

Neutral Citation No: [2020] NIFam 11

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: KEE11293

ICOS No: 2020 No 21

Delivered: 21/7/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

IN THE MATTER OF KW

**IN THE MATTER OF AN APPLICATION FOR COSTS FOLLOWING
WITHDRAWAL OF PROCEEDINGS**

KEEGAN J

Introduction

[1] In this case the relevant Health and Social Care Trust brought an emergency application for relief pursuant to the declaratory jurisdiction of this court dated 24 April 2020. The application was brought in relation to KW who is described as a vulnerable adult who is living in Trust accommodation. This application was ultimately withdrawn as a result of which KW applies for costs against the Trust. At the outset the Official Solicitor was appointed to represent the interests of KW, however as will become apparent from the history of this case the Official Solicitor ceased to act when capacity was established. The third defendant in this case is the former partner of KW against whom an interim injunction was made. There was a suggestion that the relationship is now renewed or that KW wants it to be renewed.

[2] The Trust brought proceedings because of a concern for KW that the third defendant might be imminently released from custody and his release posed a threat or risk of harm to KW. That emanates from a longstanding history to this case. KW has been subject to violence by the third defendant. In particular in 2016 she sustained a head injury and the third defendant was convicted of three separate crimes against her namely battery on 2 April 2016, grievous bodily harm on the 15 October 2016 and common assault on 14 November 2016. There are other domestic incidents recited in the papers which did not lead to any convictions.

[3] This history occurred in England and Wales where the parties were living. In addition to criminal proceedings there were also declaratory proceedings before the

High Court in London with the result that KW's passport was removed from her in late 2019. This followed a concern about KW's intentions when the third defendant was due to be deported to Italy. KW is reported to have visited the third defendant at Heathrow Detention Centre on 23 November 2019 prior to him being deported. There were such concerns that KW would travel to Italy that the application to remove her passport was made and succeeded. After that KW left supported living accommodation in England and did not return and was listed as a missing person before presenting to the Welcome Centre in Belfast.

[4] KW has a reported history of epilepsy and associated chronic seizures which are unpredictable and frequent. She has historically been non-compliant with her medication when taking drugs and alcohol which has increased the risk of seizures. KW was suspected to have acquired brain injury following a cracked skull after one of the assaults upon her and she had a metal plate fitted. At the time the treating neurologist advised that KW might have frontal lobe damage and moderate residual cognitive impairment. It is reported that KW can become quickly agitated and upset. She also has a diagnosis of bipolar disorder which can affect her mood and she can become easily distracted and irritated or agitated.

[5] It appears that KW came to Northern Ireland around 27 November 2019 with the third defendant. The third defendant was arrested on 5 December 2019 and remanded into custody. I made enquiries in relation to this which uncovered that bail was granted, but as far as the court is aware this has not been perfected due to the lack of a suitable address.

[6] Upon KW's attendance in Northern Ireland her physical health deteriorated and she had some treatment in hospital for an abscess to her right lung and deteriorating mental health. She was discharged from hospital on 24 January 2020. It appears that Tower Hamlets Social Services raised concerns with hospital social workers and these concerns were passed to the Adult Protection Gateway Team on 5 February 2020. Tower Hamlets had made various attempts to locate KW. KW was then being supported by the Welcome organisation and sleeping in crisis accommodation. This has not been without incident but from 10 April 2020 KW has remained in supported Trust accommodation which has provided her with relative stability.

[7] The Trust application was brought on the basis that it was thought that the third defendant would be released from custody on bail and that KW may not have capacity to take decisions to protect herself from him in such circumstances.

[8] In a case such as this capacity must be assessed and an opinion was obtained from Dr Barbara English, consultant psychiatrist. Indeed three reports were obtained from Dr English dated 15 May, 22 May and 3 June. In her assessment Dr English ultimately found that KW had decision-making capacity. However, she also found that KW was a vulnerable adult whose autonomy could be compromised through contact with the third defendant.

[9] The application came as an emergency to this court and I granted various interim orders up until 29 May 2020. At the outset I directed that there should have really been two applications namely, an injunction type application against the third defendant and declaratory relief in relation to KW. The court also made various enquiries in relation to the position of KW and the third defendant. In particular I was interested to find out what was happening with the third defendant's deportation and his bail application and I was concerned that he had no legal representation at the first number of hearings. Happily that situation was corrected after court directions that the third defendant be served with papers in prison and he has had the benefit of legal representation in these proceedings. I was also concerned about the position of the Official Solicitor on the basis of Dr English's opinion and ultimately KW was afforded her own representation in these proceedings.

[10] Once it became apparent that capacity was determined in favour of the vulnerable person KW, the court requested that the parties discuss the way forward and some meetings were held on 5 and 8 June 2020. I am grateful that the Official Solicitor helpfully acted as a mediator at the 8 June meeting to see whether there could be a way forward. At that meeting it was clear that certain issues were unlikely to be resolved between the parties and an agreed note was prepared and put before the court on 9 June 2020 which indicated that the interim orders would lapse by agreement but that the court would have to adjudicate on certain matters identified as follows:

- (i) Whether the first defendant falls within the inherent jurisdiction of the court at this time is a vulnerable adult.
- (ii) Whether a non-disclosure order (and more specifically an order that sensitive documentation not be released to the first defendant be made and if so in what terms).
- (iii) Whether on a finding that the court has jurisdiction the proceedings should be stayed with appropriate orders.

[11] This led me to list the matter for hearing on 29 June 2020. Given the issues in the case I directed skeleton arguments and the case was to be heard in a socially distanced court. However, prior to that hearing I received correspondence that the Trust had decided to withdraw from the proceedings. There was no objection to this course and so as a result of that the proceedings have effectively concluded without adjudication. That leads to the only remaining issue that KW and the third defendant seek costs against the Trust.

Consideration

[12] I say at the outset that this is a very troubling case. It was agreed that the court had jurisdiction to make holding orders whilst matters were investigated. The

legal debate arose once capacity was established. However, whilst KW has been described as having capacity to make decisions about her relationship with the third defendant she is described as a very vulnerable adult by Dr English in her reports. There is some jurisprudence which I was going to consider at the hearing of this matter in relation to the court's residual jurisdiction to deal with vulnerable adults with capacity. I was referred to a number of decisions in this area particularly the decision of Mr Justice Munby in 2005 reported as SA [2005] EWHC 2942. At paragraph [76] of that case Munby J stated:

“In the light of these authorities it can be seen that the inherent jurisdiction is no longer correctly to be understood as confined to cases where a vulnerable adult is disabled by mental incapacity from making his own decision about the matter in hand and cases where an adult, although not mentally incapacitated, is unable to communicate his decision. The jurisdiction, in my judgment, extends to a wider class of vulnerable adults.”

In paragraph [78], whilst not constraining the categories Munby J elaborated further on the definition of a vulnerable adult requiring some of the following ingredients (i) constraint, (ii) concern or undue influence, (iii) other disabling circumstances. In relation to other disabling circumstances Munby J stated:

“What I have in mind here are the many other circumstances that may so reduce a vulnerable adult's understanding and reasoning powers as to prevent him forming or expressing a real and genuine consent, for example, the effects of deception, misinformation, physical disability, illness, weakness (physical, mental or moral), tiredness, shock, fatigue, depression, pain or drugs. No doubt there are others.”

[13] At the outset, the Trust relied heavily on this case. This decision has been discussed in a number of further cases which deal with the delicate balance between paternalism and autonomy. In particular I was referred to *In Re L (Vulnerable Adults with Capacity: Courts Jurisdiction No. 2)* [2012] EWCA Civ 253 and a recent case of *Meyers* reported at [2019] EWHC 399 Fam. Ultimately I was not required to adjudicate on these matters. But suffice to say they are delicate and complex issues and case specific.

[14] The Trust rationale for withdrawal from the proceedings seems to be rooted in an issue of disclosure of sensitive papers which the Trust considered would harm KW if they were retained due to the fact that they could be shared with third parties. I did hear some very preliminary submissions in this area after which I directed that the matter be discussed and I said that I would hear an application in relation to

disclosure of documents or how documents should be disclosed. Again, I have not been asked to adjudicate on this because of the Trust position.

[15] In relation to costs, the representatives for KW make the point in submissions that if costs followed the event there would be no question that KW would be entitled to costs. However, Mr Corkey BL in his argument, quite rightly says that there is a more nuanced approach to costs in the Family Division and the awarding of costs is relatively rare but it is merited in some circumstances where there has been an unreasonable stance adopted by a local authority. He relies on the Supreme Court decision of *Re S* reported at [2015] UKSC 20. In his argument Mr Corkey contends that the unreasonable stance in this case is due to the absence of expert evidence, the seeking of an injunction preventing the disclosure of information and that the Trust did not adapt to a reasonable offer of settlement provided on 17 June. The representatives of the third defendant have also filed an argument broadly in support of this position authored by Ms Wilson BL.

[16] Mr Potter BL appeared on behalf of the Trust. He resists the costs applications. He has referred me to the case of *Redcar and Cleveland Borough Council v PR* [2019] 4 WLR 143 on costs. That was a case where relief was ultimately not sought after a period of enquiry. Mr Potter makes the point that the issues at stake in this case concerned the welfare of KW. He also states that issues to be addressed in declaratory proceedings do not always lend themselves to contentious litigation and that there were some particular challenges in this case given that KW is a vulnerable person at risk of harm. Mr Potter confirms that the rationale for not pursuing the declaratory application or seeking to stay the proceedings is the Trust's concern about the prejudicial impact proceedings might have on KW. There is a point raised about the costs of on-going proceedings but this is rightly not stressed with any vigour. The main issue as far as I can see is that this litigation was causing a breakdown of the relationship between KW and the Trust. Mr Potter also points out that the Trust pursued the discrete disclosure issue because it was concerned about the potential harm that could result from sensitive material being accessed by a third party.

Conclusion

[17] Having considered the various submissions, I am firmly of the view that there should be no order as to costs made against the Trust in this case for the following reasons:

- (i) As is recognised in the arguments, these are family proceedings. They were brought under the auspices of the Office of Care and Protection. They involved consideration of sensitive issues in relation to a vulnerable adult. They are not akin to proceedings where the normal rule of costs following the event apply, see *Re S*. Costs orders are rare in proceedings involving children and I consider that the same

principle applies in declaratory applications perhaps with even greater force.

- (ii) This is a case where I have not actually made any determination on any of the issues. The point is raised in *Re S* before the Supreme Court that a court at first instance is distinct from an appellate court because in the trial of first instance “nobody knows what the judge is going to find”. Therefore, the case of *Re S*, which relates to an appeal of care proceedings does not assist those applying for costs in this case.
- (iii) Fundamentally, I have to decide whether the Trust have taken an unreasonable stance in pursuing proceedings. On no account do I consider that it has. This application was properly brought. It required some considerable input from Dr English in relation to capacity. Also, capacity is not determinative of relief in cases of vulnerability. There is jurisprudence in this area which I was not asked to adjudicate upon. But there was a live issue in this case about what the court’s role would be in relation to regulating choices made by a vulnerable adult. I reject the argument that the Trust stance was unreasonable due to an absence of expert evidence.
- (iv) The point made about non-disclosure is perhaps a better point raised by those seeking costs. However, it must also fail. This is a difficult area of law which engages Convention rights. The Trust tried to deal with it by utilising a consensual method. The Official Solicitor assisted in relation to that. Again, I have not adjudicated on the point. So, it would be wrong to use this as a vehicle upon which the Trust should be penalised in costs.
- (v) There has been no significant prejudice on the ground to either person in this case. The interim declaratory relief made against KW reiterated that she would stay in the accommodation where she was happy. The third defendant was in custody and remains there as far as I know.
- (vi) Once all of the evidence was filed, the Trust reached a pragmatic decision with reasonable speed which was communicated prior to the hearing.

[18] It remains to be seen what will happen in relation to KW and whether any future applications will be necessary. I understand that the Trust remain involved and are aware of their duties towards her. I also understand that the third defendant remains in custody. As there is no application for me to adjudicate upon at present I make no findings in relation to this case. In light of the above I will not make any order for costs against the Trust. I will make an order for Legal Aid Taxation of the costs of KW and the costs of the third defendant.