



IN THE COURT OF PROTECTION

[2014] EWCOP 48

25 November 2014

Before :

THE HONOURABLE MR JUSTICE PETER JACKSON

Cases A & B
(Court of Protection: Delay and Costs)

Judgment date: 25 November 2014

JUDGMENT

IMPORTANT NOTICE

This judgment can be reported provided that the parties to the proceedings are not identified. Failure to comply with this order will be a contempt of court.

Mr Justice Peter Jackson:

1. Two cases that I heard on consecutive days last month illustrate the problem of delay and expense in proceedings in the Court of Protection.
2. Both cases concerned young men who lack the mental capacity to make decisions for themselves, but to differing degrees live semi-independently. In both cases the participants were local authorities, health providers, family members and the men themselves, with the Official Solicitor acting as their litigation friend and instructing local solicitors. In both cases, expert advice was obtained. In Case A, the young man had capital from a damages award, and the cost of his representation came out of his capital, which was of course not intended for that purpose. In Case B, the young man had no capital and the cost of his representation was met by the legal aid fund.
3. I will not name the parties or their representatives as the cases are unfortunately not unique. Each case had its difficulties, but neither was exceptional of its kind.
4. In Case A, the proceedings lasted for 18 months. In round figures, the estimated legal costs were £140,000, of which about £60,000 fell on the local authority, £11,000 on a legally-aided family member, and £69,000 on the young man himself, paid from his damages.
5. In Case B, the proceedings lasted for five years. In round figures, the estimated legal costs were £530,000, of which about £169,000 fell on the local authority, £110,000 on a family member (who ran out of money after three years and represented himself thereafter), and £250,000 on the young man himself, paid for out of legal aid.
6. These figures are conservative estimates.
7. Each case therefore generated legal costs at a rate of approximately £9,000 per month.
8. It would be superfluous to give further detail about the extravagance of the proceedings in order to conclude that the objective contained in the Court of Protection Rules 2007 was not remotely achieved in either case.
9. Rules 3-5 read:

The overriding objective

3.—*(1) These Rules have the overriding objective of enabling the court to deal with a case justly, having regard to the principles contained in the Act.*

*(2) The court will seek to give effect to the overriding objective when it—
(a) exercises any power under these Rules; or*

(b) interprets any rule or practice direction.

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

- (a) ensuring that it is dealt with expeditiously and fairly;*
- (b) ensuring that P's interests and position are properly considered;*
- (c) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;*
- (d) ensuring that the parties are on an equal footing;*
- (e) saving expense; and*
- (f) allotting to it an appropriate share of the court's resources, while taking account of the need to allot resources to other cases.*

The duty of the parties

4. The parties are required to help the court to further the overriding objective.

Court's duty to manage cases

5.—(1) The court will further the overriding objective by actively managing cases.

(2) Active case management includes—

- (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;*
- (b) identifying at an early stage—*
 - (i) the issues; and*
 - (ii) who should be a party to the proceedings;*
- (c) deciding promptly—*
 - (i) which issues need a full investigation and hearing and which do not; and*
 - (ii) the procedure to be followed in the case;*
- (d) deciding the order in which issues are to be resolved;*
- (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate;*
- (f) fixing timetables or otherwise controlling the progress of the case;*
- (g) considering whether the likely benefits of taking a particular step justify the cost of taking it;*
- (h) dealing with as many aspects of the case as the court can on the same occasion;*
- (i) dealing with the case without the parties needing to attend at court;*
- (j) making use of technology; and*
- (k) giving directions to ensure that the case proceeds quickly and efficiently.*

10. Few if any of the Rule 5 case management strategies were exhibited in these proceedings. There were too many hearings before too many judges¹, too much

¹ Case A: 8 hearings before 3 judges. Case B: 18 hearings before 7 judges, plus 6 orders made without attendance.

documentation, and too many lengthy adjournments with excessive time estimates for hearings.

11. In these cases, the consequence of delay has been protracted stress – described by one parent as *“the human misery”* – for the young men and their families, with years being lost while solutions were sought. There is also the drain on the time and energy of social work and medical professionals, who have to service the needs of the proceedings alongside their normal responsibilities.
12. Just as the meter in a taxi keeps running even when not much is happening, so there is a direct correlation between delay and expense. As noted above, the great majority of the cost of these cases fell on the state. Public money is in short supply, not least in the area of legal aid, and must be focussed on where it is most needed: there are currently cases in the Family Court that cannot be fairly tried for lack of paid legal representation. Likewise, Court of Protection cases like these are of real importance and undoubtedly need proper public funding, but they are almost all capable of being decided quickly and efficiently, as the Rules require.
13. In short, whether we are spending public or private money, the court and the parties have a duty to ensure that the costs are reasonable. That duty perhaps bites particularly sharply when we are deciding that an incapacitated person’s money should be spent on deciding his future, whether he likes it or not.
14. Another common driver of delay and expense is the search for the ideal solution, leading to decent but imperfect outcomes being rejected. People with mental capacity do not expect perfect solutions in life, and the requirement in Section 1(5) of the Mental Capacity Act 2005 that *“An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.”* calls for a sensible decision, not the pursuit of perfection.
15. Likewise, there is a developing practice in these cases of addressing every conceivable legal or factual issue, rather than concentrating on the issues that really need to be resolved. As Mrs Justice Parker said in Re PB [2014] EWCOP 14:

“All those who practice in the Court of Protection must appreciate that those who represent the vulnerable who cannot give them capacitous instructions have a particular responsibility to ensure that the arguments addressed are proportionate and relevant to the issues, to the actual facts with which they are dealing rather than the theory, and to have regard to the public purse, court resources and other court users.”
16. There is also a tendency for professional co-operation to be dissipated in litigation. This was epitomised in Case A, where the litigation friend’s submission focussed heavily on alleged shortcomings by the local authority, even to the extent that it was accompanied by a dense document entitled *“Chronology of Faults”*. But despite this, the author had no alternative solution to offer. The

role of the litigation friend in representing P's interests is not merely a passive one, discharged by critiquing other peoples' efforts. Where he considers it in his client's interest, he is entitled to research and present any realistic alternatives.

17. The problem of excessive costs is not confined to the Court of Protection. In his recent judgment in J v J [2014] EWHC 3654 (Fam). Mr Justice Mostyn referred to the £920,000 spent by a divorcing couple on financial proceedings as "*grotesque*". In V v V [2011] EWHC 1190 (Fam), I described the sum of £925,000 spent by a couple who had not even begun their financial proceedings as "*absurd*". Yet everyday experience in the High Court, Family Court and Court of Protection shows that these are by no means isolated examples: in some case the costs are even greater. There is a danger that we become habituated to what Mostyn J called "*this madness*", and that we admire the problem instead of eliminating it.
18. The main responsibility for this situation and its solution must lie with the court, which has the power to control its proceedings. The purpose of this judgment is to express the view that the case management provisions in the Court of Protection Rules have proved inadequate on their own to secure the necessary changes in practice. While cases about children and cases about incapacitated adults have differences, their similarities are also obvious. There is a clear procedural analogy to be drawn between many welfare proceedings in the Court of Protection and proceedings under the Children Act. As a result of the Public Law Outline, robust case management, use of experts only where necessary, judicial continuity, and a statutory time-limit, the length of care cases has halved in two years. Yet Court of Protection proceedings can commonly start with no timetable at all for their conclusion, nor any early vision of what an acceptable outcome would look like. The young man in Case B is said to have a mental age of 8. What would we now say if it took five years – or 18 months – to decide the future of an 8-year-old?
19. I therefore believe that the time has come to introduce the same disciplines in the Court of Protection as now apply in the Family Court. Accordingly, and at his request, I am sending a copy of this judgment to the President of the Court of Protection, Sir James Munby, for his consideration.