

IN THE BIRMINGHAM COUNTY COURT

Case No. 99162476

Priory Courts
33 Bull Street
Birmingham, B4 6DS

Monday, 17th May 2010

Before:

HIS HONOUR JUDGE CARDINAL

In the matter of:

Re: KS

Counsel for the Appellant, Mr St

MISS LAURA DAVIDSON

The First and Fourth Respondents did not attend and were not represented

Counsel for the Second and Third Respondents, Mr and Mrs S:

MR M STEPHENS

Counsel for the Fifth Respondent, Mr Lapidge:

MR A EVANS

JUDGMENT APPROVED BY THE COURT

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JUDGMENT

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1. THE JUDGE: KS is a young man of about 30 who suffered brain damage at birth and as a result has severe learning and physical disabilities. He requires most aspects of his care to be dealt with by others and that results from clinical negligence at his birth.

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2. He currently lives with his parents and has the benefit of six hours of care assistance per day by way of support from four carers appointed from a list approved by the social services department of Coventry City Council. However, those carers are paid for and engaged privately, I am told. The local authority is in no way involved in the day to day care of KS. His parents provide the remaining 18 hours of care for him per day.

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3. For a lengthy period of time the appellant and original applicant in this Court of Protection application, Mr St, was his *sole* full time carer, for some nine years indeed. As a result, inevitably, Mr St and KS became quite close. For some years Mr St lived at the family home, a property purchased out of KS's compensation monies arising from a clinical negligence claim. Mr St and KS communicated in Makaton, and I am told in addition had some aspects of language of their own. No one doubts they became very close, and during the course of oral submissions to me I heard no criticism of Mr St's care of KS, though I have seen a brief reference to that by implication in some written matters before the court.

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4. There came a time when Mr St became increasingly concerned as to the alleged behaviour of KS's family towards KS. In particular he recorded alleged incidents of cruel treatment towards him, which he referred to the local authority and to the Office of the Public Guardian, the OPG. He has alleged too that compensation monies have been misused by KS's former deputy, his mother, the third respondent, and I am told that as a result of investigations by the OPG mother has stood down and a professional deputy, Mr Stanley Lapidge, has been appointed financial deputy for KS.

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5. I understand too that attempts have been made to regularise the financial position and that in the course of doing so there will be considered the sum of \$19,000, a sum by way of compensation for a scalding accident that took place in the United States, which sum has as yet been unaccounted for. I am not asked in the course of this application to delve into financial matters in any detail and there is no such application presently before the Court of Protection. I mention it simply because there may yet be an application and also to set the matter in context.

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6. However, what prompted the health and welfare application currently before the court arose from the allegations made by Mr St as to the care of KS. Mr St has recorded three specific incidents which he referred to the court, as well as his general concern as to KS's care and he also recorded a report as to the state of KS's home. Attached to his statement in support of the application to the court, which was dated 8th January of last year, he set out these matters.

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7. First, a list of matters that concerned him as to the state of the property at *[address given]*, the property where KS lives with his parents. He took the view that the state of repair of the property was poor, that it was damp and cold and there were potential subsidence issues, and that, itself, diminished the value of KS's estate.

A 8. Second, he exhibited a report of 14th June 2008 which he alleged referred to behaviour of the father and others. I read partly from that report:

B “KS and myself, Mr St, returned home to [address given] after an evening out. KS was unhappy at having to come home and expressed this by clenching his fist and waving his right arm in the air. As we arrived home KS’s father came out to the door and said, ‘What the fuck is going on you, midnight marauder?’ KS was then taken into the house and down to his bedroom by his father. When I arrived at KS’s bedroom the door was closed and the wheelchair was out in the hall. I went in and found KS sitting on the floor in front of his father. KS was having his pyjama top put on over his head. He then laid KS down on his back and started to take KS’s trousers off. KS became angry and kicked out. His father’s response to this was to punch KS twice in his right upper thigh. He then proceeded to pull on KS’s left arm, placing it outstretched and up, knowing this would cause KS a great deal of pain as he had been informed by an accident and emergency doctor at [the local hospital] that KS had a partial dislocated shoulder and was awaiting a CT scan. Knowing this, his father went out of his way to cause KS as much pain as possible. He then proceeded to punch KS twice on his right side just below his ribs with his left hand.”

D 9. He also exhibited a report of 21st June 2008. In that he said this, *inter alia*:

E “KS was sat in his wheelchair, about to go out for the day, when his father said, ‘Hey, Dickhead,’ to KS for no reason at all. KS became angry and arched back in his chair, shaking his right fist in the direction of his father, who was seated at the dining room table with his mother. KS’s father then got up and walked towards KS clenching his left hand round KS’s right wrist and forcing it down in his lap while shouting, ‘You keep your fucking hands down.’ He then punched KS in the leg twice with his right hand and proceeded to clench KS’s left wrist which was resting on his stomach and forced it, with a sharp pulling motion, causing KS serious pain to his dislocated shoulder. This was visible by KS’s facial expression.”

F 10. Thirdly, there was an incident on 14th December where he said this:

G “KS came up for breakfast. He became angry due to the amount of people round the lounge and due to being called a ‘spas’ by his brother. KS indicated he wanted the fire on and his father responded by saying no. So KS indicated he wanted the CD player on but his father informed KS that the CD player belonged to his mother and the TV belonged to him. KS became more angry and expressed this by shaking his fist and grinding his teeth. His father came round the dining room table and told KS to fuck off. KS approached his chair and I assisted him up with the help of his brother, which KS objected to and started to arch back in his chair and grinding his teeth. I attempted to calm KS by holding his right hand and talking to him. KS’s father entered the room and started shouting at KS. He forced KS to the floor on his back and started to slap KS round the face and gave a sharp punch to the middle of KS’s chest. He then outstretched KS’s left arm to cause him as much pain as possible to his shoulder, which has been diagnosed as being an arthritic joint. His father then stood up and placed his

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right foot on KS's right forearm to prevent him from getting up from the floor. At no time did KS's brother or mother make an attempt to calm the situation or intervene in any way."

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11. I have read out parts of those three incidents alleged to give a flavour of what has been said. Mr St says it was the failure of the local authority to investigate the matter that led him to become a 'whistleblower', as he describes himself, in these present proceedings. Further impetus was given to the application when, on 5th January 2009, C Council financial and legal services directorate wrote to Mr John Lloyd of Anthony Collins, Solicitors, saying this, *inter alia*:

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"We would repeat that if your client is concerned about the treatment of KS by his parents he should formalise those allegations in a statement to the police in order that the same can be investigated as appropriate. *Our* comments on the progress of any such investigation as set out in our correspondence of 28th July [*I interpose I have not seen that*] still apply. Your client has been informed that in the event of a physical assault upon KS medical advice should be sought so that any independent medical advice can be obtained and preserved. In addition we have already discussed the possible implications to your client as a result of section 44 of the Mental Capacity Act in the event that Mr St does not take action to protect KS."

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12. Mr St regarded this letter as a threat that he would be at risk of being prosecuted were he to do nothing. The difficulty with that latter point is that if it were a threat it of course emanated from C Council. If it is the case that C Council misled or led him wrongly into taking proceedings then, of course, the subsequent refusal of the Council to take those proceedings on may lead to a complaint against them, or action against the local authority, rather than the estate of KS himself.

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13. It is Mr St's case that he properly raised concerns to the relevant local authority, and indeed to the police, although he was reluctant to make a formal statement. I am told further that he invited the local authority to engage its vulnerable adult protection procedures, but the latter did not intervene. Mr St also alleges that he was encouraged to issue proceedings by the OPG and again, if that is so and that is wrong, the remedy perhaps lies by way of complaint against the OPG, but that is not a matter for me to consider.

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14. On Mr St's behalf, Miss Laura Davidson of counsel asserted that he issued the application as a result of his grave concerns as to KS's safety. He did not wish to serve the parents, though inevitably they had to be served, and that led in early course to his dismissal as a carer and he is no longer involved in any way in the care of KS. By his application to the Court of Protection he sought, *inter alia*, to become the welfare deputy and to ask for an order debarring the parents from contact and seeking their removal from the home. In due course permission to bring proceedings was duly granted and the Official Solicitor appointed the litigation friend on 2nd March 2009.

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15. Mr St found these proceedings inevitably expensive and did not have the benefit of public funding. He was, however, I am told, reassured by the appointment of the Official Solicitor, and he felt then that the matters he had raised had come to the appropriate attention of others and the court. Accordingly, he sought leave to withdraw as a party and made the offer that he would be a witness in any investigations of the

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parents to be mounted. However, the local authority, by this time the fourth respondent to the application to the Court of Protection, declined to become applicant. Accordingly the district judge appointed the third respondent, KS's mother, as applicant, though inevitably she and her husband did not wish to proceed in the health and welfare application for they were the parties who were the subject of Mt St's criticism in his application to the court.

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16. On 4th September 2009 the proceedings were withdrawn, and it is plain that the Official Solicitor and the local authority were satisfied as to the welfare arrangements for KS. They did not seek in any way to prolong the proceedings.

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17. Mr St was not present at the hearing on 4th September, having withdrawn in June. So District Judge Owen gave him the opportunity to apply for his costs if he wished to do so. That application was listed before, and heard by, District Judge Owen on 1st December of last year, and I have seen his extempore judgment about the matter. Mr St appeals that decision to me today, or rather seeks first permission to appeal and then to appeal. I have seen the grounds of appeal, the amended grounds of appeal and skeleton arguments lodged by all three counsel appearing in this case. That is, Miss Davidson for the appellant, Mr St, Mr Stevens for the parents and Mr Evans for the new financial deputy. There has been no appearance by the Official Solicitor, nor by the local authority, though I am told the Official Solicitor is neutral as to the costs position.

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18. What is the law as to costs? That is contained in the Court of Protection Rules 157 and 159. 157 is the general rule: "Where proceedings concern P's personal welfare the general rule is that there will be no order as to the costs of the proceedings, or of that part of the proceedings, that concerns P's personal welfare." So there is the basic presumption that each party meets his or her own costs. Can that be varied? That is dealt with at rule 159 which sets out the exceptions, the departure from the general rule. Sub-rule 1 says this:

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"The court may depart from rules 156 to 158 [we are only concerned with 157] if the circumstances so justify and in deciding whether departure is justified the court will have regard to all the circumstances, including:

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- (a) The conduct of the parties;
- (b) Whether a party has succeeded on part of his case, even if he has not been wholly unsuccessful; and
- (c) The role of any public body involved in the proceedings."

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Sub-rule 2 says:

"The conduct of the parties includes:

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- (a) Conduct before as well as during the proceedings;
- (b) Whether it was reasonable for a party to raise, pursue or contest a particular issue;
- (c) The manner in which a party has made or responded to an application or a particular issue; and

A d) Whether a party who has succeeded in his application or response to an application, in whole or in part, exaggerated any matter contained in his application or response.”

Sub-rule 3 does not need to concern me.

B 19. It is worthy of note therefore that it is for the court to discern if a departure from the general rule is appropriate; the court may examine all of the circumstances, not simply the items contained in sub-rule 1(a) to (c) of rule 159, and that such a departure must be justified and the court satisfied of that in the circumstances. District Judge Owen declined to vary the general rule, and he said this in his judgment:

C “My finding, as far as the conduct of this aspect of the matter in seeing whether I can depart from the general rule, is not that there has been bad conduct on the part of Mr St. That is not a finding that I make. I do find he raised issues about which he was concerned, but it is impossible, in my view, to say whether those were reasonable allegations given the conflict between the parties involved here and the lack of any decision as to whether they were proved or not. As I have mentioned before, I am struggling there with parents who have been with KS all his life and with Mr St, who has been a carer for a substantial period of time. It does not seem to me that I can say this conduct here allows me to depart from the general rule, balancing one side against the other.”

D 20. In paragraph 17 he said:

E “It is a difficult balance against the court discouraging unfounded allegations and that is why the costs order is there against those that are warranted to be brought before the court, and I understand the positions of the parties as far as that is concerned. I understand the position of those advising them, but on the facts of this matter I am going to say that no order for costs should apply, given the views that I have made clear.”

F 21. I bear in mind, of course, that the parents contest and dispute the allegations of Mr St and of course that the allegations have never been determined. Nothing has been proved. I understand the local authority has now been involved with the family of KS, but only to the extent of recommending appropriate part-time carers and providing an advocate. I do not see any evidence of the local authority, or the Official Solicitor, raising matters that have worried them as to the care of KS. Equally, I have not seen any evidence that Mr St’s application to the court was mischievous or other than well intentioned, setting out what he thought were genuine concerns for KS where he thought he was a vulnerable man who had been abused, but he has not established the truth of what he alleges.

G 22. What is the law with regard to appeals? Mr St requests the permission of the court to appeal District Judge Owen’s decision. Rule 173 says this, at sub-rule 1:

H “Permission to appeal shall be granted only where:

- (a) The court considers the appeal would have a real prospect of success;
- or

A (b) There is some other compelling reason why the appeal should be heard.”

23. If I were to give permission to pursue the appeal then rule 179 applies, and I note rule 179(1) says this:

B “An appeal be limited to a review of the decision of the first instance judge unless:

(a) A practice direction makes different provision for a particular category of appeal [not so here]; or

(b) The appeal judge considers that in the circumstances of the appeal it would be in the interests of justice to hold a re-hearing.”

C Sub-rule 3 says:

“The appeal judge will allow an appeal where the decision of the first instance judge was:

D (a) Wrong; or

(b) Unjust because of a serious procedural or other irregularity in the proceedings before the first instance judge.”

Clearly, here there is no allegation of procedural or other irregularity, so I am confined, if I give permission to hear the appeal, to looking simply at the decision of District Judge Owen and asking myself whether that decision was wrong.

E 24. Miss Davidson argued the matter is of some importance. This is a case of a carer who reluctantly, but in KS’s interests, ‘blew the whistle’. The local authority has failed to protect him. Whistle blowing should be encouraged, not discouraged, and given the strength of the relationship between KS and Mr St, KS would wish his monies to be used to meet Mr St’s costs.

F 25. I do not think I can deal with the matter simply on the basis that Mr St was a whistleblower. He chose to withdraw the case at a time when he was without the security or knowledge that the local authority were proceeding further. He did not know what they would do. It might well be right that he thought he was acting in the best interests of KS by bringing the proceedings, but there was no finding that he did. I accept that as a matter of principle it may well be right for a whistleblower to have his costs met when acting in the best interests of a protected party, but that must depend at least in part on the allegations being found to have some merit in them, and here there is no conclusive evidence. District Judge Owen referred to there being no decision whether or not the allegations were accurate or proved. I accept that Mr St did not rush into proceedings, as did District Judge Owen, but there is no indication to me of proceedings being encouraged by the OPG or indeed, for that matter, by the local authority, even though Mr St complains that was the case.

H 26. Miss Davidson asked me to look again at the application of rule 159 and to the matters in particular in sub-rule 1 (a) to (c). Look at Mr St’s conduct, she said. This was not a rushed, but a considered application. He referred the matter to the local authority, the

- A police, the OPG. That is true, but of course his allegations were not made out. She said it could be argued that his position was that he had been in part successful. There is, after all, a financial investigation, although I am told that is not prompted wholly by the present application. Indeed, the court itself wrote to the then deputy, Mrs S, the third respondent, about its concerns.
- B 27. Miss Davidson said the involvement of the local authority and the Official Solicitor meant steps were taken to protect KS. That is not quite right. The local authority has looked at the matter, as it must for any party, and decided to take the case no further, which is scarcely a measure of success. Moreover, contrary to what Miss Davidson contended in her initial remarks, there is no package of support provided by the local authority for looking after KS.
- C 28. True, a public body has been involved, but only, in my judgment, to the extent that it had to be. I do not see this local authority as having undertaken any more than what would be required of it when made a party.
- D 29. Miss Davidson asked me to look in detail at the provisions of rule 159(2) in looking at conduct. Mr St had acted appropriately. I accept he did in raising the matters, but again he withdrew his application before his allegations were determined. Of course it was reasonable to raise matters of concern, but the allegations were neither supported nor proven. He withdrew from the proceedings before he could be sure that they would be. I accept that his application was a considered one, but he did not pursue the matter to determination. I accept there is no evidence that he exaggerated matters, but matters have not been determined at all.
- E 30. Miss Davidson had likened the position of Mr St to that of the Official Solicitor, and there is provision in rule 163 for the Official Solicitor's costs to be ordered out of the estate, the financial estate, of KS. However, it seems to me to be rather optimistic to equate the position of Mr St with that of the Official Solicitor. I accept that on his case his motives have only ever been altruistic. He sought to protect a vulnerable adult who he thought had been abused and to whom he had become attached, but he did, again, not pursue the matter to the proof stage. So I am left with serious allegations that have never been established on the balance of probabilities. There is no evidence that his allegations of ill treatment have achieved anything at all, save the appointment of an advocate by the local authority and other carers from a list approved by them - not matters, in my judgment, of significance.
- F 31. Miss Davidson reminded me of the overriding objective and the need to deal with the case justly and fairly, as I hope I have, but I do not think that assists Mr St any further.
- G 32. Rule 179, which I have quoted, sets out the way in which I deal with this matter. In my view if I give permission to appeal I am to deal with it by way of a review of the logic and decision of the learned district judge. It seems to me inappropriate that I should deal with the matter by way of a re-hearing. I have dealt with the issues thoroughly simply because I have been concerned as to the matters raised on behalf of Mr St, but I consider that I simply have to look first at the issue of permission and then decide whether the decision of District Judge Owen was wrong.
- H 33. Moreover I remind myself that even were I to decide that the exercise of discretion by the learned district judge, if exercised by me, would have led to a different conclusion

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then it is not for me to allow the appeal unless, in my view, the judgment of District Judge Owen was not within the reasonable exercise of his discretion.

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34. Sub-rule 4 of rule 179 allows me to draw any inference of fact that I consider justified on the evidence. Miss Davidson pointed me to the detailed written evidence appended to Mr St's initial application. She asked me to bear in mind that I could draw inferences from that, but again that is difficult because these are serious matters simply not made out and they are simply recorded by Mr St but not proven.

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35. Miss Davidson attacked the judgment of Judge Owen, and in particular paragraph 11, which she said was opaque. I have read that paragraph with some care and I read it now:

"It is said on his behalf it was reasonable to raise these issues, but I do take into account he is not the carer who came in just a year or so before this made. He was someone who presumably the Ss have trusted for nine years to look after their son. So to that extent there is an argument that if he wishes to raise issues perhaps it is reasonable he should do so. I understand the argument made on his behalf. What else could he do in that situation? But that has to be looked at, as I have mentioned before, in the light of the opposition to the application, the lack of any finding that those allegations have been made, the independent evidence, as I say, to Coventry City Council and the Official Solicitor, and the argument Mr St should then not have raised those allegations and it was not reasonable to do so given the lack of apparent weight to the allegations and the lack of evidence."

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36. I am aware of the necessary practice of district judges to come to a decision and make a complex ruling in a short period of time. Extempore judgments inevitably contain some errors in drafting and even in English at times, but having looked at that paragraph, and the judgment as a whole, I cannot find that it is defective in this case. This district judge was plainly and properly troubled by the apparently good hearted application by Mr St and yet his failure to establish anything at all. His judgment equally plainly reflects that dilemma, should he compensate Mr St in those circumstances, and he came to the conclusion, exercising his discretion, that he should not.

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37. Miss Davidson also attacked paragraph 13 of the judgment where the district judge dealt with the issue of best interests. He said this:

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"As far as best interests are concerned, it may be that those proceedings were in KS's best interests. Equally, it may be they should not have been brought and that KS perhaps is in no really different position now than he would have been had the proceedings not been brought."

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It is impossible again for me to make any findings as to whether it was in his best interests to bring these proceedings. In my view I do not think that I can say it was in his best interests because of the allegations from one side and the other and the fact that no substantive orders have been made.

38. She said the local authority ought to accept its duties to KS and it failed to do so. If the local authority failed to do so then plainly there is justification in bringing the application, but it seems to me that there were other remedies available even then to Mr St – to take the matter to the ombudsman, to his local councillor, to his MP and to

A those who inspect social services. It did not require him to engage in these proceedings and then withdraw from them without ascertaining that what he had said had been proved to be right.

B 39. Miss Davidson characterised the judgment of District Judge Owen as perverse. That is not, in my judgment, a fair criticism. This district judge was plainly troubled by the apparently well meaning attempt from one party to raise matters before the court, and yet again I remind everyone and myself the allegations were not made out. Indeed, during argument I asked Miss Davidson was it not the case that Mr St effectively withdrew from the application prematurely? She said not, but I fear that my suggestion is correct.

C 40. There is one aspect of the case where Mr St appears to have made some progress, and that relates to the financial deputyship then held by KS's mother. She has been replaced, but I am reminded by Mr Evans, counsel for the new deputy, that it was in fact at the instigation of the court itself that the deputyship was investigated, being dissatisfied with the returns made by Mrs S. In any event, that would not justify, in my judgment, a costs order in Mr St's favour in a health and welfare application.

D 41. Miss Davidson took me through the remainder of her amended grounds of appeal. I have dealt, I think, with grounds (a), (b) and (c) already. Indeed, she said the district judge gave insufficient weight to the appellant's appropriate and proportionate action in withdrawing as a party. I have made criticisms of that and I agree with the district judge's findings.

E 42. (e) Placed too much emphasis on the fact there was a lack of independent evidence. It seems to me his concern was in fact the fact that the matter was not proved.

F 43. (f) Failed to find that given the OPG's application to displace the second respondent as deputy arising from the appellant's concerns about finances, and it continues to investigate the matter. (1) The proceedings were plainly brought in the best interests of the first respondent; (2) There is corroboration of concerns. It seems to me those matters do not relate to the health and welfare application as I have said.

G 44. (g) That he perversely found it was impossible to say that his serious concerns were reasonable. I am afraid I disagree with that contention. It seems to me the district judge weighed the matter up very carefully.

H 45. (2) It was equally in the first respondent's best interests for the proceedings to have been brought. Again, that is a matter that simply has not been found in the course of these proceedings.

46. (h) Wrongly holding the Official Solicitor and the fourth respondent found nothing to substantiate the appellant's allegations of abuse and hence there is a lack of weight behind the need to issue the application. With respect to Miss Davidson, that is not right. I have seen the note of Mr Lloyd, of a conversation between Mr Lloyd and Sarah Lane, acting for the Official Solicitor, of 11th September 2009 where it said this:

“Social services had no concerns. They remain involved in overseeing KS's welfare. That is not on a day to day basis. There is a new team of carers that has come in and social services have arranged the appointment of an

- A advocate. Their belief is that all relevant services are in place. There is no need for a health and welfare deputy.”
47. I have dealt with concern (i) and (j) in the amended grounds of appeal. (l) says this: “Taking into account irrelevant considerations there can be no departure from the general rule.” It does not seem to me that there were any irrelevant considerations taken into account.
- B 48. In addition to the matters I have mentioned above a number of points were made on behalf of the second and third respondents, and the financial deputy, and I shall now consider those briefly.
49. First it was said that the costs claimed are for making allegations that were simply withdrawn. That must be right.
- C 50. Secondly it is said that in making the allegations Mr St inevitably put himself at risk of costs. He should be treated, in other words, simply like any other litigant beginning proceedings in the Court of Protection and that, indeed, must be right.
- D 51. Thirdly it is said that Mr St’s costs are too high. That seems to me to be an irrelevant consideration. Were I to order Mr St’s costs to be paid it would clearly be on the basis that there was a detailed assessment of them. It is not a matter for me to determine. The costs seem high, but I do not know how much work has been done, nor the rate at which they have been charged, and I do not think it is for me to investigate the matter in the course of an appeal.
- E 52. The monies claimed were simply in order to provide for Mr St in his lifestyle. That seems a little bit unfair to me. He has clearly incurred costs, intending to help KS and I simply do not wish to criticise Mr St in that regard.
53. In any event Mr St seeks to provide for his own security. There is an element of that in the application, but I shall come to conflict in a moment.
- F 54. The local authority saw no evidence to support the allegations made. That is clearly right for the reasons that I have already said.
55. There are contrary allegations by KS’s family against Mr St. So there appear to be, but they did not take this matter further.
- G 56. The application for costs contains a major inaccuracy, that the council has given a commitment to be actively involved with KS in the future. That is right. The local authority are not substantially involved.
57. There is no procedural error or irregularity. That is right and indeed that is confirmed by Miss Davidson.
- H 58. The district judge made no error of law. As can be seen he set the matters out quite correctly in his judgment.
59. In her skeleton argument Miss Davidson referred to the cases of *Re: M* and *Re: P*, but they are not relevant to a case such as this. I entirely agree with that. One should not

- A simply compensate Mr St on the basis that he thought he was doing the right thing or on the basis that KS would like him to be compensated.
60. There was not a perverse exercise of the district judge's discretion. I entirely agree with that. There is nothing strange, controversial or surprising in the manner in which the learned district judge weighed up matters and came to the conclusion that he did.
- B 61. Any variation of the usual costs rule, any departure from it, must be justified. I agree and according to the learned district judge such justification was not present in this case. In my judgment it would have to be a highly unusual, and indeed exceptional, case for a party who has not proven his allegations to receive his costs.
62. Local authority and police investigations came to nothing. I have noted that.
- C 63. The allegations did not need separate corroboration. So they did not, but the allegations were not proved.
64. The district judge reached a decision within his reasonable discretion. In my judgment he did.
- D 65. Mr St had a substantial conflict of interest in bringing his application. It seems to me at first blush that that is the case, because he sought to be a health and welfare deputy, but I do not think that his application was simply related to protecting his position of employment, and I shall not castigate him in that way.
- E 66. The examination of the house by the financial deputy as to the repairs it needed on 20th April of this year revealed that it needs simply some, to use the vernacular, TLC, but the substantial allegations made by Mr St were not made out. That causes me a little concern. It is not a matter that has been put before me by way of formal evidence, and of course it is some two years since Mr St made the allegations that he did, but it does lead me to worry that perhaps his allegations were exaggerated, even if they have not been, in any event, made out.
- F 67. The fact that there is a financial deputy investigating the matter does not prove the case to justify Mr St having his costs, and I entirely agree with that. There may well yet be further litigation, but that does not prove Mr St's application.
68. I have most carefully and in great detail considered then this application. It seems to me that Mr St's application for leave must fail for the reasons I have enumerated at length. This has troubled me a great deal. I accept that he seems to have acted for the best of motives, even if he may – and I emphasise may – have exaggerated his concerns, but nothing has been found. However, I do not think it can be said that his appeal would have a reasonable prospect of success, or that there is some other compelling reason why the appeal should be heard. Simply because KS was on very good terms with him does not mean that KS's monies should be paid out. It may well be that he has misled, principally by the local authority, into bringing this application. That, in my judgment, is where he should pursue his remedies.
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- H 69. In all the circumstances, bearing in mind I think the appeal would not have a prospect of success, I do not think that even if I allowed it to go forward that I could possibly find that the district judge was wrong. This case has caused me grave, anxious concern, but I

A cannot say the district judge was incorrect. Accordingly, I am refusing permission to appeal and therefore the matter can proceed no further. I emphasize I have enormous sympathy with Mr St and the costs he incurred, but that is where the matter will have to rest.

THE JUDGE: Now, Ms Gray, do you have an application or not?

B MS GRAY: Yes, I do. Can I pass this up to you?

THE JUDGE: Thank you. Are these just estimated costs, are they?

MS GRAY: Yes, they are.

C THE JUDGE: Yes. Have you discussed those with anybody or not?

MS GRAY: They will need to be decided by the court, will they not?

THE JUDGE: Yes, they will. Yes. Are you inviting me to do a summary assessment now or are you asking the court to consider them at a later date?

D MS GRAY: At a later date I believe.

THE JUDGE: I see. Well, what is your position please?

MRSVAQUIERO: Similarly I have a costs estimate for your honour.

E THE JUDGE: It is just an estimate, is it?

MRSVAQUEIRO: It is just an estimate, yes.

F THE JUDGE: I see. Because I mean strictly speaking I can do a summary assessment, can I not? Mr Lloyd, your client has lost I am afraid. Do you want to argue the issue of costs now or are you content to try and negotiate in the hope that a detailed assessment can be avoided?

MR LLOYD: Well, if I can just make a couple of points?

G THE JUDGE: Yes.

MR LLOYD: Yes, he has lost, I accept that, but I would ask you to just look at the wider picture that, as you say, he was motivated to bring this matter in the first instance out of concern for the welfare of KS.

H THE JUDGE: Yes.

MR LLOYD: The principle that we have been arguing about here is whether the parties should bear their own costs or whether there should be orders *inter partes*, or indeed out of the funds of KS, and I submit that, looking at the overriding objective to deal with the case justly, on the facts of this case it would be, having come to that decision, wrong in

A principle to depart from that underlying principle of each party bearing their own costs and that to order costs of this appeal to be met by Mr St really will rub salt into the wounds where he already has very substantial costs to meet.

B I think another point that I would just ask you to consider is that so far as the second and third respondents are concerned in relation to this appeal the position has always been that the deputy has been here making the case in relation to whether funds, which they look after, or the deputy looks after, for KS should be expended on these costs. They were not directly party to these matters and whether it is right for them to allow their costs in respect of being here when I would suggest that it was a matter for them really as to whether they decided they wanted to make representations or not, but I would say that it was not essential.

C I would also just raise a technical point in relation to the costs of the second and third respondents. There is a practice rule about the filing of any schedule of costs at least 24 hours before the hearing. I received it on the morning of the hearing.

THE JUDGE: Did you?

D MR LLOYD: It is not the strongest point but I do make the point.

THE JUDGE: Yes, yes. So you have not been given the chance of considering summary assessment in any event *save to say you looked at it* at the weekend.

MR LLOYD: In fact I have not had an opportunity to do that.

E THE JUDGE: No, all right.

MR LLOYD: But my basic argument is is it right in the circumstances that...

THE JUDGE: They should get their costs.

F MR LLOYD: Mr St should not be further penalised in this matter in relation to the costs.

THE JUDGE: Yes. It is (1) general principle, (2) in any event parents should not get their costs? I am with you. Thank you. Can I turn to you Mrs Vaqueiro first, if that is all right? First of all, principle.

G MRSVAQUEIRO: A great deal of expensive professional time has necessarily had to be used on behalf of the financial deputy in this matter. I hear what Mr Lloyd says regarding his client's costs. I think we would not be here if Mr St had not decided to bring us back for this costs appeal and we have had to carry out quite a bit of preparatory work for the hearing and I would therefore, on behalf of the deputy, be seeking an assessment of costs, not necessarily a summary assessment because I accept Mr Lloyd has not had sufficient time.

H THE JUDGE: Yes, I see, thank you. Now, Ms Gray. I am not going to ask you to repeat the point of principle because clearly it has been made. Would you help me please with regard to the point made about your clients' involvement, that they did not need to be here to make the argument at all?

A MS GRAY: I think obviously they felt quite strongly about the application and did want to be present and be a part of it. I understand that they have taken part in all of the proceedings to date and I understand that they felt it important to be here, to actually put representations forward.

B THE JUDGE: Yes, thank you.

C 70. Following my refusal to give permission to Mr St to appeal the order of District Judge Owen as to refusing him his costs of initiating and bringing this health and welfare application Mr Lloyd has argued that he should not nonetheless meet the costs of the appeal. In a curious way he is being forced to stand on his head because, having sought an exception to the general rule as to personal welfare applications, he is now seeking that there should not be an exception with regard to the appeal.

71. I have determined that there is no reason for Mr St to have his costs for the reasons I have given at great length this morning in bringing the application, and certainly it is true that as a general rule the court does not allow parties their costs, as I have said.

D 72. The difficulty is Mr St chose to bring this matter further and he chose to bring this matter further to challenge the judgment of District Judge Owen. That inevitably means that those involved in opposing that would incur costs. In particular it means that KS would incur costs through his financial deputy. In other words, were I to order no costs today I would be diminishing the estate of KS and that is a matter that causes me concern. There already are investigations as to whether KS's mother, by her actions as deputy, has diminished the estate of KS. I am not saying they are going to be made out and that there will be a claim or there will not be, but there is a concern, and it is important to that his estate is protected.

E 73. I also bear in mind that not only has Mr St not succeeded, in addition to that it seems to me he had little prospect of success given the fact that no one, but no one, has supported the points he has made and he has undermined himself by withdrawing from these proceedings, as I have found, when he did. So as a matter of principle it seems to me that he should meet the costs that arise from a failed appeal.

F 74. I then turn to the problem of Mr and Mrs S, the second and third respondents, and the fact that it is argued that they should not be party to this appeal. The problem with that is that any party to an appeal is entitled to appear. They can, of course, minimise their costs. It seems to me their costs ought to be minimised so far as can be. They could, I accept, have said to the financial deputy, well, you argue it, we need not come to court, but they are entitled, I think, with regard to their son's assets, to take an interest and I am not going to therefore disallow their costs on that basis.

G 75. I am concerned that only this morning are estimated costs available to the court for the court to deal with by way of a summary assessment and it would, I think, have been better to have dealt with the matter by way of summary assessment today. I am told that the successful respondents are simply not in a position to do that, and I am asked therefore to make an order for detailed assessment, which I shall, but I shall refer to that in my order because the parties ought to have been able to argue the matter today.

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76. I do not propose to make an order that Mr St pays monies on account. He is only a carer. He is not a wealthy man. It may well be, whatever the strong feelings engendered in this case, that both Mr and Mrs S and Mr Lapidge feel, in due course, it would be better not simply to pursue this matter further having made the point, simply because there is no point seeking to get the proverbial blood out of a stone, but that is a matter for them.

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[Order follows]

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