



IN THE COURT OF PROTECTION
[2012] EWHC 1068 (CoP)

No. COP12025299

Royal Courts of Justice
Tuesday, 28th February 2012

Before:

MR. JUSTICE CHARLES

(In Private)

Re: HA

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MS. K. SCOTT appeared on behalf of HA instructed by the Official Solicitor.

MS. C. VAN OVERDIJK appeared on behalf of the County Council.

Mrs C appeared in Person.

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE CHARLES:

- 1 This case comes before me for directions today. The person whose best interests have to be considered by the court is a HA. The Official Solicitor now acts for her as her litigation friend and in that capacity has continued an application under s.21A of the Mental Capacity Act 2005 (the Act) that was instigated before his appointment.
- 2 One of her daughters who lives in this country, who is one of three siblings and who has recently been directly involved in the care of her mother, Mrs C, has issued two applications: one to be a deputy in respect of welfare decisions and one to be a deputy in respect of property and affairs decisions.
- 3 HA qualified and worked as a general medical practitioner. Her home base in this country was in Loughborough where she owns a house. Her daughter lives in a different part of the country and reasonably recently HA returned to the Loughborough area where she has been placed in a residential care home.
- 4 There have been a number of assessments of both her capacity and her best interests. Her physical and mental state, on the information I have read, are and have been deteriorating. She is also clearly at risk of falls and of causing herself physical harm. She has been expressing and continues to express a wish that she wishes to go home and live in her house in Loughborough. There has been water damage to that property but my understanding is that that has now been repaired, largely at the instigation of her daughter but also some funding from an insurance company.
- 5 The most recent report before me, for reasons which I regard as compelling internally to it, indicates that HA does not have capacity to make decisions as to where she should live, as to her medical care, as to her property and affairs and relating to litigation. And I pause to say that therefore I will make an interim declaration to that effect.
- 6 Notwithstanding that report, the continuing expression by HA of a wish to go home is a major factor in the argument that by being prevented from leaving the care home for her safety and the safety of others she is or may be being deprived of her liberty.
- 7 Central issues for the court to determine are whether or not those restrictions in a care home best promote her welfare in the least restrictive way, and whether there is a support package that could warrant her return home in her best interests. Those welfare issues can fall for consideration under a number of sections of the Act. In the application before the court they are important to the consideration of the best interests assessment under the DOLS regime and s. 21A.

- 8 In a discussion with counsel for the Official Solicitor I have indicated that my present view is that in the context of an application under s. 21A the court should not, for example, extend a standard authorisation (even if it has the power to do so under s.21A), or somehow continue the statutory scheme, whilst it determines the application. Rather, my present view is that the court should exercise its own powers to hold the ring whilst it determines the application and therefore give appropriate interim authorisations of any deprivation of liberty and make appropriate interim orders. If, when it determines the application, the court concludes that the relevant person should live in a care home, or be in a hospital, then, it seems to me, that it should generally direct that the statutory DOLS scheme should apply again to any deprivation of liberty. That regime has checks and balances that generally should be preferred to review by the court.
- 9 To my mind, on that approach, the application remains one under s. 21A notwithstanding that whilst it continues the court is exercising powers conferred by other sections and a, if not the, central issue is what available regime of care will best promote P's best interests. This is because the proceedings were issued under s. 21A and, in the exercise of the jurisdiction conferred by that section, the court has to consider amongst other things the best interests of P. I add that if, in those proceedings, the court reaches a conclusion that the statutory scheme should or would no longer apply to the regime in place to promote the best interests of P, it has more than adequate powers of its own motion to make longer term declarations and orders under ss.15 and 16.
- 10 The discussion that gave rise to this expression of view arose, and is relevant, because, at the moment, there is a distinction between the funding available from the Legal Services Commission in respect of an application under s.21A, and other applications before the court, albeit that they can often raise the same central issues. I have recorded those views to indicate why I have proceeded on the basis that this application is, and remains, an application under s.21A and that the court is making interim orders in those proceedings.
- 11 At the heart of the issues before the court, is the question where, and under what care regime, is it best for HA to live? In this context, I and other judges have made decisions recently that seek to emphasise the great importance of identifying, as soon as is practicable, the relevant choices and of doing this in an appropriately defined way. That is because, for reasons I have explained in other cases, the Court of Protection is charged with choosing between pragmatically available solutions, and is not engaged in an exercise of considering and deciding what, in an ideal world, would be in the relevant patient's best interests, albeit that that could be a factor to be taken into account in determining what the relevant public authority could, applying administrative law principles be ordered to provide, or to consider providing. I make those points because it seems to me that, at this stage,

the key to achieving a speedy resolution of this case is through an appropriately thorough investigation of relevant choices, followed by appropriately particularised evidence to identify them. That approach would inform the family, inform the relevant public authorities and certainly would assist, it seems to me, the Official Solicitor in his task, looking at the matter on behalf of HA, of recommending to the court what would best promote her welfare.

- 12 How is that best to be achieved? To my mind the best way is for the local authority to carry out its investigations and enquiries pursuant to the range of its statutory duties that are engaged in this case. In that context, the local authority will consider potential alternatives. A non-exhaustive list is: HA remaining where she is; HA moving to some other care or nursing facility in the area of that local authority; and HA moving to equivalent care providers in the area where her daughter lives. Also, the prospects of HA returning home, and thus the extent and availability of the support package that would be needed if she was to do so, will have to be considered. All of those options raise, in the context of this case, a consideration of how each of the potential alternatives would be provided and funded. If HA was eligible for continuing health care she may not have to provide any of the funding. At the moment, as I understand it, it is not considered that she is so eligible but that issue ought to be addressed. If what should be provided to her is residential and some nursing care, issues as to its funding will inevitably arise.
- 13 To enable the court, and the parties, to be properly informed, full details of HA's financial position needs to be available. I will direct that all information that has been provided by her daughter into these proceedings relating to HA's financial affairs is to be made available to the other parties.
- 14 Questions have arisen before me as to whether or not: (1) there should be an interim deputy in respect of property and affairs and, (2) if there should be one, who that interim deputy should be. The choice being between HA's daughter, Mrs C and/or the local authority. The daughter has discussed matters with her brother and sister and at the moment they all speak with one voice. As she says, her brother and sister trust her to promote their mother's best interests. I accept that. However, it seems to me that it is clear that at this stage of these proceedings, and that is the investigatory stage, HA's best interests would be best promoted by me appointing the local authority to be the interim deputy in respect of HA's property and affairs, for the following reasons. First, it seems to me that speed is of the essence here and, if the local authority is not so appointed, it seems to me inevitable that that will cause delays and problems. History tells us that some delays have occurred in relevant information being provided to the local authority. And, it seems to me that if the responsibilities of an interim deputy are given to Mrs C this will cause further delays, for example, in making arrangements to visit,

and in visiting, HA's home particularly if Mrs C thought it necessary for her to be present on such visits.

- 15 Secondly, it seems to me that as the deputyship will be directed to carrying out an investigation, issues relating to unnecessary expenditure are not likely to arise. This is because the purpose of the deputyship would be simply to ensure that a full and proper investigation was made, so that everybody is properly informed in the way that I have indicated. But, and in any event, to allay any worries of the family about expenditure they have not agreed to being incurred, I have no real doubt that relevant wording can be added to the order that limits expenditure by reference to purposes and amounts.
- 16 Also, and it seems to me importantly, Mrs. C has, over the last year or so, been herself incurring expenditure, and it may well be that she would have a claim for repayment of that expenditure which, it seems to me, should be dealt with by the court in the context of her application for her appointment as a deputy on a longer term basis.
- 17 Finally, experience in litigation of this type informs all of us who deal with it more regularly than any family who, sadly for them, becomes involved in it, that there is always the potential for conflict arising between siblings, and it seems to me prudent at this stage to avoid any such risk in respect of the appointment of an interim deputy. I hasten to add that I am not indicating that I have any particular reason to believe anything other than, as she told me, Mrs. C would be fully supported by her siblings throughout this litigation.
- 18 I acknowledge that there is the potential for an equivalent conflict for the local authority in the sense that it has been funding the care home. But the deputyship which I am going to give it, will not enable it to recoup any monies in respect of that expenditure. Any such recoupment will be an issue left for future determination having regard to, amongst other things, the decisions made concerning the medium and long term care of HA.
- 19 I repeat that first among my reasons for so appointing the local authority and, indeed, the decisive reason for doing so, is the first one I gave, namely that, if I do not do so, it seems to me highly likely, if not inevitable, there will be avoidable delay in gathering relevant information and placing it before the court.
- 20 Mrs. C will be kept informed of the steps that are taken in the deputyship. The crucial thing in this case is to gather and provide details of the relevant alternatives so that future planning for HA can be carried out as quickly and, if I may say so, as cheaply as possible.

- 21 Draft directions have been put before me and agreed and I endorse them. I do not think I need to go any further into their detail. However, I stress that it seems to me that, at present, the ball is fairly firmly on the local authority's side of the net to identify the relevant alternatives and the relevant particulars, but I agree that the directions should include a provision for Mrs. C to respond to the suggestions and information put forward by the local authority. Also, once the local authority has done its piece of work, if I can put it this way, the ball will have gone over the net to Mrs C and her family and, at that stage, they will need to suggest, particularise and so bring into play any other alternatives that they assert should be considered by the court. When those exchanges have taken place, the Official Solicitor, looking at the matter on behalf of HA, will be able to make an informed recommendation to the court. Equally, I am confident that, if during the process the Official Solicitor considers that further alternatives should be considered, or further information is required, he will raise that with the relevant parties.
- 22 So far as the application for the appointment of a personal welfare deputy is concerned, a suggestion was made at the beginning of the hearing that those proceedings should be stayed after joining HA to them and appointing the Official Solicitor to be her litigation friend, which the Official Solicitor is content to do, because he is already engaged in proceedings in which the welfare of HA is the central issue. I agree with that proposal and the parties will have liberty to apply to lift that stay. Also, those proceedings should be listed as and when the other proceedings are listed, but the question whether or not there needs to be a welfare deputy is one which, to my mind, does not require active consideration, at this stage. Rather, what requires active consideration is where HA will be best placed for the medium to longer term. After that decision is made, the issue whether or not it would be sensible for her to have a welfare deputy can be considered against that background. Equivalent issues exist concerning the application for a property and affairs deputy and, at this stage, it seems to me best simply to adjourn that application to come on with the s.21A application so that, if and when appropriate, my appointment of an interim deputy can be reviewed and directions given in the light of the various alternatives that have been identified.
- 23 I have not joined HA as a party to that application. There is no need for her to be a party at this stage and if it was a freestanding application she almost undoubtedly would not be a party to it. There was a suggestion that this application should go back to a District Judge, but it seems to me that, at this stage, all the applications should be dealt with by the same judge because there is a real potential for overlap between the issues that arise in them.

LATER:

- 24 Mrs. C has raised another point which she did not raise in her submissions. I do not blame her for that. She asserts that she feels that her mother, will be devastated by the local authority being appointed interim deputy. I acknowledge

this possibility, if she is informed of the appointment, but in my view she would not have to be so informed.

25 However, now I must say that it seems to me that the stance taken historically by Mrs C in this case has on occasion been obstructive in respect of the relevant steps that need to be taken to properly inform decision makers about her mother's financial affairs, and to gain access to the property. This has caused delay, which I had in mind in giving my judgment. I add that, in my view, on the information presently before me, if the financial purse strings are controlled by members of the family it is likely that this will cause further delay and it seems to me that the balance between the competing factors, including the point now raised by Mrs C, favours the order that I have made.
