REDACTED **APPROVED**

THE HIGH COURT
WARDS OF COURT

[2024] IEHC 361

[WOC 958]

IN THE MATTER OF A.B. (A RESPONDENT)

RESPONDENT

JUDGMENT of Mr. Justice David Barniville, President of the High Court, delivered on the 14th June, 2024

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1. Introduction

1. This judgment addresses an interesting issue as to whether a respondent to a wardship petition is entitled to his costs in circumstances where the petitioner decides not to

proceed with the inquiry ordered by the court. The inquiry before a jury did not proceed in this case in light of evidence from a consultant psychiatrist retained on behalf of the respondent as to the respondent's capacity which was accepted by the petitioner.

2. The respondent's position is that he is entitled to an order for the costs of the wardship proceedings against the petitioner (who brought the petition on behalf of the Health Service Executive ("the HSE"). The petitioner's position is that, for various reasons, including the longstanding practice adopted in wardship cases, the HSE should not be liable for the respondent's costs and, instead, there should be no order as to costs. In response, the respondent maintains that the *"almost invariable practice"* adopted in wardship cases should not be followed in this case for various reasons.

3. For the detailed reasons set out in this judgment, I have concluded that I should follow the practice referred to and should refuse to make an order for costs against the petitioner/the HSE. I was asked to leave over the issue as to whether the respondent's solicitors and counsel are entitled to an order for their costs out of the estate of the respondent (in accordance with the practice in wardship cases). Should such an application be made by the respondent's solicitors and counsel, I will deal with it expeditiously after this judgment is delivered .

2. <u>Factual and Procedural Background</u>

4. On 19 March 2021, a representative of the HSE presented a petition on behalf of the HSE to admit the respondent to wardship. At the time of the presentation of the petition the respondent was in his mid-60s. The petition was supported by an affidavit of verification sworn by the petitioner and by affidavits and reports of two medical practitioners, a locum consultant psychiatrist with a community mental health centre in Munster ("Dr. O") and by a consultant in psychiatry of later life with the HSE and the

Midlands Mental Health Services ("Dr. M"). The petition was also supported by a social work report dated 14 December 2020, prepared by a social worker with the HSE community mental health services in Munster ("Mr. H").

5. At the time of the petition, the respondent was residing in the Department of Psychiatry in a hospital in the South-East. He had a long history of involvement with mental health services. He has and had the following diagnoses:

(a) schizophrenia,

(b) Asperger's syndrome,

(c) delayed processing skills (below average), and

(d) bi-polar affective disorder.

6. Since June 2019, the respondent had had a number of admissions to hospital and to a separate HSE short term stay mental health facility in the South. He had been discharged from that short-term facility to his home in July 2019 but was found to be living in dire circumstances at home by a public health nurse. He was ultimately readmitted to the Department of Psychiatry on 16 September 2019. He was readmitted to the Department of Psychiatry in July 2020, having been discharged back to the short term stay facility for a period, readmitted to the Department of Psychiatry and subsequently admitted to a hospital in Dublin between June and July 2020.

7. According to the petition, the respondent was unable to manage living at home and managing his financial affairs. He had received a substantial inheritance from his late brother. While acknowledging that he would not be able to manage on his own at home and while, on a number of occasions, expressing the wish to be made a ward of court, that process was not progressed until the current petition was presented on behalf of the HSE. It was the view of his treating team that the respondent should be taken into wardship in order to ensure that his future care and accommodation needs were properly

attended to and to protect his interests in the context of the inheritance the respondent received from his late brother.

8. The petition contained the undertaking required by O. 67 r. 4(2) RSC in which the petitioner undertook, on behalf of the HSE:

> *"…in case this petition is dismissed or not proceeded with, to pay the costs and expenses of any visitation of the respondent, or any other incident to the inquiry before the Court."*

9. The petitioner also proposed that, in the event that the respondent was taken into wardship, it would be seeking to have the General Solicitor appointed as the respondent's committee of the person and of the estate.

10. The petition was supported by affidavits and reports from two consultant psychiatrists, Dr. O and Dr. M. In her report, Dr. O referred graphically to the circumstances in which the respondent was found in his home in September 2019, prior to his admission that month to the Department of Psychiatry. Dr. O noted that the respondent had changed his mind several times over the course of a number of months as to where he was to be cared for and what he wished to do with his inheritance. This was a symptom of his condition. The respondent informed Dr. O that he wished to be made a ward of court on an application made on his behalf by his solicitor. Dr. O prepared a capacity assessment to support that application. In that assessment, she concluded that the respondent lacked capacity to manage his finances. Dr. O's report of 4 February 2021 contained a detailed capacity assessment on the basis of a number of examinations carried out over 2020 and early 2021. At one of those examinations, on 26 November 2020, Dr. O noted that the respondent *"pleaded to be made* [a] *ward of court so that he can be cared for"*. Dr. O agreed that that was the appropriate course, having regard to the circumstances in which he was living in 2019 and the rapid deterioration when he

was discharged home that year, due to his inability to care for himself. At later examinations on 28 January 2021, and 4 February 2021, Dr. O noted that the respondent was still focused on being made a ward of court and moving to a care facility in Dublin. It remained her view that the respondent was not capable of taking care of himself or his affairs. She concluded that the respondent was of unsound mind and was not able to manage his affairs as a consequence of a combination of a debilitating serious mental illness (schizophrenia) for more than four decades and Asperger's syndrome. She stated that those conditions were unlikely to resolve to a material extent in the foreseeable future to enable him to live independently. She recommended that the respondent be made a ward of court *"in keeping with his request"*.

11. Dr. M agreed with the opinion of Dr. O. She assessed the respondent on 11 December 2020. He explained to Dr. M that he felt that he was unable to look after his financial affairs and was unable to live independently. He expressed his agreement to be made a ward of court. Dr. M noted that the respondent's ability to function had deteriorated over the past couple of years and that it was likely that it would continue to deteriorate in a gradual way over time. She expressed the view that the respondent lacked capacity to make significant decisions for himself as a result of underlying mental health issues which he had had for many years and that he was of unsound mind. She stated that he was going to deteriorate over time and that it is likely that there had been a gradual deterioration in his neurocognitive abilities over many years. She supported the petition to have the respondent admitted to wardship. As I mentioned earlier, the petition was also supported by a social work report prepared by Mr. H.

12. On the basis of the petition and supporting evidence, the then President of the High Court, Irvine P., made an inquiry order on 24 March 2021, ordering that an inquiry be

carried out as to the soundness or unsoundness of mind of the respondent. Notice of the order dated 5 July 2021 and the petition were served on the respondent on 8 July 2021.

13. Before that was done, the President requested that one of the court's medical visitors, Dr. Aoife Hunt, Consultant Psychiatrist, would visit and provide a report in relation to the respondent. Dr. Hunt provided her report on 9 April 2021. Dr. Hunt found that the respondent was *"paralysed by indecision"* and referred to the *"paralysing ambivalence"* which was the *"core symptom"* of his mental illness. The respondent was unable to express any decision or choice on various issues to Dr. Hunt. Dr. Hunt expressed the opinion that the respondent was a person of unsound mind who was incapable of managing his affairs. She also commented on the suitability of the respondent's place of residence. She stated that the Department of Psychiatry was not a suitable long-term place of care for the respondent. She noted that the respondent was unable to decide where he wanted to live, and that ambivalence prevented staff from arranging a suitable placement for him. She explained that the respondent needed *"the comfort of a settled home"* .

14. According to the affidavit of service of Patricia Donnelly, the solicitor who served the papers on the respondent on 8 July 2021, when served with the papers and having been informed of his right to object to wardship, the respondent indicated that he did not think that he would be objecting but would speak to his solicitor about it. Ms. Donnelly reported the respondent as having stated that he knew he needed help with managing things and that he was *"glad that this wardship process was happening so that things can move on"*.

15. In fact, on 22 July 2021, a notice of objection to the inquiry and to any declaration being made was lodged on behalf of the respondent by his solicitor. That notice demanded that such an inquiry be conducted before a jury.

16. The respondent's solicitor had difficulty in obtaining expert medical evidence to support the objection. The matter was reviewed by the President from time to time. On 28 April 2022, the President ordered that the respondent's solicitor file an affidavit setting out his attempts to obtain a medical report in support of the objection. The President further ordered that the issue as to whether respondent was or was not of unsound mind and incapable of managing his person or property be set down and tried without pleadings by a judge sitting with the jury. The petitioner's solicitors were directed to set that issue down for hearing forthwith and the matter was listed for further review on 16 June 2022.

17. The petitioner's solicitors served a notice of trial and set the issue down for trial on 9 May 2022. It appeared first in the Jury List to fix dates on 2 June 2022 and was adjourned on the respondent's application to 12 October 2022.

18. The respondent's solicitor, Michael Finucane, swore an affidavit on 10 June 2022 setting out the difficulties he had experienced in obtaining an independent psychiatrist to assess and provide a report on the respondent. It would appear that, on 16 June 2022, when the matter was next listed for review by the President, it was confirmed that Prof. Patricia Casey had agreed to carry out an assessment and provide a report in relation to the respondent for the purposes of the wardship application.

19. In correspondence with the HSE's solicitors, the respondent's solicitor sought details of care plans and assessments of the respondent carried out by the HSE. A motion for discovery was issued on behalf of respondent on 30 June 2022 returnable for 4 July 2022. Mr. Finucane swore an affidavit in support of that application. An affidavit was also sworn on behalf of the HSE by Áine Hynes on 1 July 2022. The HSE opposed the application for discovery. Following discussions, it was agreed that the motion would

be struck out with no order as to costs. It was agreed that certain notes and assessments referred to in Dr. O's report of 4 February 2021, would be provided to the respondent.

20. Shortly thereafter, on 18 July 2022, the HSE arranged for the respondent to be transferred from the Department of Psychiatry to a high support residential placement. It appears to be accepted that this is an appropriate residential placement for the respondent, and it is apparent from later reports that the respondent is doing extremely well there. He is now under the care of another consultant psychiatrist, Dr. B.

21. The case was adjourned on a number of occasions in the Jury List to fix dates between October 2022 and June 2023. On 12 October 2022, the matter was adjourned to the next list in circumstances where there was a delay in furnishing Dr. O's assessments, which the HSE had agreed to provide to the respondent's solicitor. Those assessments were only provided that day to the respondent. The case was adjourned on 15 December 2022 to the next list as there were no dates available. On 23 March 2023, the case was adjourned to the next list on the respondent's application as his side was not ready to go on.

22. Prof. Casey interviewed and assessed the respondent on 24 February 2023, and provided a report setting out her opinion on 26 March 2023. A copy of that report was furnished to the HSE's solicitors by the respondent's solicitor on 22 May 2023. The case was next in the Jury List to fix dates on 1 June 2023.

23. A very important development took place in the meantime, on 26 April 2023, when the provisions of the Assisted Decision-Making (Capacity) Act 2015 (as amended) (the "ADMCA") came into force. Under the saver and transitional provisions of the ADMCA contained within s. 56(3), applications to admit a person to wardship which were initiated prior to the Act coming into operation could continue to be dealt with. Since the petition to admit the respondent to wardship was commenced in March 2021,

it could continue to be heard and determined by the court notwithstanding the coming into force of the ADMCA.

24. When the respondent's solicitor furnished a copy of Prof. Casey's report to the HSE's solicitors on 22 May 2023, he referred to Prof. Casey's opinion that respondent did not satisfy the test for wardship and requested the HSE to clarify its position in relation to the wardship application in light of the coming into force of the ADMCA and Prof. Casey's opinion. At the Jury List to fix dates on 8 June 2023, the HSE applied for an adjournment to allow the respondent's treating psychiatrist to consider Prof. Casey's report. The matter was listed for mention in the Jury List on 28 June 2023. On that date, the HSE informed the court that it would not be proceeding with its application to admit the respondent to wardship in circumstances where Dr. B, the respondent's treating psychiatrist, indicated that, in her view, the respondent no longer met the criteria for wardship but would benefit from the appointment of a decision-making assistant under the ADMCA. O'Connor J. then transferred the matter back to the President's List on 10 July 2023 for the issue of the costs of the proceedings to be determined.

25. The HSE's solicitors wrote to the respondent's solicitors on 5 July 2023 confirming that the HSE was not proceeding with the wardship application in circumstances where the respondent had *"regained some insight"*. The letter concluded by stating that, as it was no longer necessary to proceed with the wardship application, the HSE's position was that the proceedings should be struck with no order as to costs. The respondent did not agree with that proposal. The respondent's position was that he was seeking his costs of the proceedings. In the absence of agreement, directions were made for the exchange of written submissions and for the hearing of the respondent's application for costs. No order was ever, in fact, made given leave to the petitioner to withdraw the

petition or striking out or dismissing the petition. The issue of costs was ultimately heard by me on 29 November 2023 and 19 December 2023. Having received very helpful written and oral submissions from the parties, and as the matter was not straightforward, I reserved judgment in the matter. This is that judgment.

3. Report of Prof. Casey

26. The report obtained on behalf of the respondent from Prof. Casey is a critical piece of evidence. Her findings were what ultimately persuaded the HSE not to proceed with its application to admit the respondent to wardship and with the inquiry set down before the judge and jury.

27. Prof. Casey had been provided with the relevant prior reports in relation to the respondent, including those of Dr. O and Dr. M which supported the HSE's wardship application and the report of the medical visitor, Dr. Hunt. Prof. Casey interviewed the respondent himself and a close friend of his on 24 February 2023. When she asked the respondent whether he understood what was involved in wardship, he confirmed that he did and explained his understanding. Prof. Casey reported that the respondent said that he was *"horrified when the legislation mentioned that one had to be of unsound mind"*. She stated that the respondent told her that he believed that wardship was *"archaic and draconian"* and that he had previously said to two people that he did want to be made a ward but that he was *"simply exploring options and not wanting it in fact"*. Prof. Casey notes that the respondent stated that a previous attempt was made by the HSE to admit him to wardship in July 2019 but that that application was refused. I should observe, however, that is not mentioned anywhere else in the papers and was not relied upon by any of the parties in their evidence or submissions to the court. Mr. H, the social worker, did mention that a wardship application had been commenced in

March 2019 but had been *"paused"* due to concerns for the respondent's physical health.

28. The respondent told Prof. Casey about his current accommodation in the residential placement and was aware that the previous reports (of Dr. O and Dr. M) were prepared while he was in the Department of Psychiatry. Prof. Casey noted that the respondent had insight into the nature of his illness, that he needed to take medication and that he could not live completely independently and also that he accepted that he needed some assistance.

29. Prof. Casey's preferred diagnosis for the respondent was schizoaffective psychosis, a combination of bi-polar disorder and schizophrenia. That psychiatric condition carries a much better prognosis in terms of personality and day-to-day functioning than schizophrenia.

30. Critically, Prof. Casey noted that the application to admit the respondent to wardship was made on the basis of the relevant psychiatric reports prepared in 2021, at a time when the respondent was an inpatient in an acute psychiatric unit. She noted that people with *"major mental illness"* which has gone past the acute stage do not benefit from, and may deteriorate in, such an environment. It was Prof. Casey's opinion that that is why the respondent was *"so much better"* when she saw him in February 2023 than he was when he was seen by Dr. O, Dr. M and Dr. Hunt in 2020 and 2021.

31. Prof. Casey considered all relevant aspects of the respondent's decision-making capacity, including in the area of his finances and his care needs. She expressed the opinion that it was likely that he had previously agreed to being made a ward of court when interviewed in 2021 because he was *"unwell and saw little hope of an improvement in his condition"*. When she saw him in February 2023, the respondent did see *"prospects for a better future but within certain limitations regarding his self-*

management". Prof. Casey was not in a position to state that the respondent was of unsound mind for various reasons, including that he had insight into his illness and his limitations, knowledge about his financial affairs, a willingness to accept supported accommodation and care of the type he was then, and still is, receiving, and an acceptance of input in relation to financial matters from his close friend. Prof. Casey felt that he would meet the criteria for the appointment of either a decision-making assistant or a co-decision maker, but not a decision-making representative under the ADMCA.

32. While Dr. O, Dr. M and Dr. Hunt were all of the view, based on their various assessments carried out in 2020 and 2021 that the respondent met the criteria for wardship, Prof. Casey, based on her examination and assessment in early 2023 following the respondent's transfer to his new residential placement, concluded that he did not.

33. The court was informed on 28 June 2023, that Dr. B, the respondent's treating psychiatrist, was in agreement with Prof. Casey's opinion and, on that basis, the HSE decided not to proceed with the inquiry or its application to admit the respondent to wardship.

4. <u>The Costs Dispute</u>

34. In light of the decision by the HSE not to proceed with the petition to have the respondent admitted to wardship, the respondent sought an order for his costs against the petitioner, effectively the HSE. The HSE disputed the respondent's entitlement to an order for costs and took the position that there should be no order as to costs against it. I now have to decide whether the respondent is entitled to his costs against the HSE or whether, as the HSE has contended, there should be no order as to costs.

35. I will set out below a brief summary of the respective contentions of the respondent and the HSE on the issue of costs. I will then set out my decision and outline my reasons for that decision.

1) Respondent's Position on Costs

36. The respondent's position is quite straightforward. He contends that he is entitled to an order for the costs of the wardship proceedings in circumstances where the HSE presented the petition seeking to have him admitted to wardship and then decided, having considered Prof. Casey's report, not to proceed with that petition. In those circumstances, he contends that he is entitled to his costs against the HSE. He does so on various different bases.

37. First, the respondent relies on the provisions of ss. 168 and 169 of the Legal Services Regulation Act 2015 (the "2015 Act"). The respondent contends that he has been wholly and *"entirely successful"* in resisting the petition to have him admitted to wardship and that he should, therefore, be entitled to his costs. He contends that there is no reason for the court to order "*otherwise*" further by reference to the *"particular nature and circumstances of the case"* or the *"conduct of the proceedings"* by the parties, as those terms are used in s. 169(1).

38. The respondent submitted that I should distinguish this case from *In Re T.H. (A Ward)* [2020] IEHC 487 ("*T.H.*"). In that case, Hyland J. refused to make an order for costs in favour of a respondent who had opposed a wardship petition against the HSE where the opposition was ultimately withdrawn, and the respondent was admitted to wardship. In this case, the respondent maintained his objection to the wardship petition which was ultimately not pursued by the HSE in light of Prof. Casey's evidence. The respondent contends that *T.H* can be distinguished from the present case, and that he should recover

his costs from the HSE on the basis that he has been *"entirely successful"* in the proceedings and has won the *"event"*, being the HSE's acceptance of Prof. Casey's report and its decision not to proceed with the petition or inquiry as communicated to the respondent's solicitors by the HSE's solicitors in the letter of 5 July 2023.

39. Second, the respondent relies on s. 169(4) of the 2015 Act and submits that, in accordance with that provision, the HSE, as the party who discontinued or abandoned the proceedings after they were commenced, should be liable to pay the costs incurred by the respondent in defending the proceedings until they were discontinued or abandoned. He contends that there is no basis for the court to order otherwise under that provision. The respondent relies on the HSE's solicitors' letter of 5 July 2023, as effectively amounting to the discontinuance or abandonment of the application to have him admitted to wardship. He also relies on O. 26, r. 1 RSC to support his entitlement to the costs of the proceedings. He maintains that the HSE has effectively wholly discontinued its case against him and, on that basis, should be required to pay his costs of the proceedings.

40. In addition to these two provisions, the respondent relies on dicta of Keane C.J. in *Callagy v. Minister for Education* (Unreported, Supreme Court, 23 May 2003 (*ex tempore*)) ("*Callagy*"). The respondent relies, in particular, on the dictum of Keane C.J. that *"a plaintiff who elects to bring proceedings and then abandons them for whatever reason must pay the defendant's costs"* and that if a plaintiff wants the defendant to pay the costs, the plaintiff *"must be prepared to go on the full length of the proceedings, obtain the relief that he sought and then invite the court to award costs in the ordinary way as following the event"* (per Keane C.J. at p. 5).

41. With respect to his reliance on O. 26, r. 1, the respondent relies on *Shell E&P Ireland Limited v. McGrath (No. 3)* [2007] 4 I.R. 277 ("*Shell*") where Laffoy J. decided that

she should not depart from the normal rule that a discontinuing plaintiff should pay the defendants costs up to the date of discontinuance (although the court did accept that it had a jurisdiction to consider whether, on the particular facts, the application of O. 26, r. 1 would be unjust).

42. Third, insofar as it might be said (contrary to the respondent's principal contention) that the proceedings became moot when the HSE accepted Prof. Casey's report and decided not to proceed with the petition, the respondent relies on various cases including *Godsil v. Ireland* [2015] IESC 103 [2015] 4 I.R. 535 (*"Godsil"*) and *Cunningham v. President of the Circuit Court* [2012] 3 I.R. 222 (*"Cunningham"*) as providing support for his entitlement to the costs of the proceedings.

43. Essentially, it is contended that the significant improvement in the respondent's condition at the time he was assessed by Prof. Casey in early 2023, when compared to his condition back in 2021, was not entirely outside the control of the HSE. It was submitted on behalf of the respondent that the HSE could and should have known of the significant change in the respondent's condition prior to Prof. Casey's assessment, since the respondent was moved to a HSE-run residential unit in July 2022 and was under the care of a treating consultant psychiatrist there. The HSE ought, therefore, to have been in a position to identify the improvement in the respondent's condition prior to receiving Prof. Casey's report in May 2023 and prior to subsequently deciding in late June/early July 2023 that it would not be proceeding with the wardship application. While not necessarily accepting that the proceedings had become moot by virtue of the improvement in the respondent's position, it is the respondent's case that the HSE ought to have arranged for an up-to-date assessment and provided updated reports prior to receiving Prof. Casey's report, and, if they had, the proceedings would have been

brought to an end at a much earlier stage. On that further basis, the respondent seeks his costs against the HSE.

44. Fourth, the respondent heavily relies on the undertaking contained at para. 13 of the petition, whereby the petitioner (on behalf of the HSE) undertook, in the event that the petition were *"dismissed or not proceeded with"*, to pay *"the costs and expenses of any visitation of the respondent, or any other incident to the inquiry before the court"*. The respondent submits that the undertaking (required by O. 67, r. 4(2)) is, in very broad terms, that the HSE should be required to pay the costs of the proceedings, in circumstances where the petition was not proceeded with.

45. Fifth, while accepting that the decision of Finnegan P. in *Re Catherine Keogh (A Ward)* (Unreported, High Court, Finnegan P., 24 October 2002) ("*Catherine Keogh*") is, on the face of it, against the respondent, it was submitted on behalf of the respondent that that case can be distinguished and that, in any event, it was wrongly decided.

46. The basis on which it is said that the case can be distinguished is that the inquiry in that case proceeded before a jury and, on the basis of the answers given by the jury, Finnegan P. dismissed the petition. In this case, the HSE decided not to proceed with the petition before the inquiry was carried out before the judge and jury.

47. The basis on which it is contended that *Catherine Keogh* was wrongly decided is centred on the alleged lack of proper reasoning for the conclusions made by Finnegan P. It is maintained on behalf of the respondent that the judgment in that case does not provide a good or proper foundation for the practice followed and applied by the President in that case. It is also said that the decision in that case predated developments in the law on costs including the development of the nuanced approach to decisions on costs seen first in *Veolia Water UK plc v. Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 I.R. 81 ("*Veolia*") and subsequently in ss. 168 and 169 of the 2015 Act.

It is argued on behalf of the respondent that, contrary to what Finnegan P. decided in *Catherine Keogh*, a failure to award the respondent his costs in this case would amount to a breach of the respondent's right to equality under Article 40.1 of the Constitution and would give rise to a serious injustice to the respondent, in breach of Article 40.3.2 of the Constitution.

2) HSE's Position on Costs

48. The HSE's position is that the court should make no order as to costs against it. It is neutral on the issue as to whether the court should make any order that the respondent's solicitor and counsel recover their costs from the respondent's estate. I set out below a summary of the HSE's position on the issue of costs.

49. First, the HSE relies on the practice of the court in wardship matters as described by Finnegan P. in *Catherine Keogh* and by Hyland J. in *T.H.* The HSE supports the application of that practice in this case, while acknowledging that the facts of this case are not on all fours with the facts in *Catherine Keogh* and *T.H.* The HSE acknowledges that s. 12 of the Lunacy Regulation (Ireland) Act 1871 ("the 1871 Act") does not apply, as this was a case in which the HSE sought to admit the respondent to wardship on foot of a petition supported by medical evidence (under s. 15 of the 1871 Act). It was not an application to admit the respondent to wardship under s. 12. Further, while s. 94 of the 1871 Act confers power on the court to direct that the costs of wardship proceedings can be paid from the estate of the respondent, as noted ready, the HSE has taken a neutral position in relation to any application that the respondent's costs be paid out of his estate.

50. With respect to the practice referred to in *Catherine Keogh* and *T.H.*, the HSE relies on the conditions which must be satisfied in order for costs to be awarded on the basis of

that practice. It contends that there were reasonable grounds for the presentation of the petition which were supported by affidavits and reports from two consultant psychiatrists. Those reports confirmed that, at the time of the presentation of the petition, the respondent met the test for wardship. It was also reasonable for the application to be made as, according to a report by the HSE, the respondent was unable to make a decision in relation to his future residential requirements and had also received a significant inheritance from his late brother and was unable to make decisions in relation to that either. The HSE contends that there could no doubt about the *bona fides* of the application in circumstances where it was brought in the best interest of the respondent and for his protection and not for the purpose of securing any personal advantage for the petitioner.

51. While acknowledging that there are some factual differences between this case and *Catherine Keogh* and *T.H.*, it maintains that those differences do not affect the relevance and applicability of the practice in relation to costs referred to in those cases. It submits that, consistent with that practice, the court should, on the facts of this case, make no order as to costs.

52. The HSE disputes the respondent's contention that *Catherine Keogh* was wrongly decided. It maintains that the court should follow *Catherine Keogh* and that there are no substantial reasons for believing that that judgment was wrong. It submits that the test in *In Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189 (*"Worldport"*) for not following a decision of another judge of the same court is not met in this case. It points to the fact that the practice was very recently referred to, without criticism, by Hyland J. in *T.H.* Further, the HSE submits, contrary to the argument made on behalf of the respondent, that the decision in *Catherine Keogh* was

properly reasoned and, if applied in this case, would not give rise to any injustice. It submits in that respect that the practice:

> (a) takes account of the nature and purpose of the wardship proceedings which were brought for the purpose of protecting the respondent where there was strong medical evidence to support the application, and
>
> (b) the conditions for the application of the practice, namely, that there must be reasonable grounds for bringing the application and the application must be brought *bona fide* and for the benefit of the respondent, ensures that justice is done in this case.

It submits that those conditions have been satisfied in this instance. If the court were not to apply the practice in such a case, people would be discouraged from bringing what would otherwise be necessary and appropriate wardship applications because of a fear that the relevant person might recover, and the petitioner might then be the subject of an adverse order for costs.

53. Second, the HSE accepts that ss. 168 and 169 of the 2015 Act and O. 99 RSC are potentially relevant to a case such as this, as Hyland J. observed in *T.H.* However, it relies on the fact that those provisions preserve the general discretion of the court in deciding on the appropriate costs order to be made in each case. It relies on the flexibility expressly built into s. 169 of the 2015 Act, under which the court can depart from the general rule that costs would be awarded to an *"entirely successful"* party in civil proceedings *"having regard to the particular nature and circumstances of the case"*.

54. The HSE relies on the fact that, as noted by the Supreme Court in *In the matter of J.J.* [2021] IESC 1, wardship proceedings do not take the form of a *lis inter partes*. It points out that, in this case, the purpose of the wardship application was to enable an

appropriate residential placement to be obtained for the respondent and to ensure that the respondent's interests were protected in the context of the inheritance he had received, where all of the medical evidence was that the respondent met the test for wardship.

55. Third, the HSE disputes the respondent's contention that an order for costs should be made against the HSE under s. 169(4) of the 2015 Act. It contends that this is not a case where the HSE discontinued or abandoned the proceedings, as those terms in s. 169(4) should be understood. It disputes the characterisation by the respondent of the HSE's solicitors' letter of 5 July 2023, as being in the nature of a letter or notice of discontinuance. It was a confirmation by the HSE that, because of the improvement in the respondent's condition, it accepted that the test for wardship was no longer met and that it would not be necessary, therefore, to proceed with the inquiry.

56. The HSE submits that there is a sufficient basis for the court to *"order otherwise"* for the purpose of s. 169(4) and not to make an order for costs against it. It submits that, when considering whether to depart from the order for costs referred to in s. 169(4) in the case of an action which has been discontinued or abandoned, the court is not limited in what it can consider to those matters set out in s. 169(1) and relies in that respect on *McDaid v. Monaghan County Council* [2021] IEHC 402 (*"McDaid"*).

57. The HSE also makes the point that many of the costs incurred by the respondent could not properly be laid at the door of the HSE, including the various listings which were necessary before the President and in the Jury List to fix dates while the respondent's solicitors sought to obtain an opinion from an independent consultant psychiatrist and the motion for discovery brought by the respondent in June/July 2022, which resulted in no order being made by the court.

58. On a related issue, the HSE submits that O. 26, r. 1 does not apply, since this is not a case where a party has filed a notice of discontinuance in the limited circumstances provided for in that provision. Further, it notes that the rule provides that the court may order an action to be discontinued *"upon such terms as to costs…as may be just"*, thereby conferring a wide discretion on the court. It submits that even if O. 26, r. 1 were to apply, the exercise of that discretion in this case should lead to the court making no order as to costs against the HSE.

59. Finally, in this context, the HSE submits that the court can distinguish the decision in *Callagy* on the basis that the circumstances here were entirely different to those which applied in that case. This was not a case of a plaintiff electing to bring proceedings and then abandoning them. Nor, the HSE submits, would it be appropriate to require the HSE to proceed with the petition and inquiry for the purpose of obtaining the relief sought in the petition and then inviting the court to award costs in the ordinary way as following the event. The HSE reiterates the particular circumstances of the respondent and the need for intervention on the basis of expert medical evidence, as well as the significant improvement in the respondent's condition in his new residential unit.

60. Fourth, the HSE contests the respondent's entitlement to rely on the undertaking referred to at para. 13 of the petition as giving rise to an entitlement to the order for costs sought by the respondent. It also disputes the respondent's interpretation of the undertaking and O. 67, r. 4(2). It relies on the background to the requirement of such an undertaking, outlined by Finnegan P. in *Catherine Keogh*, which is to give the court the power to award costs and to enforce payment against those who may have presented a petition for inquiry improperly where such a power was expressly conferred on the Lord Chancellor in England by the Lunacy Regulation Act 1862 (s. 11) but no such equivalent power was conferred on the Lord Chancellor of Ireland by the 1871 Act.

61. The HSE contends that the proper interpretation of the undertaking is not that it is an undertaking to discharge the costs of a respondent to wardship proceedings. If that were so, it maintains, the practice adopted by the wardship court since the 1870s, as outlined by Finnegan P. in *Catherine Keogh*, would have been in error. It submits that the undertaking is one to discharge the costs of the medical visitor or any other incident to the inquiry which the court deems appropriate. The HSE maintains that it is for the court to determine whether the costs of a respondent should be awarded against the petitioner in the event of the petition being dismissed or not proceeded with. It notes the practice that where a petition has been dismissed the petitioner will generally still be awarded its costs, provided the petition was brought in good faith and on reasonable grounds. The HSE contends that a petitioner should not be in a worse position where it decides, for proper reasons, such as the improvement in the condition of the respondent, not to proceed with the petition provided the petition was commenced in good faith and on reasonable grounds.

62. Fifth, it contests the appropriateness of the respondent's reliance on cases such as *Cunningham* as providing support for his entitlement to an order for costs against the HSE. It relies on the fact that Prof. Casey's evidence was that the respondent's position had significantly improved by the time she examined him in early 2023 compared with his condition at the time the petition was presented, as described by the two medical practitioners who supported the petition and by the medical visitor. It was not a case, therefore, of there being a conflict of medical evidence but rather a significant improvement in the respondent's condition. This was something which was outside the control of the parties for the purposes of the analysis contained in *Cunningham*, according to the HSE. Effectively, the HSE's position is that this was not a case where proceedings became moot by reason of any unilateral action on its part. The appropriate

order, therefore, on the basis of *Cunningham* (and *Hughes v. Revenue Commissioners* [2021] IECA 5 (*"Hughes"*)) is that there should be no order as to costs.

5. Analysis and Decision on Costs

63. Before setting out my conclusions in relation to the submissions made by the parties and my decision on the costs issue, I should identify the statutory provisions which are or are potentially applicable to that issue.

64. As noted earlier, the 1871 Act contains a number of relevant or potentially relevant provisions. They are ss. 12 and 94. Section 12 conferred a jurisdiction on the Lord Chancellor (and now on the President of the High Court) to order costs where the proceedings are directed by the court on foot of a report from one of the court's medical visitors. Section 12 provides that in such a case the:

> *"costs and expenses to be incurred by any person in proceeding upon any such report and order in obedience to any such order as a foresaid shall be paid and provided for in such a manner as the* [court] *may by any general or special order at any time or from time to time direct"*.

65. In this case, the proceedings were commenced by a petition presented on behalf of the HSE for the purposes of s. 15 of the 1871 Act. The costs provisions in s. 12 do not, therefore, apply. Section 15 does not contain an equivalent provision in relation to costs to that provided for in s. 12. Further, as explained by Finnegan P. in *Catherine Keogh*, the 1871 Act did not confer any power on the Lord Chancellor of Ireland to make an order for costs or to enforce payments of those costs against a person who may have presented a petition for inquiry improperly. Such a power was conferred on the Lord Chancellor of England by s. 11 of the Lunacy Regulation Act 1862. However, s. 118 of the 1871 Act conferred power on the Lord Chancellor of Ireland to make:

"such orders as to him shall see meet for carrying into effect the purposes of this Act and for regulating the form and mode of proceeding before and by the Masters and the practise in matters of lunacy and for regulating the duties and powers of the several officers in lunacy, and so far as to him they seem expedient for altering the course of proceeding here and before prescribed in respect of the matters to which this Act relates, or any of them…".

66. In exercise of that power, the Lord Chancellor made a General Order in Lunacy on 27 June 1879 which provided for the form of undertaking by a petitioner in the terms now required under O. 67, r. 4(2). As Finnegan P. explained in *Catherine Keogh*, that provision was designed to give the Lord Chancellor of Ireland the same power as was conferred on the Lord Chancellor of England to award costs where a petition for inquiry was presented improperly.

67. Order 67, r. 4(2), which was the subject of some debate between the parties, provides that a petition seeking an inquiry must contain an undertaking by the petitioner *"that he will, in case the petition is dismissed or not proceeded with pay the costs or expenses of any visitation of the respondent or otherwise incident to the inquiry before the court"*.

68. The other relevant section in relation to costs in the 1871 Act is s. 94 under which the Lord Chancellor of Ireland was given the power to order *"the costs and expenses of relating to the petitions, applications, orders, directions, conveyances and transfers to be made in pursuance of the* [1871] *Act, or any of them, to be paid and raised out of or from the land or stock or the rents or dividends in respect of which the same respectively shall be made, in such a manner as he may think proper"*.

69. This is the section under the President of the High Court can now make an order providing for the costs and expenses relating to the petition or any other application under the 1871 Act to be paid out of the estate of the respondent to the petition. That

provision was also considered by Finnegan P. in *Catherine Keogh,* and I will return to it in the context of the practice of the wardship court in relation to costs described by the President in that case.

70. The provisions of ss. 168 and 169 of the 2015 Act and O. 99 are also potentially relevant to the issue of costs in wardship proceedings, as explained by Hyland J. in *T.H.* Sections 168 and 169 introduced a new cost regime. Section 168 provides for the power to award legal costs in civil proceedings. Section 169(1) bears the marginal note *"costs to follow event"* and provides that a party who is *"entirely successful"* in civil proceedings is entitled to an award of costs against the unsuccessful party, unless the court orders "*otherwise*". In deciding whether to order otherwise, the court has regard to the *"particular nature and circumstances of the case*" and "*the conduct of the proceedings by the parties*" including the matters set out in subparas. (a) – (g) of section 169(1).

71. Order 99 was substantially amended and replaced by a recast order which came into effect on 3 December 2019. Sections 168 and 169 of the 2015 Act came into force on 7 October 2019. O. 99, r.2 now provides that, subject to the provisions of statute (including ss. 168 and 169 of the 2015 Act), and except as otherwise provided by the rules, *"the costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those courts respectively"*. Order 99, r. 3(1) now provides that *"the High Court, in considering the awarding of the costs of any action or step in any proceedings…shall have regard to the matters set out in s. 169(1) of the 2015 Act, where applicable"*.

72. In *T.H.,* Hyland J. accepted that given the *"special and unusual jurisdiction"* of the President of the High Court in wardship, ss. 168 and 169 of the 2015 Act and O. 99 *"should be read having regard to the nature of that jurisdiction"* (at para. 38 of her judgment). She further observed that that presents no difficulty, since the provisions on

costs provide for a *"wide discretion in relation to costs and for the context of any particular case to be taken into account"*.

73. At paras. 39 and 40, Hyland J. stated that costs in wardship proceedings are *"undoubtedly subject to additional considerations that may be superimposed on the court's normal costs jurisdiction"*. That was for two reasons:

First, she observed that an order admitting a person to wardship has *"enormous implications on every aspect of that person's life"*. In those circumstances, she stated that it may be necessary to ensure that legal representation is available to a respondent to a wardship petition. That obligation derives from various sources, including the right to fair procedures and from other constitutional rights a respondent may have, as from the European Convention on Human Rights. She noted that that may have implications for the way in which ss. 168 and 169 and O. 99 are to be applied.

Second, Hyland J. observed that the 1871 Act gives specific powers to the President to award costs in wardship cases and referred in particular to ss. 12 and 94. She stated:

> *"These powers must be considered alongside ss. 168 and 169 and O. 99. In my view, nothing in s. 169 displaces those powers, despite be enacted later in time…"* (para. 40)

74. She concluded that ss. 168 and 169 and O. 99, "*remain potentially relevant in a wardship inquiry"* and observed at para. 42 that whether or not the notion of success or of an *"event"* is appropriate in wardship proceedings will depend on the particular circumstances. She concluded:

> *"The breadth of the wording of sections 168 and 169 and the discretion given to a court under Order 99 mean that a court can always make costs orders on*

> *the basis other than the success of a given party. But in my view, in some petitions for an inquiry, the concept of an entirely or partially successful party may still be helpful as part of the overall analysis of where the costs burden should lie."* (para. 42)

75. I am in full agreement with the analysis of the potential relevance of ss. 168 and 169 of the 2015 Act and O. 99 in a wardship context and with the clear confirmation by Hyland J. of the breadth of the discretion conferred on a court under those provisions in circumstances where it is sought to apply them in a wardship case.

76. I now turn to consider and provide my conclusions on the issues raised by the parties in their submissions.

1) Practice in Wardship Cases

77. The first issue which I must consider is the applicability of the practice adopted by the wardship court (whether it be the Lord Chancellor of Ireland, the Chief Justice (after 1924) or the President of the High Court (after 1936)) for how costs should be dealt with in the case of a petition properly presented on reasonable grounds and for the benefit of the respondent to the application.

78. Finnegan P. described the practice in *Catherine Keogh* as follows:

> *"The practice of the court since 1871 has been that if a petition has been properly presented and for the* [respondent][1] *benefit exclusively by a person entitled to present it the costs will be made payable out of the ward's estate even though the petition should be unsuccessful or the proceedings upon the inquiry granted result in the* [respondent] *being found sane or the finding of lunacy be quashed upon a traverse. Where the petition is presented bona fide the costs of*

[1] I have replaced the word *"lunatic"* used in the original quotation with a reference to the respondent.

opposing the inquiry will not be fixed on the petitioner even though the opposition succeeds."

79. Although Finnegan P. described the practice as being that, in the circumstances covered, the costs would be payable out of the *"ward's"* estate even though the petition does not lead to the respondent being admitted to wardship, it is clear that what he meant was that the costs would be met from the estate of the respondent, being the person the subject of the wardship application.

80. Finnegan P. relied on the judgment of the Chief Justice in *In the matter of M.J.* [1929] I.R. 509 (*"M.J."*). In that case, Kennedy C.J. concluded that he had jurisdiction and authority in a proper case under s. 12 of the 1871 Act to order that the costs of the party having carriage of the wardship application be paid out of the estate of the respondent, notwithstanding that the respondent was successful in resisting the application before a jury. He then went on to consider the circumstances in which such an order should be made.

81. Kennedy C.J. held that two conditions had to be satisfied before such an order could be made. First, that there had to have been reasonable grounds for alleging mental incapacity on the part of the respondent. Second, it had to be established that it was for the benefit of the respondent that the inquiry should proceed for the purpose of admitting the respondent to wardship. That is the test which was subsequently adopted by Finnegan P. in *Catherine Keogh*.

82. In *M.J.*, the jury found that the respondent was of sound mind and capable of managing herself and her affairs and so she was not admitted to wardship. Nonetheless, the Chief Justice was satisfied that the evidence established that there were reasonable grounds for alleging mental incapacity on the part of the respondent and also that the application was made for the benefit of the respondent. He concluded that the case was *"one*

eminently for the intervention of the court and for the direction of an inquiry as to the soundness of mind of M.J., and…[that] *the proceedings were entirely for her benefit".* In those circumstances, he ordered that the solicitor having carriage of the proceedings under the order previously made by the court be paid their costs of and incidental to the proceedings and that such costs be paid by the respondent out of her estate. It might be noted that a similar order was made previously by the Chief Justice in *In the matter of J.G.M.* (1928) 62 ILTR 105.

83. In *Catherine Keogh*, having referred to the practice of the wardship court since 1871, Finnegan P. considered whether he should make an order in accordance with that practice. In that case, the jury, having conducted the inquiry, decided that the respondent was not of unsound mind, but found that she was incapable of looking after her person and her property. Since both elements of the test in the 1871 Act were not satisfied, the President dismissed the petition. The petitioner sought his costs. That application was opposed by the respondent who sought her costs against the petitioner. The petitioner was a representative of the Royal Hospital in Donnybrook where the respondent was then residing. The petitioner was the respondent's next friend in personal injuries litigation which she brought arising from a road traffic accident in which she sustained serious injuries, including brain damage. An offer was made to settle those proceeding which was ruled by the court and the next friend was directed to bring the petition to have the respondent admitted to wardship.

84. Finnegan P. referred to the practice of the wardship court since 1871 and to the test outlined by Kennedy C.J. in *M.J.* He concluded that there were reasonable grounds to have brought the petition. Two medical practitioners had provided evidence in support of the petition, and the court's medical visitor had also provided a report stating that the responded met the test for wardship. Further, the petitioner had brought the petition on

the direction of the court which was given when ruling the settlement of the personal injuries proceedings. The President had no hesitation, therefore, in finding that there were reasonable grounds for presenting the petition. He was also satisfied that there could be no doubt about the *bona fides* of the petitioner, and the proceedings were not brought for any personal benefit of the petitioner but rather for the benefit of the respondent herself.

85. Finnegan P. then considered arguments advanced to behalf of the respondent to the effect that he should not apply the practice or follow the approach taken by the Chief Justice in *M.J*. It was argued that *M.J.* was decided prior to the enactment of the Constitution and that, to apply the practice, subject to the conditions set out in *M.J.*, would: (a) infringe Article 40.1 of the Constitution and therefore did not represent the law, and (b) would amount to an unjust attack on the respondent's property rights and render an injustice to her. The President rejected both arguments.

86. The basis on which it was contended that Article 40.1 was infringed was that the general principle in relation to costs is that costs follow the event and that an unsuccessful plaintiff will generally not recover his costs against the successful defendant, even where there may have been good grounds for bringing the case and even though the plaintiff may have acted *bona fide.* By adopting a different practice in wardship, it was said that persons in the position of respondents in such cases were not being treated equally before the law. Finnegan P. rejected that argument and drew attention to the fact that Article 40.1 provided that it was open to the State in its enactments to have *"due regard to differences of capacity, physical and moral, and of social function"*. He held that the reference to *"enactments"* and to the recognition of differences of capacity also apply in the case of non-statutory law where differences of capacity could also be recognised without infringing Article 40.1. He held that Article 40.1 did not apply to

prevent the application of the practice on costs in wardship cases where differences in capacity were properly being taken into account.

87. As regards to the argument based on Article 40.3.2 of the Constitution, the President appreciated the hardship which an adverse cost order might cause to the respondent but did not identify that as an injustice. He stated:

> *"Justice in these circumstances requires balancing of hardship as between the petitioner and the respondent. The petitioner having acted on reasonable grounds and bona fide in the interest of the respondent, it cannot be said that his being awarded costs represents an injustice to the respondent."* (at p. 8)

88. The respondent in this case argued that the decision in *Catherine Keogh* can be distinguished from the present case and that, in any event, the decision was wrong and should not be followed by me. As outlined earlier, the main basis on which that claim was advanced was that Finnegan P. did not fully explain the reasons for his conclusions and that he was wrong in concluding that there was no breach of Article 40.1, and that no injustice would be caused to the respondent in breach of Article 40.3.2 were a similar approach to costs to be taken in the present case. I do not agree that he was wrong.

89. The facts of this case are not identical to those in *Catherine Keogh* or in *M.J.* Unlike in that case, having received the report from Prof. Casey, the HSE did not go on with the inquiry before the jury, but rather agreed with Prof. Casey's conclusions. However, I do not believe that that difference is significant and that the practice, or at least a variation of it to reflect the facts of this case, is not relevant or applicable here. In my view it is, and it is consistent with the position adopted by the HSE that no order for costs should be made against it.

90. I do not agree that Finnegan P. was incorrect in his analysis on the Article 40.1 point. In circumstances where there was ample evidence before the HSE at the time that the

petition was presented to support its view that the respondent met the test for wardship, it seems to me that the reasoning adopted by Finnegan P. in rejecting the Article 40.1 argument in *Catherine Keogh* is applicable here. It is appropriate when considering the reasonableness of the approach taken in commencing the proceedings that the HSE had a substantial body of evidence demonstrating that the test for wardship was met and that evidence was supported by the medical visitor's report provided shortly after the presentation of the petition. It is also relevant that, having considered the evidence accompanying the petition, the President made the order directing the inquiry on 24 March 2021. It seems to me that, in those circumstances, the reasoning given by Finnegan P. in *Catherine Keogh* for rejecting the argument based on a breach of Article 40.1 based on the saver for differences of capacity, brief as it was, is equally applicable here.

91. In considering whether the saver in Article 40.1 to account for differences of capacity was applicable in that case, in my view, Finnegan P. was correct to take into account, as he must have done, the evidence that was available at the time the petition was brought in that case. I also consider it appropriate to consider the evidence that was available when the petition was brought in this case in determining the application of the saver in Article 40.1 and I agree with his reasoning and with the conclusion he reached in rejecting the argument based on Article 40.1. In addition, as I explain below, there is also a good basis for reaching that conclusion, having regard to the broad discretion contained in ss. 169(1) and (4) of the 2015 Act and O. 99.

92. With respect to the argument concerning Article 40.3.2 of the Constitution, I also agree with the reasoning given and the decision reached by Finnegan P. in *Catherine Keogh*. The hardship at issue in that case was an order for costs being made against the respondent in favour of the petitioner. I am not being asked to make such an order in

this case. The issue, therefore, for present purposes is whether an order that the respondent bear his own costs would create such an injustice as to be in breach of Article 40.3.2 of the Constitution. I do not believe that it does.

93. I agree with Finnegan P. that achieving justice in such circumstances requires the balancing of the various interests involved. While onerous for the respondent, in my view it would be unfair on the HSE, as the party which ultimately arranged for the petition to be brought on reasonable grounds on the basis of the medical evidence available to it, to have to discharge the respondent's costs. As in *Catherine Keogh*, the HSE in this case did act on reasonable grounds and in a bona fide manner in bringing the petition and it did not advance the petition for the purpose of advancing any interest of its own but rather brought the petition in the best interest of the respondent.

94. I agree, therefore, with the reasoning given by Finnegan P. in *Catherine Keogh,* which, in my view, supports my decision, not to make an order for costs against the respondent in the circumstances of this case.

95. It seems to me that there is also merit to the argument advanced by the HSE that I should be very slow to differ from the decision of Finnegan P. in the absence of substantial reasons for believing that his decision was wrong, for the reasons set out in *Worldport* and in the other cases referred to below.

96. Prior to *Worldport,* Parke J. had stated in the High Court in *Irish Trust Bank Limited v. Central Bank of Ireland* [1976-1977] I.L.R.M. 50, on the issue as to whether a court should depart from a decision from a court of the same jurisdiction, as follows:

> *"I fully accept that there are occasions in which the principle of stare decisis may be departed from but I consider that these are extremely rare. A Court may depart from a decision of a Court of equal jurisdiction if it appears that such a decision was given in a case in which either insufficient authority*

was cited or incorrect submissions advanced or in which the nature and wording of the judgment itself reveals that the Judge disregarded or misunderstood an important element in the case or the arguments submitted to him or the authority cited or in some other way departed from the proper standard to be adopted in judicial determination." (pp. 5 – 6)

97. On the same issue, in *Worldport*, Clarke J. (then in the High Court) observed:

" It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. Huddersfield Police Authority -v- Watson [1947] K.B. 842 at 848, Re Howard's Will Trusts, Leven & Bradley [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. " (para. 14)

98. Clarke J. (by then in the Supreme Court) returned to the issue in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27. He referred to a number of previous authorities,

including *Irish Trust Bank* and *Worldport* and noted that that the jurisprudence correctly stated the proper approach to be taken by a High Court judge in such circumstances, namely:

> *"A court should not lightly depart from a previous decision of the same court unless there are strong reasons, in accordance with that jurisprudence, for so doing."* (para. 2.2)

99. That jurisprudence was further confirmed and expanded upon by the Supreme Court in *A. v. Minister for Justice & Equality* [2020] IESC 70, in judgments delivered by Dunne J. and Charleton J.

100. In her judgment, Dunne J. emphasised that the reasons for the approach outlined in those cases is *"in part due to judicial comity as mentioned by Clarke J. but also the requirement of certainty in the law"*. She noted:

> *"Different decisions on the same issue by different members of the same court can only give rise to a situation where judges and practitioners alike would be unable to say with clarity what the state of the law is in any given area. Apart from the obvious uncertainty posed by a situation where judges were free to come to a view on a particular issue without regard to the view expressed previously by a colleague, as Clarke J. noted, the lack of certainty could give rise to increased litigation as parties and practitioners struggled to ascertain the legal status of a particular legal principle or the correct interpretation of a piece of legislation. It is for that reason that a judge of the same jurisdiction should have regard to a decision of a colleague on the same issue and should as a general rule follow that decision unless there is a clear basis for departing from that decision. As Clarke J. pointed out, it is only where there are*

substantial reasons for believing that the initial judgment was wrong that one should depart from it." (para. 63)

101. Charleton J. took a similar approach in his judgment. Having referred to the doctrine of *stare decisis*, and having noted that departure from horizontal precedent (a decision of another court of coordinate jurisdiction) is possible, he continued:

"It is also not desirable without there being an expressed and good reason. The law operates as a fortress of certainty from within, whereby the shape of decisions is apparent to those approaching it. Legal certainty and the value of resort to the courts may be undermined by quarrels among judges. Hence, the difficulty faced here. While particular skill and a deftly polite style is needed in expressing that a colleague of co-ordinate jurisdiction was wrong, it is better for the administration of justice, as well as being legally required, to quietly state a reason for not following a decision... In particular, Re Worldport … and Kadri … highlight that it should be unusual not to follow a judge of co-ordinate decision without reasons, politely expressed, as to why that other judgment was wrong. It may be that an authority was not considered, or a statute or piece of European law was left out of the analysis, or that time has advanced the understanding of the basis for the general rule upon which the decision was made and so ought no longer to be considered as an authority in modern circumstances." (at para. 8)

102. I am satisfied that the circumstances in which it would be open to me to depart from the decision and the statement of principle expressed by Finnegan P. in *Catherine Keogh*, are not present here. While acknowledging the actual differences between this case and *Catherin*e *Keog*h, the statement of principle is one which I believe does apply. This is not a case in which it can be said that the decision of Finnegan P. was not based

on a review of significant relevant authority or where there was a clear error in the judgment, or where the judgment should be revisited as having been delivered a long time ago. I do not believe the judgment contains a clear error or that some relevant authority or consideration was omitted from the analysis in *Catherine Keogh*. The judgment in that case was delivered in 2002 and is not so far back as to require reconsideration of the principle considered and applied in that case.

103. That is particularly so as the judgment in *Catherine Keogh* was extensively considered (without criticism) very recently (in late 2020) by Hyland J. in the High Court in *T.H.* The facts of that case are somewhat different to this. There, following correspondence from the HSE expressing their concerns in relation to the respondent, the President appointed a medical visitor to attend and prepare a report in relation to him. The medical visitor concluded that the respondent was of unsound mind and incapable of managing his affairs. The President directed that the matter proceed under s. 12 of the 1871 Act on foot of the report. An objection was lodged on behalf of the respondent. Two medical reports were provided on behalf of the respondent. However, neither report supported the objection. At the hearing before the President, it was confirmed that there was no evidence to contest the application and the respondent was then admitted to wardship. An application for costs was made by the legal team on behalf of the respondent against the HSE. That application was rejected by Hyland J. who directed that the costs of the respondent's representation be paid out of his estate and not by the HSE.

104. In the course of her judgment, Hyland J. referred extensively to *M.J.* and *Catherine Keogh*. She noted, at paras. 29 and 29, that it was the *"almost invariable practice"* in wardship to grant *"private"* petitioners (those who are not public bodies such as, for example, the HSE) the costs of the petition as against the estate of the ward and also

that, even where the outcome of the inquiry is that the respondent is not admitted to wardship, costs may be awarded against the respondent in favour of the petitioner.

105. At paras. 30 and 31, Hyland J. referred to the practice of the wardship court since 1871 described by Finnegan P. in *Catherine Keogh* and the arguments which were advanced in that case against the application of such a practice including the arguments based on Articles 40.1 and 40.3.2 of the Constitution. Hyland J. noted that *M.J.* and *Catherine Keogh* show that:

> *"…irrespective of whether s. 12 (in an appropriate case) or s. 94 is relied upon, there is a statutory basis for an order for costs to be made against the estate of the ward (or indeed a person where no order for wardship has been made following an inquiry). The discretion has been widely exercised such that orders have been made even where a respondent was successful in her opposition to the inquiry."* (para. 32)

106. Hyland J. observed that, if there is jurisdiction to direct the estate of the ward to cover the costs of the petitioner, there must certainly also be a jurisdiction to direct the estate of the ward to cover his or her own costs. She refused to make an order for costs in favour of the respondent against the HSE and ordered that the costs of the legal representation of the ward be paid out of his estate.

107. It is, of course, true that the facts of *T.H.* were quite different to the present case in that, having initially lodged an objection to the wardship application, the objection was not ultimately pursued before the President, and the respondent was admitted to wardship. However, the judgment in that case is significant for present purposes for the court's reference, without any criticism or reservation, to the practice described and applied by Finnegan P. in *Catherine Keogh* and to the arguments which he had considered in that case against the application of the practice. As noted earlier, the judgment also helpfully

addresses the impact of ss. 168 and 169 of the 2015 Act and O. 99 in the area of wardship, and I will return to that issue very shortly. The fact that the judge did consider the changes to the costs regime introduced by the 2015 Act and by the recast O. 99, in conjunction with the practice of costs in wardship cases also strongly suggests to me that changes in the costs regime, including the approach taken by Clarke J in *Veolia* and in the provisions of the 2015 Act do not provide a good basis for revisiting the decision of Finnegan P. in *Catherine Keogh* or the statement of principle contained therein, as submitted on behalf of the respondent.

108. The upshot of this analysis is that I do not accept the criticisms of the statement of principle and the practice referred to and applied in *Catherine Keogh*, and recently considered in *T.H,*. advanced on behalf of the respondent. While this case is not on all fours with either *Catherine Keogh* or *T.H.*, a decision that there would be no order as to costs against the HSE and that the respondent would bear his own costs (leaving aside any possible application that the costs of the respondent's legal representation would be borne by his own estate) would be consistent with the practice and the principle discussed and applied in *Catherine Keogh,* provided that the two conditions referred to in *M.J.* and *Catherine Keogh* are satisfied here. In my view, they clearly are.

109. First, it is undoubtedly the case that there were reasonable grounds for presenting the petition, for the reasons already discussed. There was strong evidence available to the HSE from two medical practitioners that the respondent met the test for wardship. There was evidence that the respondent was unable to decide where he should reside and he had recently come into a significant inheritance, and there were understandable concerns about his ability to deal with that. The medical visitor appointed by the President agreed that the test for wardship had been met. Second, there is no question

but that the HSE acted in a *bona fide* manner in bringing the petition, and that it did so solely for the benefit of the respondent and not for any personal benefit.

110. In those circumstances, and subject to my conclusion being affected by any of the other arguments advanced on behalf of the respondent, I am satisfied that the HSE is correct that, consistent with the established practice in the wardship court, there should be no order as to costs against the petitioner. Further consideration can be given to whether the costs of the respondent's representation should be met from his estate, in the event that such an application is made.

2) Sections 168 and 169 of the 2015 Act and Order 99 RSC

111. As noted earlier, I agree with the views expressed by Hyland J. in *T.H.* on the potential relevance of ss. 168 and 169 of the 2015 Act and O. 99 in a wardship context. I have referred to those provisions and the views of Hyland J. in *T.H.* earlier in this judgment. For the reasons just discussed, in considering the application of those provisions I also have to consider the particular practice and principle to the awarding of costs in wardship cases.

112. I agree with Hyland J. that it is sometimes difficult in a wardship case to speak of *"success"* or of an *"event"*, particularly as wardship proceedings do not take the form of a *lis inter partes* (as noted, for example, the judgment of the Supreme Court in *J.J.* at para. 63).

113. In this case the HSE ultimately accepted Prof. Casey's evidence, having consulted with the respondent's treating consultant and decided not to proceed with the inquiry. I accept that the respondent's position had significantly improved. However, I find it difficult to describe that decision for its effect as "*success*" for the respondent in the proceedings or as the respondent succeeding in an *"event"*. For that reason, I think it is

difficult to say that the respondent was *"entirely successful"* in the proceedings for the purposes of s. 169(1) of the 2015 Act, where the HSE decided not to proceed with the inquiry. However, it is unnecessary to reach a concluded view on that point as s. 169(1) itself and the judgments which have considered that provision (such as the judgments of Murray J. for the Court of Appeal in *Chubb European Group S.E. v. Health Insurance Authority* [2020] IECA 183 and *Higgins v. Irish Aviation Authorities* [2020] IECA 277), make clear that the court does have a discretion in certain circumstances not to award costs to a party who has been *"entirely successful"* in the proceedings against the unsuccessful party.

114. Hyland J. describes ss. 168 and 169 and O. 99 as providing for a *"wide discretion in relation to costs and for the context of any particular case to be taken into account"* (in *T.H.* at para. 39) and I agree with that. While none of the factors referred to in s. 169(1)(a) – (g) are relevant here, it is notable that, in determining whether *"to order otherwise"* and not to order costs in favour of a party who has been entirely successful, the court is required to have regard to the *"particular nature and circumstances of the case"*.

115. In my view, the *"particular nature and circumstances"* of this case are such that I should not make an order for costs against the HSE. The proceedings were brought entirely for the respondent's benefit to enable appropriate residential accommodation to be obtained for him and to protect the inheritance which he had received, in circumstances where the medical evidence at the time fully supported the bringing of the proceedings.

116. While there is some merit to the point made on behalf of the respondent that the HSE could and should have obtained more up to date evidence of the respondent's condition prior to Prof. Casey's assessment in February 2023, I do not believe that that would be

sufficient reason to justify an order for the costs of the proceedings being made against the HSE. It might well have been a sufficient reason for the court to refuse to make an order for costs in its favour were such an application to have been made by the HSE in reliance of the practice and principle discussed and applied in *Catherine Keogh*. However, since the HSE did not seek its costs, that issue does not arise here.

117. In conclusion, I do not agree with the respondent that I should make an order for costs in his favour as against the HSE under s. 169(1) of the 2015 Act.

3) Section 169(4) of 2015 Act and Order 26, Rule 1 RSC

118. The respondent relies on s. 169(4) of the 2015 Act and O. 26, r. 1 to support his application for an order for costs against the HSE.

119. Section 169(4) states:

> *"(4) Unless the court before which civil proceedings were commenced orders otherwise, or the parties to those proceedings agree otherwise, a party who discontinues or abandons the proceedings after they are commenced (including discontinuance or abandonment of an appeal) is liable to pay the reasonable costs of every other party who has incurred costs in the defence of the civil proceedings concerned until the discontinuance or abandonment."*

120. The respondent maintains that the HSE discontinued or abandoned the proceedings when its solicitors wrote their letter of 5 July 2023, and that the HSE should be liable to pay his costs up to the date of such discontinuance or abandonment under this provision.

121. O. 26, r. 1 entitles a plaintiff, in certain circumstances, by notice in writing to *"wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint"* and, in such circumstances, it provides that the

plaintiff *"shall pay such defendant's costs of the action, or, if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn"*. O. 26, r. 1 goes on to state:

> *"Save as in this rule otherwise provided, it shall not be competent for the plaintiff to discontinue the action without leave of the court, but the court may before or at, or after, the hearing or trial, upon such terms as to costs, and as to any other action and otherwise, as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out…"*

122. The respondent contends that the HSE did *"wholly discontinue"* its action against him and that it should, therefore, be required under that provision to pay his costs under this provision.

123. As noted earlier, the respondent also relies on dicta of Keane C.J. in *Callagy* and the judgment of Laffoy J. in *Shell*. The HSE disputes the respondent's entitlement to an order for costs against it on these various grounds.

124. In my view, this case is quite different to *Callagy* and *Shell* and the analysis provided in those decisions is difficult to apply in the circumstances of this case. I have set out earlier the purpose and objective of the HSE's wardship application which was not brought for the purpose of asserting any right or entitlement of the HSE, but rather it sought the intervention of the court for the purpose of protecting the respondent in terms of his future accommodation requirements and the inheritance he had received where the evidence available was that he met the test of wardship. That is quite different to what was involved in *Callagy* or *Shell*, where, in both cases, the plaintiff had brought proceedings to assert a particular claimed right or entitlement against the defendant and then decided to discontinue those proceedings without any adverse cost consequences. This is not such a case, and the proceedings are not a *lis inter partes* as was the case in

Callagy and *Shell*. It is not surprising that in *Callagy* and *Shell* the courts involved reached the decisions which they did, namely, that the plaintiffs who wished to discontinue proceedings brought to assert a claimed right or entitlement should be responsible for the costs of the opposing side on such discontinuance. As Keane C.J. stated in *Callagy*:

> *"while he was perfectly entitled to discontinue the proceedings, in my view it must inevitably follow, as always follows in circumstances such as that, that a plaintiff who elects to begin proceedings and then abandons them for whatever reason must pay the defendants' costs: If he wants the defendant to pay the costs he must be prepared to go on the full length of the proceedings, obtain the relief that he sought and then invite the court to award costs in the ordinary way as following the event."* (p. 6)

125. Similarly, when dealing with an application for leave to discontinue proceedings under O. 26, r. 1, Laffoy J. in the High Court, when considering whether to give leave to the plaintiff to discontinue without a costs liability, stated:

> *"In relation to the imposition of terms as to costs, the provision for discontinuance at an early stage suggests that the underlying precept is that the requirements of justice will normally result in liability for the costs to the date of discontinuance being borne by the plaintiff. Notwithstanding that, it is clear that what is just must be determined in each case having regard to its particular circumstances."* (para. 35 at 295)

126. Later in her judgment, she concluded that, in the circumstances of the case, *"just provision in relation to costs would allow the defendants their costs to date"*. She continued:

> *"Such provision would be consistent with the rationale which obviously underlies the provision contained in O. 26, r. 1 in relation to the costs of early discontinuance, which is that, by initiating and prosecuting the proceedings to the date of discontinuance, the plaintiff has created the situation in which the defendant has had to incur the costs of defending the proceedings. However, the court has to go further and has to consider whether the factors canvased on this application would render such provision unjust."* (para. 52 at 301)

127. Laffoy J. concluded that it should not depart from the normal rule that a discontinuing plaintiff should pay the defendant's costs to the date of discontinuance on the particular facts of the case.

128. The authors of *Delaney & McGrath on Civil Procedure* (5th Ed.) (2023) at para. 24 – 221 describe the position taken by Laffoy J. in *Shell* as having been put on a statutory footing by s. 169(4) of the 2015 Act.

129. In my view, having regard to the nature and objective of the wardship application brought by the HSE and the circumstances in which it decided not to proceed with that application, the respondent is not be entitled to his costs against the HSE under O. 26, r. 1. That is either because that provision is directed not to wardship proceedings but to normal civil proceedings (perhaps confined to plenary proceedings as it refers to a plaintiff and to defendants and to the delivery of a defence, although I do not have to decide that issue) and not to wardship proceedings or because it would be unjust in the particular circumstances of the case to impose a cost liability on the HSE under O. 26, r. 1. It would not be a "*just provision in relation to costs"*, to use the phrase used by Laffoy J. in *Shell*.

130. For similar reasons, I do not believe that the HSE should be liable to pay the respondent's costs under s. 169(4) of the 2015 Act. That is either because it is difficult

to describe what happened here as the HSE discontinuing or abandoning the proceedings as those terms are used in the subsection, even assuming that the proceedings can properly be called *"civil proceedings"*. Even if what happened in July 2023 can properly be described as the HSE discontinuing or abandoning the proceedings in light of Prof. Casey's evidence, in my view this, is a case in which I should order *"otherwise"* than directing the HSE to pay the respondent's costs.

131. I agree with Barrett J. in *McDaid* that, in considering whether to order *"otherwise"* under s. 169(4), the court is not necessarily confined to the matters set out in s. 169(1). However, even if the court were so confined, having regard to the *"particular nature and circumstances of the case"*, I am of the view that it would be unfair and unjust to order the HSE to pay the respondent's costs, having regard to the stated purpose and objective of the wardship application and the circumstances in which the HSE decided not to proceed with that application. I would be concerned that, if the HSE were to be held liable for the respondent's costs in circumstances where it appropriately decided not to proceed with the wardship application which was properly brought, it would deter similar appropriate applications in the future, for fear of the applicant being found liable to pay the respondent's costs in the event of an improvement in the respondent's condition. While it is not possible to bring fresh wardship proceedings in the case of an adult after 26 April 2023, in light of the ADMCA, similar considerations could equally apply to applications which can now brought in the Inherent Jurisdiction (Capacity) List.

132. I do not accept, therefore, that the respondent is entitled to his costs against the HSE under s. 169(4) of the 2015 Act or O. 26, r. 1.

4) <u>Mootness</u>

133. The respondent seeks his costs on the alternative, but related, basis that the proceedings became moot as a result of circumstances which were not outside the control of the HSE and that the HSE should, therefore, be liable for his costs. I have set out the parties' respective contentions on that issue earlier. The respondent's argument based on alleged mootness is really a fallback position, as his principal contention was that he was *"entirely successful"* in the proceedings when the HSE decided not to proceed with the inquiry. However, to the extent that the proceedings may be found to have become moot when the HSE decided not to proceed, the respondent claims that that situation did not occur entirely independently of the parties. He maintains that the HSE ought to have identified the significant improvement in the respondent's position found by Prof. Casey at a much earlier stage. The HSE's position is that the proceedings did not become moot by reason of any unilateral action or conduct on its part.

134. I do not see this as a case of mootness, certainly in the traditional sense. This is a case in which the HSE, having brought the wardship application on the basis of substantial supporting medical evidence, decided ultimately not to proceed with the inquiry on the basis of updated medical evidence from Prof. Casey which showed that the respondent's condition had significantly improved in the meantime. In Prof. Casey's view, the respondent no longer met the test for wardship, and, on foot of Prof. Casey's report, the HSE obtained confirmation from the respondent's treating consultant that she agreed with that view and, on that basis, decided not to proceed. That was the appropriate course to take in the circumstances. However, I do not think that the case had become strictly moot at that stage.

135. If I am wrong about that, then it seems to me that it cannot be said that the proceedings became moot by reason of *"unilateral act of one party"*, but rather became moot *"by reason of a change in underlying circumstances outside the control of either party"* (to

adopt the terminology found in the judgment of Clarke J in *Cunningham* at paras. 26, 27, p. 231). Although in had found appropriate residential accommodation for the respondent with effect from mid-July 2022, and I do not think that that is something which can be held against the HSE in terms of amounting to unilateral act on its part giving rise to a liability on its part to costs, the HSE did not take any unilateral step to effect "*a change in the underlying circumstances*" What happened is, I believe, more accurately described as a change of circumstances in the sense of an improvement in the respondent's condition for reasons out the control of either party.

136. As I have indicated already, I do not believe that it would be just or fair to impose liability for costs on the HSE for not providing an updated report on the respondent's condition prior to Prof. Casey's assessment in February 2023. That might be a good reason not to award the HSE its costs, were it to seek those costs in accordance with the practice and principle discussed and applied in *Catherine Keogh*, but the HSE is not seeking its costs.

137. Murray J., drew together the various lines of authority in this area, including *Cunningham* and *Godsil*, in his judgment for the Court of Appeal in *Hughes*. At para. 30 of his judgment, he noted that the essential structure put in place by those cases could be reduced to three broad propositions which he then set out at paras. 31 – 33 of the judgment. The first proposition is that, where the case has become moot as a result of an event which was *"entirely independent of the actions of the parties"*, the *"fairest outcome will generally be that the parties should bear the costs themselves"* on the basis that neither is responsible for the mootness (para. 30). The second proposition is that, where the case has become moot because of the actions one of the parties where those actions follow from the fact of the proceedings or were *"unilateral"* or could reasonably have been taken before the proceedings or before the costs were incurred, it

will frequently be appropriate for the party who took those actions resulting in the case becoming moot to bear the costs. The third proposition deals with the position of statutory bodies who, Murray J. noted, cannot be expected to suspend the discharge of their statutory functions merely because legal proceedings relating to the prior exercise of their powers are in existence. Those bodies must be free to continue to exercise their powers in accordance with their legal obligations. However, he observed, it would be wrong if *"under the guise of exercising their powers in the normal way, the statutory authority both effectively conceded an extant claim, and avoided the legal costs that were otherwise attend such a concession".*

138. As Murray J. observed, the cases strike a balance between those considerations and require the court to look at the circumstances giving rise to the new position in order to determine whether it amounts to a *"unilateral act"* (potentially attracting a costs liability) or whether it has resulted from a change in the relevant circumstances (in which case the court may make no order as to costs). Murray J. further noted that, in conducting the required analysis, the court should not embark on a determination of the merits of the underlying case. However, Murray J. stressed the discretion which the court has in terms of awarding costs in these circumstances. He said:

> *"the starting point is that the court has an overriding discretion in relation to the awarding of costs, and the decisions to which I have referred are intended to guide the exercise at that discussion. They are thus properly viewed as presenting a framework for the application of the court's discretion in the allocation of costs in the particular context and should not be applied inflexibly or in an excessively prescriptive manner…"* (para. 34)

139. Those observations were subsequently endorsed by Collins J. in his judgment for the Court of Appeal in *J.O. & Ors v. Minister for Justice & Equality* [2021] IECA 293 (at

paras. 36 and 37) and, in my view, reflect what the Supreme Court had previously stated in *Cunningham* and *Godsil*.

140. It is difficult to apply those principles to the facts of this case, since, as I have stated, it is not really a case of mootness at all. However, in my view, if it is, the case fits best within the first proposition, where the event, in terms of the improvement in the respondent's position, came about entirely independently of the actions of the parties. On that basis, the appropriate order would be that the parties should bear the cost themselves. That is, in any event, the order which I believe is appropriate in this case, for the reasons already set out.

5) Undertaking: Order 67, Rule 4(2) RSC

141. The final basis which the respondent relies on in support of his application for an order for costs against the HSE is the undertaking provided by the petitioner on behalf of the HSE at para. 13 of the petition. That undertaking was provided pursuant to O. 67, r. 4(2) (the terms of which were set out earlier). The respondent submits that the undertaking is in very broad terms and that the HSE should be required to pay the costs on foot of the undertaking in circumstances where the petition was *"not proceeded with"* as that term is used in O. 67 r. 4(2).

142. The HSE disputes that claim and denies that the undertaking given by the petitioner gives rise to an entitlement to the order for costs sought by the respondent. It also disputes the respondent's interpretation of the undertaking and of O. 67, r. 4(2) and relies on what Finnegan P. said about the undertaking in *Catherine Keogh*. The respective arguments of the parties have been set out in more detail earlier.

143. At para. 13 of the petition, the petitioner (on behalf of the HSE) undertook to pay the costs and expenses of (a) any visitation of the respondent, or (b) *"any other incident to*

the inquiry before the court" if the petition were (a) dismissed, and (b) *"not proceeded with"*. The HSE has discharged the costs of the visitation on the respondent by the medical visitor, Dr. Hunt. It did so without any order of the court and in accordance with the undertaking given.

144. As Finnegan P. explained in *Catherine Keogh* at para. 9, an undertaking in the terms now required by O. 67, r. 4(2) was first provided for in the General Order in Lunacy in June 1879. Finnegan P. explained that that was designed to give the Lord Chancellor of Ireland the power to award costs where a petition for inquiry was presented *"improperly"*, where the 1871 Act did not include such an express power. It was his view that the undertaking was directed to a situation where the petition was dismissed or not proceeded with in circumstances where it was presented improperly. That view is consistent with his description of the practice of the wardship court on costs since 1871 where if the petition were *"properly presented"* and for the benefit of the respondent, costs would be payable to the petitioner out of the respondent's estate even if the petition was not successful following the inquiry.

145. If the petition were unsuccessful, it would be dismissed, as was the case in *Catherine Keogh* itself. If the petition were dismissed in such circumstances, one might have expected, therefore, that the respondent would be entitled to her costs on foot of the undertaking required by O. 67, r. 4(2). However, that is not what the President ordered. Rather, in accordance with the practice he described, and being satisfied that the conditions for the application of that practice were satisfied, the President ordered that the petitioner should recover the costs of the petition and of the inquiry out of the estate of the respondent. The petitioner was not required to pay them on foot of the undertaking he was required to give in the petition.

146. I agree with the view of Finnegan P., that it is likely that the undertaking was intended to apply in the case of a petition which was presented improperly and was, for that reason, dismissed or not proceeded with. However, it is not necessary to decide that issue conclusively, as it would still be a matter for the court to determine whether the undertaking (as with any undertaking) should be enforced against the petitioner in the particular circumstances of the case. The decision is one ultimately for the court. If the court was satisfied that it would be unfair to hold the petitioner to the undertaking, it could relieve the petitioner from the undertaking and ordered that the costs be dealt with differently.

147. Having regard to the nature and purpose of the proceedings brought by the petitioner in this case, I believe that it would not be fair or just to hold the petitioner to the undertaking given in para. 13 of the petition in circumstances where the petition and the consequent inquiry were not proceeded with, having regard to the significant improvement in the respondent's position.

148. For the reasons set out earlier, I accept on the evidence that the HSE brought the petition in good faith and on reasonable grounds and for the exclusive benefit of the respondent. I do not believe that it would be fair or just to order the HSE to pay the respondent's costs of the petition in circumstances where the HSE did not proceed with the petition and inquiry in light of the evidence of the improvement of the respondent's position.

149. I agree with the HSE that it should not be in a worse position by deciding not to proceed with the petition and inquiry where, if it had done so, it might have been entitled to rely on the practice described and applied by Finnegan P. in *Catherine Keogh*, although that would be an unlikely outcome. Therefore, while the undertaking is expressed in broad terms, as the respondent submitted, I do not believe that it applies to the circumstances

which arose here, or, if it does, I do not believe that it would be fair or just to hold the petitioner to the undertaking, and I would release her from the undertaking.

150. In conclusion, I do not believe that the respondent has established an entitlement to an order for costs against the HSE by reason of the undertaking given at para. 13 of the petition.

6. Summary of Conclusions

151. In summary, for the detailed reasons set out in this judgment, I have concluded that, in the exercise of my discretion, the fair and just order to make in relation costs in this case is that the respondent and the HSE should bear his and its own costs.

152. I do not accept that the respondent has established an entitlement to an order for the costs of the wardship proceedings against the HSE, in circumstances where the HSE decided not to proceed with the petition and the inquiry once it received the evidence of Prof. Casey that the respondent no longer met the test for wardship. I have considered each of the grounds or bases on which the respondent claimed to be entitled to an order for costs against the HSE and I have concluded that he has not established such an entitlement under any of those grounds or bases. I do not believe that that would be a fair or just order in the circumstances.

153. At the request of the respondent's counsel, I have not addressed the issue as to whether the respondent's solicitors and counsel would be entitled to their costs out of the respondent's estate. If requested, I will deal with any such application expeditiously.

154. It appears that the petition was never dismissed, withdrawn or struck out. It will, therefore, be necessary to make orders bringing the wardship proceedings to an end, together with an order that each side should bear their own costs.

155. As this judgment is being delivered electronically, I will list the matter for the purposes of making final orders and, if necessary, for the hearing of any further application by the respondent's solicitors and counsel on 26 June 2024 at 10:00am.