

THE HIGH COURT

2008 No. 118 MCA
[WOC 1679]

IN RE FRANCIS DOLAN A RESPONDENT

Judgment of Mr. Justice Garrett Sheehan delivered on the 29th day of July, 2008

1. On the 4th December, 2007, the President of the High Court directed in accordance with the decision of the Supreme Court in these proceedings on the 4th July, 2007, that the following preliminary issue was to be tried by this Court:-

"Does the High Court have jurisdiction (inherent or otherwise) not limited to and without exercising the jurisdiction provided for under section 9 of the Courts (Supplemental Provisions) Act 1961 or the Lunacy Regulation (Ireland) Act 1871 to establish a trust scheme or other form of arrangement as proposed in the draft deed of trust between the Respondent's family and the Court in advance of a determination by a judge or jury as to whether the Respondent is of unsound mind and incapable of managing his person and property to protect the monies of the Respondent where the Respondent and the Respondent's family object to the exercise of wardship jurisdiction."

2. Mr. Salafia, counsel for the respondent, contends that this Court does have the necessary jurisdiction while Mr. Clarke for the Attorney General and Mr. O'Donnell for the Office of the General Solicitor for Minors and Wards of Court both say that the answer to the question should be in the negative.

3. The background is comprehensively set out in the Supreme Court judgment of Mr. Justice Geoghegan delivered on the 4th July, 2007, *In the Matter of Wards of Court and In the Matter of Francis Dolan* [2007] I.E.S.C. 26, [2008] I.L.R.M. 19.

4. Francis Dolan Junior was born on the 26th April, 1982. He suffers from cerebral palsy and is diagnosed as suffering from spastic quadriplegia with moderate mental handicap as a result of which he requires full-time care. His parents have provided this full-time care for his entire life and wish to continue to do so. Francis Dolan Junior has three sisters. In the introduction to the submissions on behalf of Francis Dolan Junior his legal team state that they are made on behalf of Francis Dolan Junior and his immediate family.

5. Francis Dolan Junior received a judgment for damages for IR£3m for injuries suffered at birth. Of that sum IR£200,000 was paid out and the remaining IR£2.8m was paid into court and placed on deposit with the Accountant General.

6. The respondent's parents do not believe that it is in the best interests of their son and their family that Francis Dolan Junior be made a Ward of Court and perceive wardship as an unnecessary and unwarranted interference in their family life. They further object to their son being declared of unsound mind and to the social connotations which they claim arise from adjudication under the Lunacy Regulation (Ireland) Act 1871. The parents did not petition the court in accordance with s. 15 of the Lunacy Regulation (Ireland) Act 1871, and this question arises in the context of their principled resistance to their son being made a Ward of Court.

7. The matter then proceeded under s. 12 of the Act of 1871. This procedure is commenced by the President of the High Court's medical visitor examining the respondent and furnishing a report for consideration by the President of the High Court. If the view of the medical visitor is that the respondent is of unsound mind then an inquiry order is made directing that inquiry must be had as to the soundness of mind of Francis Dolan Junior.

8. On the 21st November, 2003, the solicitors for Francis Dolan Junior requested the General Solicitor for Minors and Wards of Court to ask the President of the High Court to consider the creation of a trust for the management of the funds in court. The President of the High Court refused this request on the basis that he had no authority to create such a trust and this was communicated to the respondent by letter dated the 28th November, 2003.

9. On foot of the requisite reports of the medical visitor, the wardship proceedings were initiated by the President of the High Court pursuant to ss. 11 and 12 of the Act of 1871. A notice of objection to an inquiry was subsequently filed by the respondent's parents and by the respondent on the 8th October, 2004. The notice of objection contained, *inter alia*, constitutional objections to the procedure under ss. 11 and 12 of the Act of 1871. The respondent claimed that these objections should be heard prior to, or at least during, the course of the s. 12 wardship proceedings.

10. By order of the President of the High Court dated the 20th December, 2004, (amended by further order dated the 21st January, 2005), the President directed that the issue as to whether or not the respondent Francis Dolan Junior was of unsound mind and incapable of managing his person and property was to be tried before a judge of the High Court and a jury sitting in Dublin.

11. A notice of trial was served on the solicitors for Francis Dolan Junior on the 27th January, 2005.

12. The respondents lodged a notice of appeal to the Supreme Court on the 31st January, 2005, on the grounds that the President of the High Court had erred in law and/or in fact and/or in the exercise of his discretion in regard to the orders made in the wardship proceedings.

13. The respondents argued that they were entitled to have objections tried in advance of the wardship issue and in particular certain constitutional challenges to the wardship jurisdiction. A central part of the Supreme Court hearing was concerned with the question as to whether the High Court had jurisdiction to establish a trust to protect Francis Dolan's funds outside wardship.

14. Plenary proceedings challenging the constitutionality of the Act of 1871 were instituted in 2004 by Francis Dolan Junior's parents on their own behalf and on behalf of their son. These proceedings sought, *inter alia*, an injunction restraining the medical visitor from examining Francis Dolan Junior. His parents claimed that the process should be halted as it will inexorably lead to the making of a wardship order, which they allege is in breach of the constitutional rights of their son.

15. On the 19th March, 2004, Kelly J., refused to set aside the order of the President of the High Court regarding the proposed examination by the medical visitor and refused to grant the injunction sought.

16. In the course of the Supreme Court judgment Geoghegan J. directed that the matter be returned to the High Court for consideration of the question that is now before this Court.

17. The respondent's submissions regarding the court's jurisdiction to establish a trust as a means of protecting the interests of Francis Dolan Junior as an alternative to wardship fall under a number of headings.

18. The respondent first of all submits that the correct starting point in considering the question before this Court must be that the High Court has jurisdiction to create a trust in the particular circumstances of this case, and that it is then for a *legitimus contradictor* to establish that such jurisdiction is removed by the Constitution or by legislation. The respondent argues that full original jurisdiction of the High Court may be invoked to ensure that justice is done in a particular case and relies on the judgment of Gannon J. in *R. v. R.* [1984] I.R. 296 .

19. In addition the respondent placed particular emphasis on the judgment of Finlay C.J. in *re D.* [1987] I.R. 449, where he held that the exercise of the jurisdiction under the Lunacy Regulation (Ireland) Act 1871 is discretionary. The respondent submitted that this case supported his contention that the court had an inherent jurisdiction to deal with the circumstances of this case in a manner outside the Act of 1871 by the establishment of a trust. He further submitted that a Practice Direction excluding persons from wardship whose assets did not exceed €30,000 was an example of the court exercising an inherent jurisdiction alternative to wardship.

20. He also relied on the judgment of Costello J., in *H.L. v. The Governor and Company of the Bank of Ireland* [1978] I.L.R.M. 160, as supportive of his submission that the courts had an inherent jurisdiction in the circumstances of the present case to establish a trust. In that case it was held by Costello J. that since the creation of a discretionary trust appeared to be the most fitting way of making provision for the testator's eldest son the court was empowered to create such a trust by virtue of the provisions of s. 117 of the Succession Act 1965.

21. Mr. Salafia also submitted that an examination of the sixteen cases, disclosed by the Solicitor General as a result of the investigations directed by the Supreme Court, demonstrated an existing practice whereby vulnerable people, both inside and outside the remit of the Lunacy Regulation (Ireland) Act 1871, had been encouraged to settle a trust to ensure the safe and wise administration of the estate. According to the supplemental submissions filed on behalf of the respondent five of the cases involved persons who were described by doctors as being of unsound mind and unable to manage their affairs. Mr. Salafia went on to submit that these sixteen cases constituted evidence of a practice that was sufficiently established for the Registrar for Wards of Court to be able to refer to a standard draft trust which had been approved by the President of the High Court. He contended that this demonstrated an existing practice whereby vulnerable people, both inside and outside the remit of the Act of 1871, have been encouraged to settle a trust so as to ensure the safe and wise administration of their estates.

22. On behalf of the Solicitor General, Mr. O'Donnell submitted that if the court were to answer the question in the affirmative it would effectively be creating a shadow jurisdiction parallel to the existing wardship jurisdiction which would continue irrespective of what other statutory provision the Oireachtas saw fit to put in place for vulnerable adults. He dealt at length with the judgment of Finlay C.J. in the case of *In re D.* and concluded that that case, while authority for the proposition that the jurisdiction of the High Court in wardship matters was broader than the Act of 1871, as a result of the *parens patriae* jurisdiction formerly exercised by the Lord Chancellor, that case still only extended the jurisdiction so as to admit to wardship a person who has no property but whose person requires protection and management. He further submitted that the Succession Act cases were of no assistance in finding an inherent jurisdiction to create a trust since the trusts established in those cases were created pursuant to the Act itself.

23. He further submitted that the Practice Direction relating to estates under €30,000 paralleled s. 68 of the Act of 1871, and pointed out that in none of the sixteen cases researched by the Solicitor General and referred to by Mr. Salafia did the High Court establish a trust. He also submitted that if the court were to find that it could intervene and create a trust without a determination that the person lacks capacity then the court would be interfering with that person's constitutional rights.

24. Mr. Clarke submitted that the Attorney General considered that he had a very limited role in respect of the matter before the court, and rightly pointed out that it did not involve the determination of any question relating to the constitutionality of the wardship system. He urged the court to be careful that issues sought to be raised in the plenary proceedings were not adjudicated on and that the participation of the Attorney General in the context of this hearing, was without prejudice to the position of Ireland and the Attorney General in those proceedings.

25. He also emphasised that nothing that was said on behalf of the Attorney General was in any way intended to be critical of the family and in this he was endorsing an earlier submission made by Mr. O'Donnell on behalf of the Solicitor General.

26. Mr. Clarke further submitted that a core component of the case made on behalf of the respondent was that the existing legislative framework was inadequate to vindicate the respondent's constitutional rights and/or those of his family, and accordingly, the court had an inherent jurisdiction which would vindicate those rights.

27. While adopting Mr. O'Donnell's submissions on the *In re D.* case he also submitted that the court would be breaching the constitutional doctrine on the separation of powers were it to find that it had an inherent jurisdiction to create a trust.

Decision

28. I have considered the draft deed of trust between the respondent's family and the court and hold that this document envisages the court establishing a trust.

29. I now propose to address four matters which the respondent relied on as supportive of the proposition that this Court has jurisdiction to create a trust in the circumstances of this case.

1. The Practice Direction

This provides that where the funds are under €30,000.00 the person shall not be taken into wardship. This Practice Direction does not involve the establishment of a trust by the court and the source of its jurisdiction is clearly to be found in s. 68 of the Lunacy Regulation (Ireland) Act 1871, which provides that a person is not to be taken into wardship where the estate does not exceed £2,000.00 or the annual income does not exceed £100.00. These sums were later amended by s. 4 of the Courts Act 1971, by the substitute of £5,000.00 for £2,000.00 and £300.00 for £100.00. While these sums have not been further amended since, I nevertheless hold that the authority for this Practice Direction finds its origin in s. 68 of the Lunacy Regulation (Ireland) Act 1871.

2. Sixteen cases reported on by the Solicitor General

An examination of these cases reveals that in no instance was the High Court ever the settlor of a trust. Accordingly, I find no support in these cases for the respondent's contention.

It is also of some relevance here to refer to a letter of the 6th June, 2008, from the Office of the General Solicitor for Minors and Wards of Court to Mr. John Costello, Solicitor for the respondent which enclosed a copy of the correspondence between the Solicitor General and Mr. Brian E. Spierin, then B.L. The Solicitor General sought Mr. Spierin's advice regarding the establishment of a trust. In the course of his advice Mr. Spierin noted as follows:-

"Strictly speaking the President of the High Court should be a party to the Deed to take the benefit of the undertaking set out above I don't know whether he would be prepared to join in the Deed. If he does he could be joined of the third part as follows: 'The Honourable Mr. Justice Declan Costello of the High Court, Four Courts in the City of Dublin (hereinafter called 'The President of the High Court' which expression where the context so admits or requires includes his Successors in office)."

It is sufficient to note that the President did not become a party to the deed.

3. *In re D.* [1987] I.R. 449

In the course of his submissions Mr. Salafia placed considerable reliance on this case and, *inter alia*, emphasised the following passage in the judgment of Finlay C.J. at p. 456:-

"It is, I think, important to emphasise that the jurisdiction of the High Court to take persons of unsound mind into wardship is and must always remain a discretionary jurisdiction. Where a person has property it is, in my view, open to the President of the High Court, or to any judge exercising the jurisdiction on his designation, to conclude that wardship is not necessary in any given circumstances either for the protection of that property or of the person of the respondent. Similar considerations must apply to an application brought to admit to wardship a person with no property. One of the matters on which the High Court must then exercise its discretion is as to whether wardship is necessary for the protection of the person who is the respondent in such proceedings."

It does not follow from this passage or indeed from any other part of the judgment that this Court has an inherent jurisdiction to create a trust. I accept Mr. O'Donnell's submission that this case is authority for the proposition that the jurisdiction of the High Court is broader than the Act of 1871, as a result of the *parens patriae* jurisdiction formally exercised by the Lord Chancellor and now exercised by the President of the High Court. However, I also accept his submission that this judgment only extends this Court's wardship jurisdiction to include the admission to wardship of a person with no property who may require protection of his or her person.

4. *H.L. v. The Governor and Company of the Bank of Ireland* [1978] I.L.R.M. 160

As the discretionary trust in this case was established by Costello J. pursuant to s. 117 of the Succession Act 1965, it does not lend support to the respondent's case.

In his opening which I have already referred to, Mr. Salafia submitted that the High Court has jurisdiction to hear every kind of justiciable matter and that the only exceptions to this are those matters removed from its jurisdiction by the Constitution or by statute. He submitted that the correct starting point must be that this Court does have jurisdiction to create a trust in the circumstances of this case and went on to place reliance on the judgment of Gannon J. in *R. v. R.* [1984] I.R. 296, where he held at p. 309:-

"The basic principle in relation to the question of access to the Courts appears to be that in justice no wrong (using that word in the wide general sense) should be without a remedy. What is called the right of access to the Courts is essentially a right to have recourse to justice and to have judicial determination in matters or questions of a disputable nature, whether civil or criminal."

In considering the general proposition concerning the court's jurisdiction, I am mindful of the judgment of the Supreme Court in *G. McG. v. D.W. (No2)* [2000] 4 I.R. 1 regarding the concept of inherent jurisdiction.

In this case the Supreme Court had to address the question of the court's jurisdiction to join the Attorney General in proceedings brought pursuant to s. 29 of the Family Law Act 1995. One of the issues which arose in that regard was whether the courts can be called upon to exercise an unspecified inherent jurisdiction delineated by the Oireachtas in s. 29 concerning the Attorney General as a party. In addressing that question Murray J. (with whose judgment Barron J. and Hardiman J. agreed) stated, *inter alia*, as follows at p.26:-

"The concept of inherent jurisdiction necessarily depends on a distinction between jurisdiction that is explicitly attributed to the courts by law and those that a court possess implicitly whether owing to the very nature of its judicial function or its constitutional role in the administration of justice. The interaction between the express jurisdiction of the courts and their inherent jurisdiction will depend in each case according to the scope of the express jurisdiction, whether its source is common law, legislative or constitutional, and the ambit of the inherent jurisdiction which is being invoked. Inherent jurisdiction by its nature only arises in the absence of the express."

He further stated in the said judgment at p.27:-

"Where the jurisdiction of the courts is expressly and completely delineated by statute law it must, at least as a general rule, exclude the exercise by the courts of some other or more extensive jurisdiction of an implied or inherent nature. To hold otherwise would undermine the normative value of the law and create uncertainty concerning the scope of judicial function and finality of court orders."

30. I accept the submission of Mr. Clarke that the reasoning of Murray J. in the above case is directly applicable to the issue before this Court.

31. I also accept Mr. O'Donnell's submission that the full and original jurisdiction of the High Court is to deal with justiciable controversies and that the creation of a trust is not a justiciable controversy.

32. While it is clear that the respondent's family have a principled objection to wardship which they find intrusive and are also totally committed to the respondent's well-being, I am nevertheless obliged to conclude that this Court has no jurisdiction inherent or otherwise to create the trust scheme they require. Accordingly I answer the question in the negative.