

IN THE HIGH COURT OF JUSTICE
(HIGH COURT OF PROTECTION)

Case No. 11744555

Royal Courts of Justice
Strand
London
WC2A 2LL

27th October 2010

Before

THE HONOURABLE MRS. JUSTICE MACUR

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NK
(Applicant)

-v-

VW (By Litigation Friend, the Official Solicitor)
(First Respondent)
LCC
(Second Respondent)
JW
(Third Respondent)
WW
(Fourth Respondent)

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JUDGMENT
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APPEARANCES:

For the Applicant:

MR. SMITHERS

For the First Respondent:

MR. BAGCHI

For the Second Respondent:

MR. BUTLER

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27th October 2010

NK

-v-

VW (By Her Litigation Friend, the Official Solicitor)

LCC

JW

and WW

JUDGMENT

MRS. JUSTICE MACUR:

1. The vulnerable person in this case is VW, who is represented in this application by her Litigation Friend, the Official Solicitor. The Applicant for permission to make applications in relation to VW is her son, NK. The local authority, who are presently responsible for VW's care are LCC and two further Respondents, JW and WW are the brother and sister-in-law respectively of VW.
2. There is no appearance today by VW's husband, PH. I was told and I accept that a telephone call had apparently been made on his behalf seeking to know whether this application could be adjourned but indicating uncertainty as to the part which he would wish to play in future proceedings. In that this is an application for permission to proceed with those applications, then I deem it is not appropriate to adjourn to permit attendance or representation. I adopt Mr. Smithers' submission that if I were to grant permission, then every opportunity could be given to PH to apply to the Court for further consideration of that permission, given his absence today.
3. The application for permission to make application to the Court to exercise its powers under the Mental Capacity Act 2005 (MCA) is prescribed by Rule 50 of the Court of Protection Rules 2007 (CoPR) which provides :

"Subject to these Rules and to Section 50 sub-section (1) of and Paragraph 20 of

Schedule 3 to the Act, the Applicant must apply for permission to start proceedings under the Act".

4. In deciding whether to grant permission, the Court must in particular have regard to (a) the Applicant's connection with the person to whom the application relates; (b) the reasons for the application; (c) the benefit to the person to whom the application relates or the proposed order or directions, and (d) whether the benefit can be achieved in any other way. (MCA s 50(3).)
4. NK's is VW's son. He has expressed concern for his mother's welfare and in particular regards his relationship with her to have been alienated by the method and nature of care which she receives. He acknowledges, and it is beyond dispute, that VW is unable to make decisions as to her own care, welfare and financial affairs. His connection, therefore, from VW's perspective upon the present evidence before me should be seen in terms of biological link, but by view of his infrequent recent contact and the effects of her diminished mental capacity, to have no particular close emotional connection. That is not in any way to deride NK's obvious affection for his mother and his wish to act in what he perceives to be in her best interests.
5. The reasons for his application are primarily to remove VW from her present care home in Lincoln to one closer to where he lives in Hastings. He has researched and identified several suitable high quality care homes, no doubt some of which specialise in providing care for patients suffering from dementia. He is in a position to fund that particular care and would wish, by removing his mother from Lincoln, to exercise more frequent contact to her without the restrictions imposed presently within the Deprivation of Liberty Order (DLO) by the Best Interests Assessor (BIA) upon the advice of personnel of the present care home. In those circumstances, he would wish

that with the move geographically he should be appointed Deputy in relation to welfare and financial affairs.

6. The benefit to VW from his perspective would be, inter alia, the reintroduction of their relationship permitting an emotional bond in addition to the biological connection. (His criticism of the care home has included suggestions of physical ill-treatment. Those suggestions are not substantiated by any other factual evidence before me.) NK, argues that the nature of the benefit to VW is incapable of being achieved in any other fashion.
7. CoPR 3 describes the overriding objective of enabling the Court to deal with a case justly having regard to the principles contained in the Act. I must give effect to the overriding objective when interpreting any Rule or Practice Direction.
8. In those circumstances I have regard to the overriding objective which is to ensure that: an application is dealt with expeditiously and fairly, to ensure that the vulnerable person's interests and position are properly considered; to deal with the case in ways which are proportionate to the nature and purpose and complexity of the issues; to ensure that the parties are on an equal footing, to save expense and to allocate it its appropriate share of the Court's resources.
9. NK is represented by learned counsel, Mr. Smithers, who has prepared his application for permission to apply with conspicuous care. He has placed before the Court in writing the arguments as to the benefits which will be bestowed upon VW by reason of the order and directions proposed by NK. In that he has referred to those benefits, he has attempted to provide for the perspective of VW, rather than those of the Applicant, NK. He has been hampered to the extent that he must acknowledge and does so the opinions of consultant psychiatrist, Dr. A, whose opinions are not subject

to challenge. Those opinions are unequivocal in terms of where VW should reside. Dr. A, without descending into a comparison of care between homes, makes the clear assertion that to remove VW from her present placement would be detrimental to her welfare. He expresses his anxiety at the prospect in clear terms. He is unable to conceive that any living conditions, no matter how physically superior to those in the present home occupied by VW will benefit her emotional/welfare needs. He underlines the need for VW to remain put.

10. In those circumstances, the prospective benefits put forward on NK's behalf must surely fall away. It is not possible for me at this stage of proceedings to engage in a fact-finding hearing. It would be inappropriate to do so. However, accepting, for the purpose of the argument, the accuracy of NK's proposals and assuming 'availability and appropriate capacity to care for those suffering from dementia', they are unable to 'trump' such explicit professional opinion as to residence. Therefore I consider it is reasonable for me to conclude that that particular aspect of NK's application would inevitably fail.
11. Mr. Smithers, on behalf of NK, highlights the discrete issue of contact. Dr. A has expressed opinion that there should be no restrictions to visits taking place outside the care home with independent monitors. NK's recent experience of contact was in his view disadvantaged by the inappropriate, as he would deem it, supervision of members of staff of the care home which he considered to be intrusive.
12. I must, of course, look at the matter from the perspective of VW(MCA s 50(3)(c).) From VW's perspective, I assume for the purpose of this application that there is every benefit in appropriate circumstances relating to her variable mood to have contact with NK. His interest in her must surely translate, from an objective view, to

be beneficial to VW. However, that question of contact must be seen in the context of Dr. A's opinion as to where VW should be residing. In these circumstances I note the unfortunate problems between NK and members of the care home but do not elevate them to suggest that he is prohibited from having contact with his mother, or she with him.

13. In principle there is no objection to his contact. The sad fact of the matter is that NK lives at a considerable geographical distance from VW. His journeys to exercise contact with VW are difficult and costly. They are uncertain in that dependent upon VW's moods, she may not be in a fit state to receive him. Those difficulties, unfortunately, are his, and I am not required to have regard to the benefits that would flow from the proposed order or directions to anyone other than VW. Therefore his application for contact must be placed in the context of the practical arrangements that can only be devised in accordance with variable circumstances and must retain flexibility.
14. Mr. Butler and Mr. Bagchi who appear on behalf of LCC and VW respectively, point out that this issue of contact should not deter the Court from refusing permission if it would otherwise do so in the overall circumstances of the case, since there is no objection in principle to contact and there is the opportunity for NK to make representations as to the management of that contact to the BIA, and that he pursues an academic application in that it is not possible at the moment for anyone to have contact with VW away from the home in which she resides or otherwise without supervision. They argue that the application is premature on a factual basis, since NK has not, for whatever reason, good or bad, been in a position to exercise frequent contact in order to seek an alteration in the restrictions as presently imposed.

15. Mr. Smithers, on behalf of NK urges me to consider that the family connection between NK and VW is such that that particular part of my consideration should be given particular weight. In doing so he must surely be praying in aid the Article 8 rights of both mother and son. It is of course a fundamental right to enjoy family life, but that must also be determined in an application such as this with the priority given to VW's rights, as is made clear by the section itself. This is in accordance not only with the Convention but also with case law, including that of *Re S (Adult Patient) Inherent Jurisdiction Family Life*, a decision of Mr. Justice Mumby, as he then was, reported in 2003 1 FLR at Page 292.
16. Considering the overall objective of the Act and bearing in mind the unchallenged opinion of Dr. A, I am driven to conclude that the proposed order and directions to be sought by NK if permission were to be granted, are not capable of being perceived to be to the benefit of VW. The disadvantages to her in removing her from her present care home outweigh every benefit suggested that the move would bring. In those circumstances, I refuse NK permission to make application pursuant to the MCA 2005 in relation to his mother. In doing so I obviously consider that section 50 (3) and the associated Rules require the Court to prevent not only the frivolous and abusive applications but those which have no realistic prospect of success or bear any sense of proportional response to the problem that is envisaged by NK in this case.
17. I refuse permission to NK and order accordingly.
