[2024] EWCOP 77 (T2)

Case No: 13550630-03

IN THE COURT OF PROTECTION

Manchester Civil Justice Centre
1, Bridge Street West
MANCHESTER
M60 9DJ

Date: 12 December 2024

Before :

HIS HONOUR JUDGE BURROWS

- -

Between :

P **(by his litigation friend, the Official Solicitor)**	**Applicant**
- and -	
(1) MANCHESTER CITY COUNCIL	**Respondents**
-and-	
(2) The Mother	
-and-	
(3) The Father	

- -

RE: P (PROPERTY & AFFAIRS DEPUTYSHIP: JURISDICTION)

- -

Francesca Gardner (instructed by **Irwin Mitchell**) for the **Official Solicitor for P**
Helen Gardiner (instructed by **City Solicitor**) for the **First Respondent**
The Mother and the Father appeared in person

Hearing date: 12 December 2024

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JUDGMENT

[This judgment has been prepared from the notes made by counsel of the *ex tempore* judgment with some corrections and additions and approved by the Judge. The judge has adopted the anonymisation adopted by Ms Justice Henke in the earlier judgment [2024] EWCOP 26.]

HIS HONOUR JUDGE BURROWS:

APPLICATIONS TO ADJOURN

The father

1. Unfortunately, today there have been a couple of practical difficulties.

2. The first is that the father unfortunately has been admitted to the Manchester Royal Infirmary. I was told this earlier in the week when he requested the vacation of this hearing, and I indicated to him by email that it was unfortunate that he was admitted, but I needed some documentary evidence from those treating him that that was where he was.

3. In fact, today he did attend the hearing remotely but, unfortunately, he was indeed in hospital on a public ward with only curtains around him to

prevent the “broadcast” from his laptop of these court proceedings to the wider world.

4. The father also told his interpreter that he did not wish for her to interpret for him, although he did not satisfactorily explain why.

5. For those two reasons it was impossible for him to participate in this hearing, and I had to consider whether this hearing should continue in his absence.

6. I decided that it could and should. That was for one primary reason, and that was that the application was primarily about his wife who is her son’s property and affairs deputy, and it is her removal from that position that this application is primarily about.

7. Secondly, however, the father, who is clearly a learned person, able to communicate very effectively in writing, despite not speaking English, had provided a written document which outlined in some detail his and his wife’s legal submissions in response to this application.

8. This is an urgent matter. This case has been going on for a very long time. Back in March 2024, Ms Justice Henke heard an application to withhold closed material. There she gave an outline of the history of the case which I do not intend to repeat now: see P (Application to Withhold Closed Material: Concurrent Civil Proceedings) [2024] EWCOP 26.

9. The reality of the situation is all these months later, neither the Official Solicitor nor the court is any the wiser as to P’s wellbeing or even his whereabouts. I will come back to this in a moment.

10. But most importantly of all perhaps, his personal injury claim, which, according to one of the High Court Masters is worth seven figures, has not been progressed at all. P was the victim of a terrible accident when he was a student at university which left him with a brain injury and that has given rise to a disability which he would not otherwise have had. He is entitled to compensation for that, and he needs it, because a significant sum of money could be used to improve the quality of his life. But none of those whose job it is to pursue that claim have been able to pursue it any further since Ms. Justice Henke's judgment and it is very concerning that he may lose an opportunity to benefit from that if there is any further delay.

11. Furthermore, it is now said that he is living in Italy. If that is true, it is unclear how his needs are being met in terms of his disability, but also in respect of his financial needs, and how they are being met.

12. I am satisfied that time is of the essence in this case and an adjournment for father's benefit, whilst ideally preferable, is not, taking all matters into account, in P's best interests. What is in his best interests is for this matter to be resolved today as quickly as possible.

13. So, the matter proceeded in the father's absence.

<u>The mother</u>

14. The mother then made an application to adjourn the hearing. She had earlier communicated with the court saying that the hearing was taking place at a time when she was intending to visit P at his home, as she described it, in Italy.

15. This matter was listed as long ago as 15 October 2024, and the order is, and has been, in the mother's possession since shortly after that. There was a hearing last month, a lengthy hearing which lasted for virtually the entire day and at which the mother gave extensive evidence. This matter was not raised by her then. It was not suggested at that stage that she would not be able to attend this hearing. So, the application earlier this week was not one which the court looked upon favourably.

16. She is here. She turned up today. She was not renewing her application for that reason. She says however she received a large amount of documentation at the last minute and had not had an opportunity to consider it. In fact, that documentation was the updated bundle which I received at 10.20 this morning, though I think it was sent slightly earlier. But that does not contain new documents, it is simply the compendium of the documents that are already before the parties and the court. I note also that the mother did not bring any documents or a laptop to the hearing. She was entirely without access to any of the papers in the case, and that was her choice.

17. There were two position statements or skeleton arguments. The one from the Local Authority is shorter and deals with narrower issues. There is a more extensive skeleton argument from the Official Solicitor which deals with jurisdiction, habitual residence, and the principles which the court needs to apply when deciding whether to replace a property and affairs deputy.

18. The mother asked for a further adjournment to consider these documents. I would add the documents her husband and her prepared dealt with these issues in some detail, so the issues were not new to the mother.

19. I was willing to offer her more time to consider those this morning. However, it seemed to me that the central issue in this application was the mother's willingness to discharge her duties as deputy on her son's behalf, because it seemed doubtful. As I have already said, it is important for P that these proceedings progress. I was reluctant to adjourn for that reason.

20. Therefore, I did ask the mother some questions about her understanding of the application. I asked her whether she was willing to engage with those who have the responsibility to pursue the personal injury claim on behalf of her son, but also those present today who have a responsibility to pursue these Court of Protection proceedings on his behalf? There is an overlap between the two, but they are separate actions.

21. Her answer was no. The reason she gave for that, which may be genuinely held, is that she and her husband had started to represent their son's interests but then they had been removed and now, as she sees it, they are forbidden from doing anything for him, whether positive or negative, in the personal injury claim.

22. Having looked at the proceedings in the Kings Bench Division, all summarised in Henke, J's judgment, but also from my reading of the decisions of those judges at an earlier hearing, the original decision of Master Eastman, appeal of Spencer, J. and the Court of Appeal's refusal of permission to appeal from Nicola Davies, LJ, it seems to me the circumstances are a little more complicated than the mother makes them sound.

23. During those proceedings, Spencer, J. made an Extended Civil Restraint Order (ECRO), reflecting the nature and number of applications made at

that stage by P's parents. That approach has been taken in these proceedings in this Court, and although I have not considered the ECRO to prevent the mother and father from making applications in these proceedings, I think the time has come when that ought to be determined. For reasons that will become clearer shortly, I consider that is a matter for a Tier 3 Judge (a High Court Judge).

24. However, the reality is as property and affairs deputy, the mother has an obligation to act in her son's best interests when it comes to his property and affairs. It seemed to me based on her answer to my question alone she has precluded herself from continuing in that role. This was because of her unwillingness to cooperate with those who the court has appointed as litigation friend in the personal injury case to ensure that her son receives the money he is entitled to. And so that seemed to me a clear answer to the question of whether she could continue as property and affairs deputy.

25. I was reminded that under section 16 MCA, this Court is empowered to make decisions and appoint deputies. Under s.16(8) the power is given to the Court to revoke or vary the appointment of a deputy if it is satisfied that the deputy "(a) has behaved, or is behaving, in a way that contravenes the authority conferred on him by the Court or is not in P's best interests".

26. That made it clear to me, bearing in mind the urgency of the matter and the need for P to receive the money as soon as possible, that the hearing should proceed today so that I could decide whether I had the power to make the order sought and, if I did, whether I should do so.

THE APPLICATION TO REVOKE THE DEPUTYSHIP ORDER

27. Ms Francesca Gardner has submitted a comprehensive position statement in relation to the application over deputyship. She addresses, as the father addresses in his document, the foundational issue about whether the court has jurisdiction to make any decisions about P.

28. Ms Gardner's submissions on jurisdiction, supported by Ms Gardiner for MCC, were these. The Court has jurisdiction over an adult who is habitually resident in England and Wales [Schedule 3, Part 2 para 7(1)(a)] and/or an adult's property in England and Wales [para 7(1)(b)] and an adult present in England and Wales or who has property there if the matter is urgent [para 7(1)(c)].

29. Therefore, in relation to this property and affairs deputyship application, the question is whether P has property in England and Wales that gives the court jurisdiction to make decisions, notwithstanding his habitual residence being elsewhere, a matter I will deal with in a moment?

30. As a preliminary and primary observation, it appeared to me that even if P is habitually resident outside of England and Wales, perhaps in Italy, he has property which is still here. He has a tenancy, he receives state benefits, both of which constitute property.

31. Most importantly and most relevantly, the action for damages for personal injury is in this country within the jurisdiction of the High Court. With the assistance of Ms Gardiner, I was reminded that a right to damages for personal injury constitutes itself a *chose in action* which is a species of property. P has an entitlement to damages from the Defendant in his personal injury claim. An agreement on liability has been negotiated. There simply remains the quantification of damages.

32. That entitlement, albeit inchoate at the present time, is property. In relation to the Mental Capacity Act 2005 it gives this court jurisdiction to make decisions in relation to this application concerning deputyship for property and affairs in respect of P. And on that ground alone, I am satisfied that I do have jurisdiction to make the decision on the deputyship.

33. Indeed, it seems to me that the very fact the Court of Protection made the deputyship order gives it the jurisdiction to vary or revoke that order in accordance with the Act as cited above, without more.

34. If I am wrong on the first determination, I reach the same conclusion through the second.

HABITUAL RESIDENCE

35. I have also been urged to deal with the other aspect of jurisdiction which is whether P is habitually resident in England and Wales?

36. Once again, Ms Gardner pointed me towards the relevant authorities.

37. The question of habitual residence is one of fact, as Mrs Justice Gwynneth Knowles has stated in The Health Service Executive of Ireland v IM & Another [2020] EWCOP 51.

38. Her Ladyship distils a number of propositions from the authorities:

    (a) Habitual residence is a question of fact and not a legal concept: A v A Children: Habitual Residence [2014] AC 1.

(b) The place of habitual residence is that which "reflects some degree of integration by the [vulnerable adult] in a social and family environment": see A [202] Fam 42.

(c) As a factual matter, the Court needs to consider the conditions and reasons for the person's stay: see Mecredi v Chaffe [2012] Fam 22.

(d) The essentially factual and individual nature of the enquiry should not be glossed with legal concepts which would produce a different result from that which the factual enquiry would produce (A v A above);

(e) Both objective and subjective factors need to be considered. Rather than consider a person's wishes or intentions, it is better think in terms of the reasons why a person is in a particular place and his or her perception of the situation while there – their state of mind: Re LC (Children) [2014] AC 1038 at [60];

(f) It is the stability of the residence that is important, not whether it is of a permanent character: Re R (Children) [2026] AC 76 at [16];

(g) Habitual residence is to be assessed by reference to all the circumstances as they exist at the time of the assessment: FT v MM [2019] EWHC 935 (Fam) at [13].

39. Pausing there, these authorities confirm there are a number of different features of the facts in any given case that are important when making a decision as to habitual residence.

40. This led Ms Gardner on to Newcastle City Council v LM [2023] EWCOP 69, a decision of Mr David Rees, KC, sitting as a Tier 3 Judge (effectively, a

Deputy High Court Judge). He considered the issues arising out of MCA 2005 Schedule 3 where there is an international element.

41. Crucial to this case is the need to deal with uncertainties within an evolving factual matrix. David Rees, KC advocates the making of a provisional determination pending the final determination of the matter.

42. Furthermore, because habitual residence as the key to jurisdiction is so important, the court must keep the issue under review to ensure that it retains jurisdiction as it is invited to make orders, particularly, in this case, welfare orders.

43. Within this context, Ms Gardner (again supported by Ms Gardiner) submitted that I have to direct myself as to whether on the evidence I have before me I can be satisfied that P has removed himself from this community in England and Wales and integrated elsewhere? He undoubtedly has been integrated here in England: he has lived here for many years, has a flat here, went to university here, and still has some of his personal property in the flat here, and of course his parents are here. However, that will be lost if he integrates into a community somewhere else, like Italy. I must consider whether he has in fact given that up and has assumed habitual residence by integrating into another country.

44. Ms Gardner submits that I should direct myself on the paucity of evidence that P has actually relocated to Italy. She says quite candidly that we do not know he is even in Italy. That is only what we have been told by his parents. The evidence is that at some stage he did travel on a plane out of the country. It was thought initially he was going to Budapest. He might well have gone to Budapest. But he is said to now be in Italy. We have been given an address and a location but there has been no contact established.

45. However, the evidence of relocation when P flew out of England is not powerful. When seen leaving in April 2024 P was only carrying a small bag. There has been no communication from him to those representing him that he is living there. Taking those matters into account, Miss Gardner says I am entitled to make an interim decision on habitual residence.

46. Habitual residence is something the court has to take account of and review on a regular basis in order to check whether it has jurisdiction to make decisions. Ms Gardner says that I have no reason to be satisfied to the required standard that he has left, or no reason to believe that he is no longer habitually resident in this jurisdiction.

THE COURTS CONCLUSION ON HABITUAL RESIDENCE

47. This is a very unsatisfactory situation. Miss Gardner says it is unusual, even unique. After all this time, P appears not to have been seen by anybody relevant to this case other than his parents. That is extraordinary. I am unable to escape commenting that there has been complete obfuscation and stonewalling in this case by P's parents in relation to this court and the parties pursuing their son's interests here and in the High Court. The mother rhetorically asks, as a criticism what the Official Solicitor has achieved for P, what they have done in his interests, have they ever spoken to him? The answer is no, but the reason for that is they have been obstructed by the mother and the father in doing so.

48. I am satisfied that I have no, or certainly insufficient evidence that P is habitually resident in Italy (or anywhere else other than England). The facts are that P is a person with disabilities and challenges and a need for care and medication. Is it plausible that a person who has lived in England for a very long time with his family, who are still here, who suffers from physical and mental challenges of this degree, and who needs regular care and medication, and who lacks capacity to make decisions around residence and care has decided, on his own, to up sticks and move to Italy where he has no contacts? In addition, he has a large personal injury claim outstanding in England which he would also be abandoning.

49. My conclusion is, absent evidence confirming it, that P is still habitually resident here in England and Wales. I will review that conclusion based on any new evidence whenever that comes in.

THE PROPERTY & AFFAIRS DEPUTYSHIP

50. The court has jurisdiction on that basis as well as on the basis of property in this jurisdiction.

51. That gives the court jurisdiction to consider whether the mother should continue as deputy? For reasons I have given, it is clear she cannot. She made it clear to me, and I believe her, that she is not going to act in P's best interests and cooperate with solicitors in the personal injury proceedings or in these proceedings which are ancillary to it. I will remove her as property and financial affairs deputy.

52. I am asked to make an interim deputyship in favour of Irwin Mitchell Trust Corporation. There is a complication here, because Irwin Mitchell Trust Corporation takes the view it may be expensive for them to act, and

it would be better if it were at least initially to be the Local Authority to take on that responsibility.

53. The only comment I can make at this stage is it should be one of them. I am not clear if the Local Authority is offering themselves, but if they are I would prefer it were them.

CONCLUSION

54. I am very concerned about P's welfare. I am sure we all are. He ought to be located. Although I have said I have no sound reasons to believe he has relocated to Italy, I am concerned he may be abroad, maybe as a means of removing him from the court's powers. I consider that even if the Court of Protection's jurisdiction under the Mental Capacity Act may be in doubt, my position is this is a case in which the inherent jurisdiction of High Court may well have to be brought in if it is necessary to do so.

55. So, for that reason I suggest this matter ought to go to Tier 3 to a High Court Judge and that that judge ought to be expecting a hearing sometime in early February on this matter as it progresses after this judgment.

56. Ms Gardner made a reference to a possibility of a future application for a closed hearing. I have no idea what that refers to, so I will leave that for others when they make their applications.

57. That is my judgment.