

Case No: FD09P01737

**Neutral Citation Number: [2010] EWHC 1592 (Fam)**  
**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Thursday, 13 May 2010

BEFORE:

**MR JUSTICE HEDLEY**

BETWEEN: -----

**IN THE MATTER OF: P**  
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MR NICHOLAS O'BRIEN (Instructed by WGS Solicitors) appeared on behalf of the Applicant

MRS BARBARA HEWSON (Instructed by Irwin Mitchell) appeared on behalf of the Respondent

MR HOWARD SMITH (Instructed by Bates Wells and Braithwaite) appeared on behalf of the Intervener

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**Approved Judgment**  
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(Official Shorthand Writers to the Court)

Thursday, 13 May 2010

MR JUSTICE HEDLEY:

1. DP is 30 years old. He has the great misfortune to be both entirely blind and to suffer with a learning disability associated with autistic spectrum disorder, the effect of which is to make him dependent on one to one care on a life-long basis. That is one side of the picture. The other side of the picture is that he has been endowed with a remarkable musical talent which, through his own and the efforts of others, has been developed to the extent that it is in demand in the public sphere. In addition to that, not only does he have a talent for music, but he has a great love of music, of performing it, being involved in it and in responding to those who attend live performances and all the evidence makes it abundantly clear that he relishes personal human attention.
2. The result of that is that a young man who is, as everyone recognises, incapable of making crucial decisions for himself, is nevertheless involved in public performance and is and has been for some time now involved in the public sphere. A book has been written about him, television and other programmes have been made about him, performances have been filmed and televised and recorded. There are CDs available and numerous media articles have, from time to time, come into existence. It was in those circumstances hardly surprising that there was a considerable amount of media interest when it became known that the question of how DP's affairs and welfare were to be regulated was to be the subject of the consideration of the Court of Protection.
3. There was entirely independent litigation about that, the outcome of which is that the proceedings, though they remain private, have been made open to the press, but that no determinative decision has yet been made about what should be reported; since these be private proceedings, nothing can be reported without the permission of the court.
4. It is recognised that a considerable amount of information about this young man is already in the public sphere and it would be wholly artificial to endeavour to restrain the repetition of those matters. The court proposed that the way of dealing with the matter was simply to hear the evidence, for the court to give a judgment on the basis that anything mentioned in the judgment was capable of being further reported, and then to see whether, at the end of the judgment, any party wished to restrict matters that had appeared in the judgment, or whether any member of the press wished to raise the point that matters had been canvassed in the evidence which do not appear in the judgment but which they would like to report. It is on that basis that the judgment in this case is to be given.
5. As I say, it is common ground that DP lacks capacity to make the central decisions that surround his life as they would surround the life of anybody in his position. He does not have capacity to decide matters of his own accommodation, to decide matters of where and with whom he will reside, to

manage his financial affairs, to litigate, or, indeed, to make decisions about appearing in public, let alone decisions about the commercial consequences of so doing.

6. His lack of capacity engages the provisions of the Mental Capacity Act 2005, because it means that decisions of the nature which I have indicated have to be made on his behalf by others. They may be made either by the court or by persons who are appointed by the court and who, in the statute, are described as "deputies".
7. The court has before it an application by the parents and sister of DP to be appointed his deputies in respect of all welfare and financial matters, in other words, to be appointed in such a way as to be able to make all necessary decisions indefinitely into the future in relation to those matters which he himself cannot decide. It is accepted that, whether it be the court or whether it be a deputy, any decision made on behalf of a person lacking capacity, must be made in his best interests and the statute sets out in Section 4 the principles that must govern the exercise of a judgment in relation to best interests. To that one must add Section 16(4) of the Act which provides that:

"When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that –

- (a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and
- (b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances."

8. A provisional reading of those principles might be thought to sit rather uncomfortably with the concept of appointing deputies at all. Since the principle of appointing deputies is fundamental to this part of the Act, it must be appreciated that Section 16(4) has to be read in the context of the fact that, ordinarily, the court will appoint deputies where it feels confident that it can. It is perhaps important to take one step further back even than that, and for the court to remind itself that in a society structured as is ours, it is not the State, whether through the agency of an authority or the court, which is primarily responsible for individuals who are subjects or citizens of the State. It is for those who naturally have their care and wellbeing at heart, that is to say, members of the family, where they are willing and able to do so, to take first place in the care and upbringing, not only of children, but of those whose needs, because of disability, extend far into adulthood. It seems to me at least that the Act ought to be read subject to that overriding policy aim.
9. Therefore, the court ought to start from the position that, where family members offer themselves as deputies, then, in the absence of family dispute

or other evidence that raises queries as to their willingness or capacity to carry out those functions, the court ought to approach such an application with considerable openness and sympathy. Therefore, it is probably helpful to consider what it is that has resulted in the decision of the court being sought.

10. The accommodation and care of DP has, of course, inevitably been shared between different individuals and different agencies. His family clearly retain a substantial input into his care and welfare. He resides in accommodation provided by the Royal National Institute for the Blind and much of his day to day care is the responsibility of employees of that organisation.
11. The West Berkshire County Council are the relevant local authority and they have statutory obligations towards DP because of his condition and therefore they play a significant role in his care and upbringing. In this particular case, one has to add to that Professor Adam Ockelford, who has had a long involvement with DP really from the age of 5 when Professor Ockelford was then a member of the staff at the school which DP attended, and he discerned in DP a remarkable musical ability and he has played a leading role in nurturing those skills and gifts. And, it is right to say, that he, now a professor at Roehampton University, remains heavily engaged in DP's life. Indeed, he is the author of a book about DP which formed part of the evidence in the issue relating to the admission of the media to these proceedings.
12. The Royal National Institute for the Blind have raised before the court two issues for careful consideration. The first relates to accommodation and the second relates to the question of whether there should be an independent deputy in addition to the applicant family members. I deal first with the question of accommodation.
13. There is no doubt that DP has been admirably cared for where he is for a long period of time. He is happy and settled there and those who care for him have every reason to take pride in the work that they have done. But it is the policy of the RNIB, as Mr Britton, their director of education and social care told me in evidence, to encourage those in residential care to move to a greater form of independence if they develop the capacity to do so. Moreover, it is the fact that, as DP develops his career as a musical performer, that involves travel and will involve from time to time the keeping of hours and arrangements that do not always sit comfortably with the requirement of residential care. So a consensus has emerged that a serious attempt should be made to find alternative care for him.
14. He has one or two particular friends. The most desirable arrangement, so the evidence suggests, would be to have a form of independent accommodation in which, perhaps, the two or three of them could continue to live together as they have done for so long. In many ways, for the purposes of facilitating his musical career, there would be much to be said for them living, if it were possible, in Central London. The idea of setting up a home in Central London for two or three people who need round the clock care is, of course, a complex and potentially extraordinarily expensive exercise. I have been helpfully

provided with costs estimates and it would be fair to say that the cost of providing DP with that kind of accommodation would, on an annual basis, really be a six figure sum. Clearly, that will require the most careful of negotiations between the family and the Royal National Institute for the Blind and the West Berkshire County Council, and no doubt others as well.

15. It seems to me that we are sufficiently far away from a decision being made that there is no useful contribution that the court can make other than to indicate its support for the proposed general direction of travel. There is anxiety as to the making of the decision when it arises. Everybody accepts that DP has a particular need for stability and certainty because he is most comfortable in that kind of setting. Therefore, it is of particular importance that, if he has to make a move, he only has to make one move and that that move is got right. But it seems to me that since West Berkshire must continue to be involved because of their statutory obligations to DP and the Royal National Institute for the Blind must continue to be involved because they are going to be fundamental players in the mechanics of any move, let alone anything else, that in the event of serious anxiety or dispute, there is every opportunity for either of those bodies to seek to restore the matter to the court should they feel the need to do so. In the event that there is no need because there is consensus, it seems a pity, and indeed contrary to principle, for the matter to have to be the subject of court approval.
16. The other issue which is, in a sense, a more difficult one and a rather more delicate one, is the need for an independent deputy. There are really two respects in which independence may be thought necessary to anyone who knows the bare outlines of the case. The first relates to the development of DP's career as a public performer and the prospects of considerable earnings accruing to him through that if he is as successful as it is hoped he will be. It is not just a matter of performance fees but of royalties and indirect payments that arise from television, film, CDs and the like, a complex network of financial affairs, which of course would normally require considerable expert advice and management. It is generally thought, though how accurately is another matter, that those who perform in that way earn very large sums of money and there will inevitably be a degree of concern as to what is to happen where the earner of that money lacks any capacity, either to negotiate, manage or enjoy the earnings themselves. That is, as it were, one side of the issue.
17. The other side of the issue is the question of complex and very sensitive decisions that have to be taken about the extent to which DP should be encouraged to develop his public performances and the extent to which he can take on performances, and in particular the quantity of performances, where his capacity may fall well short of the demands that would be made of him. There is no doubt that the driving force behind his public performances has been Professor Ockelford and there is anxiety that, if he became increasingly successful and if the demands of the world of entertainment were significantly to increase, there would be a temptation to impose on him demands which are simply entirely inconsistent with his abilities and capacities given his disabilities. Because of the difficulty, it is said, in always understanding his wishes, there may be a temptation to assume that he is ready, willing and able

to do more than is actually the case and that, if the decisions are made by someone who has an interest in his success (and by "interest" I do not mean particularly a financial interest) then there is a risk of his being over-stretched with damaging consequences to him personally. The anxiety is expressed that the proposed deputies are too close to Professor Ockelford necessarily to be able to provide the restraint which the best interests of DP may from time to time require. I hope that is a fair estimate of the anxieties of the parties.

18. It is immediately obvious that both those are serious issues, the management of finance and the management of DP's capacities and time. The court, therefore, must be profoundly satisfied that the deputies not only can and are willing, but can be relied upon to deal with all those matters without any other involvement other than the rather general oversight of the public guardian.
19. It was to that end that I heard evidence from Mr P and from DP's sister, E. Mr P has a long history in the world of business and the management of resources, the management of money and the organisation of it. There is not a shadow of doubt but that he has all the requisite skills that would be necessary for the purposes of the proper regulation of DP's finances. He is also a man whom it is abundantly clear from his own professional and business background, is well used to analysing the need for expert advice and taking it as and when required. The court can conclude safely that again he has all the requisite skills to ensure that, not only DP's earnings but the management of his time and the commercial development of his skills, can be properly attended to.
20. Equally, it was apparent when DP's sister gave evidence, that she has a clear understanding of DP's needs and capacities. She has attended him on overseas trips and is familiar with his needs and his capacities. There is, therefore, no reason for the court to doubt that all the requisite skills either are or will be acquired by the family for the purposes of executing the office, both of welfare and financial deputies.
21. The crucial question is whether or not they have a sufficient degree of independence to be able to assert his welfare needs against the views of others, in particular against Professor Ockelford. It is perhaps important to refer to one or two examples that were given in the evidence about this. E in her evidence mentioned that on one occasion the mother had expressed her serious concerns about the enthusiasm for accepting an invitation to be involved in a popular television show, and her views prevailed and no such involvement took place. Mr P mentioned an occasion when DP had been encouraged to take part in an occasion with political overtones about which he was unhappy, and it did not go ahead. They mention, both of them, the cancellation, at quite short notice, of a planned trip to Japan because of difficulties with the travel arrangements and the trip on that basis did not go ahead, however much the playing in Japan may have been a good thing had he got there.
22. So it is said, when one looks at examples like that, then that demonstrates that

there is a sufficient degree of independence and that the deputies will contend on behalf of DP in the teeth of the enthusiasm or ambitions of others.

23. I have to say that I was profoundly impressed with the evidence of Mr P and of E. It was transparently clear that they were committed to promoting the welfare of DP and there can be no doubt in my mind but that they can be relied upon to provide an honourable and honest discharge of the duties of deputies, even though complex issues and possibly substantial sums of money may be involved. Moreover, their evidence satisfied me that they were able to withstand the pressures that might come to develop DP's commercial career (if I might so refer to it) at a pace greater than is actually good for him. I formed the view that both of them were well capable of standing up to the views of others and well capable of asserting that which they believed to be right.
24. That is not to say that I detected any sense of rigidity in these matters. As a general rule, last moment changes are not congenial to DP but there are some that he can cope with and Mr P described an incident in which DP was invited by Jools Holland at rather short notice to play at an event that DP was in fact present at and DP clearly relished the prospect and agreement was reached that he should do so. Mr P and others who read his reactions as enthusiasm to take part in it were proved right by the quality of his performance and his enjoyment of it. So there is no question of undue rigidity, and the examples that I had, satisfied me that there was a true understanding of his views. Not that I think they are infallible in that, any more than anybody else is infallible in reading the exact mind of another human being, however well they know them. I acknowledge that occasionally mistakes may well be made, but that seems to me the kind of thing that simply has to be accepted in the ordinary course of the management of the life of someone in DP's position.
25. It may be that the family felt that they had been slightly impugned by the anxieties raised by the RNIB. I have to say that in my view the RNIB were correct to raise those issues. Delicate though they are, they require to be confronted. It seems to me that those who do not know this family other than what they have read, heard or seen, might have just such questions in mind and it seems to me it is in everybody's interests that they are discussed and answered. I have sought to do that.
26. That review of the evidence and the issues leads me to the following conclusions. First, I am satisfied that both parents and the sister are and ought to be appointed as deputies to deal both with welfare and financial issues so far as DP is concerned. I also think it particularly desirable that at least one deputy should be of the same generation as DP. Secondly, I do not think it necessary that there should be an independent deputy appointed as the anxieties that give rise to a consideration of an independent deputy are, in my judgment, sufficiently met in the consideration that the court has given to the matter. In fact, there is no specific proposal for an independent deputy and it is difficult to see how an independent deputy could not be acquired without there being a significant cost in doing so.

27. The next conclusion is this. Dealing with the subject of accommodation, I think it is right, although it may not be strictly necessary, for me to make a condition under section 16(5) that in the consideration of a move of accommodation, the deputies should consult fully with the RNIB and the West Berkshire County Council. I say it may not be necessary because I do not have the slightest doubt but that those consultations would in any event have taken place, but I put them in the form of an order so that, if there were a dispute and the matter had to be returned, it would be obvious to any judge taking the matter how it was that the return had come about.
  
28. Next, I propose to use my powers under section 19(9) to require the deputies to give notice to the public guardian in the event that DP's earnings should exceed the sum of £150,000 a year. Why that? At the moment his earnings do not remotely approach anything like that because the vast majority of what he does, he does without charge. If he began to earn significantly, the effect of it would be to relieve the public purse of the benefits that are actually or notionally attributed to him at the present time in terms of his care and accommodation. If those were paid for out of his earnings, they would be, as I have indicated earlier in the judgment, a six figure sum each year. If he were to become a self-employed entertainer, there would also be substantial costs associated with it in terms of the obtaining of professional advice, tuition, travel, all sorts of things conventionally associated with it, so that he would have to earn very large sums of money indeed before there could be, as it were, a notional profit element; hence the reason for selecting the figure that I have.
  
29. Those, I think, would be the only conditions that I would want to attach to the powers of the deputies. I raised the issue, and indeed it was directly addressed by Mr O'Brien on behalf of the applicants, that arises under section 19(4) of the Act, which is whether the deputies, where there are two or more, should be appointed to act jointly or jointly and severally or on some matters jointly and on some matters jointly and severally. There are obvious difficulties here when one starts to reflect carefully on what is at stake. It is obviously desirable that in a case like this, the deputies should have the power to act severally. E is of a different generation to the other deputies, but she is of DP's generation and when one is looking far down the line, it may be that she will need to act on her own, particularly if something relatively urgent arises because the other deputies are not available by reasons of health or whatever it might be, to contribute. So clearly there has to be scope for them to act severally. On the other hand, the difficulty of granting, not perhaps in this case, but the difficulty generally in granting powers to act severally, is to lay the seeds of possible dispute where you have a number of deputies. I think that is a problem that the court simply needs to recognise without having to be able to do very much about it. The very limited experience of the operation of this Act so far suggests that, where deputies disagree, one or more of them will in fact notify either the court or the public guardian of the existence of disagreement, and therefore the matter is able to be addressed. It seems to me that it would be unduly complicated to provide conditions as to when deputies were able to act severally in a case like this, where many, many decisions, many of them wholly unpredictable at the present time, will arise for

consideration. So I simply propose at this stage to direct that the deputies are empowered to act jointly and severally and they have to be trusted either to operate in agreement or, if there is serious disagreement on a material issue, to refer that matter to the public guardian or the court.

30. I have little doubt that in this case such reference would be made as the personalities of the deputies, if I may say so, are not such as to allow themselves simply to be overridden in circumstances where they hold different views.
31. Accordingly, the court feels able to make a final order in this case by appointing the three applicants as deputies for both welfare and finance, with the two conditions to which I have referred in terms of consultation over accommodation and notification in the event of earnings reaching a particular figure.
32. That is the judgment I propose to give, and if any parties wish to make representations about individual matters that ought to be included in the order, I will gladly hear them.

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