

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. 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.

Case No: 1292720T

IN THE COURT OF PROTECTION
IN THE MATTER OF S21A OF THE MENTAL CAPACITY ACT 2005
AND IN THE MATTER OF P

P
(by her litigation friend GU)

Applicant

-and-

G
A LOCAL AUTHORITY

First Respondent

Second Respondent

J

Third Respondent

E

Fourth Respondent

JUDGMENT 31ST MAY 2017

Mark Mullins (instructed by Foot Anstey LLP) for the Applicant
Samantha Presland (instructed by Irwin Mitchell) for the First Respondent
Emily Brazenall (instructed by A Local Authority) for the Second Respondent
J in person
Lee Parkhill (instructed by Duncan Lewis Solicitors) for the Fourth Respondent

1. I heard this case for 5 days from the 24th to the 28th April 2017 and adjourned to draft this written judgment, which was sent to the parties and subsequently handed down by me at a further hearing in Bristol on the 31st May 2017. I will, in this judgment, set out the history of the case and its background, then deal with the law and the evidence and finally make findings on the central issues in the case. The case concerns the issues of where the much loved and respected matriarch of the family involved in this case should live and who she should see. The parties are:

The lady herself, who I shall refer to as P throughout this judgment, represented by her paid RPR and litigation friend from a local advocacy service, GU;
G, a son of P;
A local authority from the South West of England;
J, the daughter of P;
E, another son of P.

2. All parties save for J have been represented in this case. I have also heard evidence from S who is P's third child and a number of other members of P's family circle, plus the local authority social worker and 2 expert witnesses. I am grateful to all those witnesses, both lay and professional, and to counsel for the assistance they have given during



course of this very difficult family dispute over P which has caused family members much distress, conflict and heart searching. I do not intend to go through each witness's evidence in detail. Many issues, particularly about the care plan and the transfer, fell away during the 5 days of hearing. I intend therefore to concentrate on the very difficult live issues that I have to deal with.

3. In October 2015, shortly after her 77th birthday, P suffered a severe, life changing stroke. Prior to the stroke P had been the central point of the family. Her history is that she is from the Caribbean where she was, I understand, a school teacher. She had 3 children while living in the Caribbean and then decided that she should come to the United Kingdom to better the family's life and then she had her fourth child. She moved to London in the early 1970s and then relocated to the South West where, over a period of time, she was joined by her children. While in London, P and her husband separated. There is a short chronology that charts the comings and goings of family life at [138/39] in the independent social worker's report. Suffice it to say that it is very clear that P had a very strong family life with the children living with her then visiting her and her visiting them on a regular basis. She also had very strong friendships and was also a committed and active member of her church. Family, friends and her faith were the core of her life. I also have a very clear picture of the love and respect her extended family had for her and the central role she played in all their lives, not just by her being there but by the example she gave of caring for others. It is noticeable for instance that a number of family members are in the caring professions, care workers, teachers, nurses and so on and they all put her influence as one of the reasons for that.
4. By the end of 2003 P was living in rented accommodation in the South West. She was by this time aged 65 and her family was scattered to several areas. S and E lived a short distance away, G lived in the South East but had 2 ex-wives and a number of children who lived in the Midlands and who were on very good terms with P. J had married and had a family. She also lived in the South East. The evidence suggests that P saw a lot of all her family with them visiting her or her visiting them, particularly in the Midlands.
5. From late 2012 P began to suffer ill health, a stroke, cataracts, falls and a number of hospital admissions until her very serious stroke on 9th October 2015. She was in hospital for 5 months as a result of this stroke and further strokes in hospital and she experienced number of life changing medical consequences. She now has right-sided weakness, loss of speech and impaired cognitive functions. There is a lot of evidence about P's condition in the papers, about her posture about the sort of adapted wheelchair she needs, about her skin difficulties, her eating and swallowing problems and so on as it dictates the sort of care package she needs for the future. I am very conscious of the devastating effect of this stroke on P and how this has changed her life. She was first admitted to her local general and later transferred to a community hospital. On 8th March 2016 she was again transferred to the Nursing Home, close to her former home, where she has remained since save for one short admission to hospital in April 2016 with a possible seizure. It was clear that being at the Nursing Home amounted to a deprivation of P's liberty and a standard authorisation was first made on 27th May 2016 which has thereafter been subject to successive extensions.
6. On 15th August 2016 G, supported by J, issued an application for a decision pursuant to section 21A of the Mental Capacity Act 2005 that:
 - a) The "best interests" qualifying criteria is not met;
 - b) The standard authorisation dated 27th May 2016 should be revoked;
 - c) It is in P's best interests to live with her extended family in the Midlands, within the home of her former daughter in law, C.

This is the application which the court has been dealing with since then. There have been various directions hearings, experts have been instructed to assist the court on various issues and, as is inevitable, there has been some delay in the case. This has not assisted anyone, least of all P, and in particular it was anticipated that the court would be able to consider the issue of an interim residence order for the proposed care plan at C's home to be tested out. Issues of further expert evidence being obtained made it impossible to hear that application.

7. It is accepted by all parties that P does not have the capacity to decide for herself what is in her best interest and therefore the court has to do so. I am indebted to all the parties for their careful analysis of how the court should approach this task and in particular to counsel who represents P for the contents of the first 8 pages of his closing submissions. Section 4 of the MCA 2005 sets out some guidance. I must consider all the relevant circumstances. Here P is not going to regain capacity, she has been given the opportunity to participate in the process but because of the devastating consequences of her strokes she cannot (see for example the accounts of the visits of the nursing expert, the independent social worker and her litigation friend). Then at (6) I have to consider, so far as is reasonably ascertainable:-
- a) The person's past and present wishes and feelings and in particular any relevant written statement made when P had capacity;
 - b) The beliefs and values that would be likely to influence her decision if she had capacity;
 - c) The beliefs and values that would be likely to influence P's decision if P capacity; and
 - d) The other factors that P would be likely to consider if P was able to do so.

I am also required to consult the views of those who are engaged in caring for P and are interested in the welfare of P and all the relevant circumstances that I am aware of and that it would be reasonable for me to have regard to. Lady Hale says at paragraph 45 of *Aintree University Hospital NHS Trust v James* [2013] UKSC 67:

"The purpose of the best interest test is to consider matters from the patient's point of view, that is not to say that his wishes must prevail any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient's wishes are. Even if it is possible to determine what his views were in the past they might well have changed in the light of the stresses and strains of his current predicament... but insofar as it is possible to ascertain the patient's wishes and feelings and his beliefs and values all the things which were important to him it is those which should be taken into account because they are components in making the choice which is right for him as an individual human being."

This is an approach which I will do my best to adopt in the difficult circumstances of this case. In other words I will try to put myself in the place of P here and ask myself the question what would be her attitude to where she should live and who should care for her and who she should be able to see. This is of course not determinative of the application of itself, it is not what would P have done, it is a best interest test that requires the decision maker to perform a weighing or balancing exercise between a range of divergent and compelling factors.

8. Some issues were raised during the lead up to trial and at the trial itself which might have been so compelling that they would have been decisive in and of themselves. The first of these is transporting P from the South West to the Midlands. P's GP seemed at one stage to be suggesting that a journey by ambulance to the Midlands, which would of

course be necessary if there was a transfer of P to C's house, might possibly kill P. However when P's GP was asked to clarify this it was made clear that there was a risk of a further stroke at any time and this was what the doctor was referring to previously. Ms Gough, the nursing expert, put this in proportion by reminding us that ambulances transfer very sick elderly people all over the country regularly. I find that if it is in P's best interests to go to C's home, the transportation issue, properly planned and facilitated, is not a matter which would stand in the way.

9. A more problematic area is raised by the care plan. C and the rest of the family have put together a care plan to look after P which involves a number of family carers plus one of P's oldest friends, with whom she has shared her accommodation in the past. All the carers have expressed their clear intention and commitment to the plan. C has had her house altered to provide the adapted living area P needs. All the prospective carers were, in my assessment of them, completely clear about their intentions and motivations and my assessment is that they also have the capacity to do it. They also said that they would do training in any areas that specialist skills were necessary. In addition to this there would be the use of professional carers at times. If local authority funding was not available or there was a shortfall they would meet it (in fact my understanding that is not likely to be the case). Mr McKinstrie, the independent social work expert, did say that he would be happier if all the care was funded as it was in his view more reliable. I found that a very unusual position to express given the use the care system makes of family carers. Mr McKinstrie also made it clear that with some fine tuning he thought the care plan would work, as did Ms Gough, the nursing expert. I think what Mr McKinstrie was really concerned about when preferring paid professionals was the sustainability of the plan long term, because it relies on the goodwill of volunteers. This is something that concerned the LA P's local authority social worker and at first sight it concerned me too. However, as I heard from the family in the Midlands, I became more and more convinced that this concern was not well grounded. They were an impressive group of people. First of all there were the two ex-wives of G. Consider that bold statement for a moment, C is giving over her house and much of her time to look after her ex-mother-in-law and CB, the second of G's ex-wives is volunteering to make a considerable commitment to do the same. They and a number of other carers and several of P's grandchildren are from the caring professions. I is doing it to help her friend who helped her in the past. They are all making this commitment, first on the basis of who P is and what she means to them and second, that inter-generational care is what Afro Caribbean families do, it is a cultural norm. This was not challenged by any other party in the case and certainly falls in with my experience as a judge at the other end of one's care needs in child care cases. So it seems to me that first the care plan, with some tightening and tweaking, is a viable plan and second that, for cultural and personal reasons, I can rely on the Midlands based family's commitment.
10. It seems to me that at the heart of this case is the issue of what P would have wanted if she was able to communicate with us given the circumstances now. Central to that is the current fractured relationship between her children in this case. E and S, with E very much in the vanguard are totally against the move to the Midlands which E in particular found a preposterous proposal. They point to the current care arrangements as meeting P's needs; she is safe, well looked after in terms of her health and other needs. She sees both of them, I find on the evidence, at least once every two days, probably more and she also has contact with her church group who come in to sing to her and have services with her on a regular basis. The rest of the family can visit when they like (now there has to be a system where certain family members do not come into contact with each other), and the brothers point to the patchy record of visits recently. Finally they both made it clear to me that they would not, indeed could not, go to the Midlands to visit their mother. This last point was expressed by E in anger at J and G and he was also very derogatory about C in particular; the way she kept her house, her untidiness and

lack of organisation and so on. S was different, he was I suspect very dependent on his mother when she was well and that dependency has since transferred to E. In addition I think he genuinely views travel to the Midlands, either by car or train, as impossible. He became very upset during his evidence, crying out to his sister how much he loved her and becoming very distressed.

11. Is there any evidence about what P wants to happen to her now? P's litigation friend has tried to ascertain P's views but despite his best efforts he has not been able to obtain her present wishes and feelings. It was however very clear on the evidence that she would, prior to her stroke, have wanted, should anything happen to her, to be looked after by her family and not in a care home. This can be deduced from her cultural norms, from her reaction to her elder sister going into a care home and so on and even from the reaction of all the children, including E, at the time when she was coming out of hospital. They only agreed a care home after being told that there was a constant need for qualified nursing care 24/7 (which has actually proved not to be the case). I also accept that there had been talk of a move to the Midlands but not in the context of post stroke care but rather of moving in with her friend or getting a place of her own. She had never considered what would happen to S if she did move. It is quite right to say that supporting S has been a consistent life choice for her and this has been an integral part of her lifetime commitment to her family. It is very important to bear in mind that this core belief in family would have been a strong influence when P had capacity.
12. Counsel for G in her closing submissions produces a balance sheet of bullet points for the Midlands and the South West and I propose to do the same at this stage in this judgment:

South West:

- An arrangement that has worked for over a year
- Good medical and physical care, although some criticisms of the care regime have been made
- Good contact with E and S
- Some contact with extended family
- Contact with church group but no friends in the home and when not being visited spends time alone and eats alone

The Midlands:

- It is the least restrictive option
- Care by family is consistent with both P's culture and her views pre-stroke about institutional care
- Companionship through the day
- Carers motivated by their love and respect for her i.e. individual focused motives not just a job
- Care would be more "like home" e.g. Caribbean food and Creole language sometimes
- Assured contact with G and J when they visit
- Willingness to facilitate contact with S if E will not and willingness for E to visit (I accept the family's evidence about this)

13. At paragraphs 21 and 22 of his closing submissions on behalf of P Mr Mullins says this:

"21. Setting to one side the question of contact between P and her family the litigation friend's conclusion would be that the best interest balance would come down

decisively in favour of C's home in the Midlands (provided the outstanding issues are dealt with satisfactorily)

22. There are many factors to consider, not all pointing one way, but to the litigation friend the key factor would be the concrete advantages a regime of individualised and personal care for P in a home rather than in an institutional environment would bring, which the litigation friend considers overall confer practical benefits to P, as well as being in accordance with her general preferences".

This is a conclusion I agree with. The recent authorities speak of bringing P into the court room, of the judge forming an impression of P and then standing in her shoes and making the best interests decision from that point. Everything that I have learned about P guides me to accept the analysis I have just quoted. She was a woman who was central to the family, the rock around which they built their lives and I find that she would then have expected the family to look after her when the time came by reason of age and infirmity to rest. How is my analysis of her best interests affected by the issue of contact with E and S, her sons in the South West?

14. The closing submissions on behalf of P continue:

"23. It is necessary to make an assessment of what will be likely to happen if a. P remains in the South West or b. she moves to the Midlands.

24. If P remains in the South West there will be no disruption or break in her frequent visiting contact with E and S which is a pattern which has now been established for some time. Other members of the family are not prevented from visiting (though there are practical difficulties, especially for G). The current arrangements for contact can be revised locally between the nursing home, the local authority and the family.

25. If P moves to the Midlands she will benefit from an increased amount and a different nature of contact with C, her friend I and others including some of her grandchildren as part of C's household. This is an advantage to her. She will also see more of G and J in a homely environment.

26. However there would be a cost. An assessment has to be made as to the likelihood of E and S maintaining contact in these circumstances. The view of the litigation friend is that they would not maintain contact. It is uncomfortable and troubling to consider this prospect but the Court must proceed on the basis of things as they are and will be, not as it wished they were.

...

28. For the litigation friend two key questions arise. The first is what the risks of an abrupt end to contact with E and S will be for P. The litigation friend is unable to exclude a real possibility that P will feel abandoned and deeply distressed. The change will be associated with the move to the Midlands. The reassurance that P might be given by them being involved in and supportive of a move will not be there. Neither will E and S visit to provide this reassurance, compounding the potential problem. A serious potential risk to P's wellbeing and acceptance of the move can be identified but there appears to be no way in which it can be avoided or addressed. The litigation friend considers this is a factor of great significance which may indicate a move is not in P's best interests.

29. If the above reaction is not suffered by P a second question still arises, which is to how to weigh the options giving due weight to P's wishes, feelings and values, given the reality of contact as it is likely to be."

15. First, I must be realistic, I find that it will be very difficult for E to take up contact in the Midlands given the strength of his views. He would have to resile from very strong opinions formed for reasons I cannot even speculate about. I think S is different, if contact was facilitated for him all other things being equal I find he would go, but given the influence E has on his life I do not think it is likely to happen. If contact ceased the litigation friend is concerned that there would be the risk that P would feel abandoned and deeply distressed and that this would be associated with the move. I agree with him, it is difficult to know how this would be addressed in the sense that it would be difficult to explain to P why the two people she is most used to seeing are no longer there and there is the difficulty that this coincides with the move to the Midlands. The concern about loss of contact is also a driver for the LA's position. Their case about a move not being in P's best interests revolved originally around the journey, the sustainability of the care package and the relationship with E and S. But as the evidence emerged, the LA now puts the loss of the relationship as its primary argument.
16. The argument is also put by P's litigation friend that it is necessary for me to consider how the likely loss of the 2 most prominent relationships within the family that P has had, (simply because of all 3 living in the South West), would affect her wishes, feelings and values. How would she have reacted if the move to the Midlands meant losing contact with 2 of her children altogether, which it does given the stated intentions of E and S? The litigation friend, for his part, finds it difficult to offer an opinion but "tends towards respecting the relationship and value that P placed throughout her life on supporting S, although accepting that post stroke things in that relationship and all others are for P forever changed". This is a powerful point which I must consider now.
17. I remind myself that this is a best interests test, not a substituted judgment test, but I have to accept that I have to look at all the factors that P would have considered if able to do so. The situation would be that she was confronted with the Midlands obviously being the best thing for her for all those reasons identified in the balance sheet exercise, further she would have her two sons, one saying you will lose your relationship with me because I will not go to visit you if you move such is my current (and on his case recently acquired) antipathy to my siblings, for reasons which I as the judge do not understand. The other son is saying I cannot go to the Midlands because I will not be able to do it, not even if my sister and brother G make travel arrangements for me. What would be the effect on her of that position in her current condition, no longer the strong, loving matriarch but the frail and vulnerable person she now is.
18. I find that given everything I know about her by this stage in the case she would have:
 - a) Expected her family to look after her and not spend the rest of her life in a care home;
 - b) Expected her family to put together a plan to make her life as good as possible, even if this involved some sacrifice of personal comfort, just as she sacrificed separating herself from home and family to make a better life for the family in the UK in the early 70s.

The refusal by her two children in the South West would be bound to affect the relationship with them, post stroke the priorities are different, it is her best interests that matter most. It is perfectly possible for them both to continue a close and loving relationship with their mother. It is argued that moving their mother would be a breach of their right to family life because they would not see her. I do not agree. Their refusal to take up contact is the thing which causes contact to break down not anything the court does. If moving P is in her best interests any breach of their right to a family life is proportionate and the remedy for it is in E and S own hands.

19. I find in the new post stroke circumstances that E and S' refusal to go would not have stopped her going nor does it stop the court supporting the move. There would be a strong personal and cultural belief that having looked after her family for 50 plus years it was now the time for them to look after her. Family obligations in this family are a two way street, and particularly since S is now being assisted by E. I find that would be reflected in what P would want for herself. If it comes to a choice of being looked after in the way that is in her best interests, the way she expected to be looked after or staying in the home I am convinced her choice would be to be looked after by her family.
20. I come to the conclusion that it is in P's best interests to be moved to live at her ex-daughter in-law's property with some conditions. First the care plan needs to be further refined to cover the areas where it is deficient. Second, a transfer plan needs to be agreed which involves the Midlands based carers spending time with P in the South West and then a familiar face accompanying her in the ambulance. Third, and this was a source of real concern for the LA, a plan must be agreed to cope with an adverse or negative reaction by P to the process of leaving the Nursing Home. If it proves impossible to facilitate a move then the case will have to come back before me and I will have to reconsider the position. Finally a proposal for contact by E and S should be made to include transport by car door to door and return for an initial period of 2 weekly visits. I am told the Midlands relatives will do anything to facilitate the move and make P happy so I am asking them as a group to do this. If E and S refuse to take this up it is a matter for them.

Post Script 31/05/17 – E's Application for Additional Reasons and Permission to Appeal

1. I have read the document filed by E's representatives and considered the issues. I am not going to add to my reasons but will say that it seems to me that the issues in this case can be boiled down to two strong points; the benefits of P moving to live with family in the Midlands and the detrimental aspects of the same, including the potential loss of relationships with family in the South West.
2. I came to the conclusion, after hearing all the evidence, that the potential loss of contact with E and S is a complex issue and that there is at least some chance that it would not happen in the event P moves to the Midlands. I also took the view that, even if it meant a cessation in P's relationship with E and S, the benefits of a move to the Midlands outweighed the detriment. I feel well positioned to make this appraisal having heard all of the evidence.
3. My view is that E is seeking to re-litigate something that is in the province of fact. I do not think that there is any prospect of success in an appeal and accordingly decline permission to appeal. However, it is a matter for E's representatives as to whether the issue is put before another court. I will grant a stay of this order until E has made an application for permission and this application has been determined. This does not stop contingency plans for a move to the Midlands being made in the meantime.

His Honour Judge Nicholas R. Marston
Dated: 31st May 2017