



IN THE COURT OF PROTECTION

CASE No: 13177469

Neutral Citation Number: [2019] EWCOP62

Before:

HIS HONOUR JUDGE MARIN

Between:

In the Matter of JBN

The Public Guardian

Applicant

- and -

DJN

Respondent

Ms B Rich instructed by the Public Guardian
Ms H Galley (instructed by Gordons) for the Respondent

Hearing date: 2 December 2019

Judgment: 23 December 2019

Approved Judgment

This judgment is covered by the terms of a transparency order made pursuant to Practice Direction 4C (Transparency) of the Court of Protection Rules 2017. It may be published on condition that the anonymity of the incapacitated person and members of their families must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

HIS HONOUR JUDGE MARIN:

1. On 22 November 2017, the Public Guardian applied to the court to revoke a Lasting Power of Attorney for property and affairs (“the LPA”) made two years earlier by JN, a gentleman who was then 78 years old. JN had appointed his son DN as his attorney.
2. The application was accompanied by a witness statement made by Ms JB, an “investigator” at the Office of the Public Guardian (“OPG”).
3. The purpose of the application was said to be that:

“The Public Guardian has concerns that [DN] has not acted in the best interests of [JN] by selling his residence for £975,000 and transferring most of the proceeds to himself, and mixing the finances with those of [JN] by operating a joint account.”
4. The Public Guardian was particularly concerned that these matters placed JN’s future care costs in “jeopardy”. He therefore invited the court when first considering the application on paper, to suspend DN as attorney and appoint an interim deputy.
5. On 8 December 2017 after reading the application, a district judge suspended the operation of the LPA, ordered DN as attorney not to exercise any of his powers under the LPA and directed the appointment of the interim deputy. This appointment was formalised by a separate order made on 18 December 2017. Both orders contained provision for DN to apply to the court to vary or discharge them.
6. DN contested the substantive application. He maintained that JN had capacity at all relevant times and denied any wrongdoing.
7. The final hearing was listed before me over two days on 17 and 18 June 2019. On 25 June 2019, I handed down a judgment (“the judgment”). I dismissed the Public Guardian’s application, restored DN to the running of JN’s financial affairs under the LPA and discharged the appointment of the interim deputy.
8. DN now seeks an order that the Public Guardian pay his costs which he says are around £82,000. The application was resisted by the Public Guardian who filed a position statement from Leading Counsel setting out his objections.
9. The costs hearing was listed earlier this year but adjourned by consent as Leading Counsel was unable to attend. In the event, he could not attend the relisted hearing so the Public Guardian was represented by Ms Rich who did not appear at the substantive hearing. DN continued to be represented by Ms Galley.
10. The Court of Protection is a creature of statute, namely the Mental Capacity Act 2005.
11. Section 51 of the Act allows for rules of court to be made in respect of the practice and procedure of the court. Section 55 allows the rules of court to make provision for regulating matters relating to costs. The applicable rules are the Court of Protection Rules 2017 (“COPR 2017”).
12. Rule 19.2 of the COPR 2017 sets out the general rule for costs in cases relating to property and affairs, namely:

“19.2 Where the proceedings concern P's property and affairs the general rule is that the costs of the proceedings, or of that part of the proceedings that concerns P's property and affairs, shall be paid by P or charged to P's estate.”

13. Rule 19.5 provides that:

“(1) The court may depart from rules 19.2 to 19.4 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances including –

- (a) the conduct of the parties;
- (b) whether a party has succeeded on part of that party's case, even if not wholly successful; and
- (c) the role of any public body involved in the proceedings.

(2) The conduct of the parties includes –

- (a) conduct before, as well as during, the proceedings;
- (b) whether it was reasonable for a party to raise, pursue or contest a particular matter;
- (c) the manner in which a party has made or responded to an application or a particular issue;
- (d) whether a party who has succeeded in that party's application or response to an application, in whole or in part, exaggerated any matter contained in the application or response; and
- (e) any failure by a party to comply with a rule, practice direction or court order.

(3) Without prejudice to rules 19.2 to 19.4 and the foregoing provisions of this rule, the court may permit a party to recover their fixed costs in accordance with the relevant practice direction.”

14. Counsel also referred me to various authorities, namely *Manchester City Council -v- G and F* [2010] EWCA Civ 939; *Re Cathcart* [1891] 1 Ch 466; *D -v- R and S* [2010] EWHC 3748 (COP); *The London Borough of Hillingdon -v- Neary* [2011] EWHC 3522 (COP); *G -v- E (Costs)* [2010] EWHC 3385 (Fam).

15. Ms Galley on behalf of DN filed a detailed skeleton argument in support of her contention that the Public Guardian had behaved unreasonably in this matter such that the court was justified to depart from the normal costs rule. I do not propose to repeat the many points that she makes; instead, I shall draw certain threads of her argument together.

16. Her starting point was it was wrong for the Public Guardian to embark on such hostile court proceedings; in particular, obtaining interim orders was unjustified.
17. Ms JB accepted in her statement filed with the application that DN had been “*entirely open with the OPG*” and co-operated with him.
18. JN’s care costs were never in jeopardy. At the time proceedings were issued, DN had ensured that a years’ care home fees were deposited in the bank. There was also available a freehold garage investment property worth around £225,000 and monthly rental payments from the long-standing tenant of the garage were made.
19. The Public Guardian knew that at a point in the recent past when JN’s capacity was not in question, JN had said that he wanted his home to be sold. The Public Guardian was also aware of Dr C’s comment in his Special Visitor’s report dated August 2017 that:

“56. I was struck by [JN’s] dislike of having his son investigated, seeming to take the view that his son would get the money anyway.”
20. Ms Galley submitted that in view of these matters, the Public Guardian’s approach to the case in seeking a suspension of the LPA and the appointment of an interim deputy was an overreaction. It was also a waste of JN’s money especially when the interim deputy’s fees amounted to £9000 which were paid from JN’s funds.
21. Instead, Ms Galley maintained that the Public Guardian should have restricted the proceedings to an inquiry of the one matter that was in dispute, namely whether or not JN had capacity at the time of the sale of his home in October 2016. This would have resulted in more focused and less acrimonious litigation.
22. On the issue of capacity, Ms Galley submitted that the Public Guardian never really had any evidence to rebut the presumption of capacity.
23. She referred to various passages in the judgment including the failure of the Public Guardian to obtain the conveyancing file from the solicitor who acted in the sale, the lack of evidence from the financial adviser and the estate agent, the cut and paste approach in the report of Mr F the Court of Protection General Visitor and the cautious approach of Dr C in his report on capacity where he would only say that it was “*less difficult to argue*” that JN “*did not have capacity*”.
24. Ms Galley complained that the evidence before the court at the hearing was mostly known to the Public Guardian before he initiated proceedings. Rather than evaluate that evidence carefully and consider whether he could succeed in his claim that JN lacked capacity, the Public Guardian merely relied on what Ms JB said was the “desk top evaluation” of the papers that she carried out prior to the issue of proceedings. What therefore resulted was the commencement of litigation that was bound to fail which it did.
25. Ms Galley was also critical of the Public Guardian’s stance towards settlement, particularly in view of Ms JB’s oral evidence that as a matter of policy, the Public Guardian did not negotiate.

26. On 12 July 2018, a hearing took place before HHJ Harris. The judge's order obliged DN to send his proposals to settle this case to the Public Guardian by 19 July 2018. The Public Guardian was ordered to send a response by 26 July 2018 in terms of either accepting the proposals, suggesting amendments or refusing the proposals and providing reasons.
27. DN made a detailed proposal. It included provision for all monies held by the interim deputy being paid into a joint account in the name of DN and JN, which would be styled as an attorney account; only care home fees or other legitimate expenses would be withdrawn from that account; DN would undertake to pay the equivalent of one year's care home fees into the account together with a sum each month equivalent to one month's care home fees, so that there would always be a year's fees available. DN also wanted to continue the negotiations for the new lease of the garage's tenant which had been well advanced and to agree an increase of rent. This matter had of course been taken out of his hands with the appointment of the interim deputy.
28. This offer was built upon an earlier offer made in February 2018 when DN offered to deposit two years' care fees to "*safeguard my father's welfare*".
29. The proposal was rejected by the Public Guardian. In his statement in reply to the proposal, he said that:
- "It is submitted that the proposals appear to be a way of the attorney assuring the Public Guardian and Court that he can keep the bulk of the gift of £950,000 whilst ensuring that the donor's needs are catered for. There is no explanation as to the legal mechanism which will be used to ensure that the donor's needs are protected against the attorney changing his mind about his will, or claims from third parties against the donor's estate...*
- Moreover, the proposal appears to give no thought as to the possibility that the attorney could become insolvent in the future.*
- Unless the attorney were to be appointed instead as a Deputy, the Public Guardian is unable to monitor the position."*
30. DN kept his offer open until February 2019 when it was withdrawn as JN by then had become entitled to state funding for his care home fees. Given that the case was driven by the Public Guardian's concern about the funding of JN's care, DN through his solicitors invited the Public Guardian to withdraw the proceedings. The request was refused and the Public Guardian did not enter any further negotiations to settle matters which Ms Galley submitted was unreasonable as was the Public Guardian's stance all along.
31. Ms Rich argued that the proceedings were not hostile. The Public Guardian was simply exercising his duty to investigate the conduct of attorneys. This duty is found in two places.
32. First, section 58 of the Mental Capacity Act 2005 which provides that:

"58 Functions of the Public Guardian

- (1) The Public Guardian has the following functions—
- (a) establishing and maintaining a register of lasting powers of attorney,
 - (b) establishing and maintaining a register of appointing deputies,
 - (c) supervising deputies appointed by the court,
 - (d) directing a Court of Protection Visitor to visit—
 - (i) a donee of a lasting power of attorney,
 - (ii) a deputy appointed by the court,
 - (iii) the person granting the power of attorney or for whom the deputy is appointed (“P”),and to make a report to the Public Guardian on such matters as he may direct,
 - (e) receiving security which the court requires a person to give for the discharge of his functions,
 - (f) receiving reports from donees of lasting powers of attorney and deputies appointed by the court,
 - (g) reporting to the court on such matters relating to proceedings under this Act as the court requires,
 - (h) dealing with representations (including complaints) about the way in which a donee of a lasting power of attorney or a deputy appointed by the court is exercising his powers,
 - (i) publishing, in any manner the Public Guardian thinks appropriate, any information he thinks appropriate about the discharge of his functions.
- (2) The functions conferred by subsection (1)(c) and (h) may be discharged in co-operation with any other person who has functions in relation to the care or treatment of P.”

33. Second, the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2017.

34. Regulation 43 provides that:

“Applications to the Court of Protection

43. The Public Guardian has the function of making applications to the court in connection with his functions under the Act in such circumstances as he considers it necessary or appropriate to do so.”

35. Regulation 46 states that:

“Power to require information from donees of lasting power of attorney

46.(1) This regulation applies where it appears to the Public Guardian that there are circumstances suggesting that the donee of a lasting power of attorney may—

- (a) have behaved, or may be behaving, in a way that contravenes his authority or is not in the best interests of the donor of the power,
- (b) be proposing to behave in a way that would contravene that authority or would not be in the donor’s best interests, or
- (c) have failed to comply with the requirements of an order made, or directions given, by the court..

(2) The Public Guardian may require the donee—

- (a) to provide specified information or information of a specified description; or
- (b) to produce specified documents or documents of a specified description.

(3) The information or documents must be provided or produced—

- (a) before the end of such reasonable period as may be specified; and
- (b) at such place as may be specified.

(4) The Public Guardian may require—

- (a) any information provided to be verified in such manner, or
- (b) any document produced to be authenticated in such manner, as he may reasonably require.

- (5) “Specified” means specified in a notice in writing given to the donee by the Public Guardian.”
36. The Public Guardian had valid concerns for commencing the proceedings and for being concerned about DN’s conduct. There were questions about JN’s capacity that deserved investigation. The Public Guardian had no policy to not negotiate; this litigation represented the Public Guardian carrying out his statutory duty and supervising an attorney. However, Ms Rich accepted that this was not like the typical case brought by the Public Guardian to court.
37. She submitted that the usual costs order should be applied, namely that JN’s estate pays the parties’ costs. Ms Rich noted that the Public Guardian’s position is to only seek disbursements and counsel’s fees and to be responsible for his internal staff costs. DN’s costs should also be paid from JN’s estate.
38. In the alternative, if the court concluded that a costs order would leave JN with insufficient funds, the court should make no order for costs. This would mean that the Public Guardian would bear his own costs and DN’s costs would be met from the monies he received from JN. Whatever position the court adopted, Ms Rich said that this was certainly not a case where the Public Guardian should be made to pay the other party’s costs.
39. At the hearing, the bundle comprised documents and statements from the proceedings and various authorities. The parties also filed written submissions. In reaching my decision, I have regard to all the material before the court and the oral submissions made by Counsel.
40. I turn now to my conclusions.
41. The decision of Peter Jackson J (as he then was) in *Neary* makes it clear that:
- “...Each application for costs must therefore be considered on its own merit or lack of merit with the clear appreciation that there must be a good reason before the court will contemplate departure from the general rule...”*
42. I have considered the various authorities to which I was referred but I also have in mind the comments of Peter Jackson J in *Neary* that:
- “I find that these decisions do not purport to give guidance over and above the words of the Rules themselves-had such guidance been needed, the Court of Appeal would no doubt have given it in Manchester City Council -v- G...”*
43. I also note that *Re Cathcart* was decided under another statute and set of rules and, as Henderson J (as he then was) said in *D -v- R and S*:
- “I agree that some assistance can be obtained from the old cases, but caution is needed and the assistance is only limited. I say that because the general rule now has statutory force and it applies unless, in terms of rule 159(1), the court is satisfied that circumstances justify a departure from it.”*

44. *D -v- R and S* was also decided before *Neary* which now gives clear and straightforward guidance to the court.
45. The Public Guardian issues a large number of applications in the Court of Protection each year relating to the conduct of attorneys. These proceedings are often issued as a last resort in circumstances where the attorney has refused to respond to his queries. In many cases, the attorney even refuses to respond to the court application. These cases normally reveal careful scrutiny of the attorney's conduct by the Public Guardian who is careful to protect the interests of the person who lacks capacity.
46. Although I agree with Ms Rich that this was an unusual case, I have concluded that there is good reason to depart from the normal costs order made in property and affairs cases.
47. It was abundantly clear at the outset that the real issue was JN's capacity at the time of the sale of his property.
48. Accordingly, before commencing proceedings the Public Guardian should have reviewed the capacity evidence. In my judgment, had he done so with care, he would have concluded that it was weak. Indeed, even the Special Visitor's report was guarded.
49. Nonetheless, the Public Guardian was content to commence proceedings solely on the basis of the desk-top evaluation of the case carried out by an investigator. I am clear that this led to proceedings being issued which went beyond what was necessary and reasonable.
50. The Public Guardian should have appreciated the obvious deficiencies in the capacity evidence. He could have invited DN to agree to a joint expert being instructed to consider the matter before issuing proceedings so that he could consider his position carefully or he could have issued proceedings and asked the court to adjudicate only on the issue of capacity. Instead, he embarked upon litigation which sought a range of reliefs and orders.
51. It is particularly concerning that the Public Guardian sought without notice orders of a very serious nature, namely the suspension of the LPA and the appointment of an interim deputy.
52. This approach completely ignored the fact the DN was co-operating with the Public Guardian and had offered to place monies in an account to cover all care costs.
53. It is not surprising that interim orders were made on paper given that the tenor of the application and evidence in support suggested serious wrong-doing on the part of DN that required a response from the court. This did not though reflect the reality.
54. At the very least, the application for interim orders should have been on notice to DN. Had this happened, the court would have had a fuller picture and the case could have been directed on a path to address the real issues that arose. My view is that the application for interim orders should never have been made; that it reflects the lack of consideration given to this case by the Public Guardian.

55. What flowed from the interim orders was acrimonious litigation with DN defending every issue raised against him and the appointment of an interim deputy which caused further acrimony and litigation costs, as well as achieving next to nothing for JN at a high price for which he ultimately had to pay.
56. The Public Guardian adopted what seemed to be a standard approach to litigation based on his approach to other cases. This was a serious failure especially when rule 1.4 COPR 2017 expects litigants to comply with the overriding objective. This obligation applies equally to the Public Guardian.
57. His approach also seemed strange in the context of JN having told Dr C that he was upset about the investigation of DN and the history of joint financial dealings between JN and DN at times when JN had capacity.
58. This all amounts in my judgment to a good reason to depart from the normal costs order especially having regard to rules 19.5(2)(a) to (c). I accept Ms Galley's criticisms in this regard.
59. With regard to the points made about settlement, Ms JB was clear when she gave evidence that the Public Guardian's policy is not to negotiate in any case. Ms Rich said that this was not his position. It is disappointing that the Public Guardian did not personally address this important matter in a statement to the court. The court is entitled to know if he has such a policy. Accordingly, I shall order the Public Guardian to file a statement within fourteen days to clarify his position.
60. As I have already said, the rules of court apply equally to all court users including the Public Guardian. Rule 1.4 COPR 2017 imposes a duty on litigants to help further the overriding objective and this includes co-operating with the other party.
61. In this case in July 2018, HHJ Harris made a specific order to compel the parties to try and resolve matters. DN made an offer which the Public Guardian rejected.
62. DN's offer did not address the real issue of concern to the Public Guardian, namely JN's capacity and what was to become of the proceeds of sale of JN's property. The Public Guardian was therefore entitled to refuse that offer and cannot be said to have acted unreasonably.
63. DN raised a number of other matters such as his health suffering through this litigation, his decision not to visit JN during the litigation to avoid any allegations being made against him, his distress generally and a refusal by the Public Guardian to agree to some hearings being adjourned. None of these matters found a reason to depart from the normal costs order in my judgment.
64. Taking everything together and having regard to my conclusions, the relevant law and the parties' submissions, I believe that the fairest order is to provide that the Public Guardian is not entitled to be paid his own costs from JN's funds and that he should pay 50% of DN's costs (which shall include the costs of this hearing) all of which shall be assessed at the Senior Courts Costs Office by a Costs Judge.
65. I am handing down this judgment without the parties being present and it will be sent to them by the court. If any points arise from my judgment, the parties should write to

the court within ten days. Otherwise, I would ask Ms Galley to file a draft order within fourteen days. Time for any appeal will run from the date this judgment is sent to the parties.

ADDENDUM:

After judgment was handed down, the Public Guardian filed a statement which confirmed that he has no general or blanket policy of not negotiating in cases brought before the court. I accept this assurance and see no need to take matters further.