

Appendix FF

No. 2

O. 58, r. 18(1)

SUPREME COURT
Respondent's Notice

Supreme Court record number	S:AP:IE:2017:000124
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High Court Proceedings:

Health Service Executive	V	█
Record Number:		WOC 9013

Date of filing	18 August 2017
Name of respondent	Health Service Executive
Respondent's solicitors	ByrneWallace Solicitors, 88 Harcourt Street, Dublin 2
Name of appellant	█
Appellant's solicitors	Kiely McCarthy Solicitors, 1 New Wellington Terrace, O'Connell Avenue, Limerick.

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	Health Service Executive
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The respondent was served with the application for leave to appeal and notice of appeal on date:
4 th August 2017

The respondent intends :	
<input type="checkbox"/>	to oppose the application for an extension of time to apply for leave to appeal
<input checked="" type="checkbox"/>	not to oppose the application for an extension of time to apply for leave to appeal
<input type="checkbox"/>	to oppose the application for leave to appeal
<input checked="" type="checkbox"/>	not to oppose the application for leave to appeal
<input checked="" type="checkbox"/>	to ask the Supreme Court to dismiss the appeal
<input type="checkbox"/>	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
<input type="checkbox"/>	Other (please specify)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	<input checked="" type="checkbox"/>
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Respondent's Representation

Solicitor			
Name of firm			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode		Ref.	
How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address
Telephone no.
e-mail address

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

The Respondent does not oppose the application of the Applicant/Appellant for an extension of time.

3. Information about the decision that it is sought to appeal

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

- 1) The Respondent did not attempt to make, nor make, any ex parte application to detain the Applicant at the Central Mental Hospital without putting the Applicant on notice. The Respondent made an ex parte application for liberty to issue proceedings seeking an urgent hearing date and short service thereof. Furthermore, the Respondent expressly sought in its ex parte docket, an Order appointing a Solicitor to act on behalf of the Applicant for the purpose of the proceedings. The application was made on an urgent basis in light of the Applicant's imminent release from the Central Mental Hospital which the medical professionals believed would put the Applicant's health, safety and well-being in grave danger;
- 2) A controlled admission to an Approved Centre and thereafter the Central Mental Hospital under the Mental Health Act 2001 (hereinafter referred to as the "2001 Act") could not in the particular circumstances of the case appropriately take place pursuant to the inherent jurisdiction;
- 3) The inherent jurisdiction of the High Court should only be invoked in the absence of an adequate and satisfactory statutory mechanism and such a mechanism was available in this case by way of an application for wardship pursuant to the provisions of the Courts (Supplemental Provisions) Act 1961 (hereinafter referred to as the "1961 Act");
- 4) While the Applicant may fall within the remit of the 2001 Act, he also falls under the Wardship jurisdiction. Given the specific circumstances of the case, and the fact that the procedures required under the 2001 Act were inappropriate and unworkable, an application to take him into Wardship was an entirely appropriate application to make in order to safeguard the health, safety and welfare of the Applicant;
- 5) The circumstances of the case of *PM (APUM) v HSE*, Record No.: 2015/6115P alluded to by the Applicant in his grounds of appeal (hereafter referred to as the "*PM case*"), in which sworn evidence was presented to Moriarty J. on the 6th May 2016, differed significantly from those in the case at hand. In particular:
 - i. It was an application by PM, through his next friend, to be immediately returned to this jurisdiction from a Hospital in the UK and placed in the Central Mental Hospital;
 - ii. It was not an application under the wardship jurisdiction but rather under the inherent jurisdiction;
 - iii. The Orders in the case were made on consent of all the parties and in particular PM;
 - iv. In those circumstances there was no written judgment or substantive consideration of legal arguments or issues;
 - v. Rather the Judge was content to make the agreed orders on the basis that they

were not intended to set a precedent and the matter was exceptional;

6) The Trial Judge had full and adequate regard for all the circumstances of the PM case in his ruling of the 3rd April 2017. He concluded, and was entitled to conclude, that the approach adopted by consent in that case was not appropriate or applicable in the particular circumstances of the within case. Further he concluded that the appropriate approach in the within case was the use of the Wardship jurisdiction pursuant to the provisions of the 1961 Act, which approach had not been canvassed or considered in the PM case;

7) In circumstances where the parallel statutory mechanism of Wardship was available to the Trial Judge and perfectly capable of being invoked to adequately safeguard the best welfare interests of the Ward, it was entirely appropriate that same could and should be utilized.

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why: N/A

In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)-

- * the decision in respect of which leave to appeal is sought does not involve a matter of general public importance
- * it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court

In the case of an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. where it is sought to appeal to the Supreme Court from the High Court)-

- * the decision in respect of which leave to appeal is sought does not involve a matter of general public importance
- * it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court
there are no exceptional circumstances warranting a direct appeal to the Supreme Court.

The Respondent acknowledges that the appeal by the Applicant/Appellant raises issues of general public importance concerning

- (a) The nature and extent of the wardship jurisdiction of the High Court
- (b) The circumstances in which such jurisdiction may be exercised in regard to a person suffering from a mental disorder as defined in the Mental Health Act 2001.
- (c) The interaction between the wardship jurisdiction and the Mental Health Act 2001.
- (d) The powers of the High Court to detain persons pursuant to the wardship jurisdiction.
- (e) The nature and extent of the protections which should be afforded to persons who are so detained.

It would appear likely that if an appeal in regard to this matter is heard by the Court of Appeal that an application for leave to appeal to the Supreme Court will be made by the unsuccessful party. In such circumstances it is appropriate that the matter should come before this Court in the most expeditious and cost effective manner, which is by way of direct appeal.

**delete where inapplicable*

5. Respondent's reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

(B) Grounds of opposition:

- a) Insofar as concerns the judgment delivered by the President of the High Court on the 27th

March 2017, the learned Trial Judge did not err in law and/or fact and/or on mixed questions of law and fact by reason of the following:

By reference to the Appellant's first and second grounds of appeal:

- i. The Trial Judge had full regard for all the criteria for admission to an Approved Centre as provided for under the provisions of the Mental Health Act, 2001 (hereafter referred to as the "2001 Act"). However, in the circumstances of this case, it was clear on the medical evidence that the provisions of the 2001 Act for admission to the Central Mental Hospital could not be adequately and appropriately applied for reasons regarding the health, safety and wellbeing of the proposed Ward;
- ii. The learned Trial Judge examined both the Wardship jurisdiction and the statutory jurisdiction as provided by the 2001 Act and correctly determined that they are "*parallel jurisdictions*" which both deal with persons of unsound mind;
- iii. The Trial Judge held that the 2001 Act does not interfere with the jurisdiction of the Court under Section 9(1) of the Courts (Supplemental Provisions) Act 1961 (hereinafter referred to as the "1961 Act"). The "*parallel jurisdictions*" exist as the legislature chose to put them in place, by neither expressly or implicitly diluting or fettering the jurisdiction conferred under Section 9(1) of the 1961 Act by the provisions of the 2001 Act;
- iv. Accordingly, the Trial Judge found that, in light of the uncontroverted medical evidence, Wardship was the more appropriate jurisdiction when taking into account the specific circumstances of this case. Such finding was appropriate and correct and within the discretion of the Trial Judge;
- v. While the Appellant may have been willing to consent to controlled admission, detention and transfer under the 2001 Act, the procedure proposed by the Appellant to allow for the operation of the 2001 Act in this case was found, on the evidence, to be inappropriate and unworkable. In such circumstances, the Trial Judge was correct in holding that it was more appropriate to invoke the parallel Wardship jurisdiction and such finding was within his discretion;
- vi. The Trial Judge had full and adequate regard for the differences between the operation of the 2001 Act relating to detention and treatment and the processes and procedures under Wardship. The Trial Judge held, and was entitled to so hold, that the monitoring and review of persons detained and treated under the 2001 Act is not superior to the rights of a person detained as a Ward of court;
- vii. The Trial Judge correctly determined that the rights of Wards of Court detained under Section 9 of the 1961 Act are secured as the procedures must be operated in a manner consistent with both the Constitution and the European Convention on Human Rights. Orders made for the detention of a Ward of Court are subject to regular reviews at least every six months. Upon review, the Ward is entitled to appear and/or be represented. Furthermore, a report must be furnished to the Court from the treating psychiatrist of the Ward. In addition, the psychiatrist may be required to provide oral evidence. Furthermore, the Court may at any time, order an independent Psychiatrist known as the Medical Visitor to conduct an examination of the Ward and provide a separate, independent report to Court. Moreover, any detention orders made under Section 9 of the 1961 Act are made with liberty for all interested parties to apply to the Court for review on short notice.

By reference to the Appellant's third ground of appeal:

- i. The Trial Judge was correct in determining that a controlled admission to an Approved Centre and thereafter the Central Mental Hospital under the 2001 Act could not in the particular circumstances of the case appropriately take place pursuant to the inherent jurisdiction. The inherent jurisdiction of the High Court should only be invoked in the absence of an adequate and satisfactory statutory mechanism and such a mechanism was

available in this case by way of an application for wardship pursuant to the provisions of the 1961 Act;

By reference to the Appellant's fourth ground of appeal:

- i. The Trial Judge correctly held that although the Oireachtas provided procedures and protections for persons of unsound mind under the 2001 Act, the legislature, in choosing not to remove or fetter the jurisdiction conferred under Section 9(1) of the 1961 Act by the provisions of the 2001 Act, created "*parallel jurisdictions*". Hence, while the Appellant may fall within the remit of the 2001 Act, he also falls under the Wardship jurisdiction. Given the specific circumstances of the case, and the fact that the procedures required under the Mental Health Act were inappropriate and unworkable, the Trial Judge was entirely correct to hold that Wardship was the appropriate jurisdiction to invoke;
- ii. The Trial Judge further held that although the procedure pursuant to the 2001 Act was not appropriate and adequate in light of the medical evidence, the protections under the 2001 Act could be equally afforded and guaranteed under the wardship jurisdiction.

By reference to the Applicant's fifth and sixth grounds of appeal:

- ii. The circumstances of the case of *PM (APUM) v HSE*, Record No.: 2015/6115P referred to by the Appellant in their grounds of appeal (hereafter referred to as the "*PM case*"), in which sworn evidence was presented to Moriarty J. on the 6th May 2016, differed significantly from those in the case at hand. In particular:
 - i. It was an application by PM, through his next friend, to be immediately returned to this jurisdiction from a Hospital in the UK and placed in the Central Mental Hospital;
 - ii. It was not an application under the wardship jurisdiction but rather under the inherent jurisdiction;
 - iii. The Orders in the case were made on consent of all the parties and in particular PM;
 - iv. In those circumstances there was no written judgment or substantive consideration of legal arguments or issues;
 - v. Rather the Judge was content to make the agreed orders on the basis that they were not intended to set a precedent and the matter was exceptional.
- iii. The circumstances of the PM case were reviewed and evaluated by the Trial Judge who determined that given such circumstances his Judgment in the within case would not have been changed or materially altered by knowledge of the said case.

b) Insofar as the learned Trial Judge refused to set aside or reconsider his decision of the 27th of March 2017 in his ruling delivered on the 3rd of April 2017 the learned Trial Judge did not err in law and/or in fact and/or on mixed questions of law and fact. Such ruling was within the discretion of the Trial Judge who was entitled and able to determine whether the determination by consent in the PM case would have materially altered or affected his decision of the 27th March 2017 in the within case.

By reference to the Applicant's seventh ground of appeal:

- i. The Trial Judge had full and adequate regard for all the circumstances of the PM case in his ruling of the 3rd April 2017. He concluded, and was entitled to conclude, that the approach adopted by consent in that case was not appropriate or applicable in the particular circumstances of the within case. Further he concluded that the appropriate approach in the within case was the use of the Wardship jurisdiction pursuant to the provisions of the 1961 Act, which approach had not been canvassed or considered in the PM case;
- ii. In circumstances where the parallel statutory mechanism of Wardship was available to the Trial Judge and perfectly capable of being invoked to adequately safeguard the best welfare

interests of the Ward, it was entirely appropriate that same could and should be utilized.

- a) Insofar as concerns the ruling delivered on 7 April 2017, the learned Trial Judge did not err in law and/or in fact and/or on mixed questions of law and fact by reason of the following:

By reference to the Applicant's eight ground of appeal:

- i. The Wardship jurisdiction is designed for the protection of the Ward. Once a person is taken into Wardship, it is therefore entirely appropriate and in fact essential, that ancillary orders be made to secure the health, safety and welfare of the Ward. Accordingly, the Trial Judge was correct to make the relevant ancillary orders as they were both appropriate and necessary to safeguard the welfare of the Ward.

By reference to the Applicant's ninth ground of appeal:

- i. The Trial Judge was correct to treat the application for the ancillary orders as a '*review of detention*'. The Trial Judge had before him an up-to-date affidavit of Dr. Mohan, the treating psychiatrist and accordingly on the evidence available, was appropriately able to assess the Appellant's detention, care and welfare circumstances and make appropriate ancillary orders;
- ii. The Appellant had been taken into Wardship and was expressly on notice of the matter coming before the Court. The Ward was also legally represented by both Junior and Senior Counsel;
- iii. There is no obligation upon the Court to allow or ensure provision of any further independent psychiatric assessment before the review of a detention and the decision to proceed in the within case without such a further independent psychiatric assessment was a decision which the Trial Judge was entitled to make within his discretion. This was particularly so in the circumstances of the case where there was no real dispute as to the nature and effect of the Appellant's psychiatric condition;
- iv. The Court may, on the application of any party or if the Court feels it necessary, order an independent psychiatric review and report from the Medical Visitor, but this was not necessary in this instance in light of the substantial uncontroverted medical evidence before the Court. Indeed no application for a second opinion was made on behalf of the Appellant at any time. Furthermore, the Appellant retains the right of liberty to apply to the Court at short notice, should he wish to raise any issue outside of an assigned review date.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

The Respondent's grounds of opposition have been settled by Sarah Mc Kechnie BL and Gerard Durcan SC.

6. Additional grounds on which decision should be affirmed

In addition to the grounds set out above, the Respondent claims the Supreme Court should strike out the appeal and affirm the decision of the President of the High Court by reason of the following:

- i. The jurisdiction of the High Court in regard to persons of unsound mind is statutory in nature, the relevant provision being Section 9(1) of the Courts (Supplemental Provisions) Act 1961. This was clarified *In the matter of FD (2015) IESC 83*;
- ii. Furthermore, this jurisdiction is exercised pursuant to, and in accordance with the provisions of Section 9(1) of the 1961 Act, by way of Wardship;
- iii. Where a person is made a Ward of court, the court is vested with jurisdiction over all matters relating to the person and is subject only to the provisions of the Constitution. As per Hamilton CJ in *In the Matter of a Ward of Court (Withholding Medical Treatment)(No.2)* [1996] 2 IR 79, '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' over a Ward;
- iv. The provisions of the Mental Health Act 2001 do not prevent or prohibit the Court from exercising the statutory jurisdiction vested in it pursuant to Section 9(1) of the Courts (Supplemental Provisions) Act 1961;
- v. The 2001 Act does not in its provisions expressly restrict or fetter the exercise of the jurisdiction under Section 9(1) of the 1961 Act. Hence, there are "parallel jurisdictions" designed to safeguard persons of unsound mind;
- vi. These "parallel jurisdictions" exist because the legislature put them in place;
- vii. The provisions of Section 9(1) of the 1961 Act give statutory effect to the old *parens patriae* jurisdiction. This represents a legislative choice;
- viii. The provisions of the 2001 Act represent a legislative choice. The absence of any express prohibition on the use of jurisdiction vested by Section 9(1) in circumstances which fall within the 2001 Act is an important part of that choice. There is nothing in the terms of the 2001 Act which restricts the use of the jurisdiction arising under the 1961 Act. Further the continued use and availability of such jurisdiction is contemplated and permitted pursuant to section 283 of the Mental Treatment Act 1945 which Act falls to be construed together as one with the 2001 Act pursuant to s.1 (2) of the 2001 Act;
- ix. The rights and interests of a person detained pursuant to Section 9 can be just as effectively secured as pursuant to the procedures set out in the 2001 Act. Detention of a Ward pursuant to Section 9 of the 1961 Act can and must be operated in a manner consistent with the Constitution and the European Convention, as acknowledged in *S.S. (A Minor suing by his Guardian ad Litem and Next Friend ML) v The Health Service Executive and Others* [2008] 1 IR 594 and in *The Health Service Executive v J O'B* [2011] 1 IR 794.

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

Yes

No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?

Yes

No

If Yes, please give details below:

Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

The Respondent believes that it is in the best interests of all parties that the issues which arise in this appeal be finally resolved as quickly as possible. The Applicant/Appellant has for a considerable period of time suffered, and continues to suffer, from a serious psychiatric illness which requires and justifies his detention. It is appropriate that the legal basis for such detention and the nature of the protections to which he is entitled while detained be definitively determined at the earliest opportunity.

However, the Respondent does not accept, as pleaded by the Applicant, that the Applicant is currently being deprived of important safeguards whilst being detained in the Central Mental Hospital. The Applicant is being afforded all appropriate and necessary safeguards, which safeguards are simply being operating within the wardship jurisdiction rather than under the provisions of the 2001 Act.

Signed:



(Solicitor for) the Respondent

Please submit your completed form to:

The Office of the Registrar to the Supreme Court
The Four Courts
Inns Quay
Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.