Neutral citation number: [2024] EWCOP 6 Case no. 14044755

IN THE COURT OF PROTECTION

In the matter of VS (deceased)

First Avenue House
42-49 High Holborn
London
WC1V 6NP

Tuesday, 19th December 2023

Before:
HER HONOUR JUDGE HILDER

B E T W E E N:

(1) CS
(2) AG

Applicants

-and-

PS

Respondent

-and-

Professor Celia Kitzinger

Intervenor

The Applicants appeared in person
The Respondent appeared in person
The Intervenor appeared in person

AMENDED APPROVED TRANSCRIPT OF ORAL JUDGMENT

as amended pursuant to Rule 5.15 of the Court of Protection Rules 2017 on 12 February 2024

This judgment was delivered in public.

HHJ HILDER:

1. During his lifetime, there were proceedings in the Court of Protection in respect of Vincent Stephens. He was a party to those proceedings, acting through a litigation friend, the Official Solicitor.

2. The general rule in Court of Protection proceedings is that hearings are conducted in private, as set out in Rule 4.1 of the 2017 Rules. However the "ordinary" approach, as set out in Rule 4.3 and Practice Direction 4C, is that hearings are held in public but subject to an order which imposes restrictions on the publication of information which identifies or may lead to the identification of the protected person (and others) or their whereabouts. This order is commonly referred to as the 'transparency order.' Such an order was made in this matter, more or less in the standard terms provided in the Practice Direction, by Her Honour Judge Owens on 30 January 2023, expressed at paragraph eight to have effect until further order of the Court.

3. The last order in the substantive proceedings about Mr. Stephens was made on 16th June 2023. That order was made at a hearing and at the end of it, no party raised any issue about the transparency order. I make that observation without any intent of criticism at all. That is absolutely usual, in my experience, in Court of Protection hearings.

4. Mr. Stephens died on 18th June 2023.

5. By COP9 application dated 7 September 2023, Professor Carolyn Stephens - the first-named applicant in the substantive proceedings - now seeks discharge of the transparency order. I will refer to this application as "the discharge application".

6. The discharge application is supported by Professor Celia Kitzinger, whom I have joined for the purposes of the application as intervenor. Professor Kitzinger has a longstanding close interest in the operation of transparency considerations in the Court of Protection. She makes regular blogposts via the Open Justice Project, of which she is a co-director. She sent an email to the Court timed at 18.02 on 5th November 2023, which I have subsequently deemed to be her application in this respect.
7. The discharge application is opposed by Dr Sorensen, who was a respondent in the substantive proceedings.

8. The Official Solicitor was notified of the discharge application but, by email timed at 14.23 on 22 September, she responded as I accept to be accurate, namely that she is no longer involved because there is no one for her to represent.

9. By way of context, it is sufficient for present purposes to note the following matters:
    - Professor Stephens is the only child of Vincent Stephens;
    - after her mother/his wife died, Mr. Stephens formed another companionship;
    - Dr Sorensen is the daughter of that companion, who has herself now died;
    - Mr. Stephens appointed both of them (Dr Sorensen and her mother) as his attorneys for both property and affairs and for welfare.

10. I have not, at any stage, made any findings of fact at all about the companionship or what may or may not have happened since the death of Mr Stephens' wife.

11. Professor Stephens wishes to air concerns that individuals and/or public bodies either actively prevented her from maintaining contact with her father or at least failed to facilitate ongoing relationships with a vulnerable person. Dr Sorensen maintains that Mr. Stephens himself wanted to be left alone to pursue his chosen path in later years.

12. The substantive proceedings in this court focused on contact between Mr Stephens and his daughter and wider family and friends. Arrangements for such contact were achieved at the

first hearing, and subsequently contact took place at the care home where Mr. Stephens was then resident.

13. Insofar as is material, the transparency order in these proceedings provides at paragraph six that:

> "The material and information covered by this injunction is
>
> (i) any material or information that identifies or is likely to identify that
> a) VS is the subject of these proceedings (and therefore a P as defined in the Court of Protection Rules 2017) or that any person is a member of the family the subject of these proceedings, namely VS; and
>
> (ii) any material or information that identifies or is likely to identify where any person listed above lives or is being cared for or their contact details".

14. All of that information, according to paragraph seven of the transparency order:

> "cannot be published or communicated by any means orally or in writing, electronically, and persons bounds cannot cause, enable, assist or encourage the publication or communication of it or any part of it".

15. For the purposes of the issue before me today I have considered:

a. from Professor Stephens:

i. her COP9 application, which sets out at paragraph 2.2 the reasoning for her request;

ii. a 22-page position statement dated 1st December 2023; and

iii. oral submissions made today;

b. from the intervenor:

i. a 15-page position statement dated 17th November 2023; and

ii. oral submissions made today;

c. for Dr Sorensen:

i. a document entitled "Points of Dispute by P S" dated 22 September 2023;

ii. a position statement dated 1st December 2023; and iii. oral submissions made today.

16. None of the litigants before me has the benefit of legal representation. Therefore, with their agreement, I took the perhaps unusual approach of outlining to them the law of which I have reminded myself today *before* I heard their submissions. Having done that once, I do not expect them to sit through it again, but I confirm that this is what I am reminding myself of. [*Inserted here is the transcript of that part of the hearing where the judge outlined the law*:

    a. None of the litigants today has the benefit of legal representation. My task is more complicated than simply choosing which side I prefer. I must set the opposing cases in the context of the law and determine the outcome accordingly. So, more commonly, I would expect the legal representatives now to set your factual arguments into the legal context. Of course I do not expect unrepresented litigants to be able to do that and I intend that you are at no disadvantage for not being represented. So I have a proposal as to how we may conduct the hearing. Having already read your position statements, I suggest that I outline to you what I am reminding myself of in respect of the law so that you know the law that I will be applying, and then you each have an opportunity to say to me anything further that you want to say in the context of that explanation. Happily, I can see lots of nodding heads for that. Does anybody want to disagree with that way forward? Excellent.
    That is what we will do then.

    b. I am reminding myself of the following broad propositions:

        i. The transparency order in the Court of Protection is intended to reconcile the personal nature of information which is likely to be disclosed in the proceedings with the public need to understand and have confidence in the Court's decisionmaking process.

        ii. So I remind myself specifically of paragraphs 27, 28 and 29 of Practice Direction 4A, which tell me as follows:

            "27. The aim should be to protect P rather than to confirm anonymity on other individuals or organisations. However, the order may include restrictions on identifying or approaching specified family members, carers, doctors or organisations or other persons as the court directs in cases where the absence

of restriction is likely to prejudice their ability to care for P, or where identification of such persons might lead to identification of P and defeat the purpose of the order. In cases where the court receives expert evidence the identity of the experts (as opposed to treating clinicians) is not normally subject to restriction, unless evidence in support is provided for such a restriction.

28. Orders will not usually be made prohibiting publication of material which is already in the public domain, other than in exceptional cases.

29. Orders should last for no longer than is necessary to achieve the purpose for which they are made. The order may need to last until P's death. In some cases, a later date may be necessary, for example, to maintain the anonymity of doctors or carers after the death of a patient."

iii. I remind myself also of the "familiar" balancing exercise between Articles 8 and 10 of the European Convention of Human Rights. Article 8 protects privacy in family life. Article 10 protects freedom of expression. And the classic exposition of the balancing exercise is that of Lord Steyn in the case of *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, in particular at paragraph 17, where he said this is the approach the Court should take:

"First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each."

iv. I have reread the decision of Charles J, then Vice-President of the Court of Protection, in *V v Associated Newspaper*s [2016] EWCOP 21, from which I note his conclusion that the Court of Protection has jurisdiction, even after a finding of capacity and the death of the subject of the proceedings, to make a reporting restrictions order (although I note that in that case Charles J also sat as a High

Court Judge.) At paragraph 11 of his summary of conclusions, it is stated that reporting restrictions orders in serious medical treatment cases can extend beyond the death of the subject of proceedings and there is no presumption or default position that such order should end on P's death.

v. Finally I remind myself of "the naming propositions", which are the well-known paragraphs in a speech by Lord Rogers in *In Re Guardian News and Media Limited* [2010] UKSC 1, where he said " 'What's in a name?' 'A lot', the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed. Editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb information. A requirement to report it in some austere abstract form devoid of much of its human interest could well mean that the report would not be read, and the information would not be passed on."

17. Turning to each of the party's positions:

A. Professor Stephens says she was 'forced to come to the Court of Protection' due to the actions of Mr Stephens' two attorneys, and she gives four reasons for now wanting to discharge the application:

- firstly, that the subject of the order had been protected during the proceedings. Having now died, Mr Stephens himself does not need any further protection.
- secondly, those whom Professor Stephens regards as his family all support the discharge of the restrictions order. Attached to her position statement, there are written confirmations of this by eight such persons. Explicitly, Professor Stephens contends that Dr Sorensen is not "family" of Mr Stephens and, therefore, was never protected by the order. Paragraph 12 of her position statement expands on that argument.
- thirdly, the very existence of the transparency order now causes anxiety to Professor Stephens and her family members because they just do not know what it is they are, and are not, allowed to talk about or to whom. It is a very

unnatural restriction - what they can say, as when colleagues in the canteen last week ask what happened?

- fourthly, there is a very strong public interest in understanding lasting powers of attorney and the role of the Court. Professor Stephens has been invited to take part in a BBC programme which proposes to cover these issues, and she says that it is important that such coverage is facilitated.

B. The intervenor, Professor Kitzinger, has very helpfully set out in her position statement, from paragraph 11, precisely the balancing exercise which I have already identified.

- She notes that it is important that family members themselves actually want to discuss their experiences.
- She notes that the death of Mr Stephens is a material change of circumstances from the time when the order was made.
- She points out that the wording of the transparency order presumes a shared understanding of who is and is not "family", when in fact such a shared understanding might not exist.
- She acknowledges Dr Sorensen's concern that information presented to the Court may be accepted as true.
- She has given me orally this afternoon an account of her own experience of watching the BBC programmes to date, and she agrees with Professor Stephens that the public interest is engaged because this case has already involved public bodies and their representatives - one more in fact since the Court of Protection became involved - and the public has a legitimate inclination in knowing what those public bodies are doing. More specifically, she says that the role of lasting powers of attorney is a matter of legitimate public interest at the moment.
- She refers to the "What is in a name?" proposition as I have outlined already.

C. Dr Sorensen says that

- the matters considered by the Court were actually narrow - the proceedings focused on the ability of the applicant, family members and friends to visit Mr Stephens. That issue was addressed; there is no public interest in it.

- She points out that the Public Guardian's report, which was initiated by Professor Stephens and not by the Court, found that there were no matters of concern.
- She expresses her fear that evidence has been submitted to the Court which has not actually been tested by the Court but that an inference may be drawn of its truth when there in fact has been no such acceptance of truth by the Court.
- She *does* consider herself to be a family member of Mr. Stephens', not least because of the longevity and the closeness of her relationship with Mr Stephens.
- She contends that Professor Stephens can still, even if a transparency order remains in place, give her point of view anonymously, with no less impact.
- She expresses her concern that, "the *modus operandi* seems to be that if Professor Stephens throws enough mud, then some may stick", and she has a professional reputation to protect.

18. Bearing all of that in mind, I turn to the balancing exercise in this matter.

19. The following factors seem to me to point in favour of granting the application and discharging the transparency order:

    a. Firstly, the circumstances of this case do clearly fall into a domain of proper public interest. In an aging population, where second families are far from unusual, the responses of public bodies to shifting loyalties and changing perspectives are a matter on which there should be open public debate on an informed basis. In particular, the use of lasting powers of attorney is a matter of high public consciousness given recent legislation and a policy of encouragement.

    b. The second factor in favour of granting the application and discharging the transparency order is that the subject of these proceedings has now died. He has therefore, in law, no continuing interest to protect, whereas it would be a significant intrusion into the rights of freedom of speech of the living to maintain the order.

c. Thirdly, Mr. Stephens' daughter and many of his wider family and friends actively seek to be able to talk about their experience, and actively waive their rights to privacy.

20. On the other hand, factors pointing to refusal of the application and maintaining the transparency order seem to me to be:

a. Dr Sorensen objects to intrusion into her private life. She has concerns about the fairness of the reporting and the damage to her own standing, and she does not willingly waive her right to privacy

21. Considering those factors, I have to come to a clear view as to how the balance settles. Even if I accept that Dr Sorensen comes within the persons covered by paragraph 6(i)(a) of the transparency order, that is even accepting that Dr Sorensen falls within the meaning of "family member" of Mr. Stephens, I am satisfied that the scales come down very heavily in favour of discharge of the transparency order. Mr Stephens himself is no longer in need of its protection. The family of his marriage actively wish to be able to discuss their experiences, including in court. It is not the role of the Court of Protection, still less within its practical ability, to control the accuracy and fairness of reporting. In any event, that is not the meaning of freedom of speech. The answer to any concerns of 'balance' in reporting is probably more openness, not less - that Dr Sorensen too should be free to discuss her experiences.

22. I have considered whether there should be some limited form of transparency order, at least to protect the address of Dr Sorensen, but on the information that I have been provided with, it is perfectly clear that she has already been located by the BBC. I note that Professor Stephens
says that this was nothing to do with her, and I accept that. In reality there is now little point in me trying to take that step.

23. I consider that it is not necessary for me today to make any finding as to whether Dr Sorensen falls within a legal definition of "family", although I have sympathy for her position. As I have measured the balancing exercise, even assuming in her favour that she is 'family' of Mr. Stephens and to that extent against the applicant, the pointer is still in favour of granting the application and discharging the transparency order. So it is much better if determination of such issue is left for another day, when there is a proper argument to be heard. Meanwhile, I do note that care should be taken in the making of transparency orders, so that individuals within its scope are clearly understood by everybody.

24. Finally, although it is not within the scope of this decision, it may be helpful to note that the Rules Committee is currently considering the terms of the standard transparency order template. One focus of its concerns is the expressed duration of the transparency order when it is made. Had the transparency order in this matter been expressed to have effect "until final order", it would have ceased to have effect on 16th June 2023 - Professor ~~Sorensen~~ Stephens would not have had to make this application; Dr Sorensen would not have had the opportunity to argue against it in circumstances where she is aware of the applicants' intentions to publicise. Had the order been expressed to have effect "until the death of VS", it would have ceased on 18th June 2023, and the same could be said. The time between the making of the discharge application in September and today's hearing is partly explained by an earlier listing being vacated because the respondent was not available to make submissions. Restriction of freedom of speech is always a serious matter but there has been no argument made to me today of any real prejudice caused by the time allowed to facilitate argument against the application.

End of Judgment.

Transcript of a recording by Ubiqus (Acolad UK Ltd)
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