



IN THE COURT OF PROTECTION

2012 EWHC 886 (COP)

COP No. 12084253

Date: 17/4/2011

IN THE MATTER OF THE MENTAL CAPACITY ACT

Before:

THE HONOURABLE MR JUSTICE PETER JACKSON

BETWEEN:

THE NHS TRUST

Applicant

and

D

(by his litigation friend, the Official Solicitor)

Respondent

JUDGMENT: Re D (Official Solicitor's Costs)

Victoria Butler-Cole (instructed by Hill Dickinson) for the NHS Trust

Christopher Johnston QC (instructed by the Official Solicitor) for D

This judgment consists of 17 paragraphs. Pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken and copies of this version may be treated as authentic.

Mr Justice Peter Jackson:

Introduction

1. On 23 March 2012, in these Court of Protection proceedings, declarations were made authorising the withdrawal of medical treatment from D, who had been in a permanent vegetative state since July 2011. The applicant was the NHS Trust who were treating D and the declarations were supported by all those concerned for his welfare. The decision is to be found at [2012] EWHC 885 (COP).
2. On 26 March 2012, active medical treatment was replaced by palliative care, and D sadly died on Good Friday, 6 April 2012.
3. The Official Solicitor, who acted as D's litigation friend at the court's request, has applied for an order that the Trust should pay half of his costs. This application was opposed by the Trust, who argue that the proper outcome is for there to be no order for costs.
4. The case has been presented impeccably and neither party makes any criticism of the manner in which the other has acted. The scale of the costs is however substantial, reflecting the meticulous care with which such applications must be approached. The Trust's costs amount in round figures to £65,000 and the Official Solicitor's to £32,000, so the sum in question is £16,000 or thereabouts.
5. Nor is there anything to choose between these two publicly funded bodies in terms of need. Both are funded by Government on the basis of budgets set in a time of financial stringency.
6. The Trust is a small one. Its limited annual budget for legal expenses is already overspent. The Official Solicitor, who has a national remit, is facing similar difficulties. He already has to ration the circumstances in which he appears, though there is no suggestion that he will become unable to act in cases such as this.

The Rules

7. Decisions about costs must now be taken under the Court of Protection Rules 2007. Rules 157, 159 and 163 concern costs:

Personal welfare – the general rule

157. 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.

Departing from the general rule

159.—(1) The court may depart from rules 156 to 158 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances, including—

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- (a) the conduct of the parties;
 - (b) whether a party has succeeded on part of his case, even if he has not been 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 issue;
 - (c) the manner in which a party has made or responded to an application or a particular issue; and
 - (d) whether a party who has succeeded in his application or response to an application, in whole or in part, exaggerated any matter contained in his application or response.
- (3) [*Not relevant*]

Costs of the Official Solicitor

163. Any costs incurred by the Official Solicitor in relation to proceedings under these Rules or in carrying out any directions given by the court and not provided for by remuneration under rule 167 [*which relates to deputies*] shall be paid by such persons or out of such funds as the court may direct.

- 8. The Official Solicitor's application falls under r.163, the only costs rule that is specific to a particular body. The rules do not make clear whether r.163 takes applications by the Official Solicitor outside the general rule (r.157) and the exceptions (r.159), but in my view it is safer to assume that it does not.
- 9. Issues of conduct and success provide no basis for departure from the general rule in a case such as this. The question is whether there should be a departure on the basis of r.159(1)(c) – the role of any public body – and r.163 itself, which singles out the Official Solicitor.

Earlier decisions

- 10. Since the Mental Capacity Act came into force in October 2007, there has been no reported authority on the question of the Official Solicitor's costs. In contrast, over the course of the previous 25 years, there were no fewer than nine decisions and a Practice Note on the subject. It is in my view permissible to survey these materials, for the assistance that they contain: see RT v LT and Anor [2010] EWHC 1910, per Sir Nicholas Wall P.
- 11. Chronologically, the decisions are:

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<i>Re G (A Minor)(Wardship: Costs) [1982] 1 WLR 438 – CA</i>	Local authority to pay half Official Solicitor's costs in wardship case
<i>Re H [1986] unreported – Sheldon J</i>	Local authority to pay half Official Solicitor's costs in wardship case
<i>Northampton Health Authority v The Official Solicitor and the Governors of St Andrews Hospital [1994] 1 FLR 162 – CA</i>	Health authority to pay half Official Solicitor's costs in medical case
<i>B v Croydon Area Health Authority [1995] Fam 133 – CA</i>	Health authority to pay half Official Solicitor's costs in medical case
<i>Thameside and Glossop Acute Services Trust v CH [1996] 1 FLR 762 – Wall J</i>	Health authority to pay 20% of Official Solicitor's costs in medical case
<i>Practice Note (Official Solicitor: Declaratory Proceedings: Medical and Welfare Decisions for Adults who Lack Capacity) [2001] 2 FLR 158</i>	The Official Solicitor will invite the court to make an appropriate order in relation to his costs (not repeated in the reissued Practice Note in 2006)
<i>A Hospital NHS Trust v S [2002] EWHC 468 (Fam) – Dame Elizabeth Butler-Sloss P</i>	Health authority to pay half Official Solicitor's costs in medical case
<i>X NHS Trust v J [2005] EWHC 1273 (Fam) – Munby J</i>	Health authority to pay half Official Solicitor's costs in medical case
<i>NHS Trust v Ms D & Others [2005] EWHC 2439 (Fam) – Coleridge J</i>	Health authority to pay £5000 towards Official Solicitor's costs in medical case
<i>A Hospital v SW and a PCT [2007] EWHC 425 (Fam) – Sir Mark Potter P</i>	Health authority to pay half Official Solicitor's costs in medical case

12. These decisions were carefully analysed by Sir Mark Potter P in the last of them. He found the overall position to be that, while there was no rule that required the Official to be awarded half his costs, there was a long-standing practice of the court exercising its discretion to make such orders. Sir Mark Potter remarked that pragmatism had its place in these particular types of case, and concluded that an order for half costs was a reasonable starting point.

Discussion

13. The question is whether the 2007 Rules have changed this practice. Naturally, the Official Solicitor argues that they have not, while the Trust argues that the court has a genuine, unfettered discretion.

14. In my judgment, the Rules have not brought about a change in the considerations that the court should bear in mind when faced with an application of this kind. In proceedings under the inherent jurisdiction before the Act came into effect, the ordinary rule as between litigants was that there would be no order for costs unless there was some good reason for one, while the practice in relation to the Official Solicitor was, as we have seen, different. I find nothing in the Rules to suggest an intention to disturb this dispensation one way or the other. As already stated, orders for costs in favour of the Official Solicitor have never been based upon issues of conduct or success. His distinctive role as a public body assisting the court in the most difficult cases still finds expression in rr.159 and 163.
15. I therefore consider that the approach of Sir Mark Potter should continue to be followed, namely that in these cases an order for half costs is a reasonable starting point, from which the court can depart if there is reason to do so. I accept that to exercise discretion in this way in effect displaces the 'general rule' in cases in which the Official Solicitor acts, but the pragmatic basis for this compromise is as strong now as it ever was. To disturb long-standing practice would introduce uncertainty into every case, and foster costs arguments between public bodies. It would make it very difficult for public bodies to budget in individual cases and for the Official Solicitor to budget generally.
16. Applying that approach, and there being no special factors in this case, I direct the Trust to pay half of the costs of the Official Solicitor, to be subject to detailed assessment if not agreed.
17. Finally, there is much to be said for a rationalisation of the underlying arrangements, with the Official Solicitor's budget being set in such a way that he does not depend upon the recovery of costs from other public bodies. That, however, requires a change by Government to the financial rules of the game. It is not a change that can be brought about by decisions of individual referees.