IN THE COURT OF PROTECTION No. COP12405885

NEUTRAL CITATION NUMBER:
[2016] EWCOP 67

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 1 September 2016

Before:

MR JUSTICE BAKER

(In Private)

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005
AND IN THE MATTER OF D (APPOINTMENT OF LITIGATION FRIEND)

B E T W E E N :

B — Applicant

- and -

D (1)
MINISTRY OF DEFENCE (2) — Respondents

MS V. BUTLER-COLE (instructed by Irwin Mitchell) appeared on behalf of the Applicant.

MR A. MAHMOOD (instructed by the Government Legal Department) appeared on behalf of the Respondent.

MS B. DOLAN QC appeared on behalf of the Official Solicitor.

J U D G M E N T

(Transcript prepared from a poor quality recording and without the aid of documentation)

MR JUSTICE BAKER:

1 These proceedings in the Court of Protection concern a young man who I shall refer to as "D", who is twenty-six years old and was a member of the Armed Forces and who, tragically, in 2013, sustained a serious brain injury following an assault by another member of his regiment. As a result, he has been left with a permanent disability, or certainly an indefinite disability, and has, for the last two years or so, been living in a rehabilitation unit run by the Defence Medical Rehabilitation Centre.

2 By orders made in November 2014, HHJ Cushing made an order authorising his residence at that unit and made a declaration that such residence would be lawful notwithstanding that it amounted to a deprivation of liberty.

3 D has undergone a long and arduous process of rehabilitation following treatment in the unit and has made some progress but continues to suffer from significant disability. His mother, who has shown complete dedication to her son, has explored options for future treatment and, in particular, has made enquiries about the possibility of stem cell therapy. That form of treatment is not, as I understand it, at present available in this country, nor elsewhere in Western Europe, but is performed in certain countries, and in particular D's mother has ascertained that it may be available for her son at a unit in Moscow.

4 Accordingly, on 23 July of this year, an application was lodged on D's behalf by his mother, acting as litigation friend, for an order permitting D to travel to Moscow to receive stem cell treatment at the unit.

5 In support of that application, D's mother has filed a statement exhibiting documents, in particular emails from D indicating that he would wish to undergo that treatment and, in addition, documents from the unit giving particulars of the treatment and the medical and scientific basis for it, including references to a number of research articles about this highly complex form of therapy.

6 The application was served on the Ministry of Defence, who had originally been the applicant to this court when the orders were made in 2014. In addition, a further issue has arisen, concerning D's future residence, which has led the Ministry to make a further application to the court. It is unnecessary for the purposes of this short judgment to refer to that application in any detail.

7 The matter was referred, I think, to the President, who directed that it be listed before a High Court Judge, and thus it comes before me today for preliminary directions.

8 The first issue raised before me, and the subject of this short judgment, is the question as to whether D's mother is the appropriate person to act as his litigation friend in these proceedings. She has instructed Irwin Mitchell, who have, in turn, instructed Ms Butler-Cole today, and Ms Butler-Cole submits that D's mother falls squarely within the rules as to an appropriate person to act as a litigation friend in these proceedings. She acknowledges that D's mother has a firm view as to the merits of the proposed treatment, but rightly refers me to authority that the fact that a proposed litigation friend has a view as to the outcome does not disqualify that person from acting as litigation friend.

9 The continued appointment of D's mother as litigation friend is opposed by the Ministry of Defence who contend that, because of her firm views as to the outcome of the application

concerning stem cell treatment, she cannot fairly and competently conduct proceedings on D's behalf.

10 Contact has been made with the Official Solicitor prior to today's hearing to ascertain whether he would be willing to act as litigation friend. I was told that there had been a number of communications between the parties about that proposal. It was not thought necessary to refer me in any detail to those communications. Suffice it to say that Ms Dolan QC, with Mr Beck from the Official Solicitor's office, have appeared before me today to explain that, although the Official Solicitor's position is, of course, that he is the litigation friend of last resort, in the circumstances of this case, if the court thought it appropriate to invite him to act as litigation friend, he would accept that invitation.

11 In the course of her brief submissions, Ms Dolan drew my attention, without producing written documentation, to the fact that a brief trawl of the internet demonstrates that stem cell treatment is a topic of some controversary, certainly in Western Europe, where it is not, at present, available as a clinical procedure. It is available in certain countries, including Russia, but Ms Dolan contends this is a decision which is going to require careful analysis by the court on the basis of expert evidence.

12 As to that, Ms Butler-Cole, on behalf of d's mother, readily accepts that there should be expert evidence and, indeed, Ms Butler-Cole relies on the fact that D's mother fully accepts the need for expert evidence as demonstrating that her client falls within the category of persons who can properly be appointed to act as a litigation friend.

13 The provisions as to a litigation friend are found in Part 17 of the Court of Protection Rules. Rule 140, headed, "Who may act as litigation friend?" reads as follows:

"(1) A person may act as a litigation friend on behalf of a person mentioned in paragraph (2) if that person –

(a) can fairly and competently conduct proceedings on behalf of that person, and

(b) has no interests adverse to those of that person.

"(2) The persons for who a litigation friend may act are –

(a) P,

(b) a child,

(c) a protected party."

14 Ms Butler-Cole submits that there is nothing to indicate that D's mother cannot fairly and competently conduct proceedings on behalf of D. Furthermore, there is no evidence that she has any interest adverse to those of D.

15 In the course of argument, I was referred to the decision of Charles J in *Re UF* [2013] EWHC 4289 (COP). The facts of that case are somewhat different from those of the present case. In particular, it should be noted that that case concerned a dispute between family members as to the right course to be taken in respect of P. It does, however, in my view, provide important guidance, albeit only from the court of first instance, and I note in particular the observation of Charles J at para.21 onwards of the judgment, where he says:

"… it seems to me that Rule 140 must be read and applied in the context of the overriding objective and having regard to the circumstances of each case. The overriding objective is set out in Rule 3 as follows:

‘(1) These Rules have the overriding objective of enabling the court to deal with cases justly and having regard to the principles contained in the Act.

(2) …

(3) Dealing with a case justly includes, so far as is practicable –

(a) ensuring that it is dealt with expeditiously and fairly;

(b) ensuring that P’s interests and position are properly considered;

(c) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

(d) ensuring that the parties are on an equal footing;

(e) saving expense; and

(f) allotting to it an appropriate share of the court’s resources, while taking account of the need to allot resources to other cases.’”

16 As to the application of the principle on the facts of that case, Charles J continues, at para.23:

“I agree that members of a family, even if there is a family dispute concerning P's best interests could, albeit I think rarely, appropriately act as P's litigation friend in proceedings relating to that dispute. However, it seems to me that he or she would need to demonstrate that he or she can, as P's litigation friend, take a balanced and even-handed approach to the relevant issues. That is a difficult task for a member of the family who is emotionally involved in the issues that are disputed within the family and it seems to me an impossible task for AF to carry out in this case. One only has to look at her statements to see that she is clearly wedded to a particular

> answer. You do not see within her statements a balanced approach or anything approaching it, such as: 'This is the problem. These are the relevant factors for and against'. That is not a criticism. Rather it seems to me that it is a product of the result of there being long-standing family disputes and the existing clear divisions of opinion within the sibling group as to what will best promote UF's best interests."

17 Although, as I have said, and is clear from the passage I have just recited, the decision in *Re UF* concerns a case where there was a dispute within the family, it seems to me that the approach and principles identified by Charles J are relevant to this case, and indeed all cases where the court is considering whether a family member can act as a litigation friend.

18 For the present purposes, on the basis of the evidence put before me so far, I have no reason to doubt that D's mother is motivated solely by what she believes to be in the best interests of her son. I accept that she only wants what is best for him and that she would not take any action which she thought would cause him harm or expose him to unnecessary risk.

19 It was suggested by Mr Mahmood on behalf of the Ministry that she may have influenced D to express views that he has expressed, positive views, about the prospect of the stem cell treatment. At the moment, I do not accept any suggestion that she has unduly influenced D to express such views. I acknowledge that she has supported the proposal that an independent expert be instructed to provide an opinion before the court makes its decision. On the other hand, it does seem to me that she is, to use the phrase adopted by Charles J in *Re UF*, "clearly wedded" to the view that this treatment is in D's best interests.

20 My impression is that, although she is not unshakeable in that view, it would take a lot to lead her to change her mind. Now, I do not blame her for holding that position. I can well

understand a parent in that position taking that approach but, having regard to the overriding objective which underpins procedures in the Court of Protection, in particular the need to ensure that a case is dealt with expeditiously and fairly, and that P's interests are properly considered, and that the case is dealt with in a way that is proportionate to the nature, importance and complexity of the issues, it does seem to me that it may be difficult for her to act as a litigation friend with the degree of competence and fairness required in this case, which seems to me to raise unusual, indeed seemingly novel, issues for this court.

21 In all the circumstances, therefore, I have concluded that the right course would be to invite the Official Solicitor to act as litigation friend for D in these proceedings.

22 In reaching this view, I wish to emphasise three final points. First, nothing I have said should be read as implying any criticism of D's mother. To date, everything I have read in all the documents put before the court demonstrate that she is utterly dedicated to her son and to doing whatever she can to help him in the very difficult and sad circumstances in which he now finds himself.

23 Secondly, D's mother will be a party to these proceedings and her voice will be heard at the final hearing when the decision as to his treatment is taken. Her views are an important part of the best interests analysis which this court will carry out.

24 Thirdly, nothing I have said should be read as implying that I have formed any view at all on the ultimate outcome or that I will automatically follow the expert's recommendation. My mind remains open and will remain open until all the evidence has been adduced and considered. It does not follow that the court will necessarily adopt the view of the expert. The court's obligation is to make a best interests decision on the basis of all the evidence, including D's own wishes and feelings and the views of members of his family.

CERTIFICATE

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** This transcript has been approved by the Judge (subject to Judge's approval) **