Neutral Citation Number: [2024] EWHC 294 (Fam)

Case No: 14075345

IN THE HIGH COURT OF JUSTICE
COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14th February 2024

Before:

MRS JUSTICE ARBUTHNOT

Between:

VT (by her litigation friend, the Official Solicitor)	**Appellant**
- and -	
NHS CAMBRIDGESHIRE AND PETERBOROUGH INTEGRATED CARE BOARD	**First Respondent**
- and -	
CAMBRIDGESHIRE COUNTY COUNCIL	**Second Respondent**

- -

Miss Hutchinson (instructed by **MJC Law**) for the **Appellant**
Mr Parkhill (instructed by **Mills & Reeve LLP**) for the **First Respondent**
Mr Withers (instructed by **Pathfinder Legal Services Ltd**) for the **Second Respondent**

Hearing dates: 1st November 2023 and 28th November 2023

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JUDGMENT – IMPORTANT DECISION TAKEN AT A PROCEDURAL HEARING

Mrs Justice Arbuthnot:

Introduction

1. On 1st November 2023, I allowed the appeal brought by the Appellant, VT, by her litigation friend, the Official Solicitor, against a decision made on 2nd October 2023 by a Circuit Judge ("CJ"), sitting as a nominated Judge of the Court of Protection.

Background

2. VT was said to have a historic diagnosis of schizophrenia. However, until she was aged 78, VT continued to reside in her own home. The conditions in her home were said to be putting her at risk. Cambridgeshire County Council ("CCC") therefore made an application to authorise P's move to a residential setting from hospital. The Court made orders authorising VT's move to residential care. VT was not represented at the initial hearing on 28th April 2023 or when a COP9 application was made on 10th May 2023 to change the discharge location.

3. VT moved to residential care on 2nd June 2023. VT was deprived of her liberty pursuant to a standard authorisation which came into force on 16th June 2023. VT expressed a wish to return home.

4. On 12th July 2023 the CJ made an order for a section 49 Mental Capacity Act 2005 Report which was to be filed on 29th September 2023. There was a recital to the order which said that the parties' shared aim, in principle, was to return VT home, with or without a package of care.

5. On 17th July 2023, the Court appointed a deputy for property and affairs on an interim basis.

6. There was a further directions hearing on 7th September 2023, by which time VT's condition had deteriorated. Cambridgeshire and Peterborough Integrated Care Board ("ICB") was joined as a party, as VT had been granted funding through the ICB as commissioner for services. It was ordered to provide a witness statement setting out the services it would be willing to fund to facilitate VT's return home. It was also to provide details of any other residential options including a care home.

7. A further directions hearing before the CJ was to take place on 2nd October 2023 with a time estimate of one hour.

8. One hour before the directions hearing took place, during pre-hearing discussions, the ICB said to the other parties, for the first time, that it intended to invite the Court to determine its application summarily.

9. On 2nd October 2023, the section 49 report on capacity had not been filed. Those representing VT, supported by CCC, applied for further evidence about P's current presentation and an exploration of the care that could be given to her on a return home. Those representing VT and CCC contended that this would enable a fair best interests decision to be made.

10. The ICB invited the Court to conclude the proceedings that day. The ICB said it was increasingly of the view that a return home would be clinically unsafe for VT and on that basis it was not prepared to commission a package of care at home.

11. The ICB's application was opposed by the Official Solicitor on behalf of VT and by CCC. VT's legal representatives argued that the matter should be listed for a contested hearing and not determined summarily. The issues which they said had to be determined at a final hearing were VT's best interests.

12. The property and affairs deputy made it clear that VT had private resources which might be able to fund private care at home but that they did not have the expertise or knowledge to put a package in place in a very short period of time. The deputy had provided a statement where she said it would take nine days for the property to be made suitable for VT.

13. The CJ made final decisions. The CJ decided that VT lacked capacity to conduct proceedings, to make decisions about her residence and about the care she should receive, to manage her property and affairs and to make decisions concerning her items and belongings. The Court determined that the best interests requirement was met.

14. In the judgment the CJ was asked to give, the CJ said that VT lacked capacity on the evidence and said that there was no point in waiting for the section 49 report as it would not add very much to the picture which was "fairly clear" from other evidence.

15. That CJ said that although VT would like very much to go home the CJ's role was to decide what was in her best interests and that was not to go home. In the view of the CJ, all a further witness statement would do was to confirm what the Judge was being told in Court in submissions. The CJ did not see any purpose in prolonging the proceedings.

16. Furthermore, the CJ said VT was in declining physical health and she would need a full-time care package. There was a real risk VT would decline help and then she would deteriorate rapidly and that would not be in her best interests. It was not the ICB's job to put together a package of care and the professionals would be put to too much trouble.

17. The decision was appealed by the Official Solicitor on behalf of VT supported by CCC. It came before Mrs Justice Theis who listed the proceedings in front of me to consider permission to appeal and the substantive appeal, if permission were to be granted.

Appeal

18. I considered the transcript of the hearing on 2nd October 2023, the skeleton arguments and the relevant authorities. The ICB took a realistic approach. By the time I heard the application on 1st November 2023, VT had stabilised. The initial thoughts that she was in a rapid terminal decline were misplaced.

19. I gave permission and allowed the appeal giving a short *ex tempore* judgment.

20. I listed the matter before me on 28th November 2023 by which time matters had moved on and VT's health had declined substantially.

Discussion

21. This was the second case in a short period where I had allowed an appeal against final decisions made by a CJ at a case management hearing when the parties had expected only a procedural hearing.

22. I asked the parties therefore to provide me with a consideration of the principles and some suggestions for guidance. I am very grateful to them for their assistance. What is set out below is assisted particularly by the submissions of Mr Parkhill counsel for the ICB who did not appear below.

23. The principles Courts apply in Court of Protection cases are well known but bear repetition.

24. The Court of Protection Rules 2017 set out the overriding objective. This includes dealing with a case justly and at proportionate cost. Any case should be dealt with expeditiously and fairly, so far as it is practicable, ensuring that P's interests are properly considered. Any case should be dealt with in proportion to the nature of the issues.

25. The Court has a duty to actively manage cases on its own initiative or on application by a party. Active case management allows the Court to consider the appropriate pathway for the case. Courts are to ensure that delay is avoided and costs are kept down. The Court is to decide promptly which "issues need a full investigation and hearing and which do not". The Court is enjoined to take a proportionate approach to the issues. The Court should deal with as many aspects of the case as the court can on the same occasion.

26. The Court of Protection does not have an express power to give summary judgment but such powers exist in the Court of Protection by virtue of rule 2.5, which provides for the application of the Civil Procedure Rules:

> "2.5.—(1) In any case not expressly provided for by these Rules or the practice directions made under them, the court may apply either the Civil Procedure Rules 1998 or the Family Procedure Rules 2010 (including in either case the practice directions made under them) with any necessary modifications, in so far as is necessary to further the overriding objective".

27. The principles concerning the Court's powers to manage cases have been considered in a number of authorities.

28. In *KD & Anor v London Borough of Havering* [2009] EW Misc 7**,** HHJ Horowitz QC considered an appeal against orders made at an interim hearing. At paragraph 1, the Judge explained:

> "… in the course of a short hearing in proceedings brought under the Mental Capacity Act 2005 and expected to be interlocutory by the parties who appeared, District Judge Jackson made orders intended to dispose of all welfare issues in the case."

29. In paragraph 27, HHJ Horowitz QC said:

> "…It is not, it seems to me, the intended policy of the [Mental Capacity Act 2005] Act that every case should proceed to an extended hearing with the assistance of instructed experts or examination of experts.
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> 28. But such summary power is, in my judgement, to be exercised appropriately and with a modicum of restraint. The power to make an order of the court's own initiative without hearing the parties or giving them an opportunity to make representations does not extend as was done here to engagement in that procedure at the outset of a hearing in which the parties were in attendance all the more so in expectation of procedural and no other steps. It is plainly a power to be exercised as an alternative to a hearing and in the proper case such as an emergency or where there is little or no apparent contest anticipated to the exercise of the court's powers. It is not likely to be an appropriate power to be exercised where the outcome is a deprivation of liberty in circumstances where there is a serious issue or potential issue whether that is appropriate and so where Articles 5 and 6 are potentially both engaged."

30. In *N v ACCG & Ors* [2017] UKSC 22, at paragraph 40, Baroness Hale referred to the availability, via the CPR, of summary judgment, but also referred to the decision in *KD*, and the need for restraint in its use:

> "The Court of Protection has extensive case management powers. The Court of Protection Rules do not include an express power to strike out a statement of case or to give summary judgment, but such powers are provided for in the Civil Procedure Rules, which apply in any case not provided for so far as necessary to further the overriding objective. The overriding objective is to deal with a case justly having regard to the principles contained in the 2005 Act (Court of Protection Rules 2007, rule 3(1)). Dealing with a case justly includes dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues and allocating to it an appropriate share of the court's resources (rule 3(3)(c) and (f)). The Court will further the overriding objective by actively managing cases (rule 5(1)). This includes encouraging the parties to co-operate with one another in the conduct of the proceedings, identifying the issues at an early stage, deciding promptly which issues need a full investigation and hearing and which do not, and encouraging the parties to use an alternative dispute resolution procedure if appropriate (rule 5(2)(a), (b)(i), (c)(i), and (e)). The court's general powers of case management include a power to exclude any issue from consideration and to take any step or give any direction for the purpose of managing the case and furthering the overriding objective (rule 25(j) and (m)). It was held in KD and LD v Havering London Borough Council [2010] 1 FLR 1393 that the court may determine a case summarily of its own motion, but their power "must be exercised appropriately and with a modicum of restraint".

31. In *CB v Medway Council & Anor (Appeal)* [2019] EWCOP 5, Hayden J considered another case in which the trial Judge had disposed of proceedings at an interim hearing.

32. Similar to the case of VT before me, CB was deprived of their liberty. At paragraph 30, Hayden J rejected arguments, based on article 5, as being 'too elaborate', and, at paragraph 31, the Judge said that the issue was simply one of sufficiency of information:

> "The simple issue is whether the Judge had sufficient information before her to discount, at this stage, any real possibility of CB returning to her home, supported by the extensive and expensive care package that is being mooted. The language of the Judgment itself, to my mind, answers this question in phrases such as "I very much doubt…. I am very sceptical…. The practicalities are…. likely to be extremely difficult…." I share the Judge's scepticism and I also very much doubt that even with an extensive package of support a return home will be in CB's best interest. I note too that Dr Ajiteru expressed himself in cautious terms (see para 10 above). However, scepticism and "doubt" is not sufficient to discount a proper enquiry in to such a fundamental issue of individual liberty.
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> …
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> 33. It is easy to see why the Judge took the course she did and I have a good deal of sympathy with her. She will have recognised, as do I, that the effluxion of time has had its own impact on the viability of the options in this case. However, what is involved here is nothing less than CB's liberty. Curtailing, restricting or depriving any adult of such a fundamental freedom will always require cogent evidence and proper enquiry. I cannot envisage any circumstances where it would

be right to determine such issues on the basis of speculation and general experience in other cases".

33. Guidance as to the quality of evidence required to determine capacity was identified by the European Court of Human Rights in *Sýkora v The Czech Republic,* 22 November 2012, at paragraph 103:

> "any deprivation or limitation of legal capacity must be based on sufficiently reliable and conclusive evidence. An expert medical report should explain what kind of actions the applicant is unable to understand or control and what the consequences of his illness are for his social life, health, pecuniary interests, and so on. The degree of the applicant's incapacity should be addressed in sufficient detail by the medical reports"

34. It plainly is possible for the Court of Protection to:

a. decide matters of its own motion;

b. decide which issues need a full investigation and hearing and which do not;

c. exclude any issue from consideration; and

d. determine a case summarily of its own motion.

35. In any cases where such powers are contemplated, at a stage where the determination would dispose of the case, two matters will need to be given careful consideration:

a. Whether the court has sufficient information to make the determination (per Hayden J "curtailing, restricting or depriving any adult of such a fundamental

freedom will always require cogent evidence and proper enquiry" paragraph 33 *CB supra*); and

b. Whether the determination can be reached in a procedurally fair manner.

36. Deciding whether the evidence has reached a point at which the court can make a determination is a case management decision. Whether the evidence has reached that threshold will, necessarily, depend on the facts of each case.

37. The requirements of procedural fairness are not set in stone; the requirements are informed by context. Notice to the parties is an element of procedural fairness. Whether such notice is required, and how much notice is needed, will depend on the context. Procedural fairness in this case, however, would seem to require more than one hour's notice that final decisions might be made.

38. If an early final hearing is contemplated by the Court then an approach might be to include a recital to that effect in an earlier order. In some cases, notice that a final determination is contemplated might alter the evidence which is put before the court. In other cases, I accept that the provision of notice might have no impact on the preparation of the case.

39. Active case management of course allows the Court to consider whether a final order could be made at a case management stage and to consider what needs a full investigation and what does not. The Court must take a proportionate approach to the issues.

40. In allowing VT's appeal, I determined that the CJ reached a decision which was not properly open to them. The section 49 report was not available and it was not appropriate for the CJ to make a decision on capacity when the CJ could only say that

it was "fairly clear" from other evidence that VT lacked it. The decision as to best interests was contested properly by those acting on behalf of VT and CCC and was taken without permitting adequate exploration of the reasons why alternative options were not open to VT.

41. In short, in this case, the CJ reached decisions which, in principle, were possible, but which were not sustainable on the material before the court. VT's interests were not properly considered. In the circumstances, it was not appropriate to reach such an important decision for VT based on submissions. The effect of the decisions taken were to deprive VT of a fundamental freedom. The decisions were taken without the cogent evidence required and in a procedurally unfair manner.