

Neutral Citation N0. [2020] EWCOP 44

**IN THE COURT OF PROTECTION**

**Truro Combined Court Centre  
Edward Street, Truro, Cornwall  
TR1 2BP**

**IN THE MATTER OF SECTION 21A OF THE MENTAL CAPACITY ACT 2005**

**AND IN THE MATTER OF NP**

**BEFORE:**

**DISTRICT JUDGE IAN TAYLOR**

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**CORNWALL COUNCIL**

**Applicant**

**- and -**

**NP**

**(by his litigation friend, the Official Solicitor)**

**1<sup>st</sup> Respondent**

**- and -**

**BKP**

**2<sup>nd</sup> Respondent**

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**Ms Zoe Gannon (instructed by Cornwall Council) for the Applicant**

**Mr Oliver Lewis (instructed by Abbotstone Law) for the 1<sup>st</sup> Respondent**

**Ms Emma Sutton (instructed by Emma Stacey Legal) for the 2<sup>nd</sup> Respondent**

**Hearing date 9 September 2020**

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**Judgment**

## **District Judge Taylor:**

### THE PARTIES

1. The Applicant is Cornwall Council, the first respondent is NP by his litigation friend the Official Solicitor and the second respondent is BKP the wife of the first respondent.

### THE FACTS OF THE CASE

2. Mr NP is a 69-year-old man. He previously lived with his wife of 35 years, Mrs BKP at their matrimonial home. There is a wealth of information provided by BKP in her various statements about NP and their life together which has always been based in the same area of Cornwall where they have both been actively involved in their community for their whole lives.
3. NP has diagnoses of neurological sequelae of herpesviral encephalitis and personality change due to known psychological condition. This followed what must have been a hugely distressing incident for BKP on 2<sup>nd</sup> December 2018 when NP collapsed at home and had to be hospitalised. On 4<sup>th</sup> February 2019 NP was transferred to the X neuro-rehabilitation unit where he currently resides.
4. There is no dispute that NP lacks the capacity to conduct proceedings and to make decisions regarding his residence and care needs, and the court has already made declarations pursuant to s.15 MCA.
5. In about September 2019 BKP was told by the X neuro-rehabilitation unit that it was considered that NP's recovery had 'plateaued' and was not going to be receiving further physiotherapy or occupational therapy. He was therefore medically fit for discharge. The issue arose as to where NP should be discharged, the Council believing his needs would be best met in a residential care home and BKP wishing him to return home with a package of care.
6. Cornwall Council has filed a needs assessment dated 28<sup>th</sup> April 2020 and has updated that recently, however NP's care needs have not materially changed. BKP broadly agrees with its contents.
7. NP's care needs include the following:
  - a. NP has mobility difficulties that vary on a day-to-day basis. Transfers generally require 2 carers;
  - b. NP can usually manage to walk 5 meters with 1 carer, sometimes he becomes tired and a second carer needs to be ready with a wheelchair, and sometimes he can walk further;
  - c. As a result of his cognitive impairment and his mobility difficulties, NP requires assistance with his personal care, including washing, dressing and undressing, meal prep. If large food items are cut up, he can generally eat with a fork and lift a cup to drink;
  - d. NP needs assistance to manage his toileting needs;

- e. NP sometimes wakes up during the night and at times his behaviour whilst he has been in hospital can become “*physical*” ;
  - f. NP’s moods are variable and he can be unpredictable;
8. NP’s current wishes and feelings are to return home. If he had capacity, it is likely that he would want to return home. His previously expressed values demonstrated by him living at home and being married to his wife for 35 years, in my view amply demonstrate that he would want to return home.

## THE PROCEEDINGS

9. On 8<sup>th</sup> April 2020 Cornwall Council made the application which was subsequently reconstituted as a s.21A MCA challenge, given that NP is deprived of his liberty by way of a standard authorisation under Schedule A1 to the MCA. The authorisation was made by the applicant on 1<sup>st</sup> April 2020 and is due to expire on 29<sup>th</sup> September 2020.
10. The question for the court to determine today is where is it in NP’s best interests to live when he is discharged from hospital. There are only two options being either a return to the marital home or a transfer to the Z Nursing Home.
11. The social worker has written six statements, the last dated 4<sup>th</sup> September 2020, setting out the Local Authority’s position on NP’s needs and how in its view those needs can be met. The social worker’s view was that it was not in NP’s best interests to return home, because in the event of a breakdown, it would be “easier for him to adjust rather than returning home first and then needing admission to [Z Care Home] or another placement on a temporary basis”. His concerns on sustainability focused on “NP’s behavioural volatility which can lead to his physical aggression on an unpredictable basis”, and he was “concerned for the welfare of BKP in having to manage such likely incidents as NP’s primary carer and for the other carers who will be providing care”. In a previous statement he set out some recent incidents where NP had been aggressive on the ward.
12. BKP’s statement dated 7<sup>th</sup> September 2020 responded to these concerns. She explained how she was able and willing to meet NP’s needs at home. She and NP cared for NP’s mother, who had Parkinson’s disease and dementia, at their home for ten years. She explained that before the Covid-19 lockdown, she used to visit her husband in the X rehabilitation unit every day, but since lockdown she has been shielding and the ward has been unable to accommodate visitors. NP and BKP have therefore not seen each other for six months. BKP explained the very close relationship that she has enjoyed with her husband over many years. In setting out her view that it would be in NP’s best interests to return home, she said that the time at home would: “Give [NP] and I time together, some of which would be private, which I believe would be overall good for both our mental health” and “enable us to have privacy of our relationship, a hug, a kiss goodnight and experience most of the lucid moments he has together.”
13. The primary submissions made on behalf of BKP were that:

- (1) The identified risks can clearly be appropriately managed on an interim basis, and a sensible risk appraisal points very obviously to the court directing a home trial;
  - (2) The period of the trial can be appropriately utilised to obtain/ file further evidence to more accurately determine where NP should reside and what care he should receive on a longer term basis;
  - (3) The court must avoid the temptation to put the physical health and safety of NP before everything else and ask itself, what good is it making NP safer if it merely makes him miserable?
  - (4) It would be wrong not to try a trial at home, even with a degree of pessimism, if a placement is available with a package of support;
  - (5) The factor of magnetic importance is that if a trial is not attempted now, the reality is that NP will never again have the opportunity to live in his own home with BKP.
14. On behalf of NP, the position of the Official Solicitor was that a trial at home was in NP's best interests. No option being risk-free, if the return home fails, it is likely to do so quickly, and the strength of the relationship between NP and his wife, coupled with her ability and willingness to provide care, supported by a care package paid by the Local Authority, means that the return home is feasible and that there is both a plan in place that prevents known risks from arising, as well as the contingency of a vacancy at the Z Care Home being kept open for three weeks. The Official Solicitor took the view that a trial return home was the less restrictive of the two options, the most proportionate and the option that best afforded NP his rights under article 8 of the European Convention on Human Rights and article 19 of the UN Convention on the Rights of Persons with Disabilities (see below).
15. The hearing today was listed as a one-day hearing to determine best interests. It was planned that the court would hear live evidence from the matron of the ward in which NP is currently living, NP's social worker and BKP. At the start of the hearing, counsel for the Local Authority informed the court that the Local Authority had modified its position, whereby having reflected on the recent evidence on NP's night-time needs, and the evidence received from BKP the day before the hearing, it no longer opposed a trial return home, but had significant reservations about the sustainability and risks involved in NP living and receiving care at home. Given the Local Authority's reservations about the risks of a trial at home, and as the ultimate decision in a case such as this fell '*on the shoulders of the court and not on the shoulders of the parties*' (*Re M (Deprivation of Liberty)* [2013] EWHC 3456 (COP) [§41] Counsel for the Local Authority requested the court determine the matter by way of a short judgment.

## THE LAW

16. The powers of the court in relation to Schedule A1 to the MCA are set out in section 21A(2) which give the court jurisdiction for the purposes of Article 5(4) of the European Convention on Human Rights ("ECHR") to review the authorisation of a person's detention and provides that:

*'Where a standard authorisation has been given, the court may determine any question relating to any of the following matters –*

- (a) whether the relevant person meets one or more of the qualifying requirements*
- (b) the period during which the standard authorisation is to be in force*
- (c) the purpose for which the standard authorisation is given*
- (d) the conditions subject to which the standard authorisation is given*

Thereafter section 21A(3) provides that:

- 'If the court determines any question under subsection (2), the court may make an order –*
- (a) varying or terminating the standard authorisation, or*
  - (b) directing the supervisory body to vary or terminate the standard authorisation'*

17. Once an application is made under section 21A, the court's powers are not confined simply to determining the question of whether P meets one or more of the qualifying requirements and the court has the power to make declarations under section 15 as to whether P lacks capacity to make *any* decision, and once such a declaration is made, the court has wide powers under section 16 to make decisions on P's behalf concerning his personal welfare or property and affairs (*CC v KK* [2012] EWHC 2136 (COP), Baker J at para 16, *PH v A Local Authority* [2011] EWHC (Fam), Baker J at para 15).

18. The criteria to be applied when making decisions about what is in the best interests of an incapacitated adult are set out in section 4 MCA 2005: *'(1) purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of -*
- (a) the person's age or appearance, or*
  - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.*
- (2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.*
- (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.*
- (4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.*
- (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.*
- (7) He must take into account, if it is practicable and appropriate to consult them, the views of -*
- (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,*
  - (b) anyone engaged in caring for the person or interested in his welfare*
  - (c) any donee of a lasting power of attorney granted by the person, and*
  - (d) any deputy appointed for the person by the court, as to what would be in the person's best interests and, in particular, as to the matters mentioned in sub-section (6). ...'*

19. The leading case as to the application of the best interests criteria is the decision of the Supreme Court in *Aintree University Hospitals NHS Foundation Trust v James and others* [2013] UKSC 67. At §39 of her Judgment, Baroness Hale observed:

*'The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological ..... they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be; and they must consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be'*

*'The purpose of the best interests test is to consider matters from the patient's point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient's wishes are. .... But insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him,*

*it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being'*

20. In *Wye Valley NHS Trust v Mr B* [2015] EWCOP 60, Peter Jackson J (as he then was) stated:

*'Where a patient lacks capacity it is accordingly of great importance to give proper weight to his wishes and feelings and to his beliefs and values ... once incapacity is established so that a best interest's decision must be made, there is no theoretical limit to the weight or lack of weight that should be given to the person's wishes and feelings, beliefs and values. In some cases, the conclusion will be that little weight or no weight can be given in others, very significant weight will be due. This is not an academic issue, but a necessary protection for the rights of people with disabilities. As the Act and the European Convention make clear, a conclusion that a person lacks decision-making capacity is not an "off-switch" for his rights and freedoms. To state the obvious, the wishes and feelings, beliefs and values of people with a mental disability are as important to them as they are to anyone else, and may even be more important. It would therefore be wrong in principle to apply any automatic discount to their point of view.*

*It is, I think, important to ensure that people with a disability are not – by the very fact of their disability – deprived of the range of reasonable outcomes that are available to others .....*

21. In *ITW v Z, M & Various Charities* [2009] EWHC 2525 (Fam) Munby J (as he then was) set out a number of features at para 35 which may be important when assessing P's wishes and feelings:

- a. The degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings;
- b. The strength and consistency of the views being expressed by P;
- c. The possible impact on P of knowledge that their wishes and feelings are not being given effect to;
- d. The extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and
- e. The extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in their best interests.

22. In cases of vulnerable adults, there is a risk that all professionals involved with treating and helping that person (including, a Judge in the Court of Protection) may feel drawn towards an outcome that is more protective of the adult. This point was articulated most strikingly in the Judgment of Munby J in *Re MM (An Adult)* [2007] EWHC 2003 (Fam):

*'A great judge once said, 'all life is an experiment', adding that 'every year if not every day we have to wager our salvation upon some prophecy based upon*

*imperfect knowledge’ (see Holmes J in Abrams v United States (1919) 250 US 616 at 630). The fact is that all life involves risk, and the young, the elderly and the vulnerable, are exposed to additional risks and to risks they are less well equipped than others to cope with. But just as wise parents resist the temptation to keep their children metaphorically wrapped up in cotton wool, so too we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else. Often it will be appropriate to do so, but not always. Physical health and safety can sometimes be brought at too high a price in happiness and emotional welfare.*

*The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately to be paid in order to achieve some other good – in particular to achieve the vital good of the elderly or vulnerable person’s happiness. What good is it making someone safer if it merely makes them miserable?’*

23. The ‘protectionist culture’ has been deprecated by the court, which has confirmed that its function in challenges such as this can be to take decisions on behalf of P that public authorities feel are too risky for them properly to be able to take themselves, and that it is perfectly appropriate that responsibility for the outcome should fall on the shoulders of the court (*Re M (Best Interests: Deprivation of Liberty)* [2013] EWHC 3456 (COP) [2013] EWCOP 3456, Peter Jackson J, §41).

24. Additionally, in *Re GC* [2008] EWHC 3402 (Fam), Hedley J considered whether it was in the best interests of an elderly man to be discharged from hospital to the home where he had lived for many years and commented:

*‘GC is a man in the 83rd year of his life and my concern is to ask myself: how will he most comfortably and happily spend the last years that are available to him? ..... Next it seems to me that for the elderly there is often an importance in place which is not generally recognised by others; not only the physical place but also the relational structure that is associated with a place ...’*

25. In connection with the issue of a ‘trial’ placement, Hedley J commented at §24:

*‘It seems to me that it would be wrong not to try, even with a degree of pessimism, a placement with a package of support’*

26. Also the decision of District Judge Eldergill in *Westminster City Council v Manuela Sykes* [2014] EWCOP B9 is of relevance:

*‘several last months of freedom in one’s own home at the end of one’s life is worth having for many people with serious progressive illnesses, even if it comes at a cost of some distress. If a trial is not attempted now the reality is that she will never again have the opportunity to live in her own home’*

and that



*'although there is a significant risk that a home care package at home will 'fail', there is also a significant risk that institutional care will 'fail' in this sense (that is, produce an outcome that is less than ideal and does not resolve all significant existing concerns)'*

27. The Court must also consider the right to live independently and be included in the community, as set out in Article 19 to the UN Convention on the Rights of Persons with Disabilities 2006 ("CRPD"), which the UK ratified in 2009:

***Article 19 – Living independently and being included in the community***

*States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:*

- a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;*
- b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;*
- c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.*

28. General Comment No. 5 on article 19 by the UN Committee on the Rights of Persons with Disabilities, published in 2017, clarified that institutional settings violate Article 19. It set out that elements of institutions or institutionalisation include:

- a. obligatory sharing of assistants with others and no or limited influence over whom one has to accept assistance from;
- b. isolation and segregation from independent life within the community;
- c. lack of control over day-to-day decisions;
- d. lack of choice over whom to live with;
- e. rigidity of routine irrespective of personal will and preferences;
- f. identical activities in the same place for a group of persons under a certain authority;
- g. a paternalistic approach in service provision;
- h. supervision of living arrangements; and
- i. usually also a disproportion in the number of persons with disabilities living in the same environment. [para. 16(c)]

29. It is clear that Z Nursing Home constitutes an institution, and that if there are two options then the court should prefer the option that avoids a violation of P's rights under the CRPD, albeit that the CRPD has not been incorporated into English and Welsh law, the court should pay it due regard given the UK's ratification.

**THE OPTIONS**

30. I must decide whether upon discharge it is in NP's best interests to live and receive care in the marital home with a package of care provided by BKP and 4 care visits per day with 4 sleeping night carer, or to live and receive care in the Z Care Home.
31. Trial at home pro's:-
- a. It accords with NP's current wishes
  - b. It accords with NP's historic beliefs and values
  - c. There is every possibility that NP's physical and importantly mental health needs may be able to be catered for
  - d. Without a trial the Court will be lacking important information to make final decisions
  - e. The Local Authority will keep a bedroom open at Z Care Home for a period of three weeks
  - f. The careful and sensitive planning for pre-transition shadowing and the transition itself
  - g. It is the least restrictive option and prevents NP from living in an institutional setting
32. Trial at home cons:
- a. There is a risk of breakdown leading to emergency placement in the Z Care Home within the first three weeks and uncertainty thereafter
  - b. There are risks of physical harm to NP if his supervision is inadequate
  - c. There is less security than the alternative due to the potential for changes in carers etc
  - d. It is not 'secure' regarding the actual property and the furnishings etc hence a higher risk of potential physical harm to NP
33. Z Care Home pros:
- a. There would be highly skilled staff and a 'secure' environment
  - b. There is less chance of breakdown of placement or the need for NP to move
  - c. There is the ability to meet all of NP's physical needs going forward including if his health deteriorates
34. Z Care Home cons:
- a. It is not in accordance with NP's wishes and therefore there is a risk of disruption of the placement by him
  - b. It is not in accordance BKP's wishes which should be canvassed and taken into consideration
  - c. It is not the least restrictive option
  - d. It will effectively mean that no other option will be available

#### REASONS FOR DECISION

35. Taking all of the issues set out above into consideration and in particular carefully considering the care plan which has been placed before the Court and into which clearly a huge amount of time and effort has been put by the social worker and the Local Authority for which I am very grateful, and whilst acknowledging the risks to

NP of the home trial but noting the relevant law and case law, the Court concludes that there is not such a level of risk in the trial as to prevent the Court from considering it to be in the best interests of NP to attempt the same.

36. The key to success is for the Local Authority and BKP to work together and to find mutually acceptable solutions to the issues which will inevitably arise during the course of the trial period and beyond.
37. In the order I will make today I will list a review hearing on 30 October 2020 for one hour to review how the trial period has gone and make any further directions needed. That hearing may be vacated in advance by consent of the parties.

DJ I TAYLOR  
09.09.2020