Neutral Citation Number: [2019] EWCOP 57

IN THE COURT OF PROTECTION
SITTING IN THE LIVERPOOL CIVIL AND FAMILY COURT

Case No: 12953741

Courtroom No. 22

35 Vernon Street
Liverpool
L2 2BX

Monday, 1st July 2019

Before:
SIR MARK HEDLEY

B E T W E E N:

CHESHIRE WEST AND CHESTER COUNCIL

Applicant

and

PWK
(by his litigation friend THE OFFICIAL SOLICITOR)

Respondent

ADAM FULLWOOD instructed by the local authority solicitor appeared on behalf of the Applicant
BEN MCCORMACK instructed by Peter Edwards Law appeared on behalf of the Respondent

JUDGMENT
(Approved)

This judgment is covered by the terms of an order made pursuant to Practice Direction 4C-Transparency. It may be published on condition that the anonymity of the incapacitated person and

members of his family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

SIR MARK HEDLEY:

1. PWK is aged 24, having been born on 17 January 1995. He attended the hearing throughout and talked directly to me twice during the course of it. His is not a happy story.
2. He was neglected as a child and spent much time in the care system. He was the subject of a late but, as it turned out, correct diagnosis of autism and mild learning disability. This resulted in his needs remaining unmet during his schooling. He also has a visual impairment and he has spent time compulsorily detained under the Mental Health Act 1983. His current care is, and will continue to be, provided pursuant to Section 117 of that Act. He has been subject to proceedings in the Court of Protection since 2016.
3. It is not necessary to give a more detailed account of his background since he has now achieved stability in his life. He lives in a house with another resident and their day-to-day care is provided by a private agency. PWK made it clear to me that he is happy, both with where he lives and the general quality of care that he receives.
4. The package of support, which includes two-to-one supervision, undoubtedly involves a deprivation of liberty. If PWK has the requisite capacity then, of course, he can consent to that deprivation. If, however, he does not have that capacity, then his deprivation of liberty needs to be authorised. His present accommodation is not a care home so the statutory scheme under Schedule A1 of the Mental Capacity Act 2005 does not apply. This deprivation of liberty requires the authorisation of the Court under Section 16 of that Act. Accordingly, questions as to his capacity arise. A finding that PWK lacks the relevant capacity is the only gateway which allows the Court to make best interest decisions and to grant authorisations. That is so even where, as here, there are no realistic alternatives to what is provided and the person concerned is in fact content with the arrangements.
5. The applicant Local Authority seeks declarations of incapacity in six areas: first, where to reside; secondly, care and support needs; thirdly, contact with others; fourthly, social media and the internet; fifthly, financial and property affairs; and lastly, use or possession of his car provided by the Motability scheme.
6. It is common ground that these issues should be determined, though the Official Solicitor, on behalf of PWK, queries whether the question of the car should be separately determined and also invites attention to the fact that in relation to some matters, for example where to reside, PWK, in reality, has no choice.
7. Apart from hearing PWK twice during the trial, each time at my invitation, I also heard evidence from the social worker, Mr Sean McDonagh. He conveyed a warm concern for PWK and a desire to work with him. This is generally reciprocated, though the social worker is the inevitable butt of any conflict that PWK has with the Local Authority at any particular time. That said, I am satisfied that he understands and is committed to acting in the best interests of PWK.
8. I also heard from Dr Lisa Rippon, a consultant psychiatrist approved under Section 12(2) of the Mental Act 1983. Until Dr Rippon's involvement this year, it had always been the common view of those involved that PWK lacked capacity in each relevant area. In her earlier reports, Dr Rippon challenged this view. However, having had the opportunity to consider all the information in the case, in her third report dated 10 April 2019, she revised her views and found that he lacked the relevant capacities. Inevitably, her views had to be explored with some care and, given the inherent complexity of the case, it was listed before a tier-three Judge.
9. As Dr Rippon's evidence proceeded, the true difficulty became clear. When PWK was relaxed and in a good place he might well be regarded as having capacity. However, when

he became anxious his position could be very different. Moreover, there were many things that could trigger anxiety and quite often his carers would be confronted with irrational behaviour that could be difficult to manage.

10. The question arose as to how the legal position on capacity should be addressed in these circumstances. Whenever the question of capacity arises, the Court should start with a consideration of Sections 1 to 3 of the Mental Capacity Act 2005. The Court should avoid glossing the Act but should stick to its wording. It is essential to remember that under Section 1(2) there is a presumption of capacity which anyone seeking to challenge it, here the Local Authority, must do so by establishing incapacity on the balance of probabilities. By Section 1(4), it may not seek to infer incapacity from the taking of unwise decisions. By Section 2(1) it is clear that capacity is a decision-specific concept. Moreover, it has a mental component. It provides:

> 'For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'

11. It is just worth remembering that subsection (2) of that section provides, 'It does not matter whether the impairment or disturbance is permanent or temporary.'
12. In the circumstances of this case it is not doubted that PWK, by reason of his autism and learning disability, suffers an impairment within Section 2(1) of the Act.
13. One then goes to Section 3(1). That provides:

> 'For the purposes of Section 2, a person is unable to make a decision for himself if he is unable –
> (a) to understand the information relevant to the decision,
> (b) to retain that information,
> (c) to use or weigh that information as part of the process of making the decision, or
> (d) to communicate his decision (whether by talking, using sign language or any other means).'

14. Clearly there is no issue in this case about PWK's ability to communicate a decision and the focus is on the first three subparagraphs. For the purposes of Section 3 being satisfied, any of those subparagraphs might turn out to be decisive.
15. It is important to recognise that in this case there is likely to be a particular focus on understanding relevant information, retaining it and using or weighing it. There will be many occasions when PWK is hampered by anxiety when those grounds are clearly made out. However, that will not always be the case. It may fluctuate. The question is how the law deals with that.
16. In *Royal Borough of Greenwich v CDM* [2018] EWCOP 15, Cohen J made a declaration of fluctuating capacity. There are, as it seems to me, two potential difficulties with that approach. The first is the question of whether the statute actually permits the making of a declaration in those terms. The second is that there is the practical problem of how those responsible for PWK's care could in fact operate such a declaration on the ground. It is not, of course, my place to say that this decision was wrong in the circumstances of that case, but I do believe that PWK's case requires a rather different perspective.
17. I take the liberty, if I may, of adopting the position that I sought to set out in my judgment in *A,B & C v X, Y & Z* [2012] EWHC 2400 (COP). There I was dealing with a person with some fluctuating capacity. I sought to draw a distinction between isolated decisions, for

example, making a will or power of attorney, and cases where decisions may regularly have to be taken sometimes at short notice, as for example, in managing one's own affairs.

18. In paragraph 41 of the judgment I expressed myself as follows:

> 'In the light of Dr Posser's evidence, I am satisfied on balance that he lacks capacity to manage his own affairs. In so finding I acknowledge, as I have done in relation to the other matters, that there would be times when a snapshot of his condition would reveal an ability to manage his affairs. But the general concept of managing affairs is an ongoing act and, therefore, quite unlike the specific act of making a will or making an enduring power of attorney. The management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent. In the context of the evidence that I have, I am not satisfied that he has capacity to manage his affairs.'

19. Some have referred to this as taking a longitudinal view. In my view, this approach has the value of clarity. It establishes that the starting point is incapacity. The protection for the protected person lies in the mandatory requirements of Section 4, in particular subsections (3) and (6) which provide as follows:

> '(3) He must consider –
>
> (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and
>
> (b) if it appears likely that he will, when that is likely to be.
>
> (6) He must consider, so far as is reasonably ascertainable –
>
> (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
>
> (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
>
> (c) the other factors that he would be likely to consider if he were able to do so.'

20. It seems to me that the closer the protected person is at the moment of actual decision to capacity, the greater the weight that his views must carry and of course, any decision made must take in to account that he may acquire capacity and, therefore, it must not be beyond change.

21. In PWK's case all the relevant decision-making with which I am concerned lies in the field of repeat rather than isolated decisions. Dr Rippon's view, which was not really the subject of challenge, was that where a longitudinal perspective was adopted then PWK lacked capacity in all relevant areas.

22. When PWK spoke to me he was lucid, courteous and engagingly succinct, yet it was equally apparent that his thinking was wholly dominated by his car. Because of his visual impairment he cannot drive it and is dependent on others to do so. For understandable reasons, which do not require recitation in Court, his care providers will not authorise their staff to drive it. It is, therefore, unused and may indeed on that basis be repossessed by Motability. Family members have varying views about the car.

23. What is clear is that for PWK it is a dominant concern. This concern generates disproportionate anxiety, which then seriously interferes with his decision-making in all areas and he does or says things which he usually rapidly regrets. It is a good illustration of

the issue that Dr Rippon was concerned to highlight.

24. It is because the car features so significantly in PWK's thinking that I think it ought to be the subject of a separate determination. Ordinarily I would accede to the view that this was simply a component of the care package and ought to be treated as such. In the unusual circumstances of this case, however, I have decided that it should receive individual consideration.

25. As I have said, PWK is a man with multiple disadvantages but who can and does function remarkably well within the constraints of his care package. Dr Rippon was clearly impressed by his abilities to think and express himself in interview, as I was by his ability to handle himself in Court. Yet there is another side to the picture when PWK is overwhelmed by anxiety and speaks and behaves in a way he rapidly comes to regret. That anxiety is often but not always predictable and is liable to affect every part of his life and not just the issue of the moment, whatever that may be. It is the unpredictability of that anxiety and the seriousness and breadth of its impact which is decisive in this case in overturning the legal presumption of capacity. Although its effect is principally in Section 3(1)(c), it does often extend to the earlier matters too. It is, in applying a longitudinal perspective to this,that highlights the incapacity.

26. For the reasons that already appear sufficiently in this judgment, I am satisfied that PWK lacks capacity to conduct these proceedings to determine his residence or care or his contact with others or his management of his own affairs. It is not appropriate for me to give detailed directions under this head under Section 4. It is enough to say that the detailed care package provided under Section 117 of the Mental Health Act 1983 is, as it seems to me, entirely in his best interests and that it is further both proportionate and in his best interests to deprive him of his liberty to the extent implicit in that package. The details are matters to be worked out on the ground on the basis of decisions made in accordance with Section 4 by those responsible for his care.

27. I have considered, with care, the observations made by Cobb J in *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2. In my judgment, it is correct to make a separate determination in this case as well. I am satisfied, again applying a longitudinal perspective, that PWK lacks capacity in this area. Just as PWK is undoubtedly able to make choices as to what he wears or what he eats, so he will be able to make many choices in this area, but not all and in particular he lacks the ability to make judgments about what is actually harmful as opposed to merely unpleasant and some judgments will simply have to made for him. Again, I think it both unwise and unnecessary to say more for all the indications are that these matters can be negotiated and resolved on the ground.

28. The car is a controversial matter. However, three things are clear: first, that PWK cannot drive it himself; secondly, no one can compel an unwilling carer to drive it for him; and thirdly, no one has attempted to assert a right to drive in the face opposition from the care providers. However, possession of the car and access to it and use of it, even whilst stationary, have proved to be controversial. As I say, matters relating to this wholly dominated PWK's written observations and in particular his second address to me.

29. Having reflected with care on this, I have concluded that PWK lacks capacity to make decisions about the use of his car. I am not convinced that he is always able to retain all the necessary information. However, I am amply satisfied that, because of the acute anxiety that this subject generates in him, he is unable to use and weigh that information as part of the decision-making process.

30. It is not for me, again, to make best interest determinations about this for it is necessarily part of the care package. I am satisfied that both the social worker and the care providers understand the importance of this matter to PWK and will take account of that. It may be

wise that, if the decision is to remove the vehicle, to ensure that it is done at the behest of Motability rather than the Local Authority or the care providers as I think PWK might find that an easier decision to accept.

31. Those then are my findings on capacity, to which I have added some limited observations on best interests. As the effect is to authorise a deprivation of liberty, this should now be the subject of at least annual review. This case can now be returned to the experienced District Judge who earlier had the conduct of it. It should be a matter for the parties, who have independent rights to apply to the Court, and the Judge to determine when and how it is reviewed so long as the period does not exceed 12 months.

32. I should like to express my gratitude to counsel for their assistance in this matter. I should like to end by wishing PWK, who has carried disadvantages that might have crushed another person, all the very best for the future and that he will find all the happiness that can be made available to him.

End of Judgment

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This transcript has been approved by the judge.