IN THE COURT OF PROTECTION **CASE NO: 10218676 and 8 others**

Before :

DISTRICT JUDGE MARIN

Between:

IN THE MATTERS OF:
MOD, VS, HR, ML, MW, DW,
MT, EJG and ANR
(Deprivation of Liberty)

- -

Ms A Lee (instructed by Legal Services Lincolnshire) for the Applicant in MOD
Mr Molloy Solicitor for the London Borough of Hillingdon in VS
Ms Ali solicitor for the London Borough of Islington in ML
Mr N O'Brien (instructed by Hertfordshire Legal Services) in MW and DW
Ms Kakonge (instructed by Suffolk Legal Services) in MT and EJG
Ms Rickard (instructed by Hampshire County Council) in ANR
No party attended in HR

Hearing date: 8 July 2015
Judgment: 9 July 2015

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Approved Judgment

This judgment is being distributed on the strict understanding that in any report no person other than the advocates (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of P and the members of P's family must be strictly preserved.

DISTRICT JUDGE MARIN:

1. This judgment arises from case management hearings listed before me on 8 July 2015 in nine unrelated cases.

2. The applications in each case seek the court's approval of arrangements whereby the person who lacks capacity (who I shall refer to generically as P) is deprived of his or her liberty. Each application was made under what has become known as the *Re X* procedure.

3. Given the importance of the issues that arose at the hearing not only to the parties in these cases but to many other court users, I am giving this judgment to explain the issues that fall for determination in these and many other cases.

4. If only for the benefit of the lay parties in each of these cases, I should summarise the background to the legal and procedural issues that arise although I appreciate that they are well known to their legal representatives.

5. Schedule 1A of the Mental Capacity Act 2005 contains a scheme whereby a managing authority of a hospital or care home is allowed to deprive a patient or resident of his or her liberty if the procedure set out in the legislation is followed.

6. However, where authorisation is required for deprivation of liberty outside of the hospital or care home setting, an application must be made to the court under section 16(2)(a) of the Mental Capacity Act 2005.

7. On 19 March 2014, the Supreme Court handed down its judgment in *P (By His Litigation Friend the Official Solicitor) v Cheshire West and Chester Council and Another; P and Q (By Their Litigation Friend the Official Solicitor) v Surrey County Council* [2014] UKSC 19 ("*Cheshire West*"). The essence of the case was to clarify the definition of deprivation of liberty in the context of the Mental Capacity Act 2005 and the living arrangements of the parties in the case. In purely lay terms, the definition was wider than had been previously thought. I need say no more than that although the case is of immense significance.

8. From the perspective of the Court of Protection however, it quickly became apparent that in view of the decision in *Cheshire West,* the court was likely to receive a large number of applications for it to approve living arrangements that did not fall under the scheme in Schedule 1A. At the time, estimates of up to 100,000 cases were given.

9. In order to address the anticipated increase in the number of cases in the Court of Protection relating to deprivation of liberty, the President of the Court of Protection convened a hearing in June 2014 to address the issue and to consider the implementation of a streamlined process to deal with these cases.

10. Potential legal and procedural issues that could arise in a streamlined procedure were identified at the hearing and adjudicated upon by the President. His conclusions on the various issues and the way forward are set out in two judgments handed down in August and October 2014 and reported as *Re X and Others (Deprivation of Liberty)* (2014 EWCOP 25) and *Re X and others (Deprivation of Liberty) (Number 2)* (2014 EWCOP 37).

11. In November 2014, a new Practice Direction 10AA was implemented. It dealt with all deprivation of liberty cases and in particular set out at Part 2 the new streamlined procedure for what are referred to as *Re X* applications.

12. To support the new streamlined application, extra judges were trained to deal with the *Re X* cases and court resources were made available to ensure the cases would be processed speedily.

13. However, three issues in *Re X* were appealed to the Court of Appeal. The first was whether P must always be a party. The President had said that he did not have to be a party. The second was whether the initial decision and any subsequent reviews required an oral hearing. The President said this was not necessary. The third was whether a litigation friend for P can conduct litigation without a solicitor. The President said he did not.

14. On 16 June 2015, the Court of Appeal handed down its decision which is reported as *Re X (Court of Protection Practice)* (2015 EWCA Civ 599). They concluded that they did not have jurisdiction to entertain the appeal. However, the court went on to say that if they would have had jurisdiction, then P should be a party. The two other issues were not considered by them.

15. At paragraph 108 of the Court of Appeal's judgment, Black LJ commented:

> "..The concern about the increased workload that may be generated by the Cheshire West decision is understandable and I do not doubt that the joinder of P as a party would be more burdensome to the system in various ways than the President's scheme and may import greater delay. The extent of the increased burden would only become apparent over time..."

16. In fact, almost immediately after the judgment was handed down, the court started to receive more and more applications now that the *Re X* litigation had ended. Applicants clearly took the view that the way was clear to issue applications that had awaited the Court of Appeal's decision.

17. I understand that at present, about 100 applications have been issued since the Court of Appeal's decision three weeks ago with more arriving each week. At the hearing, one local authority told me that they alone have "hundreds" that are to be issued imminently.

18. Of course, the question then arose as to how to approach the applications given the Court of Appeal's view about P's participation in each case, the *Re X* procedure being effectively discredited and the need therefore for a hearing in each case.

19. In the cases before me, District Judge Batten ordered a hearing which she listed before me. Mindful of the Court of Appeal's decision, in each case she invited the Official Solicitor to act for P and ordered him to file submissions prior to the hearing to say whether he had been able to take up the invitation to act as litigation friend for P; if he had not been able to take up the invitation, what further steps were required to enable him to determine the invitation to act and if he was able to act, what directions or orders he was seeking.

20. By way of compliance with this order, the Official Solicitor wrote a letter which is not only referable to the cases before me but also to all other similar cases where he has been invited to act.

21. The Official Solicitor said this:

> "..I am not currently in a position to accept the invitations to act as litigation friend in the 'referrals' in these cases.
>
> I am most unlikely, on my current understanding of my budgetary position, to be able, even when I have established a light touch process for this class of case, which is nevertheless consistent with my duties as litigation friend, and the external outsourcing to fund them, to be able to accept invitations to act in more than a relatively small proportion of the total expected numbers of these former streamlined procedure cases.
>
> Even before the dramatic increase for the month of June 2015 .... and these 43 actual and impending invitations to me to act as litigation friend in this class of case, in resource terms my CoP Healthcare and Welfare team was then running at or beyond full stretch, 'fire fighting' in a way that was unlikely to be sustainable beyond the short term."

22. He went on to elaborate:

> "There has been an increase in the number of invitations to me to act as litigation friend ('referrals') for P in Court of Protection welfare applications, including applications for orders the giving effect to which deprives P of their liberty.
>
> For the three calendar years 2011, 2012 and 2013 the number of new referrals a month averaged 28 cases. In 2014 this increased to an average monthly referral rate of 50 cases. In the five months to the end of May 2015, the monthly referral rate was in excess of 53 cases. In resource terms my CoP Healthcare and Welfare team was then running at or beyond full stretch, 'fire fighting' in a way that was unlikely to be sustainable beyond the short term.
>
> There has been a dramatic increase for the month of June 2015 with 99 new referrals to the end of the month. But that number for June does not include the 43 new invitations to act to which I am responding. As at the end of May I had 137 referrals in my CoP Healthcare and Welfare team, in the 'pre-acceptance' stage (which clearly did not include these former streamlined procedure cases).
>
> From time to time, I have taken those steps I have been able to take, having regard to budgetary constraints and balancing the needs of all my teams, to increase staff available to the work of the healthcare and welfare team as its caseloads have risen.
>
> But, as has been frequently noted publicly, I do not have the staff resources to manage the expected significant additional increase in

> caseload arising from the decision of the Supreme Court in Cheshire West."

23. Despite reference in the letter to a light touch scheme to allow cases to be processed quickly, the Official Solicitor nonetheless commented that:

> "But the simple facts are that:
>
> - I am not currently in a position to accept the invitations to act as litigation friend in the referrals in these cases; and,
>
> - I am most unlikely, on my current understanding of my budgetary position, to be able, even when I have established a light touch process, which is nevertheless consistent with my duties as litigation friend, and the external outsourcing to which have I referred above, to be able to accept invitations to act in more than a relatively small proportion of the total expected numbers of these former streamlined procedure cases."

24. As if to emphasise the seriousness of the matter, the Official Solicitor copied his letter to the President and Vice President of the court, the local authority applicants in the cases and the Ministry of Justice as his "sponsoring department".

25. At this point, I should say something about the cases before me.

26. ML is 87 years old, suffers from dementia and is currently in a rehabilitation unit although I was told at the hearing that she is expected to leave this placement in about three months. She has a son who lives in the Dominican Republic and he would like her to live with him. The local authority does not know at present if this plan is likely to materialise.

27. The remaining people in the cases before me are aged between 19 and 50 years and all of them have autism and serious learning difficulties. They also all live in supported placements.

28. In every case, P's family in the form of parents or siblings support the application and are satisfied with P's living and support arrangements including the restrictions on P's liberty.

29. It seems to me that the cases before me can be divided as follows.

30. In my opinion, the case of ML never really belonged in the *Re* X procedure. Further information about her present placement and where she will go afterwards be it abroad or elsewhere in this country is required. There is clearly going to be a need to consider her best interests at a hearing at some point in the future and the *Re X* procedure was not designed for her case.

31. In the case of VS, the *Re X* application was made for a placement which VS has now left so the paperwork filed is inadequate and more information is required. However, had this been considered under the *Re X* procedure, it may be that upon filing further information, the court would have approved the arrangements especially as VS'

parents support the placement but equally a judge could have removed the case from the *Re X* process.

32. In the remaining seven cases though, family members have expressed themselves to be satisfied with the arrangements including the deprivation of liberty which typically includes restricting P from leaving the placement without supervision for safeguarding reasons which on the papers seem necessary and proportionate. It is likely that under the *Re X* procedure, an order would have been made either immediately or after a request for clarification of some small matters in one or two of the cases.

33. What emerges is that in seven of these cases, orders would have been made under the *Re X* procedure on paper and potentially also in an eighth case.

34. However, the Court of Appeal's decision raises important issues.

35. The first issue is whether P must be a party in each of these cases whatever the position and particularly in circumstances where everyone involved in P's care agrees with the arrangements.

36. To elaborate on this issue, I can do no better than turn to the Court of Appeal's judgment.

37. At paragraph 86, Black LJ said:

> "Counsel were unable to identify any situation where the issue before a court or tribunal was an adult's liberty, in which the person would not, themselves, be a necessary party to the proceedings. As far as children are concerned, secure accommodation proceedings under section 25 of the Children Act 1989 are perhaps the closest parallel to proceedings in the Court of Protection concerning deprivation of liberty, certainly closer than wardship and private law proceedings. In secure accommodation proceedings, as indeed in care proceedings, the child is a party. What this might indicate, it seems to me, is that it is generally considered indispensable in this country for the person whose liberty is at stake automatically to be a party to the proceedings in which the issue is to be decided. The President's conclusion that it was unnecessary for this to be so in relation to an adult without capacity appears therefore to run counter to normal domestic practice. It might, therefore, be thought to require very firm foundations if it is to be regarded as acceptable."

38. At paragraph 104, she said:

> "...I stress that I am only concerned, at present, with whether P must be a party to the deprivation of liberty proceedings. Given the tools presently available in our domestic procedural law, I see no alternative to that being so in every case."

39. And at paragraph 106:

> "...I remind myself that no other example could be found of an adult whose liberty was in question in proceedings before a court or

> tribunal not being automatically a party to those proceedings. P is therefore in a position which is the opposite of what the Strasbourg jurisprudence requires, namely that the essence of the Article 5 right must not be impaired and there might, in fact, need to be additional assistance provided to P to ensure that it is effective".

40. At paragraph 127, Gloster LJ remarked that:

> "...I am supported in this conclusion by the views of Lord Justice Moore-Bick and Lady Justice Black, with which I agree, that in any event the President's conclusion - that a patient need not be made a party in order to ensure that the proceedings are properly constituted (even though he may be joined as a party at his request) - is not consistent with fundamental principles of domestic law and does not provide the degree of protection required by the Convention and the Strasbourg jurisprudence".

41. And finally, Moore-Bick LJ at paragraph 171 said:

> "I agree with Black LJ for the reasons she gives that a procedure under which such a person need not be made a party in order to ensure that the proceedings are properly to constituted (even though he may be joined as a party at his request) is not consistent with fundamental principles of domestic law and does not provide the degree of protection required by the Convention and the Strasbourg jurisprudence."

42. Despite the very strong comments of the Court of Appeal, I note that the order listing this hearing referred to the fact that the court was "mindful" of the "obiter remarks of the Court of Appeal" in *Re X*; in other words, that technically, as the Court of Appeal found that it had no jurisdiction, its comments about whether P should be joined as a party were an expression of opinion rather than a binding decision. This point was not lost on Ms Rickard who wanted to persuade me that I could treat these remarks as obiter and make an order in her case.

43. The second issue is that if P must be joined as a party, he will need a litigation friend. In fact, rule 3A(4) of the Court of Protection Rules 2007 provides that the order joining P as a party will only take effect on the appointment of a litigation friend so without one he cannot be a party. It is for this reason that in paragraph 27, I deliberately do not refer to P as a party but as the people involved in this case because so far, P has no party status.

44. Apart from MOD where an IMCA is willing to act as litigation friend and has instructed solicitors, the issue of litigation friend is very much alive in every case.

45. In the case of ML, I was told that her son lives abroad and seems not to have a strong connection with ML. The local authority feel that he is unlikely to be suitable to act as litigation friend and I agree. ML therefore has no-one else and looks to the Official Solicitor as her only hope.

46. In other cases, enquiries are to be made of parents and family members but again, that raises another issue which was considered at the hearing.

47. Rule 140 provides that a litigation friend must not only act fairly and competently on behalf of P but also have no interest adverse to P.

48. In most of these cases, the family may be said to have an adverse interest to P.

49. Thus, where P lived with his parents but has moved to new accommodation because the parents through no fault of their own cannot manage any longer to look after P or where P has to remain in supported accommodation because his family cannot allow him to live at home, does this mean that parents and other family members have an adverse interest such that they cannot act as litigation friend?

50. On the subject of family involvement, I have in mind the decisions Charles J in *Re UF* (2013 EWHC 4289 (COP) and of Baker J in *AJ –v- A Local Authority* (2015 EWCOP 5).

51. Additionally, Black LJ in *Re X* when discussing the *Re X* procedure noted that:

> "...It would be translated into action by many who were expert and efficient but, inevitably, also by some who were lacking in time or expertise or judgment. In what follows, I am not suggesting bad faith on the part of those involved in the process, merely acknowledging the pressures and realities of everyday practice."

52. It seems to me that these comments could apply to family members because however noble their sentiments, there must be a question in every case as to whether they have the expertise to properly evaluate placements, support packages, consider whether any deprivation of liberty is necessary or proportionate and source or consider if there are better options for P.

53. If family members cannot act as litigation friend, who is left?

54. Ms Ali on behalf of the London Borough of Islington told me that they had absolutely no one. Their IMCAs are already over-stretched and cannot do this work but even if they were available, she told me that they refuse to act as there is no indemnity insurance in place. Ms Ali is hopeful that by the end of 2016, indemnity insurance will be in place and IMCAs available but this is a long way off and not guaranteed. None of the other parties had any other suggestions.

55. What results therefore is a complete impasse. The Court of Appeal strongly suggests that P should be a party. If so, he must have a litigation friend before he can become a party. If family members cannot take on this role either because it is legally or procedurally wrong or simply because none exist, then all eyes turn to the Official Solicitor. But he says that he cannot act as he has no resources to do so. The result therefore is that the cases all stand still and cannot proceed as will hundreds and potentially thousands of other cases. The ramifications of this are huge. In fact, I cannot think of a more serious situation to have faced a court in recent legal history.

56. One possible solution to this impasse is the appointment of a Rule 3A Court of Protection Rules 2007 representative.

57. Rule 3A came into effect on 1 July 2015 and was not in force at the time of the *Re X* appeal and was thus not considered by the Court of Appeal.

58. The rule provides as follows:

3A: Participation of P

(1) The court shall in each case, on its own initiative or on the application of any person, consider whether it should make one or more of the directions in paragraph (2), having regard to –

(a) the nature and extent of the information before the court;

(b) the issues raised in the case;

(c) whether a matter is contentious; and

(d) whether P has been notified in accordance with the provisions of Part 7 and what, if anything, P has said or done in response to such notification.

(2) The directions are that –

(a) P should be joined as a party;

(b) P's participation should be secured by the appointment of an accredited legal representative to represent P in the proceedings and to discharge such other functions as the court may direct;

(c) P's participation should be secured by the appointment of a representative whose function shall be to provide the court with information as to the matters set out in section 4(6) of the Act and to discharge such other functions as the court may direct;

(d) P should have the opportunity to address (directly or indirectly) the judge determining the application and, if so directed, the circumstances in which that should occur;

(e) P's interests and position can properly be secured without any direction under sub-paragraphs (a) to (d) being made or by the making of an alternative direction meeting the overriding objective.

(3) Any appointment or directions made pursuant to paragraph (2)(b) to (e) may be made for such period or periods as the court thinks fit.

(4) Unless P has capacity to conduct the proceedings, an order joining P as a party shall only take effect –

(a) on the appointment of a litigation friend on P's behalf; or

(b) if the court so directs, on or after the appointment of an accredited legal representative.

(5) If the court has directed that P should be joined as a party but such joinder does not occur because no litigation friend or accredited legal representative is appointed, the court shall record in a judgment or order

(a) the fact that no such appointment was made; and

(b) the reasons given for that appointment not being made.

(6) A practice direction may make additional or supplementary provision in respect of any matters set out in this rule.

59. The rule imposes a duty on the court to actively consider P's role in proceedings. In addition to being a party, one option is for P to retain non-party status but to have a representative whose functions are effectively to provide the court with information to allow the court to make a best interests decision.

60. It may be possible to say that P's rights are sufficiently protected in a case involving deprivation of liberty by the appointment of a rule 3A representative. Maybe there is scope to argue that the mechanical act of having P's name stated as a party in a case and being represented by a litigation friend is not that much different to having a representative whose work is directed and controlled by the court having P's best interests in mind. In both cases, P has access to all papers in the case and takes the same role. Perhaps therefore, it could be said that being a party connotes being fully involved and actively represented in a case rather than the more traditional view of a party being someone who takes ownership of a case by having his name on the court documents and who is involved in his case as opposed to a non-party who is excluded from the case. I make these comments as an observation but express no opinion.

61. Of course, any suitable person can be a representative including a Care Act Advocate or IMCA and if indemnity insurance is a concern to IMCAs, acting as a representative being given a defined role by the court may lessen their fears of acting but otherwise, any suitable person can be a representative. So for example, what would be wrong with a long standing friend of P or P's family, who is a person of integrity with the clear ability to properly represent P's interests in being a representative? Or the family solicitor or accountant or a cleric who has known P for many years and is willing to carry out this task dispassionately?

62. If the use of a rule 3A representative is permissible, clearly it would go towards solving the problem of the absent Official Solicitor. Indeed, the court could give general guidance to ensure that when a case is issued, details of any proposed representative are provided with an assurance that s/he is ready to start work immediately.

63. At the hearing, these issues were discussed with everyone trying to find a solution. Without exception, everyone agreed that these issues need to be resolved especially as they affect many other cases already listed for hearing and many more that are to be issued as I have already said.

64. As a litigation friend has been found in MOD's case, I gave directions to progress that case and it will not be linked with the other cases any longer.

65. So far as the remaining eight cases are concerned though, I decided to transfer them to the Vice President of the Court of Protection to decide issues at a hearing which I listed as follows:

    1. Whether P must be joined as a party in a case involving deprivation of liberty

    2. Whether the appointment of a rule 3A representative is sufficient in a case involving deprivation of liberty

    3. If P must be joined as a party, in the absence of any suitable person to act as litigation friend, what should be done in circumstances where the Official Solicitor cannot accept an invitation to act.

    4. Whether a family member can act as litigation friend in circumstances where that family member has an interest in the outcome of the proceedings.

    5. Whether other deprivation of liberty cases not before the court on this occasion but which raise similar issues to this case should be stayed pending a determination of the issues recorded at paragraphs 1 to 4.

66. With regard to the fifth issue, some of the parties expressed the concern that they have other cases listed and they were loathe to incur the cost of a hearing if a similar order is likely to be made or the court will stay the case pending determination of these issues. To address this, I have invited the Vice President to consider staying the cases presently listed such that hearings already listed may be vacated. It occurs to me that he may also wish to consider whether an automatic stay should be imposed on future cases that are issued.

67. I have taken the course of referring these cases to the Vice President because it is vital that a decision is made on these issues as quickly as possible. None of the parties were equipped to fully argue the issues at the hearing as they would need to prepare: this is not a criticism as the issues were not identified until the hearing. There would therefore need to be another hearing and if so, it must make sense that this hearing produces a judgment from a senior judge which will set out the court's view on these matters and direct the way forward. There will thus be a saving in time and costs which is consistent with the overriding objective in the court process.

68. So far as the Official Solicitor is concerned, I do not discharge him in any of these cases and I have ordered him by 4pm on 22 July 2015 to file and serve on the parties a statement which shall:

1 Provide a full and evidence based explanation of why he cannot cope with the number of deprivation of liberty applications in which he is invited to act as litigation friend

2 Explain in full detail providing evidence where appropriate as to which areas or processes cause him difficulty and why

3 Inform the court when he expects to be able to cope with deprivation of liberty cases and the likely time scale in which he can start work on a case.

4. Provide any other information to the court that will assist the court to make decisions in this case regarding the position of the Official Solicitor.

69. I believe that this information is vital to allow the court to properly consider his position.

70. I am also anxious that the court can properly evaluate the availability of a litigation friend in all of the cases apart from MOD where one has been appointed. I therefore ordered the Applicants in each case by 4pm on 22 July 2015 to file a statement which shall:

1 Explain what steps have been taken to find a litigation friend for P

2 Set out whether IMCAs or other Advocates or resources are available to act as litigation friend or if not, why they are not available.

3 List all family members who are willing to act as litigation friend.

71. I was asked in all the cases to approve the deprivation of liberty of P on an interim basis. I declined to do so because it seems to me that the effect of the Court of Appeal's judgment is to demand a higher level of scrutiny than the *Re X* process demanded and on the information available which is in the form of *Re X*, I am unable to do so. There are also some cases where the information is incomplete. However, my order provides that applications for interim orders can be renewed at the next hearing.

72. By setting out the issues as they emerged at the hearing and making the orders I have referred to, my aim is to ensure that matters can be adjudicated upon and resolved as soon as possible.