



Neutral Citation Number: [2011] EWHC 3321 (COP)

Case No: COP 1205016

**IN THE COURT OF PROTECTION**

Preston Combined Court Centre

Date: xx/12/2011

**Before:**

**THE HONOURABLE MR JUSTICE PETER JACKSON**

**Between :**

**C**

**Applicant**

**(by his litigation friend, the Official Solicitor)**

**- and -**

**BLACKBURN WITH DARWEN BOROUGH COUNCIL**

**- and -**

**A CARE HOME**

**- and -**

**BLACKBURN WITH DARWEN TEACHING CARE TRUST**

**Respondents**

**Ms Barbara Hewson** (instructed by **Maxwell Gillott on behalf of the Official Solicitor**) for CC

**Mr Jonathan Butler** (instructed by **Legal Services**) for the Local Authority

The Care Home did not appear and was not legally represented

**Mr Simon Burrows** (instructed by **Hempsons**) for the Care Trust

Hearing date: 6 December 2011

Judgment date xx December 2011

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**JUDGMENT**

Approved

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**Mr Justice Peter Jackson:**

### **Introduction**

1. Mr C is a single man aged 45 who lacks capacity to litigate or to make decisions about where he should live. The application made on his behalf under s.21A Mental Capacity Act 2005 ('the MCA') on 11 June 2011, is for the discharge of a standard authorisation dated 23 January 2011 under the MCA Deprivation of Liberty Safeguards ('DOLS'). That authorisation was sought by the managers of the home in which Mr C lives ('the care home') and was granted by his local authority ('the LA') as supervisory body.
2. The application under s.21A directly raises the question of whether Mr C is being deprived of his liberty and, if he is, whether this is necessary. The proceedings also indirectly raise a wider question about the jurisdiction of the Court of Protection in relation to a person who, like Mr C, is subject to a guardianship order under s.7 of the Mental Health Act 1983 ('the MHA').

### **Background**

3. At the age of 4, Mr C was knocked down by a bus. It is not clear whether this had long-term effects but it is the case that he subsequently attended a school for pupils with learning difficulties. After school, he worked for ten years in his father's business. After the death of his father, he continued to be supported by his mother and two sisters.
4. In February 2000, when living in a hostel, Mr C fell off the roof and suffered a severe brain injury for which he required surgery, following which he developed epilepsy. He lived in warden-controlled accommodation until moving in February 2008 to a rehabilitation unit for people with brain injuries. In May 2008 he was detained for five weeks under s.3 MHA after attempting to kill himself by strangulation. In June 2008, he moved into another unit as part of a community integration programme, before returning to the rehabilitation unit in December 2008. There he made a second, similar suicide attempt and was again detained under the MHA. In April 2009, he bought a large knife and called an ambulance, saying that he was going to kill himself. In May 2009, he made several further attempts to harm himself, including by self-strangulation.
5. In June 2009, Mr C's MHA detention came to an end and in October 2009, he went abroad for a month. On his return in December 2009, Mr C was admitted to the care home where he has now lived for two years.
6. In June 2010, the LA made an application for guardianship, following which Mr C made a further suicide attempt. On 25 June 2010 he was made subject to the guardianship of the LA for 6 months under s.7 MHA, the criteria for which are that a person suffers from a mental disorder of a nature or degree which

warrants his reception in guardianship and that it is necessary in the interests of his welfare or for the protection of other persons.

7. In November 2010, Mr C again went abroad for about a month without the LA's knowledge. On 20 December 2010, the guardianship was renewed for a further period of 6 months.
8. In January 2011, the police were called after Mr C had kicked down a door when trying to leave the care home. As a result, assessments were carried out and a standard DOLS authorisation was issued on 23 January 2011 for 12 months. This was reviewed in May 2011, and some less stringent controls on Mr C's visits to his family were substituted. In the same month there was an incident of aggression by Mr C towards a female staff member.
9. Summarising, the history shows that Mr C suffers from:
  - Epilepsy
  - Organic personality disorder
  - A history of self-harming
  - Aggression towards staff and family members
  - Impulsive behaviour with no sense of danger, for example running into traffic
  - Obsessive-compulsive traits
10. As Mr C's guardian, the LA has required him to live at the care home, which has locked doors. Mr C has 1:1 supervision inside and outside the home, including when on trips to his family (this at their request). Such trips out of the home are frequent, nearly daily, but are limited by the availability of the supervising staff, who have other responsibilities. When Mr C tries to leave unsupervised, distraction techniques are employed. His mood is controlled by antipsychotic medication.
11. For all his difficulties, Mr C has significant abilities, to the extent that he is employed to perform some of the duties of a janitor at the care home.

### **The current proceedings**

12. On 11 June 2011, an MCA application was issued on behalf of Mr C, challenging the standard authorisation. Directions were given, leading to Mr C being represented by the Official Solicitor ('the OS'), and to reports being obtained on his mental capacity and his best interests. These reports were commissioned as a practical expedient, everyone being mindful that the court's jurisdiction was challenged in the light of the guardianship.
13. On 27 June 2011, the MHA guardianship was renewed for one year. Mr C's appeal to the First Tier Tribunal was rejected on 31 October 2011.
14. The MCA application came before me on 6 December 2011, when I read the documents, heard submissions from counsel for the OS, the LA and from the

Care Trust that provides the care home ('the Trust'). I also heard directly from Mr C at his request. Written submissions were made by the care home, which is also a party.

### **The expert reports**

15. Dr M, consultant psychiatrist, has closely considered the history and interviewed Mr C. She advises that he lacks capacity in relation to the issues before the court. This conclusion is accepted by all parties.
16. Mr W, independent social worker, has investigated the issue of best interests. In agreement with the best interests assessor, he concludes that Mr C is being deprived of his liberty and that the court should authorise this deprivation. However, he considers that the current situation is not in Mr C's best interests and that he should move within three months. In Mr W's view, Mr C needs to be in a specialist environment with adequate space and adequate funding to meet his extremely complex needs. By this means, Mr C might be helped through rehabilitation and move on to supported community living. Mr W observes that the staff ratio means that Mr C's trips outside the home are unduly limited. He recommends that a named specialist rehabilitation unit should be approached to see whether it can offer a place. This unit is some 30 miles from the care home, and away from where Mr C's family members live.
17. As a result of other commitments, Mr W was not available to attend the hearing, but was able to speak to the parties' advisers by telephone during the course of the day.
18. Like the parties, I have considered the effect of Mr W's absence on the court's ability to make a decision on the issues. In the end, no one applied for an adjournment and all asked for the matter to proceed. Mr W has clarified his views in written communications since writing his report. I accept that if he had been able to attend, he might have added to his views to some extent, despite the limited time available for the hearing. I therefore concluded that it was appropriate to proceed without oral evidence, and that the court could fairly reach decisions on the available information.

### **The parties' positions**

19. **Mr C** spoke on his own behalf. He said that he feels a great deal of stress as a result of being under both guardianship and DOLS. It gets on his mind and makes his epilepsy worse. He gets confused and doesn't know who to turn to. He has been at the care home for two years and wants to go somewhere else. He does not get on with the other residents and stays in his bedroom for most of the day to avoid them. The situation is too much for him. He wants the guardianship and the DOLS lifted.

20. **The OS**, on behalf of Mr C, made submissions through Ms Hewson. She argues that:

- (1) Mr C is entitled to the protection of DOLS, and is not 'ineligible'.
- (2) Mr C is being deprived of his liberty because of the extent of the restrictions on his freedom of movement and because, as a person who is relatively high-functioning, the weight of these restrictions is particularly heavy.
- (3) The standard authorisation is flawed and ineffective because it is insufficiently specific about what is and what is not permitted.
- (4) It is in any event unnecessary because Mr C was not prevented from going out when he wanted to in his previous placement (the rehabilitation unit) and because at the care home he is usually allowed to go out with supervision when he becomes upset and insists on it.
- (5) On a proper analysis of s.8 MHA, the Court of Protection is not prevented from making best interests decisions in relation to the residence of persons under guardianship.
- (6) Directions should be given to investigate the alternative placement possibility proposed by Mr W.

21. **The LA** responded through Mr Butler. He submits that:

- (1) (In agreement with the Trust) a person, such as Mr C, is not ineligible for the protection of DOLS merely by virtue of being subject to guardianship.
- (2) Mr C is not being deprived of his liberty, despite his unhappiness at being in the care home. Reference to the MCA Code of Practice and the decision in Cheshire West and Chester Council v P [2011] EWCA Civ 1257 demonstrate that the present regime consists of restrictions that are no more than is appropriate to a person in Mr C's position.
- (3) The standard authorisation is not well drafted but is based on sound assessments and its effect can be clearly understood.
- (4) Restrictions on Mr C are essential for his wellbeing and will continue to be employed. In the absence of an authorisation, the care home will be able to step in, using its reserve powers under ss.5 and 6 MCA to prevent serious harm to Mr C.
- (5) s.8 MHA prevents the Court of Protection from exercising jurisdiction in this matter. The question of Mr C's residence is one of the matters exclusively reserved to the LA as his guardian. Intervention by this court would

emasculate the powers of the guardian and set up a conflict between the two legal processes.

(6) These proceedings should go no further.

22. **The Trust**, through Mr Burrows, supports the LA's legal submissions. In response to Mr W's recommendations, the Trust will review the possibility of increased funding to enable Mr C to spend more time out of the care home under supervision. It does not believe that he requires further rehabilitation and opposes the prospect of a move on clinical grounds. In fact, the further assessment proposed by Mr W would unsettle Mr C and exacerbate his disturbance.

23. **The care home** expresses profound concern at the effect of this protracted dispute on Mr C's mental and emotional state. It refutes Mr W's suggestion that its staff lack any of the necessary qualifications to meet Mr C's needs. From extensive knowledge of looking after him, the care home makes the point that it is intrinsic to Mr C's condition that he resents necessary care and supervision, and that this would not change if he went elsewhere. The care home is committed to continuing to work with Mr C and with other agencies to maintain his progress once the unsettling effect of the proceedings subsides.

#### **Discussion**

24. Mr C's situation raises multiple legal issues. It is a truly unhappy state of affairs that the law governing the fundamental rights and welfare of incapacitated people should be so complex. As this case shows, its intricacies challenge the understanding of professionals working in the field and are completely inaccessible to those for whose benefit the legislation has been devised, including those with a relatively high level of understanding, such as Mr C. This judgment, while keeping citation from statute, regulation, codes of practice and reported cases to the necessary minimum, still remains more focused on technical issues than I would like.

25. The application formally before the court relates to the DOLS authorisation (s.21A MCA). Underlying it is an issue about Mr C's residence, about which there is no formal application under s.16 MCA. No party raises that absence as a bar to the OS's submissions being considered on their merits and I will therefore address both issues.

#### **Conclusion: the standard authorisation**

26. Having considered the arguments in relation to the standard authorisation, my conclusions are as follows:

(1) As a preliminary matter, I find that Mr C qualifies for the protection of the DOLS regime.

The DOLS safeguards do not apply to certain people who are under the MHA regime. They are incongruously referred to in the legislation as being 'ineligible to be deprived of their liberty'.

Persons under the guardianship regime fall within Case D in paragraph 2 of MCA Schedule 1A, which in turn brings paragraphs 3 and 5 into play.

In consequence of paragraph 3, the person will be ineligible if an authorised course of action (defined at paragraph 13 as a deprivation of liberty resulting from an order of the Court of Protection under s16) is not in accordance with a requirement of the guardianship regime. So, Mr C having been required to reside at the care home by the LA as his guardian, the MCA cannot be used to authorise a deprivation of liberty elsewhere. As this is not the effect of the authorisation in this case, which seeks to keep him at the care home, paragraph 3 does not take him outside the regime.

In consequence of paragraph 5, the person will be ineligible if he is being accommodated in hospital for mental health treatment, and objects. This qualification is not engaged in Mr C's case.

- (2) On a narrow balance, Mr C is subject to restriction, as opposed to deprivation, of his liberty.

I accept that Mr C is acutely anxious about the restraints upon him, being more aware of his predicament than the subjects of previous reported cases. On the other hand, the restraints upon him within and outside the care home are relatively lighter. The existence of locked doors and a requirement of supervision are not in themselves a deprivation of liberty, where their purpose is to protect a resident from the consequence of an epileptic fit, or harm caused by a lack of awareness of risk, or from self-harm. The limit on the number of outings as a consequence of staffing levels does not tip the balance, when Mr C in fact has quite regular access to the community and to his family.

I reach this conclusion after consideration of Mr C's particular circumstances and the guidance given in the *Cheshire* case. One feature mentioned in that decision (at paragraph 58) is the difference it makes if a person has somewhere else to go and wants to live there. In the present case Mr C undoubtedly wants to live somewhere else, but this is a reflection of his unhappiness with the care home. He would like to be able to live an unconfined life in the community, but this is not realistically possible due to the extent of his difficulties. I distinguish his situation from those where a person has been removed from a home that is still realistically available. While Mr W's suggestion of another unit is

consistent with Mr C's wish to leave the care home, it does not represent an actual alternative at the present time.

The current standard authorisation, due to expire on 22 January 2012, will therefore be discharged. If circumstances change, the care home will have to assess whether a fresh application for an authorisation is necessary.

In case my prior conclusion is incorrect, I address the OS's other submissions.

- (3) I do not accept that the standard authorisation was vitiated by the rather perfunctory way in which it was completed.

The basic requirements for the form of a standard authorisation are set out at paragraph 55(1) of MCA Schedule A1. Although these are barely met in this case, one must look to the substance of these documents, and not just to their presentation. Authorisations must be founded on sound assessments. In the present case, the managing authority's request and the best interests assessment are documents of substance. The nature of the restrictions is sufficiently clear from the documentation (see, for example, the detailed account of the restrictions at page 7 of the care home's application and the reasons for them at pages 7 and 8 of the best interests assessment, which it is unnecessary to repeat here). The fact that they are inadequately summarised in the standard authorisation is unsatisfactory for a document of this importance, but not fatal to the lawfulness of the authorisation.

- (4) I reject the submission on behalf of Mr C that the regime at the care home is unnecessary.

The history shows that Mr C is a vulnerable person who requires constant support and supervision. The fact that the restrictions are applied flexibly does not mean that they are not necessary for his safety and wellbeing, and possibly that of others. It follows that, had Mr C been deprived of his liberty, I would not have set aside the standard authorisation.

I have given thought to Mr W's recommendations and his conclusion that the current situation is not in Mr C's best interests. I acknowledge that he has not had the opportunity to enlarge upon his recommendations. Nevertheless, his advice has to be balanced against the known history, which is that Mr C has already experienced specialist rehabilitation in his previous placement. Account also has to be taken of the unsettling effect of the proposed investigations on Mr C's well-being. Moreover, Mr W's proposal is opposed by Mr C's local authority, his health trust and his care home. In my view, on the information currently available, it may very well not be in Mr C's best interests to disturb his current placement.

27. I therefore accept the broad submissions of the LA and the Trust in relation to the application under s.21A for the discharge of the standard authorisation. The authorisation will be set aside for the reasons that they give, rather than for those proposed by the OS.

**Conclusion: jurisdiction of the Court of Protection in guardianship cases**

28. s.8 MHA reads as follows, with emphasis supplied:

**Effect of guardianship application, etc.**

8(1) Where a guardianship application, duly made under the provisions of this Part of this Act and forwarded to the local social services authority within the period allowed by subsection (2) below is accepted by that authority, **the application shall**, subject to regulations made by the Secretary of State, **confer on the authority or person named in the application as guardian, to the exclusion of any other person—**

- (a) **the power to require the patient to reside at a place specified by the authority or person named as guardian;**
- (b) the power to require the patient to attend at places and times so specified for the purpose of medical treatment, occupation, education or training;
- (c) the power to require access to the patient to be given, at any place where the patient is residing, to any registered medical practitioner, approved mental health professional or other person so specified.

29. If the patient absents himself without leave from the place at which he is required to reside, he may be taken into custody and returned: MHA s.18(3).

30. However, guardianship does not enable the guardian to deprive a person of their liberty and there is no power given to the guardian to prevent the person from leaving: MCA Code of Practice 13.16. Accordingly, authorisations under the DOLS regime may be necessary.

31. The LA and the Trust submit that the effect of s.8 is clear. The exclusive right to determine place of residence is vested in the LA as guardian. The Court of Protection cannot discharge the guardianship when a statutory procedure for this exists, and it cannot entertain an application to determine place of residence while the guardianship is in force.

32. In response, the OS argues that the reference in s.8 to *any other person* does not include the court, because it is a public authority and not a person. Ms Hewson submits that:

"...if Parliament had intended a guardian's decisions to be exempt from judicial review, of any kind, section 8 would have been drafted to read "to the exclusion of

any other *authority or* person. A guardian's decision-making must be susceptible to judicial oversight."

## Discussion

33. The relationship between the MHA and the newly-added MCA DOLS provisions was considered by Charles J in GJ v The Foundation Trust and others [2009] EWHC (Fam) 2972, following a hearing at which he had the benefit of submissions on behalf of the Secretary of State for Health. Although that case concerned a hospital patient, the judge considered the matter more widely, including with reference to persons under guardianship.
34. At paragraphs 58-65, Charles J concluded that in general the MHA, where it applies, has primacy over the MCA, and that decision-makers should take all practical steps to ensure that that primacy is recognised and given effect to. I find this approach persuasive in relation to the present case and I respectfully adopt it.
35. In my view, there are good reasons why the provisions of the MHA should prevail where they apply. It is a self-contained system with inbuilt checks and balances and it is well understood by professionals working in the field. It is cheaper than the Court of Protection.
36. It is of note that the Court of Protection only became involved in Mr C's case because of the DOLS issue, from which point the argument has spread towards a consideration of welfare orders.
37. On the other hand, it is not in my view appropriate for genuinely contested issues about the place of residence of a resisting incapacitated person to be determined either under the guardianship regime or by means of a standard authorisation under the DOLS regime. Substantial decisions of that kind ought properly to be made by the Court of Protection, using its power to make welfare decisions under s16 MCA.
38. In particular, I note that the MHA Code of Practice at Chapter 26.35 states that:
- "If a patient consistently resists the exercise by the guardian of any their powers, it can normally be concluded that guardianship is not the most appropriate form of care for that person, and the guardianship should be discharged."
- The combination, found in this case, of guardianship and DOLS should in my view be an alerting factor as to the appropriateness of guardianship.
39. However, a decision about the existence of jurisdiction does not depend on the balance of advantage and disadvantage. Tempting though it is to find that the court can override the effects of guardianship (no doubt expressing it to be *in exceptional circumstances*) by making an order that conflicts with the guardian's

requirement about place of residence, the effect of s.8 is inescapable. The words "*to the exclusion of any other person*" are synonymous with "*exclusively*". I cannot accept that Parliament intended to differentiate between a person and an authority in the manner that Ms Hewson suggests. If the distinction is drawn between an individual and an authority, her reading means that the guardian (who could well be an individual) is protected from interference from private individuals but not from public bodies. These would not be limited to the court, but include bodies such as local authorities and health trusts. This cannot be right. The clear intention of the section is to make the three specified decisions the exclusive responsibility of the guardian. That power can only be removed by the discharge of the guardianship under s.72 or by means of judicial review, to the extent that it is available.

40. I therefore find that the Court of Protection lacks jurisdiction to determine Mr C's place of residence while the guardianship remains in effect.

41. Again, if I am wrong about the question of jurisdiction, I would have declined to exercise it in this case at this stage. The Court of Protection, if it had power, would surely only make an order that conflicts with the MHA guardianship regime in exceptional circumstances involving a breach of a person's rights under Article 5 or Article 8 ECHR that was striking and required urgent correction. However unsettled Mr C undoubtedly is at the care home, those circumstances do not exist in his case.

### **The guardianship**

42. s.72(4) MHA provides the power of the Mental Health Tribunal to discharge a person from guardianship.

### **72 Powers of tribunals.**

72(4) Where application is made to the appropriate tribunal by or in respect of a patient who is subject to guardianship under this Act, the tribunal may in any case direct that the patient be discharged, and shall so direct if it is satisfied—

- (a) that he is not then suffering from mental disorder; or
- (b) that it is not necessary in the interests of the welfare of the patient, or for the protection of other persons, that the patient should remain under such guardianship.

43. Mr C's application to the tribunal on 31 October 2011 under s.72(4) was unsuccessful. It is a reflection of the isolated progress of the two sets of proceedings that the papers before me give no clue to the reasons for that decision, and in particular as to whether the tribunal had regard to the Code of Practice in circumstances where Mr C undoubtedly resists the guardian's decision about his place of residence.

44. Guardianship is a relatively rare status. There must be a question as to whether it is the proper vehicle for a decision about Mr C's residence. I invite the LA to consider its position as a guardian. If it chooses to renounce its role, or if the guardianship is discontinued by some other means, this court can then be asked to make orders or declarations about Mr C's residence. So that the outcome of any such application should not be protracted, I reserve the matter to myself if available.
45. In these unusual circumstances I shall not dismiss the welfare application made in Mr C's behalf, but adjourn it with liberty to restore in the event that the guardianship issue is discharged. In the meantime there will be no directions for further enquiries or disclosure.
46. I regret that this leaves a position where Mr C will probably believe that he might be able to leave the care home as a result of further legal action. This is the result of the congested legal landscape, not of the present decision. In the meantime, I caution that a renewed application to this court may not, after consideration of Mr C's welfare, lead to orders for further investigations, let alone to a move from the care home.
47. I invite counsel to draft an order giving effect to my decision.

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