimous medical evidence is that he does not have capacity to manage his person and property. It is contended that the practical consequence of that will be a permanent deprivation of his right to make his own decisions including whether to litigate. It is contended that by reason of the absolute nature of the provisions of the Marriage of Lunatics Act 1811, A. would be permanently precluded from entering into a marriage notwithstanding that there is a difference of medical opinion in respect of whether he has capacity to marry in light of the report of Dr. O'L., consultant psychiatrist, of November 2019.

Failed to take into account…

26. It was argued that the President in refusing the adjournment failed to take into account the prejudice to A. which would arise were the wardship inquiry to proceed to a conclusion prior to the determination of his plenary proceedings, in particular the adverse impact on A.'s right of access to the court as well as the loss of the right to marry.

27. It was argued that the President failed to attach sufficient weight to the fact that, upon A. being admitted into wardship, he would be permanently deprived of any possibility to autonomously pursue an assessment of his capacity at law to marry and the constitutionality of the relevant legislation. He would lose the personal right to prosecute the plenary proceedings, an entitlement which will vest in his committee.

28. It was further contended that the President erred in holding that the interests of justice required that the wardship inquiry proceed and failed to have regard to the fact that A. consented to the continuation of all existing interim orders, including an order prohibiting A. from participating in any civil ceremony of marriage, pending determination of the PCO application. This consent, it was contended, obviated any risk of prejudice arising from the adjournment.

29. It was argued that the President failed to have regard to the views of the notice party, F., who was a respondent to the injunction brought within the wardship proceedings.

Took into account irrelevant matters…

30. It was argued that the President erred and there was no evidence before him in so far as he considered that the wardship inquiry was necessary to facilitate provision of medical care to A. Should such medical treatment be required, the matter could be addressed by virtue of an interim order being made in the wardship proceedings pending determination of the plenary proceedings.

31. It was contended further that the President attached undue weight to the views of A.'s siblings in reaching his conclusion to refuse the adjournment sought in circumstances where neither submitted an affidavit in support of their contentions.

32. The President erred, it was asserted, in concluding that A.'s personal advocate, Mr. C., had prior to the institution of the wardship proceedings indicated that A. had expressed to him a view that he did not wish to marry the notice party.

33. It was argued that the President took into account concerns that an inheritance of A. under the estate of his late father was at risk of dissipation.

Arguments and submissions on behalf of S.

34. Comprehensive submissions were filed on behalf of S. contesting the contentions of A. that there was an absence of Irish legal authority on the legal principles applicable in an application seeking to adjourn a hearing. Reliance was placed on the decision of Kearns P. in *Lawlor v. Geraghty* [2010] IEHC 168, [2011] 4 I.R. 486, which primarily considered the general principles relevant to a coroner's discretion to grant or refuse an adjournment, and the Supreme Court decision in *R.B. v. A.S. (Nullity: domicile)* [2002] 2 I.R. 428. S. also placed reliance on jurisprudence from the European Court of Human Rights and in particular the decision in *R.P. and Ors. v. The United Kingdom* (App. No. 38245/08), [2013] 1 F.L.R. 744 where the court determined that:-

> "In cases involving those with disabilities the court has permitted the domestic courts a certain margin of appreciation to enable them to make the relevant

procedural arrangements to secure the good administration of justice and to protect the health of the person concerned…" (para. 65)

It was contended that in wardship proceedings a judge is required to decide a legal issue in accordance with broad legal principles and in the light of all the circumstances of the particular case.

35. S. contended that, in substance, the application for an adjournment of the wardship inquiry amounted to an application for an indefinite stay of the proceedings pending the outcome of the collateral plenary proceedings with a proviso that A. will accept that the President of the High Court in the meantime had interim and interlocutory jurisdiction in wardship and under the inherent jurisdiction to ensure as might be necessary the care and welfare of A. It was argued that the granting of an adjournment in respect of wardship proceedings was inconsistent with the continuing duty of the courts to have regard to the "best interests" of a vulnerable citizen and to discharge the courts' continuing constitutional duties towards such a person pursuant to the provisions of Article 40.3.1° and 40.3.2° of the Constitution.

36. It was urged on behalf of S. that the President of the High Court had made clear in the *ex tempore* ruling that the decision to refuse the adjournment of the hearing did not constitute in any way a determination of the substantive inquiry. The President had carried out a constitutionally-compliant balancing exercise where he was satisfied that the interests of justice required that the wardship hearing not be indefinitely adjourned. It was acknowledged that S. have continuing concerns as to whether A. had capacity in the first instance to instruct his legal representatives, which remain unresolved. Concerns were also expressed surrounding the acquisition on behalf of A. of a second passport and a passport card. It was urged that in matters pertaining to the care, protection and welfare of a vulnerable person such as A., it is not appropriate to indefinitely adjourn proceedings concerning his continuing welfare. To do so, it was contended, would undermine the integrity of the wardship proceedings and require the President of the High Court on an interlocutory basis to address matters of continuing care and welfare.

Arguments advanced on behalf of F.

37. Written legal submissions and oral arguments were advanced on behalf of the notice party. She supported A. and argued that in refusing the adjournment there was an attendant collateral risk of a denial of justice to her as she had a subsisting application before the President in the wardship proceedings seeking to set aside the injunction granted *ex parte* on 20 June 2019 restraining her marriage to the proposed ward, A., and wherein she had contended that the wardship jurisdiction had been invoked by S. in the first instance for a collateral purpose, namely to prevent her entering into a marriage with A. She contended that a consequence of allowing the wardship application to proceed first would be that, were A. admitted to wardship, he will be considered by operation of law and irrespective of his actual functional capacity to lack capacity to instruct legal representatives directly. She stated that the most likely person to be appointed A.'s committee is either the General Solicitor for Minors and Wards of Court or one of A.'s siblings. It was asserted that A.'s siblings did not wish the plenary proceedings to

continue and, further, that continuation of the proceedings will be subject to the approval of the President of the High Court. It was argued that it appears "inherently improbable that… the plenary proceedings would be continued." It was thus contended that the prejudice to A. and F. were the wardship proceedings not adjourned is "self-evident, substantial and will have far reaching consequences for the fundamental rights of both of them."

Views of A.'s siblings

34. A.'s sister provided a written submission. In it she succinctly sets out her concerns regarding the welfare of her brother stating: -

> "Given this medical evidence, I do not believe that A. is instructing a legal team."

She annexed email correspondence from a member of the family of F. dated 11 June 2019 which stated: –

> "If A.'s family ever attempt to make him a ward of court we will fight it."

She concludes: –

> "The welfare and care for my brother has to be the principal concern. His best interests will not be served by adjourning the wardship hearing."

A.'s brother addressed the court directly confirming that he agreed with the concerns of his sister.

Discussion

38. The application was in substance for a stay of the wardship proceedings pending determination of the PCO application and accordingly it is appropriate to have regard to the principles governing an appeal against the grant or refusal of a stay.

39. Wardship proceedings are by their nature inquisitorial and it is unfortunate that a high degree of tension and conflict has developed between the parties in this matter. However that may be, the fact is that the parties, all connected through A., each in turn asserting that their primary concern is directed towards vindicating his best interests and welfare, have diametrically opposite views as to what those best interests might be or how his interests and welfare might be vindicated; whether wardship is axiomatic or inimical to his best interests; and, whether otherwise he lacks the capacity to enter into and contract a marriage and even if he does not, whether he has been subjected to duress and/or undue influence brought to bear upon him of such a kind or degree as to undermine his free will and negative any consent he might purport to give to such a marriage.

Deference

40. An appellate court will ordinarily be slow to interfere with the decision by a court of first instance to grant or refuse an adjournment or a stay. The starting point is that this court does not approach the decision of the President of the High Court with a view to forming, and if necessary substituting, its own judgment as to the manner in which the discretion should have been exercised whether to grant or refuse the order. Neither does this court

consider whether the exercise of discretion by the President was one of which it approves. The discretion remains vested in and that of the President. Appellate courts should not too readily interfere with seemingly sensible and appropriate case management decisions made by judges who ordinarily are likely to have a far better "sense" of the case than an appellate court can ever have.

41. An intervention may, however, be made in the exercise of discretion where, on review, the court is found to have made some clear error or exercised that discretion in a manner which appears to produce an injustice.

42. The standard of review in respect to the exercise of discretion involves the grant of very considerable deference, particularly to the President of the High Court acting in wardship. Where, as here, several factors required to be balanced on either side of the equation, this court will not lightly interfere with the balance struck by the trial court. However, although an adjournment or stay is a discretionary matter, where the refusal of an adjournment or stay gives rise to a real risk of a breach of constitutional rights or, more generally, the risk of an injustice, this court can and must intervene.

43. In determining whether the exercise of discretion is vitiated by virtue of matters having been taken into account and accorded undue weight which are immaterial or matters of fundamental importance having been wholly disregarded, inevitably this court as a necessary part of the review function has to make an evaluation on whether such matters should have been taken into account or disregarded in the first place and the operative consequences where such error is established. The order at first instance ought to be reversed where the decision was so plainly wrong that the only legitimate conclusion was that the trial judge had erred in the exercise of his discretion.

Minimise the risk of injustice

44. This appeal falls to be determined in light of the jurisprudence and with due regard to the principles identified in *Okunade v. Minister for Justice* [2012] IESC 49, [2012] 3 I.R. 152, duly modified in the context of the very exceptional circumstances which have arisen. In *C.C. v. Minister for Justice* [2016] IESC 48, [2016] 2 I.R. 680 Clarke J., as he then was, observed at para. 21: -

> "I think it is fair to characterise the judgment of [*Okunade*] as containing a series of determinations as to the law, which moved from general propositions of wide application to the test by reference to which those general principles are to be applied in increasingly specific circumstances. …It is important to note that, in so analysing the broad situation, the fact that the same general problem can arise in the context of the situation pending an appeal is actually touched on."

Clarke J. then considered para. 67 of the *Okunade* judgment which provides: -

> "…In many situations it is necessary to decide what is to happen in the intervening period pending a trial or other determination (or indeed an appeal) when, by definition, it is not possible to decide what the ultimate outcome will be. All such

cases involve the risk that, when the dust settles, it will be seen that some person or body has suffered either by the intervention of the court or, equally, by its non-intervention. However, the only way to remove that risk of injustice would be to decide the case, issue or appeal immediately. The whole problem is that that process takes time. In those circumstances, I do not believe that the test as to whether the court should intervene pending trial depends on whether the temporary measure sought is described as a stay or as an injunction or, indeed, as any other form of order which might arise on the special circumstances of an individual case. The court must, in all cases, act so as to minimise the risk of injustice."

Clarke J. in *C.C.* continued at paras. 23 and 24: –

"Thus, the overarching principle is said to be one applicable in all cases where a court has to make a short-term and summary decision as to what is to happen pending a fuller hearing. The approach of the court in such circumstances has to be to act in such a way as to minimise the risk of injustice.

…It is… important to note that, while the particular focus of [*Okunade*] was the grant or refusal of injunctions in the immigration field, the judgment does deal with all forms of order which may be sought on a temporary basis pending some form of full hearing."

45. Clarke J. observed at para. 35: -

"It seems to me to be clear that the stay pending appeal jurisprudence applies the same basic principles and test as were identified in [*Okunade*]. As pointed out at para. 67, p. 179, of [*Okunade*], the problem as to what to do pending an appeal gives rise to the same type of issues as arises in the context of the grant or refusal of a stay or interlocutory injunction pending trial…"

He continued at paras. 36 and 37: –

"As in all cases, the first question is whether there is any stateable or arguable basis for the appeal itself. …In passing I might comment that it seems to me that 'balance of justice' or 'minimising the risk of injustice' is a more accurate description than 'balance of convenience'…

…it seems to me that the established and well settled jurisprudence on the question of whether there should be a stay or other intervention pending an appeal fits four-square within the principles identified by this court in [*Okunade*]. There is no different test. …the precise way in which the overall approach may apply may differ depending on the context. The context may include the nature of the proceedings, the nature of the interference sought from the court and, indeed, the stage which the proceedings have reached. That list is not…intended to be exhaustive. …the fact that the precise application of the general principle or test may differ from one type

of case to another or from one stage of proceedings to the next does not take away from the fact that there is but a single principle or test."

46. The *Okunade* principles operate to reinforce established principles in our jurisprudence including that the overriding consideration in determining whether to grant or refuse a stay is to maintain a balance so that justice will not be denied to either party as was stated by McCarthy J. in *Redmond v. Ireland* [1992] 2 I.R. 362 and reiterated in *Emerald Meats Ltd. v. Minister for Agriculture* [1993] 2 I.R. 443.

47. Those principles, when applied in the context of an application for the grant of a stay, involve the court engaging with the following considerations:

(a) whether the applicant has established an arguable case – if not, the application must be refused.

The plenary proceedings are certainly arguable. Coupled with that, the appellant has established that if the wardship inquiry proceeds it is almost inevitable that A. will be taken into wardship. It is improbable that A.'s committee will seek or wish to prosecute the plenary proceedings – at least in their current iteration.

48. If an arguable case is demonstrated then:

(b) the court should consider where the greatest risk of injustice would lie, but in doing so the court should: –

(i) give all appropriate weight to the orderly implementation of measures which are *prima facie* valid;
(ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and
(iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings; but also
(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

It is significant that the stay is sought solely until the conclusion of the PCO motion which was first returnable before the High Court in February 2020. Undertakings are offered on behalf of A. regarding the continuation of existing orders made in the wardship proceedings and the entitlement of S. to seek such interim orders as may be appropriate pending determination of the PCO motion.

49. In addition to considerations (a) and (b):-

(c) in the limited cases where it may be relevant, the court should have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,

(d) whereas the court is not to involve itself in a detailed investigation of fact or complex question of law, certainly in the context of judicial review, the court can place all due weight on the strength or weakness of an applicant's case.

50. In *C.C*. Clarke J. revisited subparagraph (d) of the *Okunade* test, para. 104, which had considered that appropriate weight can be given to the strength or weakness of a case in certain instances. He pointed out that a fuller account of the reasoning for this approach was to be found at paras. 98 and 99 of the *Okunade* judgment itself: -

> "98. In addition, while there may well be some judicial review processes which could come within the parameters of what Lord Diplock spoke of as 'difficult' questions of law, many such cases involve either very net questions of law or involve the application of well-established principles to the circumstances of the case. It seems to me, therefore, that in considering whether to grant a stay or injunction pending the progress of judicial review proceedings, the court can have regard to the strength of the case at least where, as will frequently be the case, the challenge does not involve issues of fact as such or the sort of complex questions of law which in the words of Lord Diplock, at p. 407 'call for detailed argument and mature considerations.'"

"The case" to be considered is the application for a PCO. That application is certainly maintainable in light of the authorities and the terms of the grounding affidavit.

51. It is appropriate to apply the *Okunade* test as thus clarified and by analogy to the terms of the PCO motion and also to the plenary proceedings proposed to be prosecuted by A.; assessing the potential injustice which may result from, on the one hand, intervening in favour of A. only to find that he loses, as opposed to not intervening in favour of A. only to find that at some point in the future, whether by litigation prosecuted by F. or otherwise, some or all of the claims made in the plenary proceedings are successful.

52. As paras. 110 and 111 of the *Okunade* decision make clear, an applicant for a stay is entitled to put before the court evidence of the practical consequences of the order being made pending conclusion of the proceedings in question.

***Bona fides* of appellant**

53. In assessing the *bona fides* of the appellant it is necessary to form some general view with regard to the maintainability of the plenary proceedings in respect of which the PCO is being sought. In *Redmond v. Ireland* McCarthy J. in the Supreme Court observed that a heavy responsibility lay on the legal advisors of a party seeking a stay to assist the court on the reality of an appeal, noting that appeals had previously been brought for tactical rather than *bona fide* reasons.

54. The plenary proceedings are integrally connected to the wardship suit in the instant case. Indeed the plenary proceedings seek the striking down of the entire wardship machinery as being repugnant to the Constitution. It is contended that the Marriage of Lunatics Act 1811 did not survive the enactment of the Constitution and/or is repugnant to its terms. Like relief is sought in regard to the Lunacy Regulation (Ireland) Act 1871.

55. A series of exceptional factors are disclosed on the facts of the instant case:

    i. the virtual certainty that A. will be admitted into wardship at the conclusion of the inquiry in light of the medical evidence;

    ii. A. is injuncted from entering into a marriage by the exercise of the High Court's wardship jurisdiction, notwithstanding that he is not a ward of court;

    iii. wardship will have the immediate and direct impact upon him of the Marriage of Lunatics Act 1811 and automatically render void any marriage he may enter into;

    iv. the plenary proceedings challenge the validity of the wardship machinery and the validity of the 1811 Act;

    v. A. has a *prima facie* entitlement to be *dominus litis* in his own proceedings which he is now exercising and which will be lost in the event that a stay is refused;

    vi. admitting A. into wardship now will result in his autonomous right to prosecute the plenary proceedings to a conclusion being irrevocably lost. Dominion and control over the decision making processes in regard to the litigation will vest in his committee or the General Solicitor for Minors and Wards of Court;

    vii. leave of the President of the High Court will be required to permit continuation of the plenary proceedings;

    viii. S. did not suggest that they would consent to the committee continuing the plenary proceedings or support seeking leave of the President of the High Court to same;

    ix. it can reasonably be inferred that S. and A.'s siblings would oppose efforts to continue the plenary suit.

56. Issues were raised by his siblings, by S. and by the President of the High Court himself as to the nature and extent of the instructions which A. provided to his solicitors in regard to the plenary proceedings. These are matters which the court cannot inquire into or assess at this stage. What can be said is that two members of the Bar appeared and represented A. at the hearing of the appeal and assured the court that they were satisfied that they had sufficient instructions to do so. Issues concerning instructions can be comprehensively dealt with within the ambit of the plenary proceedings, including the PCO application, if the trial judge sees fit.

57. The right to litigate and the related right to have access to the courts are distinct constitutionally protected rights as the Supreme Court clarified in *Tuohy v. Courtney* [1994] 3 I.R. 1. The right to litigate was defined in that case at p. 45 as "the right to achieve by action in the courts the appropriate remedy upon proof of an actionable wrong causing damage or loss as recognised by law." In circumstances where the prospect of the committee supporting continuation of the plenary proceedings appears very unlikely, A. will be precluded from exercising his right to litigate the validity, not alone of the wardship itself, but of the ancillary consequence that any marriage he enters into thereafter is void.

58. It is not a relevant factor in this case that the wardship proceedings were first in time as S. contends. One brought forth the other. A determination of the wardship inquiry prior to the plenary proceedings will substantially diminish and potentially eliminate the entitlement of A. to come to the High Court to obtain a decision of the courts on any of the matters raised therein and I am satisfied that in substance that would, in the exceptional circumstances of this case, potentially amount to a constitutionally impermissible denial of access to the courts.

59. In *Ryan v. Attorney General* [1965] I.R. 294 Kenny J. referred to the right to marry as an example of the personal rights latent in Article 40.3 of the Constitution. The Law Reform Commission has proposed the repeal of the Marriage of Lunatics Act 1811 in its consultation paper on *Vulnerable Adults and the Law: Capacity* (L.R.C. C.P. 37-2005) at paras. 6.51 and 8.20. The automatic and ancillary nature of the operation of the 1811 Act, which is an incident of the taking into wardship of an individual, calls for close scrutiny. This is in circumstances where the criteria and principles governing a determination as to whether an individual does not have capacity to manage his person and property is a clinical and medical process which does not necessarily or apparently encompass the considerations to be taken into account in determining whether an individual has the capacity to give his full, free and informed consent to enter into and sustain a marital relationship.

60. In the plenary proceedings A. has demonstrated a stateable cause of action directly concerning his own personal fundamental rights and contesting the ambit and extent of his right to assert and exercise legal agency in the context of his lived experience of cognitive disability, and the substitute decision-making paradigm to which the wardship orders will subject him.

61. An overriding consideration is to seek to maintain a balance so that justice will not be denied to either party. The court has regard to the views of the notice party, F., and also to the brother and sister of A. with whom he has at all material times maintained a close and positive connection.

62. The prosecution of the wardship inquiry to a conclusion carries with it the prospect that A. will be taken into wardship and the inescapable ensuant consequence of the automatic operation of the Marriage of Lunatics Act 1811. This is of far reaching and existential

consequence to A. This is relevant in balancing the respective rights and interests of the parties in the stay application.

Application of the principles

63. The President was understandably concerned at the deterioration of the formerly warm and close relationship A. had with his brother and sister. But that factor was not determinative of the adjournment application, one way or the other. I am satisfied that the President was entitled to have regard to the views of A.'s siblings and merely because the said concerns were not deposed to by way of affidavit did not preclude him having regard to same.

64. Neither was it correct to suggest that the President failed to have regard to the views expressed and submissions made on behalf of A.'s fiancée, F. It is implicit from the judgment that the President had indeed considered same, though it is to be inferred from his judgment that he had particular concerns that either the notice party, F., or persons close to her were involved in exerting undue influence upon A. and in effect overbearing his mind for the purposes of procuring that he entered into a marriage with her.

65. The President in reaching his determination was primarily concerned with the welfare of A. However, the balancing exercise engaged in was, with respect, erroneous in that, in my view, the President failed to attach sufficient weight to the adverse impact of the wardship on A.'s entitlement to litigate and to marry. The application before him was confined in duration to the determination of the PCO motion. Significant assurance was offered which the President ought to have relied on:-

> "It was intimated that that motion, if lost, would probably result in the proceedings going no further. If granted presumably the proceedings are likely to go further." (p. 6, lines 16 to 18)

66. The President failed to attach sufficient weight to the fact that there was consent offered on behalf of A. to the continuation of the existing interim orders and in particular the order prohibiting A. from participating in a civil ceremony of marriage. The undertakings offered, which were renewed in this court, sufficed to assuage all reasonable concerns identified by the court, the siblings of A. and S. which could have arisen from the adjournment. Were any further welfare concerns to arise subsequent to the grant of the adjournment, it was open to S. to seek further interim orders within the wardship proceedings as they saw fit.

67. There was no evidence before the President to support S.'s contention that A. required, or would foreseeably require, any medical treatment which necessitated the urgent exercise of the wardship jurisdiction. The concerns raised by the President regarding who might have legal authority to decide issues concerning his health or medical treatment are not readily understood and were erroneously weighed in the balance in refusing the adjournment sought.

68. With regard to concerns expressed that wardship was necessitated for the purposes of preserving the assets and estate of A., the President appears to have been misdirected as to a material fact in circumstances where A. is a beneficiary under the terms of the Last Will and Testament of his father. Whilst the said Will has been admitted to probate, the entitlements of A. thereunder are held pursuant to the terms of a discretionary trust. A.'s own siblings are the trustees of same. Delays as may arise by virtue of the PCO being proceeded with carry no risk directly to the dissipation of his estate such as would warrant being accorded the weight they received in the balancing exercise leading to the refusal of the adjournment sought. The correct position was not, it appears, known to S. and, in turn, the position presented to the President – which, understandably, caused him to have concerns about A.'s estate – was not correct.

69. The circumstances surrounding the institution of the said proceedings and the concerns of the President regarding same were matters which could and can be dealt with by the High Court judge dealing with the PCO motion in the first instance.

70. It was clear that A. did not have capacity to instruct a solicitor in respect of costs and the basis upon which A.'s agents had taken instructions on issues other than costs was unknown. This was a relevant factor but undue weight was accorded to it in light of the views of Dr. O'L. in his report of 19 November 2019.

71. The trial judge stated at p. 6:-

> "It goes without saying that both [A.'s] personal status and his personal estate are, in the absence of a wardship determination, in question…Who has legal authority to decide issues concerning his health or medical treatment to say nothing of his assets?"

However, neither A.'s health, medical treatment nor his assets are necessarily jeopardised in circumstances where clear undertakings have been tendered to this court.

72. The President had concerns regarding delays in the prosecution of the PCO motion. However, A.'s lawyers gave assurances to this court that the motion would be progressed with all reasonable expedition. Therefore, the characterisation of the delay as "open ended" or of "indefinite duration" which was repeated in this court does not appear to be correct. There will undoubtedly be some delays. However, delays must be considered first and foremost in the context of the relative risk of prejudice to each side. The undertakings in place meet the concerns of S. and protect the interests of A. and his welfare pending determination of the PCO motion.

73. In securing the *ex parte* injunction on 20 June 2019 to restrain the proposed marriage, evidence was adduced by S. of comments attributed to Mr. C., an independent advocate from the National Advocacy Service. At p. 2 of the judgment, line 29, referring to A.'s advocate, the President noted: -

> "An email from him, which was exhibited indicated that [A.] did not wish to be married and that, as I say, was placed before the court."

Whereas such evidence was before the court on 20 June 2019, when Mr. C. became aware of it, it was the subject of a significant modification and a subsequent affidavit was sworn on behalf of S. correcting material errors which had unfortunately mischaracterised the position of Mr. C. Undue weight was accorded to the said email as a factor in refusing the application.

74. The President's weighing of the factors was, in my view, clearly erroneous. In coming to his conclusion to refuse the adjournment sought, the President misdirected himself with regard to several crucial factual matters which cumulatively persuaded him to refuse the application. He further attached insignificant weight to the gravity of the practical consequences for A. in circumstances where the unanimous medical evidence is that A.'s capacity is such that he ought to be admitted to wardship. He failed to have due regard to the fact that wardship would automatically and permanently deprive A. of his right to make his own decisions and in particular the right to litigate the irrevocable nature of the Marriage of Lunatics Act 1811 and whether he has legal capacity to consent to a marriage.

75. The contentions on behalf of S. that wardship was immediately needed for the purposes of protecting the welfare of A. and affording him care do not, in the particular circumstances here, warrant being given the weight that the President gave to them and, at the least, such considerations were materially outweighed by the prejudice identified by A.

76. S. emphasised that A. being admitted into wardship would not negate or cancel the plenary proceedings. The decision of the High Court judge in the wardship inquiry involves the statutory test as to whether A. is a person of unsound mind but there is thereafter a separate legal question for determination as to whether or not in the circumstances the High Court judge would be satisfied to admit A. into wardship. It was contended that this court ought not to pre-empt the outcome, particularly of that latter decision. Though that may be technically and procedurally correct, it is necessary to have regard to the inevitable reality presented by the medical evidence which in this case is all one way. The practical consequence of the admission of A. into wardship is that the plenary proceedings will come to an end.

Undertakings

77. In granting a stay it is important that it be on terms that will reconcile the justifiable concerns of all parties.

78. I am satisfied that the *bona fide* and reasonable concerns of S. and the notice parties can be addressed by the undertaking of A. to consent to the existing interim orders continuing pending conclusion of the PCO application.

79. An undertaking was given by Mr. Lynn S.C. to progress the PCO motion with all due expedition which meets the concerns regarding delay.

80. Further, it was accepted by counsel on behalf of A. that S. and the next of kin are entitled to apply to the President of the High Court in wardship for such further or other interim orders, or further directions, as they consider necessary or appropriate in the interests of the welfare of A.

81. It was further confirmed that all reasonable efforts would be taken by FLAC, who have been retained as agents by A., to endeavour to foster a positive relationship in all respects, and insofar as feasible, between A. and his brother and sister.

82. Counsel on behalf of the notice party, F., confirmed that all reasonable steps will be taken to foster and encourage a positive relationship between A. and his siblings and that nothing will be done to undermine or in any way trench on that relationship.

Conclusion

83. In light of the jurisprudence, I am satisfied that the order refusing the adjournment ought to be set aside. The course of action which carries the least risk of an injustice to the parties, having due regard to all of the matters referred to above and in particular the undertakings and matters referred to at paras. 77 to 82 above, is to grant a stay pending determination of the motion now in being seeking a PCO, with the stay to operate only until the determination of that motion. All other applications to be remitted to the President of the High Court in wardship.

84. Since this decision is being delivered electronically Faherty J. and Collins J. have authorised me to record hereby their concurrence with the judgment.