THE HIGH COURT

WARDS OF COURT

[2016 No. WOC 8554]

IN THE MATTER OF M. B.

RESPONDENT

Extempore JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 18th day of March, 2016

1. On the 27th August, 2015 E.F. presented a petition to the then President of the High Court. The petition recited as follows:-

> "1. M.B. the respondent is 91 years old, and is a retired pub owner. She was married and her husband predeceased her. She previously resided at/in Co. W. She currently resides at – General Hospital.
>
> 2. She came under the care of the Health Service Executive in July 2014.
>
> 3. She suffers from Alzheimer's type dementia. Her mental mini-score examination is 9/30. She has no understanding of the risks and benefits associated with her treatment and the pros and cons of residential care placement. She has, at the petitioner's instance, been examined by two registered medical practitioners, whose affidavits deposing to her present medical condition are filed herewith.
>
> 4. The names, addresses, descriptions and religion of her next of kin are as follows (details included).
>
> 5. Her property, the total estimated approximate value of which is €76,147.99 is as follows:
>
> a) Bank account €1,147.99
>
> b) Property containing a derelict residence and licensed premises with an estimated value of €75,000 in the respondent's own name.
>
> Her total estimated income is approximately €130 per week consisting of a pension."

2. The petition was supported by two affidavits each of which was sworn by a registered medical practitioner. One was that of Dr. Ogo Chukwjama, a Registrar in Old Age Psychiatry. In his affidavit the doctor recorded that M.B. was admitted to hospital due to an inability to cope at home and with a history of falls and general deterioration of her health. He set out her background physical history which included hiatus hernia, oesophagus stricture and recurrent foot ulcers. He recorded that M.B. acknowledged the plans for long term care but was adamant that she wanted to go home. She did not understand the need for the plan and insisted that she would be able to look after, both herself and her sister, at home. Whilst in hospital she had been receiving full time care but became agitated when contemplating the enormity and complexity of day to day activities such as bathing and preparing meals. She is doubly incontinent. He pointed out that she did not understand the risks involved in her living alone and unsupervised, and expressed his view that she was unable to look after her own affairs, both in the day to day management of her care and the management of her financial affairs. He said that she was of unsound mind and does not have the mental capacity to manage her affairs.

3. The second affidavit was sworn by Dr. Obada Yousif who is a Consultant Physician. He reported having assessed her and diagnosed her as suffering from Alzheimer's type dementia. Her mini-mental score examination was 9/30. He expressed the view that her condition was a progressive one and that her mental functions will continue to deteriorate with time. He recorded that she is unable to register information and unable to maintain concentration. He also expressed the view that she is of unsound mind and is unable to manage her own affairs.

4. On the 25th September, 2015, Kearns P. ordered an inquiry to be had as to the soundness or unsoundness of mind of M.B. Following the making of that order Dr. Niall J. Gormley, M.D., M.R.C.P.I., M.R.C. Psych. was appointed medical visitor to examine and report on M.B. Dr. Gormley is a Consultant Psychiatrist specialising in Old Age Psychiatry. He prepared a report which was furnished to the Registrar of Wards of Court on the 19th October, 2015. He carried out his assessment of M.B. in the hospital on the 9th October, 2015. His report records that the nursing staff informed him that she required assistance with activities of daily living and was doubly incontinent. At the time of his assessment she was lying in bed. She appeared calm and established reasonably good rapport. She was unable to describe the circumstances of her admission and felt that her doctor had sent her into hospital for a "build up". She was unable to tell him what was planned for her future but stated that she wished to go home. She felt that she would not need additional help at home as her sister would look after her. She was aware that her sister was at that stage in a nursing home but she appeared to believe that her sister was employed there rather than a long term resident. When Dr. Gormley asked her what would happen if her sister was unable to return home, she replied that she would not like to think about that situation. M.B. believed that she could wash and dress independently. She acknowledged that she was unable to mobilise but told him that she could creep along the ground at home if necessary. She knew she was in hospital and the current day and month but not the date or year. There were deficits in her short term memory. The doctor concluded as follows.

> *"In summary, M.B. is a 91 year old lady who has been an inpatient in – Hospital for the past 15 months. Based on the recent assessment of her and a comparison of the early stages of her admission in some respects her mental state and cognitive function have improved. Despite this improvement, her current presentation is consistent with dementia. As part of the dementia process, M.B. has significant impairment in her insight and judgment. She does not have an awareness of the level of her disability, and her need for assistance in her activities of daily living. She has an unrealistic expectation that her sister will return from a nursing home to look after her at home.*
>
> *Although M.B. has stated that she wishes to return home, I feel she would be very vulnerable if she was discharged to her own home and it would be very difficult to meet her needs considering her level of disability. M.B. does not have an understanding of her day to day financial affairs. She is being well cared for in – hospital but in the future she will require*

long term care in a nursing home or geriatric hospital.

In my opinion, M.B. is of unsound mind and unable to manage her affairs."

5. In early January 2016 an organisation called SAGE became involved in this matter. On the 7th January, 2016 it wrote to me through Mary Condell, a solicitor, in the following terms:-

"Dear Judge Kelly,

SAGE – the support and advocacy service for older people has its origins in the response of the HSE to the Leas Cross Nursing Home scandal in 2005. It is now being developed under the governance of Third Age Ireland, with funding from the HSE and Atlantic Philanthropies. It is guided by a national advisory committee chaired by former Law Reform Commissioner, Patricia Rickard-Clarke. Sage is working to expand access to support and advocacy services in all care settings and is committed to addressing individual and systemic issues and to the promotion of quality standards for support and advocacy work with older people. Our mission is 'to promote and protect the rights, freedoms and dignity of older people by developing support and advocacy services wherever aging poses a challenge for individuals'.

In this context we write regarding a wardship application in respect of M.B. which is grounded, we understand, on an affidavit of her cousin E.F. and medical assessments of M.B.'s capacity carried out some months ago.

Sage were asked to become involved with M.B. by the local HSE Elder Abuse Officer, who had in turn been called in by the Staff Nurse on the ward she currently occupies in – hospital, out of concern for her human rights as they believed that an unnecessary application to have her taken into for (sic) wardship.

Myself and my Sage colleagues Ms. Anne Harris and Dr. Ailis Quinlan, Sage's medical advisor, attended on M.B. yesterday at – hospital. Each of us formed the opinion that M.B. has capacity to make decisions concerning herself and her property, albeit that she needs some support, the sort of support and assistance that our advocate Anne Harris has been providing her with to date, and is happy to continue to provide for as long as is necessary.

We will be submitting our detailed report to you early next week to be taken into account in the wardship applications.

Briefly, however, when we engaged with M.B. yesterday she confirmed that she does not wish to be made a ward of court nor to have Mr. F to (sic) be appointed by the court to make decisions about her affairs. She understands that she is not in a position to return home but as next choice she confirmed that she is happy to go to – community unit, where her sister currently resides.

We should appreciate if we were advised when the wardship application is due for hearing before the court so that we can attend, as M.B. is anxious that we report back to her what occurs. We will get the Sage report to you as early as we can next week."

6. On the 9th February, 2016 the medical advisor to Sage sent a report to me in the following terms:

"Sage had been requested by hospital personnel to advocate on behalf of M.B. Wardship proceedings had, we understood, been initiated on the grounds that she lacked capacity. However, nursing staff had questioned this.

On 6th January, 2016, I attended – hospital along with Mary Condell and Anne Harris, both Sage representatives. The purpose of our visit was to enable us to form an opinion regarding M.B.'s capacity. Anne Harris, who had met with M.B. previously, introduced her to Mary Condell and myself. Since M.B. is deaf in one ear and we did not wish to tire her unduly, Mary Condell carried out a conversation with her and I took contemporaneous notes.

In response to Mary Condell, M.B. confirmed that she was considerably better than when she was originally admitted to the hospital. While her preference would be to go home on discharge, she realised this was not an option, having spoken to Anne Harris. However, she said she would be happy to join her sister in a nursing (sic) in -. She informed us that J. is her younger sister and that she M.B. 'is the boss'!

When Mary Condell posed the question re possible wardship, M.B. stated she 'wouldn't like that'. She 'wants to have control'. She 'wants to be free, in charge of herself'. M.B. commented that her cousin E.F. had painted the pub. He had said to her 'we will sell it' but she said to us 'no, I will sell it'. He is currently running the pub, opening it a few nights a week. He keeps the takings, and M.B. said this is only fair since he is paying for the stock in the first place. However, M.B. confirmed that the pub licence is in her name. She recently signed a cheque for €300 in this regard. M.B. stated that she 'hasn't decided yet what to do with the pub'.

M.B. was able to relate how her name is on the deeds of the pub since 1960, when she had first obtained the pub licence. Initially she opened it for only one day per year in order to keep the licence, as she was living in the U.K. She had worked in administration in two hospitals and in the U.K. Her late husband, T., died suddenly aged around 70. Initially, she thought he had been 69, but then thought he may have been a year or two older. J., who had also worked in the U.K. running a restaurant, and herself, ran the pub together until they both became unwell.

She wants to have the ward of court proceedings withdrawn/stopped. She 'understands what is going on'.

She described a typical evening in the pub, where it would be frequented by four our five regulars. Trade had dropped off with the decline of the building trade. She also noted that it tends to drop off at this time of the year, after Christmas, as people have no money left!

Several customers visit her regularly, and E.F. visited her yesterday. He is 'well over 80' and has a son and daughter living in London. M.B. expressed concern that 'E.F. would walk straight all over me altogether'.

We met with the ward nurse manager after our meeting with M.B. She corroborated all details re recent events described by M.B., i.e., renewal of pub licence, visitors, her sister J. In my opinion, M. is fully orientated in both time and space.

Having used the functional test to assess her capacity, I'm of the opinion that M. has capacity to make decisions about herself and her affairs, but that she may need support around some issues."

7. Given the conflict between the views of Dr. Gormley and Dr. Quinlan oral evidence was given by both of them and each was cross-examined.

8. Dr. Quinlan qualified as a doctor in 1978. She entered public health medicine in 1982. Her postgraduate qualifications are all in public health medicine with a good deal of time having been spent by her working in community care and with the State Claims Agency. She is a trained mediator.

9. Dr. Quinlan has no postgraduate qualifications in psychiatry, old age psychiatry or geriatric medicine. She has not treated a patient of any sort during the last 30 years.

10. The report from which I have quoted was prepared on foot of a 45 minute exposure to M.B. at which she did not ask M.B. a single question. Rather she observed the interaction between M.B. and the two other persons who formed what she described as a "triumvirate" from Sage and who met M.B. The two other persons were Ms. Condell, the solicitor, who appeared on this application and Ms. Anne Harris who has a background in nursing.

11. Dr. Gormley qualified as a doctor in 1989. He obtained his membership of the Royal College of Physicians in 1992 and his membership of the Royal College of Psychiatrists in 1995. He obtained a doctorate in medicine in 2000 with his thesis being written on the management of dementia. He worked *inter alia* at the Maudsley Hospital in London and has lectured in old age psychiatry there. He has been a consultant in old age psychiatry since 2001 and has been a medical visitor to the High Court for the last 14 years.

12. I do not propose to set out in detail the evidence given by the two doctors in support of the opinions expressed by them in writing in the reports already recited. They both adhered to the expressions of opinion contained in those reports during the course of their examination and cross-examination. Dr. Quinlan is of the view that M.B. has capacity to make decisions about herself and her affairs but with the necessity for support "around some issues". Dr. Gormley takes the view that she is unable to manage her affairs.

13. Having had the opportunity of listening carefully and observing the doctors I prefer the evidence of Dr. Gormley, the medical visitor, for a number of reasons. First, his qualifications are much more relevant than Dr. Quinlan's to the issues that fall for consideration on this application. He has an excellent postgraduate record relevant to these issues and has a particular speciality in the diagnosis and treatment of dementia, particularly in elderly people. This work has been a major part of his medical interest for many years.

14. Second, his clinical experience is far superior to that of Dr. Quinlan. She has not treated a patient since 1986 whereas he has been and continues to be involved in the diagnosis and clinical care of precisely the sort of patient who present with issues such as M.B.

15. Third, Dr. Gormley's examination and investigation was more thorough than that of Dr. Quinlan. He spent a longer time with M.B. and examined her on two occasions. His second examination was carried out on the 13th January, 2016 and that was the subject of a second report presented to the Court. While she showed some improvement he, nonetheless, did not alter his original conclusion. The criticism of him made by Dr. Quinlan was in some respects conjectural but I reject her criticism that he was too dependent on the mini-mental test in coming to his conclusions. That was not a well-founded criticism. Dr. Gormley made it clear in his testimony that he had a very clear knowledge of the limitations of that test as being merely a screening one. It formed only a very limited part of his overall assessment of M.B. He was well able to distinguish between M.B.'s functional ability in some respects and aspects but not in others. I found him to be an impressive witness who gave careful consideration to M.B. and her condition. I accept his evidence in full. Insofar as there is a conflict between his testimony and that of Dr. Quinlan (and it is a limited conflict), I prefer his evidence.

16. I hold that M.B. is not capable of managing her affairs and consequently should be admitted to wardship.

17. I have dealt with this case on its merits as though M.B. had instructed Ms. Condell, solicitor, to appear on her behalf. But that is not, in fact, what happened. M.B. executed a form called "Authority to Act". That form is headed with the logo of Sage. The heading is "Authority To Act" and it reads as follows:-

> "To enable us to work with you, and on your behalf, we need to get information from you and from others. The information you provide will assist us in dealing with any issues you raise.
>
> 1. Sage will retain this information on an Electronic Case Management System. This system enables us to keep track of our work and the actions taken to support you.
>
> 2. Sage has formal policies and procedures in relation to confidentiality and the obtaining, retaining and sharing of personal information and records.
>
> *(a) 'I, M.B. give authority /consent to Sage to act on my behalf.'"*
>
> The remainder of the printed form is struck out and then proceeds as follows:-
>
> "Name of persons / organisations with whom Sage has authority to act:
>
> *'To speak for me in the High Court and to let the court know I do not wish to be taken into wardship and that I do not wish to instruct a solicitor of my own.'"*

There is then the mark of M.B. with her name printed beneath it and the form is witnessed by Mary Condell and Anne Harris and dated the 17th February, 2016.

18. I permitted Sage and Ms. Condell to appear and to participate in the hearing as though Ms. Condell was M.B.'s duly appointed solicitor. This was done on a *de bene esse* basis.

19. Having heard argument on the issue of the entitlement of Sage or Ms. Condell to participate, I am satisfied that they have no such entitlement.

20. Ms. Condell's client, as she freely admitted, is Sage. It is not M.B. Ms. Condell has been brought into the matter as an employee of Sage. It is Sage which has instructed her through the agency of Ms. Harris who is M.B.'s advocate in Sage.

Sage may well have a useful advocacy function for elderly people in general but such function does not extend to appearing before this Court in the manner that has been done in the present case.

21. I am satisfied that M.B. could not have appeared herself in this Court because of her infirmities. She could, however, have instructed a solicitor to do so. That solicitor could have been Ms. Condell but only if M.B. were her client. M.B. was and is not her client.

22. What is not permissible is precisely what has happened in this case where Ms. Condell has appeared with Sage as her client working on instructions given to her by Ms. Harris on behalf of M.B.

23. Accordingly, for the future, having heard argument on this issue, I will not permit Sage to appear on behalf of any other person as it has done on this application.

24. I will admit M.B. to wardship and appoint the General Solicitor for Wards of Court as her Committee.