APPROVED FOR PUBLICATION

Case No: COP 1191258T

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/12/2011

Before:

THE HONOURABLE MR JUSTICE PETER JACKSON

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Between :

THE LONDON BOROUGH OF HILLINGDON	**Applicant**
- and -	
STEVEN NEARY **(by his litigation friend, the Official Solicitor)**	**First Respondent**
- and -	
MARK NEARY	**Second Respondent**

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Mr Hilton Harrop-Griffiths (instructed by **Hillingdon Legal Services**) for the Applicant

Ms Aswini Weereratne (instructed by **Miles & Partners on behalf of the Official Solicitor**) for the First Respondent

Mr Mark Neary made no submissions

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JUDGMENT (Costs)

Mr Justice Peter Jackson:

1. The proceedings relating to Steven Neary began on 28 October 2010 and ended on 9 July 2011. The history is to be found in the judgment reported at [2011] EWHC 1377 (COP)

2. The parties have been unable to resolve the question of costs, and the Official Solicitor and Hillingdon have made written submissions.

3. The landmark dates are:

30.12.09	Steven goes for respite care
15.4.10	DOLS procedures invoked
7.7.10	Hillingdon formally refuses to return Steven home
28.10.10	Hillingdon issues COP proceedings
18.11.10	IMCA recommends return home
23.12.10	Mostyn J orders return home
28.2.11	Directions hearing, press issues determined
23-27.5.11	Main hearing
29.6.11	Round table meeting
9.7.11	Final hearing, welfare plans approved

Principles

4. The primary provision on costs in the Court of Protection is s.55 Mental Capacity Act 2005, which provides as follows:

> ***55. Costs***
>
> *(1) Subject to Court of Protection Rules, the costs of and incidental to all proceedings in the court are at its discretion.*
>
> *(2) The rules may in particular make provision for regulating matters relating to the costs of those proceedings, including prescribing scales of costs to be paid to legal or other representatives.*
>
> *(3) The court has full power to determine by whom and to what extent the costs are to be paid.*
>
> *(4) The court may, in any proceedings –*
>
> *(a) disallow, or*

(b) order the legal or other representatives concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with the rules.

(5) "Legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience to conduct litigation on his behalf.

(6) "Wasted costs" means any costs incurred by a party -

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

5. The relevant rules are Rules 157 and 159 of the Court of Protection Rules 2007, which provide:

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–

(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) Without prejudice to rules 156 to 158 and the foregoing provisions of this rule, the court may permit a party to recover their fixed costs in accordance with the relevant practice direction.

Decisions on costs

6. I have reviewed five Court of Protection decisions on costs, summarised in the Appendix to this judgment:

   [2010] EWHC B29 (COP), a decision of Senior Judge Lush

   G v E & Ors [2010] EWHC 3385 (Fam), a decision of Baker J, upheld on appeal in

   Manchester City Council v G & Ors [2011] EWCA Civ 939

   D v R (the Deputy of S) and S [2010] EWHC 3748, a decision of Henderson J in a property and affairs case.

   AH v Hertfordshire Partnership NHS Foundation Trust & Anor (including costs) [2011] EWHC 276 (COP) and 2011 [EWHC] 3524 (COP), a decision of my own.

7. I find that 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.

8. Each application for costs must therefore 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. Beyond that, as MCA s. 55(3) – cited above – makes plain, the court has "full power" to make the appropriate order.

9. The questions that must be addressed are these:

   (1) Is departure from the general rule justified in all the circumstances, including the conduct of the parties, the outcome of the case and the role of Hillingdon as a public body?

   (2) If so, what order should be made?

Submissions

10. On behalf of Steven, the Official Solicitor relies on the illegality of Hillingdon's actions, its disorganised decision-making, the lack of proper assessment of Steven's best interests, its uncooperative attitude towards Mr Mark Neary, its delay in referring the matter to the court (thereby increasing costs), and its attempt to defend its actions to the end, both in court and in the media.

11. The Official Solicitor analyses the course of events and seeks

    (1) one third of his costs up from the issue of proceedings up to and including the hearing on 23 December 2010;

    (2) half of his costs between 23 December 2010 and the hearing on 28 February 2011;

    (3) all of his costs from 28 February 2011 to 9 July 2011, to include the costs of the May hearing and the hearing in July, but excluding the costs of the meeting on 29 June;

    (4) all of the costs of the press issue.

    (5) all costs to be paid on the indemnity basis, as in G v E.

12. Hillingdon argues that with regard to welfare issues, the delay in issuing proceedings did not add much to the costs: there would have had to be three hearings and a meeting anyway.

13. It makes no specific submissions about the costs of the human rights issues, but argues that any award should be limited to the period between February and June 2011. It resists an order for indemnity costs or for an order for costs in relation to the press issues.

14. Hillingdon proposes

    (1) No order for costs up to and including 28 February 2011

    (2) Any award for costs in respect of the ECHR claim to be from 28 February to 9 June 2011

    (3) No order for costs thereafter

    (4) Any costs to be assessed on the standard basis

Decision

15. I consider that a departure from the general rule is justified on the facts of Steven's case for the reasons contained in my main judgment, as briefly mentioned in paragraph 10 above. The approach taken by Hillingdon was significantly unreasonable in each of those respects. This was anything but a typical case and an award of costs is plainly justified.

16. As to the amount of the award, I have considered the approach taken by the parties in apportioning responsibility for costs at each stage of the proceedings. I accept that this is a useful discipline but, having submitted to it, I prefer in the end to look at the matter as a whole, even though it means stepping outside the ring that the parties have drawn.

17. I shall order Hillingdon to pay Steven's costs on the standard basis from the date of the issue of proceedings (28 October 2010) to the conclusion of the main hearing (27 May 2011), except insofar as those costs are attributable to the press issues.

18. In explanation:

    (1) I favour an approach that is as simple as possible.

    (2) I do not see why Hillingdon should not pay the full costs from the date of issue to the date of the December hearing. Having finally issued proceedings, it asked for inappropriately wide powers and it then took a court order to get Steven home.

    (3) Thereafter, it is true that Hillingdon accepted the conclusions of the joint experts on Steven's future placement, but those conclusions echoed ones reached by the IMCA, which Hillingdon could itself have arrived at months earlier. Hindsight was not required. Again there is no reason for anything less than full costs to be paid for the period between December and May.

    (4) The nature of the findings at the May hearing make the argument for payment of that component of the costs unanswerable.

    (5) In contrast, the period between May and July was spent in cooperative efforts to secure successful future arrangements for Steven, and should not attract a costs award.

    (6) As to the costs of the press issues, no order is appropriate. As it happens, the Official Solicitor's submissions about publicity failed, but a stronger reason for making no order is that the press application raised issues of general public importance.

(7) As to the basis of assessment, there are some aspects of Hillingdon's conduct that make the application for indemnity costs a respectable one, but overall I consider an award on the standard basis to be sufficient in the circumstances of the case.

(8) Stepping back, I do not know whether my order is more favourable to Steven than the application as presented by the Official Solicitor. In some respects the award is more generous than the application, and in others less so. Faced with disagreement between the parties, the court is not constrained by the way in which the parties themselves frame the issue, but has to deal with the matter on its merits.

(9) Finally, there is nothing in this decision to deter public authorities or others from issuing proceedings in a timely way in appropriate cases. Far from increasing the risk of costs orders being made, or their being made with effect from an earlier date, the greater likelihood is that matters would not reach the stage where such orders were in prospect at all.

APPENDIX: COP decisions on costs

SC v London Borough of Hackney [2010] EWHC B29 (COP)

1. This was an appeal against an order for costs made by a District Judge arising out of a welfare dispute in which a highly involved relative opposed a local authority's plans for her elderly relation. The District Judge had been critical of the relative's conduct and had said this:

> *One purpose of the 'no costs' rule is that it allows welfare disputes to be brought before the courts without fear that if a party fails to succeed, he will be liable for his opponent's costs. However, this purpose falls away in my judgment when a party behaves so badly and fails to see reason and commonsense that it would be offensive to allow that party to rely upon the protection of Rule 157. Obviously, it should be reserved for use in exceptional cases, and in my judgment this is such a case.*

2. Allowing the appeal, and substituting no order for costs, Senior Judge Lush said this:

> *The purpose of a general rule is that it should apply in a typical case. SC is not untypical of many of the litigants in person who appear on a regular basis in health and welfare proceedings in the Court of Protection and, despite what [the District Judge] and [counsel for the local authority] have said about this being an exceptional case, it is not. It could almost be said that this aspect of the court's jurisdiction was*

created to deal with situations of this kind, where a local authority, NHS Trust or private care home is experiencing problems with a particularly difficult and vociferous relative.

Accordingly, the general rule (rule 157) should apply, and the court should only depart from the general rule where the circumstances so justify. Without being prescriptive, such circumstances would include conduct where the person against whom it is proposed to award costs is clearly acting in bad faith. Even then, there should be a carefully worded warning that costs could be awarded against them, and a consideration of their ability to pay. If one were to depart from rule 157 in all the cases involving litigants whom [the expert witness] has described as "extreme product champions", the court would be overwhelmed by satellite litigation on costs, enforcement orders, and committal proceedings.

I have an advantage over [the District Judge]. I can reflect on this case quietly and calmly, with the benefit of hindsight, and without the pressure and overwhelming sense of urgency with which he had to adjudicate at first instance. However, for the reasons given above, I consider that his decision to award costs against SC was partly wrong and partly unjust. Accordingly, I allow this appeal and set aside the original order insofar as it related to the London Borough of Hackney's costs, and in its place I make no order for costs.

3. The judgment also traces the history of the approach to costs in the Court of Protection before the reforms contained in the Mental Capacity Act 2005, and refers in particular to the decision in Re Cathcart [1892] 1 Ch 549. In that case the Court of Appeal made clear that the objective was to achieve a fair and just result and that the good faith of the litigant in question was of importance.

G v E & Ors [2010] EWHC 3385 (Fam)

4. This was a deprivation of liberty case in which Baker J ordered a local authority to pay costs on a combination of the standard and the indemnity basis. In doing so, he said this:

> *38. The work carried out by the local authorities and other public bodies such as NHS Trusts in this important field cannot be underestimated. Thousands of dedicated professionals and support staff devote their lives to helping people with learning disability, for long hours and low salaries. All public bodies face very difficult times as they struggle to come to terms with the implications of the cuts in public expenditure recently announced. The Court of Protection must work with these professionals under the collaborative philosophy underpinning the MCA and its Code of Practice to which I alluded in the earlier judgment concerning deputyship in these proceedings.*

39. *That does not mean, however, that local authorities, or any other public bodies, can be excluded from liability to pay costs in appropriate cases. The rules about costs must be applied fairly to all litigants, regardless of who they are. In this case, all the costs of litigation will be borne by the public purse. The Legal Services Commission is an equally hard-pressed public agency and the Commission – and the taxpayers who fund it – are entitled to look to the Court to apply the costs rules impartially and ensure that there is a level playing field. Gone are the days when it is appropriate for a court to dismiss applications for costs on the basis that it all comes out of the same pot. Such an approach would undermine confidence in the courts and distort public administration and accountability. I deprecate the practice of relying on arguments that the impact of a costs order would reduce the local authority's social care budget. The Legal Services Commission could equally well argue that the denial of a costs order in this case in favour of G, F and E will reduce the funds available for other cases. If a costs order is made, that will be the fault of Manchester City Council, not the Court.*

40. *Of course, 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.*

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. Miss Irving boldly relies on the ignorance of the local authority's staff as an excuse and submits that the complexity of the statutory provisions left large numbers of professionals uncertain as to the meaning of "deprivation of liberty". Given the enormous responsibilities put upon local authorities under the MCA, it was surely incumbent on the management team to ensure that their staff were fully trained and properly informed about the new provisions. If a local authority is uncertain whether its proposed*

actions amount to a deprivation of liberty, it must apply to the Court. As it is, the local authority's actions in this case would have infringed E's Article 5 and 8 rights under the old law as well as under the MCA.

42. *Furthermore, I do consider the local authority's conduct, certainly up to the moment when the issue of deprivation of liberty was conceded at the start of the hearing in January, amounted to "a significant degree of unreasonableness" so as to give rise to a liability for costs on an indemnity basis.*

43. *Miss Irving is on stronger ground when she submits that some form of investigatory process, almost certainly involving court proceedings, would have been required in this case in any event… But, in my judgment, the hearing would have been significantly shorter, and the issues less complex, than they were by the time of the hearing in January to March 2010. In particular, the best interests analysis would have been less complicated than it was by that date when E had been living away from F for over nine months. Furthermore, if the local authority had followed the proper procedure under the MCA, G's role in the proceedings would, in my judgment, have been much more peripheral. It is highly likely that she would not have had to initiate any proceedings herself, and possibly would not have even been a party at all. In the event, it was G who had to take the lead in establishing that the local authority's conduct amounted to a deprivation of E's liberty.*

44. *Assessing the extent to which the delays in the commencement of proceedings extended the scope of the necessary enquiry is very difficult and a "broad brush" approach is unavoidable. In considering the scope of the enquiry which the court was required to carry out, I bear in mind that not all of the delays were attributable to the local authority.*

Manchester City Council v G & Ors [2011] EWCA Civ 939

5. Baker J's decision and reasoning were upheld by the Court of Appeal, which overlaid no gloss of any kind on the rules, beyond agreeing with the judge that it was not a typical case.

D v R (the Deputy of S) and S [2010] EWHC 3748

6. An order was made for a litigant in a property and affairs case to pay their own costs and a proportion of a deputy's costs after a certain date. Henderson J reached this conclusion because the litigant's conduct had led to the hearing being substantially longer and more complicated than it should have been.

7. He also referred to Re Cathcart, noting that under the Lunacy Act 1845 the court's discretion in the matter of costs was unfettered, whereas now it is subject to the Rules. He described the authorities (Cathcart and one other old case) as being of little assistance, although they do make valuable observations on a number of other matters that are as relevant now as then: good faith, the relationship between the parties, the amount of costs and the ability to pay them.

AH v Hertfordshire Partnership NHS Foundation Trust & Anor (including costs) [2011] EWHC 276 (COP)

8. An order was made for various public bodies to pay half the costs of a number of residents of a specialist unit after the bodies' plans to move them into the community were rejected. Departure from the normal rule was based upon poor compliance with the Practice Direction on Pre-Action Conduct, the fact that the residents were left to bring proceedings, the absence of any proper best interests assessment, lack of proper planning, and a successful outcome for the residents.