Case No. COP 11822229

IN THE COURT OF PROTECTION
Neutral Citation number: [2015] EWCOP 69

Royal Courts of Justice,
STRAND,
London, WC2A 2LL.

7th July, 2015

B e f o r e :

MR JUSTICE BAKER

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005
AND IN THE MATTER OF M

BETWEEN

A LOCAL AUTHORITY

Applicant

-and-
(1) M
(by his litigation friend, the Official Solicitor)
(2) E
(3) A

Respondents

MISS KERRY BRETHERTON appeared as counsel on behalf of the applicant local authority, instructed by the local authority solicitor.

MR ANDREW BAGCHI Q.C. appeared as counsel on behalf of the Official Solicitor, instructed by Miss Nicola Mackintosh

The Second and Third Respondents appeared in person

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J U D G M E N T
(As Approved)

7th July, 2015

IMPORTANT NOTICE

This judgment was delivered in private. 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 no person other than the advocates or the solicitors instructing them and other persons named in this version of the judgment may be identified by name or location and that in particular the anonymity of the 1st Respondent and members of his 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.

J U D G M E N T

MR JUSTICE BAKER:

Introduction

1. This is the final judgment in these long-running proceedings concerning M, a young man now aged rising 26, which have been continuing in the Court of Protection for nearly two years.

2. The background to this case, which I do not propose to repeat here, is set out in full in the earlier judgment delivered by this court on 11th August 2004 (reported as Re M [2014] EWCOP 33) following a fact-finding hearing in which I considered allegations by the local authority that M had been ill-treated in the care of his parents. In that judgment I made findings in terms substantially as sought by the local authority and summarised in the order made at the conclusion of that judgment as follows.

"(1) M has autistic spectrum disorder and a learning disability.

(2) There is no evidence that his autism was caused by the MMR vaccination.

(3) M's parents' account of an adverse reaction to that vaccination is fabricated.

(4) His mother, E, has also given many other false accounts about M's health.

(5) As a result, she has subjected M to numerous unnecessary tests and interventions.

(6) M suffered from a dental abscess for which E failed to obtain proper treatment and caused him 14 months of unnecessary pain and suffering in 2012/2013.

(7) E has also insisted that M be subjected to a wholly unnecessary diet and

regime of supplement.

(8) Through her abuse of the responsibility entrusted to her as M's deputy, E has controlled all aspects of his life and restricted access to him by a number of professionals.

(9) E has further proved herself incapable of working with the local authority social workers and many members of the care staff at the various residential homes where M has lived.

(10) E's behaviour amounts to factitious disorder imposed on others.

(11) In addition, E has a combination of personality disorders: a narcissistic personality disorder, a histrionic personality disorder and an emotionally unstable personality disorder.

(12) Nonetheless, both E and M's father, A, are deeply devoted to M and would have much to contribute to him if they can work in collaboration with the local authority's social workers and other professionals in M's best interests. Such an outcome would manifestly be to M's advantage but will not be achieved unless A, and in particular E, can demonstrate a fundamental change of attitude."

3. As will also be apparent from a reading of that earlier judgment, a feature of that hearing, and indeed these proceedings as a whole, has been the very great difficulty this court has experienced in managing the case. That difficulty has been caused principally by the conduct of E, M's mother, which in turn is attributable to a large extent to her personality, as described and analyzed at paragraphs 101 to 110 of the main judgment.

4. At the same time, it has been obvious to this court throughout these proceedings that both E and A love their son and have devoted much of their lives to his care and well-being. They are desperately sad that, as a result of my findings, they are unable to care for him and continue to devote great energy in pursuing an agenda in respect of him. Some of that agenda is misguided based, as it is, on an inability to recognise the facts as I have found them to be, but in other respects they have demonstrated a genuine and laudable wish to do whatever they can for their son, whatever the circumstances. Thus, although they do not accept my findings and have indicated they never will accept them, they have engaged in the process of assisting this court in making decisions as to his future in the light of those findings. For that the court is grateful, even though E's conduct continues to cause considerable difficulties in managing the case.

5. In outline, the following events have occurred since the fact finding judgment in August 2014. I stress that this is only an outline; it is not necessary to recite the intervening history in any greater detail. Following the judgment, I made an order on 11th August that, in addition to a recital of the findings as set out above, included, inter alia, the following provisions:

(1) a recital that it is was in M's best interests that his finances be administered

by the granting of an appointeeship to an appropriate officer of the local authority;

(2) a recital that the court would consider at a further hearing final orders in relation to M's residence and contact with family members and whether it was in his best interests to appoint a deputy for health and personal welfare;

(3) declarations pursuant to s.15 of the Mental Capacity Act 2012 that M lacks capacity to litigate in relation to his residence, in relation to care arrangements, in relation to contact and to give consent to medical treatment;

(4) a further declaration that it was not in M's best interests to live with his family but, rather, that it was in his best interests to live in residential accommodation or supported living arranged by the local authority, the precise location to be the subject of a further declaration in due course;

(5) a declaration that, in the interim, it was in M's best interests to continue to live at the address where he had been living for the previous six months;

(6) an order that it was in his best interests to have contact with his mother, father and sister, S, on two occasions per week in the community, supervised by the local authority;

(7) pursuant to s.4(a) of the Act, in so far as the measures made above amounted to a deprivation of liberty, the same were authorised as being in his best interests;

(8) an order that E's application to be appointed as M's deputy for personal, health and welfare and for property and affairs be dismissed and her earlier appointments in that capacity discharged;

(9) pursuant to s.16 of the Act, subject to the agreement of his GP, an order that it was lawful and in M's best interests to be administered inoculation against tetanus;

(10) a direction for a further hearing on 10th September, with permission to the local authority and M through his litigation friend, the Official Solicitor, to instruct the previously appointed independent social worker, Mr McKinstrie, to prepare a further report as to residence and contact;

(11) an order that, for the avoidance of doubt, previous orders restraining E from removing M from his accommodation and E and A from disclosing or publishing information relating to the proceedings were to remain in force.

6. Following the judgment, E and A indicated that they intended to appeal my findings and a notice of appeal was duly filed.

7. On 10th September, following a hearing at which E and A were represented, a further order was made providing, inter alia, that it was in M's best interests to move to live at supported living accommodation operated by a

company, hereafter referred to as 'EL', by 30th September 2014, E and A having agreed that he should move to live at that address until such time as my judgment was set aside. The order provided that the earlier order for contact should remain in force until further order. The order concerning tetanus inoculation was suspended. A further hearing was listed for two days in November 2014 to consider a variety of further outstanding issues.

8. Subsequently, however, E and A withdrew their consent to the proposed move, claiming that they had been "manipulated" into giving their agreement, and the matter was, therefore, restored before me on 26th September, following which hearing I made a further order providing, inter alia, a declaration that it remained in M's best interests to move to the identified supported living accommodation. and ordering that he should move to that address by 30th September. I further gave permission to the local authority and the Official Solicitor to reinstruct Dr Gwen Adshead to prepare an addendum report as to the risks, if any, posed by M's family in relation to contact arrangements following my judgment. Thereafter, M duly moved to the placement run by EL, and subsequently E and A requested an amendment to the contact order by email. That request was refused.

9. On 23rd October, the court was informed that, as a result of an incident involving M and another resident at the unit, EL had decided that he could no longer remain there. I therefore listed the matter for a further urgent telephone hearing on 28th October. By that point the local authority had identified alternative accommodation at another unit, hereafter referred to as "T Road", and I gave further directions designed to facilitate the determination of the issue of his future residence at the hearing previously arranged for November. Subsequently, a second option was identified, hereafter referred to as "R Road", and I gave further directions at a further hearing on 4th November. Following a further series of emails, those directions were varied again by further order on 17th November.

10. The next hearing duly took place on 26th and 27th November. Having heard evidence from Mr McKinstrie, the social worker, LG, Dr Adshead, A and E, I concluded that M should move to T Road. I declared that it was in his best interests to have contact with family members in accordance with the terms of a schedule appended to the order. In short, that provided that there should be contact with his mother, father and sister after his move to T Road on one occasion per week, at the weekend for two hours, to be supervised by two support workers provided by the agency in the community. I provided that contact should continue to be regulated by the previous protocols for contact which were already in place. In addition, it was directed that the local authority would facilitate additional contact between M and his father, A, on a minimum of one occasion per fortnight during the week, based on a sporting activity. It further provided that there would be additional family contact on Christmas Day and such further contact as may be agreed by the local authority and the Official Solicitor. The schedule also recorded that, the court having expressed the hope that it may be possible for the restrictions on contact to be relaxed, providing it

was in M's best interests, the local authority should keep the frequency of contact and the need for two supervisors under review. Provision was also made as to written communications. I identified a number of issues remaining outstanding at that point, namely: the making of a final order for contact; whether to appoint a deputy for health and welfare; if so, the identity of the deputy and his or her obligations; an application by E to lift the restrictions concerning the reporting of the case and disclosure of documents; the management of future applications; and the scheme for the authorization of any deprivation of liberty. And I gave directions for a further hearing in February 2015 aimed at resolving those issues. Following this hearing M moved to T Road, where he remains. It is the evidence of the local authority that he has flourished at that placement.

11. The intention that all outstanding matters would be resolved at the hearing in February proved over-optimistic. The only issue resolved at that hearing was the final order for contact under which the existing arrangements as set out in the schedule attached to the previous order remained in place, save that the family's weekly contact was increased to three hours. Further directions were then given concerning the outstanding issues. In particular, so far as the identity of the deputy was concerned, the Official Solicitor was directed to seek clarification on certain issues from the Office of the Public Guardian concerning the funding of a deputy. Further directions were subsequently applied for by the parties and ordered by email.

12. Meanwhile, on 10th March 2015, McFarlane LJ dismissed E and A's application for permission to appeal against my findings made on 11th August 2014.

13. At the next hearing, on 16th April, there was prolonged argument concerning a number of the issues identified and it became apparent that further hearings would be required. It was agreed in principle, however, by all parties and the court that a deputy should be appointed, not only for health and welfare but also for property and affairs. As a result, the question of an appointeeship fell away. As to the identify of the deputy, the local authority proposed, as they had consistently done, an employee from within the authority, albeit separate from social services, whereas E and A proposed an independent person. Various inquiries were made via the Office of the Public Guardian to identify a suitable independent person. The question of the identity of the deputy was adjourned until 23rd April, along with the other issues.

14. At the hearing on 23rd April a number of potential deputies were canvased, including friends and acquaintances of the family, M's advocate, as well as the local authority employee already identified and independent persons identified or nominated by the Office of the Public Guardian. Following the hearing on 23rd April, I made an order that contained, inter alia, the following provisions:

(1) I concluded that a deputy should be appointed for health and welfare and finances and that, accordingly, an appointee for finances should not be appointed, but adjourned the decision as to the identity of the said deputy.

(2) I reserved judgment on E's application to lift the restrictions concerning the reporting of the case and disclosure of documents.

(3) I further reserved judgment on the management of future applications and the scheme for the authorization of any deprivation of liberty.

(4) I adjourned the proceedings to a further hearing in June 2015 to consider and determine the identity of the deputy and resolve any further matters which anybody wished to raise in these proceedings before making a final order.

(5) I identified some issues to be transferred to the senior judge of the Court of Protection for determination of certain financial disputes between the local authority and E and A arising out of the earlier disputes concerning E's deputyship.

(6) I dismissed an application for costs made by E and A.

(7) I ordered that E and A should pay the local authority one third of the costs of instructing Dr Beck and Mr McKinstrie, with provision as to payment of those costs.

(8) With respect to a further application by E and A for wasted cost orders against the legal representatives of the local authority and M, those applications were dismissed as being 'totally without merit'."

15. At the hearing in June, I heard argument and evidence on the question of the identification of the deputy, following which I reserved judgment. I also heard some further brief submissions on the questions of disclosure of documents and publicity.

16. This judgment, therefore, deals with the following issues:(1) the identify of the deputy;
(2) deprivation of liberty;(3) disclosure and publication of information relating to the proceedings; (4) other miscellaneous issues.

Deputyship.

17. At one point there was a dispute between the parties as to whether a deputy should be appointed at all and whether the deputy should be for health and welfare or property and affairs or both. Happily, the parties reached an agreement that a deputy should be appointed for property and affairs and health and welfare, and this court has approved that decision. I do not propose to lengthen this judgment still further by setting out the reasons for the court's approval of this course. Suffice it to say that I am satisfied that the circumstances of this case merit such an appointment having regard to

the terms of s.16(4) of the Act and Chapter 8 of the Mental Capacity Act Code of Practice. As to the powers to be given to the deputy and the scope of her appointment, I am satisfied that, notwithstanding the terms of s.16(5) of the Act and my own observations in G v. E [2010] EWHC 2512, that, in the exceptional circumstances of this case, the terms and scope of the appointment need to be wide-ranging. The detailed terms of the conditions of the appointment were not in fact the focus of the argument in the course of the oral hearing, which was directed at the identity of the deputy (as to which see below), but have been the subject of submissions submitted since the hearing. On behalf of the Official Solicitor, Mr Bagchi Q.C. drafted orders following the hearing which elicited a detailed response from E and A in the form of track-changed documents. I do not propose to go through each and every one of the issues identified by those track changes, although I have considered them all carefully. In my judgment, it is unnecessary to do so. Suffice it to say, I have considered them all and, as will be seen, incorporated some of them into the final order.

18. So far as the health and welfare deputy is concerned, the terms will be as follows:

"It is ordered that:

(1) Appointment of deputy:

(a) [insert name] [see below] is appointed as deputy 'the deputy' to make personal, welfare and health decisions on behalf of M that he is unable to make himself, subject to the conditions and restrictions set out in the Mental Capacity Act 2005 and in this order;

(b) the appointment will last until further order;

(c) the deputy must apply the principles set out in s.1 of the Act and have regard to the guidance in the code of practice to the Mental Capacity Act 2005, subject to the provisions below.

(2) Authority of deputy:

(a) the court authorises the deputy to make the following decisions on behalf of M that he is unable to make for himself when the decision needs to be made in relation to:

(i) contact with members of his family, save that any decisions to suspend contact with any member of his close family, namely, E, A or S, for a period in excess of one month, or for a total period of one month in any six months, shall be referred to the Court of Protection by the deputy for consideration at the earliest opportunity;

(ii) decisions on day to day care, including diet and dress;

(iii) consenting to medical or dental examination and treatment on his behalf;

(iv) making arrangements for the provision of care and services;

(v) whether he should take part in particular leisure or social activities;

(vi) complaints about his care or treatment; and

(vii) to be appointed as litigation friend in any litigation concerning M and, in particular, deciding to make a claim in or to claim in any civil litigation in relation to M.

(b) For the purpose of giving effect to any of the decisions, the deputy may execute or sign any necessary deeds or documents.

(c) The deputy does not have the authority to make a decision on behalf of M in relation to a matter if the deputy knows or has reasonable grounds for believing that M has capacity in relation to the matter.

(d) The deputy does have the authority to make the following decisions or to do the following things in relation to M:

(i) to prohibit any person from having contact with him, but the deputy may suspend contact, as referred to above;

(ii) to direct any person responsible for his health care to allow a different person to take over that responsibility;

(iii) to refuse consent to the carrying out or continuation of the life sustaining treatment in relation to him;

(iv) to do an act that is intended to restrain him otherwise than in accordance with the position specified in the Mental Capacity Act 2005, save as authorised by the court.

(3) Reports and consultation.

(a) The deputy is required to keep a record of any decisions made or acts done pursuant to this order and the reason for making or doing them and send them to the local authority and A and E at least once a month.

(b) Pursuant to s.16(5) of the Mental Capacity Act 2005, the deputy is authorised not to notify A and E of any health or welfare decision in advance or consult with them in advance of the implementation of a decision in relation to M unless the decision is:

(i) a decision as to whether it is M's best interest to have serious medical treatment, as defined in practice direction 9(e) of the Court of Protection Rules 2007;

(ii) a decision to change M's place of residence; or

(iii) a decision to suspend contact between M and E or A or S.

(c) The deputy must submit a report to the Public Guardian as and when required to do so and, in any event, at least once a year."

19. I add these further brief comments in outline in response to some of the issues raised in E and A's track-changed documents. First, I do consider it appropriate to grant the deputy the power to suspend contact as set out above, but it will be seen that I have amended the draft prepared by Mr Bagchi in a way that limits the deputy's powers. The suspension of contact with close family members is a serious step and should only be taken if the deputy considers it to be in M's best interests. I anticipate that this will only occur in exceptional circumstances. Secondly, it is not necessary to refer within the exceptions, as suggested by E and A, to the deputy's powers to take decisions under a lasting power of attorney or an advanced decision under s.24 of the Act. M has not executed either a lasting power of attorney or an advanced decision, and the omission of these two provisions does not amount to discrimination or a breach of his human rights as E and A assert. Thirdly, the reference to "restrain" his intended to restrict the deputy's powers so as to prevent any restraint of M beyond that which is permitted under the Act and authorised by this court. Fourthly, I accept in part E and A's complaint about the clause authorising the deputy not to notify or consult them, but only to the extent that I consider the deputy should be obliged to notify and consult with them in respect of any decision to suspend contact between M and E and/or A and/or S. Finally, the matters listed by E and A in a proposed additional subparagraph to the reporting and consultation obligations are to my mind satisfactorily covered, to the extent that it is in M's best interests, elsewhere in the terms of reference as set out above

20. The draft order prepared by Mr Bagchi for the property and affairs deputy is substantially in standard terms. E and A raise only a few minor amendments. I have considered them carefully but conclude that the order should remain in the terms of Mr Bagchi's draft, subject to the insertion of the appropriate figures, which I would be obliged if Mr Bagchi would email in due course. No more need to be said about that now in this judgment.

21 I therefore turn to the question of the identity of the deputy. A number of possible candidates were put forward to fulfil that role. Ultimately, however, there were only two viable options: one, an employee of the local authority, whom I shall hereafter refer to as "Ms Y", and, two, a solicitor, whom I shall refer to as "Ms Z". The local authority supports Ms Y. E and A support Ms Z. The Official Solicitor, through Mr Bagchi and Miss Mackintosh, ultimately declared himself neutral.

22 Ms Y has been a qualified social worker for 21 years and has worked in the field of social care for 38 years across a range of services in a number of different authorities. At present she works in a different office from the social work team responsible for this case as the access to resources manager of the local authority, responsible for managing direct payments to

all services user groups, purchasing supporting independent services, arranging short-term beds and managing the cost model matrix for high cost placements. She is based in an office not far from T Road and would therefore be easily contactable and available to undertake visits if required. She has had no previous involvement in this matter and knows nothing of the proceedings, save for the main judgment of August 2014 which has been released to her. The local authority has other individuals who have acted as deputies and, according to the senior manager, the arrangements seem to work well. It is the local authority's case that Ms Y has the necessary skills, is at the right level of seniority, is not carrying an excessive caseload, has no prior knowledge of this case, has vast experience and is a registered social worker, all of which, in the submission of the local authority, makes her an ideal candidate.

23. In oral evidence before me, Ms Y thought that she would be able to devote about eight hours a week maximum to this case. No-one has suggested to her any specific time limit, but she obviously would have to fit her responsibilities as deputy into her main job. She said that if more time was required she would arrange things and acknowledged that in some weeks it could take more/some less. She has never acted as a deputy before. She has looked at the Mental Capacity Act Code of Practice to ascertain the responsibilities it would involve and was aware of the key principles, in particular the obligation to act in the best interests of M and to consult with the appropriate people before making a decision. She was aware from reading the judgment that there have been a number of controversies in this case over issues that are likely to recur in the future. She said nothing about that caused her concern. She said that she had a lot of experience of this type of case as a care manager. She acknowledged that it was difficult for anyone to put a loved one into the care of somebody else. She recognised that this gave rise to a level of anxiety and was familiar with dealing with complaints in these circumstances. On some occasions she has found it possible to resolve such matters satisfactorily, on other occasions not. She saw that it would be very difficult for E and A to accept that she would be independent of the local authority. She stressed, however, that she has experience of challenging and criticising the actions of others within the local authority in the course of her work. She said that she thought she was likely to make decisions that the local authority would not like and also on occasion decisions that E and A would not like. Cross-examined by E, she stressed that she recognised that E, A and S are very important people to M and acknowledged that they had "done a great job with M".

24. Ms Z is a solicitor practising as a sole practitioner specialising in Court of Protection and related work. She has been qualified since 1998 and in 2005 set up her own firm as a sole practitioner. She has plenty of experience as a deputy in property and affairs, but this would be her first case as a health and welfare deputy. She has been on the panel of deputies recommended by the Public Guardian since 1st June of this year. Ms Z could not say how many hours would have to be devoted to this case every week. If more than 10 hours was required, she would find it challenging, but her proposal is to delegate part of the work to her assistants. All members of her team have

experience in working in the field and she would expect all of them to have dealings with members of the family. Her plan would be to analyze the case and assess the types of decisions required, identifying those in respect of which she needed to be involved and those which could be left to other members of staff. Ms Z said that she was aware of the background of conflict between E and A and other professionals. She saw the risk that she would be bombarded by communications from family members. It would, therefore, be important to establish boundaries at the outset. She had experience of challenging cases in the course of her work.

25. I have found this a finely balanced decision but in the end I have decided to appoint Ms Z as deputy. In reaching this decision I stress that I have no criticisms of Ms Y. She is plainly highly qualified and experienced in many difficult cases and sensitive to the anxieties and concerns of family members. I believe that she would be scrupulous about maintaining independence from those employees within the local authority involved with the family. The fact is, however, that she is employed by the same local authority which has been responsible for taking and prosecuting these proceedings. As a result, it is, in my judgment, very unlikely that she would ever have the full trust and confidence of E and A. I have already found the multiple criticisms levelled E and A at the social workers in this case to be almost completely unjustified and I have no reason to question the integrity or professionalism of anyone within this local authority. But, in my judgment, it is essential that the new deputy is given the best opportunity to forge a good working relationship with everyone in the case, in particular E and A and, therefore, if possible, must be not only independent of the local authority but seen to be independent.

26. That objection would not necessarily be decisive. Were there to be no other credible candidate, as seemed likely at one stage, I would have had no hesitation in appointing Ms Y. But, in my judgment, Ms Z is eminently qualified to perform this role. She is in some respects the opposite of Ms Y. Whereas Ms Y has plenty of experience of dealing with complex care cases, with no experience of working in the Court of Protection or of acting as a deputy, Ms Z, although not experienced in social work matters, has plenty of experience in Court of Protection work and in the legal complexities of the 2005 Act. Furthermore, she has acted as a deputy for property and affairs in the past, although not hitherto for health and welfare. She has the support of a team experienced in this sort of work. From my limited opportunity to observe her in the witness box being questioned by Mr Bagchi, Miss Bretherton and E, I formed the view that she has both the judgment and the independence to enable her to fulfil this role. I believe she will quickly master the details of the care plan and allocate staff appropriately to the various tasks required. On balance, therefore, I conclude that the best person in all the circumstances to act as deputy for M, both for health and welfare and for property and affairs, is Ms Z and I shall make an order to that effect.

Deprivation of liberty

27. The relevant provisions of Article 5.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

"Everyone has the right to liberty and security of the person. No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure proscribed by law ...(e) the lawful detention of persons of unsound mind ..."

Article 5.4 provides:

"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by the court and his release ordered if the detention is not lawful."

Following the decision of the European Court in HL v. United Kingdom [2005] 40 EHRR 32, the 2005 Act was amended to the new s.4A headed, "Restriction on deprivation of liberty" which provides (so far as relevant to this case):

> "(1) This Act does not authorise any person, ('D') to deprive any other person ('P') of his liberty.
>
> (2) But that is subject to:
>
> (a) the following provisions of this section; and
> (b) s.4B [concerning life-sustaining treatment not relevant to this case.
>
> (3) D may deprive P of his liberty if by doing so D is giving effect to a relevant decision of the court.
>
> (4) A relevant decision of the court is a decision made by an order under s.16(2)(a) in relation to a matter concerning P's personal welfare.
>
> (5) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home regulations, deprivation of liberty)."

28. Schedule A1 to the Act provides a complex and comprehensive system for the arrangement and authorization of the deprivation of liberty of persons lacking capacity by local authorities under the so-called 'deprivation of liberty safeguards' (DOLS), subject to the overriding supervision of the Court of Protection. In this case no authorization for the deprivation of M's liberty was ever sought or granted and it is, therefore, unnecessary to set out

the detailed provisions of the DOLS in this judgment. In the absence of such an authorization, M may only be deprived of his liberty by order of the court.

29. The care plan under which M is being provided with care and support at T Road is approved by the court pursuant to s.16(2)(a). Under s.1(6) of the Act, before making a decision for or on behalf of a person who lacks capacity, regard must be had to whether the purpose for which it is needed can be effectively achieved in a way that is less restrictive of his rights and freedoms. In this case I have already decided that it is in M's best interests to reside at T Road under the care plan approved by the court. But where the circumstances amount to a deprivation of liberty, the court requires that further safeguards be put in place and, in particular, the court must consider arranging regular reviews of these arrangements - see JE and DE v. Surrey County Council [2006] EWHC 3459 Fam, and GJ v. A Foundation Trust [2009] EWHC 2972 Fam.

30. When determining whether there is as a matter of fact a "deprivation of liberty" within the meaning of Article 5, three conditions must be satisfied, namely: (a) an objective element of a person's confinement to a certain limited space for a not negligible time; (b) a subjective element, namely, that the person has not validly consented to the confinement in question; and (c) the deprivation of liberty must be one for which the State is responsible - see Storck v. Germany [2005] 43 EHRR 96. In this case the second and third elements are plainly satisfied. M does not have capacity to make decisions as to his residence, so the second element is satisfied because any consent can only be valid if the person has capacity to give it - Storck v. Germany supra. So far as the third element is concerned, although the confinement may be effected by a private individual or institution, the third element will be satisfied if it is imputable to the State as a result of the direct involvement of public authorities through the authorization procedure under Schedule A1 or an order of the court. The question in this case is, thus, whether the first objective element is satisfied.

31. This question - what is, objectively, a deprivation of liberty - has been the subject of much debate and analysis, but was answered ultimately by the Supreme Court in P v. Cheshire West and Chester Council and another, P and Q v. Surrey County Council [2014] UKSC 14, in which it was held that the "acid test" was simply whether the person concerned "was under continuous supervision and control and was not free to leave" – paragraph 49. If M's circumstances satisfy this test, then this court must make an appropriate declaration that the arrangements under which he is living at T Road amount to a deprivation of liberty, that the arrangements are authorised by the court as being reasonable and proportionate and in M's best interests and that such deprivation is therefore lawful. The court must then direct a further review after an appropriate time, normally one year.

32. On behalf of the local authority, Miss Bretherton submits that that the reality of M's position is that he is not free to leave T Road. He is under the complete supervision and control of the care staff. Miss Bretherton stresses

that the purpose of recognising that there is a deprivation of liberty in these circumstances is to ensure that proper safeguards are in place to prevent a breach of Article 5. The purpose of the order authorising a deprivation of liberty is not to restrict M but, rather, to protect him and ensure that the court can monitor the actions of the public body which is depriving him of his liberty. The local authority, accordingly, ask the court to authorise the deprivation of liberty in accordance with s.4A and direct a further review in approximately one year's time on paper. The local authority's position on this issue is supported by the Official Solicitor.

33. In their written submissions E and A argue that it "is in M's best interests for his existence to be normalised as much as possible under the circumstances inflicted upon him." They submit that the application to authorise his deprivation of liberty is "unreasonable, disproportionate and contrary to his best interests, civil liberties and human rights." They continue:

"There is no justification for this. He has never ever had this imposed on him ever before and he has done nothing to deserve it now. We ask the court not to impose this for the convenience of others ... It is in M's best interests to have the same rights as any other resident living in T Road or in any residential placement, as M has a sufficient understanding and knowledge to realise that he is being treated different, but will not realise why and, therefore, he would be more likely to internalise this to affect his health and well-being."

They say that M's needs should be met in the usual way and no different from those of any other disabled person requiring support, in accordance with legal and civil rights. They add:

"M is already imprisoned by his disability. It is not for those who purport to represent his best interests to imprison him further in order to exercise their control and to exercise their power over him."

34. I understand that E and A are concerned at the thought that their son is being looked after in circumstances that amount to a deprivation of liberty and their wish that this should now cease, but I think that E, and perhaps also A, misunderstand the purpose of the court being asked to authorise a deprivation of liberty. It is not to imprison or stigmatise M but rather to protect him.

35. If M was able to live at home his circumstances would in all probability not amount to a deprivation of liberty, but he cannot live at home because, in the light of my findings, there is a risk that he will suffer harm. The court, therefore, has had to identify the best option for his residence and care and has decided that it is in his best interests to reside at T Road. Having made that decision, in the course of which I have had regard to s.1(6), I must now decide whether, objectively, his circumstances amount to a deprivation of liberty. In my view, the acid test identified by the Supreme Court is manifestly satisfied. He is under continuous supervision and control of the

staff at T Road and is not free to leave, save for certain specific activities on which he will be accompanied and supervised. As a matter of objective fact, he is therefore being deprived of his liberty. It is, thus, my duty to make a declaration to that effect and that this is in his best interests and, in order to ensure that his Article 5 rights are protected, I shall direct a further review by the court in 12 months. As to that review, I shall make the following directions as discussed at court and included in a draft order prepared by Mr Bagchi:

"The authorization of M's deprivation of liberty contained in this order shall be reviewed by this court in June 2016, and:

(a) shall be listed for an attended oral hearing upon the application of any party to the Clerk to the Rules, unless the court considers it appropriate to dispense with an oral hearing, in which case the application shall be considered on the papers, upon submission of the documents listed below to the clerk to Mr Justice Baker by email;

(b) at least 28 days prior to the court review, the applicant will arrange a multi-disciplinary meeting on a date to be fixed, with a view to all parties, (including E and A), being able to attend so far as is feasible to consider the care arrangements for M. The Official Solicitor will be invited to that meeting. The purpose of that meeting will be to consider whether an agreed case summary can be prepared for the court and whether an oral hearing is necessary;

(c) 21 days prior to the court review the applicant will file and serve a short updating statement on M's care arrangements and any new case summary, attaching an updated care plan for M;

(d) the other parties shall file and serve a position statement no later than seven days prior to the court review and the Official Solicitor shall file and serve a position statement if so advised three days before the review."

36. In the track-changed document, E and A raised a number of objections to this draft. They objected to the matter being reserved to me. I consider this below. They demand that the next hearing be an oral hearing and object to the hearing "being nothing more than a paper exercise". I disagree. It is quite normal for such reviews to be carried out without an oral hearing and it is properly a matter for the court to determine after receiving the paperwork whether an oral hearing is required. They asked that they be expressly included by me as being entitled to attend the multi-disciplinary meeting to be convened 28 days prior to the court review. I had read the phrase "all parties" as manifestly including them, but I am happy to make this clear and have, therefore, added their names in brackets. They asked that the deputy be included expressly but, as I understand the scheme of the proceedings, the deputy will now take over from the Official Solicitor as litigation friend, including for the purpose of future deprivation of liberty reviews. In those circumstances, the word "parties" includes the deputy.

Disclosure.

37. Under the present order made following the judgment on 11th August 2014:

> "E and A shall not, whether by themselves or encouraging any other person to do so, disclose or publish any information relating to these proceedings to any person, including any legal organisation, save for their legal representatives."
>
> The original order to that effect was made at the hearing in March 2014 when concerns were raised by the local authority that E and A would disclose information relating to the proceedings to the media. At various points since the hearing in August 2014, I had indicated that I would wish to relax this restriction so that it goes no further than necessary in M's best interests and, in particular, does not restrain E and A from legitimately raising and discussing issues arising in these proceedings in a way that does not infringe M's best interests.

38. At my request, Mr Bagchi prepared a detailed note of the law on disclosure and publicity in relation to the Court of Protection. He reminds me that rules 90, 91 and 93 of the Court of Protection Rules 2007 address directly the approach to be adopted when a person seeks to publish information relating to hearings in the Court of Protection. He summarises the rules as providing that:

> "(1) As a general rule, that proceedings are held in private - s.12 of the Administration of Justice Act 1960.
>
> (2) The court may authorise the publication of information so as to authorise what would otherwise be a contempt of court, but in doing so may also impose wide-ranging restrictions on the publication of the identity of any party or other relevant person - rule 91(3).
>
> (3) An order authorising publication can only be made where it appears to the court that there is 'good reason' for making the order."

39. Mr Bagchi reminds me of a number of authorities in this area, in particular the decision of Mummery J, as he then was, in Re B [2004] 2 FLR 142, and in A v. Ward [2010] EWHC 16, the decision of Hedley J in the Court of Appeal in Independence News and Media and others v. A [2009] EWHC 2858 and [2010] EWCA Civ 343, of Peter Jackson J in London Borough of Hillingdon v. Neary [2011] EWHC 43 COP, and of this court in A Local Authority v. A and others [2011] EWHC 1764, and in W v. M [2011] EWHC 1117.

40. E and A have also filed a set of submissions on this point. They, too, refer to a number of authorities, in particular recent decisions of the President in Re J (Reporting Restrictions: InternetiVideo) [2013] EWHC 2694 Fam, Re An Application by Yorkshire County Council [2014] EWHC 136 Fam, and the Practice Guidance published by the President on Transparency in the

Court of Protection, dated 16th January 2014. E and A then put forward a number of arguments in this case in the following terms. They submit that:

"The interests of justice is not served by having secret courts to indulge in and perpetuate the dark ages of conflicting with the heart of the common law system of justice in respecting issues of human rights and in keeping with the ECA ... In a civilised and democratic society, the legal system must be seen to be open to scrutiny. In the spirit and opinion of the fundamental principles of justice and liberty is openness and transparency, as endorsed by the reforms of the Family Division and the Court of Protection in its drive against secrecy. The core legal and social issues highlighted in this case are of enormous public interest importance, as the judgment recognises. Therefore, they are worthy of debate in a public forum. Our experience would benefit so many, as so much is topical, with recent legislation, reforms and reviews, which is in the wider interest. The particular interests we would wish to focus on are those of (i) costs of DIY justice - litigants in person; (ii) deputyship of those vulnerable and the importance of working collaboratively with the local authority; (iii) the Mental Capacity Act to be embedded into society and the implications of not doing so for all concerned.

E and A entirely respect the anonymity that sufficiently protects those involved and they have no intention to either breach that, engage in blanket tittle-tattle or blame culture."

41. Following the hearing, Mr Bagchi prepared a draft order, to which E and A responded, as I have indicated already, in the form of a track changed document. In this they reiterated their wish to pursue certain policy issues, and I pointed out during oral argument that I had said they ought to be encouraged and not prevented from speaking out. They stated that they had no wish to undermine M's anonymity but did have issues regarding the prohibition of the identity of the placement and objected in particular to any restrictions on family and friends knowing of M's address, asserting that this would be an unjustified interference with his human rights. Finally, they referred, as they had done during the hearing and in a specific COP9 application, to their opposition to the continued anonymisation in the published documents of both the local authority and the individual social workers.

42. It is inappropriate for this court to traverse again in this judgment legal ground which is well trodden. The principles are clear. The court must balance M's Article 8 rights against other rights, in particular the Article 10 rights of E and A, having regard to the particular importance attached to freedom of expression by virtue of s.12(4) of the Human Rights Act 1998. On the other hand, as Lord Judge LCJ observed in Independence News Media v. A supra, at paragraph 10:

"The affairs of those who are incapacitated for the purposes of this Act are examined before a judge in court. The affairs of those who are not incapacitated are, of course, handled privately, usually at home, sometimes

with, but usually without, confidential professional advice. None of these decisions is the business of anyone other than the individual or individuals who are making them. Thus, this, as we emphasize, presents an entirely separate, and we suggest self-evident, aspect of personal autonomy. The responsibility of the Court of Protection arises just because of the reduced capacity of the individual requires interference with his or her personal autonomy."

On the other hand, as the President has observed in Re J supra, at paragraphs 36 to 40, the court recognises:

"The importance in a free society of parents who feel aggrieved at their experience of the family justice system [to which I add the Court of Protection] being able to express their views publicly about what they contend to be the failings on the part of individual judges or failings in the judicial system, and the same goes, of course, for the fair criticism of local authorities and others ... It is not the role of the judge to seek to exercise any kind of editorial control over the manner in which the media reports information which it is entitled to publish ... Comment and criticism may be ill-informed and based on ... misunderstanding or misrepresentation of facts. If such criticism exceeds what is lawful, there are other remedies available. The fear of such criticism, however justified that fear may be and however unjustified the criticism is ... is not of itself a justification ... The publicist - I speak generally, not in the present case - may be an unprincipled charlatan seeking to manipulate public opinion by feeding a tendentious account of the proceedings, but freedom of speech is not something to be awarded to those who are thought deserving and denied to those who are thought undeserving."

43. Applying these principles to this case, my order should do no more than is necessary to protect M's interests. It is certainly none of my business what E or A do with the rest of their lives and I do not discourage them from publishing their experiences or views on the many issues that have arisen in this case. Nor must the court interfere with M's ability to communicate with family and friends. As for the extent of the anonymisation of the judgment, E and A object to the names of the local authority and social worker being identified. They rely on paragraph 20 of the Practice Guidance which provides, inter alia, that public authorities should be named in the judgment approving publication unless there are compelling reasons why they should not, and that the anonymity of the judgment as published should not normally extend beyond protecting the privacy of the adults who are the subject of the proceedings and other members of the family, unless there are compelling reasons to do so. In my judgment, however, there is a compelling reason in this case for keeping the local authority and the names of the social workers and all others associated within the County where the events of this case have taken place anonymised in any published version of this judgment. Having considered the matter very carefully, I have concluded that, without such restriction, there is a significant risk that M could be identified because of the highly unusual facts of this case.

44. Having considered all of the many submissions made on these issues and the draft orders, I have decided that the order should be somewhat different to that submitted by Mr Bagchi and I shall make an order in the following terms:

> (1) Subject to sub-paragraph (2) below, no person shall disclose or publish (in any form, whether in any newspaper or broadcast or via the internet) any information which leads to the identification of MJB or his placement.
>
> (2) EMB and AB are permitted to disclose to family and friends that MJB is living in supported living and to provide family and friends with the address to permit communication between them and MJB provided that they inform any person to whom this address is given that there is a court order which prevents the publication of any information which leads to the identification of MJB or his placement.
>
> (3) Subject to sub-paragraphs (4), (5) and (6), no person shall disclose or publish (in any form, whether in any newspaper or broadcast or via the internet) any document filed in these proceedings to any person without the prior permission of the court.
>
> (4) The parties may disclose the papers filed in these proceedings to their legal advisers and to the MJB's deputy for health and welfare and deputy for property and affairs.
>
> (5) The Applicant and MJB's deputy for health and welfare and deputy for property and affairs may disclose the judgments in these proceedings, care plans and contact protocols to professionals, including medical professionals and any advocate, concerned with MJB's care and welfare.
>
> (6) The parties are at liberty to disclose the official transcripts of the judgments dated 11th August 2014 and 7th July 2015 to any person provided that they bring to that person's attention the warning notice in relation to the restrictions on publication on the face of the judgment.
>
> (7) No person shall identify any person or place as being a person who has been anonymised, or a place which has been anonymised, in the official transcript of the judgment delivered 11th August 2014.

(8) Save as aforesaid all parties may disclose any information relating to these proceedings, provided that in doing so they inform any person to whom this information is disclosed of the terms of this order.

Other miscellaneous issues

45. Finally, there are a number of miscellaneous matters raised by E and A.

(1) Contact protocol and M's activities. In their written submissions, E and A sought to revisit matters concerning contact and the protocol governing contact, M's care plan and activities upon which this court has already given its decision. I decline to reopen any inquiry into those matters in respect of which I have already made decisions and orders. Henceforth, any adjustments will be considered by those responsible for M's care, including his new deputy, and in making those adjustments those persons shall carry out such consultations as may be appropriate.

(2) Communications with other professionals. At the hearing I had understood that E and A agreed to an undertaking not to communicate with M's dentist or GP or other professionals involved in providing care for M, save in writing via his deputy or otherwise with the consent of the deputy. This provision duly appeared in Mr Bagchi's draft order. However, in the track-changed document, E and A objected to the phrase "save in writing". In my judgment, given the lengthy history of unwarranted and damaging interference by E in the work of the professionals involved in M's care, as described in the main judgment, such a restriction is wholly justifiable in M's best interests and I shall make an order to that effect. However, the terms of the order, reflecting Mr Bagchi's draft undertaking, give the deputy a discretion to permit communication otherwise than in writing if she considers it appropriate. I am confident that I can trust Ms Z to exercise that discretion sensibly.

(3) Disclosure of judgment and care plans to professionals. The local authority seeks permission to disclose the judgment and care plans and contact protocols to medical professionals and any advocate concerned with M's care and welfare. E and A ask that such an order be more specific, asserting that the local authority proposal is intended to be a further means by which they can be "maligned". I completely reject this argument. The order sought by the local authority is entirely sensible and practicable in M's best interests and I shall so order.

(4) Penal notice. The order contains an injunction on disclosure and must, therefore, contain a penal notice. As drafted by Mr Bagchi, that notice is directed only at E and A, but the order that I am making is not confined to E and A but extends to everyone served with the order. The penal notice attaching to the disclosure order should,

therefore, be amended to read: "If you disobey this order you may be found guilty of contempt of court and may be sent to prison or be fined or have your assets seized." However, the draft order submitted by Mr Bagchi contained an undertaking, and to that, as set out above, E and A raised an objection. And, as indicated above, I have now substituted it with an order. That is directed at E and A and should, therefore, be accompanied by a penal notice directed to them.

(5) Finding re suitability to act as litigation friend. Mr Bagchi's draft included a recital to the effect that the court had found that neither E nor A were suitable persons to act as litigation friends for M. I did not in fact make such an express finding in the main judgment in August 2014, and I do not recall making any such finding at any other point. I will if necessary consider this and any representations on this point. In my view, however, it is unnecessary to include such a recital since I am including within the deputy's terms of reference a provision that she should be allowed to act as litigation friend in all proceedings in respect of M from this point.

(6) Change of social worker. E and A ask me to invite the local authority to change the two social workers, JR and LG, who have been involved in this case for several years. I decline to do so. As indicated in my main judgment, I do not accept the criticisms relentlessly levelled at the social workers by E and A. They have done an excellent job in very difficult circumstances. E and A also ask me to invite the local authority to apologise for its "maligning" of them to them to the CQC. I am not in a position to say whether they have been so maligned, and I do not consider it necessary to investigate this issue.

(7) Permission to appeal against costs. By a further COP9 application dated 8th June 2015, E and A sought permission to appeal against the small costs order made, asking for that to be extended to 21 days after they had received the judgment dated 23rd April 2015. That judgment was delivered extempore at a hearing attended by all parties, including E and A. As the time for appealing that order had expired by the date of their application for such an extension, I do not consider that I have power to extend the time for appealing. If they wish to pursue this application, they must take it to the Court of Appeal.

(8) Further applications. The Official Solicitor is concerned at the risk of further unmeritorious applications by E and A which, unless restricted, would waste the time and resources of the court and other parties. Mr Bagchi reminds me that there is in the Court of Protection rules and the Mental Capacity Act no power akin to s.91(14) of the Children Act 1989. Nonetheless, he also reminds me of the court's inherent powers to restrict applications - see, in particular, Bhamjee v. Forsdick and others (No 2) [2003] EWCA Civ 1113. He invites the court to make a direction forbidding any further application to this

court in respect of M without prior permission of the court. E and A object, stating that this violates their rights as human beings. At this stage I do not consider it necessary or appropriate to go as far as the Official Solicitor proposes. This order marks the end of these proceedings. I expect all parties will do their best to avoid litigation in future and try to work collaboratively with the new deputy I have now appointed. Despite the many applications that have been issued in the course of these proceedings, I am not prepared to make an order at this stage to the effect that E and A should be restrained from making an application without the permission of the court. It does not follow, simply because they have made numerous applications in the course of these proceedings, that they will continue to do so now that these proceedings have come to an end. Nonetheless, without imposing any requirement for permission, I shall direct that any application upon issue shall in the first instance be referred to me for further directions.

(9) "Reserved to me". Finally, E and A object to any order which provides that all future applications be reserved to me. They argue that such a restriction is an infringement of their human rights and argue that any future applications should be made in the usual way that does not specify for the attention of any named judge. I have tried to explain the principle of judicial continuity to E and A in the course of the hearing but they have maintained their position. In my judgment, it would be wholly unfair on any other judge and wasteful of valuable resources to expect another judge to take on such an application. As long as I am available, all further applications shall be reserved to me.

[Note – at a further hearing, E and A attended and gave an undertaking not to communicate with M's dentist or GP or other professionals involved in providing care for M concerning the care and treatment given to M save in writing via M's deputy for health and welfare or otherwise with the consent of the deputy. The undertaking was accepted in lieu of the order mentioned in paragraph 45(2) of this judgment.]
