

Birmingham Civil Justice Centre
Priory Courts
Bull Street
Birmingham

26th October 2012

Before

HIS HONOUR JUDGE CARDINAL

WCC

(Applicants)

-v-

AB & SB

(Respondents)

APPROVED JUDGMENT

APPEARANCES:

For the Applicant:

MR NEAVES

For SB:

MISS KHALIQUE

For CB:

MR. MULLINS

For AB & DB:

NOT REPRESENTED

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WCC -v- AB & SB

JUDGMENT

JUDGE CARDINAL:

1. The Court is faced with what is a short decision but not an easy one to make, with regard to the Litigation Friend to represent AB. He is a young man who presently lives with his mother and was born on the 8th May 1986, so he is therefore 26-and-a-half years old. He is black British and of mixed heritage with, I think, African-Caribbean parents. I am told he has a diagnosis of severe learning disability and autism spectrum disorder, with challenging behaviours, and the local authority tells me in its case summary that he also has some Tourette's syndrome.
2. In its application to the Court of Protection, the local authority appended a COP 3 form and a statement by an independent social worker, Sunita Chopra, who is a Social Care Manager and who is an independent social worker for these purposes. Sadly, that report, although concluding that this young man lacked capacity to make various decisions, did not address the diagnostic and functional tests under Sections 2 and 3 of the 2005 Act and does not really set out, despite its length, the sort of detail I would like to see. It gives sufficient information, in my view, for me to make any interim declaration, as needs be, under Section 48 of the Mental Capacity Act 2005, but it is insufficient for the long term. It is perhaps not surprising, therefore, to learn that SB, the mother, does not agree that her son lacks capacity in all respects.
3. The local authority's case is founded on the apparent - I say "apparent", because I have not yet found this to be the case - lack of co-operation from time to time, by Mother, with the local authority as to the care of her son, and in particular in terms of co-operating with those who provide care packages. I have been told today, but I have not yet evaluated this, that there are some difficulties with the current care provider, and that the Care Quality

Commission is investigating the standard of their work. I am unable, therefore, to draw conclusions, even on an interim basis, as to whether or not SB has placed difficulties in the way of the care of her son.

4. Before me are three applications. The first is the main application by the local authority. The second is an application by CB, who is the aunt and the sister of Mother, the aunt of AB, and the third is a more recent application by the local authority with regard effectively to the moving of AB to supported living. I am told by Mr. Neaves, although Mother has construed this very much worse than the local authority apparently intends, that it is merely an expression of what the local authority might have to do, and that it does not seek the removal of AB from his mother now. It is perhaps unfortunate that such is the state of relations between SB and the local authority, that there is clear misunderstanding of what the local authority intends. I think it would be premature of me today to criticise either Mother, for her understanding, or the local authority for the impression given by the application.
5. The difficulty today, however, is that CB seeks to be Litigation Friend. She does so upon the usual basis, that she says she can fairly and competently conduct proceedings on behalf of AB, and that she has no interests adverse to those of AB, as set out in Rule 140 of the Court of Protection Rules 2007. I remind myself that under Rule 144, sub-rule (3), it says: “The Court may not appoint a Litigation Friend unless it is satisfied the person to be appointed satisfies the conditions in Rule 140, sub-rule (1)”. So I have to be extremely careful as to the appointment of CB.
6. The additional difficulty in this case is that the Official Solicitor has been asked to consider representation of AB on two occasions following initial orders made by this Court. No response had been received from the Official Solicitor to those requests, even though the case was listed before me today. As a result of that lack of response, I personally took it upon myself to telephone the Official Solicitor this morning. I have to say, in the current state of the Official Solicitor’s administration, getting through by the standard telephone number is a

byzantine process, and it took me a considerable period of time eventually to locate the person responsible for this case. She told me, first, she apologised for there being no written response or telephone response to the Court's enquiry owing to the dire state of administration because of pressure of work at the Official Solicitor's office, and second, more to the point, that she would not be able to consider appointment of the Official Solicitor unless and until I had disposed of CB's application. For practical purposes, that means it would take another ten weeks from today, in my estimate, before a Litigation Friend was identified through the Official Solicitor to represent AB.

7. It is my view that AB needs representation now, and that today I ought to proceed, in view of the disputes between Mother and the local authority as to social care issues, and in view of the dispute as to just what AB lacks capacity in, to order independent reports from a consultant psychiatrist and an independent social worker so that this matter is investigated properly. To his credit, Mr. Neaves, on behalf of the local authority, agrees that those directions are sensible.
8. Should I appoint CB? I have read her COP 24 witness statement. In that, she makes it clear that she can act independently and she says that she is concerned as to delay, as am I. In particular she says, "I am confident I can represent my nephew's best interests independently and impartially with the assistance of the solicitor I sought advice from. My only wish is for AB to have a voice within these proceedings. We have a good relationship and communicate well with each other. I want the Court to have the best information upon which to base its decisions, and I believe with the enacting of AB as Litigation Friend, I can assist greatly in pleading my nephew's best interests to the Court".
9. Now, the local authority has indicated a number of concerns about this lady's position. Mr. Mullins summarises some, but not all, in his Position Statement of the 25th October. First, that CB will not be able to provide the necessary commitment to the role. I do not think, in view of what I have heard, that that is right. It seems to me that she has taken the step of

being advised, I am told by two solicitors and counsel, and that she understands just what is involved. I am told by her counsel she understands full well that in placing herself in this role, she may well be in conflict with her sister, and that may be very substantial conflict. Moreover, I put the matter more strongly, she may have a duty to be in conflict with her sister.

10. Second, the local authority says the role places an impossible burden on her, and she would not be independent or objective. It seems to me from such representations which I have heard, it is her intention to be just that. It is always difficult for a family member, but it seems to me that of itself is not ruling out this lady. What she needs to do is establish she is not impartial, as it were, before there is a further consideration of her role. Third, that she will succumb, as it were, to the strong-minded views of SB. Well, again, the proof of the pudding is in the proverbial eating, and it seems to me that this lady can have the opportunity of demonstrating that she will stick to her guns and put her nephew's interests exclusively first.
11. Two additional points against her appointment were advanced orally by Mr. Neaves in submission to me. The first was this lady had withdrawn from acting effectively as a voluntary advocate on behalf of her nephew in the past. It seemed to me that that submission was without merit. Just because a number of members of the family have at different stages offered themselves as supporters, interveners, advocates, whatever one wants to call them, does not mean that this lady has easily lost heart, or that she could not be trusted in the future. It is not unusual for groups of - or other members of an ethnic minority family to act in concert with one another. I do not think this lady has disqualified herself from acting as Litigation Friend by that conduct.
12. However, more particularly, Mr. Neaves drew my attention to the Acknowledgement of Service, which I find on Page A42 of the bundle. That says this. At Paragraph 3.2: "My nephew has the capacity to decide where he wants to live, who he wishes to support him and

manage his finances”. 3.3: “One may seek to establish his capacity in other areas. The mental capacity assessment was, in my opinion, incomplete. I did observe the assessment”.

13. Now, two points arise from this, or rather three. In the first place, I do not think by saying she is opposing the application, that necessarily means that she is doing other than seeking representation to be heard. The boxes, after all, only offer an alternative, are you for or against it; they do not say, “Do you want the matter examined carefully?”, which is in effect what she then went on to say. In the second, it seems to me that she has good reason for putting the matters forward as she does, because she too has her personal doubts about her nephew’s position and wants the matter examined. Thirdly, her criticism of the mental capacity assessment seems to me to have a little merit in it, inasmuch as it does not follow the sort of pattern one would wish to see before coming to a final conclusion. There are those on the autistic spectrum who do nonetheless have capacity in certain respects, and it would not be right for me to assume, simply because this young man has these difficulties, that he will definitely lack capacity with regard to decisions as to residence, contact, care package, litigation, etc. These matters need examination, and knowing as I do that these advocates have been involved in this sort of work before, I have not the slightest doubt that an appropriate question can, should and ought to be asked of an independent psychiatrist, and indeed the independent social worker.
14. Therefore, I do not construe what is said in the Acknowledgement of Service, although apparently at first blush, something that ought to disqualify CB from acting, as indeed disqualifying her. Moreover, she made those conclusions when she did not have the benefit of legal advice, and I think had not seen the COP 3 form, so she did not know what was said. There is, of course, this note to Rule 140 of the Court of Protection Rules, in the Jordan’s Court of Protection Practice 2012. “A relative or concerned person may act as Litigation...for a party other than P, but such a person would be likely to have a conflict of interest in acting for P, and if wishing to participate, should be a third party in their own

right. The Litigation Friend for P would generally be the Official Solicitor unless an independent professional person, e.g. a social worker who is not otherwise involved, was available for appointment”.

15. This country is however undergoing a period of considerable austerity. The funds available to the Official Solicitor’s Department are depleted in terms of the numbers of parties who need his representation. It takes many weeks for the Official Solicitor to take matters on, and he will only become Litigation Friend in any event if he is a Litigation Friend of last resort. He will not do so when it seems appropriate to him that others should act. I cannot, therefore, even today be sure that the Official Solicitor will take this matter on, although he has indicated in principle he will, if I rule out the whole of AB’s family. Therefore, it seems to me, that the comments of the learned authors in the Jordan’s Practice book are perhaps a little excessive. As Mr. Mullins reminded me, I must go by the rules, not the notes, and the rules say that a person can act if they can fairly and competently conduct proceedings on behalf of the person concerned, and have no interests adverse. If it were the case that in the teeth of clear evidence from an independent social worker, from an independent psychiatrist, that this young man needed to be removed from his mother’s care, nonetheless CB argued that he should not be, I would begin to have severe doubts about her role as Litigation Friend. She will know that the court keeps a watching brief over this case, I think I shall reserve it to myself hereafter.
16. So if at some point I have doubts about her role, I will entertain an application very quickly from the local authority to remove her. However, it seems to me there are no arguments today of great merit as to why she should not act as Litigation Friend. Accordingly, I propose to appoint her. I say this, making no criticisms whatsoever of this local authority. They are right to bring this matter to Court. Perhaps their more recent application is rather woolly in terms of timing, but these are matters that need to be evaluated by the Court. WCC should know that I regard its conduct of Court of Protection applications generally as very

responsible and well-put. Therefore, it are right to ask the Court to investigate the matter.

This requires such investigation, and then decisions will be made one way or the other.

17. So I make no criticisms of the local authority in nonetheless rejecting its arguments today. I believe also, in coming to the conclusions I have, that I have looked to the best interests of this young man. They are what will govern my decision, and I expect CB to take an independent and impartial view of simply what is in her nephew's interests, and not of course to be a second voice for SB, with whom she may have to be in considerable conflict in due course, I know not.
