

Judicial Communications Office

Thursday 12 May 2011

JUDGE CRITICISES TRUST FOR SEEKING TO USE GUARDIANSHIP TO RESOLVE DISPUTE WITH FAMILY OF VULNERABLE ADULT

Summary of Judgment

Mr Justice Treacy, sitting in the High Court, was today critical of the way in which a Trust sought to use guardianship powers to resolve a dispute between the family of a vulnerable adult and his professional carers.

The applicant, named in court as JR50, is a 45 year old man who suffers from a number of medical conditions. He developed cerebral palsy at the age of 3 months as a result of deficiencies in the medical treatment he received for bronchial pneumonia. He suffers from low muscle tone and as a result has difficulty in swallowing. This presents a continuous risk of choking which is exacerbated if he is given inappropriate food. He also suffers from restricted mobility in his arms as a consequence of falling out of an unprotected bed in a nursing home when he was 26 years old. He had been placed in this home while his mother underwent hip replacement surgery. The applicant also suffers from a learning difficulty. There is no medical consensus about the extent of his mental capacity/incapacity other than that all experts agreed that he cannot make decisions for himself about what foods he can safely eat. There is also evidence that he may suffer from a mental disorder of a kind which might benefit from the use of anti-psychotic drugs but there is divergence in this medical opinion.

The application was brought at a time when JR50 had been in his current nursing home as a voluntary patient for 14 years. His family frequently visited him during the week, took him out at weekends and included him in family holidays. Over a period of time a disagreement emerged between the family and some of the professional carers about the applicant's treatment and care. Some advisers suggested he would benefit from the use of anti-psychotic drugs. The family vehemently objected to this. Other professionals recommended that the applicant should only receive food of a certain consistency. Again the family had difficulty accepting this.

Mr Justice Treacy said that the conflict between the professional carers and the family had not been handled well by either side. Members of the family

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had become intransigent in their resistance to some of the advice. On the other side, he referred to an example of when some of the care professionals peremptorily refused the family permission to take their son on an outing without the insertion of a feeding tube into his stomach. The inappropriate handling of the suggestion of this medical procedure precipitated an emotional outburst from JR50's mother which culminated in her being handcuffed and forcibly removed by police from the side of her disabled son. The judge said the outcome of this could not have been helpful for any of the parties, least of all for JR50 who was present when the incident occurred.

Relations between the family and the professional carers reached a low ebb on 17 December 2009 when the Trust decided to restrict the family's contact with JR50. The Trust applied for guardianship of JR50 under the Mental Health (NI) Order 1986. This resulted in his visits to his family home, his overnight stays with his family and his holidays with the family stopping or being severely reduced. JR50 made an application for review of this decision on the grounds that the Trust did not have legal authority to restrict him from leaving his nursing home unless supervised by Trust staff. He also claimed that the restriction of family contact offended his rights under Articles 2 and 8 of the European Convention on Human Rights. The Trust claimed that it took guardianship powers because of the medical evidence that there was a significant risk of JR50 choking which was exacerbated if he was given inappropriate food.

Mr Justice Treacy said that it was clear that this case showed a fraught conflict between two sets of well motivated carers each of whom had different perspectives and different roles in JR50's life and each of whom had strong convictions about how his needs could best be met. He said that, unfortunately, the two roles did not co-exist peacefully and productively:

“Each side in its own way sought to have the dominant role in the patient's care and to restrict or marginalise the input of the other. This drive for exclusive control is not appropriate and ultimately is not beneficial to the patient. The patient is the focus of this Court's concern and the Court wishes to ensure that the patient is able to benefit from the accepted and respected input of everyone with a legitimate interest in his care.”

Mr Justice Treacy said he was “entirely satisfied” that whatever guardianship may or may not permit, it did not permit one party to a dispute about the management of a vulnerable person to assert a borrowed primacy over any other party's legitimate but conflicting interest:

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“The idea that guardianship might be used in such a way offends fundamental principles of law and common sense. In effect, in the circumstances of this case, the Trust took on guardianship powers to give itself a determinative role in a dispute with a private family and clothe itself with powers which it alleged vested it with sufficient authority to defeat the family’s interest. It is quite clear that this is not what guardianship is for and that the Trust was wrong in seeking to use guardianship for this purpose.”

The judge said that it appeared to be accepted by both parties that other methods existed to resolve disputes of this nature. He said that because of this he did not propose to go further and rule on the nature and extent of any aspect of guardianship powers. Instead he referred to the Code of Practice on the Mental Health (NI) Order 1986 which stated that guardianship should be part of an agreed comprehensive care plan drawn up by the professionals who are or who could be involved in the patient’s care, and ... the patient’s nearest relative or other informal carer. The Code also states that effective co-operation and communication between all persons concerned in implementing the care plan is a necessary component.

Mr Justice Treacy said that, in his view, this meant that all parties should be engaged as accepted and equal partners in the creation and delivery of the most appropriate care package for the vulnerable individual. He concluded that it is important that all forms of expertise and insight, both professional and personal, should be equally valued at the level and in the way appropriate to the issue under discussion in the care plan. The judge referred to two examples of professionals in this case displaying appropriately inclusive and accepting attitudes. He said that this form of progressive, inclusive practice may provide a backdrop against which guardianship powers may work effectively. It may also create a situation where guardianship powers may never be necessary to support a vulnerable voluntary patient:

“But using guardianship to exclude, control or render ineffective an appropriately concerned interest is never the right way to proceed in cases such as this one.”

Mr Justice Treacy concluded by saying that the family and the professional carers had made their peace since the application was brought. He said that in these circumstances rather than making an order against one or other of the parties he was going to invite them to come together to consider and propose a formulation of order which is appropriate and which would safeguard the new harmony that has emerged around JR50.

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NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website (www.courtsni.gov.uk).

ENDS

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