[2019] IEHC 781

THE HIGH COURT
SPECIAL CARE

[2018 No. 194 MCA]

IN THE MATTER OF S., A CHILD

BETWEEN

CHILD AND FAMILY AGENCY

APPLICANT

AND
M. O'L.

FIRST RESPONDENT

AND
M.M.

SECOND RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 28th day of May, 2019

1. This application relates to a child S. a minor born on 30th December, 2001 who was the subject of an interim special care order in accordance with s. 23L of the Child Care Act, 1991 ("the 1991 Act") on 28th March, 2018. A full special care order was made on 1st May, 2018. The second respondent was appointed to act as guardian ad litem for S. from the outset of the special care proceedings.

2. The full special care order in respect of S. expired on 31st July, 2018.

The relevant legal framework

3. The statutory framework relating to special care orders for children, which involves intervention to provide secure therapeutic care, was introduced by the Child Care (Amendment) Act, 2011 which substituted and inserted Part IV A into the 1991 Act. Part IV A was commenced by Statutory Instrument No. 637 of 2017 Child Care (Amendment) Act 2011 (Commencement) Order 2017 on 31st December, 2017. Prior to the latter date, for the proceeding twenty years or so, such cases were dealt with pursuant to the inherent jurisdiction of the High Court. Essentially, Part IV A established a statutory regime for the admission of children to special care.

4. The statutory regime authorises the detention of children in special care units where the child's welfare warrants special care, as opposed to care with relatives, foster parents or residential care. Part IV A provides for two types of orders, special care orders and interim special care orders, vesting jurisdiction to make such orders in the High Court. Part IV A provides for the effect, duration and obligations arising from an interim special care order and a special care order such as, inter alia, specific proofs, appointment of a guardian ad litem, relationship with criminal proceedings, consultation with various parties prior to the application being made, the provision of special care units, and reviews by the High Court.

5. It is apposite at this juncture to set the relevant provisions of Part IVA of the 1991 Act.

6. Section 23B of Part IVA, in relevant part, provides:

"(1) The [Child and Family Agency] shall provide special care to a child in respect of whom a special care order or an interim special care order has been made for the period for which that special care order or interim special care order has effect.

(2) The [Child and Family Agency] shall not detain a child in a special care unit unless the detention is pursuant to, and in accordance with, a special care order or an interim special care order made in respect of that child or the High Court has otherwise ordered..."

7. The statutory prerequisites which must be established by the CFA to the satisfaction of the High Court before it makes a special care order are set forth in s. 23H of the 1991 Act which identifies eight separate criteria in respect of which the High Court must be satisfied prior to making a special care order. Section 23H provides:

"(1) Where the High Court is satisfied that —

(a) the child has attained the age of 11 years,
(b) the behaviour of the child poses a real and substantial risk of harm to his or her life, health, safety, development or welfare,
(c) having regard to that behaviour and risk of harm and the care requirements of the child —

(i) the provision, or the continuation of the provision, by the [Child and Family Agency] to that child of care, other than special care, and
(ii) treatment and mental health services under, and within the meaning of, the Mental Health Act 2001,will not adequately address that behaviour and risk of harm and those care requirements,

(d) having regard to paragraph (c), the child requires special care to adequately address —

(i) that behaviour and risk of harm, and
(ii) those care requirements, which the [Child and Family Agency] cannot provide to the child unless a special care order is made in respect of that child,

(e) the [Child and Family Agency] has carried out the consultation referred to in section 23F (3) or, where the [Child and Family Agency] has not carried out that consultation, the High Court is satisfied that it is in the best interests of the child not to have carried out that consultation having regard to the grounds provided in accordance with section 23F (9),
(f) in respect of the family welfare conference referred to in section 23F (5) —

(i) the [Child and Family Agency] has convened the family welfare conference and the [Child and Family Agency] has had regard to the recommendations notified in accordance with section 12 of the Act of 2001, or

(ii) it is in the best interests of the child that the family welfare conference was not convened having regard to the information and grounds provided in accordance with section 23F (10),

(g) for the purposes of protecting the life, health, safety, development or welfare of the child, the child requires special care, and

(h) having regard to paragraphs (a) to (g), the detention of the child in a special care unit, as it is required for the purpose of providing special care to him or her, is in the best interests of the child,the High Court may make a special care order in respect of that child.

(2) A special care order shall specify the period for which it has effect and that period shall not exceed 3 months from the day on which that order is made unless that period is extended under section 23J …"

8. Section 23I provides for a system of mandatory reviews on notice to be conducted by the High Court in each four-week period during the currency of the special care order in the course of which the Court must consider whether the child continues to require special care.

9. Pursuant to s.23J of the 1991 Act, the High Court may extend the period for which the special care order has effect. No more than two applications to extend a special care order can be made and each may not exceed three months.

10. Where the child's care requirements have changed, and he/she no longer requires special care or is no longer benefitting from special care the High Court may discharge the special care order: Section 23NE.

11. Provision for the making of a special care order in respect of a child who was previously the subject of such an order is set out in s. 23NJ of the 1991 Act:

"(1) Nothing in this Act shall be construed as preventing the [Child and Family Agency] from applying for a special care order or an interim special care order, in respect of a child who has previously been the subject of —

(a) an application for a special care order or an interim special care order,

(b) a special care order, whether or not the period for which it had effect was extended in accordance with section 23J, or

(c) an interim special care order, whether or not the period for which it had effect was extended in accordance with section 23N.

(2) Where a special care order has been made in respect of a child, whether or not the period for which it had, or has, effect was extended in accordance with section 23J, the [Child and Family Agency] may apply for another special care order in respect of that child —

(a) at any time after the first-mentioned special care order ceased to have effect, or

(b) during the period for which the first-mentioned special care order has effect, and where the High Court, pursuant to an application to which paragraph (b) refers, makes the special care order, the first-mentioned special care order shall cease to have effect immediately following the making of that special care order.

(3) Where an interim special care order has been made in respect of a child, whether or not the period for which it had effect was extended in accordance with section 23N, the [Child and Family Agency] may apply for another interim special care order in respect of that child, subject to subsection (4), at any time after the first-mentioned interim special care order ceased to have effect.

(4) Subsection (3) shall not apply in respect of a hearing, referred to in section 23M(1)(a), held pursuant to the making of an interim special care order ex parte.

(5) Where an interim special care order has been made in respect of a child, whether or not the period for which it had, or has, effect was extended in accordance with section 23N, the F148 [Child and Family Agency] may apply for a special care order in respect of that child —

(a) at any time after the interim special care order ceased to have effect, or
(b) during the period for which the interim special care order has effect, and where the High Court, pursuant to an application to which paragraph (b) refers —

(i) makes the special care order, the interim special care order shall cease to have effect immediately following the making of that special care order, or
(ii) if the High Court refuses to make the special care order it shall discharge the interim special care order.

(6) The [Child and Family Agency] may apply for a special care order, or an interim special care order, in respect of a child who is, or has previously been the subject of an order of the High Court the effect of which was to detain a child in secure residential accommodation and such application may be made, in accordance with this Part —

(a) at any time after that High Court order ceased to have effect, or
(b) during the period for which that High Court order has effect,

and where the High Court, pursuant to an application to which paragraph (b) refers, makes the special care order or, as the case may be, the interim special care order it shall give directions in respect of the cessation of the effect of that High Court order."

12. Section 23NK of the 1991 Act designates the High Court as the forum for any application for directions where a child is in the care of CFA pursuant to a special care order or an interim special care order. It provides:

"Where a child is in the care of the [Child and Family Agency] pursuant to a special care order or an interim special care order, the High Court may —

(a) of its own motion, or
(b) on the application of the [Child and Family Agency], a parent, the guardian of the child or a relative, give directions or make an order on any question affecting the welfare of the child as the High Court thinks proper and may vary or discharge any such direction or order.]"

13. Section 23NL provides:

"(1) Where an existing order has effect in respect of a child on the day on which a special care order or an interim special care order is made in respect of that child, subject to subsection (2), the provision of special care to that child by the [Child and Family Agency] shall take precedence over the care provided to the child pursuant to such existing order during the period for which the special care order or interim special care order has effect.

(2) Where an existing order has effect for a specified period, nothing in subsection (1) shall be construed as affecting that period.

(3) In this section 'existing order' means —

(a) an interim care order made under section 17,
(b) a care order made under section 18,
(c) an emergency order made under section 13, or
(d) a supervision order made under section 19."

14. Pursuant to s. 26(1) of the 1991 Act, in any proceedings under Part IV, Part IVA or Part VI, where the child to whom the proceedings relate is not a party, the court may, if it is satisfied that it is necessary of justice to do so, appoint a guardian *ad litem* for the child.

15. Section 47 provides that where a child is in the care of the CFA (other than special care), the District Court has the power to give directions and make orders on any question pertaining to a child's welfare:

"Where a child is in the care of the [Child and Family Agency] [subject to Section 23NK], the District Court may, of its own motion or on the application of any person, give such directions and make such order on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order."

The background to the within motion

16. S. first became known to the social work department of the CFA in 2011 as he was witnessing an older brother consuming alcohol and being aggressive in the family home. In 2012, S's mother disclosed domestic violence being perpetrated on her by her then partner. The social work files indicated that the domestic violence was extremely serious and that S. was a witness to this violence. In 2013, a referral was made to the social

work department that S. was being physically violent to his mother, In December, 2014, S was voluntarily received into the care of the CFA until June 2015 when a reunification plan was put in place. S. then lived at home from June 2015 until June 2016, with the CFA's social work department putting in place a number of supports to assist in the relationship between S. and his mother. By early June, 2016, S's behaviour was once again in issue. Respite plans to relieve tensions were not successful and S. was received back into voluntary care in June 2016. Thereafter, he had multiple placements including a foster placement and a number of residential placements two of which were emergency residential units. All of the placements broke down, the principal reason being S's drug use and drug debts, his aggressive behaviour and property damage. The main concerns that the social work department had in relation to S. were his ongoing high risk and chaotic behaviour, including drug use and drug debt, criminal behaviour, no daily routine, history of aggression and violence (especially towards his mother and female staff members), refusal to stay in identified placements or placements breaking down through aggression and violence.

17. As stated earlier, an interim special care order was made by the High Court on 28th March, 2018. S. was missing in care at this time until 6th April, 2018 when he was located and brought to the special care unit specified in the interim special care order. The full special care order was made in respect of S. on 1st May, 2018. S was detained in the specified special care unit until the special care order expired on 31st July, 2018. For the duration of the special care order, S.'s case was periodically reviewed by the High Court, as provided for in the legislation.

18. For some weeks prior to the expiry of the special care order on 31st July, 2018, there was a significant concern that a step down placement from special care would not be found for S. before the expiration of the special care order. In this regard, the second respondent brought a motion dated 17th July, 2018 seeking directions from the Court. The directions sought were as follows:

> "1. A direction that [the CFA] put in place an appropriate step down residential therapeutic placement, which meets the welfare and educational needs of [S.], as a matter of urgency and in accordance with expert advice as to [S.'s] particular long-term welfare and educational needs.
> 2. Further or in the alternative, a direction that the [CFA] urgently take all steps necessary to obtain an appropriate specialist or private Foster Placement, to meet the welfare and educational needs of the said minor and for his benefit.
> 3. Further or in the alternative, a direction that the Applicants urgently take all steps necessary to obtain a single occupancy unit to meet the welfare and educational needs of the said minor, and for his benefit.
> 4. Further or in the alternative, a direction that the Applicants urgently and immediately take all possible steps to identify a placement which will meet the welfare and educational needs of the said minor, whether by way of a residential unit or private/specialist or professional fostering, or otherwise in

Northern Ireland for the benefit of the said minor, in the event that an appropriate placement is not available in this jurisdiction.

5. A direction of this Honourable Court that the step down placement is necessary to vindicate the constitutional rights of the said minor.
6. An Order providing for such further or other Order (including an interim and/or interlocutory relief) for the benefit of the welfare of the said minor as this Honourable Court doth seem fit."

19. The second respondent's concerns were set out in an affidavit sworn 15th July, 2018.

20. He avers as follows:

"3. [S.] is a sixteen-year-old boy with a diagnosis of Chronic Post Traumatic Stress Disorder. He grew up in a home where he was exposed to significant domestic violence from a young age. [S.'s] parents are no longer in a relationship and his father resides in a nursing home. [S.] exhibited physically violent behaviour towards his mother in 2014, and was placed in voluntary care. He returned home in 2015 and was physically violent again. He returned to a voluntary care arrangement in 2016 upon which he had multiple placements (one foster placement and four residential units). These placements broke down in circumstances where [S.] engaged in drug use (cannabis, ecstasy, MDMA and cocaine) aggressive behaviour and property damage.

4. [S.] was missing in care for over one month before he was placed in Secure Care, his lifestyle was chaotic and he was at serious risk.
5. All professionals are in agreement that [S.] has done exceptionally well since he was placed in [the residential unit]. He has engaged fully in all assessments, has attended school regularly and has avoided becoming involved in incidents while in [the residential unit]. Both the social work team, the GAL and the staff in [the residential unit] are in agreement that he is ready to transition to a step down placement. Furthermore, there is agreement between the professionals that [S.] will not meet the threshold for an extension of the secure care order and the Applicant … has indicated that in the circumstances they do not intend to apply for a further order. [S.] has indicated consistently against entering [the residential unit] that he would cooperate with all assessments and that in return for keeping his end of the bargain, he would like a placement in the Cavan/Monaghan area.
6. No onward placement has been identified for [S.] and this is having extremely serious effect on him. [S.] is suffering from anxiety as a result of not having an onward placement and has difficulty eating when stressed. [S.] has described to the GAL that he is suffering from stomach pain as a result of the stress.
7. [S.] has engaged in a number of assessments while in [the residential unit] including a Speech and Language Assessment, Psychological Assessment and an Addiction Assessment. These Assessments have assisted professionals

greatly in understanding [S.] and contain a number of recommendations in relation to supports which should be provided for [S.] in his new placement, including CBT, Occupational Therapy and ongoing Psychological Support."

21. In 2015, S.'s difficulties were considered consistent with Developmental Trauma Disorder. A report of Helen Long, Senior Clinical Psychologist with Tusla's Assessments Consultation and Therapy Service (ACTS) states as follows:

> "On assessment [S.'s] scores on cognitive and memory assessments were below average with the exception of his Visual Delayed Memory, which was within the Average Range. It is felt that [S.'s] poor scores were possibly due to early brain trauma, experience of domestic abuse disrupted attachment and disrupted educational opportunity. There was evidence an assessment of Very Elevated Anxiety Moderately Elevated Depression, Anger and Disruptive Behaviour and Extremely Low Self-Concept. There was also evidence of Chronic Post Traumatic Stress Disorder and that [S.] had been using drugs and alcohol to manage feelings associated with this. Assessment of [S.'s] language skills … suggested that he demonstrated Mild Deficits in Core and Receptive Language Skills and Moderate Expressive Language Deficit. [S.] presented with severe difficulty with Language Memory Indices and this was particular area of weakness throughout the assessment."

22. In her report of 15th June, 2018, Eimear Mallon, Senior Speech and Language Therapist with ACTS outlined S.'s receptive language difficulties in the following terms:

> "[S.'s] receptive language difficulties are further evidenced during his Child in Care Review Meetings … whereby [S.] is expected to listen to outcomes, objectives and offer his own opinion on ongoing matters related to his care. [S.] was observed to have great difficulty with understanding the language used during such meetings. Many of the terms used with young people in Special Care (mobilities, care orders, etc.) are abstract words that [S.] would not previously have been exposed to. It is important that all professionals working with [S.] adapt their language level to allow [S.] to participate in meetings that impact upon the care provided to him. [S.'s] comprehension difficulties may also impact on his behaviour as it is likely that [S.] will not always understand what he being told or asked to do. In general conversation on the unit, [S.] may pick up some of the words that are said to him, but not follow the main message. Keep in mind that what appears to be a lack of engagement or non-compliance may be comprehension difficulties, and that a history of these difficulties often leads to young people adopting non maladaptive behaviour. [S.] should be encouraged to seek clarification from staff and other professionals at all times. A receptive language difficulty may also impact [S.'s] understanding of non-verbal communication."

23. S.'s difficulty in providing clear narratives or recalling certain events were also highlighted in the report.

24. The second respondent's motion did not proceed in July, 2018 in circumstances where a placement was found for S. to which he moved on 1st August, 2018 following the expiry of the special care order on 31st July, 2018. The High Court was advised of the availability of the placement on 26th July, 2018. At that time, the second respondent expressed concerns regarding the step down placement and the services that would be put in place for S. to meet his welfare needs. The range of services that would be available to S. were still unclear by the date the special care order expired. The second respondent requested that the Court review the matter notwithstanding the ending of the special care order and he requested that he continue to be involved as S.'s guardian at least during his transition into his step down placement.

25. An issue then arose as to whether the second respondent's role had expired with the expiration of the special care order, and whether the Court had the power, post the expiry of the special care order, to order the continued involvement of the second respondent and to review the matter during the minor's transition to a step down placement to ensure his welfare needs were met.

26. In July, 2018, the Court made an interim order continuing the appointment of the second respondent until the hearing of submissions on the issue of the Court's jurisdiction whereupon it was proposed to determine the extent of the jurisdiction of the Court.

The issue which arises for determination

27. In essence, the issue to be determined in the within proceedings is whether the Court has jurisdiction to review S's case post the expiry of the special care order on 31st July, 2018. The second respondent contends the Court has the jurisdiction to make orders and give directions post the discharge or expiry of a special care order and has the power to, in effect, retain the guardian appointed under the special care order for this purpose. The first respondent, S.'s mother, supports the position being adopted by the second respondent. The CFA is asking the Court to find that where an interim special care order or special care order made under Part IV A of the 1991 Act expires or is discharged the role of the High Court should cease save in the most exceptional circumstances.

The second respondent's submissions

28. The first argument advanced by counsel for the second respondent is that under Part IV A of the 1991 Act there is an acknowledgment by the legislature that the High Court retains a residual jurisdiction to make detention orders in respect of children and that, accordingly, the Court has the power to make orders after the expiry or discharge of a special care order. It is submitted that s. 23B(2) of the 1991 Act appears to contemplate that the High Court can detain a child otherwise than by way of a special care order. Counsel also points to s.23NJ(6) of the 1991 Act and submits that this provision again contemplates that an order for the detention of a child under the High Court's inherent jurisdiction can subsist alongside the jurisdiction to make a special care order under Part IV A of the 1991 Act.

29. In the alternative to the foregoing, counsel contends that the High Court has jurisdiction to review a minor's case post the discharge or expiry of a special care order because

there is nothing the 1991 Act which excludes such a jurisdiction or unequivocally removes the entitlement of the Court to exercise such jurisdiction as the Court has exercised prior to the coming into force Part IV A of the 1991 Act.

30. Furthermore, it is submitted that the Court's inherent jurisdiction may be used to supplement a statutory regime. It is argued that there has been no express or implicit superseding of the High Court's inherent jurisdiction: the framing of s. 23B (2) and s. 23NG (6) in fact supports this argument.

31. It is also argued that whatever the precise interpretation of s. 23B and s. 23NG (6), it cannot be said that these provisions suggest that the legislature intended to preclude the operation of the High Court's inherent jurisdiction in its entirety. In order to do so, different legislative provisions to those contained in Part IV A would have been necessary. The legislature has not said in Part IV A that it intended to bring an end completely to the inherent jurisdiction of the High Court.

32. As the 1991 Act does not provide for review upon the expiration of the special care order, when a transition is being made by the minor concerned from special care to a step-down placement, the High Court is entitled to exercise the supervisory/ review jurisdiction it exercised heretofore pursuant to the Court's inherent jurisdiction. Pre the coming into force of the Part IV A of the 1991 Act, in exercising its inherent jurisdiction, the High Court retained an overview jurisdiction albeit that it had discharged the secure care order. There is nothing to suggest that the legislature was contemplating not allowing the inherent jurisdiction of the High Court in this regard.

It is contended that there is nothing in Part IV A to suggest that the Court's inherent jurisdiction would be limited to or within the four corners of the 1991 Act: the legislature must be presumed to know the nature and extent of the High Court's inherent jurisdiction, including its review jurisdiction after a special care orders expires or is discharged.

33. It is submitted that had the legislature intended to bring the High Court's inherent jurisdiction to an end this would have been expressly set out in the 1991 Act. What the 1991 Act has not done is to envisage that there would be no form of inherent jurisdiction surviving post the coming into force of Part IV A.

34. In aid of her argument that the 1991 Act does not operate so as to preclude the Court from effectively supervising or monitoring, by the exercise of its inherent jurisdiction as heretofore, S's transition from special care to a step down placement, counsel cites Bennion on Statutory Interpretation (7th Ed. at p. 660) as to the general principles governing the interaction between the inherent jurisdiction and statutory provisions:

> "Where an Act silent on an issue the existing law is taken to apply unless excluded expressly or by implication. The existing law is therefore available to supplement a legislative scheme".

35. It is further submitted that any orders made, or directions given by the Court pursuant to s.23NK of the 1991 Act, or its power to review compliance with such orders or directions, do not fall once the special care order is discharged or expires.

36. The reach of directions or orders made under s. 23NK must be taken to extend (where necessary) after the special care order has ceased. Thus, if the High Court gives directions during the currency of a special care order, it must be able to monitor the implementation of its directions after the special care order ceases to exist. Given the powers of the Court under s. 23NK, the Court's overview cannot just cease after a special care order is discharged or expires: there must exist the possibility for the Court, if it deems it appropriate, to ensure that the directions given during the currency of the special care order are being complied with.

37. Furthermore, the import of s. 23NL of the 1991 Act is that the High Court takes over all the care requirements of a child once a special care order is made, including the Court reviewing arrangements for a child's step down placement while the child is in special care. Essentially, the Court is in charge of the entire welfare of the child who is the subject of a special care order. There is nothing in s. 23NL of the 1991 Act which prohibits the Court from regulating its own processes.

38. What is being advocated by the second respondent is that under the 1991 Act, the High Court is charged with and has a duty to protect the constitutional rights of a minor, not only regarding the justification for their detention but also with regard to all of the care aspects pertaining to the minor.

39. For many children who are the subject of a special care order there may be no District Court orders in place. This is the case in respect of S: there is only a voluntary care arrangement in being.

40. It is submitted that S.'s particular difficulties, as highlighted in the reports of the ACTS clinicians, evidence the need for him to have representation so that his constitutional rights can be vindicated.

41. Counsel argues that the position being adopted by the CFA, namely that s. 47 of the 1991 Act, together with the dictum of the Supreme Court in *In Re F.D*. [2015] 1 I.R. 741, preclude the High Court from exercising post special care order discharge jurisdiction is extreme in circumstances where there is no joined up system in the 1991 Act between the two care jurisdictions: the absence of such a joined up system suggests transition from special care would be managed by the High Court. That may involve perhaps one review by the High Court post discharge, or a number of reviews, depending on each individual case. It is open to the High Court to say that some cases are more appropriate for the High Court to oversee post discharge/expiry of a special care order and that some cases are for the District Court pursuant to s. 47 of the 1991 Act and to then direct the CFA or the guardian of a child to bring an application to the District Court under s. 47. It is not the second respondent's case that the High Court can step in to the area occupied by s. 47 of the 1991 Act.

42. The second respondent is not asking the High Court to create a parallel jurisdiction to the statutory special care regime. What is being urged is that it would be extraordinary, where the High Court has made directions regarding a minor during the currency of a special care order, that the High Court would not be able to check that those directions are being implemented.

43. In aid of her submissions, counsel cites the decision of the Supreme Court in *A.M. v. HSE* [2019] IESC 3.

44. It is submitted that based on the ratio of *A.M. v. HSE.,* the CFA's contention that In *re F.D.* governs the position in the present case is not correct.

45. With regard to the CFA's arguments that a s. 47 procedure is the appropriate mechanism post the discharge or expiry of a special care order, it is submitted that the s. 47 procedure is not capable of automatic invocation upon the lapse of a special care order. It requires an application to be made in the District Court. If the guardian appointed under the provisions of Part IV A has no status once a special care order lapses, then how is a section a s. 47 application to be brought or S's welfare to be protected where there is no District Court care order?

46. If the CFA submission that the High Court's jurisdiction ends after the discharge or expiry of the special care order is to be accepted, then there is a void in S.'s case as he is not subject to a District Court care order and he himself has no capacity to bring a s. 47 application in the District Court. S.'s mother is also vulnerable. Moreover, S. has had no contact with her since the discharge of the special care order.

47. It is submitted that all these matters engage S.'s fundamental constitutional rights. S. is dependent on his guardian, the second respondent. This is particular so where S. has had at least five different social workers in his case. There is therefore an absence of constants in his life, save for his guardian.

48. For all of the foregoing reasons counsel for the second respondent submits that the Court has power to review S.'s case, post the expiry of the special care order and to retain his guardian for those purposes.

The first respondent's submissions

49. As with the second respondent, it is the first respondent's submission that the High Court has the jurisdiction to review the case once the special care order has expired or is discharged and to make orders continuing the appointment of the second respondent beyond the currency of the special care order for the purpose of such review.

50. In the first instance, counsel submits that it is well within the High Court's discretion as to how it governs its own procedures. Counsel refers to the decision of the U.K. Court of Appeal in *R. v. Gail October* [2003] EWCA (Crim) 452 and *Spencer v. Spencer* [2018] EWCA 100, in aid of the submission that the Court has inherent power to control and manage its own business and to invoke its inherent jurisdiction where legislation has not spoken on the particular matter.

51. It is also contended that if the legislature is to take away that power it is has to be clearly worded. That was not done in Part IV A of the 1991 Act.

52. What is in issue in the present case, post the coming into force of Part IV A, is the ability of the High Court to say that it wants to review matters post the discharge/expiry of the special care order. If the High Court does not have power to review matters post discharge/expiry of a special care order, then the High Court is in a vacuum as to what the effect of its orders/directions has been.

53. The High Court is a court of plenary jurisdiction. As such it has all the powers to do justice in justiciable matters. Thus, the cutting down of those powers has to be done clearly. This has not been done.

54. For the CFA to say that the High Court has no jurisdiction to review matters post the discharge/expiry of a special care order is a very narrow view of the law and effectively ties the hands of the High Court.

The CFA's submissions

55. Counsel for the CFA submits that the position being adopted by the CFA is not to tie the hands of the High Court; rather the CFA is of the view that the inherent jurisdiction of the High Court to review or make orders or give directions is significantly reduced and curtailed once a special care order is discharged or expires.

56. The CFA is not urging an absolutist position. It recognises that there may be exceptional circumstances in which the High Court's inherent jurisdiction can be used after the discharge or expiry of a special care order.

57. The principal issue in this case is whether the High Court can utilise its inherent jurisdiction in the manner advocated by the first and second respondents.

58. The CFA does not agree with the second respondent's submission that ss. 23B(2) and 23NJ(6) of the 1991 Act provides for an alternative mechanism to the statutory mechanism provided for in Part IV A of the 1991 Act in relation to taking children into special care. The interpretation of s. 23B (2) urged on the Court by the second respondent would set at nought the lengths the legislature went to in Part IV A to provide a statutory framework for the making of special care orders and how they are to be managed.

59. It is submitted that the provisions of s. 23B (2) have to be read as a saver with regard to secure care orders made by the High Court prior to the coming into effect of Part IV A.

60. If the CFA is correct in this argument, then the next question is whether it is permissible for the High Court, via its inherent jurisdiction, to review any case post the discharge or expiry of the special care order. Counsel submits that the High Court's jurisdiction in this regard is limited to exceptional circumstances.

61. Insofar as the first and second respondents rely on Bennion, and argue there have not been an express revocation in the 1991 Act of the High Court's inherent jurisdiction, those arguments ignore the dictum of MacMenamin J. in *HSE v. A.M.* that where a statutory remedy is provided it is only in exceptional circumstances where constitutional rights are in issue that the inherent jurisdiction of the Court can be invoked.

62. In support of the argument that where there is a statutory jurisdiction it is inappropriate for the inherent jurisdiction of the Court to be run as a parallel shadow jurisdiction, counsel points to para. 89 of *HSE v. A.M*. where MacMenamin J. states that *"inherent jurisdiction must not be used as a first port of call when, by legislation, the Oireachtas has spoken on the matter".*

63. Counsel also relies on the dictum of Murray J. in *G. McG. v. D.W. (No. 2) (Joinder of the Attorney General)* [2000] 4 I.R. 1 and that of Clarke J. in *Mavior v. Zerko Limited* [2013] IESC 15.

64. The 1991 Act provides for two care regimes, i.e. the District Court care orders and the High Court special care mechanism. Moreover, the legislation provides for two different mechanisms for reviews. It is submitted that s.23NK of the 1991 Act designates the High Court as the forum for an application for directions only while a child is the subject of the relevant special care order.

65. In respect of the District Court, its power is set out in s. 47 of the 1991 Act. Counsel submits that the power of the District Court to make directions under s. 47 is very broad and thus sufficient to vindicate the rights and best interests of a child in the context of Article 42A of the Constitution.

66. Furthermore, while, pursuant to s. 23NL of the 1991 Act, a special care order has precedence over an existing care order, that precedence only subsists during the period for which the special care order or interim special care order has effect. It is submitted that this is underpinned by the provisions of s. 23NL (2) and (3).

67. Where the special care order ceases to have effect, the 1991 Act makes clear that what it terms as "precedence" over the care of the child returns to the District Court.

68. In circumstances where the Oireachtas has clearly delineated the responsibilities of the different courts, where an application to court is considered to be necessary after the elapse of a special care order, the appropriate forum for the application is not the High Court, but rather the District Court. In that regard, the CFA notes that all of the "existing orders" referred to in s. 23NL are orders which can exclusively be made in the District Court.

69. This is consistent with a developed line of authority as to the scope of what Baker J. in *V.Q. v. Judge Horgan* [2016] IEHC 631 described as *"a statutory mechanism … by which questions regarding the care and welfare of the child could be determined"* (at para. 27), i.e. s. 47 of the 1991 Act.

70. Counsel contends that if Part IV A of the 1991 Act is to be viewed in the manner advocated by the respondents, that would be to ignore s. 47 and the limitations on the High Court's powers as set out in s. 23NK and s. 23NL. It is submitted that it is only where constitutional issues are at stake, and where no remedy is provided by statute, can the High Court's inherent jurisdiction be invoked.

71. As far as S.'s particular circumstances are concerned, counsel acknowledges that the Court may feel it necessary to make the orders sought by the second respondent i.e. to provide for a continuing review and the continuation of the second respondent's involvement in circumstances where S.is almost eighteen years of age, where his mother is not in a position to interject and where there are no District Court orders made in respect him. Accordingly, the Court may consider S.'s case exceptional given that there are constitutional principles at stake. That it is not to say however that the Court can review every case through its inherent jurisdiction, as the CFA's position is that the High Court does not have this power save in exceptional circumstances.

72. Where the vindication of the child's rights can be met by s. 47 of the 1991 Act, there is no need for the inherent jurisdiction of the High Court save in exceptional cases, as perhaps is the case with regard to S.

Considerations

73. As already set out, the issues before the Court relate to the jurisdiction of the High Court to make orders continuing the appointment of the second respondent beyond the currency of the special care order, and whether the Court has power to review a minor's case once the special care order has expired or is discharged.

74. I will firstly address the second respondent's argument that certain provisions of Part IV A of the 1991 Act contemplate that the erstwhile inherent jurisdiction of the High Court to detain children in secure care continues to subsist post the commencement of Part IVA. In aid of her contention, counsel points to the provisions of s. 23B (2) of the 1991 Act. She submits that s. 23B (2) appears to contemplate that the High Court can detain children otherwise than under a special care order. She asserts that if this is correct, then its suggests the intention of the legislature was not to remove or extinguish the inherent jurisdiction of the Court in its entirety. It is thus submitted that on the basis that the Court has power under its inherent jurisdiction to detain children, it retains a jurisdiction to review a minor's case post the discharge or expiry of a special care order.

75. Counsel next points to s. 23NJ (6) of the 1991 Act, which allows the High Court to make a further special care order after the discharge or expiry of a special care order and any extensions thereto. It is contended that this provision also speaks to the residual power of the High Court to make special care orders. It is submitted that s. 23NJ(6) contemplates that detention orders under the inherent jurisdiction of the High Court can subsist along with special care orders under the 1991 Act. It is therefore argued that the provisions of s. 23B (2) and s. 23NG (6) make clear that the legislature did not take away the inherent jurisdiction of the High Court and expressly or implicitly recognised an inherent jurisdiction of the High Court to bring children into special care outside of the

four corners Part IVA of the 1991 Act. It is contended that since the Court retains this jurisdiction as expressly or implicitly recognised in s.23B(2) and s. 23NJ(6), the Court has the power to review a minor's case post the discharge or expiry of a special care order.

76. I do not agree with the interpretation put on s. 23B(2) and s. 23NJ(6) by counsel for the second respondent. I accept the CFA's argument that the interpretations urged on the Court by the second respondent with regard to s.23B(2) would set at nought the lengths the legislature went to in Part IVA to provide a statutory framework for the making of special care orders.

77. Undoubtedly, Part IVA of the 1991 Act was crafted having regard to the body of jurisprudence that has been built up over the past twenty years or so, that jurisprudence itself having been informed by the provisions of the Constitution and the European Convention on Human Rights and Fundamental Freedoms. Thus, insofar as it might be suggested that the intent of the legislature in enacting s. 23B(2) and s. 23NJ(6) was to leave in place the power of the High Court under its inherent jurisdiction to detain children in secure care alongside the statutory jurisdiction, that argument is rejected. The legislature has acknowledged by the enactment of and coming into force of Part IVA that it was appropriate to put on a statutory footing the powers of the High Court to detain children in secure care heretofore exercised on foot of the High Court's inherent jurisdiction. I find support for this in the judgment of the Court of Appeal in *Child and Family Agency v. M.L. & Ors* [2019] IECA 109, where, at para. 10 thereof, Whelan J. states that "*all such application [for special care orders for children] now fall to be determined under Part IVA [of the 1991 Act]*". In my view, therefore, the erstwhile inherent jurisdiction of the High Court to make special care orders has been replaced by the provisions of Part IVA. Even if I am wrong in this regard, I do not think that the arguments advanced by the second respondent with regard to s.23B(2) and 23NJ(6) really address the principal question at stake in this case. As S. was in fact brought into special care pursuant to the provisions of Part IVA of the 1991 Act, the crux of this case is whether, post the expiry of the special care order, the High Court can exercise any supervisory function.

Does Part IVA of the 1991 Act preclude the exercise of the supervisory functions of the High Court post the expiry or discharge of a special care order?

78. As I have said, the principal question in these proceedings is whether the provisions of the 1991 Act preclude the High Court from exercising a supervisory function post the expiry or discharge of a special care order.

79. Both the first and second respondents argue that Part IV A of the 1991 Act does not operate so as to preclude the High Court, post the expiry of the special care order, from monitoring or supervising S's transition from special care to his step-down placement. They contend that under the inherent jurisdiction, the High Court in special care/detention cases exercised jurisdiction:

- To permit the guardian *ad litem* to remain involved in the proceedings in the interests of the welfare of the minor where the secure care/detention order was no longer in existence, for at least a period of time after the detention order had expired;
- To permit the guardian *ad litem* to make applications for directions in respect of a child who had been the subject of a special care/detention order during that period; and
- To review cases where a special care/detention order had expired or been discharged, for at least a period of time post expiry or discharge of the order.

80. It is argued that this post expiry review period was usually of temporary duration to entitle the High Court to supervise the transition from detention to step down, given that the High Court was continually crafting the arrangements which were to be put in place for the child post the secure care order. It is contended that that supervisory function is not undermined in the 1991 Act.

81. It is undoubtedly the case that up to the coming into force of Part IV A of the 1991 Act, minors' cases were commonly reviewed by the High Court even where secure care orders had been discharged. This is clear from *HSE v. D.K*. [2007] IEHC 488.

82. In *HSE v. D.K*., MacMenamin J. comprehensively detailed the circumstances in which a secure care order should be made under the inherent jurisdiction, the nature and extent of information to be given to the court in making such applications, the necessity for regular review of the detention of the minor, and myriad other matters, including the role of the guardian *ad litem* in the proceedings. In the course of his judgment, MacMenamin J. outlined the procedure which should apply where a child whose case was listed in the High Court minor's list fails to reside or continue to reside in the location where the court was told he or she would be staying.

83. MacMenamin J. also outlined the steps which might be taken if a child or minor in a step-down facility were to leave that facility and refused to reside there. He stated, inter alia, at para. 58:

> *"(b) Where a detention order is ended and the child is placed in a step-down facility his or her case should be adjourned to a date in the Minor's List for review. If during the adjourned period or subsequent adjourned periods, the child behaves in such a manner to place himself or herself at risk the court should be informed of this within a reasonable period and should be given an assessment of the level of risk together with an assessment of the action required, including whether the minor requires to be returned to a secure unit.*
>
> *(c) If a minor requires to be returned to a secure unit but no place is available, the court should be informed of the level of risk applicable to him or her and the steps which may be taken to alleviate that risk."*

84. MacMenamin J. clearly contemplated that on the ending of a detention order, where the child is placed in a step down facility, the matter should remain before the High Court for a review, in order to monitor how the child was progressing in a step down placement. This, he found was part of the jurisdiction of the High Court pursuant to the inherent jurisdiction. As to the role of the guardian *ad litem* post discharge, MacMenamin J. opined:

> *"(l) When the Health Services Executive moves to have a minor discharged from secure care, the guardian ad litem should apprise the court of the child's view regarding his onward placement. In addition, the guardian ad litem should inform the court of his or her professional opinion regarding such a move and the promised onward placement.*
>
> …
>
> *(o) The guardian ad litem should express a view to the court as to how a case is best kept under review after a minor is discharged from secure care. When a minor is discharged from such care the guardian ad litem should confirm with the court whether they are to continue to remain involved in the proceedings." (at para.58)*

85. It is thus clear that under the inherent jurisdiction, review post discharge of the detention order was required in the best interest of the minor. Furthermore, the guardian was under a duty to inform the High Court of his or her view as to how best the matter may be kept under review, and whether the guardian was to remain involved with the proceedings. This dictum clearly establishes that pursuant to the inherent jurisdiction, the guardian was entitled to remain involved in the proceedings post the discharge or expiry of the secure care order.

86. Counsel for the second respondent submits that, contrary to the CFA's arguments, the *dictum* of MacMenamin J. in *HSE v. D.K*. with regard to the role of the guardian ad litem is not gainsaid by the decision of Baker J. in *A.O.D. v. Judge Constantine O'Leary* [2016] IEHC 555. The latter case concerned the role of a guardian *ad litem* in care proceedings in the District Court. At paras. 52 and 57 of her judgment Baker J. stated:

> *"52. MacMenamin J. was dealing with the role of a guardian ad litem appointed for the purposes of High Court proceedings in the form of an inquiry under Articles 40.3, 41, and 42 of the Constitution in respect of a fourteen-year old boy who died while he was in the care of the State. The inquiry into the events leading up to his death was carried out with a view to ensuring 'that the procedure for implementation of detention orders of young persons at risk works in the most effective way for the protection of these young persons'. MacMenamin J. was not considering the question of the nature of the role to be taken by a guardian ad litem appointed by a court of limited jurisdiction under its statutory power contained in s. 26 of the Act of 1991.*
>
> …

57. I must assume in those circumstances on a schematic interpretation of the legislation that the guardian ad litem appointed under s. 26 is envisaged as performing a role different from the reporting and assessment role carried out by the person preparing a report under s. 27. I consider that the function of the guardian ad litem appointed under s. 26 is to represent the child in the litigation, and to promote the interests of the child and the interests of justice. The furtherance of the interests of justice by the appointment of the guardian ad litem would suggest that the Oireachtas had in mind that the guardian ad litem would take a role consistent with the furtherance of the interests of justice, and therefore will take a role in the proceedings not merely as a witness."

87. To my mind, *A.O.D.* largely concerned whether a guardian appointed under s. 26 of the 1991 Act could appoint legal representation and whether a guardian could be a party to proceedings. I accept, however, the second respondent's submission that the function of a guardian as described in *A.O.D*. is not dissimilar to what was set out by MacMenamin J. in *HSE v. D.K* and is not dissimilar to the role which a guardian *ad litem* plays in special care proceedings before this Court.

88. In aid of their argument that the provisions of the 1991 Act do not preclude the Court reviewing a minor's case post the expiry or discharge of the special care order the respondents rely, *inter alia*, on s. 23NK of the 1991 Act. Section 23NK is the High Court equivalent of the District Court's s. 47 powers. Section 23NK provides, in effect, that at any time prior to the discharge or expiry of a special care order it is open to the High Court to give directions or make an order, including of its own motion, on any question affecting the welfare of a child where that child is in special care. It is the first respondent's contention that s. 23NK should be interpreted in a purposive manner.

89. I accept the first respondent's contention that the only temporal limitation in s. 23NK is that the child has to be in special care at the time orders or directions are given by the High Court. I also accept the respondents' submission that the reach of orders or directions given by the Court during the currency of a special care order may in a particular case extend beyond the expiry or discharge of the special care order. That being so, to my mind, it cannot the case that the directions of the Court can be said to apply only during the currency of the special care order. It is undoubtedly the case, particularly where the transition plans for a child are not finalised prior to the expiry of the special care order, that the Court may wish to be apprised as to whether a particular order or direction in relation to the transition, made during the currency of the special care order, has been complied with. It must be noted that the very basis for the making of such orders or directions is "the welfare of the child", as referred to in s. 23NK.

90. As part of the case that the Court has no power to exercise a supervisory function post the expiry or discharge of a special care order save in exceptional circumstances, counsel for the CFA submits that the Oireachtas has clearly delineated the responsibilities of the District Court and the High Court in the 1991 Act. He thus submits that after the elapse of a special care order the appropriate forum for all further applications is not the High Court

but rather the District Court. In aid of his submission in this regard, counsel for the CFA points to s.23NL of the 1991 Act.

91. As against that position, it is the respondents' contention that the High Court always has jurisdiction to review its own orders. They submit that the provisions of s. 23NL do not preclude the High Court from regulating its own processes. They also argue that the CFA has failed to address the crux of the respondents' arguments which is that orders or directions made by the High Court under s. 23NK may have effect after the discharge or expiry of a special care order and that it cannot therefore be the case that s. 23NL could bring an end to that, as the CFA suggests.

92. It is worth repeating the exact provisions of s. 23NL:

> "(1) Where an existing order has effect in respect of a child on the day on which a special care order or an interim special care order is made in respect of that child, subject to subsection (2), the provision of special care to that child by the [Child and Family Agency] shall take precedence over the care provided to the child pursuant to such existing order during the period for which the special care order or interim special care order has effect.
>
> (2) Where an existing order has effect for a specified period, nothing in subsection (1) shall be construed as affecting that period.
>
> (3) In this section 'existing order' means —
>
> (a) an interim care order made under section 17,
> (b) a care order made under section 18,
> (c) an emergency order made under section 13, or
> (d) a supervision order made under section 19."

93. If it is the case that a child the subject of a special care order is also the subject of a District Court care order as defined above, then in some of the cases that come before this Court in the context of special care, the guardian's role, albeit no longer a guardian under special care, may well continue to subsist post the discharge or expiry of a special care order. This is so because in some of the cases that are the subject of special care proceedings the guardian who has been appointed by the High Court may well be the guardian already appointed in the District Court care proceedings Thus, once a special care order is discharged or expires, and the precedence which s.23NL(1) afforded to the High Court no longer applies, assuming the guardian's role in the District has been retained, there will be in such cases a smooth transition back to the District Court. Thereafter, pursuant to s. 47 of the 1991 Act, it is open to any person (including the CFA, the guardian *ad litem* or a parent) to apply for directions on any question affecting the welfare of the child concerned.

94. In circumstances such as the foregoing, it is unlikely that the High Court may require to exercise a supervisory role post the discharge or expiry of a special care order. Accordingly, at the time of the discharge or expiry of a special care order, it is open to the

Court to say that a particular case, post discharge or expiry, is more suitable for the District Court and to direct the CFA or the guardian of a child to bring an application to the District Court under s. 47, if such an application is warranted having regard to the circumstances of the case. Indeed, as it has done on at least one occasion in other special care proceedings before this Court, the CFA itself may tell the Court that it proposes to bring an application in the District Court under s.47 of the Act.

95. I will return in due course to the broader question as to whether even where there is an extant District Court care order the High Court has the power to review a minor's case post the discharge or expiry of the special care order.

96. If it is the case that when a special care order is made in respect of a child there is no District Court care order in being, then there is no "existing order" of the District Court in respect of which precedence can be regained once a special care order expires or is discharged, as envisaged by s. 23NL. Thus, in those circumstances the question arises as to how and by whom an application can be brought in the District Court in respect of a child who was the subject of a special care order which has been discharged or has expired.

97. Notwithstanding that there may be no District Court orders in being pursuant to ss. 13, 17, 18 or 19 of the 1991 Act (the provisions referred to in s. 23NL), it remains the position that s.47 of the 1991 Act provides that "[w]here a child is in the care of the CFA other than special care under Part IVA, the District Court may of its own motion or on the application of any person, give such directions or make such order on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order." As S. is in the voluntary care of the CFA (as defined in s. 4 of the Act), it is therefore open to any person to apply to the District Court for directions pursuant to s. 47 of the 1991 Act.

98. Indeed, counsel for the second respondent acknowledged that given that a voluntary care arrangement pertains to S., his case is one where an application can be made to the District Court for directions under s. 47 of the 1991 Act.

99. However, counsel queried how was a minor such as S. to bring an application to the District Court to vindicate his or her constitutional rights if the guardian *ad litem* who was appointed in the special care proceedings to represent S's interests could not do so post the expiry or discharge of the special care order. She asked who, in the absence of the guardian appointed under the special care order being able to do so, was left to speak for S.? It was submitted that the CFA will only make a s.47 application if they feel there is reason to be concerned for S.'s welfare. Counsel also argued that even if the CFA were to act, their concern may not be shared by the child himself. Counsel further pointed to the breakdown of the relationship between S and the first respondent, the first respondent's inability to interject and the lack of constants in S's life, save the second respondent.

100. It is also the second respondent's position that there is nothing in the 1991 Act which "joins up" special care and District Court care. It is contended that absent an application

being brought under s.47, there is no provision in the 1991 Act for the District Court to supervise the transition of a child from special care. I accept that to be the case.

101. In the case of S., it is a matter of fact that there was no step-down placement identified for him until a week before his discharge from special care. Furthermore, it was unclear what services were going to be applied to S. This was in circumstances where there was expert advice as to his long-term welfare needs. This was also against the backdrop where there was no subsisting care order of the District Court in relation to S. It was also the case that S. had at the time of his discharge from special care no communication with his mother (at his wish). Thus, in circumstances where S. is a minor, if the CFA is correct in its submission that the High Court has no function post the discharge of the special care order, and with S.'s guardian also to be discharged on the expiry of that order, there would be no one in the immediate term to represent the child's interests during his transition from special care.

102. Accordingly, notwithstanding that where a child is in the care of the CFA there is a statutory mechanism in the form of a s. 47 application in the District Court available after the expiry or discharge of a special care order, the question that arises in this case (and may well arise in other special care cases) is how the s.47 mechanism can be given effect to in light of the child's incapacity to bring such an application in the District Court. Whilst the s. 47 mechanism exists, given the factual matrix that pertained in S's case, I accept that there was an immediate disconnect in terms of S's interests being protected between the ending of the special care order and his going back into voluntary care and into his stepdown placement. If there is such a disconnect then it must follow the High Court has power to review matters under its inherent jurisdiction, if only to ascertain whether, during the transition period, an application should be made pursuant to s.47 of the 1991 Act. At the very least, notwithstanding the expiry of the special care order, the High Court, as it did in the present case, is entitled to make provision for how S's transition out of special care was to be managed and to review how the transition is being managed. As I am satisfied that the Court has the power to review, it must follow that it has the power to retain the guardian *ad litem* to ensure that S's welfare is protected during the transition to his step-down placement.

103. Overall, I am satisfied that the High Court, post the discharge or expiry of a special care order, retains its inherent jurisdiction to review, if necessary, the circumstances of any child the subject of a special care order and, if necessary, has the power to retain the services of a guardian appointed under a special care order so that the voice of the child can be heard and in order that issues as may pertain to the child can be articulated. This is particularly so in circumstances where the High Court may have given directions during the currency of a special care order as to how a child's transition/step down from special care should be effected. If such directions are given, then the Court must be in a position to oversee the child's transition from special care. I find this is so even where there may be existing District Court care orders in being, albeit that in such circumstances any review by this Court post the expiry or discharge of a special care order may be of short

duration since if the child is subject to a District Court care order, issues regarding his or her welfare can be dealt with under s.47 of the 1991 Act

104. It is certainly the case that the legislature has provided under s. 23NL(1) of the 1991 Act that where there are District Court care orders as defined in s. 23NL(3) in being at the time of the making of a special care order, upon the discharge or expiry of a special care order the District Court care orders regain precedence. To my mind, however, as I have said, that does not necessarily mean that the High Court cannot review the circumstances of a minor post the discharge or expiry of a special care order, particularly in circumstances where the Court during the currency of the special care order may have given directions pursuant to s. 23NK in relation to the minor's transition from special care including, for example, that an application be brought in the District Court in respect of the minor, and in respect of which the Court may wish to be apprised as to whether such direction has been complied with.

105. I am therefor of the opinion that the CFA's interpretation of s. 23NL cannot be correct, given the provisions of s. 23NK, and the fact that orders and directions made by the High Court under that provision are capable of having effect or reach even after the expiry or discharge of a special care order.

106. In summary, therefore, the crux of the within case is whether the CFA is correct in saying that as soon as a special care order ceases the Part IV care order (if there is such an order) comes into effect and that the only recourse after the discharge/expiry of a special care order is an application in the District Court pursuant to s. 47. For the reasons set out herein, I do not accept the CFA's arguments.

107. In the absence of any provision in the 1991 Act which precludes the High Court's overview, I am satisfied that the Court has the power to review a minor's case post the discharge or expiry of the special care order.

108. In the course of his submissions, counsel for the first respondent referred the Court to the decision of the UK Court of Appeal in *Spencer v. Spencer* [2018] EWCA (Civ)100. In that case the UK Court of Appeal held that although the lower court had no statutory power to make a direction for the testing of the deceased's stored DNA, the court's inherent power to give directions for post mortem DNA testing had not been ousted by the Family Law Reform Act, 1969 which made provision for the giving of directions for scientific testing only in relation to the living and not in relation to samples retained after death. The Court of Appeal held that, accordingly, the judge had been correct in his approach and in his conclusion that there was a residual power under the inherent jurisdiction for the court to order that the extracted DNA of the deceased could be utilised for the paternity of the applicant to be determined. At para. 41 of the judgment, King L.J. cited in *Re L. (Vulnerable Adults with capacity: court's jurisdiction) (No. 2)* [2013] FAM 1, where Davis L.J. referred to the ordinary rule of statutory interpretation, citing Lord Wilberforce in *Shiloh Spinners Limited Ltd. v.Harding* [1973] AC 691, 725:

"In my opinion where the courts have established a general principle of law or equity, and the legislature steps in with legislation in a particular area, it must, unless showing a contrary intention, be taken to have left cases outside that area where they were under the influence of the general law."

109. I agree with the submission of counsel for the first respondent that, in effect, the approach adopted by the UK Court of Appeal in *Spencer* puts into effect the principle outlined in Bennion on Statutory Interpretation, referred to earlier in this judgment.

110. In arguing that the High Court's jurisdiction to exercise powers of review in circumstances where a special care order is discharged or has expired is not precluded by Part IVA of the 1991 Act, counsel for the first respondent also contended that the issue was not whether the High Court had the power to review a minor's case post the expiry or discharge of a special care order but whether the Court should exercise those powers in a particular case. He submitted that the Court may well decide in any particular case that it is not appropriate or necessary to review matters post the discharge or expiry of a special care order and that matters are best to left to the District Court. This submission is aptly made, to my mind.

111. I accept that in some cases it will not be necessary for the High Court to exercise a review, but that in other cases it will be appropriate to do so.

112. To return to the particular circumstances of the present case. To my mind it was essential that the second respondent would continue to be retained post the expiry of the special care order and that S's transition from special care would be reviewed by the Court. This was particularly so given the difficulties that presented regarding S.'s step down placement and given his particular vulnerabilities.

113. S's vulnerabilities, especially his frailties in language and his diagnoses of anxiety and moderate depression warranted the retention of his guardian and the oversight of the High Court post the discharge of the special care order. Indeed, Counsel for the CFA did not really demur in this regard, as is clear from his oral submissions to the Court.

Does the finding that the Court has jurisdiction to review S's case undermine the statutory scheme under the 1991 Act?

114. The question now to be addressed is whether the Court's findings as set out above undermine the fundamentals of the 1991 Act or the jurisdiction of the District Court pursuant to s. 47 of the Act.

115. The salient issue is whether the Court's findings amount to the exercise of a shadow or parallel jurisdiction to that provided for in the 1991 Act.

116. In considering this issue, the Court is mindful of the dictum of Murray J. in *G. McG. v. D.W. (No. 2):*

"*The concept of inherent jurisdiction necessarily depends on the distinction between jurisdiction that is explicitly attributed to the courts by law and those that a court possesses implicitly whether owing to the very nature of its judicial functions or its constitutional role in the administration of justice. The interaction between the expressed jurisdiction of the courts and their inherent jurisdiction will depend in each case according to the scope of the expressed 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."* (pp. 26 and 27)

117. Later in his judgment, Murray J. goes on to state:

"*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 employed or inherent nature. To hold otherwise would undermine the normative value of the law and create uncertainty concerning 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)

118. In the course of his submissions in this case, counsel for the CFA cited *Mavior v. Zerko Limited* where Clarke J. considered the dictum of Murray J. in G. McG. v. D.W, in the following terms:

"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'.

119. At para. 20, Clarke J. opined:

"…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 courts 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"."

120. Both the CFA and the first and second respondents cited the decision of the Supreme Court *A.M. v. HSE* in support of their respective positions.

121. The factual matrix in that case was as follows: Following his conviction A.M. was sentenced to ten years' imprisonment which he served in the Central Mental Hospital (CMH). Shortly before his release the matter came before the High Court on an application by the HSE for A.M. to be made a ward of court and that orders be made for A.M.'s future detention in the CMH. Counsel for A.M. argued that a wardship order should not be made and that an order for A.M.'s future detention could only be made pursuant to the Mental Health Acts 1945 to 2001 (the "2001 Act") which, it was argued, contained statutory safeguards not provided for in wardship applications. It was argued that in making the wardship application the HSE were attempting to "circumvent" the 2001 Act.

122. On the facts, A.M. could have been the subject of an application under the 2001 Act. However, the evidence before the High Court was that the HSE could not comply with the complex procedures laid down in that Act. Kelly P. acceded to the wardship application. The matter was appealed to the Supreme Court which upheld the High Court.

123. As part of A.M.'s case before the Supreme Court it was argued that the 2001 Act 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. Part of the HSE's case was that inherent jurisdiction was no longer available given the provisions of the 2001 Act. Counsel for the HSE relied on the judgment of the Supreme Court in *In re FD* [2014] 1 IR 741, a decision cited by counsel for the CFA in the within proceedings. The issue in *In re FD* was whether there existed alongside the wardship jurisdiction expressly vested by statute in the High Court, an inherent jurisdiction which exists outside of the wardship jurisdiction to enable and regulate the protection of the property of a person who may lack mental capacity. *In re. FD*, the Supreme Court found that a shadow jurisdiction could not coexist alongside a statutory jurisdiction covering precisely the same matter.

124. In giving judgment for the Supreme Court in *A.M. v. HSE*, MacMenamin J. referred, *inter alia*, to the dicta of Murray J. and Clarke J., respectively, in *McG v. D.W and Marivor*, as quoted earlier in this judgment. MacMenamin J. also addressed the decision of the Supreme Court in *In re.FD.*

125. MacMenamin J. rejected the HSE's reliance on *In re FD* on the basis that in *In re F.D.* there were no fundamental constitutional principles at stake, unlike the position that pertained in *A.M. v. HSE.* He stated:

> *"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."

128. MacMenamin J. opined that in *In re FD*, the ratio was confined to the specific issues at play in that case. He stated, at para. 86, quoting Laffoy J. in FD:

> *"[I]nsofar 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)*

129. MacMenamin J. went on to state:

> "*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

…

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.

….

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.

…

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."

130. I am satisfied that underlying the Supreme Court's judgment in *A.M. v. HSE* is the notion that if there had not been such a separate statutory wardship scheme alongside the scheme provided for in the 2001 Act, then the inherent jurisdiction of the High Court could have been relied upon to protect the constitutional rights of A.M.

131. In the present case, the question is whether the legislature has spoken on the issue of whether the High Court has the power to review a minor's case once a special care order is discharged or has expired. I find that it has not. Prior to the enactment of Part IVA of the 1991 Act the Court had such power. For the reasons set out in this judgment, I am satisfied that the Court retains such power of review. While the Court acknowledges the dictum of MacMenamin J. as set out in para. 89 of *A.M. v. HSE*, it remains the case that the legislature did not address in Part IVA of the 1991 Act the power of the High Court to review matters post the discharge or expiry of a special care order. If not addressed, then the law provides that it was not intended by the legislature to interfere with the High Court's inherent jurisdiction to review a minor's case post the discharge or expiry of a special care order. Accordingly, in my view, there is no question that the High Court when exercising such review as may be necessary post the discharge/expiry of a special care order is exercising the type of shadow jurisdiction cautioned against in the jurisprudence quoted in this judgment. This is so because, to my mind, the High Court's review jurisdiction has not been "expressly and completely delineated" by the provisions of the 1991 Act.

132. The concern of the High Court in the present case has to be the right of S. to have his constitutional rights vindicated and have a say in a process which fundamentally concerns him as a matter of constitutional and procedural fairness. Therefore, if the High Court has made orders or given directions during the currency of a special care order and if a child, post the discharge or expiry of the order, is then transferred into a step down placement, the guardian appointed by the Court for the purpose of the special care proceedings must where necessary remain involved post the discharge or expiry of the special care order so as to put the child's interest before the Court for the purpose of any review which the Court might have deemed appropriate, having regard to the circumstances of the case.

133. Prior to the coming into force of Part IVA of the 1991 Act, what was contemplated by MacMenamin J. in *HSE v. DK* was that on the expiration of a detention order, where the child is placed in a step-down facility, the matter should remain in the High Court for review, to monitor the transition. I am satisfied, in the absence of any statutory provision in the 1991 Act ousting that jurisdiction, that this remains part of the jurisdiction of the High Court.

134. I should also add that in exercising such jurisdiction as is in issue in the within matter the Court is doing no more than what is done by courts routinely when matters are put in for review where the proceedings are spent.