

[2023] EWCOP 68

Case Number. 13979987

IN THE COURT OF PROTECTION

The Court House
George Street
Lancaster

**Before HIS HONOUR JUDGE BURROWS
sitting as a nominated judge of the Court of Protection at Tier 2**

BETWEEN:

A LOCAL AUTHORITY

Applicant

-v-

**(1) SAM M
(by his litigation friend, the Official Solicitor)
(2) HELEN**

Respondents

GARY WILLOCK (instructed by the LA) **appeared** on behalf of the **Applicant**
KATHERINE SCOTT (instructed by **Simpson Millar**, on the behalf of the **Official Solicitor**) appeared on behalf of the **First Respondent**
ROBERT DARBYSHIRE (instructed by **Slater Heelis**) appeared on behalf of the **Second Respondent**

JUDGMENT

22nd NOVEMBER 2023

This judgment was delivered in public, and the proceedings are subject to the Transparency Order dated 24 August 2022. The anonymity of SM must be strictly preserved, and nothing must be published that would identify SM, either directly or indirectly. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

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HIS HONOUR JUDGE BURROWS:

At the request of the parties, this judgment is to be published. The names of the parties will be changed to protect their anonymity. In order to prevent P's identification, the local authority will not be named, and neither will the geographical area in which he lives be identified or the names of his carers and other relevant professionals.

INTRODUCTION

1. This is an ex tempore judgment following a hearing yesterday. It was originally listed to be a two day fact-finding hearing with a view to me deciding whether to make an injunction, removing Helen from the house she lives in with her son. However, there was a change of approach the evening before by the local authority, in concert with those representing Helen, and they invited me yesterday to adjourn the matter for a period of six months, to allow Helen to demonstrate that she could keep with the rehabilitation that she claims (and I believe her) that she has started.
2. The only problem with the agreement was that the Official Solicitor, representing Sam, was not involved in the discussions until the agreement had been reached by the other two parties. Experience shows that it is never a good idea to leave any party out of discussions, but when the one left out represents the person concerned, the Official Solicitor, that is 'suboptimal' practice, if I can put it that way.
3. Needless to say, this matter has proceeded as a contest, although, as I will explain, the extensive fact-find has not been undertaken, for reasons that will become clear.

BACKGROUND

4. This case is about Sam M. He is a man in his 30s. Until the age of 18 he had a normal, healthy life. Then, in 2018, he was the victim of a serious assault which, with an additional factor of clinical negligence, has led to him being seriously disabled. He is quadriplegic. He has non-epileptic attack disorder. He has dysphagia. He is constantly at risk of aspiration. As a result, he is regularly assessed and seen by his speech and language therapist. He spends his waking hours mostly in an adapted wheelchair. He communicates, with some considerable difficulty, through a letter board. When I met him, he was assisted by his speech and language therapist in the communication process. He suffers from a great deal of cognitive damage.
5. As a result of the clinical negligence, however, Sam received significant financial compensation, the details of which I do not know and do not need to know. There is a large fund which is managed by a property and affairs deputy, who was appointed by the Court of Protection in November 2011. Since 2015, Sam has lived in a specially adapted bungalow in a town in the North of England. He shares that home with his team of carers, or at least those who are at the time on duty providing him with the 2:1 care that he needs. He also shares the home with his mother, Helen.
6. I emphasise at the outset that Sam is the owner of the home. It is provided for him out of his compensation because it is the best place for him to receive the care he needs, within the context of his overall best interests. I would also add that I have visited Sam in his home. That was in April of 2023. It is a spacious bungalow. He is able easily to move, or rather, to be moved around his house. There is enough room for him to enjoy his own space and what limited privacy he can have, bearing in mind there are others living there at any given time whose job it is to provide him with care. When I saw him, he was apparently in a good mood. He was keen to communicate and to tell me what he wanted to tell me. He showed me his pet pineapple python and his set of samurai swords (both of which had evaded the risk assessment conducted in advance of my visit).
7. I also met Helen and have met her on a number of other occasions, both at court and at home that day. Unfortunately, and for reasons I shall explain in a moment, it is going to be necessary for me to consider Helen's behaviour. However, I say at the outset that it is clear to me that she loves her son, and he loves her. He wants her to

remain part of his life. As far as Helen is concerned, I have considerable sympathy with her situation. She was the mother of a perfectly healthy young man, whose life was, if not destroyed, certainly gravely damaged by what appears to have been a senseless attack. That was compounded by negligence on the part of the hospital in failing to determine at an early enough stage how serious his injuries were.

THIS APPLICATION: WHAT THE COURT CAN DO

8. What am I being asked to do? It seems to me that at the beginning of this application, the intention was for me to make an injunction removing Helen from the house that she shares with her son. However, due to circumstances that came about yesterday morning, there was new evidence about WT, who effectively runs the care at Sam's home, and this led to his suspension yesterday. I was invited to consider those facts, and that he had been suspended, as being such as to call into question the evidence that he had given in his written statement, and he would give orally. Secondly, it would not be fair for him, perhaps, on the day after he was suspended, to have to address allegations made against him, based upon the same evidence that formed the basis of his suspension.
9. I decided at that point that it would not be fair or proper to have the full two-day fact-finding hearing. However, I was pressed by Ms Scott, on behalf of the Official Solicitor, to hear evidence before making a decision on the remaining issue, which was whether to adjourn the matter for a period of six months or so, and then to return to decide whether I should make such an order at that stage. It was implicit that I was being invited at the same time to decide whether it was in Sam's best interests for his mother to remain with him now, during the next six months.
10. In relation to that issue, I heard oral evidence from a number of witnesses, who I will come to in a moment.
11. It is worth starting with the basics. The jurisdiction of this court is to make decisions on behalf of a person who is unable to make those decisions for himself. I only make decisions that the person himself could make if he had the capacity to do so. So, what I am being asked to decide is whether it is in Sam's best interests for his mother to

live in his house. If not, she could be evicted from that house. That is a decision he could make for himself if he had capacity to do so. I am placing myself in his position and I have the options available to me that he would have.

EVIDENCE

12. As far as the evidence is concerned, I have approached it this way. Due to the new information about WT and that a full fact-finding was not carried out, I have decided that I will for present purposes disregard the contentious evidence, particularly that which involves him.
13. However, I am satisfied on Helen's own evidence, that I am able to conclude her behaviour is such as to give rise to a risk of harm to Sam, in the form of suboptimal care, a toxic atmosphere and the risk of the breakdown of the care package.
14. I refer to the Scott schedule in the supplemental bundle and the following matters that are either admitted or not denied and have been asserted by a witness other than Mr WT.
15. Firstly, Helen admits being intoxicated, leading to safeguarding reports from the ambulance service, in February 2021. She admits being extremely intoxicated in October 2021. She "cannot recall" - and therefore cannot doubt - the evidence that she was intoxicated and behaving in a manner that was not conducive to Sam's best interests in September and October 2022. At the same time, in September and October 2022, it is alleged that she called one of the carers a 'bitch'.
16. She admits being intoxicated on 23 July 2023 and being abusive to a carer, Ms T, calling her a "fucking idiot" and saying that the agency workers were "generally shit". She also made references to Ms T's Jewishness when she was drunk. I was tempted to regard that as antisemitic. It was certainly a reference to a racial characteristic in an unpleasant way. Helen cannot recall interfering with Sam's personal care in August 2023, although it has been admitted that she did. She does admit threatening Mr WT, the lead care worker, in October 2023, and admits threatening to cut his fingers and toes off whilst she had been drinking.

17. I have left out the contested evidence and I am also mindful that Helen argues that MT, by his actions, has himself created a toxic atmosphere. I can believe that there is some truth in that even from a cursory reading of the text messages that have been placed in the bundle. Mr WT has not had the opportunity to respond to these, so what I say about them is subject to that caveat. I can well believe that there has been an unhealthy culture in Sam's house. That is based on those text messages and the character that they seem to demonstrate on the part of Mr WT. I can well imagine that such communications and attitudes could lead to conflict, nastiness and a shift of focus away from Sam's care.
18. However, it is important to recognise in her witness statement and oral evidence, Helen admitted that she has a drink problem. She used the term 'self-medicating' and that shows both insight into her problem, but it also informs the court of how serious that problem is. Furthermore, she admitted taking four times the proper dose of mirtazapine. Mirtazapine is an antidepressant she has been prescribed. She has taken over the recommended dose on occasion to help her sleep. This shows that she is suffering from depression, she is stressed, and she has self-medicated, not only with alcohol but also with prescription drugs.
19. She is now seeing a psychologist or psychotherapist. She intends to start receiving support with her alcohol addiction - and she now admits that is what it is - and she has told me that she has not had a drink since, I think, this October. This is described by Mr Willock and Mr Darbyshire as a "watershed". However, Ms Scott, on behalf of the Official Solicitor, is less euphoric. She invites the court to conclude that for Helen to remain in the house during a six-month trial period while she is grappling with her addiction problems, as well as depression, is asking too much of her. Because of that, it is also taking too much of a risk with Sam's welfare.
20. Mr Willock, on the other hand, put the local authority's position forward this way. The local authority now asserts that it is in Sam's best interests for there to be a six month adjournment, during which Helen will remain in the house, subject to strict conditions, an agreement as to her conduct, and she will be required to disclose, on a regular basis, details and evidence of her appointments with the professionals

assisting her with her problems. Mr Darbyshire supports that, as well as raising other arguments I will deal with later.

21. Can I just say this about the local authority's change in position? I heard the evidence of Mr F yesterday who, I assume, was the decision-maker. He is obviously an intelligent and thoughtful person, and his evidence was appropriately intelligent and thoughtful. However, in a case such as this, when concerned with the conduct of a person within a small and enclosed care setting it seems extraordinary to me that he changed the position of the local authority, from suggesting that it was in Sam's best interests for his mother to leave the property, to one of her staying for a probation period, without speaking to anybody who was providing care for Sam at the house beforehand. That calls the value of that decision into question.

BEST INTERESTS: OPTIONS AVAILABLE

22. Let us deal now with the law. As I have said, I have to make a decision on behalf of Sam if he is unable to make that decision for himself and if that decision has to be made. I am persuaded that I do have to make a decision today. That is because neither decision that I could make, or indeed no decision at all, would be neutral. There are consequences that will follow whatever decision is made, including leaving the matter to see how things turn out. I have to ensure that what I consider to be the right consequences follow the decision that is made.
23. I can only make a decision on behalf of Sam that he could make himself and I need to explain the position in this case a little more clearly.
24. In this case, there was no dispute that Helen is Sam M's bare licensee. She resides at his home at his invitation, and she must leave if that invitation or licence is revoked. That means, as I and counsel for the parties in this case understand it, I can do one or both of two things if I decide it is appropriate. First, I can declare it not to be in Sam's best interests for Helen to reside in the house. That will prompt the property and affairs deputy, who would have to act in his best interests, following such a declaration, to revoke Helen's licence.

25. Secondly, I could make an injunction, achieving the same result directly. That power is confirmed on the Court of Protection in *Re G (Court of Protection: Injunction)* [2022] EWCA Civ 1312. The exercise of such a power is the subject of a somewhat dramatic case, *A Local Authority & TA, XA, GA and SR* [2021] EWCOP 22, in which Mr Justice Cohen ordered a son out of his elderly mother's home and forbade him from re-entering.
26. It seems clear to me, from the legal submissions I have heard, that the approach I need to take is as follows.
27. Firstly, I have to determine what is in Sam's best interests, taking into account section 4 of the Mental Capacity Act, which I shall not quote here.
28. Important here is the need to ensure that Sam's welfare is protected as best it can be. That means to try to ensure the consistent and effective administration of the care he needs, in an atmosphere that does not cause him harm.
29. I must recognise his wishes and feelings, which I will come to shortly. I must recognise his Article 8 rights to a private family life. Clearly, to remove his mother from his home would engage and interfere with those Article 8 rights.
30. Mr Darbyshire has advanced the argument that I must consider Helen's Article 8 rights, too. She is in danger, after all, of losing her home and no longer living with her son. I accept her rights are a relevant consideration, however, for the reasons I will explain in a moment, when balancing her rights, I must ensure that I do not forget that Sam is my primary concern. That is not just as a matter of law under the Mental Capacity Act, but also because he is an extremely vulnerable person, whose welfare needs jealous protection.
31. I hasten to add at this point that there is no dispute that Sam lacks the capacity to make the relevant decisions. Relevant to the decision I have to make today are his understanding and ability to make decisions about his care, his residence and also his contact with others. For a purely legal analysis, I would say that in this case, care is

the preeminent concern, but in each of those areas of decision-making I am satisfied he lacks capacity.

32. Moving back to the consideration of the facts, in carrying out my evaluation of Sam's best interests here, I have anxiously considered all the evidence that has been put before me. I will only refer to the evidence I conclude to be most relevant to the decision I have to make.
33. Sam lives in a house that was purchased by a personal injury settlement, following a clinical negligence claim. The package of care which enables him to live at his home is funded by that settlement. The property and affairs deputy, Ms Nichol, confirmed what the court already knew namely that the fund is the product of a settlement of the clinical negligence litigation. I have not seen the documents for that case, and I do not need to.
34. However, the figure was reached upon evidence that forecasts the cost of Sam's care for the rest of his life. There was expert evidence as to diagnosis and prognosis. In other words, the opportunities for spontaneous recovery, as well as evidence on the costs of rehabilitation, namely for assistance in speeding up and improving any recovery that there may be. There will also have been evidence as to how much it would cost for Sam to be supported for the rest of his life. Leading counsel drafted a detailed schedule, and no doubt there would have been a counter-schedule too. Eventually, a settlement was reached and that would have been approved by a High Court judge, whose primary concern would be to ensure that the figure was the right figure, and enough to fund Sam's care in the future. If that money runs out, it will have an adverse impact on Sam's care.
35. Ms Nichol, the property and affairs deputy, caused me some concern with some of the evidence she gave me. Firstly, that the cost of the package was in excess of what it should be. In particular, the case manager is incurring costs of between £30,000 and £40,000 a year, which is higher than estimated. In addition, the overall cost of care was high. This was, in part, due to the need to investigate incidents and safeguarding. It was also higher because of the high turnover in staff. Each new staff member has to be trained, which distracts those training that person from the delivery of care.

Furthermore, there is a high use of agency staff because of the high turnover, and that is more expensive.

36. Secondly, Sam is not progressing as he ought in his rehabilitation. Ms Nichol is an experienced property and affairs deputy and was able to access her experience of other clients in reaching her conclusion that Sam was not doing as well as he should. That is a shame, perhaps even a tragedy, because, from my own experience, Sam is a very spirited man, whose strong character shines through despite his catastrophic injuries and significant communication problems.
37. These two factors are, in my judgment, two sides of the same coin. The increase in cost is due to the same toxicity in the atmosphere, the dysfunctional culture and conflict within Sam's home, as the suboptimal level of care and rehabilitation that he is receiving.
38. Surprisingly, in her evidence yesterday for the very first time, as far as I was aware Ms Nichol told the court that she had commissioned a report by a rehabilitation expert, Reach, because she was so concerned about the suboptimality, as she saw it, as well as the cost, of the package of care Sam was receiving. That report, which should be available shortly, is intended to identify where the delivery of care and rehabilitation for Sam is going wrong and falling short. I assume it may identify the causes of any failures on the ground, although I do not know.
39. However, this overall picture of suboptimal care is consistent with the two emails in the bundle from RX, speech and language therapist, and Dr K, consultant clinical neuropsychiatrist.
40. Ms X, who I met when I visited Sam in April 2023, and who greatly impressed me, said the following in emails she sent.
41. Firstly, "Communication has always been an area to improve. That has not always been used by Helen (or Sam) as what he currently uses is "fit for purpose" but very much relies on others facilitating and providing opportunities to talk." She also refers

to, “The support team are already under stress due to the ongoing issues and difficult working conditions with Helen’s behaviour, especially when under the influence.”

42. Dr K goes further. She refers to Sam and Helen having “a meshed relationship with blurred boundaries.” She refers to Helen’s “pre-existing personality characteristics and history of familial dysfunction pre-injury.” I do not have details of that, so I cannot place any great weight on it, but that is clearly a view she has reached. “Unfortunately,” she says, “the ongoing nature of the disruption to Sam’s care and neuro-rehabilitation has led to the support team suffering from chronic stress and being hyper-vigilant to further influence.” She goes on: “A system of mistrust from all the parties has developed and now makes the environment uncomfortable for all.” She identifies that people take sides. She makes it clear that Sam’s neurorehabilitation has slowed down.

43. Both Ms X and Dr K refer to how important Helen is in Sam’s life, and vice versa, and how carers will have to work with her in the future, whether she is living in the house or not.

44. However, finally, in Dr K’s words, “In order that Sam has the best opportunity to flourish in terms of his rehabilitation, it would be better if Helen lived elsewhere but was facilitated to spend planned and appropriate time, doing specific activities with Sam when she visited.”

DISCUSSION & BALANCING BEST INTERESTS

45. So, that is the evidence I have taken into account. I have heard submissions from the parties, which I have also taken into account, and I was greatly helped by them. They were focused and succinct.

46. Coming to the balancing exercise, I have to make a decision now. For Helen to remain at the house for a six month probationary period is not neutral and with it goes the risk of the continuation of a toxic atmosphere, further inadequacy of rehabilitation, as well as the ever-present risk of care package breakdown. In other words, that would leave not enough staff to look after Sam, leading to him being

moved to residential care as a matter of urgency. I think everybody would accept that that would be a disaster for him.

47. Helen has done something to help herself, but she is at the start of her journey. She is a very unwell and unhappy woman, in a toxic and stressful environment. She has resorted to alcohol and drugs as self-medication. The proposal of the local authority and her is that she returns to that environment whilst she is undergoing therapy. I am extremely doubtful that is an environment conducive to her improving.
48. I am, of course, mindful that WT is now suspended and that may have a positive impact on the culture and environment at Sam's house. Equally, we are now awaiting the outcome of the Reach report. That may be, however, a two-edged sword. If changes are due to be made, that will likely cause disruption, in the early stages at least, and changes in the care plan whilst they are bedded in. Of course, it will hopefully lead to a better environment in the longer term, but probably not in the short term.
49. I am also mindful of Sam's wishes and feelings, as recently recorded by Mr Lloyd in his attendance note of the 14th November. Of course, Sam does not want to evict his mother. Of course, he loves her. But he also wants peace in his house, and he wants to be able to receive proper rehabilitation. In my judgment, these are inconsistent wishes, and I must approach them as such.
50. I have considered Helen's rights under Article 8. I have also taken her own interests into my broad canvas of factors that have fed into this judgment. She suffered an unspeakable tragedy when Sam was injured. She has had to live with that since then. She has lived with him for a number of years. All this has led to her becoming depressed and dependent on substances. I do not think, as a matter of fact, that it is in her interests to live at Sam's home whilst she tackles her problems.
51. Of course, her interests are her business and not mine and I am not going to make any best interests decisions for her, but they are relevant because I am quite sure that if she does not succeed in rehabilitating herself whilst she is living at Sam's property, the situation will become worse and the likelihood of failure will increase. With the

added pressures, with a contract of expectation and the local authority checking up on her attendance at therapy, that only makes the situation even more difficult.

52. Helen's knowledge of her son does, at the same time, prove positive in this case, and we have had examples of where her understanding of her son has led her to assist his carers direct their efforts to what he really wants. However, I am satisfied that historically, for the reasons I have explained earlier, the negative aspects of Helen's involvement greatly outweigh the positives. The primary consideration when determining best interests in this case - the magnetic factor, is the need for Sam to receive optimal care, rather than suboptimal care, as he is presently receiving.
53. Rehabilitation is the way Sam's life can be enhanced. This is not happening at the moment. I am sure presently his care is suboptimal, and his progress is being stunted. I am satisfied that there is a very high likelihood that this will continue over the proposed six month period. There is a risk of abject failure and a care crisis that could lead to Sam being placed in residential care. There is also the continuing draining of the costs coming out of the large but finite fund managed by the property and affairs deputy, as she said yesterday.

CONCLUSION & DECISION

55. Balancing that against all the other factors, including Sam's love for his mother and his contradictory wishes and feelings, Helen's views as to his care, and also the views of those who have provided care to him and the professionals involved in his welfare, I have decided that it is not in Sam's best interests for Helen to live in the same house at the present time.
56. I have considered her Article 8 rights. I am conscious that Helen will lose her home, but that she will receive assistance from the property and affairs deputy if she needs it, in funding herself in a new home.
57. I will stop short, at this stage, unless I am invited to do so, of making an injunction. I believe that once the property and affairs deputy receives the best interests declaration I am making, she will serve Helen with a notice terminating her licence. I take Helen

at her word that she will leave. And that is what should happen. She should be given a reasonable period to leave; in my judgment, that should be 14 days. Thereafter, steps must be taken to ensure that Helen and Sam can have a good relationship together, something along the lines of the restrictions that I have seen so far, but she must not, when entering his house, interfere with the care workers. It is vitally important that there is a maintenance of stability in the provision of care and that he is not caused the upset and distress that he has obviously been suffering and which is clear from the statements he has made to his legal representative.

58. That is the judgment in this case.
