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From Wardship to Guardianship: Preparing for Change

G.N. Rubotham, Director of Reform and Development , Courts Service.

Introduction

The Courts Service management welcomed the publication in 2003 of the Law Reform Commission's Consultation Paper on Law and the Elderly. Reform of the law relating to the protection of mentally incapacitated individuals has long been needed, if only more recently recognised. In the 125 years between the enactment of the Lunacy Regulation (Ireland) Act 1871 and the Powers of Attorney Act of 1996, some minor changes had been made: in the allocation of wardship jurisdiction to judicial personnel[1], in the terminology of court forms[2], and in the monetary limits within which local wardship jurisdiction could be exercised.[3] However, it is fair to say that no substantive reform had occurred until the introduction into Irish law of the instrument known as the enduring power of attorney with the coming into effect of the 1996 legislation.

The Consultation Paper of 2003, which mapped out initial proposals for changes in substantive law and institutional arrangements relating to those with intellectual disability and others in need of protection, may justifiably be described as one of the most important initiatives in the field of public law in recent decades. The Courts Service management expressed its support at the time, either fully or subject to qualification, for the majority of the recommendations in the Consultation Paper, in particular in relation to:

- the revision of the definition of general incapacity;
- the expansion of the powers which may be granted to attorneys under an enduring power of attorney and the supervision and guidance of attorneys under EPAs;
- the establishment of an office of Public Guardian, properly resourced and with the ability to draw upon a range of skills sets, and the powers and duties envisaged by the Commission as being exercisable by a Public Guardian in respect of mentally incapacitated individuals;
- the creation of mechanisms short of wardship or guardianship which would afford protection to mentally incapacitated individuals;

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[1] Section 19, Courts of Justice Act, 1924; Section 9, Courts of Justice Act, 1936; Section 9, Courts (Supplemental Provisions) Act, 1961.

[2] Section 4, Courts of Justice Act, 1928 (now incorporated in Section 9(4)(a), Courts (Supplemental Provisions) Act, 1961.

[3] Section 2(3) and Section 4 of the Courts Act, 1971

- the clarification by means of legislation of the entitlement of medical professionals to administer treatment to the mentally incapacitated in cases of emergency;
- the affording of protection by means of legislation to those acting in the best interests of a mentally incapacitated individual;
- the adoption of measures by financial institutions to protect against financial abuse.

Those reservations which we had related principally to the transfer from the court to tribunals of the function of determining issues of capacity and the manner in which that function was to be exercised . We also had concerns that the ascribing of too large a remit to an office of Public Guardian – ranging from protection of vulnerable as well as legally incapacitated adults to advice, support and advocacy - would place an inordinate burden upon the Public Guardian, requiring very considerable personnel resources, and impinging on that office's effectiveness.

However, a comprehensive and complex reform initiative of the kind contemplated will inevitably generate discussion on the precise approach to implementation, and the Courts Service management much appreciates the invitation it has received from the Law Reform Commission to join in a working group tasked to tease out and find solutions for the institutional arrangements which should underpin a new regime and which, presumably, will be the subject of a final report by the Commission.

I shall seek in this paper to examine some of the challenges which present themselves in facilitating the transition to a new Guardianship regime, and to identify areas in which steps are being taken in the administration of the existing wardship system to improve its effectiveness in the period leading up to a full modernisation of protection arrangements. My comments are, of course, predicated on the substantial implementation of the Law Reform Commission's final recommendations.

Jurisdiction

In its 2003 Consultation Paper, the Law Reform Commission recommended the abolition of the current wardship regime and its replacement by a new system of guardianship.[4] In order to appreciate the extent of this reform, a brief consideration of the basis of the current regime is desirable. The origin of the courts' jurisdiction in wardship over mentally incapacitated persons lies in the prerogative exercised by the Sovereign, as *parens patriae,* to have charge of the care and custody of incapacitated subjects[5]. The role of the Sovereign was customarily delegated to each Lord Chancellor under an instrument of authority known as the Sign-manual, the last of which in Ireland issued to the Lord Chief Justice of Ireland in 1921. Under the Lunacy Regulation (Ireland) Act, 1871, a

[4] Par. 4.61 of the Consultation Paper.

[5] A detailed consideration of the origins of the jurisdiction in the case of the mentally incapacitated is to be found in Fry, "The Lunacy Acts", 2nd Ed.(1877), Chapter 1, and Elmer, "The Practice in Lunacy" 6th Ed.(1877), Chapter 1.

separate, "non-prerogative", jurisdiction was vested in the Lord Chancellor over persons found to be mentally incapacitated where the individual concerned had limited assets or income[6] or had been acquitted on indictment on grounds of insanity[7], and persons found to be "of weak mind and temporarily incapable of managing [their]affairs"[8]. Such "non *parens patriae*" cases are now a rarity.

In 1961, the wardship jurisdiction[9] was vested in the newly established High Court, to be exercised by the President of the High Court.[10] An interesting debate has been aired as to whether the old *parens patriae* regime survived the 1937 Constitution, or whether, as would seem to follow from one authority[11], the jurisdiction currently exercised in wardship is a creature of statute - rather than of the original Crown prerogative - to be interpreted in accordance with Article 40.3.3 of the Constitution. Whatever be the current basis of the jurisdiction, the powers exercisable under it are very extensive indeed:

> "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 ".[12]

For all the shortcomings which may be attributed to the wardship regime, a significant advantage of it is the comprehensive remit it gives to the court to address any aspect of an individual's personal or material welfare. The benefit of this may be seen if one considers the difficulties encountered in England and Wales when the Court of Protection's powers under *parens patriae* were abolished[13] and replaced by a remit defined by statute. The Court of Protection's new statutory power to "make orders with respect to the property

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[6] The limit as to property being €6,348 and income from such property €380: Section 68 of the 1871 Act, as amended by section 4 of the Courts act 1971.

[7] Section 70 of the 1871 Act

[8] Section 103 of the 1871 Act

[9] Which as of 1961 was exercised by the former High Court of Justice under section 9(1) of the Courts of Justice Act, 1936.

[10] Under section 9 of the Courts (Supplemental Provisions) Act 1961

[11] *In re D* (1987) IR 449, where Finlay C.J. noted that under section 9 of the 1961 Act wardship jurisdiction was *vested in*, rather than *transferred to*, the High Court.

[12] Hamilton C.J., *In Re a Ward of Court (withholding medical treatment) (No.2)* [1996]2 IR 79 at p.106, having cited with approval dicta of Lord Ashbourne in *In re Birch* (1892) 29 L.R. Ir. 274 at p. 275 and *In Re Godfrey* (1892) 29 L.R. Ir. 278 at p.279. Blayney J. in the same case, also endorsing Lord Ashbourne's dicta aforementioned, observed, at p.140, "It is clear ...that the jurisdiction conferred upon the Lord Chancellor was primarily a duty and responsibility to care for all persons who were *non compos mentis* and that in the performance of that duty and the exercise of that responsibility the Lord Chancellor had delegated to him an authority personal to the Sovereign herself over the persons and estates of idiots and lunatics. 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...".

[13] By the Mental Health Act 1959.

and affairs of a patient"[14] was held in a leading case[15] not to extend to the management and care of the patient's person, and the provisions of the new legislation specifically governing consent to medical treatment[16] did not cover the medical procedure sought in the case concerned.

The lesson to be learnt from this is that, in formulating the respective powers under statute of the institutions and agents which will be charged with decision-making powers in a new guardianship regime, the greatest care will require be taken to ensure that no gap is left in their statutory remits in respect of personal and material welfare decision-making. This is of particular significance in the area of consent to medical treatment.

The Commission in its Consultation Papers of 2003 and of May last[17] has indicated that consent to emergency and minor treatment could be given by a personal guardian, certain non-routine and major health care decisions by a tribunal, and the most significant health care decisions (such as withdrawal of artificial life-sustaining treatment, organ donation and psychosurgery) by the court. The Commission – wisely, I suggest - avoided settling upon a final demarcation of the decision-making remits in this regard, and has invited further views on the issue. The legislative solution will need to ensure that individual health care decisions are made at a level appropriate to the seriousness of the treatment required, that emergency treatment is facilitated, and that no lacuna is left when defining the respective remits of court, tribunal or Public or personal guardian.

The terminology of capacity

In its Consultation Paper of 2005, the Commission, in addition to addressing how incapacity is to be defined and determined, drew attention to the objectionable, outdated and opaque nature of the terminology currently employed in denoting intellectual incapacity[18], and recommended its replacement with appropriate expressions, to be drafted in terms which are enabling rather than restrictive.[19]

The term "lunatic", as an expression used to denote intellectual incapacity, suffuses the Lunacy Regulation (Ireland) Act 1871. A "lunatic" is defined as "any person found by inquisition "idiot, lunatic, or of unsound mind, and incapable of managing himself or his affairs"[20]. The continued use in legislation concerned with intellectual disability of expressions which have long since acquired a pejorative meaning is, by common consent, unacceptable. The controversy which such terms generate has tended to colour the views of relatives and third parties towards a system which, despite its archaic nature, has in

[14] Under section 95, Mental Health Act 1983.

[15] In re F (Mental Patient: Sterilisation) [1990] 2 AC 1.

[16] Part IV of the Mental Health Act 1983.

[17] See, in particular, pars. 6.41, 6.56, 6.58 and 6.62 of the 2003 Consultation Paper and par. 7.96 et seq. of the 2005 Consultation Paper, "Vulnerable Adults and the Law: Capacity" LRC CP 37- 2005.

[18] Pars. 3.16 and 4.50 of the 2005 Consultation Paper.

[19] Pars. 3.16 to 3.19 and 4.51 of the 2005 Consultation Paper.

[20] Section 2 of the 1871 Act.

large measure operated for the great benefit and protection of incapacitated individuals. Apart from the problems of perception thus generated, the terminology is considered inappropriate and inadequate by the medical profession and those who work with persons affected by intellectual disability. This has on occasion presented problems for medical practitioners called upon to provide medical reports or affidavits as to incapacity. Furthermore, it would appear that the need to make a finding of unsoundness of mind as a precondition of affording wardship protection has presented difficulties for a jury charged with deciding a contested issue of capacity.[21]

The Office of Wards of Court, with the approval of the President of the High Court, had some years ago made representations as to the need for a modern definition of the concept of incapacity for wardship purposes, quite apart from the terminology involved. We appreciate that such a reform would at this stage best be effected within the framework of a new system of protection. In the meantime, however, the need arises to devise a medically and socially acceptable expression for use in medical affidavits which, in the interests of due process, accurately describes the type of incapacity contemplated by the 1871 Act.

Resourcing case management

The present regime
The Office of Wards of Court is the court office - attached to the President of the High Court - which supervises the personal care and administration of the affairs of intellectually disabled adults and minors admitted to the wardship of the court.

The Office has a complement of 21 personnel, including the Registrar, Senior Assistant Registrar, 8 case officers and audit and support staff. Key to the Office's supervisory function is its staff of case officers, who are the committee's first point of contact in addressing problems and in obtaining sanction for expenditure or for the entering into of transactions on behalf of the ward. The average caseload handled by each case officer has been steadily increasing in line with the increase in the number of persons taken into wardship each year. That average is currently 256 per case officer, comparing with an average of 164 cases per caseworker in the Public Guardianship Office for England and Wales, in circumstances where the latter is concerned only with supervision of the financial affairs of the incapacitated adult. The Court retains a panel of 47 medical visitors – the great majority being consultant psychiatrists - to conduct independent examinations of respondents to wardship proceedings and carry out visitation of persons admitted to wardship.

Case officers have built up considerable experience and expertise in case management of persons with disabilities, but this, perforce, has been achieved largely through "on the job" experience and mentoring: no formal courses are currently available for this specialised type of work, as is the case in Germany, for example. The third level or

[21] Re Keogh, High Court, 15th October 2002.

professional qualifications most commonly held by staff are law-related. While some senior staff will have acquired experience in estate management in other areas of court business such as bankruptcy, most staff will have come from litigation support backgrounds. The Office has no in-house professionally qualified social or medico-social workers.

In carrying out its task, the Office relies heavily upon private committees – mostly family members of wards, and upon the Office of the General Solicitor for Minors and Wards of Court, who acts as committee in circumstances where a private committee cannot be found or where it would not be appropriate, due to conflict of interest or for other reasons, for a private committee to act. Wards' funds are invested in a suite of unitised managed funds - trustee authorised investments - in accordance with a set of investment strategies approved by an Investment Committee assisted by independent advice.

The General Solicitor's Office has a total of six officers (four solicitors and two non-solicitors) performing case management duties. There is, it must be said, some potential for duplication of activity between case managers in the Office of Wards of Court and the General Solicitor's Office, a possibility which should be eliminated in a Public Guardian's Office model.

The ability of the Courts Service to provide adequate staffing levels, in particular at case management level, to meet the needs of wards is heavily constrained by the limitations on personnel numbers which apply to it, in common with other Civil Service Departments and agencies. Even within these constraints, the Courts Service is obliged to make difficult decisions as to how best to marshal its personnel resources to meet the operational requirements of general and specialised litigation areas in the various court jurisdictions it serves. Case managers are largely drawn from the existing pool of court staff – usually from conventional litigation support offices - and it is fair to say that little in the experience of a court clerk or registrar prepares one for a role in managing the person or affairs of incapacitated adults or minors.

The fact that protection of persons in wardship, due to its origin in the *parens patriae* jurisdiction, resides within the courts system obscures the social and/or health service nature of that function. Had supervision of intellectually disabled adults – the process of determining capacity aside - been so regarded, it is conceivable that the wardship area might have benefited from the large-scale investment seen in our health sector in recent years. While some success has been achieved in increasing the number of case officers, Courts Service management is not in a position to guarantee availability for the future of adequate and appropriately qualified staff resources to meet the needs of a constantly expanding wardship client base provided by an ageing population.

The proposed regime

This concern underlines the merit of establishing an independent agency – quite separate from the Courts Service - as the pillar of a new Guardianship regime, as recommended by

the Commission[22], free from pressures of competing and wholly unrelated operational responsibilities, and with the ability to select personnel from a broader range of disciplines, such as social work and estate management, and, ideally, some discretion to fix terms of employment or retainer. From the point of view of the incapacitated adult or his or her carers, the litmus test of the effectiveness of any new regime will be the quality of service offered in their case. The argument for greater flexibility in resourcing case management is even more compelling when one considers the considerably expanded protection brief envisaged for the new Public Guardian, a brief which would co-exist with a wide-ranging advice, support and advocacy role.[23]

The Public Guardian's protection remit would be extended firstly as a result of the adoption of a functional approach to capacity, i.e. one which judged capacity by reference to a particular decision to be made at the time it has to be made.[24] This is likely to mean that more individuals will be candidates for protection albeit that the protection required individually may be more limited in scope. Additionally, the Public Guardian's Office would have a general supervisory role over attorneys appointed under Enduring Powers of Attorney, giving directions as to the level of accounting to be done, and receiving reports from and accounts of attorneys in appropriate cases.[25] More significantly, however, the Commission in its 2003 Consultation Paper recommended the establishment of an *intervention and personal protection system* which would be available both for persons who, though legally incapacitated, do not need guardianship and for persons who, though legally capacitated, need protection but are unable to provide it for themselves.

The proposal to include vulnerable, though capacitated, individuals within the scope of the protection regime would very likely entail a quite substantial increase in the caseload of a future Public Guardian's Office over that currently handled by the Office of Wards of Court. While it is difficult to estimate in advance the likely extent of the increase, the experience in Germany in light of a similarly radical reform of its guardianship law in the early 1990s is instructive.[26] Under the old law, some 450,000 individuals were in wardship or curatorship as of 1991. As of the end of 2003, some 1,091,633 were under protection of the new guardianship law - a distribution of some 13.23 guardianships per 1000 inhabitants.[27] Crudely transposed, this would suggest an ultimate figure of in excess of 50,000 candidates for protection in Ireland, but this estimate must be qualified: the distribution of guardianships in Germany is no doubt influenced by the demographic profile of its population and the approach to financing of guardianship in that jurisdiction.[28] Whatever be the likely number of clients, the steep proportionate increase

[22] Pars. 6..34 and 6.35 of the 2003 Consultation Paper.

[23] Par. 6.34 of the 2003 Consultation Paper.

[24] Pars. 2.38 to 2.40 and 3.44 of the 2005 Consultation Paper.

[25] Pars. 3.36 to 3.38 and 3.45 of the 2003 Consultation Paper.

[26] The German legislation reforming wardship and curatorship of adults came into effect on the 1st January 1992: Bauer and Klie: "Gesetzsammlung zum Betreuungsrecht", Muller, 3rd Ed. 2005.

[27] Figures quoted from presentation by Ulrich Hellmann, Lebenshilfe Deutschland, to namhi Parents' Seminar, 6th November 2004.

[28] Based on the Irish Census figures for 2002.

in the number of individuals under protection seen in Germany since the 1990s reform is not an unlikely outcome.

Effective protection

Protection measures
The heavy and diverse caseload which a Public Guardian's Office may expect will emphasise the need to concentrate its personnel resources to best effect. At present, protection of individual wards of court is afforded generally through:

- a set of directives, contained in a court order made on taking the individual into wardship, governing the ward's personal care arrangements and management of the ward's estate, and specifying the powers of the committee in those areas
- a requirement that permission from the court or the Registrar be obtained for certain types of transaction and expenditure outside the authority delegated to the committee
- the auditing of accounts returned by the committee and
- visitation of the ward whether on a regular or occasional basis by medical visitors
- intervention on foot of information received by the committee or third parties or arising from issues identified from audits or visits

The court-centred nature of day-to-day decision-making in wardship matters may on its face appear cumbersome and expensive. However, where a court order is required this will almost invariably - with the exception of orders determining capacity – be sought in chambers on the basis of correspondence or telephone communications. In view of the high priority traditionally given by High Court Presidents to wardship matters and the level of access afforded to the Registrar of Wards of Court by the President, decisions - especially in the area of consent to medical treatment - can be made quickly and with minimal formality.

Identifying risk
The combined pressures of a wide-ranging remit and heavy caseload, and finite personnel resources, will require a future Office of Public Guardian to marshal protection resources to best effect, and point to the need for risk profiling in its approach to case management. An examination of the Public Guardianship Office for England and Wales by the National Audit Office published in June last[29] drew attention to the need for that Office to direct its scrutiny of cases more effectively towards known areas of risk, taking into account case history, size of assets involved and the sustainability of spending decisions by receivers compared to the patient's income and assets. The NAO identified a need for adequate aggregate information on the nature and scale of risks managed, to enable optimal targeting of resources.

[29] "Public Guardianship Office: Protecting and promoting the financial affairs of people who lose mental capacity", National Audit Office, June 2005.

Visitation
However, regular and targeted auditing is not of itself a sufficient safeguard of the incapacitated person's interests, especially in the area of personal care. No better means of overseeing the welfare of an individual exists than visits by a skilled visitor with some regularity. At present, the provision of regular visitation has proved difficult to implement. The 1871 Act stipulates that visitation be conducted by medical or legal visitors at least once yearly where the ward is in institutional care, and four times yearly otherwise [30]. Aside from the fact that medical visitor and case officer resources are quite insufficient to guarantee visitation with the frequency aforementioned, the use of medical professionals for visitation is unnecessary in the vast majority of cases and would be a heavy expense to the ward's estate. To address this, the Courts Service has proposed an amendment to the 1871 legislation to enable the retention of a broader range of skilled visitors and to permit visitation to be conducted more flexibly, though not less frequently than once yearly.[31]

A future Public Guardian would need to have at their disposal a nation-wide panel of skilled visitors drawn from the caring professions, each of whom should be required to report not less than once annually on the client group assigned to them, or more frequently as the Public Guardian on a profiling of the case requires.

Not unrelated to the need for regular visitation is that of periodic independent review of the condition of those declared legally incapacitated. As the Commission has noted[32], wards of court are excluded from the review procedures established by the Mental Health Act 2001. I can only observe that this outcome was not one desired by the Office of Wards of Court at the time, and it is to be hoped that the benefit of a statutory review procedure will be extended to wards of court who are detained, in common with other individuals detained involuntarily on psychiatric grounds.

Investigation
Given the caseload in prospect, a need will arise for a dedicated investigation team of experienced officers tasked to deal with complaints from third parties and referrals from case officers. This team could play a valuable role in educating case officers to identify risks in the area of personal care and financial management.

Alternatives to wardship or guardianship

In addition to a substituted decision-making system in the form of guardianship, the Commission has recommended an intervention and personal protection system short of guardianship, and consisting of specific orders (services orders, intervention orders and

[30] Section 56 of the Lunacy Regulation (Ireland) Act 1871.
[31] In England and Wales, the Court of Protection expects each client to be visited by a professional visitor within the first six months of a receiver being appointed and after that as the Court directs, but not less than once again within five years (to be reduced to three years in 2005-2006).
[32] Par. 4.28 of the 2005 Consultation Paper.

adult care orders), which would avail both legally incapacitated persons who do not require the protection offered by guardianship status and legally capacitated, though vulnerable, adults.[33]

Under current law, such limited remedies, where they are available, may not be granted in the absence of a finding of general incapacity, and until recently those remedies were largely unavailable for incapacitated adults outside the context of wardship. Within the last year or so, however, the President of the High Court has adopted an approach designed to afford protection, in cases where an adult found on medical evidence to be incapacitated is entitled to limited assets, without subjecting the individual to the full consequences of wardship. Where the amount of the respondent's entitlement does not exceed € 30,000 or thereabouts, the President, on receipt of an undertaking from a concerned family or carer (a) to apply the amount for the maintenance and benefit of the respondent, and (b) to account to the Registrar of Wards of Court for the application of the funds as and when called upon to do so, will authorise the family member or carer to receive and give a valid discharge for the funds concerned and apply the funds in accordance with the undertaking. The procedure is initiated and completed by correspondence, no formal order being required, and follows after the usual background inquiries have been concluded by the Registrar.

Conclusion

In identifying particular areas for comment, I am conscious that I have by no means covered all of the issues which will challenge those charged with the "design and build" of a Public Guardianship regime. Certain issues – and I mentioned some in referring to the Courts Service management's response to the recommendations of the 2003 Consultation Paper – involve an interpretation of legal principles. Others, such as a regional structure for the institutions which will form part of the regime, will require a balancing of the need for accessibility to the system with availability of professional resources.

The new protection model proposed would be more complex than its predecessor, being dependant on effective interaction of court, tribunal, Public Guardian and personal guardian. This is not a criticism, but rather a reminder of the challenge posed, i.e. to ensure that the decision-making process for personal or material welfare issues does not become more complicated and difficult for the protected individual or their carers to access or understand.

Indeed, the Commission's recommendations to date have provided an admirable basis on which we may proceed to construct the protection regime which a developed society in the 21st century should expect.

[33] Chapter 6, Part E of the 2003 Consultation Paper, page 190 et seq..