THE HIGH COURT
Civil

[2022] IEHC 646
Record No. WOC10950

IN THE MATTER OF

F.E.

A WARD OF COURT

EX TEMPORE JUDGMENT of Ms. Justice Niamh Hyland delivered on 25 October 2022

Introduction

1. This case concerns F.E. who is detained at present pursuant to Court Order. It appears that the most recent Order in this respect was that of 16 May 2022, being an Order of the then President, Ms. Justice Irvine. She made a s.27 Order. I am making a similar Order here. Second, she directed that the Ward continue to be placed at a nursing home in North Dublin. There were associated Orders, including Orders which prevented the Ward from leaving the nursing home, and Orders in respect of the Ward being returned to the nursing home.

2. The matter was listed for review on 17 October. It was obviously adjourned to today's date, 25 October 2022. When the application came before me, the HSE, who had been the moving party, indicated that they had evidence that the Ward no longer lacked capacity and that in those circumstances they were not seeking to renew the detention Order. The result of a finding of capacity would be that the wardship would fall away since the Court would no longer have jurisdiction. The Committee of the person and

of the estate, who is the General Solicitor in this instance, indicated that they were of the opinion that the Ward continued to lack capacity.

3. There were essentially three medical reports before me. From the report of Dr. Humphries, it is clear that there were a significant number of additional medical reports. However, the three reports provided to me were as follows.

4. First, the report of Dr. Monteiro, consultant psychiatrist, of 13 October 2022. That was obtained by Joan Doran, the solicitor appointed by the General Solicitor and was Dr. Monteiro's third report in respect of the Ward.

5. Next, there was a report of Dr. Doherty, consultant psychiatrist from the Mater Hospital of 11 October 2022. That report was obtained by the HSE. On obtaining that report, and on receiving some additional communication from Dr. Doherty, the HSE decided to get a second opinion.

6. That was the report of Dr. Karen Elizabeth Humphries, consultant psychiatrist, of 20 October 2022. It was based upon a physical meeting with the Ward.

7. I was fortunate to have three recent medical reports, but it was clear from my reading of them in advance of the case that they were not all in agreement. Dr. Monteiro and Dr. Doherty considered that the Ward continued to lack capacity and Dr. Humphries felt that he had regained capacity. The report of Dr. Doherty was not in fact tendered by the HSE, but it was shared by them with the General Solicitor and was therefore quite properly before me.

8. In those circumstances I directed that I hear oral evidence because I could not decide on conflicting averments and medical reports, particularly in a matter as important as capacity. Very helpfully, all the parties were able to work together to get the clinicians to give evidence at short notice. Equally helpfully, the clinicians were able to make themselves available and both Dr. Monteiro and Dr. Humphries gave evidence. Dr.

Doherty did not give evidence. The HSE is not relying upon that report. I am not entirely clear as to whether or not the Committee was relying on the report of Dr. Doherty. What counsel for the Committee submitted was that Dr. Doherty came to the same conclusion as Dr. Monteiro and for the same types of reasons. In those circumstances, he argued that I should treat Dr. Monteiro's evidence as the evidence identifying a lack of capacity.

9. I heard both clinicians, having read their reports in advance. Dr. Humphries was very clear in her evidence, and in particular she was very helpful about the question of the Wernicke Korsakoff's syndrome and the extent to which it was present. One can see from the Order of President Irvine that paragraph 6 refers to the Ward's cognitive dysfunction in the context of Korsakoff's syndrome, so certainly, earlier on in the life of this case, there was a view that the Ward had Korsakoff's syndrome. But Dr. Humphries says that she does not believe that the Ward has Korsakoff's syndrome. She is very clear about that. The basis for her conclusion in that respect is that there has been a remarkable cognitive recovery based on her evaluation of the Ward, and in particular, his completion of mini mental state examinations. She notes for example at para. 6.16 that "*… an early MMSE in 2021 was reported as 18/30. That [which was] completed by Dr Doherty in October 2022 was 29/30*". Her own finding was that the Ward scored 27/30. She said that *"... level of improvement, in my opinion, would not be in keeping with Wernicke-Korsakoff Syndrome."*.

10. She said that she was of the opinion that his previous presentation was when he was extremely badly affected by his alcohol addiction. That was when he was first brought into the nursing home. She said she thought it likely that he was showing the first part of the diagnosis i.e. Wernicke's syndrome. She says she believed that accounted for him being in an acute state. She notes that this state can be treated with high doses of

intravenous vitamin B infusions and absence from alcohol and a person may recover from it with time (Para. 6.8). She concluded that the Ward undoubtedly did present with Wernicke's syndrome at a point in time. She made it quite clear that she thought he no longer has Wernicke's acute syndrome and nor does he have Wernicke-Korsakoff's syndrome. It is fair to say that Dr. Monteiro agreed with her conclusion. Therefore, I do not need to take into account that medical condition at this point as a basis for any lack of capacity.

11. Dr. Humphries went on to say that she thought that the Ward likely has a mild cognitive impairment but not one that would interfere with his capacity.

12. She then went on to go through the four-part capacity test that is identified in the Assisted Decision-Making (Capacity) Act 2015. Counsel for the HSE correctly identifies that the elements of that test are in fact extremely similar to those identified by Judge Laffoy back in 2009 in *Fitzpatrick v. F.K. [2009] 2 IR 7.* Dr. Humphries went through each of those elements, and she identified that the Ward did not fail any of those tests. She indicated that in relation to alcohol, he is an addict, and that she thought he was likely to make bad decisions but capacitous decisions. She indicated that in relation to the question of weighing information, although he tended to minimise his addiction, nonetheless he was able to look at alternatives and weigh them up and measure them. And she said that minimising the extent of addiction and the extent of drinking were in fact characteristic of addicts and did not necessarily point in any way to a lack of capacity.

13. The evidence of Dr. Monteiro is very important. Although in his report he comes to the conclusion that the Ward lacks capacity, in fact as the examination and cross-examination went on, it became clear that the approach he had used to determine capacity was not one in keeping with the law. I am not referring here to the 2015 Act,

because obviously that Act has not yet been commenced but rather the law on capacity more generally. Dr. Monteiro had looked at the question of capacity and had considered the four-part test. But when he reflected on the question of capacity, he came to the view that the Ward lacked capacity, not because he failed to meet all or part of the four-part test, but because Dr. Monteiro concluded it was not in the Ward's best interests to leave the nursing home. This was because he was very likely to continue to drink alcohol with disastrous consequences, given the state of his health when he entered the nursing home. For that reason, Dr. Monteiro concluded he lacked capacity.

14. Dr. Monteiro observed that he felt Dr. Doherty had taken a similar approach. I think that is correct. When one looks at the recommendations of Dr. Doherty, she identifies the Ward requires placement in a suitable setting. She says if the Ward returns home, he would be at serious risk of returning to heavy alcohol use and she sketches out the likely consequences of that. She goes on to say that she is of the opinion that he is a person of unsound mind and is unable to manage his person although his cognitive function has improved and is now within normal limits. It is true that under the heading "Capacity" she observes that he does not meet all the criteria in the four-part test but notes it is his addiction, rather than cognitive impairment, that is the main factor influencing his impaired decision making.

15. Dr. Monteiro does not identify the best interests test as explicitly in his report, although when one looks at his concluding section, he says that the Ward would have a much better quality of life if he were in an environment where he had others with whom he would have constructive or entertaining conversations. He says that the Ward fails on two of the four tests of capacity. But he also refers to the Ward's long history of repeated falls, malnutrition, and his high risk of recurrent seizures. He identifies that

they have become more life threatening. He identifies that the Ward is set on continuing to drink and is unable to consider the possibility that alcohol has in the past led to physical problems. Thus, implicitly in his report, he considered the Ward's best interests. That consideration became explicit in the course of cross-examination.

16. I should also refer to the fact that both psychiatrists who gave evidence identified that the Ward has a diagnosis of schizophrenia, but that neither of them felt that this was in any way relevant and was not impacting on his capacity at all. In fact, Dr. Monteiro went so far as to say that he had some doubts himself about the diagnosis of schizophrenia, but that is not relevant to my assessment.

17. I should also mention the very important evidence of the Ward himself. This hearing is all about him, and were it not for him, the hearing would not be taking place. The Ward made some interesting points to me. He said that he didn't agree with Dr. Monteiro's assessment that he would go back to his old ways if he was able to go back to his home and leave the nursing home. He said he wouldn't go home and start to drink. He said he would find things to do, he knows the dangers of drink. He says that in relation to his conversation with Dr. Monteiro where he indicated that if he had an opportunity he would drink every second or third day, he didn't know why he had said that and it was a mistake. In a very important passage, he said, "*I know I'll be dead if I drink*" and then he said he knows he was brought back to life, that he was a lucky man, and that he was aware of the dangers of alcohol. He identified the things he could do if he was indeed able to go home.

18. Obviously, I am entitled to take into account, not just the medical evidence but also the Ward's evidence to me. Certainly, from my brief conversation with him he seemed to understand the dangers of his addiction, understand the consequences if he went back drinking again, and to have a determination not to go down that road.

19. In summary, it seems to me that the General Solicitor does not now have the evidence to sustain this application. The application was undoubtedly brought for good reason, and in the best interests of the Ward. I attach no blame or criticism to the General Solicitor in seeking to have the detention Order extended, because from Dr. Monteiro's report it appeared that he believed that the Ward did not have capacity, both in the medical and legal sense. But as noted above, it became clear on cross-examination of Dr. Monteiro that Dr. Monteiro was looking at the question of capacity through a particular prism. That that prism is not one that meets the legal test, i.e. one cannot take into account best interests when considering capacity. Once the Court has decided there is a lack of capacity, the Court then has a discretion as to whether to admit a person to wardship. Best interests in the context of wardship is particularly relevant when deciding whether to admit a person into wardship. It is at that point the best interests test comes into play, rather than at the point when one is assessing the existence of capacity.

20. In the circumstances, the General Solicitor's application to continue the detention Order is not underpinned by evidence of a lack of capacity, and in those circumstances the application must fail. Further, there is evidence before me that the Ward now has regained capacity. The HSE has not sought in terms to withdraw the wardship, but there is a recognition that there is no basis for seeking a continuation of the Orders and an acceptance that regaining capacity means that there is no basis for wardship. Accordingly, I am going to discharge the Ward from wardship and vacate all existing Orders.