

IN THE COURT OF PROTECTION

First Avenue House
42-49 High Holborn
London WC1A 9JA

Thursday, 15 August 2019

BEFORE:

HER HONOUR JUDGE HILDER

BETWEEN:

DL
(by her litigation friend The Official Solicitor)

Applicant

- and -

LONDON BOROUGH OF ENFIELD

Respondent

MR J MCKENDRICK QC (instructed by GT Stewart Solicitors and Advocates) appeared on behalf of the Applicant

MR J HOLBROOK (instructed by London Borough of Enfield) appeared on behalf of the Respondent

JUDGMENT
(As Approved)

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(Official Shorthand Writers to the Court)

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This judgment was delivered ex tempore at a hearing conducted in public subject to a transparency order made on 1st July 2019.. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

1. In this matter I am concerned with DL, I am going to begin quite deliberately with a very brief summary of the factual background of this case. I do that to emphasise that these proceedings, like all Court of Protection, proceedings, are about a human being and frustrations about limited resources or cumbersome processes are always secondary to that.
2. DL was born on 4 December 1937, so she is now 81. She never married, she had no children but she does have two cousins, K who is 86 and M who is apparently somewhat younger. DL lived previously with her mother until her mother died but anyway up to January 2018 she was living in her own home at [address], a one-bedroom flat latterly with the assistance of a package of care consisting of one visit in the morning, meals delivered on Mondays and Thursdays, a private cleaner and some help with online shopping from her cousin. Issues arose about increasing clutter. Then DL had a fall and she was taken to hospital.
3. On 11 February 2018 DL was discharged to WP Nursing Home and at that stage the move was treated as a capacitous decision.
4. It is subsequently reported that DL has not left her room in the care home since Christmas 2018.
5. There is at page F30 in the documents before me, which are part of the deprivation of liberty documentations, an outline of her living arrangements to Mr McKendrick referred me. I need not read them all out. It is common ground that in her current living arrangements DL is deprived of her liberty.
6. There are three mental capacity assessments currently available to the court. At F15 there is the assessment by Jonathan Hare, Consultant Psychiatrist prepared on DOLS form 4 and dated 16 September 2018. He concludes that DL then lacks capacity to determine whether she should be accommodated in the care home. On the basis of that report, a standard authorisation was granted which appears at F19 of the bundle and was effective from 21 September 2018 to 20 January 2019. At F26 in the bundle is a report on DOLS form 3 by T Musundire dated 22 January 2019. That document also concludes that DL lacks capacity but the 'functional test' parts of the form are not completed. A subsequent standard authorisation was granted on 24 January 2019. It is effective until 23 January 2020 and it appears at F38 of the bundle in front of me.
7. Additionally at G18 there is a statement by a social worker, who concludes that DL lacks capacity, "to make an informed decision around her care and living arrangements" In particular she describes DL's, "minimal insight into her presenting health problems or as to the quality of care that she requires to maintain her wellbeing."
8. Then there is a report by Dr Anna Sobel which appears at G132 of the bundle and is dated October 2018.
9. In terms of physical health it is said in various places that DL suffers from osteoarthritis, high cholesterol, osteoporosis and oedema; and it said variously that she is doubly incontinent or that she is continent with support - the records are not

consistent. It is said at G114 that she requires assistance of one carer with transfers and mobility.

10. These proceedings began on form DLA issued in the name of DL herself with the help of GT Stewart Solicitors and Advocates and her appointed RPR. That application form is dated 28 June and appears at D1. It makes it clear that the purpose of the application is to challenge the standard authorisation granted on 24 January.
11. On 1 July District Judge Beckley made a standard directions order on the papers and a transparency order. The matter came for an attended hearing before District Judge Mort on 12 July. On that occasion, as Mr Holbrook accepts, although no indication of this was given until shortly before the hearing the London Borough of Enfield took the position that it wanted to adjourn the hearing to deal with matters of jurisdiction as to the appropriateness of these proceedings. As a result of that, this application was listed before me today specifically for legal argument on the respondent's challenges. At Judge Mort's hearing there was no consideration given to the draft orders which had been prepared by the applicant in respect of directions and disclosure orders because of the position the local authority adopted. Instead the local authority was directed to file its skeleton argument by 4 o'clock on 26 July and the applicant its skeleton in response by 4 o'clock on 9 August and it was said that the costs of the legal challenge would be dealt with at the conclusion of this hearing today and for that reason costs schedules were to be exchanged.
12. There is no indication in the papers available to me that the local authority filed any application seeking an extension of time to file its skeleton. The applicant, however, did file such a COP9. No order has been made on that application, because the skeleton has now been received. The late filing of the local authority's skeleton was the reason essentially for the applicant having to make her COP9.
13. I have read the following statements;
 - a. on behalf of the applicant: by Shaun Livingston dated 8 June (G1) but signed 2 August (G38) and dated 9 August, (G40);
 - b. on behalf of the local authority, statements from Busola Onafowokan dated 31 July 2019, unsigned (G15) and Shauket Khan dated 31 July (G24) This morning I was passed a further statement by Steven Riding dated 14 August (G144)
14. I have read all of the papers in the bundle but in particular I have taken further note of the RPR reports by Karon Lyne which appear at I1, I3, I5 and I7 and respectively deal with visits in November 2018, January 2019, March 2019 and May 2019. I have read also the CQC report of WP Nursing Home which appears at J1.
15. The applicant's legal representatives say that she expresses a wish to try and live at home with other people helping. It is noted that she has also told the social worker this at G16.

16. I will not at this point go into the details of the costs of these proceedings so far but it may become pertinent to do so later.
17. In respect of how this matter came to be listed for legal argument, the applicant's representatives say that they did invite discussions before the issue of proceedings, and have provided a copy of an email dated 17 June, but received no response. Accordingly, the application was subsequently issued on 28 June. In a similar vein the applicant says they sent draft orders on 11 July. They got a reply by e-mail within 14 minutes. That reply did not take issue with the stated understanding that the drafts were agreed and no notice of any other change of position was subsequently given.
18. In his written position statement Mr McKendrick QC seemed to take the position that this hearing could only proceed in respect of submissions on the legal argument. However, in fact today he has been able to put forward proposals which are based on the orders previously suggested (but with amendments), so that there is some scope for the court to make case management decisions.
19. The local authority says it is cousin K's view that DL should remain in the care home. It is the local authority's view that she needs nursing support, that it is not feasible for her to live in her flat and any move now that she has been in her current placement for 18 months would just be disruptive. The local authority points out that, when she still had capacity, DL herself decided to live in the care home. The local authority says it would now like a 'pragmatic and common sense approach' to DL's objection to the placement. It points out that the documents from the DOLS process do show that DL's liberty and right to family life are being respected and Mr Riding's latest statement emphasises that - because of illness, holidays and general lack of resources - the local authority has simply not been able to comply with directions in respect of costs.
20. So, the scope of the argument before me today is actually very much more limited than was contended at the July hearing. In particular, Londone Borough of Enfield now accepts that these proceedings are appropriately brought; and further Mr Holbrook has accepted orally that there is no threshold test to this type of proceedings. Secondly, LBE now accepts that in the absence of a suitable and willing relative or friend the Official Solicitor is appropriately involved in these proceedings as a litigation friend. Thirdly, LBE now accepts that the applicant's funding arrangements are appropriate.
21. So, the entire scope of the argument is the need for reality and the need for cost consciousness in these proceedings, the nature and extent of these proceedings and local authority's assertion that public funding is only appropriate to litigate those matters properly within the ambit of a section 21A challenge.
22. I make it very clear at the outset that I consider that all of those matters are properly dealt with as case management issues. They are not jurisdiction issues.
23. LBE's position at the outset today is that
 - a. the application was defective for failing to identify the nature of the dispute;

- b. the orders sought on 12 May, (and there they are referring to the draft orders submitted but not considered), were not necessary or proportionate; and
- c. the case can be determined today, although in that respect Mr Holbrook is anxious to be clear that he is not inviting the court to make a summary judgment and he has not made any application to change the purpose of this hearing which was, I repeat, listed to consider legal argument.
24. So, the local authority now takes a much less extreme and I am bound to say more sensible position than it did at the July hearing and so my reference to legal provisions can be shorter than might otherwise have been necessary.
25. Mr Holbrook agreed in his submissions that the draft orders prepared by the applicant were submitted to the local authority in advance of the July hearing and that the local authority did not indicate any issue. He further agreed that the local authority attended court in July through him and there were no pre-hearing discussions with other parties. Mr Holbrook further agreed that there were no submissions as to what might be appropriate case management directions made to the district judge. Rather, through counsel LBE attended court with the attitude that this case was to challenge what might colloquially be called ‘a gravy train’. Mr Holbrook said today, "I am challenging the accepted wisdom of what goes on in the Court of Protection."
26. I am bound to say that Mr Holbrook's arguments bear little resemblance to my experience of what goes in the Court of Protection today and over the last almost ten years.
27. Mr Holbrook rests his arguments, chiefly, on the decision of the Court of Appeal in *Briggs v Briggs* [2017] EWCA Civ 1169 and he has referred me to the judgment of King LJ in particular at paragraphs 88 and 89 where she says:
- "In my judgment, regardless of whether the amendments to the [Mental Capacity] Act went beyond that which was absolutely necessary in order to fill the *Bournewood Gap*, I am entirely satisfied that the provisions were not intended to, and do not, provide a duplicate route by which personal welfare decisions and in particular medical treatment decisions, can be made in circumstances where the deprivation of liberty itself is not the real or essential issue before the court."
28. She goes on in the next paragraph to say:
- "... Section 21A relates to decisions about the deprivation of liberty and not, as suggested by the judge [in the *Briggs* case at first instance]"
- "... to the circumstances which lead up to the deprivation of liberty. Sch. 1A para.16 to my mind is clear that each of the conditions which have to be satisfied relate directly to whether it is

necessary, proportionate and in the best interests of P to be detained."

29. I want to make it absolutely clear that I accept that in its entirety but it has to be set in the context of the case. The facts of the case were acknowledged in paragraph 5 of the judgment where King LJ reiterated that:

"The respondent issued her application on the standard "Deprivation of Liberty Application Form". In the statement of facts and grounds accompanying her application she said:

"... Whilst framed under as an application under S21A ... the issue at the heart of this case is one of serious medical treatment. The applicant recognises that this is an unusual approach to take in a case concerning serious medical treatment and wishes to make it clear from the outset that the reason she has elected to take this approach is one of funding.""

That is not the case in the matter before me.

30. It is important then to turn to paragraph 92 of King LJ's judgment, where she says:

"In my judgment a question in relation to serious medical treatment is not fundamentally a question in relation to deprivation of liberty. The issue before the court, as was accepted by the judge, was whether P should or should not be given certain medical treatment. It may be that following the making of such a decision there will be implications in relation to P's liberty ... In my view, in such circumstances, the deprivation of liberty is secondary. The real question is whether it is in her best interests to have the surgery, whether or not it is in her best interests to be deprived of her liberty is then determined against the backdrop of the decision in relation to the proposed serious medical treatment. In my judgment that makes the appropriate application an application made under s.15 - s.17 MCA and not an application under s21A."

31. Again, I wish to make it absolutely clear that I entirely agree and accept that.
32. Mr Holbrook appeared to me to be reluctant to go further into King LJ's judgment but in my view it is important that we do because she went on to say:

"Having said that, in my judgment Mr Nicholls has sought to place too narrow a scope on Sch. A1. There are many issues which relate to a deprivation of liberty which need appropriately to be considered by the assessor and which may be reflected in recommendations for conditions in the assessor's report and which

may even be determinative of whether a standard authorisation is made."

33. King LJ then went on to consider a table of cases which counsel had supplied to her, giving an illustration of types of section 21A applications and she observed:

"... Each of them has involved a dispute as to whether P should reside in some form of care home or return to either his home or to live with a family member in the community. Such cases are focused specifically on the issue as to whether P should be detained and are properly brought under s21A. Proper consideration of those cases by the assessor in compliance with the guidance in the DOLS Code, requires far more of an extensive consideration of the relevant circumstances than that which is suggested by Mr Nicholls, namely simply ensuring a care plan and needs assessment is in place without further consideration as to the content."

34. At this point it is worth breaking off to record that Mr McKendrick QC on behalf of the applicant explicitly drew my attention to paragraph 16 of Schedule A1 and to the requirements of the best interests assessor at paragraph 38. I am in absolutely no doubt that the applicant is aware of the context of these proceedings and I am equally in no doubt as to the context of these proceedings. King LJ went on to give a very helpful illustration of how that context operates, she said:

"Contact, for example is an issue capable of going to the heart of whether being detained is in a person's best interests; it may be that in an ideal world P's best interests would be served by a deprivation of liberty in the form of her living in a care home properly looked after, where the appropriate medication regime will be adhered to and P will have a proper balanced diet. Desirable as that may be, and such a regime may well provide the optimum care outcome for P, but it may also be the case that unless regular contact can be facilitated to a particular family member, the distress and confusion caused to P would be such that it would be no longer in her best interests to be detained, and that what might amount to sub-optimum physical care would ultimately be preferable to no, or insufficient contact. The weighing up of such options are part of the best interests assessment process in relation to which the professionals who are eligible to be assessors are peculiarly qualified to conduct."

35. When I drew Mr Holbrook's attention to that passage he accepted it without argument. It is, of course, binding on me but in any event it is very clear and in my view a helpful explanation with which I wholeheartedly agree.
36. Mr Holbrook also referred me to some earlier cases in his written submissions. In particular he included a quote from Parker J in *NCC v PB* [2019] EWHC 1267 (Fam)

at paragraphs 127 and 128. I will not read them out now here but they are in Mr Holbrook's position statement and I agree with those statements too. In my view they go to the case management decision process and the overriding objective.

37. Similarly, Mr Holbrook referred me to Peter Jackson J's comments in the case of *A v B* (Court of Protection Delay and Costs) [2014] EWCOP 48 at paragraph 14. Again, I need not read it out (it is set out in Mr Holbrook's written position statement) but I make it clear that I agree with that too. I do not argue with any of those propositions. They are pertinent to case management powers. This is not a question of jurisdiction.
38. Mr Holbrook emphasises context, namely the deprivation of a person's liberty in paragraph 16 of Schedule A1. I agree with that too. Mr McKendrick QC specifically addressed it.
39. However large the numbers of a local authority caseload of persons being provided with care in the circumstances of their liberty being deprived it is imperative that those responsible for such conditions are never allowed to become cavalier about the significance of deprivation of liberty to the individual concerned and to society as a whole. In my judgment Article 5 rights do not become less precious because of the administrative burden of cases reliant on them.
40. Mr McKendrick QC has reminded the court of the generous ambit of Article 5.4 which entitles a person to speedy consideration by a court and in particular has referred to the case of *Waite v the United Kingdom* ECHR 2002. Article 5.4 is first and foremost a guarantee of a fair procedure for reviewing the lawfulness of detention. An applicant is not required as a precondition to enjoying that protection to show that on the facts of his case he stands any particular chance of success in obtaining his release. When I put that to Mr Holbrook he also, and I quote, "entirely endorsed this" proposition.
41. Closer to home, the Court of Protection's own Vice-President has recently had cause to restate this approach in the case of *CB v Medway Council* [2019] EWCOP 5 at paragraph 33. He said:

"What is involved here is nothing less than CB's liberty. Curtailing, restricting or depriving any adult of such a fundamental freedom will always require cogent evidence and proper enquiry. I cannot envisage any circumstances where it would be right to determine such issues on the basis of speculation and general experience in other cases."
42. So, bearing in mind that these proceedings are brought pursuant to section 21A and that it is very clear from the paperwork that the qualifying requirements being scrutinised may include capacity and definitely include best interests, I have no doubt that it is appropriate for the court to go on to consider now, as in my view everybody involved should have been willing and able to do in July, what are the appropriate case management decisions to progress this matter.

43. In respect of the section 49 report for which the applicant has submitted a draft order and initially (I think) intended to ask the court to make, the local authority says that is not necessary. The local authority contends that the available evidence is sufficient in respect of the capacity issues and in respect of the other matters highlighted in the draft order at paragraph 9, they are not necessary or appropriate because it is not a welfare case.
44. In fact, the Official Solicitor's position today is that he is quite willing for no order to be made today, for further investigations to be made and for a paper application to be made within seven days giving the court much more specific details about what expert evidence is being sought and by whom. That seems to me the appropriate way forward today. It is important that I make clear that in my judgment, section 49 powers are a vital tool in the armoury of the Court of Protection but the court is also aware that the very usefulness of that tool comes as a burden to other public services, in this case the NHS. Practice Direction 14E sets out the circumstances to consider when the court is being invited to make a section 49 order and I emphasise that it is important that the court and the parties follows those requirements.
45. In this matter DL is publicly funded. Subject to further information being ascertained it would appear that at present she does not have any current or recent engagement with the mental health trust directly. Considering the original draft of the section 49 direction it does seem that the intention was to use the section 49 powers as an alternative really to obtaining an independent expert report. Subject to further information which may come to light in the next seven days it would seem to me that in this matter at this time the independent expert route is the more appropriate way to go.
46. In respect of the disclosure orders which were originally sought, the local authority says they are not necessary. However, Mr Holbrook has also accepted that they do not place any burden on the local authority and that the Official Solicitor has no other way of getting information pertaining to his client. The Official Solicitor has helpfully agreed that the drafts should be moderated so that they are time limited. DL has lived a long life and not all of it the records it will have engendered are relevant to these proceedings. The draft orders have been amended so that the disclosure requirement is only from 1 January 2017. On that basis I am quite satisfied that it is necessary and appropriate to make orders for disclosure to the applicant of GP records, CCG records and nursing home records.
47. That leaves the question of a COP24 statement by the local authority. I hope I have made it clear to Mr Holbrook that I am dealing with this matter very definitely in the context of considerations of appropriateness of deprivation of liberty. In that context and bearing in mind King LJ's judgment it seems to me absolutely obvious that a statement from the local authority setting out some of the further information which the Official Solicitor has sought is a sensible, proportionate requirement in this case.
48. Therefore, I am going to make a direction which provides for the respondent local authority to file a witness statement which includes those matters set out at (c), (d) and (e) of paragraph 2 of Mr McKendrick's draft and (b) and (c) of paragraph 3. If in due course an application is made for the filing of any expert report it will, it seems to

me, be appropriate also to give the local authority an opportunity to respond to that or at least consider the local authority's involvement in that but I need not do that today. Mr Holbrook has indicated that he does not have any issues with those parts which I have indicated but I think a date has yet to be addressed.

49. In respect of the other directions in the draft orders submitted, paragraphs 4 and 5 I think are necessary, appropriate and proportionate. Paragraph 6, for the avoidance of doubt, could and should be amended to include a provision which allows for the parties to file proposals for a final order for consideration of the court without an attended hearing if they reach agreement on that basis. I do not think it is strictly necessary ever to have that direction but for the avoidance of doubt I put it in.
50. I will today list this matter for a further hearing and fix the hearing date but I would like to make clear that putting it in the diary now is a way of making sure that there is not further delay. If the hearing is not needed then the following directions apply.

(After further submissions)

51. I am now asked to determine where the burden of costs of consideration of this 'legal argument', which was the express purpose of this hearing should lie.
52. The substantive proceedings in this matter fall within rule 19.3.
53. Mr Holbrook seeks to characterise the dismissal of his application today as if this was an application dismissed in the ordinary run of events not in itself sufficient for departing from the general rule. I would have some sympathy with that if we were talking about the substantive application but we are not. We are talking about the local authority's application framed in July as a jurisdictional matter, determined by me today never to have been anything more than case management issues.
54. The Official Solicitor says that the court should depart from the general rule, as the court has power to do pursuant to rule 19.5. The grounds for that are said to be that
 - a. the local authority gave no indication of its position until the morning of the hearing on 12 July and in particular it failed to articulate any disagreement with draft orders which had been submitted before that hearing.
 - b. there was no local authority representative at court, at the July hearing so no possibility or limited possibility of discussion.
 - c. there has since then been failure to comply with directions for filing the skeleton argument which have caused inconvenience and further delay.
 - d. the position statement drawn up by the local authority in respect of the July hearing was drawn up without sight of the bundle and is now accepted by the local authority's counsel himself to have been largely wrong in that only two out of the six submissions were pursued today.

(I think that is a reasonable summary of those matters spelt out in paragraph 39 of Mr McKendrick's position statement but in any event I make it clear that that is what I am referring to).

55. General rules are important. That they give everybody a predictability and a sense of expectation which helps the whole system to work more efficiently. I do not depart from general rules easily. I do have regard to those grounds spelt out in rule 19.5. It does seem to me painfully clear that that progress which has been made in this matter today could and should have been made in July if the local authority had taken a more sensible and appropriate approach to these proceedings. Because they did not, it is inescapably the case that the applicant's costs have been increased.
56. It is unusual in a section 21A case, at least at this stage of the proceedings, to have leading counsel. I take note that leading counsel was not instructed on 12 July. However, the consequences or the implications of what the local authority was fervently telling the court and the applicant it was going to pursue in July and was still pursuing to a degree today, (but which I have rejected), explains why it was felt appropriate to instruct leading counsel. I quite understand why the Official Solicitor regarded this as an important matter, the answering of which had to be taken seriously.
57. All public purses are stretched. If you are sitting on a cloud looking down at the public purses, no doubt the sense of taking money from one part of the public pot just to give it to another part of the public pot is questionable. Unfortunately the reality is that each of those parts of the pot can only operate within their own limits and therefore movements between them do make a real difference I do not see why the very important services which the Official Solicitor's office provides should be further tightened or jeopardised by the approach which LBE has chosen to take in these proceedings.
58. Having regard to all of those matters, I am satisfied that in this matter it is appropriate to depart from the general rule. I accept Mr Holbrook has some point when he says that there would have had to have been a hearing at which directions which were made and therefore the costs of one hearing should not be recoupable. Therefore I make the order that all of the costs incurred on behalf of the applicant since the hearing on 12 July are to be paid by the local authority.

(After further submissions)

59. As to the quantum of those costs I am satisfied that Mr Holbrook ought to have opportunity to take instructions notwithstanding that the failure of the local authority to attend by any one other than counsel and the fact that the schedules were not filed on time probably amounts at least to some degree to breach of directions. Nonetheless, this is a sizeable amount of money and I think Mr Holbrook ought to have an opportunity to take instructions on it, rather than making a summary assessment now. That opportunity should however be short so I give a window of opportunity for this to be agreed and that window is 14 days from today. If the costs

are not agreed by that date then they shall be the subject of detailed assessment at the standard rate.

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This transcript has been approved by the Judge