Neutral citation: [2024] EWCOP 27
COP number 12577692

**IN THE COURT OF PROTECTION AT LEEDS**

Leeds Combined Court Centre
Oxford Row
Leeds

**Before DISTRICT JUDGE GEDDES**

**IN THE MATTER OF MK ("P")**

**NHS WEST YORKSHIRE INTEGRATED CARE BOARD**

**Applicant**

**-v-**

**(1) MK (by her litigation friend, the Official Solicitor)**
**(2) AK**

**Respondents**

**Mr Boukraa instructed by the ICB, appeared on behalf of the Applicant**
**Ms Titus-Cobb, instructed by Simpson Millar on behalf of the Official Solicitor, appeared on behalf of the First Respondent**
**AK, the Second Respondent appeared as a litigant in person**

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**JUDGMENT**

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1. This is an application by the ICB to extend an injunction made and extended on a number of occasions by this court against the Second Respondent. This judgment is intended to be free-standing so far as possible but it is impossible for me to separate the issues the application raises from decisions which have been made in a succession of judgments since 2016 and a full understanding of the case can only be gleaned by reference to that history.

2. The jurisdiction of the court derives from the Mental Capacity Act 2005 which provides a structure for the making of decisions on behalf of those who by reason of mental incapacity are unable to make their own.

3. By way of very brief background, MK is the subject of the proceedings (and therefore "P" for the purpose of the Act). She is an 81-year old Muslim lady originally from Pakistan. She has seven children including the Second Respondent AK and his sister J. There are five other brothers. All of the siblings other than AK have a current role in MK's care arrangements. AK's ability to contribute to those arrangements has been curtailed and controlled by the court since the outset of proceedings in October 2014 in circumstances in which a dispute had arisen as to MK's medication regime and conflict within MK's home, where she lives with a 24 hour care package, had caused upset to the family and carers. The full background is contained in a substantive judgment I gave on 7 December 2015 the written version of which is contained in the bundle for this hearing.

4. I was unable to conclude proceedings on that occasion because there was a need for MK's medication regime to be reviewed. I had cause in those circumstances to consider the interim injunction which was then in place. The Local Authority (whose application it was before the ICB took over funding responsibilities) sought supervised contact arranged in advance. The OS sought a relaxation of arrangements so that unsupervised contact could take place on say two occasions per week.

5. In his skeleton argument for this hearing AK has chosen to extract an exchange in submissions relating to those contrary arguments in which I challenged the LA's basis for saying contact should be supervised in that they were saying there was a danger that unsupervised AK would interfere with MK's medication as he had previously (as I had determined he had in that hearing). This was a bad point taken by the LA because along the line arrangements had been made for MK's medication to be administered by District Nurses not just because of risks from AK but in the light of other siblings giving MK incorrect medication as I had found occurred in the period July-August 2014. AK's intention is to remind me and the other parties that the case was not as straightforward as appears from a bare recital of the findings which I undoubtedly made against AK on that occasion and anyone reading that judgment would be aware that this is true.

6. Nevertheless, I was satisfied in 2015 that an injunction remained necessary (in the somewhat more relaxed form it has taken since then) to protect MK from being directly exposed to conflict between AK and the siblings or carers, to protect MK's care arrangements and carers from stress and breakdown and to protect MK from unnecessary medical or other assessment prompted by AK alone. My reasons are fully set out in that judgment and are not repeated here.

7. Under the terms of the order, (which have remained unchanged ever since) "AK must not a. Attend at the home of MK [spelled out in full] other than on Tuesdays and Thursdays for periods of up to 1 hour on each occasion between the hours of 1pm and 2pm (or such other time as may be agreed in advance by the Applicant); and b. Instruct any person (including medical professionals) to carry out any form of assessment of MK without the prior authority of the court". The injunction has both been extended from time to time and has once been enforced by an application for AK's committal in the intervening years.

8. The last time I extended the order I did so for a period of three years from February 2021 to 14 February 2024. The Applicant at that stage advocated for an indefinite injunction but I was persuaded by MK's litigation friend, the Official Solicitor, to make the extension for a three-year period.

9. The ICB's application to further extend the injunction was dated 12 December 2023. Again, they advocate an indefinite extension, which is now supported by the Official Solicitor on MK's behalf.

10. The application was made late in my judgment and, as a result it was not possible for proper directions to follow and a hearing to be listed within the lifetime of the existing injunction. This meant that on 9 January 2024 when I gave directions for the filing of evidence from AK and a hearing of the opposed application I also felt it necessary to extend the injunction to cover the period until this hearing. I criticised the ICB for this late application for which I can see no reason. Nevertheless in the light of the decision I will make later in this judgment to extend the injunction no prejudice has in fact been caused to AK.

11. As a result of AK's presentation of his case it was not possible to give a judgment during the two hour time estimate I had considered would have been more than enough to conclude all matters. As it was, AK failed to heed my warnings about the time he had to make his points throughout the hearing. He insisted on asking repetitive questions of the witness Edward Kirby, even where he had elicited the answers he was looking for long before. He also insisted in his submissions on following through points in his skeleton argument which were totally without merit (to which I will turn in due course and which I endeavoured to explain to AK during the hearing to no avail) and ultimately simply reading from that document in the misconceived belief that unless he did so the document would not be "on the record". As a result, and after what I consider to be fair warning I adjourned without hearing him to the conclusion of his submissions, extending the injunction for a further period so as to cover the time that would elapse before this judgment could be handed down.

12. Having reflected on whether the better course would have been to adjourn to another date to enable AK to conclude his submissions I remain satisfied that such a course would have been both unnecessary – as I had the document from which he was reading and he made no new or expanded points from it – and disproportionate – as the only reason he was cut short was his failure to follow my instructions.

13. I have read a statement in support of the application from Edward Kirby who is MK's Health Case Manager dated 12 December 2023. It is a short statement, most of which summarises the background to the various proceedings relating to MK. Mr Kirby states his support for the further extension of the injunction. He concedes there have been no breaches to the injunction during the course of the latest, three-year extension, but states his belief that it is the injunction being in place that prevents this.

14. He states that AK continues to be "unaccepting of MK's diagnosis of vascular dementia" He states that AK remains "fixated on MK's diagnosis and prescribed medication. He has not taken the opportunity to visit her during the times permitted in the Order but attended Court in July this year in order to oppose the application [for further authorisation of a deprivation of liberty in the community] and he continues to challenge the recorded professional view of MK's capacity and care needs. I am therefore of the view that if the injunction was lifted, AK would arrange for MK to be assessed by medical professionals in line with his own beliefs surrounding MK's condition and further examination would not be in her best interests."

15. He states that the other members of MK's family support the continuation of the injunction against him visiting and causing re-assessment of MK because of their fear that "conflict within the family would [l]ead to a rapid breakdown of MK's care package and this would clearly not be in her best interests".

16. Under questioning from AK Mr Kirby conceded that he had not sought MK's views on the application whether before it was issued or afterwards. He also conceded that he had not met AK before the first court hearing and had not sought his views on the application or on MK's care package generally. AK claims that both these features represent failures or breaches of the Code of Practice to the Mental Capacity Act. Under cross-examination he confirmed that he had recently sought the views of A but not MK on the application and that she, on behalf of the other siblings, continued to view the injunction as necessary to the care arrangements.

17. AK's skeleton argument makes clear that he considers it a significant if not fatal procedural failure that MK's wishes and feelings have not been elicited. Moreover,

he complains that he has not been consulted on the application. In respect of both these points he is adamant that there has been a breach of the Code of Practice.

18. I made the following observations on the evidence of Mr Kirby. The first is that it is clear that the account of the siblings' views is a hearsay account rather than being contained within a statement of their views first hand. It is clear that the weight to be given to hearsay evidence is less than that of first hand evidence and eliciting evidence in this form deprives the respondent of the chance to cross-examine. Nevertheless I do not doubt the evidence of Mr Kirby of their views. The views have remained consistent over the last eight or so years. Given that the views of AK do not appear to have changed – of which more later in this judgment – it seems unlikely that the views of the siblings would change.

19. Secondly I note that Mr Kirby is relatively new to this role at just over a year. I do not believe he has a depth of knowledge of the background to this case which AK has or which I have as the Judge who has maintained continuity since 2015. I would not expect him to. Nevertheless, I am satisfied that he has a sufficient understanding to be able to make sound judgments on the current position having had the chance to see MK first-hand, conduct at least one review of her care arrangements and consult with her carers and with other professionals. He has given credible evidence of his first hand experience of MK's presentation and I have no hesitation in finding him to be a honest witness.

20. It is acknowledged that there was a lack of consultation with AK. It is a somewhat strange concept to talk about consultation in circumstances in which an injunction is sought but in this case there has been no direct conversation between AK and Mr Kirby in the last year about the restrictions which exist and which the ICB say are needed into the indefinite future. At the outset of the hearing I was concerned that this could be a significant gap in the evidence but having heard AK and read his skeleton argument I am now satisfied that such a discussion would have been futile in any event.

21. I say this because throughout these many years of litigation it has been acknowledged that MK loves her son and would like to see him. Despite this, and despite having

been free to visit his mother unsupervised twice a week for the last 8 years he has not visited her at all, apparently on the basis of his opposition to the restrictions put upon him. He has made no other – more convenient - arrangement with the Local Authority or the ICB. He has no first hand up to date knowledge of his mother's condition. In these circumstances it is difficult to see what contribution he could make to a best interests discussion and it is not clear what the ICB could do to encourage him to take a different position on seeing his mother without disrupting her care package.

22. Mr Kirby also knew that as recently as the summer of 2023 his colleague had concluded proceedings relating to the deprivation of liberty in the community and he was able to consult with her. During those proceedings, as he was informed, AK's position was exactly as it has been all along both in relation to the lack of acceptance of MK's diagnosis and the finding that she lacked mental capacity. He continued (and continues) to dispute the same on the basis that he contends she is sedated by her medication. In August 2023 I declined to set up a substantive hearing on the issue because the matter has been previously litigated and there was no purpose to hearing the same arguments again.

23. I do not necessarily conclude from this that Mr Kirby was right not to initiate any discussion of the need for the injunctive order with AK but this hearing has, in my judgment amply demonstrated that had he done so he would have been met with an unyielding position from AK which is well-documented in a number of judgments and other records of the last few years.

24. Regarding the consultation with MK it is argued on her behalf by the OS that an application to extend an injunction is not a best interests decision in itself but is an application for an ancillary order to protect those declarations and orders as to her care arrangements which have been made on a best interests basis. I am not sure if this is right but it is not necessary for me to determine the point, let alone adjourn to fill a gap in the evidence because sadly, and understandably in the light of a now 13-year old diagnosis of the progressive disease of vascular dementia, MK is not in a position to express meaningful wishes and feelings on the issue in any event.

25. AK did not file evidence as such. Instead, he filed a skeleton argument. He did not give evidence under oath and no party required him to answer questions on the skeleton which he confirmed set out his position on the application. Despite his contention that the case management order did not reflect what was directed at the hearing on 9 January 2024 and his application (which I had refused on paper) to adjourn this hearing to allow him to see any evidence filed on behalf of MK before formulating his case, he confirmed that he did not need time to file further evidence, his case being fully set out in the skeleton which I had had the opportunity to read and which is before me now.

26. I am quite satisfied there is jurisdiction in the Court of Protection to grant an injunction to protect and support best interests decisions made for P, in this case MK's living, care, treatment and contact arrangements. AK has appealed six of my previous decisions, many of which included injunctive relief to support those arrangements, unsuccessfully. There has been no change to the law that I am aware of which is derived from the power conferred by section 16(5) of the Mental Capacity Act 2005 which states that "The court may make such further orders…as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order…made by it under subsection (2)". In turn, by section 47 of the Mental Capacity Act 2005 the COP is conferred jurisdiction to make any order the High Court may make and, in turn, the jurisdiction of the High Court to make injunctions is through section 37(1) of the Senior Courts Act 1981. That this is so, is unambiguously confirmed in Re SF (Injunctive Relief) [202] EWCOP 19 and has been reconsidered in Re G (Court of Protection: Injunction) [2022] EWCA Civ 1312 and in the authority on which AK places much reliance in his skeleton argument discussed below.

27. AK has cited extensively from Senior Judge Hilder's judgment in EG & Anor v AP & Ors [2023] EWCOP 15 ("EG"). He rightly points out that this is a factually very different case from this one. Nevertheless, he relies on various passages which he says hold true as principles across the exercise of the jurisdiction of the COP.

28. In so far as he argues that EG is authority for the proposition that there is no jurisdiction in the COP to make an injunction per se, he is simply wrong. The

injunction made in EG was one to protect a right against third parties that P asserted (or was asserted on her behalf) but was in dispute. The decision reaffirmed that there is no jurisdiction in the COP to determine such disputes, which are the province of civil or family courts.

29. AK states that EG is authority for the proposition that in this case any dispute between himself and his siblings should be resolved in other jurisdictions such as by application for a non-molestation injunction or by recourse to the police. This misses the point. The injunction which has been in place for so many years in these proceedings and which it is proposed continue is to protect **MK** from conflict between the siblings being played out **in or outside of her own home** distressing her directly and having – in particular – a disruptive effect on the care arrangements which involve both the siblings (other than AK) and professional carers.

30. A significant difference between the injunction sought and the making of a non-molestation injunction under the Family Law Act 1996 is that breach of the former can be punished through committal for contempt of court whereas breach of the latter may lead to an arrest. It would not be to AK's advantage in this sense if an injunction under such a provision were to be made, even though it would certainly be possible for a Family Law Act 1996 injunction to be brought on MK's behalf to exclude AK from her property. I make no comment about the need or otherwise for injunctive relief for any other person in so far as it is not relevant to the interests of MK. As AK points out, such relief would be an entirely separate matter to be litigated between capacitous people.

31. The test to be applied on this application includes that it is just and convenient so to order but I also take into account that injunctive relief may interfere to a greater or lesser extent with the individual freedoms of the person restrained and that any such interference should be both necessary and proportionate. I also take into account that the duration of an injunction should not exceed the period over which it is anticipated protection is going to be required.

32. AK cites the expression of principle in N v A Clinical Commissioning Group [2017] UKSC 22 that "the decision-maker can only make a decision which P himself could

have made. The decision-maker is in no better position than P." He goes on to make a point that does not follow and is faulty in its reasoning: "This clearly means that MK would not stipulate that I should only be allowed to see her at certain times restricting and curtailing her own Article 8 Right [sic]. The Applicant is not in a "better" position which it holds itself out to be [sic]."

33. I have already said that I am quite clear that MK would have the right to restrict AK's contact with her if she had capacity. The best interests decisions which I have made have included the exercise of such a power on her behalf in her best interests, fully acknowledging on each occasion that history shows that MK loves and would like to see her son and values him dearly. Whether she would have now, or previously, imposed restrictions on AK's ability to visit is just one of the factors I took into account when coming to the best interests decisions that I made under section 4 of the Act.

34. AK complains that the existing injunction is imprecise in its terms. I do not agree. There has already been an application to commit on a breach of the injunction which did not fall as a result of any imprecision. The terms are clear in my judgment and do not fall to be set aside on grounds of "illegality" as AK contends or otherwise.

35. AK cites the encouragement of SJ Hilder to explore whether voluntary undertakings could be used to "hold the ring" whilst a dispute was determined. I would emphasise the word voluntary here as in the case of EG there was no jurisdiction to impose injunctive relief. In his oral submissions AK was critical of a lack of exploration of this issue. I believe that the question of undertakings was explored in the early days although AK says not. At that time, I believe I have read, AK was not willing to give them. There would be no difference in the way in which undertakings would be enforced compared with the orders which have been in place. Both would be enforced by an application to commit if breached. I do not consider it convenient to adjourn for further exploration of this issue as there is no suggestion in his detailed skeleton argument that AK in fact offers such undertakings and he remains in opposition, it appears, to the restrictions which would otherwise be subject of the solemn promise. Indeed, he explicitly says that the giving of undertakings would not be "justifiable".

36. AK heads up a five-paragraph section of his skeleton with the words Dispute Resolution Hearing. Whilst I would applaud any form of alternative dispute resolution that would heal the rifts in this family and resolve issues between these parties finally I have tried to explain to AK that the concept of a dispute resolution hearing as discussed in EG is a procedural step in the Property and Affairs pathway but is not included as a step in the Personal Welfare pathway. Practice Direction 3B explains each of these pathways. In so far, therefore, as AK submits that the failure to list a DRH was a failure of the process adopted in respect of this application I reject that submission and I do not need to comment further.

37. AK's best point seems to be that the injunction is unnecessary because he accepts the care plan for MK. It is true that he has accepted her living and care arrangements for many years and has never advocated for any other form of living arrangement for her. I consider the harm the injunction is intended to protect from, however, and I do not consider that this acceptance is sufficient protection. AK's position on the care arrangements does not differ much from his position in the original proceedings and in the intervening years there has never been a suggestion that AK seeks some other care package for his mother.

38. I turn now to whether the restriction on AK arranging any medical or other assessment is necessary and proportionate. Since these proceedings began there has never been a time when AK has been accepting of the prescription drugs MK has been given. His original target for particular criticism was Mirtazapine and this issue was fully explored with the help of expert evidence in the hearing following the one already referred to. I found that it was in MK's best interests to have the medication prescribed by her treating physicians, which included Mirtazapine. That decision has been renewed over time as I was satisfied that MK was being given the reviews to which she was entitled of her medication. Nevertheless, AK continues to challenge this decision and even in his skeleton argument for this hearing he asserts that "the court under s.47 [sic] ought to have allowed me to obtain a professional opinion about the impact of Mirtazapine and Pregabalin". He goes on to discuss evidence which was fully explored in proceedings in 2016 and was the subject of judicial determination.

39. AK says he now agrees she should not have a physical examination. In cross-examination Mr Kirby agreed with AK that a paper exercise would not have the same impact on MK as a physical examination and suggested that the ICB would not have the same objection to such an exercise. I do not know whether this position would remain the same in the event of an application for an order under section 16 with an application for expert evidence under rule 15.5 of the Court of Protection Rules (COPR) or a report under section 49 of the Act but in any event it would be a matter for the court to determine whether such evidence was necessary and would meet the test I would have to apply under rule 15.3. Certainly, in the past I have been satisfied that no such evidence was needed the issues having been fully explored with the help of expert evidence previously.

40. In my judgment AK's own words demonstrate his continued wish to challenge MK's medication regime. More than that, he continues to assert that MK has capacity notwithstanding her long-standing diagnosis of vascular dementia and findings over many years that she does not have capacity in respect of the decisions which have been made for her from time to time. These issues are inextricably entwined for AK who believes that MK is sedated to the point of incapacity despite any findings to the contrary I may have made in the past. In his skeleton for this hearing he states that he now accepts "the sad realisation that MK has become a "legal junkie" and withdrawing from ANY of the medication would be highly detrimental" but other sections of his documentation and his questioning puts this acceptance in doubt as I explain above.

41. Whilst he has the right to hold what views he likes, the reason I continue to find that the injunction is both necessary and proportionate is that I am satisfied on the balance of probabilities that AK continues to intend to subject his mother to an assessment, whether physical or not and that doing so without some form of consensus would be harmful to MK. The reality here is that there is an extensive team around MK who are far better acquainted than AK is about her current progression and presentation. Her medication is subject to regular review. Pregabalin is now controlled by a stricter regime than previously with the advantage of more regular review. If there was a consensus, or even a minority view held by more than one person that her regime

needs to be considered again or subject to a second opinion the injunction would not stop there being a discussion or agreement to seek that second opinion. There is no such consensus or minority opinion, however. AK stands alone as he has done for so many years and in those circumstances it is naïve in my view to consider even a paper-based assessment to be harmless.

42. The instruction of an expert to do even a paper-based assessment would require various steps to be taken and which would be an imposition either on MK's privacy or a burden on her carers:
    a. MK's medical records would be required for the expert
    b. A discussion or discussions with her carers or at the very least a summary of a consensus opinion as to her presentation would be needed
    c. A neutral letter of instruction would be required

43. On the current evidence it is my view that none of these steps are necessary and to take them essentially simply to appease AK is not in MK's interests. The issue has been repeatedly litigated in the welfare decision making process. In any event the injunction does not prevent this happening. What it prevents is AK taking action unilaterally and I remain firm in my judgment that without the protection of the injunction MK would be exposed to this risk.

44. When I look at the proportionality of this injunction I can see no way in which it infringes any "right" AK has in law. He would not have had the right to force MK to submit to medical examination if she had capacity. He does not have the right to act unilaterally under the Mental Capacity Act or its Codes of Practice.

45. In relation to contact, equally, AK appears to think he has the right to visit MK at her home whenever he likes. I doubt that right. A visit to a capacitous parent will always depend on their willingness or availability to entertain the person wishing to visit. He does not have a right to enter MK's home without her invitation. As she lacks capacity in relation to contact there has to be a decision made for her as to how she should be enabled to spend her time.

46. It is common ground that MK would choose if capacitous to see AK – and probably would not raise objections to this being on his terms and whenever he likes. The problem is that a best interests decision does not just depend on MK's wishes and feelings and her values when she had capacity although these are powerful features. In this case those powerful factors have been outweighed by the primary need to ensure that her care arrangements remain stable. Those arrangements, supported by the injunction have been remarkably successful and have been sustained over many years. This has enabled MK to enjoy other things she would likely have chosen for herself such as continued residence in her own home, relatively stable physical health including in relation to the management of her diabetes and contact with her six other children and other family members.

47. It is the ICB's belief that those arrangements would be strained and endangered by a lifting of this injunction. I accept that family members who are actually supporting MK with physical and emotional help and companionship continue to support this position. In my judgment AK's continued isolation from his siblings suggests that it remains necessary that his freedom to attend at MK's home does need to be controlled. This has the benefit originally identified of allowing other siblings to refrain from attending the home when AK might be visiting his mother to avoid conflict and ensures that her routines are not unduly disrupted.

48. I turn again to look at proportionality. The injunction as I varied it originally allows two visits per week of up to one hour each. Those visits have never been taken up. The injunction allows AK to agree different arrangements with the ICB. He has never sought to do so. It is unsustainable in my judgment to argue that no injunction is required from a position of having chosen not to take up any visits at all and with no indication in evidence of what his intentions would be if the injunction were lifted. Any interference with his rights to visit there may be is substantially mitigated by the measures I have outlined above. It is only AK's own choice that has led to their estrangement.

49. I am therefore satisfied that this limb of the injunction as well as the other are both necessary and proportionate and should be extended.

50. The ICB and the OS now join in advocating an unlimited duration. I agree. There is no evidence to suggest that the need for an injunction has abated over the last 7 or 8 years and there is no evidence to suggest that it will abate in the foreseeable future. I will make the duration "until further order". There is always a right to apply for the variation or discharge of an injunction, whether because the need no longer exists or has diminished or because there has been a change in circumstances. The burden of proving that a variation or discharge is appropriate would be on the applicant for that variation. It is time, in my judgment, to draw a line under the regular review of this injunction without evidence of change.

51. I therefore make the orders sought by the ICB for the reasons given above.

DISTRICT JUDGE GEDDES
Handed down 10 April 2024