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Supreme Court of Ireland Decisions

Judgment

Title:	AM v Health Service Executive
Neutral Citation:	[2019] IESC 3
Supreme Court Record Number:	124/17
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Court:	Supreme Court
Composition of Court:	O'Donnell Donal J., MacMenamin J., Dunne J., O'Malley Iseult J., Finlay Geoghegan J.
Judgment by:	MacMenamin J.
Status:	Approved
Result:	Appeal dismissed

THE SUPREME COURT

[Record No. 124/2017]

O'Donnell J.
MacMenamin J.
Dunne J.
O'Malley J.
Finlay Geoghegan J.

BETWEEN:

HEALTH SERVICE EXECUTIVE

APPELLANT

AND

AM

RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 29th day of January 2019

Introduction

1. On the 7th November, 2016, counsel for the HSE made an ex parte application to the High Court (Kelly P.), concerning the appellant, AM. The appellant had previously been sentenced to a lengthy term of imprisonment for crimes described later in this judgment. Following his conviction and sentence he was transferred to the Central Mental Hospital. The evidence adduced before the High Court in the ex parte application was that, because of his mental condition, AM would pose a serious threat, both to his own life and welfare, and the life and welfare of others. The HSE wished to have AM made a ward of court, and on that basis asked the Court to make orders for his future detention in the Central Mental Hospital. A series of interlocutory hearings followed the ex parte application. At subsequent interlocutory hearings, and, ultimately, at a full hearing, counsel for AM submitted that a wardship order should not be made concerning his client. He submitted that an order for AM's continued detention could only be made pursuant to the Mental Health Acts, 1945 to 2001 (hereinafter referred to as "the 2001 Act"). Counsel for AM submitted that the 2001 Act contained statutory safeguards not provided for in wardship applications. His case was that, by making a wardship application, the HSE was attempting to "circumvent" the 2001 Act. Kelly P. acceded to the HSE's applications on an interlocutory basis. Later in a comprehensive judgment delivered on the 27th March, 2017, after the President set out his reasons on the facts and law for making AM a ward of court, and, in the exercise of that jurisdiction, ordered his detention at the Central Mental Hospital ("CMH") [2017] IEHC 184.

2. There appears to be no issue that, on the facts, AM could have been the subject of an application under the 2001 Act. But the evidence before the High Court was that the HSE could not comply with the complex procedures laid down in that Act for admission to the CMH. Wardship applications, generally, concern the welfare of the person concerned, and, frequently, also orders for the care of property held by that person. The question is whether, in the circumstances described in this judgment, the President erred in making AM a ward of court, and in the exercise of the power ordering his detention?

3. The issues which arise in this appeal are significant in this, and, potentially, other cases. For this reason, this Court granted leave for an appeal directly to this Court. ([2017] IESCDET 126). The issue identified for determination is whether the HSE, or any other person who seeks to have a person involuntarily detained on mental health grounds, can do so by way of wardship procedure and by the invocation of the inherent jurisdiction of the High Court, notwithstanding the fact that the appellant satisfies the criteria for a detention order under the Mental Health Act, 2001 ("the 2001 Act").

4. The history of the first legislative "code", which is now briefly outlined may for context, for convenience, be referred to as "the wardship jurisdiction" of the courts. The second "code" is the Mental Health Act, 2001 ("the 2001 Act"), and its predecessors. The wardship jurisdiction is then considered in more detail. The judgment then considers the past and more recent jurisprudence of the courts on wardship. The High Court judgment is then assessed by reference to the law as set out. In a sense, it might be said that one of the key questions in this case is as to the extent, aspects of the two jurisdictions might occasionally "intersect", while at the same time being separate codes of law.

Wardship Generally

5. The wardship of the Court's jurisdiction can be traced back to medieval times. It was first outlined in an English statute, "De Prerogativa Regis" 17 Edw. Sr.1 cc. 9 and 10, which identified prerogatives of the King. At that time, the jurisdiction was seen as the delegated exercise of a " *parens patr* iae" power, originally vested in the Crown as part of the Royal prerogative. (See, generally, Kevin Costello, 'The Expulsion of Prerogative

Doctrine from Irish Law' (1997) 32(1) The Irish Jurist 145, Laura Cahalane, 'The Prerogative and its Survival in Ireland' (2010) 1(2) IJLS 1).

6. Subsequently, by a series of enactments, wardship jurisdiction became vested in the Lord Chancellor of Ireland. The titles of these regulatory Acts emphasise the stigma which then attached to mental incapacity. The Acts were entitled the Lunacy Regulation (Ireland) Act, 1871 ("the 1871 Act") and the Lunacy (Ireland) Act, 1901. Later, by way of s.69 of the Government of Ireland Act, 1920 ("the 1920 Act"), and an order made thereunder (S.I. 1803 of 1921), and then by virtue of s.19(1) of the Courts of Justice Act, 1924 ("the 1924 Act"), the jurisdiction was transferred to the Chief Justice of Ireland, and thereafter, by virtue of s.9(1) of the Courts of Justice Act, 1936 ("the 1936 Act"), and later by s.9(1) of the Courts (Supplemental Provisions) Act, 1961 ("the 1961 Act") to the President of the High Court. The President of the High Court is empowered to assign another judge of the High Court to perform these functions. (See Anne-Marie O'Neill, *Wards of Court in Ireland* (First Law Limited 2004) Chapter 1, paras. 1.7-1.8, and, more generally, Darius Whelan, *Mental Health Law and Practice: Civil and Criminal Aspects* (Thomson Reuters (Professional) Ireland Limited 2009). But, as decided in *In re a Ward of Court* [1996] 2 I.R. 79, in fact, the exercise of this power is subject to the provisions of the Constitution itself. In that judgment, this Court was referring, in particular, to Article 40.3.2 of the Constitution, which sets out the duty of the Court to protect, as best it may, from unjust attack, and in the case of injustice done, to vindicate the life and person of every citizen. The fact that this power has a constitutional source does not prevent the enactment or application of legislation which can regulate the manner in which the power is exercised.

The Legislative Background

7. Writing extra-judicially in 2009, McCracken J. described the general mental health area as being the "poor relation" of the health services. He described the "appalling fact" that it had it taken five years for the Mental Health Act, 2001 Act to be brought into force in 2006. This legislation contained substantial safeguards for persons involuntarily detained. The 2001 Act eventually came into effect, at about the same time as the Criminal Law (Insanity) Act. 2006 which, as McCracken J. pointed out, had itself been pending as a Bill since 2002. (See Whelan, cited at para. 9 above: "Foreword"). The road to legislative reform in this area has been a long one. The enactment of the Assisted Decision-Making (Capacity) Act, 2015 marks a further step. Ultimately, the wardship jurisdiction is to be phased out. But, this still-current legislation forms a large part of the background to this appeal.

Wardship Generally

8. An order making a person a ward of court has real consequences. It can deprive a person of the power to make many of the choices which are fundamental and integral to day-to-day life. But such orders were sometimes over-broad in their effect and disproportionate in their scope. Nowadays the HSE makes a significant number of such applications, often the High Court. (See Mary Carolan, 'More than 2,600 judged incapable protected as Wards of Court', The *Irish Times* (Dublin, 16 January 2016)). But, to date, the HSE has not issued a code of practice or protocol which might inform next of kin, health professionals, legal advisors, or the public at large as to the procedures and criteria which it will adopt in any given case. One possible reason for this is that the HSE wishes to maintain flexibility. Perhaps there may be a concern that certain provisions of the Mental Health Act, 2001, including those which govern admission to the CMH, are unwieldy and over-bureaucratic. What occurred in this case illustrates some of the difficulty. But administrative difficulties cannot abrogate legal entitlements. This appeal raises the question of the relationship between the two legal codes involved. It raises the question as to the lawful course of action when a person *simultaneously* falls within the criteria necessary to be made a ward of court, *and also* come within that category of persons who may be the subject of an involuntarily

detention order under the Mental Health Acts. Later in the judgment, wardship is considered in more detail.

The Purposes of, and Relationship between, the Two Jurisdictions
9. Orders in wardship and those made under the Mental Health Act, 2001, generally, have different purposes. Ward of court applications are broadly intended to protect *persons who lack the capacity* to make decisions regarding their own welfare. By contrast, the provisions of the Mental Health Act, 2001 outline the circumstances in which a person suffering from a *mental disorder* may be the subject of an involuntary detention order. The 2001 Act outlines safeguards prior, and subsequent to, the making of such an order. These are necessary to vindicate rights protected by the Constitution and the European Convention on Human Rights ("the ECHR"; "the Convention").

10. But, in exercising the wardship jurisdiction, the courts nowadays adopt and apply a range of additional procedures in order to ensure that wardship procedures also protect the rights in question. In general, the two statutory codes do not overlap. They are distinct. This distinction is one intended by the Oireachtas, as expressed in the enactments considered later. But there may also be occasions when there is a need for continuity and coherence in legislation protecting vulnerable people. As will be seen, there are aspects of the two legislative codes which do not always operate effectively. Not only can this create profound legal and administrative difficulties, but there is a real risk of mishap, or serious and unforeseen circumstances. When seen as a whole, the legislation does not always operate in a legally coherent way. Recently, s.15(3) of the 2001 Act was held to be invalid having regard to Article 40.4.1 of the Constitution, in conjunction with Articles 40.3.1 and 40.3.2. In a judgment delivered this year, the Court of Appeal held that this statutory provision did not provide for sufficient, timely, periodic reviews of detention of a person. (See *AB v. Clinical Director of St. Loman's Hospital & Others* [2018] IECA 123 [2018] 2 I.L.R.M. 242 (Hogan J.; Peart and Gilligan JJ. concurring)). That judgment has not been appealed.

Distinctions
11. As now explained, the intention of the legislature is that the two jurisdictions should operate separately. But the question which arises then is the extent to which the jurisdictions are entirely mutually *exclusive* , or whether, on occasion, wardship can nonetheless be invoked in what, for brevity, I will call a "2001 Act" case? Can there be, on occasion, a case where there is an "overlap", and where wardship jurisdiction can be invoked even where the person subject to the order comes within the statutory criteria laid down in the 2001 Act?

Legislative Intention
12. The 2001 Act, which deals with involuntary detention, is not a standalone piece of legislation. It is in *pari materia* ; that is, to be construed as one with, the Mental Treatment Act, 1945 ("the 1945 Act") and the Mental Treatment Act, 1961. Section 1(2) of the 2001 Act provides:

"The Mental Treatment Act, 1945, the Mental Treatment Act 1961, and this Act may be cited together as the Mental Health Acts, 1945 to 2001, and shall be construed together as one."

Insofar as material, these Acts of the Oireachtas together provide for the detention and treatment of persons who suffer from a "mental disorder". The qualifying criteria will be considered later.

13. The demarcation line between wardship and the Mental Health Acts is shown by s.283 of the 1945 Act. This expressly provides for a saver in regard to the wardship powers of judges of the High Court and Circuit Court as follows:

> *"(1) Nothing in this Act shall affect any power exercisable immediately before the commencement of this section by a Judge of the High Court or a Judge of the Circuit Court in connection with the care and commitment of the persons and estates of persons found to be idiots or of unsound mind.*
>
> *(2) No power, restriction, or prohibition contained in this Act shall apply in relation to a person of unsound mind under the care of a Judge of the High Court or of a Judge of the Circuit Court.*
>
> *(3) The provisions of this Act in relation to the registration of premises shall not apply in relation to any premises by reason only of the fact that a person has been received as a patient therein by direction of a Judge of the High Court or a Judge of the Circuit Court."*

14. The statutory intention is, then, explicit; neither the 1945 Act nor its successors are to remove or delimit the wardship jurisdiction of the High Court and Circuit Court in regard to persons of " *unsound mind* ". Not only does s.283 refer to the "care" of such persons, but also to their " *commitment* ", in the sense of placing such persons in the care of a centre or institution. The use of those two words in this still-current legislation acknowledges the continuing power of the courts to order the detention, by way of wardship, for the " *care or commitment* " of persons of " *unsound mind* " if such a course of action is " *necessary* " and " *appropriate* ". But, it is clear that, while the courts may make an order that a ward of court be detained in a particular place, such a person may not simultaneously be the subject of an order or orders under the Mental Health Acts. This would be contrary to the intention of the Act. This does not prevent "mirror orders" to protect rights being made in the exercise of the wardship jurisdiction, however.

The High Court Judgment

15. Whether a person can be made a ward of court depends, in the first instance, upon the scope of that jurisdiction. The criteria for making such an order were set out on behalf of this Court by Finlay C.J. in *In Re D* [1987] 1 I.R. 449. The Court held that a court may take into wardship an individual of unsound mind whose person requires protection and management, even one who is not entitled to any property which requires protection or management. Orders are generally made pursuant to ss. 12, 15, 68 or 70 of the 1871 Act. As Finlay C.J. explained, such an order may be made where it is " *necessary* " and " *appropriate* " to do so. This judgment is considered later, and in more detail. But the fact that words of broad import, such as " *necessary* " and " *appropriate* ", are the criteria, does not, in itself, answer the question as to whether, in this case, AM could, or should, have been made a ward of court.

Unusual Features

16. This appeal has a number of unusual features. First, is the fact that counsel for AM acknowledges that, at least in a non-legal sense, it was " *appropriate* " for his client to be placed in the CMH. In this limited sense, what falls for consideration in this appeal are more perhaps the legal " *means* " which the HSE sought to utilise, rather than the " *ends* " achieved; the ultimate objective being the lawful placement of AM in the CMH. But, it is argued, the wardship procedure came with the unlawful consequence of absent legal safeguards which are part of the procedure and orders under the 2001 Act. In this case, it is noteworthy that Kelly P. made orders at an early stage, providing for AM's legal representation.

17. In response to these objections, counsel for the HSE submits that what occurred in this case must be primarily seen in its own unusual factual context. Counsel submits that the HSE was, in fact, faced with an " *emergency* " situation arising from the imminent possibility that AM, a potentially serious risk to himself and others, was eligible for release from detention on foot of a sentence of imprisonment four days after the original application was made on the 7th November, 2016. By the time of the application, he had been transferred from prison, and placed in the CMH. Relying on the fact that the detention order would have expired on the 11th November, 2016, and on what was strong medical evidence, counsel for the HSE submits that AM's release could foreseeably have had the most serious consequences, and that the HSE had, unavailingly, sought to comply with the 2001 Act. However, the officials found they could not do so. Counsel submit that, on the facts of this case, the wardship criteria were satisfied and the order is lawful.

18. A second unusual feature is that, in contrast to other cases which from time to time arise, AM's family do not differ from the HSE doctors regarding his psychiatric condition or the treatment regime. Further, no case is made that, as a result of some identified issue arising during the course of his detention, AM had been denied some specific right with regard to his treatment.

19. The decision made by the President of the High Court must therefore be seen against an unusual factual background, with a recognition that, on occasion, courts must decide matters only on the basis of the facts and circumstances presented at the time of an urgent application. Courts of first instance do not operate in a perfect world with infinite time and the luxury of hindsight. Urgent *ex parte* and interlocutory decisions must sometimes be made, having regard to two precepts: first, that the best cannot be the enemy of the good, and, second, by the application of the precautionary ethical principle found in medicine to "first do no harm". Applications such as these may call for hard choices. The careful words of a judgment do not always convey the legal complexities that lie behind them. But the protection of rights is fundamental.

20. There is a further unusual feature to the appeal. As outlined earlier, the appellant's case is that, by invocation of the wards of court procedure, the HSE was trying to circumvent the 2001 Act. The term " *circumvent* " can, of course, be interpreted in different ways. On one interpretation, it could mean the HSE tried to " *work round* " the Act, because it was simply too difficult for them to apply, and that, despite all conscientious efforts having been made, it became necessary, by sheer force of circumstance, to proceed by way of wardship. Alternatively, it might mean that what occurred was, in some sense, part of a preconceived and concerted plan to defeat AM's rights. A finding that there had been improper motivation would require clear, cogent, evidence. There was no evidence before the High Court which showed that the HSE had acted *mala fides* , or had tried to circumvent the 2001 Act in some improper or unlawful way.

The Background

21. The background to AM's detention must now be set out in some detail. A detailed description risks dehumanising a person. But, the factual basis for the High Court judgment must be fully explained.

22. AM has an extensive history of criminal charges and convictions. These include early convictions for criminal damage, assault and public order offences. In 2001, he was diagnosed as having a delusional disorder involving paranoid beliefs. He carried a butcher's knife, ostensibly for his own protection. He threatened health professionals on a number of occasions. On the 29th September, 2001, he was arrested and charged with the murder of a homeless man by stabbing. He was found guilty of manslaughter and sentenced to ten years' imprisonment in February, 2004, subsequently reduced on appeal to seven years. With backdating and remission, he was discharged from prison to

community living accommodation on the 23rd April, 2007. During the period when he was at liberty, AM's aggression caused concern to his own family.

23. On the 17th January, 2008, AM attended a local hospital complaining of serious mental stress. He was to consult with a psychiatrist and a psychologist. He was dissatisfied with his treatment. AM stabbed both the psychiatrist and psychologist. These were extremely serious, life-threatening assaults. He was arrested and later transferred from Limerick Prison to the CMH. In May, 2009 he was sentenced to ten years' imprisonment for assault causing serious harm, with a concurrent three-year sentence for assault causing harm. It is noteworthy that no plea of insanity was raised at the trial. Following his conviction, he remained in the CMH.

The Psychiatric Evidence

24. The sworn evidence of the treating psychiatrists indicated that, at the time of this application to the High Court, AM continued to lack insight into his condition. The psychiatric evidence was that his intelligence was significantly impaired. He had, on occasion, been threatening and aggressive to fellow patients. There was a continuing risk of opportunistic absconding or escaping. He required restriction and monitoring of his access to weapons. If released, he represented a specific risk to his family. He posed a risk, too, to the clinicians treating him. Even when not in a delusional state, he had a history of violent behaviour. By the time of the High Court application, AM therefore met the diagnostic criteria for schizophrenia and continued to suffer from active symptoms of that disorder. By then, therefore, he suffered, therefore, from a "mental disorder" as defined in s.1 of the Criminal Law (Insanity) Act, 2006, and, as will be seen, also came within the category of mental disorder defined in s.3 of the 2001 Act. He had no real insight into his condition. He did not believe he required any further treatment. He had been found to have a moderate mental disability.

25. But the evidence *also* established that, to use the terminology applied in the wardship case law, he was a person of "unsound mind", lacking the capacity to manage his affairs or live independently in the community. He required a highly supported and exceptionally structured placement in order to ensure even the most minimal response to the treatment regime. On this basis, AM fulfilled the legal criteria to be made a ward of court, absent any other consideration.

26. In the affidavits sworn in the High Court application, the treating psychiatrists deposed that the CMH was the only facility in the State that could safely and adequately meet the needs presented by AM's paranoid schizophrenia. If he did not remain within that secure setting, they believed it was likely he would not comply with his treatment regime and that his condition would rapidly deteriorate. Not only would his own life, health, safety and welfare then be put at risk, but he would have posed a significant hazard to other persons in the community. The psychiatric evidence went so far as to describe the possibility of AM's release into the community as being possibly " *catastrophic* " both for himself, and, potentially, for other persons with whom he might come into contact.

Triage

27. The CMH operates a system of triage known as "Dundrum 1", wherein patient risk factors are assessed. In this system, "0" is lowest and "4" is highest. AM was assessed at the highest level, "level 4", having regard to the seriousness of the violent occurrences of his past and the risks of such violence in the future. One psychiatric report described AM as "potentially very dangerous", as having limited insight into his condition, and with limited capacity to self-manage outside a more secure setting if removed from the CMH. If he did not take the medication he had been prescribed it was "very likely" that he would relapse into what was described as "florid psychosis". AM had made "numerous threats" to kill or harm people over the years. He had no friends. He

had a complex and often violent relationship with his siblings who lived nearby in his home area.

Constitutional Rights
28. It can therefore be said without any equivocation that AM's constitutional rights to life and welfare, and the same constitutional rights of others, guaranteed under Article 40.3.1. and Article 40.3.2 of the Constitution, lie at the centre of this case, and the orders made in the High Court application. The existence of all these rights must be seen as important considerations. This was a case where, if no order was made, the appellant would have been released into the community with consequences which could have been serious for himself and for others, including members of his family or other persons with whom he came into contact. The evidence simply cannot be read any other way. There was no evidence to the contrary. The significance of these considerations becomes clearer when this judgment comes later to consider the question of inherent jurisdiction.

A Discretionary Order
29. Faced with all these attendant risks, therefore, the High Court had to address a situation where there was a real possibility that AM would be released into the community within four days. Admission to wardship is a discretionary order. The President was exercising a judicial discretion in an area where he should have had some latitude. But, the choices available were significantly narrowed by circumstances outside the control of the Court. Counsel for AM submits that, nonetheless, the President was entitled only to apply the 2001 Act, as his client satisfied the statutory criteria for admission to the CMH under that Act. But, counsel for the HSE submits that this was simply not feasible; and that unsuccessful efforts had been made to invoke and apply the "unwieldy" 2001 Act procedure. Inescapably, entirely practical questions arise as to whether, subject to law, the President had any real alternative to making the orders which he did make, and the extent to which, even at the time of the first application to the High Court, the die was cast?

The Issues Next Considered in the Judgment
30. This judgment now considers in more detail the Act of 2001; then, again in more detail, wardship jurisprudence, decided authority on inherent jurisdiction, in particular, the judgment of this Court in *In re FD* [2015] IESC 83; [2015] 1 I.R. 741 (Laffoy, Dunne and Charleton JJ.), and the judgment under appeal. Reliant on the decision in FD, the HSE's case is that inherent jurisdiction now has no role whatever to play in cases coming within this broad range of case.

The Mental Health Act, 2001
31. Involuntary detention for psychiatric reasons has a long and sometimes disturbing history in many jurisdictions. This judgment now considers the scope of the 2001 Act and the safeguards contained there. What is dealt with generally in this Act is a deprivation of the fundamental constitutional right to liberty. Awareness of this fact is necessary to understand the protections the Act contains. Section 3(1) of the Act of 2001 defines " *mental disorder* " as meaning:

"mental illness, severe dementia or significant intellectual disability where -

> *(a) because of the illness, disability or dementia, there is a serious likelihood of the person concerned* ***causing immediate and serious harm to himself or herself or to other persons*** *, or*
>
> *(b) (i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a* ***serious deterioration in his or her condition or would prevent the***

> ***administration of appropriate treatment*** *that could be given only by such admission, and*
>
> *(ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent."* (Emphasis added *)*

There is no doubt that AM satisfied these criteria, now emphasised in the text above, at the time of the application to the High Court. It is not suggested that the situation has changed.

32. In the same section, at subsection 2, *"mental illness* " is defined as meaning:

> *" **a state of mind** of a person which affects the person's thinking, perceiving, emotion or judgment and which **seriously impairs the mental function** of the person to the extent that **he or she requires care or medical treatment in his or her own interest or in the interest of other persons** ." (* Emphasis added *)*

AM satisfied these criteria also. Not only did he require care in his own interests and those of others, but for the vindication of his own constitutional rights and the rights of others.

33. " *Severe dementia* " is defined under s.3(2) as meaning:

> *"a deterioration of the brain of a person which significantly impairs the intellectual function of the person thereby affecting thought, comprehension and memory and which includes severe psychiatric or behavioural symptoms such as physical aggression."*

Again, the evidence establishes these criteria were fulfilled.

34. Finally, s.3(2) defines "significant intellectual disability" as:

> *"a state of arrested or incomplete development of mind of a person which includes significant **impairment of intelligence and social functioning and abnormally aggressive or seriously irresponsible** conduct on the part of the person." (* Emphasis added *)*

There is evidence that these criteria were also fulfilled. Clearly, AM came within a number of the s.3 statutory criteria.

Safeguards: Section 4 (Best Interests)

35. The 2001 Act contains extensive statutory safeguards. Section 4 is a significant provision, in that it applies a "best interests" test, a protection not to be found in the text of wardship statutes. The section provides that:

> *"(1) In making a decision under this Act concerning the care or treatment of a person (including a decision to make an admission order in relation to a person), the best interests of the person shall be the principal consideration with due regard being given to the interests of other persons who may be at risk of serious harm if the decision is not made."*

36. The provision goes on to lay down quite rigorous procedural requirements and specific forms of protection. Any person who is to be admitted, or exposed to certain forms of treatment, should, as far as is practicable, be entitled to make representations on such a proposal. (s.4(2)). In making such decisions, due regard is to be given to the rights of such a person to dignity, bodily integrity, privacy, and autonomy. (s.4(3)).

Section 8
37. Section 8 of the Act deals with the involuntary admission of persons to approved centres. It provides that a person may be involuntarily admitted to an "approved centre" pursuant to an application under s.9 or s.12 of the Act, and there detained on the grounds that he or she is suffering from a mental disorder. (s.8(1)). Section 8 provides, however, that nothing in that section is to be construed as authorising the involuntary admission of a person to an approved centre by reason only of the fact that the person is suffering from a personality disorder, is socially deviant, or is addicted to drugs or intoxicants. (s.8(2)).

Section 9
38. Section 9 of the Act identifies persons who may apply for involuntary admission. These include a spouse or relative, an authorised officer, a member of An Garda Síochana, or, subject to exceptions set out in subsection (2), "any other person". Certain categories of person are precluded from applying. An underage person or an individual who may be related to a person the subject of the application cannot apply. A member of the governing body, or the staff, or a person in charge of, the approved centre concerned are all precluded from applying. No application can be made by a person having a financial interest in payment to the approved centre.

Section 10
39. Section 10 lies at the centre of this appeal. Referring to the Mental Health Commission ("the Commission"), it provides:

> *"(1) Where a registered medical practitioner is satisfied following an examination of the person the subject of the application that the person is suffering from a mental disorder, he or she shall make a recommendation (in this Act referred to as "a recommendation") in a form specified by the Commission that the person be involuntarily admitted to an approved centre (* ***other than the Central Mental Hospital*** *) specified by him or her in the recommendation." (Emphasis added)*

The Commission plays an important supervisory and protective role for persons who come within the purview of the 2001 Act. Counsel for the HSE is undoubtedly correct in pointing out that by reference to the emphasised text, no admission can be made directly to the CMH. The section goes on to set out certain detailed procedures necessary for an application. These need not be outlined. In the context of this case, however, there is a close interconnection between s.10 and s.21, considered together later.

Section 13
40. Under s.13, where a recommendation is made in relation to a person, other than a recommendation by member of An Garda Síochana, the person making the application shall arrange for the removal of the person to the approved centre specified in that recommendation. It will be remembered here that the persons who make such application are identified in s.9 of the Act, but may not include a doctor who is a member of the staff of the approved centre. (s.13(1)). Where the applicant is unable to arrange for the removal of the person concerned, the clinical director of the approved centre specified in the recommendation or a consultant psychiatrist acting on his, or her, behalf, shall, at the request of a registered medical practitioner who made the recommendation, arrange for the removal of the person to the approved centre by staff members of that centre. (s.13(2)). Where there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, the clinical director or a consultant psychiatrist acting on his or her behalf may, if necessary, request An Garda Síochana to assist the staff of the approved centre in the

removal of the person to that centre, and An Garda Síochana shall comply with such request. (ss.13(3)).

Section 14
41. Section 14(1) provides that, where a recommendation in relation to a person the subject of an application is received by the clinical director of an approved centre, a consultant psychiatrist on the staff of that centre shall, as soon as may be, carry out an examination of the person. If the psychiatrist is satisfied that the person is suffering from a mental disorder, he or she may make an order to be known as an " *involuntary admission order* ". The consultant psychiatrist is to take charge of the person concerned and detain him or her for a period not exceeding 24 hours (or such shorter period as may be prescribed after consultation with the Commission). This is for the purpose of carrying out an examination or, if an admission order is made or refused in relation to that person during that period, until it is granted or refused. (s.14(2)).

Section 15
42. By virtue of s.15(1), an admission order shall authorise the reception, detention and treatment of the patient concerned and shall remain in force for a period of 21 days from the date of the making of the order and, subject to subsection (2) and s.18(4), shall then expire. Section 15(2) provides that the period referred to in subsection (1) may be extended by a renewal order made by the consultant psychiatrist responsible for the care and treatment of the patient for a further period not exceeding three months. As s.15(3) provides, the further detention of the person may be made for a period not exceeding six months, beginning on the expiration of the renewal order made by the psychiatrist under subsection (2), and thereafter, may be further extended by order made by the psychiatrist for periods each of which does not exceed twelve months. As mentioned earlier, s.15(3) was recently held constitutionally invalid by the Court of Appeal.

Section 20
43. Section 20 of the Act provides, in turn, that where a patient or the person who applied for a recommendation under which a patient is detained in an approved centre applies to the clinical director of the centre for a transfer of the patient to " *another approved centre* ", the clinical director may, if he or she so thinks fit, arrange for the transfer of the patient to the centre with the consent of the clinical director of the second-mentioned approved centre.

Section 21
44. Section 21 is directly on point. It is to be read in conjunction with s.10 of the Act. It provides:

> *"(1) Where the clinical director of an approved centre is of opinion that it would be for the benefit of a patient detained in that centre, or that it is necessary for the purpose of obtaining special treatment for such patient, that he or she should be transferred to another approved centre (other than the Central Mental Hospital), the clinical director may arrange for the transfer of the patient to the other centre with the consent of the clinical director of that centre.*
>
> *(2)(a) Where the clinical director of an approved centre -*
>
> > *(i) is of opinion that it would be for the benefit of a patient detained in that centre, or that it is necessary for the purpose of obtaining special treatment for such a patient, to transfer him or her to the Central Mental Hospital, and*

(ii) proposes to do so,

he or she shall notify the Commission in writing of the proposal and the Commission shall refer the proposal to a tribunal.

(b) Where a proposal is referred to a tribunal under this section, the tribunal shall review the proposal as soon as may be but not later than 14 days thereafter and shall either -

(i) if it is satisfied that it is in the best interest of the health of the patient concerned, authorise the transfer of the patient concerned, or

(ii) if it is not so satisfied, refuse to authorise it."

The evidence before the High Court did not even get to the point of " *transfer* " or " *retransfer* " back to the CMH, despite the fact that AM did satisfy the criteria outlined in the 2001 Act.

Later Sections
45. The Act sets out in detail the composition (s.48) and powers of a mental health tribunal. (s.49). It provides for appeals to the Circuit Court. (s.19). It also provides for an Inspector of Mental Health Services to be appointed each year, who is given extensive powers to visit approved centres to ensure the rights of persons who are detained in such centres are being protected and vindicated. (s.50).

Sections 10 and 21 Considered Together
46. Undeniably, s.10 prohibits direct admission to the CMH. It also prevents continuation of detention under a new regime of a person such as AM, whose term of imprisonment is ending, even one whose release could pose a serious risk. Section 21 is presumably intended to deal with such a situation. It applies where the clinical director of an approved centre is of the opinion that it would be for the benefit of a patient detained in a centre that they should be transferred to an approved centre other than the CMH, the clinical director may arrange for the transfer of such patient to the other centre with the consent of the clinical director of that centre. (s.21(1)). Section 21(2) contains provisions empowering the clinical director, where he or she is of the opinion that it would be for the benefit of a patient and for the purpose of obtaining special treatment, to transfer that patient to the CMH. If the director proposes to do so, he or she shall notify the Commission in writing of the proposal and the Commission shall refer the proposal to a tribunal.

The Evidence before the High Court on Attempts to Comply with the 2001 Act
47. I pause here to point out that there was no direct evidence before the High Court regarding attempted compliance with these provisions. Before the Court were, rather, averments which were in the nature of hearsay evidence. The eminent psychiatrists were the sole deponents for the HSE. I do not criticise their evidence in any way. They deposed to the effect that they had been " *informed* " by HSE officials that efforts had been made to have AM admitted to a centre, but that no centre had been prepared to accept him even temporarily for assessment. The evident was that the possibility of placing AM in an alternative approved unit had been " *explored* ", but that the clinicians responsible for such units did not think it would be possible to manage AM in such a setting. The material before the High Court on this point was, at best, sufficient, and no more. It placed the President of the High Court in an invidious position. If he dismissed

the application or adjourned it, calling for more evidence from HSE officials, the consequences might have been " *catastrophic* "; if he acceded to the application, he was constrained to do so on the evidence described.

48. In fact, the evidence focused more on the position of AM. Procedures had not progressed to the point of any question of " *transfer* " for assessment to another centre, so that AM could thereafter be readmitted to the CMH. The psychiatrists, undoubtedly, had to deal with a very difficult situation. I would hold there was material before the High Court which was sufficient to show that it was not possible to operate the provisions of the 2001 Act.

49. But one might rhetorically ask, albeit with hindsight, what were the precise circumstances in which the HSE officials sought to invoke this unusual procedure? Again, with hindsight, it should have been easy to foresee this situation. Yet the application to the High Court was left to the eleventh hour, when, effectively, the court had little choice but to accede to the application. I raise these questions in the full acknowledgement that, to use the word loosely, the situation might have been an "impossible" one. But had the application been brought earlier, the High Court might well have been justified in requiring more information as to why, when, and how, this situation had developed in the way it did.

50. By way of extenuation, one can say, as did the President in his judgment, that the 2001 Act is extremely unwieldy. Possibly, some of these statutory provisions were inspired by overriding concerns as to overcrowding in the CMH. (See Whelan, at paras. 19.31-19.32, and the Third Annual Report of Inspectorate of Prisons and Places of Detention, 2004-2005, at pp. 18-24). Nevertheless, the High Court was owed a much fuller explanation as to why this crux had arisen. A further lesson from this case is that certain provisions of the 2001 Act require rethinking in order to eliminate the risk of potential mishaps. The resolution of problems like this should not depend on the ingenuity and improvisational skills of lawyers and the courts.

51. I turn now to a more detailed consideration of the statutory wardship jurisdiction of the courts.

Wardship

52. An order for wardship is based on a "status" approach to capacity. (See Whelan, at paras. 13.13-13.19). The present statutory basis which regulates an order for wardship is outlined in s.9(1) and (2) of the 1961 Act, which provides:

> *"(1) There shall be vested in the High Court the jurisdiction in lunacy and minor matters which -*
>
> *(a) was formerly exercised by the Lord Chancellor of Ireland,*
>
> *(b) was, at the passing of the Act of 1924, exercised by the Lord Chief Justice of Ireland, and*
>
> *(c) was, by virtue of subsection (1) of section 19 of the Act of 1924 and subsection (1) of section 9 of the Act of 1936, vested, immediately before the operative date, in the existing High Court.*
>
> *(2) The jurisdiction vested in the High Court by subsection (1) of this section shall be exercisable by the President of the High Court or, where the President of the High Court so directs, by an ordinary judge of the*

High Court for the time being assigned in that behalf by the President of the High Court."

But this can only be seen as a regulatory, jurisdictional, vesting provision. The basis for the jurisdiction is fully described in *In re D* (Cited at para. 18 above) and *In re a Ward of Court* (Cited at para. 9 above). It is now necessary to consider the former judgment in more detail.

In re D

53. In *In re D* , this Court had to consider whether the High Court had jurisdiction to take a twenty-year-old woman of "unsound mind" into wardship, who required protective orders. But the woman was not entitled to any property which required protection or management. Historically, such applications arose in the context of the protection of property, as well as persons. In FD, this Court held that a jurisdiction to make a wardship order did exist in such circumstances, but it was not a jurisdiction conferred or delimited by the Act of 1871. Rather, it was part of the general protective jurisdiction over persons of unsound mind vested in the High Court by s.9 of the 1961 Act. Put another way, the jurisdiction was derived from one not only delimited by the 1961 statute, but had been vested in the pre-independence courts.

54. Finlay C.J. summarised the effect of s. 9 as follows at p. 453 of the report:

"I am satisfied that this section must be construed as vesting a jurisdiction in the High Court, as both sub-sections 1 and 2 of it describe it as doing, the extent of which jurisdiction is described and identified by subclauses (a) and (b) by reference to jurisdictions formerly exercised, and by subclause (c) by reference to jurisdictions previously vested in the former High Court."

He continued:

"It did not, as did s.19 of the Act of 1924, transfer any jurisdiction but rather directly vests it".

The effect of this clear statement is that, subject to the Constitution, the High Court is vested with the same jurisdiction formerly exercised by the courts prior to independence, together with the jurisdiction previously vested in the former High Court.

55. At pp. 454-455 of the report, Finlay C.J. referred to the statement of Ashbourne L.C. in *In re Birch* (1892) 29 L.R. Ir. 274, in which the Lord Chancellor affirmed that the jurisdiction was conferred by the terms of the "Queen's Letter in Lunacy", which was addressed to each successive holder of that judicial office. Lord Ashbourne stated at pp. 275-276 that the words of the document amounted to:

"…an express delegation by the Crown under the Sign-manual of its prerogative jurisdiction in Lunacy to the Lord Chancellor. The single purpose of the Crown is to benefit this afflicted class by confiding them to the care of its highest Judge and one of its greatest officials. There is no restriction by which the jurisdiction of the Lord Chancellor is confined to any particular section of this afflicted class. The parental care of the Sovereign extends over all idiots and lunatics, whether so found by legal process or not."

56. As pointed out earlier, wardship applications generally concerned the protection of property or assets. But at p. 454 of his judgment in *In re D* , Finlay C.J. concluded on the facts that the High Court was vested with a jurisdiction, " *where necessary and appropriate* ", to take into its wardship a person of unsound mind whose person requires protection and management, but who was not entitled to any property which requires protection or management. He held none of the statutes provided that the twin tests of necessity and appropriateness were confined to property or assets. It is not disputed between the parties in this case that these two criteria are tests of general application in wardship.

57. Considering *In re Birch* (Cited at para. 58 above) and *In re Godfrey* (1892) 29 L.R. Ir. 278, Finlay C.J. analysed the jurisdiction in this way:

> *"I am driven by these two decisions and by the statement of a former Lord Chancellor of Ireland as to what his understanding of his jurisdiction was and indeed the exercise by him of it, to the conclusion that it extended beyond the taking into wardship of persons who had property and the management and protection of their property as well as the protection of their person. Such a construction of the jurisdiction in lunacy matters vested by the Act of 1961 in the High Court seems to me to obtain significant support from a consideration of the provisions of Article 40, s.3, sub-s. 2 of the Constitution where the obligation imposed on the State by its laws to protect as best it may from unjust attack and in the case of injustice done to vindicate the life and person of every citizen is put in equal place with the obligation to protect and vindicate the property rights of every citizen."*

Finlay C.J.'s conclusion was that this jurisdiction was effectively non-statutory, based on pre-independence jurisprudence, but subsequently supported by the provisions of Article 40.3.2 of the Constitution. His reference to, and reliance on, this constitutional principle is particularly important, as will be seen in *In re FD* in 2015. Orders may be *ex parte* or interlocutory (See Order 52, Rule 2, and Order 67, RSC 1986).

58. It follows from this that the Court has jurisdiction to make orders for the placement of a ward of court in a particular centre, such as, in this case, the CMH. In the words of Hamilton C.J. in *In re a Ward of Court* at p. 106:

> *"When a person is made a ward of court, the court is vested with jurisdiction over all matters relating to the person and estate of the ward and in the exercise of such jurisdiction is subject only to the provisions of the Constitution: there is no statute which in the slightest degree lessens the court's duty or frees it from the responsibility of exercising that parental care".*

The duty includes giving directions with regard to the care, maintenance and wellbeing of the ward. In making such decisions, the Court will apply the best interests test. (At p. 106). Insofar as concerns AM, the Court was entitled to direct the placement and detention of AM in the CMH. (See also, Harris, *A Treatise on the Law and Practice in Lunacy in Ireland* (Corrigan and Wilson Ltd. 1930), p. 8).

59. In another significant passage, to be found at p. 456 of the report, Finlay C.J. stated:

> *"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." (* Emphasis added *)*

The jurisdiction is, undoubtedly, a wide one, albeit to be read in light of the Constitution, ECHR jurisprudence, and the rights guaranteed and outlined there. A court is empowered to make such *ex parte* or interlocutory orders as are necessary to give

effect to this broad jurisdiction, and for the protection of the rights, interests, and welfare of the person involved, as well as property.

The FD Case

60. Counsel for AM submits that the Act of 2001, used in conjunction with the inherent jurisdiction of the High Court, could have been used to "create" a situation whereby the procedures under the 2001 Act could have been complied with inside acceptable time limitations. But, it must be said, this was based on a series of hypotheses as to how the 2001 Act procedures might have been complied with on a step-by-step basis. There was no evidence to support these hypotheses. The point is considered later in this judgment. In response, counsel for the HSE submits inherent jurisdiction is, in fact, no longer available in this area. The case is made that the jurisdiction of the courts is now entirely statutory in nature in this area. Counsel relies on the judgment of the Court in *In re FD* in 2015. (Cited at para. 33 above). To my mind, such reliance is misplaced, insofar as it is said to reach such a broad conclusion. First, it is necessary to consider the background to *FD* case in a little more detail.

61. The applicant, FD, was the beneficiary of a settlement in the sum of IRÂ£3 million in a plenary action where he had been the plaintiff. The monies were to be paid into court pending an application to make him a ward of court. FD's parents strongly opposed the wardship process. They refused to make a wardship application. They requested a determination by the High Court as to whether a trust or some other arrangement outside of wardship could be arrived at which would allow them to decide how to apply the monies recovered for the benefit of their son. The *FD* case had a long procedural history. What was in issue throughout was the question of whether there was vested in the High Court an inherent jurisdiction to *create a trust fund* , when, in general, a person such as FD would have been made a ward of court and the monies paid into court to be administered in his interest.

62. The case commenced in early 2002, when the application was made to the President of the High Court, Finnegan P., to set up the trust. The President felt that wardship was the correct course, and that the monies be paid into Court. The parents objected and received a full hearing before Kelly J. in the High Court. The issue arose as to whether the President's direction was a judicial or administrative act. Kelly J. delivered judgment *(FD (an infant) suing by his next friend BD and Ors v. Registrar of Wards of Court* [2004] IEHC 126; [2004] 3 I.R. 95). He held this should be tried as a preliminary issue. The then President thereafter directed that an issue be tried by a judge and jury as to whether or not the young man was of unsound mind and incapable of managing his person or property. The parents maintained their objection to making him a ward and, in advance of any such inquiry taking place, appealed against the order of the then President. The parents also sought the trial of a preliminary issue as to whether it was open to the High Court to protect the monies recovered by the respondent, FD, other than by making him a ward of court, and if so, whether such a course of action would be desirable in the case.

63. In the case of *In the Matter of Wards of Court and In the Matter of Francis Dolan* [2007] IEHC 26; [2008] 1 ILRM 19, delivered in 2007 and reported in 2008, this Court (Geoghegan J.; Fennelly and Kearns JJ. concurring) allowed the appeal against the President's direction for the trial of a preliminary issue, and instead remitted the matter to the High Court to formulate a wording for the trial of a preliminary issue as sought by the respondent FD.

64. This judgment did not form part of the argument in this appeal, nor does it form part of the ratio of this judgment. But what Geoghegan J. said in 2007 throws light on the issues which were, and were not, later before this Court in 2015. As will become clear, the issue in FD in 2015 was not based on any *constitutional right* , but rather a far simpler non-constitutional point; that is, whether inherent jurisdiction permitted the

setting up of a trust when the matter could be dealt with under the statutory wards of court jurisdiction?

65. The observations of Geoghegan J. in the judgment are of great importance because they make it entirely clear that what was in question, both then and subsequently, was simply whether or not there was a jurisdiction under the 1871 Act, to create a trust. If there was such a jurisdiction, then the question would arise as to whether it would be lawful to permit a trust by reliance on inherent jurisdiction? Geoghegan J. comprehensively set out the history and nature of wards of court jurisdiction, previously outlined by Finlay C.J. in *In re D* . He again pointed out that in *In re D* , the issue had been whether a person who had no property could be taken into wardship, and that the FD case had arisen because the Act of 1871 was apparently relevant only to property management.

66. Geoghegan J. went on to explain that the 1871 Act was merely regulatory, and said the tenor of the judgment of Finlay C.J. was to the effect that the jurisdiction of the former Lord Chancellors of Ireland was a wide one. Geoghegan J. explained that before 1922 it was technically the position that the King or Queen, as the case might be, had custody of all persons of "unsound mind", but the monarch's jurisdiction was always delegated to the Lord Chancellor. He described the evolution of the legislation both prior to and after independence. He set out that s.19 of the 1924 Act provided for the *transfer* of this jurisdiction to the Chief Justice. This included all the jurisdiction in lunacy and minor matters which had "lately" been exercised by the Lord Chancellor, and which, at the passing of the Act, had been exercised by the Lord Chief Justice of Ireland, pursuant to the 1920 Act. Referring to s.9 of the 1961 Act, Geoghegan J. concluded:

> *"Given the nature of the new State, I am of opinion that that section must be given a broad interpretation and it must cover the jurisdiction exercised by the Lord Chancellor in relation to persons of unsound mind irrespective of whether the 1871 Act applied to the case in point or not."*

67. Geoghegan J. referred to a then recent report of the Law Reform Commission:

> *"This view finds some support in the consultation paper of the Law Reform Commission "Law and the Elderly" where the Commission makes the comment at paragraph 4.10:*
>
> > *"Even if the parens patriae jurisdiction did not survive past 1922, it can be argued that the legislation outlined in the passage quoted from Hamilton C.J. at paragraph 4.04 (this was in the Supreme Court appeal In the Matter of a Ward of Court (Withholding Medical Treatment) (No. 2) [1996] 2 I.R. 79) provided a statutory basis for a new, **but similar** , jurisdiction which is now vested in the President of the High Court." (* Emphasis added *)*

68. Having referred to this quotation, Geoghegan J. went on:

> *"In fact as I will be pointing out that jurisdiction is vested in the High Court. The Commission goes on to comment that -*
>
> > *"Alternatively it may be that the President's authority should be grounded on the inherent jurisdiction of the court whereby the court is empowered to step in to protect an individual's personal rights under Article 40.3 of the Constitution a provision which was considered as a possible source of jurisdiction by Finlay C.J. in In re D. cited above."*

69. He continued:

> *"An important change came about by section 9 of the Courts of Justice Act, 1936 in that by that section the jurisdiction which had been personally vested in the Chief Justice by the 1924 Act became transferred to the former High Court though it was thenceforth to be exercised by the*

> *President of the High Court or, if and whenever the President so directed, by an ordinary judge of the High Court for the time being assigned in that behalf by the President. As Finlay C.J. pointed out, section 9 of the Courts (Supplemental Provisions) Act, 1961 expressly vested the jurisdiction in the High Court but repeated the provision that it would be exercisable by the President or a judge delegated by him."*

70. I reiterate here that this Court had reached the same conclusions in *In the Matter of a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 I.R. 79, where Hamilton C.J. followed and applied Finlay C.J.'s judgment in *In re D* , holding that the jurisdiction previously vested in the Lord Chancellor prior to 1922 was now vested in the High Court by virtue of s.9 of the Act of 1961. In his concurring judgment in the 1996 case, Blayney J. explained that what was delegated to the Lord Chancellor were powers, duties and responsibilities previously vested in the Sovereign. He continued:

> *"This authority clearly gave to the Lord Chancellor extremely wide powers which, as Lord Ashbourne states, had never been curtailed by statute, and they are to be exercised whenever the liberty or happiness of persons non compos mentis required his intervention". (* At p.140 *).*

As did Hamilton C.J., Blayney J. concluded, that this was a *parens patriate* jurisdiction.

71. Thus, the judgments of Finlay C.J. and Geoghegan J. in *In re FD* reached the same conclusion as Hamilton C.J. in the *Ward of Court* case, albeit perhaps with different nuances. Finlay C.J. based his conclusions on pre-independence precedent and statutory interpretation reinforced by Article 40.3.2 of the Constitution. Geoghegan J. grounded his view more on the provisions of the Constitution, together with interpretation of the post-independence statutes to which Hamilton C.J. also referred. There is no doubt as to the constitutional basis of the exercise of the power.

72. Once this Court had delivered judgment in *FD* in 2007, the matter then went back to the High Court ([2008] IEHC 264; [2011] 1 I.R. 75). Sheehan J. concluded that an express provision, setting out the jurisdiction of the court (i.e. the 1871 Act), generally excluded the exercise of a broader inherent jurisdiction, and that the extension of an express jurisdiction of the court did not provide grounds for the creation of an entirely separate jurisdiction to that which had been established by statute law. On that basis, he held that the creation of an arrangement such as that which had been proposed did not come within the full and original jurisdiction of the High Court as it related to determination of judiciable controversies. Sheehan J.'s judgment in FD was appealed to this Court. Why the appeal was so long delayed is unclear.

Inherent Jurisdiction

73. Prior to considering the judgment of this Court, on the appeal from Sheehan J., it is necessary briefly to describe the outlines of inherent jurisdiction insofar as it arises in the context of this case. This issue was not considered in the High Court judgment, doubtless because the submissions before the President focused mainly on statutory jurisdiction.

74. The existence of an inherent jurisdiction was expressly recognised by this Court (Hamilton C.J., O'Flaherty, Keane and Murphy JJ.; Denham J. dissenting) in *DG v. The Eastern Health Board* [1997] 3 IR 511, at page 524, upholding the High Court judgment of Kelly J. Hamilton C.J. explained that it was a power which should be recognised in extreme and rare occasions, when a court is satisfied that it is required for a short period in the interests of the welfare of the child, and that there is, at the time, no other suitable facility. The majority of the full Court held that the courts have jurisdiction to do all things necessary to vindicate the personal rights of the citizens. (See *The State (Quinn) v. Ryan* [1965] 1 I.R. 70). This Court held on the facts that the welfare of the applicant minor in DG took precedence over his right to right to liberty. (See *Attorney General v. X and Ors* [1992] 1 IR 1). Denham J., although dissenting, in fact agreed that the learned trial judge did have jurisdiction to make the detention order on the

basis of inherent jurisdiction, but that the jurisdiction should be exercised only on extreme and rare occasions. The Court unanimously held that the exercise by the High Court of its jurisdiction in this regard should not be used by the Eastern Health Board (the statutory predecessor of the HSE) to relieve them of their statutory obligations in regard to the applicant minor, and that the authorities should continue efforts to make suitable alternative arrangements consistent with his needs. If no such arrangements could be made, he should not be detained in a penal institution.

75. This jurisdiction has also been used on rare occasions in the case of adults when it has been shown that there was a legislative lacuna; that such an adult was of unsound mind; that their mental disorder was of such a degree warranting compulsory confinement; and where the validity of the continued confinement depended upon the persistence of such disorder. (See *In the matter of J.O'B* and in the matter of the inherent jurisdiction of the High Court, *The HSE v. J.O'B (a person of unsound mind not so found)* [2011] IEHC 73; [2011] 1 IR 794). As is obvious, the HSE was the applicant in the *JO'B* case, where it sought to assert, and rely on, inherent jurisdiction. (See also *HSE v. VF (a person of unsound mind not so found*) [2014] IEHC 628; [2014] 3 I.R. 305. The protections necessary are discussed in the *VF* case and in *SS (a minor) v. HSE* [2007] IEHC 189; [2008] 1 IR 594).

76. Counsel for the HSE asserts that the decision of this Court in *FD* in 2015 is authority for the proposition that inherent jurisdiction simply no longer plays any role in cases such as these. I am not persuaded that this is so, when put so broadly. In fact, the Court has been referred to a High Court order where the HSE itself applied to invoke the same inherent jurisdiction in an application made to the High Court as late as the 6th May, 2016. (See the case of P *M v. DC and the HSE* [2013] IEHC 425). The recorded invocation of the jurisdiction in 2011 and 2016, and perhaps in other cases, sits rather uncomfortably with the case the HSE now seeks to make, to the effect that jurisdiction in this area is now entirely statutory. It is irreconcilable with the earlier decided authorities of this Court. It is hardly likely that, in 2016, the HSE would have sought to invoke a jurisdiction which it considered the High Court did not have.

The Judgment of this Court in FD in 2015

77. In fact, a consideration of the judgment of this Court in *FD* (Laffoy J.; Dunne and Charleton JJ. concurring) shows that in 2015, this Court did not evince any intention of either diminishing or eliminating the powers of inherent jurisdiction when fundamental constitutional principles were at stake. The point is that no such fundamental principle was at stake in *FD* .

78. In the 2015 decision in *FD* , the Court did not in any way distinguish *DG* , still less give any indication of disagreement with the judgment in DG. (See *Mogul of Ireland Limited v. Tipperary (North Riding) County Council* [1976] 1 I.R. 260). In fact, the passages now referred to in Laffoy J.'s judgment in *FD* make explicit reference to two different situations; the first, whether or not inherent jurisdiction permitted the parents of *FD* to establish a *trust fund* to administer the large sum which he had received by way of damages, rather than his being made a ward of court; the second (which did not arise in *FD* in 2015), where *fundamental constitutional principles were at stake* . Laffoy J.'s judgment therefore must be viewed in its context. It concerned an appeal where fundamental constitutional principles were *not* at stake.

79. Laffoy J. first considered the observations of Finlay C.J. in *In re D* :

> *"In stating that the section must be construed as "vesting a jurisdiction" in the High Court, it is clear from the next sentence of the judgment that Finlay C.J. was drawing a distinction between a provision such as s. 19 of the Act of 1924 providing that jurisdiction "shall be transferred", on the one hand, and a provision such as s. 9 of the Act of 1961, which was*

concerned with directly vesting, as distinct from transferring, jurisdiction, on the other hand." (At para. 24 *).*

80. On this, Laffoy J. observed:

"In quoting that passage, the clear objective of Finlay C.J. was to identify the jurisdiction formerly exercised by the Lord Chancellor of Ireland. Having done so, he had identified a jurisdiction which the Oireachtas expressly vested in the High Court by virtue of s. 9(1) of the Act of 1961. In other words, the source of the present jurisdiction of the High Court which was formerly exercised by the Lord Chancellor is s. 9 of the Act of 1961, by virtue of which the Oireachtas vested that jurisdiction in the High Court. Reliance on succession to the royal prerogative does not arise." (At para. 26 *).*

81. Applying these dicta to Sheehan J.'s judgment, Laffoy J. concluded at para. 27 of the judgment in *FD* :

"The passage from the judgment of Finlay C.J. in In re D. [1987] I.R. 449 at p. 456, which was quoted by the trial judge in F.D. (No. 2) [2008] IEHC 264, [2011] 1 I.R. 75 at p. 82 and which is quoted at para. 14 above, is concerned with the exercise of the jurisdiction to take a person into wardship rather than with whether the jurisdiction exists. In both examples given in that passage it had been found that wardship jurisdiction did exist: where the person to whom the inquiry relates has property, in which case the jurisdiction exists under the Act of 1871; and where the person has no property, in which case the jurisdiction exists by virtue of s. 9(1) of the Act of 1961. In my view, the trial judge was correct in stating that it does not follow ***from that passage that the High Court has an inherent jurisdiction to create a trust*** *." (* Emphasis added *)*

82. Laffoy J. referred to passages from two judgments in support of her reasoning. In *G McG v. DW (No. 2) (Joinder of the Attorney General)* [2000] 4 I.R. 1, the issues addressed were the jurisdiction of the courts to join the Attorney General in proceedings pursuant to s.29 of the Family Law Act, 1995, and whether, in particular, the courts could be called upon to exercise an unspecified inherent jurisdiction in the face of the jurisdiction which had been delineated by the Oireachtas in s.29 of that Act, concerning the Attorney General as a party. Speaking for this Court in *G McG* , Murray J. explained, at pages 26 and 27 of the report:

"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."

83. Later, Murray J. made clear:

"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. It may indeed be otherwise where a fundamental principle of constitutional stature is invoked against a statutory or regulatory measure determining jurisdiction, but that is not the case here." (At p. 27 *).*

84. The same issue was considered by Clarke J. in this Court in *Mavior v. Zerko Limited* [2013] IESC 15; [2013] 3 IR 268. The issue in *Mavior* was whether a defendant in High Court proceedings was entitled to security for costs against a plaintiff which is an

unlimited company resident within the State. Having quoted the passages from Murray J. in *G McG* , cited earlier, Clarke J. stated, at para. 17:

> *"It seems to me that what Murray J. cautioned against in the passages cited was the creation of parallel jurisdictions for resolving much the same area of controversy, founded on, on the one hand, existing law and, on the other hand, an asserted inherent jurisdiction. As Murray J. pointed out, to attempt to invoke an inherent jurisdiction of the courts so as to go beyond delineation specified, in a constitutionally permissible way, in a statute, would be for the courts to trespass on the legislative role of the Oireachtas. If, in a constitutionally permissible way, the Oireachtas have defined the limits of a particular jurisdiction then it is not for the courts to extend those limits by invoking a vague "inherent jurisdiction".*

85. In *Mavior* , Clarke J. said at para. 20:

> *"[I]t seems to me that the real question which the court should ask itself in a case such as this is as to whether any proposed evolution of the interpretation of the scope of the power amounts to a permissible and legitimate exercise of the court's proper interpretative role. If so, then the scope of the power regulated by the rule may be reinterpreted. If not then a rule change or, in some cases, legislation will be required. It is not appropriate that such issues be addressed by the creation of a parallel "inherent jurisdiction". What would the point be of an elaborate analysis of the circumstances in which an order of the type under consideration in this case could be made under the Rules if it were possible to by-pass the Rules and the existing case law altogether by invoking a separate inherent jurisdiction… If it would not be appropriate, for whatever reason, to engage in revisiting the scope of the jurisdiction under the Rules then it does not seem to me that the same end can properly be achieved by using the backdoor of an alleged inherent jurisdiction."*

86. Laffoy J. referred to this passage in her judgment. But, insofar as material to this case, the conclusion in FD must be understood from two paragraphs from that judgment, as follows:

> *"32. On this appeal the issue is whether there exists, alongside the wardship jurisdiction expressly vested* ***by statute in the High Court*** *, an inherent jurisdiction, which exists outside the wardship jurisdiction, to enable* ***and regulate the protection of the property of a person who may lack mental capacity*** *. As was established with clarity by the decision of this court in In re D. [1987] I.R. 449, the current jurisdiction of the High Court in matters involving mental incapacity is the jurisdiction expressly vested in the High Court by the Oireachtas by virtue of subs. (1) of s. 9 of the Act of 1961 and exercisable in the manner stipulated in subs. (2) of that section. Neither the nature of the High Court's judicial function nor its constitutional role in the administration of justice, in my view, permits the recognition of an inherent jurisdiction in the High Court to make provision for the protection of persons with mental incapacity outside the wardship process* ***by, for example, sanctioning the establishment of a trust to protect the assets of a person believed to be incapable of managing*** *his or her own property affairs. The rationale underlying the judgment of Murray J. in G. McG. v. D.W. (No. 2) (Joinder of Attorney General) [2000] 4 I.R. 1 and of Clarke J. in Mavior v. Zerko Ltd. [2013] IESC 15, [2013] 3 I.R. 268 makes it clear why such recognition is not permissible.* ***No fundamental principle of constitutional stature has been invoked to justify a different conclusion*** *. The effect of a finding that such an inherent jurisdiction exists by this court would be, in the words of Clarke J. in Mavior v. Zerko Ltd. [2013] IESC 15 at p. 275, para. 17, "to trespass on the legislative role of the Oireachtas". (* Emphasis added *)*

87. Laffoy J. therefore concluded, at para. 33:

> *"The consequence of the conclusion in the preceding paragraph is that no inherent jurisdiction of* ***the type advocated on behalf of F.D.*** *exists in the High Court and the trial judge was correct in answering the question posed in the preliminary issue in the negative." (* Emphasis added *)*

The emphasised passages clearly indicate that the judgment distinguishes the facts before the Court in 2015 from the type of case involving constitutional rights, such as described in DG. In 2015, this Court was called upon to determine a more limited issue. There can be no doubt that when Laffoy J. was referring to a " *fundamental principle of constitutional statur* e", she was referring to situations such as those identified in Finlay C.J.'s observations on Article 40.3.2 of the Constitution, Geoghegan J. in speaking for the unanimous Court in *In the Matter of Wards of Court and In the Matter of Francis Dolan* at pp. 28 and 29, and having regard to the earlier observations of this Court in DG. While the judgments of this Court in *In re a Ward of Court* is not material in the judgment in *FD* , I have no doubt that the observations of the Court (Hamilton C.J., O'Flaherty, Blayney, Denham JJ., Egan J. dissenting) also informed the consideration and discussion in *FD* .

88. The observations contained in the judgment of this Court in *FD* are in no way inconsistent with those of Finlay C.J., Geoghegan J., and Hamilton C.J. in the decisions considered earlier. All of these earlier cases concerned the original jurisdiction of the courts when fundamental constitutional rights were at stake. By contrast, *FD* in 2015 did not concern a " *fundamental principle of constitutional stature* " where, as Laffoy J.'s judgment implies, different considerations would arise in the case then before the Court. It could never be the intention of the Oireachtas that the words of the Constitution itself should be set at nought, or attenuated by the words of a statute. If the Court in *FD* had intended any other conclusion be drawn, it would have said so in explicit terms.

89. Applications invoking an inherent jurisdiction may, therefore, be made, but only in exceptional cases. But the fact that there exists such a jurisdiction is not conclusive of this case. What is under direct consideration here are undoubtedly two statutory regimes. As was made entirely clear by the judgment in *DG* , inherent jurisdiction must not be used as a first port of call, when, by legislation, the Oireachtas has spoken on the matter.

90. In this appeal, and relying on the judgment in *FD* in 2015, counsel for the HSE submitted that the jurisdiction of the High Court with regard to persons of unsound mind is now *only* statutory in nature. It is said this jurisdiction is exercised pursuant to, and in accordance with, the provisions of s.9(1) of the 1961 Act "by way of wardship". In my view, the HSE's position is too broadly stated, and does not have regard to specific distinctions to be found in the judgment of this Court in *FD* . As pointed out earlier, in this case fundamental constitutional rights are engaged. This submission is not reconcilable with the observations of this Court in the authorities cited earlier in *In re D* and *In re a Ward of Court*

91. What is in issue in this case is, therefore, a situation distinct from *FD* . It is one where rights to life and liberty under Article 40.3 of the Constitution did arise, and where this Court has held there is an inherent jurisdiction, albeit one to be used sparingly, and only as a "backstop" when statutes do not govern the situation. Here there was a statutory regime, that of wardship.

92. But even to conclude that *FD* is distinct from this case does not, by itself, lead to a conclusion on the order under appeal. AM's case is that the Oireachtas determined on foot of the 2001 Act that a person such as himself should be afforded all the protections of that Act. It is said that, unlike those provided to persons detained under the wardship process, these protections are clearly defined, easily accessible, legally guaranteed and consistent for the State's obligations under the Constitution as well as international treaties and conventions. These are set out in detail in written submissions. Significant

protections are provided under the 2001 Act. In all, this arises under some 21 different headings. I endeavour to summarise them here:

- The application of a best interests' test;

- Prior notification of an intention to make an application to the person the subject of such application;

- Recognition of the rights to dignity, bodily integrity, privacy and autonomy;

- Restrictions on the categories of person who may make an application for recommendation for an individual to be admitted to an approved centre;

- Clear provisions regarding the statement of reasons why an application is made;

- A staggered two-stage process for admission to an approved centre with a recommendation initially coming from a registered medical practitioner and containing precise rules as to the timing and type of medical examination required;

- Provisions regarding removal to an approved centre;

- Precise rules as to examinations under s.14;

- Provision for a staggered series of time limited orders providing for involuntary detention;

- A detailed series of requirements for compliance with law in the case of involuntary detention including the involvement of the Commission and notice of rights being given to the patient;

- Provision for an independent psychiatrist to review the patient within 21 days of the making of an admission order or renewal order together with access to medical records;

- Provision for independent review to be carried out by a tribunal established by the Commission;

- Provision for a form of limited appeal to the Circuit Court against the decision of a tribunal to affirm an order;

- Protections regarding the transfer of a patient on medical and clinical grounds;

- Scope for permission for a person to be absent from a centre by permission of a consultant psychiatrist;

- Provisions for independent review by the Commission and the Mental Health Tribunal which are governed by detailed procedures and sanctions in the case of false evidence;

• Provision for protection of involuntary patients in respect of the obtaining of consent; and

• Protections against various forms of psychosurgery, electroconvulsive therapy, administration of medicines and protection of patients in seclusion or in respect of whom mechanical means of bodily restraint are to be applied.

93. Counsel for AM submits in this appeal that, if the HSE had, in a timely fashion, adopted the appropriate procedures under the Act of 2001, *along with the invocation of the court's inherent jurisdiction* , a procedure, or set of procedures, applying the 2001 Act could have been followed. He outlined a step-by-step process where he says this could have been achieved. Counsel contends that by proceeding in the manner it did, the HSE and the clinical director of the CMH failed to acknowledge that by invoking wardship procedure there would be deprivation of the statutory entitlements under the Act of 2001. It is said this was a serious disservice to the interests of a vulnerable adult in circumstances where this was neither "necessary" nor "appropriate"; the criteria established by this Court in *In re D* .

94. But while there is some force in these submissions, in theory, what is missing is any practical, factual or evidential substratum upon which that case can be advanced in this appeal. It has not been established that the invocation of the 2001 Act was feasible. To the contrary, the HSE's case is that it was impossible to initiate, or move on, the 2001 Act procedures simply because no other centre would, even temporarily, accept AM for assessment. Ultimately, therefore, one might pose the rhetorical question: what lawful alternatives were available to the President of the High Court in the circumstances and on the timescale within which he had to operate? The fact that there was no real alternative would not, of course, render the decision lawful. But it does raise the question as to whether the decision to make AM a ward of court was "necessary" and "appropriate".

95. The appeal brought in this Court does afford an opportunity to give consideration to some of the safeguards in the Act of 2001. But this cannot be achieved without a consideration of one of the undoubted difficulties of that Act, which is that the procedures, insofar as they applied, or are sought to be applied here, were, as the President appositely commented, "unwieldy". If anything, this is an understatement.

"Necessary" and "Appropriate"

96. The unavoidable logic of the situation is that the decision and orders made in this case were " *necessary* " and " *appropriate* ". (See *In re D*). This is one of the unusual cases where, generally, the "parallel lines" between the two jurisdictions did meet. But this is because the evidence in this case did meet the requirements for the invocation of either jurisdiction provided adequate procedural protections were made available for AM in order to vindicate his rights.

97. In reality, there was no other legal option but to make the order sought. When faced with a situation such as that which arose in this case, in general, a Court should first consider the scope of the legislation engaged. A court should carefully assess the evidence to determine whether the case comes within the scope of wardship or the mental health legislation. The President's judgment clearly sets out the legal basis for his order.

98. I conclude, therefore, that the decision made by the High Court was " *necessary* " to vindicate AM's constitutional right to life and welfare. It was " *necessary* " to protect the rights to life and welfare of other persons. What was at stake were fundamental constitutional principles of life and liberty. The interlocutory hearing took place on the 10th November, 2016, where fair procedures were observed in making orders pending

the ultimate outcome in the President's judgment. Provision was made for legal representation. Fair procedures were observed thereafter. AM undoubtedly satisfied the criteria for admission to the CMH as defined in the Act of 2001; but, on the evidence available to the High Court, the requirements for making wardship orders on an interim and final basis were also satisfied.

99. To admit AM to wardship was also, in this case, " *appropriate* ". The evidential basis was sufficient to meet this requirement. The requirement for such orders was immediate and could not be, and should not have been, deferred. This conclusion is based on the facts as they were made available to the High Court, and in the absence of any countervailing evidence. Even though AM was admitted into wardship, the essential safeguards and protections as regards procedural rights, review by the courts, consent and treatment could be no less than if he had been admitted to the CMH under the Mental Health Acts.

Procedural Steps Taken by the President

100. It is said in this case, and in recent commentary, that wardship procedure has not always offered sufficient constitutional and ECHR safeguards in the past. (See National Safeguarding Committee Review Report 2018). But the fact that wardship is a separate jurisdiction does not prevent the High Court from adopting what might be called "mirror" procedures to vindicate the constitutional and ECHR rights of persons made wards of court. The President took the opportunity in the judgment to set out some of the protections which have been put in place for persons detained under the wardship jurisdiction. These include:

> (1) Orders for detention of a ward are subject to regular review at least every six months. (See Winterwerp v. The Netherlands (App. No. 6301/73) (1979) 2 EHRR 387);
>
> (2) In many cases a shorter period of review has been ordered;
>
> (3) On such review there is an entitlement on the part of the ward to appear or to be represented;
>
> (4) In many cases where the applicant for the detention order is a statutory body such as the present applicant, it will be ordered to discharge the costs of representation of the person detained;
>
> (5) Each review involves a report being presented to the Court by the treating consultant psychiatrist, the contents of which are made known to the committee of that ward;
>
> (6) If necessary the psychiatrist will be required to give oral evidence;
>
> (7) The Court has the option to appoint a medical visitor to conduct an examination and to make a separate and independent report on the condition of the ward;
>
> (8) The use of restraint is usually not authorised unless such an order is specifically sought, and then it is granted only on appropriate evidence as to its necessity;
>
> (9) All detention orders are made with liberty to all interested parties to apply on very short notice; and

(10) No more than 48 hours' notice is required in order to apply to court. In practice a shorter notice period may be involved.

101. Having referred to the judgment of Kenny J. *in DPP v. Shaw* [1982] 1 I.R. 1 in relation to Article 40.3.1 of the Constitution, Hamilton C.J. stated in *DG* at p. 522:

> *"It is part of the Courts' function to vindicate and defend the rights guaranteed by Article 40, section 3.*
>
> *If the courts are under an obligation to defend and vindicate the personal rights of the citizen, it inevitably follows that the courts have the jurisdiction to do all things necessary to vindicate such rights."*

That these protections to vindicate and protect the rights of wards are now in place is important. But I would go further and say that *without* the range of such protection and those others necessary in each case, questions might arise as to constitutional and Convention compliance.

102. More generally, for Constitution and ECHR compliance, any law in this area which has the effect of a deprivation of liberty must be precise. It must be clear in its application. That clarity must be such that a citizen, or other person, can ascertain what will be the circumstances in which a procedure will be invoked and how that procedure will be applied. An individual who is to be subject to an order must reliably be shown to be of unsound mind. The continued validity of any such a person's detention must depend on it being shown that the situation which warranted involuntary detention continues. There must be available a speedy, effective and periodic system of review. (See, in particular, *Winterwerp v. The Netherlands* (Cited at para. 103 above) and *HL v. The United Kingdom* (App. No. 45508/99) (2005) 40 EHRR 32). Needless to say, also, any order must be proportionate. Fair procedures must be observed. (See *Eastern Health Board v. MK* [1999] 2 I.R. 99 (Denham J.).

103. I would also re-emphasise that legislation discussed in this judgment does not permit an "interweaving" of procedures under the 2001 Act with the wards of court procedure. The legislative intent is that the two jurisdictions shall be kept apart and operated separately. As pointed out, this does not prevent suitable and appropriate safeguards from being put in place in wardship procedure, which, in effect, mirror those which exist under the 2001 Act, and any others which are necessary for constitutional and Convention compliance. But these are not to be "2001 Act" procedures.

104. Article 34.1 of the Constitution provides that *justice* shall be administered in courts established by *law.* If the courts are under a constitutional duty to defend and vindicate the personal rights of citizens, they must also have the jurisdiction to do so. Not all mental illness, disability, incapacity, or conduct, whether by minors at risk, or adults, will be governed by the black letters of a statute. There will occasionally be times when the requirements of constitutional vindication do not fit into any neat statutory category and where it may be necessary to resort to inherent jurisdiction. But this only can arise where fundamental constitutional rights are in issue, and if statute law does not provide a remedy. In the case of minors at risk, experience in the High Court in the last two decades illustrates that, in a sense, the "exception" became the rule, and inherent jurisdiction became a first, rather than a last, resort.

Conclusion

105. The Court's wardship jurisdiction is sufficiently broad to allow it to have been invoked in this case. AM was of "unsound mind". He was required to be in the Central Mental Hospital. In this case it was " *necessary* " and " *appropriate* " to make the order. The President of the High Court engaged in a lawful exercise of wardship jurisdiction. In the circumstances of this case, the orders made were necessary and appropriate to vindicate the rights of AM and also to protect the rights of the public. There is no error

in the High Court judgment. For the reasons outlined in this judgment, therefore, I would dismiss the appeal.