Neutral Citation Number: [2023] EWCOP 11

Case No: COP14007906

COURT OF PROTECTION
AT THE ROYAL COURT OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/04/2023

Before:

VIKRAM SACHDEVA KC (sitting as a Deputy High Court Judge)

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Between :

WEST HERTFORDSHIRE HOSPITALS NHS TRUST	**Claimant**
- and -	
AX	**Respondent**
(By her litigation friend, the Official Solicitor)	

- -
- -

Eloise Power (instructed by **Kennedys**) for the Claimant
Sophia Roper KC (instructed by **the Official Solicitor**) for the Respondent

Hearing dates: 21 and 28 October 2022
Written submissions: 8, 14, and 16 November 2022
Further written submissions: 10 and 13 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5th April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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VIKRAM SACHDEVA KC
(Sitting as a Deputy High Court Judge and nominated Judge of the Court of protection)

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.

VIKRAM SACHDEVA KC

Introduction

1. The Trust's application in this case seeking a declaration of incapacity and an order permitting a Caesarean Section was made out of hours on Friday 21 October 2022. After hearing evidence from Consultants in Obstetrics & Gynaecology ("Ms. A") and Psychiatry ("Dr. B") Morgan J adjourned the application to the following week when it became clear that the reason for the application being made urgently was the fact that AX had reached term rather than any particular risk in her case, and proper cross-examination of the psychiatric evidence was not possible because the relevant psychiatric notes were not in the court bundle.

2. On 28 October 2022 the application returned to court before me. By that time the Trust had reassessed capacity to consent to and found that AX now possessed capacity. Accordingly, the Trust made an application to withdraw the application, with the consent of the Official Solicitor. That application was approved by the court.

3. This is the Official Solicitor's application for a costs order against the Trust. The Official Solicitor has obtained agreement from the Trust that 50% of her costs be paid; this application seeks the other 50% of her costs, or some intermediate percentage. The Order of Morgan J dated 21 October 2022 contained a provision, agreed between the parties, that there be no order for costs. Accordingly it is accepted by the Official Solicitor that her application for costs can only seek costs incurred after that date.

Factual Background

4. AX was born on 14 June 1991 and was aged 31 when she arrived in the United Kingdom on 12 August 2022 after a decision to travel to see a family in Italy for whom she had worked as an au pair. At that point she was 27 weeks pregnant. Since arriving in London she had been experiencing symptoms consistent with a manic episode, including a thought disorder, flight of ideas, and tangential thinking. She had spent $15,000 since arriving and had run out of money. She had tried five times to get on planes to return home, and had reached the departure lounge on several occasions, but had then felt overwhelmed and could not go through with it. She had been staying with people she had met in pubs and had had her bag and phone stolen from her.

5. She presented to Accident and Emergency with abdominal pain on 12 September 2022 and was referred to the Mental Health Liaison Team due to what was considered "erratic behaviour"; she was described as "labile and tearful". The Estimated Date of Delivery ("EDD") (40 weeks from the first day of the last menstrual period) was identified as 15 November 2022.

6. On 15 September 2022 she was detained under s2 Mental Health Act 1983 ("MHA").

7. On 22 September 2022 she was transferred to a Mother & Baby unit, for which the Applicant Trust is responsible. AX was recorded as being "[c]urrently in crisis, hypermanic."

8. On 29 September 2022 Drs A and B had a discussion with AX regarding the options available for the forthcoming birth. AX was keen to have a Caesarean section.

9. On 3 October 2022 AX became agitated at a meeting with Dr B after she was told that she would not necessarily be able to leave hospital on the expiry of her detention under s2 MHA.

10. On 4 October 2022 a professionals' meeting to discuss the plan of care took place. It was recorded that the baby was then in the breech position, and the question was asked whether AX could give consent to Caesarean section. The plan was to complete the birth plan for circulation to professionals and to seek legal advice regarding restraint.

11. The same day a referral for an Independent Mental Capacity Advocate ("IMCA") was made.

12. On 5 October 2022 AX became angry and agitated during a meeting with Dr B and her parents, such that it was not possible to have a discussion about her treatment and future plans for the baby.

13. On 10 October 2022 the appointed Independent Mental Capacity Advocate specifically asked for an issue- and time-specific capacity assessment, observing that a capacity assessment in relation to her birth plan was needed.

14. On 12 October 2022 AX was detained under s3 MHA.

15. On 13 October 2022 AX attended another meeting with Dr B and her parents, at which she was agitated and stated that she did not want her parents involved.

16. On 14 October 2022 Dr A saw her and recorded that she preferred vaginal delivery, and in particular pool delivery. Dr A explained that pool delivery was for low risk labour, and that she was high risk as they did not know what her mental state would be like in labour. AX also thought she was at 33 weeks and could fly until 36 weeks, but it was explained to her that it was not safe for her to fly.

17. On 16 October 2022 it was recorded that AX had contacted solicitors seeking to appeal against her detention. Her solicitor visited her on 18 October 2022.

18. That day a multi disciplinary legal meeting took place at which one issue discussed was the fact that AX's capacity to make decisions about labour, birth and for the newborn was "fluid" and changed quickly. There was disagreement at the meeting whether she had such capacity. Dr A considered that AX had capacity during the (brief) consultations she had had with her. A consultant anaesthetist (Dr C) had a discussion with AX on 14 October about pain relief and she considered that AX did not then have capacity.

19. On 20 October 2022 in a meeting with Dr B AX stated that she did not want her mother to be present for the birth, but later backtracked, stating that her mother was there for that purpose. She reiterated that her main preference was to return home for the birth and was not happy with mental health professionals making decisions on her behalf.

20. At a professionals' meeting the same day the discussion centred around AX's capacity remaining fluctuant and her currently lacking capacity "towards her mental health". It was also stated that they were "currently unable to comment on her capacity towards natal care". It was also noted that the most recent scans showed cephalic presentation and that there was no medical reason to warrant Caesarean Section. The following was then recorded:

> "We discussed that **her capacity towards consenting to any medical procedure or medical interventions will need to occur on the day of presentation, given that capacity is time and subject specific** and matters will be conducted for her own best interest if needed…" (emphasis added)

21. As regards her capacity, Dr C reported that AX had been "improving over the past few weeks" and that her capacity "remains fluctuant". When it came to capacity to make decisions about the birth Dr C said "she doesn't have capacity towards mental health, but a capacity towards her physical health and to be able to consent to prolong labor and pain medication that needs to have been closer to the time because we can't determine that right now when she is doing well."

22. On 21 October 2022 the instant application was made which incorporated the following:

    i) A statement from Dr A which stated the plan was for vaginal delivery but expressed no view on capacity.

    ii) A statement from Dr B which stated that AX lacked capacity the previous day:

> "[AX] shows some understanding of the information that she has been provided about her options and is able to recall this. However she is severely impaired in her ability to process the information as a result of mania resulting in an impaired ability to weigh up the pros and cons of each option. In addition [AX] finds herself easily overwhelmed when presented with information and options and this leads to irritability. At the time of my meeting [20 October 2023], I did not think that she had capacity to make decisions about her obstetric care".

    Dr. B went on to opine that AX was unlikely to regain capacity to consent to treatment.

    iii) A Birth Plan for vaginal delivery with the possibility of emergency Caesarean Section that incorporated restraint as follows:

> "Restraint
>
> We would prefer to avoid any form of restraint during delivery, however some restraint may be needed to keep [AX] safe on the theatre table whilst being sedated/anaesthetised…
>
> In the event of a vaginal delivery the use of straps for her feet may be needed if stitches are required. If instrumental delivery is needed we may also need to hold [AX] in a lithotomy position to keep her in a safe position (so her legs do not fall off the bed/theatre table) to prevent injury to her…"

23. The Skeleton Argument (which was drafted by counsel other than Ms. Power) justified the application on the basis that AX currently lacked capacity to consent to the proposed birth plan, and that the implementation of the proposed plan was very likely to require a degree of restraint which would amount to a deprivation of AX's liberty requiring the court's authority. As to the timing of the application it was asserted that "[t]he

application has been made as soon as it became apparent that spontaneous labour could begin."

24. An urgent hearing was sought, which took place before Morgan J out of hours. The timing of the hearing was justified on the basis that AX had reached 37 weeks that day and this meant that she could go into labour "at any minute", including over the weekend. Dr A had given firm advice that the application had to be made that day. When the judge asked when the Applicant's solicitors were aware that AX lacked capacity, the answer given by Counsel (again, not Ms. Power) was that the assessment was done on 20 or 21 October 2023.

25. The judge appeared initially to be satisfied with the written evidence, and (for her part) did not require the clinicians to give oral evidence.

26. Leading Counsel for the Official Solicitor, Ms. Katie Gollop KC, sought an adjournment of the hearing, on the basis that no assessment of litigation capacity had been made, and that it was not apparent why an urgent out of hours hearing was required, given that the baby had changed from a breech presentation to cephalic, and that there had been no opportunity to finish reading the papers, let alone for the Official Solicitor to speak to her client or speak to any family members. Leading Counsel also queried the assertion that the first time capacity had been considered was 20 October 2022, given that AX had first met Drs A and B on 29 September 2022.

27. The judge ruled that, if the Applicant wished to pursue the application that day, oral evidence from the Consultants was required.

28. Dr. A stated as follows:

    i) That 37 weeks was term, that pre-term the chance of spontaneous labour is 12%, but that from term it rises to 50%, so that from that point on any mother can go into labour. There is a 27% chance of emergency Caesarean Section.

    ii) As to when it was first thought that AX may lack capacity she said that both she and Dr B felt that AX lacked capacity on 29 September 2022.

    iii) On 14 October 2022 AX was retaining some information but could not weigh risks and benefits.

    iv) On 20 October 2022 Dr B held the same view.

    v) It was always known that on 21 October 2022 she would be 37 weeks pregnant and at term.

29. Dr B stated as follows:

    i) She first considered AX to lack capacity regarding the delivery of a baby when she saw her on 26 September 2022.

    ii) The timing of the application has been led by the Applicant rather than her Trust and she could not comment on why the application had not been made sooner.

iii) Discussions about court took place at the last professionals' meeting, and she was advised that mental health was covered by s3 MHA, and that it may be that the Court of Protection will need to be considered.

30. Neither doctor had made an assessment of litigation capacity.

31. At that point it became clear that, although Dr B had had access to the recent psychiatric records from her (mental health) Trust, they were not contained in the court bundle.

32. The Official Solicitor made an application to adjourn pending disclosure of the recent psychiatric records, which was accepted by Morgan J.

33. The case was subsequently listed for hearing on 28 October 2022, and no order for costs was made for the 21 October 2022 hearing.

34. In the meantime, on 27 October 2022 a further capacity assessment was performed by Dr B, with the conclusion that AX had regained capacity. The further report stated that she had increased AX's olanzapine from 15mg to 20mg, and it would take 3 – 5 days to take effect. By 27 October 2022 Dr B considered that AX had made a vast improvement, even as compared to 22 October 2022 when she had conducted a litigation capacity assessment of AX. Dr B considered that AX had both litigation capacity and capacity to consent to make decisions about her care and treatment. She considered that the change is due to the increase in Olanzapine to its maximum dose of 20mg. She opined that it would be very difficult to predict if AX would lose capacity during labour, but that she would be kept under review, and that psychosis during labour was not a substantial risk.

35. Dr. D, a further Consultant Obstetrician, filed a statement recording her meeting with AX on 27 October 2022 during which she went through the birth plan. In her view AX had capacity to consent today "as she is able to recollect information from her previous and today[']s discussion, ask appropriate questions and was able to articulate her decision for Elective Caesarean Section and her reasoning behind it…"

36. Accordingly at the hearing on 28 October 2022 the Applicant sought to withdraw proceedings, subject to the Official Solicitor's application for costs. The Official Solicitor consented to such a course.

37. I acceded to that application. The questions that remains is whether a costs order is appropriate.

The parties' submissions

38. In summary, the Official Solicitor initially submitted:

i) If an application was required, it could and should have been made sooner than on 21 October 2022, in line with the guidance in *NHS Trust v FG* [2014] EWCOP 30 (hereafter *"Re FG"*) allowing for a hearing in normal court hours; the Trust was well aware of all the relevant background, as AX had been a detained patient at its Unit for approximately four weeks.

ii) There was no urgency which justified an Out of Hours application: the fact that AX had reached 37 weeks' gestation, without more is not a sufficient reason to seek an urgent Out of Hours hearing.

iii) The evidence filed for the Out of Hours application was incomplete, and deficient: there was no assessment of capacity to litigate, no proper assessment of capacity to make decisions about labour and delivery, and no records after 22 September (including its own psychiatric records).

iv) The oral evidence did not make up for the deficiencies in the written evidence filed. One clinical witness contradicted what was said in the record to be her opinion. The other suggested multiple assessments of capacity to make decisions about labour and delivery had been carried out, when they had not.

v) These deficiencies were compounded by the Trust's failure:

a) to ensure AX had been provided with a copy of her birth plan at all prior to the Official Solicitor's request on 27 October 2022, the day before the adjourned hearing; and

b) to ensure that AX had the chance to discuss that plan with clinical staff, with a (re-)assessment[1] of her capacity to make decisions about her delivery if appropriate before 27 October 2022.

vi) While the primary focus of these submissions is the Out of Hours application, the Official Solicitor submits that the Trust's conduct thereafter further aggravated the difficulties faced by the Official Solicitor and AX by its chaotic preparation for the case in the run up to the adjourned hearing, and in particular the events of 27 October.

39. The Official Solicitor went on to state as follows:

i) She is well aware that in many cases, medical treatment decisions have to be made urgently, on incomplete evidence, and that this is entirely justified by the urgent circumstances which require an application to protect P's best interests. The Out of Hours system exists for that purpose. However, as Trusts have been repeatedly reminded, an application Out of Hours carries considerable disadvantages for all concerned, and should only be made where justified.

ii) The Official Solicitor's ability to ensure AX's effective participation in the proceedings was severely prejudiced by the Out of Hours application: there was no time to consider the application properly, nor contact AX or any member of her family. The conduct of the proceedings the following week created further unnecessary difficulties.

iii) An award of costs is the only way for the court to express disapproval of a party's conduct of an application such as this, in which no orders were ultimately sought. The Official Solicitor submits that the circumstances on 21 October 2022 clearly did not justify an urgent application; and that a costs application is,

[1] It is not even clear that there was any such assessment before the hearing on 21 October 2022.

unusually, therefore necessary and proportionate to protect the integrity of the Out of Hours system.

40. The Trust submits as follows:

i) The guidance in *FG* was not followed prior to the out of hours hearing on 21 October 2022.

ii) It intends to take steps to address this within the Trust, including a need for training in relation to the *FG* principles.

iii) There was insufficient justification for seeking an out of hours hearing on 21 October 2022.

iv) The decision was based upon clinical advice seeking to promote AX's best interests, provided in good faith, that the matter could not wait until normal court hours on 24 October 2022.

v) The Trust took "more considered advice" in the following days of its own motion and before receiving the Official Solicitor's Position Statement, recognising that Dr B's capacity assessment dated 22 October 2022 was insufficiently detailed and indeed did not address the most important points, and requested another assessment.

vi) It would have been helpful for Dr B to have reassessed AX before 27 October 2022, but this was outside the Trust's control, her not being a Trust employee.

vii) On 27 October 2022 the Trust and those assisting them were doing their very best to manage a rapidly-evolving situation, and they ultimately arrived at the correct conclusion.

viii) The cases on costs do not generally give guidance.

ix) The factual matrix is considerably more extreme than in the instant case where costs orders have (rarely) been made, and there is no justification from the general rule.

41. Subsequently, I sought further submissions from the parties, in view of the fact that the parties had omitted to address the fact that they had agreed that there be no order for costs on 21 October 2022.

42. The Applicant conceded that she could no longer claim costs arising out of the hearing of 21 October 2022.

The Law: Costs in Welfare Cases

43. The costs rules are as follows.

44. *Section 55 Mental Capacity Act 2005* sets out a wide discretion in relation to costs:

> "*55 Costs*
> (1) Subject to Court of Protection Rules, **the costs of and incidental to all proceedings in the court are in its discretion**.
> …
> (3) **The court has full power to determine by whom and to what extent the costs are to be paid**." (emphasis added)

45. The latest Court of Protection Rules (which came into force on 1 December 2017) state as follows:

> *"19.3. Personal welfare - the general rule*
> Where the proceedings concern P's personal welfare **the general rule is that there will be no order as to the costs of the proceedings**, or of that part of the proceedings that concerns P's personal welfare.
> …
> *19.5.— Departing from the general rule*
> (1) **The court may depart from rules 19.2 to 19.4 if the circumstances so justify**, and **in deciding whether departure is justified the court will have regard to all the circumstances including**—
> (a) **the conduct of the parties**;
> (b) **whether a party has succeeded on part of that party's case, even if not wholly successful**; and
> (c) **the role of any public body involved in the proceedings**.
> (2) The conduct of the parties includes—
> (a) conduct before, as well as during, the proceedings;
> (b) whether it was reasonable for a party to raise, pursue or contest a particular matter;
> (c) **the manner in which a party has made** or responded to **an application** or a particular issue;
> (d) whether a party who has succeeded in that party's application or response to an application, in whole or in part, exaggerated any matter contained in the application or response; and
> (e) **any failure by a party to comply with a rule, practice direction or court order**. …" (emphasis added)

46. The power to award costs is discretionary, to be exercised on the facts of the individual case.

47. The case law does provide some indications as to how the discretion is likely to be exercised, while leaving the decision in each case to the judge.

48. There is a reason why the exercise of the discretion to award costs in welfare cases in the Court of Protection are different from those contained in the Civil Procedure Rules. As Baker J, as he then was, said in *Cheshire West and Cheshire Council v P* [2011] EWCOP 1330 (Fam) [2011] COPLR 273 at [52]:

> "The processes of the Court of Protection are essentially inquisitorial rather than adversarial. In other words, the ambit of the litigation is determined, not by the parties, but by the court, because the function of the court is not to determine in a disinterested way a dispute brought to it by the parties, but rather, to engage in a

process of assessing whether an adult is lacking in capacity, and if so, making decisions about his welfare that are in his best interests."

49. In *G v E (Costs)* [2010] EWHC 3385 (Fam) Baker J stated at [40]:

> "Of ourse it is right that the Court should follow the general rule where appropriate. **Parties should be free to bring personal welfare issues to the Court of Protection without fear of a costs sanction. Local authorities and others who carry out their work professionally have no reason to fear that a costs order will be made**. The submission that local authorities will be discouraged from making applications to the Court of Protection if a costs order is made in this case is a thoroughly bad argument. The opposite is, in fact, the truth**. It is only local authorities who break the law, or who are guilty of misconduct that falls within the meaning of rule 159, that have reason to fear a costs order**. Local authorities who do their job properly and abide by the law have nothing to fear. In particular, **the Court of Protection recognises that professional work in this very difficult field often involves very difficult judgments and decisions. The Court is not going to impose a costs burden on a local authority simply because hindsight demonstrates that it got those judgments wrong**." (emphasis added)

50. This observation was approved by the Court of Appeal in that case: *Manchester City Council v G and others* [2011] EWCA Civ 939 [2011] CP Rep 45 at [17].

51. Baker J continued at [41]:

> "In this case, however, I am entirely satisfied that **the local authority's blatant disregard of the processes of the MCA and their obligation to respect E's rights under the ECHR amount to misconduct** which justifies departing from the general rule."

52. The Court of Appeal dismissed the appeal against the costs order.

53. In *Hillingdon LBC v Neary* [2011] EWHC 3522 (COP) at [7] Peter Jackson J (as he then was) commented on these cases:

> "**These decisions do not purport to give guidance over and above the words of the Rules themselves** – had such guidance been needed the Court of Appeal would no doubt have given it in *Manchester City Council v G*. Where there is a general rule from which one can depart where the circumstances justify, it adds nothing definitional to describe a case as exceptional or atypical. Instead, the decisions represent useful examples of the manner in which the court has exercised its powers." (emphasis added)

54. Bad faith or flagrant misconduct are not conditions precedent to justify a departure from the normal principle: *Re AH (Costs): AH v Hertfordshire Partnership NHS Foundation Trust* [2011] EWHC 3524 (COP) [2012] COPLR 327. In that case substandard practice and a failure by the public bodies to recognise the weakness of their own cases and the strength of the cases against them justified a partial departure from the normal rule. Peter Jackson J summarised the proper approach as follows at [12]:

> "I understand the respondents' wish to contrast the more egregious events in cases such as *G v E* with the facts of the present cases, but I do not find this approach to be of assistance in reaching a conclusion. Each application for costs must be considered on its own merit or lack of merit with the clear appreciation that **there must be a good reason before the court will contemplate departure from the general rule**." (emphasis added)

55. This approach was followed by the President in *Re G (Adult) (Costs)* [2014] EWCOP 5 [2014] COPLR 432 at [11] in making a partial costs order against a media body which had sought to be added as a party. An appeal against the costs order was dismissed: *Re G (An Adult) (Costs)* [2015] EWCA Civ 446.

56. In *North Somerset Council v LW* [2014] EWCOP 3 an application for permission to carry out an elective Caesarean Section was heard on 15 and 16 April 2014, and at another hearing on 23 April 2014 it was agreed that LW possessed capacity to consent to an elective Caesarean Section. Keehan J granted an order that the Trust pay the Official Solicitor's costs of the hearings on 15 and 16 April. The judge's reasons were as follows:

> "40. I am in no doubt that, on the evidence before me, UHBT fell well short in meeting their duties to LW and her unborn child. I so find for the following principal reasons:
>
> i) no comprehensive plan or contingency plan had been devised until after the court had been seized of the matter;
>
> ii) there was an unacceptable delay in arranging and/or undertaking a capacity assessment of LW to consent to medical treatment;
>
> iii) on the evidence of BC the unborn child was at serious risk of death or very serious harm;
>
> iv) in light of that evidence, and see paragraph 20 above, I do not understand, notwithstanding the account given by Caroline Saunders in her statement of 22 April, why:
>
> a) an urgent capacity assessment was not undertaken on 9,10, or 11 April; and
> b) if it found LW lacked capacity to consent to medical treatment, an urgent application was not thereafter issued in the Court of Protection;
>
> v) until the court was seized of this matter, no psychiatrist, and in particular no psychiatrist familiar with LW, had been invited to attend the capacity assessment;
>
> vi) the response of the trust to the order of Baker J of 11 April was wholly inappropriate and unacceptable. I accept the submissions of the local authority and of the Official Solicitor that, in terms, the tenor of the letter of 14 April sent by the trust to the local authority is indicative of the lackadaisical approach of the trust to this complex and serious matter; and

> vii) there appears to have been little or no planning or communication between component parts of the trust responsible for LW's medical care and/or between the clinical staff and its legal department and certainly none which reflected the complexity, seriousness and urgency in this matter.
>
> 41. The cumulative effect of these factors is that part of the hearing on 15 April and the whole of the hearing on 16 April, were completely ineffective. Accordingly I am satisfied that in the premises the court is justified in departing from the general rule that there be no order as to costs: rr 157 & 159."

57. In *Re M (Costs)* [2015] EWCOP 45 Baker J stated as follows:

> "The court retains a residual power, **which it exercises occasionally**, where one or other party has been found [guilty] of… **conduct that can be described as significantly unreasonable**." (emphasis added)

58. In *London Borough of Lambeth v MCS* [2018] EWCOP 20 [2018] COPLR 490 at [2] Newton J described the principles as follows:

> "**Proceedings brought in the Court of Protection almost never attract an enquiry into the issue of costs, essentially since they are inquisitional in nature**, the general costs principles do not sit easily within the parameters of the Court's considerations. However, as the President recognised in *Re G* [2014] EWCOP 5, **there will occasionally be cases but there must be good reason before the Court will contemplate departing from the general rule. For example an order for costs was made in *Re SW* [2017] EWCOP 7 where the application was "scarcely coherent … totally without merit … misconceived and vexatious"**. These proceedings would not necessarily be categorised in that way, but **what if they were or should have been fundamentally unnecessary, that is to say they should never have been brought? Or what if the conduct of the proceedings been so poor, so incompetent that not only did they take much longer than they should (thus unnecessarily necessitating P remaining for so very much longer in difficult circumstances) and requiring many extra unnecessary hearings**? In those circumstances is the Court not able to mark its disapproval by the consideration and award of costs." (emphasis added)

59. In *Re ND (Court of Protection: Costs and Declarations)* [2020] EWCOP 42 [2021] 1 FLR 1091 Keehan J made a costs order against a local authority that had repeatedly breached court orders in failing to provide adequate care and support plans, such that five extensions of time were required, resulting in an unnecessary hearing.

60. In *Re JB (Costs)* [2020] EWCOP 49 [2021] COPLR 88 Keehan J made a costs order against a local authority which had issued an application in the Court of Protection for an injunction against the provider of a specialist residential unit to prevent JB from being made to leave the unit. The application was described as "totally without merit", since the Court of Protection did not have jurisdiction to make such an injunction, given that the provider had given valid notice to terminate the contract.

Application to the facts

61. The facts are not seriously disputed. AX was considered to lack capacity arising from an impairment of, or a disturbance in the functioning of, the mind or brain, in relation to the birth of her child on 26 and 29 September 2022.

62. It follows that, pursuant to the principles in *FG*, an application should have been made considerably in advance of the date of the eventual application, 21 October 2022. Category 4 (real risk that P will suffer a deprivation of liberty) is clearly applicable. It also falls within category 1 (delivery by Caesarean Section is finely-balanced or is proposed and is likely to involve more than transient forcible restraint of P).

63. The real prejudice which arises from a failure to follow the guidance in *FG* most seriously impacts P, for there is no opportunity for the litigation friend (often the Official Solicitor) to properly meet P and ascertain his or her wishes and feelings and beliefs and values, or to ascertain the view of those caring for P. Nor is there a chance for the litigation friend to properly interrogate the medical and nursing notes, or to decide whether to seek permission to instruct expert(s) on behalf of P.

64. The court, which is a valuable and scarce resource with many competing demands on its time, is also capable of being seriously inconvenienced, with the knock-on effects on the ability of other litigants to access court.

65. In *FG* Keehan J said as follows (Annex at [22]):

> "Late applications are to be avoided save in a case of genuine medical emergency. They have four very undesirable consequences:
>
> i. the application is more likely to be dealt with by the out of hours judge and without a full hearing in public;
>
> ii. the available written evidence is more likely to be incomplete and necessitate substantial oral evidence;
>
> iii. it seriously undermines the role that the Official Solicitor can and should properly play in the proceedings; and
>
> iv. it deprives the court of the opportunity to direct that further evidence, including independent expert evidence, if necessary, is obtained in relation to the issue of capacity or best interests.
>
> This approach is dictated by P's Article 5, 6 and 8 rights and best interests."

66. Similar points were expressed by Lieven J in *University Hospitals Dorset NHS Foundation Trust v Miss K* [2021] EWCOP 40 at [3] as follows:

> "I appreciate that these cases are very difficult, and that everyone is trying to act in good faith and in the patient's best interests. I also appreciate that doctors and Trusts are unwilling to make these applications unless they really need to. However, as has been said in so many cases before it feels like a waste of breath, the burden of making an application at the eleventh hour ultimately falls upon the Court and the Official Solicitor."

67. The Practice Note concerning Appointment of the Official Solicitor in welfare proceedings states as follows:

> "**Urgent medical treatment cases**
>
> 24. **In the case of an urgent serious medical treatment application, it may assist to contact the Official Solicitor's office in early course to notify her staff of the urgent application and to discuss any pressing issues**. In such a case, please send an email marked in the subject line "URGENT: for the attention of a healthcare and welfare lawyer" to the healthcare and welfare inbox oswelfarereferrals@ospt.gov.uk" (emphasis added)

68. Had that guidance been followed, it may be that the Applicant would not have sought a substantive hearing out of hours on 21 October 2022.

69. The agreed position after the professionals meeting on 20 October 2022 that, because the assessment of capacity is time- and subject-specific, the assessment can only be done on the date of the proposed procedure, was wrong. A capacity assessment should be done in advance of the procedure, and if there is reason to think that that position has changed by the time of the hearing, a further capacity assessment should be performed.

70. Having not made the application prior to 21 October 2022, the mere fact that term had been reached did not justify an out of hours hearing on 21 October 2022, as the Applicant accepted. Although there was an increased risk of spontaneous delivery, having left it late the Applicant would have been better advised making an application for directions on 21 October 2022 leading to an urgent hearing early the following week, which probably would have given the Official Solicitor time to meet AX, read the notes, and contact relatives. It was also regrettable that the birth plan had not been explored in detail with AX prior to issuing the application: it should have been explored with her.

71. As to the costs arising out of the 21 October 2022 hearing, the agreed order provides for no order for costs, and I have no jurisdiction to re-open that order.

72. In any event, even though the Applicant did not follow the guidance in *FG*, and that should have been obvious to the Applicant at the time (rather than simply with hindsight), and no separate assessment of litigation capacity was undertaken, and the mental health Trust notes were not in the court bundle, I do not consider that it reaches the threshold where a costs order is called for on the facts of this case, whether it is described as "significantly unreasonable", or a "blatant disregard of the processes of the MCA", without treating these as legal tests which must be satisfied before a costs order can be made. The way in which this application was approached signifies substandard practice. Whether to make an application to the Court of Protection, and the appropriate timing of an application, is not just a clinical question, but one which also involves a legal judgment. The Applicant, in identifying the need for training in this area, recognises its actions on 21 October 2022 were inappropriate.

73. Although it is important to follow the guidance in *FG*, there is no suggestion in the case itself that breach of the guidance automatically justifies a costs order against an applicant. Something more is needed.

74. It is incorrect that the only way a court can express its disapproval of a party's conduct of a case is by making a costs order: it can be expressed in a judgment, and the court's views of the Applicant's actions in this case should be tolerably clear. Lieven J similarly voiced criticisms of the Trusts' conduct in *University Hospitals Dorset NHS Foundation Trust v Miss K* [2021] EWCOP 40 but there was no application for costs, or suggestion that one might have been justified.

75. As to the costs arising subsequently, the Official Solicitor does not press this with the same force, the primary focus of the costs submissions being directed at the out of hours hearing. The evidence is that AX lacked litigation capacity on 22 October 2022, but had improved sufficiently by 27 October 2022 to be found to possess substantive capacity, by Dr B and by Dr D. That improvement is attributed by Dr B to the recent increase in the dose of Olanzapine. That conclusion has not been questioned by the Official Solicitor, and I have no reason to doubt it.

76. I therefore see no reason to criticise the Applicant's conduct after 21 October 2022, and I decline to make a costs order for that period.

Conclusion

77. The application for costs fails, for the reasons given above.

78. This decision is not intended to derogate from the clear importance of complying with the principles set out by Keehan J in *NHS Trust 1 v FG (Practice Note)* [2014] EWCOP 30 [2015] 1 WLR 1984. This case clearly fell within categories 1 and 4 of G, and an application to court should have been made at least 4 weeks before the Expected Date of Delivery.

79. Since the second hearing in this matter there has been helpful guidance issued on the information relevant to the decision in Caesarean Section cases after the Supreme Court decision in *A Local Authority v JB* and the correct means of recording a capacity assessment: see *North Bristol NHS Trust v RM* [2023] EWCOP 5 at [62] and [65], per MacDonald J.

80. It is important that an assessment is made of litigation capacity before commencing proceedings. There is recent jurisprudence on the generally close relationship between substantive capacity and litigation capacity: see *Lancashire v Q* [2022] EWCOP 6 per Hayden J at [22], and *An NHS Trust v P* [2021] 4 WLR 69 at [33] per Mostyn J.

81. As to those with "fluctuating" capacity, rather than seeking an anticipatory declaration it may be more appropriate to seek declarations on the evidence of current capacity, ie the longitudinal view: *A Local Authority v PG* [2023] EWCOP 9, per Lieven J. The instant case is better characterised as one of improving rather than fluctuating capacity.

82. Finally, parties would be well-advised to remember the requirements for urgent hearings set out by Theis J, as she then was, in *Sandwell & West Birmingham NHS Trust v CD* [2014] EWCOP 23 [2014] COPLR 650 at [39], notwithstanding the revocation of Practice Direction 9E.