

**IN THE COURT OF PROTECTION**

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

Date: 14/03/2022

**Before :**

**HIS HONOUR JUDGE BURROWS**

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**Between :**

**A LOCAL AUTHORITY**

**Applicant**

**- and -**

**ST**

**Respondent**

**(by her litigation friend, the Official Solicitor)**

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**Sophie Hurst** (instructed by **LA Solicitor**) for the **LA**  
**Sophia Roper** (instructed by **Simpson Millar**) for the **Official Solicitor on behalf of ST**

Hearing dates: 3 March 2022  
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**APPROVED JUDGMENT**

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of ST must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

## **HIS HONOUR JUDGE BURROWS :**

### INTRODUCTION & BACKGROUND

1. This short judgment deals with the application for costs made by the Official Solicitor. It concerns only those costs of, and incidental to this hearing and not the action so far as a whole. I have heard brief oral submissions from Ms Sophia Roper on behalf of the Official Solicitor, and Ms Sophie Hurst on behalf of the local authority. Their submissions were succinct and helpful.
2. Since these proceedings are ongoing and this judgment is delivered in public. I have sought to preserve the privacy of the person concerned by anonymising her, the local authority and any other locations and facts that may identify her.
3. These proceedings concern a young woman who I shall call Sarah, or ST. Sarah is 18 years of age. She lives in the North of England. She has had a troubled life. She has been the subject of emotional, physical and sexual abuse throughout her childhood and adolescence. She has a diagnosis of mild learning disability and ADHD the effects of which are exacerbated by her trauma.
4. Just before Christmas 2021, Sarah's situation reached a crisis. She was missing and it was feared she was at risk of serious harm. The LA made an urgent application to this Court because of credible concerns for her safety. This was due to her taking illicit substances and continuing to be involved with an abusive man with whom she was in a relationship and who had physically assaulted her. I made orders empowering the LA, along with the police to remove Sarah to a place of safety and for her to be deprived of her liberty there. The Official Solicitor was involved from the beginning. Every order made was made only after the OS and the Court had scrutinised the nature of the proposed plan and its likely impact on Sarah.

5. There was general agreement between the parties as to the basic care plan needed to keep Sarah safe. There was also agreement that there was sufficient evidence of her incapacity to make decisions as to her residence and care for interim declarations to be made under s. 48 of the Mental Capacity Act 2005 (MCA). But it was also agreed that an independent psychiatrist should be instructed to prepare a detailed and robust assessment of Sarah's capacity to make a number of decisions. That expert is to report in a couple of months.
6. I say at this point that the above brief background demonstrates the difficult task the LA undertook when making the application to this Court. They acted with urgency and they acted properly.

#### PROCEDURAL CHRONOLOGY

7. The brief procedural chronology is as follows. I made initial orders on 21 December 2021. There was a remote hearing on 23 December 2021 at which the OS accepted the invitation to act as Sarah's litigation friend. Interim declarations were made as to Sarah's incapacity in the relevant areas. It was agreed that the Court needed an independent psychiatric report in order to consider the making of long-term best interest declarations in respect of Sarah that could have a profound impact on her life. The joint instruction of a consultant psychiatrist was agreed in principle, although the identity of that expert was at that time unknown. Later, on 7 January 2022 that expert was identified, and other disclosure orders were made.
8. On 13 January 2022, I was informed that Sarah had absconded from her placement and was once again at risk. I made an order that she be taken to a safe residence and there she should be detained.
9. On 27 January 2022 there was another remote hearing at which the LA and the OS were legally represented. I was told Sarah was doing well, having made "good progress". I was asked to consider meeting Sarah for a judicial visit sometime before the next hearing. This I agreed to do- indeed, I met her the day before this hearing. I authorised Sarah's continued residence at the

placement having found that she continued to lack capacity to make decisions around her residence and care, and that her deprivation of liberty was reasonable, proportionate and lawful.

10. I listed another hearing to take place on 15 February 2022. There was however an issue on which the parties could not agree. The LA wished considerably to restrict Sarah's use of social media. This was because they feared she would make contact with harmful people, perhaps engage in online activities and conversations that may cause her harm, and give away the address where she was residing, thereby exposing herself to a risk from her "boyfriend".

11. The Official Solicitor was concerned with two aspects of this. First, that there was no specific capacity assessment dealing with Sarah's capacity to make decisions about the use of social media. Secondly, that even if she were to lack such capacity the restrictions proposed would be unnecessary and disproportionately restrictive.

12. I wanted to know about Sarah's use of the internet (which I had not prohibited) as well as her contact with her family, and her acceptance of medication.

13. On 15 February 2022, another short remote hearing took place. It remained clear that the access to social media was still an issue between the parties. Due to her age and previous reliance of social media, this was clearly a matter of great concern to Sarah. Equally, access to social media was a potentially hazardous activity for Sarah since she could disclose where she was residing to those who may wish her harm. I adjourned the application and listed an attended hearing in Manchester on 3 March 2022 with a one-day time estimate.

#### CRITICAL DIRECTIONS & DEFAULT

14. I made the following material directions:

(9) .....By noon on 25 February 2022, the applicant shall file an updating statement addressing and exhibiting but not limited to:

***Social media and internet access***

- a. the assessment of ST’s capacity to make decisions as to her access to the internet and social media conducted on 14 February 2022
- b. its reasoned assessment of the risks to which accessing social media would expose ST and any benefits which such access would provide her in terms of her wellbeing and cooperation with professionals
- c. its reasoned assessment of the impact on ST’s emotional and mental wellbeing of being denied access to social media, and the risks to which such denial would expose ST in terms of her wellbeing and cooperation with professionals
- d. the options which have been considered as regards ST’s access to social media, identifying all measures which could be taken to mitigate the identified risks
- e. an update as to ST’s use of the internet
- f. its position as to ST’s best interests as regards access to the internet and social media

.....

(11).....

- a. by 4pm Friday 25 February 2022, the applicant shall file and serve an updated and paginated court bundle;
- b. by 4pm Monday 28 February 2022, the applicant shall file and serve a position statement;
- c. by 4pm Tuesday 1 March 2022, the solicitors for [ST] shall file and serve a position statement;
- d. [ST]’s social worker [XX] shall attend the hearing.

15. Crucial to this case management was the capacity assessment concerning Sarah’s use of social media. That was carried out on 14 February 2022. The decision about which Sarah’s capacity is assessed is stated as: “Does ST understand using social media safely”? This was not the correct statement of the decision to be assessed, which was recorded on the Order as ST’s “capacity to make decisions as to her access to the internet and social media”.

16. The assessment records that she is able to understand the relevant information and to retain that information for long enough to make a decision. The

assessor concludes that ST “is able to weigh some of the pro’s and con’s, but she cannot weigh the risks to the extent that would keep her safe”. She is able to communicate her decision.

17. The social worker’s statement should have been served before noon on 25 February 2022, it was in fact served just before 5 p.m. that day. The statement records that Sarah has, in fact, been using Facebook. There have been no inappropriate posts. Sarah has been able to access social media using a Firestick.
18. By close of business on 25 February 2022, it should have been clear to the LA that neither the capacity evidence nor the best interests evidence was compelling. Certainly, it would have seemed highly unlikely that a Court would find that Sarah lacked the capacity to make decisions around social media, and even if it did, that preventing her use of that media would be in her best interests.
19. The LA’s position statement was due at 4 pm on Monday 28 February 2022. The timetable was such that the social worker and the legal “team” at the LA should have been formulating their position that day. In fact, that did not happen. The solicitor dealing with the case was occupied in Court. No one else stepped into his shoes.
20. Instead, on 1 March 2022 the OS’s position statement was served on the LA in compliance with the directions, but obviously without the author knowing what the LA’s position was. That document is clear that the LA’s case on capacity and best interests is weak. The issue of costs is also raised.
21. Counsel for the LA was only instructed the next day, specifically to draft a position statement and appear at the hearing. That document was dated 2 March 2022 and was sent to the parties and the Court just before 5 pm on 2 March 2022. An earlier email from the LA had been sent to Sarah’s solicitor, but she was occupied with a judicial visit I was paying to Sarah at the time. That position statement conceded that there was insufficient evidence to rebut

the presumption of Sarah's capacity to make decisions about accessing the internet and social media.

22. The attended hearing listed before me in Manchester with a day listing was therefore ineffective.

### A VERY BRIEF SUMMARY OF THE LAW ON COSTS

23. I have read and heard submissions from counsel on the principles I must apply when considering an application for costs in a welfare case in the Court of Protection. I will not outline those extensive submissions in full, but a summary of what I must do will suffice.

24. In personal welfare cases the 'general rule' as to costs is that "there will be no order as to the costs of the proceedings....": COPR'2017 r 19.3.

25. However, COPR r. 19.5 specifies the circumstances where the court may depart from that general rule. When deciding whether to do so 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 that party's case, even if not wholly successful; and (c) the role of any public body involved in the proceedings" COPR 19.5(1).

26. COPR 19.5(2) states:

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 matter;
- (c) the manner in which a party has made or responded to an application or a particular issue;
- (d) whether a party who has succeeded in that party's application or response to an application, in whole or in part, exaggerated any matter contained in the application or response; and

(e) any failure by a party to comply with a rule, practice direction or court order.

27. Although there is a considerable amount of caselaw on this issue, these cases tend to illustrate examples of where the court has (or has not) exercised its powers under r. 19.5 rather than operating as paradigms.

28. Essentially, I must look at the facts of the case, apply the non-exhaustive list of factors in COPR 19.5(2). Then I must decide whether to depart from the general rules, and, if so, what order to make?

### FINDINGS

29. I remind myself that I am not looking for bad faith on the part of the party against whom the order is sought. There is no need for that- and certainly, there is no hint of that here on the part of the LA.

30. This case has been properly brought, as I have already indicted. Nothing I say below should act as a deterrent to LAs deciding whether to bring urgent cases such as these.

31. However, the matter that led to the hearing of 3 March 2022 was specifically whether Sarah had capacity to make decisions about social media access and, if she did not, whether it was in her best interests for restrictions or even a prohibition to be imposed? The OS made her position very clear from the outset. The LA was in no doubt this was the subject of the hearing. There was also no doubt how significant that issue was and is. Restrictions and prohibitions on social media use are profoundly significant for Sarah as a young woman used to using and perhaps living on that media. Equally, if she were able to use that media it could expose her to serious risk. She could engage in on-line activities which could cause her distress and put back her



improving mental state. She could even disclose her safe place and expose herself to direct harm at the hands of others.

32. With the stakes so high, it was incumbent on both parties, but particularly the LA who sought to restrict her social media use, to ensure that they conducted themselves in accordance with the directions made by the Court, and considered the strength of their case continually. A failure to do so by either side could have led to an unnecessary expenditure of time and money.

33. In this case the LA knew, or ought to have known by 25 February 2022 that their case was weak. I suspect there was little contact between the social worker and the LA's very busy solicitor. The failure to serve an updated paginated bundle by 4 p.m. on 28 February also points to a lack of time. The social worker's witness statement was served late, however, just before the close of office hours, when it should have been served by noon that day. Had matters proceeded as they should, by Monday 28 February 2022, the LA should certainly have had a clear position, and that should have been the subject of their position statement that should have been served by 4 p.m. that afternoon. It was not. Instead the OS had to provide a position statement responding to the LA's unknown case. By the time the LA instructed counsel, the deadline for their position statement was long gone. Ms Sophie Hurst's position statement was sensible and reasonable in conceding the application. The problem is it was too late.

34. I would add that at no stage did the LA seek an extension to the timetable, or to vacate the hearing on 3 March.

35. Should I describe these failings of the LA as conduct that fell below a proper standard? Or perhaps that it was unreasonable for them to continue to pursue a particular matter, namely social media restrictions, when the capacity and best interests evidence was clearly weak? Or should I point to the failure to

comply with the directions order that had been made by the court with the parties' general agreement? I consider each of these factors to apply in this case. I am therefore satisfied it is appropriate to depart from the general rule.

36. Had it not been for these failings and breaches, the hearing would not have gone ahead, and the parties would not have travelled to Manchester. It seems to me that I must take into account when deciding what order to make that it is probable some directions would have had to be made once it was clear that the hearing of 3 March was to be ineffective. Some time would have had to be spent on formulating an order. However, none of that would likely have involved a hearing, and if it had, it would not have been all day or attended.

### DECISION

37. The order I am going to make is that the LA pay 85% of the costs incurred by the OS of and incidental to the hearing on 3 March 2022 I make it clear that does not include the cost of the judicial visit, which would certainly have occurred whatever.

38. I hope the parties can translate my order into an agreed liquidated sum. Failing which, I direct that the OS submits to the Court within 14 days a costs schedule. The LA then has 7 days to argue counter to that schedule. I will then summarily assess the costs after that.

39. That completes the judgment.