Neutral Citation Number: [2020] EWCOP 77
Case No: COP1354556T

**IN THE COURT OF PROTECTION**

Sitting at Leeds Civil Hearing Centre
Coverdale House
Leeds

Date: 23/06/2020

**Before**:

**HIS HONOUR JUDGE HAYES QC**

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**Between :**

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| **KK** | **Applicant (for joinder)** |
| **- and –** | |
| **LEEDS CITY COUNCIL** | **Respondents** |
| **DK** | |
| **(By the Official Solicitor as her Litigation Friend)** | |

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**Ben McCormack** (instructed by **Henry Hyams**) for the Applicant (KK)
**Sophie Allan** (instructed by **Local Authority Legal Services**) for the First Respondent (Leeds City Council)
**Joseph O'Brien** (instructed by **Switalskis** on behalf of the **Official Solicitor**) for the Second Respondent (DK)

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# Approved Judgment

**HIS HONOUR JUDGE HAYES QC:**

**Introduction**

1. These are Court of Protection proceedings concerning a 19-year-old woman, DK, born on 3 May 2001.

2. This Judgment is the Court's determination of an application by KK to be joined as a party to the proceedings.

3. The applicant in the substantive proceedings (and 1st respondent to this joinder application) is Leeds City Council ("LCC").

4. DK has been assessed to lack capacity to conduct the proceedings. The Official Solicitor is appointed as her litigation friend. DK is the 2nd respondent to the joinder application.

5. Both LCC and the Official Solicitor oppose the joinder application.

6. The legal representation is as follows:
   a. Ben McCormack, Counsel, acts on behalf of KK;
   b. Sophie Allan, Counsel, acts on behalf of LCC;
   c. Joseph O'Brien, Counsel, acts on behalf of DK by her litigation friend the Official Solicitor.

7. KK's biological relationship with DK is that of the maternal aunt. Very sadly, DK's mother took her own life when DK was four months old. After her mother's tragic death, DK was brought up by KK and NL (maternal uncle). So far as DK is concerned, they are her 'mum' and 'dad'. DK's biological father is unknown.

8. DK was born and brought up in [Area B]. KK and NL still live in that city. During DK's childhood, professionals became very worried that she was a victim of Child Sexual Exploitation. At the age of 16, DK went into the care of [Area B] council. There have been a series of placements in different areas of the country. DK's ongoing exposure to sexual exploitation and trafficking led to involvement by the

National Referral Mechanism. In October 2019, DK moved placement once more (to Leeds) after she spoke of an imminent plan to marry an older man whom she barely knew. DK had given her address to this man and was at risk of exploitation. She spent some time in one placement in Leeds before moving to her current placement.

9. There were incidents of DK absconding from the placement. On 20 December 2019, LCC came to learn that DK wished to return to [Area B] to spend Christmas with her family. LCC's view was that this would not be DK's best interests. A capacity assessment was undertaken and the conclusion reached that DK lacked capacity in respect of that decision. Accordingly, an urgent application was issued in the Court of Protection.

10. This emergency application was heard ex parte by District Judge Gardner in York who made interim declarations in respect of DK over the Christmas period and listed the matter for a hearing before Her Honour Judge Lynch on 2 January 2020. At that hearing in the new year, directions were issued and the matter was listed for a further hearing in March 2020.

11. On 14 January 2020, KK issued her application to be joined as a party to proceedings.

12. KK's joinder application came before HHJ Lynch on 28 February 2020. Then (as now) KK's application was opposed by both LCC and the Official Solicitor. The application was adjourned until 22 May 2020 to allow time for receipt and consideration of the social care and police records (which are extensive). HHJ Lynch listed the proceedings before me. She structured the hearing on 22 May 2020 such that an application on behalf of DK to limit disclosure of documents was listed in the morning with KK's joinder application listed in the afternoon.

13. The day before the hearings listed on 22 May 2020, it emerged that counsel then instructed to appear for KK (Francesca Gardner) had to withdraw for professional reasons (which I accept she could not have anticipated). Accordingly, the joinder application by KK was adjourned with my approval until 16 June 2020 which was the soonest date that I could hear it whilst also allowing sufficient time for alternative counsel (Ben McCormack) to be instructed to act for KK. The issue of disclosure

remained listed before me, as HHJ Lynch had directed, on the morning of 22 May 2020 when I heard submissions on behalf of LCC and DK. However, I did not give any Judgment then on that issue. The issue of disclosure only requires determination *if* the Court is satisfied that the test for joinder of KK as a party is satisfied. If she is not joined as a party, then the question as to what (if any) written evidence should be withheld from her does not arise. If she is joined, then – as Mr McCormack submitted – there would need to be a further hearing at which he could address the Court further on behalf of KK (albeit submissions for KK would have to be made in the absence of knowing the information sought to be withheld).

**Joinder – The Legal Test**

14. Rule 9.15(1) of the Court of Protection Rules 2017 ("COP Rules 2017") provides that "Any person with sufficient interest may apply to the court to be joined as a party to the proceedings".

15. That rule only founds the right to *apply*. It does not automatically follow that the person who can show "sufficient interest" must be joined as a party. Rather, that question falls to be determined by the court applying rule 9.13(2) (quoted below).

16. Rule 9.15(1) operates to screen out applications which cannot meet the "sufficient interest" test. If the court is not satisfied that the person who makes an application (or purports to do so) has "sufficient interest" then that is the end of the matter. To give an obvious example, someone unknown to P (or with only fleeting/trivial involvement in P's life) would not satisfy the "sufficient interest" test. They would have no right to make an application and would accordingly fall at that "first hurdle".

17. If a person overcomes this first hurdle of "sufficient interest", the application is properly made. But it does not follow that the applicant must be joined. The court then must apply a further test when deciding if to join that person as a party. That test is found in rule 9.13(2) of the COP Rules 2017 which provides:

    "The Court <u>may</u> order a person to be joined as a party if it considers that it is <u>desirable</u> to do so for the purpose of dealing with the application" (underlining added).

18. The language used in rule 9.13(2) conveys that the court has a broad discretion when determining if a person should be joined to the proceedings. As Mr McCormack properly conceded during oral submissions, even if that person can show a close relationship with P, this does not give rise to an "entitlement" or "right" to be joined or any "presumption" that joinder should happen.

19. The rules quoted above are also subject to the general principles set out in rule 1.1 of the COP Rules 2017 which provides:

(1) These Rules have the overriding objective of enabling the court to deal with a case justly and at proportionate cost, having regard to the principles contained in the Act.

(2) The court will seek to give effect to the overriding objective when it:

(a) exercises any power under the rules; or

(b) interprets any rule or practice direction.

(3) Dealing with a case justly and at proportionate cost includes, so far as is practicable:

(a) ensuring that it is dealt with expeditiously and fairly;

(b) ensuring that P's interests and position are properly considered;

(c) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

(d) ensuring that the parties are on an equal footing;

(e) saving expense;

(f) allotting to it an appropriate share of the court's resources, while taking account of the need to allot resources to other cases; and

(g) enforcing compliance with rules, practice directions and orders.

20. This means that when I interpret and apply the rules for joinder, I must keep the above factors in mind and seek to give effect to the overriding objective when doing so. As part of that exercise, I must ensure that DK's "interests and position are properly considered". This wording is emphasised by both LCC and the Official Solicitor. If the Court is persuaded that joining KK as a party will be contrary to the interests and position of DK, then it contended that I should refuse KK's application to be joined. As Ms Allan puts it at paragraph 9.1 of her Position Statement dated 9 June 2020:

"At the risk of stating the obvious, these are Court of Protection proceedings concerning DK and her best interests. It is imperative that DK's interests are prioritised".

The same proposition lies at the core of the submissions made by Mr O'Brien on behalf of DK.

21. In terms of how to construe and apply the wording in rule 9.13(2), I am assisted by the ruling of Bodey J in *Re SK (by his litigation friend the Official Solicitor)* [2012] EWHC 1990 (COP), a case decided when the former Court of Protection Rules 2007 were in force (the relevant rule then being rule 73 which was similarly worded). Bodey J stated:

> '*... the court may join a new party if it considers that it is "...desirable to do so for the purpose of dealing with the application." The clear import of the wording ... is that the joinder of such an applicant would be to enable the court to better deal with the substantive application (for example, by its being able take into account and test the views of a close relative who knew the incapacitated person and was familiar with his wishes, feelings and preferences before he became incapacitated).' (para* [42])
>
> *The word "desirable" necessarily imports a judicial decision as regards balancing the pros and cons of the particular joinder sought in the particular circumstances of the case.' (para* [43]).

22. I observe now that if ever there was a case which illustrates the need to balance competing factors when deciding this issue, this is it. All counsel have put their respective cases in a skilled and measured manner in seeking to persuade the court of their opposing positions. It has proved to be a challenging task in balancing the factors which pull in opposite directions. To complicate matters further, in opposing the joinder application, LCC and the Official Solicitor rely upon written evidence which has not been disclosed to KK. That evidence is material to the balancing exercise which informs the court's decision. But it cannot be disclosed to KK because, to do so would - of itself - be to act contrary to DK's best interests. This means that KK (and those who act for her) are unaware of what that written evidence

contains and why it is said to weigh against her joinder application. This has necessitated this Court preparing a Supplemental Judgment (not to be seen by KK or her legal representatives) which addresses that evidence. This is an unusual course but one that was proposed to the Court as the best way of ensuring that DK's interests are protected.

23. Although I was invited by LCC (supported by the Official Solicitor) to "give a short 'open' Judgment supported by a more detailed closed Judgment" (LCC's Position Statement 9 June 2020, paragraph 10(i) and oral submissions), I have, in fact, endeavoured to make this Judgment (which the existing parties and KK will see) as detailed as I can. The Supplemental Judgment (which KK will not see) is correspondingly shorter.

**Does KK have "sufficient interest" to make an application (applying rule 9.15(1))?**

24. I consider that this question can be dealt with shortly. I find that the fact that KK took on the role of mother figure for DK from the age of 4 months and was her main carer throughout her childhood until DK's admission to care at the age of 16 means that KK meets the test of "sufficient interest". I find that KK is able to pass this "first hurdle" and I proceed to address what I will term the "desirability test".

**Is it desirable for KK to be joined as a party for the purpose of dealing with the application (applying rule 9.13(2))?**

25. I should make clear that, although rule 9.15(1) and rule 9.13(2) are worded differently and apply sequentially in the way I have explained, this is not to say that there is no cross-over between them. When I apply the desirability test in rule 9.13(2), I must bring into account the reasons why it is that KK has "sufficient interest" to make her application.

26. This point is illustrated by paragraphs 7 and 8 of the Position Statement on behalf of KK dated 18 May 2020 (by her former counsel) where a range of matters are listed. Although the factors identified are linked in those paragraphs (by counsel) to the "sufficient interest" test, it is implicit that KK seeks to rely on such matters to contend

also that the "desirability" test is met. It is emphasised on KK's behalf that she has played a parenting role in DK's life since the age of 4 months. DK calls her "mum" and regards KK's children as her siblings. She highlights her ongoing contact with DK and maintains that she is interested in her welfare and decision making about her. She voices concern about past placement breakdowns and expresses the wish to participate in the assessment process leading to best interest decisions. From KK's perspective, DK has the wish to return to live with her and the younger "siblings".

27. Such matters not only establish that KK has "sufficient interest" to make her application; they are material also to the question whether it is desirable that she should be joined as a party to these proceedings and I weigh them carefully in the balance when considering her application. In many cases, such matters would combine to satisfy the desirability test, in the absence of strong reasons weighing heavily on the other side of the balance. For understandable reasons, they are emphasised on behalf of KK in her written and oral submissions.

28. What, then, are the countervailing factors said to be? In LCC's Position Statement dated 9 June 2020, Ms Allan lists (at paragraph 7) the factors which found LCC's opposition to joinder. In his oral submissions on behalf of the Official Solicitor, Mr O' Brien submitted that this was a "compelling list". In its redacted form, paragraph 7 reads:

"[7] As to KK's application, LCC remains opposed to the same and avers that such joinder would not be 'desirable' or in DK's best interests. In particular:

*i)* DK has made allegations [against] family members and their associates, including AK (KK's husband), BK (NL's eldest son) *[redacted]*

*ii)* *[redacted]*

iii) There is a strong presumption of disclosure of documents between parties in proceedings and any order for non-disclosure is generally subject to a test of strict necessity. In the event that KK is joined to proceedings, LCC would

oppose disclosure of documents within the proceedings to her for all the reasons set out in its position statement in respect of the official solicitor's application for non-disclosure. However, in the event of joinder, disclosure may well remain an issue which is both complex and time-consuming in circumstances where the focus should properly be on DK's best interests.

iv) LCC considers that KK's relationship with DK exhibits elements of control and that KK having party status would perpetuate and facilitate this control.

v) LCC is further concerned that KK can behave in ways which are harmful to DK e.g. DK recently attempted to take an overdose of medication and a support worker at DK's placement overheard part of a telephone conversation between DK and KK shortly afterwards where KK appeared to encourage DK to end her life. DK *[redacted]* exhibited behaviours appearing to confirm this. For the avoidance of doubt, it is understood that KK denies this interpretation of events.

vi) DK's behaviour has been observed to change when she feels that KK may find out and DK may say what she feels KK wants to hear. LCC has grave concerns that KK being a party to these proceedings may inhibit DK from making disclosures and expressing her wishes and feelings both in respect of these proceedings and outwith the proceedings".

29. At paragraph 8 of LCC's Position Statement, it is acknowledged that DK views KK as her 'Mum' and in family proceedings involving children, "there is clearly a strong presumption that parents should be parties". (Indeed, I would add, those with parental responsibility for the child are made parties automatically by operation of rule 12.3 of the Family Procedure Rules 2010). However, Ms Allan goes on to submit that:

"… the position is somewhat different when proceedings involve a vulnerable adult in the court of protection, particularly where it is not either a proposed or realistic option for P to reside with or be cared for by the prospective party".

30. At paragraph 9, Ms Allan addresses the approach that she submits the Court should take when considering and balancing DK's and KK's Article 6 and Article 8 rights. I

have quoted (at paragraph 20 above) her core observation that it is imperative to prioritise the interests of DK in these Court of Protection proceedings. She continues:

> "[9.2] DK's Article 6 and Article 8 rights are plainly engaged: LCC submits that KK becoming a party is likely to inhibit DK expressing her true wishes and feelings, her participation in these proceedings and her engagement with professionals. Any orders for disclosure to KK will impinge on DK's privacy".

31. Ms Allan proceeds to address the welfare issues that are before the court. As to residence, KK does not advance the case that KK should return home and this would not be a realistic option in any event. Nor would a return to [Area B] given the very serious risks to DK which led to her being moved away from that locality. Ms Allan goes on (at paragraph 9.4 of her Position Statement) to address the issue of contact:

> "[i] LCC has previously undertaken an assessment of DK's capacity to consent to contact with both her family and others which concludes that DK lacks capacity to make decisions about contact [*I18-I32 NB LCC opposes disclosure of these documents to KK*]
>
> [ii] Following the hearing on 28/2/20 a risk assessment was undertaken in respect of contact [dated 9/3/20 at J112-J123] which concluded that it was in DK's best interests for contact with her family to be supervised. DK's family were consulted as part of that process and DK and NL confirmed that their preference was for contact to be supervised until they could be satisfied that there was no risk of DK making what they deem to be '*false allegations*' [J115 and J116].
>
> [iii] Prior to the Covid 19 public health crisis plans were being made for face to face contact to take place at a neutral location. KK was to suggest venues which would be suitable for DK's younger brothers, who have autistic spectrum disorder. However, since the onset of the public health crisis DK – who has brittle asthma – has had to 'shield' and so contact has been limited to phone-contact, which takes place regularly".

32. Ms Allan notes that in the Position Statement dated 18 May 2020 on behalf of KK, it is contended that any decision as to DK's best interests should involve consultation with KK and adds:

> "[9.5] … For the avoidance of doubt, KK *is* consulted in respect of best interests' decisions for DK (see e.g. in respect of issues of contact and LCC's recent application in respect of phone and social media ...) and LCC will continue to consult her. The court can also consult KK and consider her views as to any best interests' decisions without her being a party to proceedings. Such consultation could include, for example, KK having some details as to any available options and being permitted to provide evidence as to her own views. It is submitted that this would be a fair means of KK participating in proceedings.
>
> [9.6] As set out in a separate document, LCC has recently made an application to restrict DK's phone and social media use. KK was consulted in respect of LCC's concerns as regards DK's phone and social media use and conveyed her concerns about increased restrictions, as set out in the record of conversation appended to the application. The court will note that the proposed restrictions would still enable DK's family to contact her by phone, and she them. Contact via social media for several hours each day would also be possible. Whilst LCC supports the court considering and having regard to KK's concerns in making its decision in relation to the application, it is not necessary or desirable for KK to be a party in order for such consultation to take place".

33. In response to the above, Mr McCormack addressed what he identified as the two main threads to the opposition to KK being joined. He broadly categorised these as:
    a. That KK was open to criticism in the way that she had behaved; and
    b. That she did not need to be joined and that consultation with KK was the solution.

34. As to criticisms of KK's behaviour, the matters set out at paragraphs 7(iv) and (v) of LCC's Position Statement were noted. Mr McCormack made clear on behalf of KK that she denied exerting an improper degree of control over DK and that KK's case was that DK depended upon her and would phone her regularly. As to the specific incident recently when DK attempted to take an overdose of medication, Mr

McCormack confirmed (as LCC's Position Statement acknowledges in its final sentence) that KK completely denied acting in the manner alleged. In relation to paragraph 7(i), it was acknowledged on KK's behalf that KK had made allegations which had been investigated by the police. KK, he said, would take any step necessary to assist in the determination of the facts by the Court of Protection. At the core of his submission was that if LCC advances a case that these are *facts* that the court needs to decide to determine welfare issues, then the only way that this could be dealt with was by joining KK as a party, enabling her to see the evidence relied on and giving her the opportunity, with the benefit of a lawyer representing her, to present her case in response. He also made the point, conversely, that if LCC took the decision that allegations impugning KK were not claimed to be so important as to require a court fact-finding process, then such "insignificant" facts (the word used by Mr McCormack at paragraph 6 of his Position Statement dated 15 June 2020) could not justify the exclusion of KK from proceedings to which she would, in the ordinary course of events, be joined as a party.

35. As to this, I accept the fundamental point that a difference must be drawn between "allegations" on the one hand and "facts" on the other. If authority for this is needed, it comes from authorities in the family jurisdiction that to speak of allegations (or other similar terms) about a named person's conduct is different to a judicially determined fact that they so acted; *Re H and R (Child Sexual Abuse: Standard of Proof)* [1996] 1 FLR 80; *Re A (A Child) (Fact-finding hearing: Speculation) [*2011] EWCA Civ 12.

36. This issue comes to the fore in care proceedings concerning children because the power for the court to make any public law order can only be exercised if the so called "threshold criteria" in s.31 of the Children Act 1989 are satisfied. If the threshold is crossed, then the Court proceeds to makes its welfare determination for the child concerned. A Local Authority bringing such proceedings is required to establish facts on the balance of probabilities that (when protective measures were taken) the child was suffering or was likely to suffer significant harm attributable to the care given or likely to be given to the child, not being what it would be reasonable to expect a parent to give. The "attributability" limb of that statutory test, therefore,

requires the court to make determinations of fact which relate to the standard of care that the child received or is likely to receive.

37. In this regard, as all Counsel acknowledged in submissions, Court of Protection proceedings are different. There is no threshold test in the Mental Capacity Act 2005 equivalent to that in s.31 of the Children Act 1989. The MCA 2005 protects persons who lack decision-making capacity (the starting point being the presumption of capacity). If a person does lack capacity (as defined in s.2 and s.3 of the Act), the jurisdiction to make best interest decisions is engaged. The legislative structure for this is set out in section 4 of the Act.

38. Under the heading "Best interests", section 4 of the MCA 2005 includes the following:

> 1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—
>
> (a) the person's age or appearance, or
>
> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.
>
> (2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
>
> (3) He must consider—
>
> (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and
>
> (b) if it appears likely that he will, when that is likely to be.
>
> (4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
>
> (5) …
>
> (6) He must consider, so far as is reasonably ascertainable—
>
> (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) …

(d) …

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

39. This legislative wording links to the second issue addressed by Mr McCormack in response to the position advanced by LCC and the Official Solicitor. He submitted that joinder would enable KK to see the evidence (subject to any directions for non-disclosure), provide her own account of DK's background, her current circumstances and what she (KK) believes DK's wishes and feelings to be. He cited the legal test in *RC -v- CC and another* [2014] EWHC 13 (COP) and contended that the narrowness of the exceptions to non-disclosure "cannot dictate the appropriateness of a properly made joinder application". He submitted that the court's case management powers to control what KK can and cannot see as a party was the way of striking, "the proper balance between the (claimed) need to protect DK by preventing KK from seeing particular aspects of the case, and the need for the court to hear from a close family member as to the issues at the heart of this case" (Position Statement 15 June 2020, paragraph 15). Mr McCormack developed these points in oral submissions. He emphasised that KK should be given the opportunity, not just as someone consulted under s.4(7) of the MCA 2005, but rather as a party playing a role in the legal process. As Mr McCormack put it, KK should participate "sitting in the theatre, not sitting in the wings". On the issue of DK's residence, he confirmed that KK was not advancing the case that DK should return home but that KK's wish was for DK to move to an

area much closer to KK's home in [Area B]. On the issue of contact, he said that KK's wish was for unsupervised contact whilst being "open minded to reasonable points" made against that position. But, he said, what she wants is the opportunity to put that case as a party and to see the evidence which founds the basis of a different approach.

40. These points engage with some of the factors that I must weigh in the balance when I seek to give effect to the overriding objective. What is being submitted on behalf of KK is that to ensure that the case is dealt with fairly and to ensure that the parties are on an equal footing, the court should join KK as a party to enable her to be involved in the process. Disputes – such as there are – as to best interest decisions for DK would then fall to be resolved by the court with KK present and participating as a party. These are all important considerations with, I say now, have weighed heavily with me in the decision that I am tasked with making.

41. In this case, however, the situation for DK is far more complex. The complexity is added to by the fact that LCC and the Official Solicitor rely upon written evidence filed in the substantive proceedings the content of which cannot be revealed to KK as, they submit, to do so would be wholly contrary to DK's best interests. They submit that that evidence (placed within the wider context of DK circumstances and vulnerabilities) weigh heavily on the other side of the balance as the effect of joining KK will lead to consequences which cannot be DK's best interests. Further, to take any step of revealing that evidence to KK would be contrary to DK's best interests. This is not remedied, they submit, through the court joining KK as a party and then exercising its powers to redact or limit disclosure of information to KK. The act of joining KK, in itself, would be to take a step contrary to DK's best interests and therefore cannot meet the "desirability test".

42. I have set out that written evidence and considered the implications of it in a Supplementary Judgment. I realise that, for KK, this means that I have considered and weighed in the balance evidence about which she is unaware. But I cannot decide whether it is "desirable" to join KK as a party without asking myself the question whether to take that step would be to act in accordance with or contrary to DK's best

interests. And I cannot answer that question without having regard to the evidence which has been drawn to my attention.

43. Without revealing what that evidence is, I should state my key conclusions having considered and analysed what it says:
    a. I am satisfied that the reasons for not revealing the written evidence to KK are valid and that the necessity for redaction is rooted in DK's best interests.
    b. If I reveal to KK what that written evidence is, DK is likely to disengage from her engagement both with professionals and with these proceedings.
    c. Similarly, if I join KK to these proceedings, notwithstanding that written evidence, those same consequences will be likely to result.
    d. I accept the case of LCC (as set out in paragraph 9.2 of LCC's Position Statement and as supported by the Official Solicitor), that this will inhibit DK expressing her true wishes and feelings and undermine the process of ensuring her effective participation in these proceedings.
    e. Accordingly, the weight to be given to that evidence is significant as the effects of joinder, if allowed, would be to bring about consequences adverse to DK's welfare.
    f. This is not resolved by joining KK as a party and then exercising the Court's power to limit or redact disclosure. The effect of joinder, in itself, will bring about these adverse consequences for DK.

44. Applying the legal structure set out earlier in this Judgment, my analysis and conclusions on this joinder application are as follows.

45. The case law requires me to weigh the advantages and disadvantages when addressing the desirability of joinder; *Re SK (by his litigation friend the Official Solicitor)* [2012] EWHC 1990 (COP) at para 43.

46. In performing that balancing exercise, I accept that KK has advanced reasons which, in nearly all cases, would weigh in favour of granting a joinder application. Her case has been put with great skill on her behalf when emphasising those matters which would support joinder.

47. However, the Court has been presented with written evidence which leads to my conclusions about the adverse consequences (set out at paragraph 43 above) if KK is joined. Accordingly, the disadvantages for DK weigh very heavily on the other side of the balance.

48. When I weigh these competing factors, I remind myself that the very purpose of these proceedings is to ensure the protection of DK and that decisions are made in her best interests. The Court will fail to fulfil that role by making a decision which runs counter to her best interests.

49. Making decisions that are in the best interests of DK is crucial if the Court of Protection is to remain true to its name. Placing DK's best interests at the heart of all decisions is vital. To be able fully to understand DK's wishes and feelings, professionals working with her need to be able to do so over a period of time and to maintain her trust and confidence. A proper structure to enable this to happen is essential for DK. As LCC and the Official Solicitor rightly submit, it cannot be in DK's best interests to make a decision which undermines the ability to do this.

50. If I join KK as a party, I will preciptate circumstances which run counter to both s.4 of the MCA 2005 and the overriding objective in rule 1.1 of the COP Rules 2017. In particular:
    i. The Court must, so far as reasonably practicable, permit and encourage DK to participate, or to improve her ability to participate, as fully as possible in any act done for her and any decision affecting her (MCA 2005, s.4(4); and
    ii. The Court must, so far as is practicable, ensure that DK's interests and position are properly considered (COP Rules 2017, Rule 1.1(3)(b)).

51. To join KK would be to strike at the heart of this statutory scheme designed for DK's participation in the legal process. Put another way, allowing KK to participate (as a party) will be at the expense of ensuring DK's effective participation.

52. Bringing about these consequences for DK would therefore interfere with her right to a fair hearing under Article 6.

53. There is no "right" for KK to participate in these proceedings as a party. Whether or not KK should be joined is subject to the test of desirability laid down in rule 9.13(2) of the COP Rule 2017. If the Court concludes, balancing the advantages and disadvantages, that that test is not met, then there is no interference with KK's Article 6 right.

54. Further, KK remains a person who would fall to be consulted pursuant to s.4(7) of the MCA 2005. I accept that this is materially different to participation as a party. However, I also accept the submissions of LCC and the Official Solicitor that, in the circumstance of this case:
    a. This is a fair way of striking the balance between the opposing factors; and
    b. This is the only way of ensuring that DK's best interests are properly recognised and acted on.

55. As to the Article 8 right to respect for private and family life, I find that, for the reasons set out further in the Supplemental Judgment, to join KK as a party would be to interfere with DK's right to respect for her private life. I remind myself that it is established law in the family jurisdiction that where there is a conflict between the interests of the child and those of the parent(s) which can only be resolved to the disadvantage of one of them, the interests of the child must prevail under article 8(2); *Yousef -v- The Netherlands* [2003] FLR 210, ECHR. I find that this same principle applies in these court of protection proceedings such that DK's interests must prevail over those of KK.

56. It follows from the above that, when I have balanced the competing factors in this case, I have concluded that it is not desirable to join KK for the purposes of the application. The factors which support her case to be joined are, I find, outweighed by the very significant disadvantages which would result from joinder.

57. KK therefore fails to meet the test prescribed in rule 9.13(2) of the COP Rules 2017 and I refuse her application to be joined as a party.

**HHJ Hayes QC**

**23 June 2020**