Neutral Citation Number: [2023] EWHC 1258 (Fam)

Case No: FD23F00031

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
And
IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/05/2023

Before :

MR JUSTICE MOSTYN

- -

Between :

A Local Authority	**Applicant**
- and -	
LD (1) and RD (2)	**Respondents**

- -
- -

Conrad Hallin (instructed by the local authority legal department) for the Applicant
Leonie Hirst (instructed by Edwards Duthie Shamash on behalf of the Official Solicitor) for the First Respondent

Hearing dates: 15 and 19 May 2023

- -

Approved Judgment

.....

MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that in any published version of the judgment the anonymity of the applicant local authority, the respondents and the social workers and other persons mentioned in the judgment 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. This order has been made *pro tem* as the court is satisfied that a departure from anonymity to any degree could expose the first respondent to the risk of serious harm.

.

Mr Justice Mostyn:

1. In this judgment a reference to:

   i) "The inherent jurisdiction" is to the inherent power of the High Court, devolved to it from the Crown following the constitutional settlement enacted by the Act of Settlement 1701, to protect vulnerable, but nevertheless capacitous, adults.

   ii) "Section 48" or "s.48" is to s.48 of the Mental Capacity Act 2005.

   iii) "The s.48(a) condition" is to the requirement within s.48 that the court has reason to believe that the protected party lacks capacity.

   iv) "The applicant" is to the Local Authority.

   v) "OS" is to the Official Solicitor.

   vi) "LD" is to the protected party, the first respondent, represented by the OS as his litigation friend.

   vii) "RD" is to his mother, the second respondent.

2. This judgment deals with two matters which have arisen in this complex and sensitive case which is proceeding under s.48 and/or the inherent jurisdiction.

3. The two issues are:

   i) the exact meaning and scope of the s.48(a) condition, and

   ii) if s.48 does not apply, the extent of the power under the inherent jurisdiction to make an order which has the effect of depriving LD of his liberty.

Background facts

4. LD is in his forties. He has Downs Syndrome, a severe learning disability, autism traits and a diagnosis of atrio-ventricular septal heart defect which can negatively impact on the ability of his blood to circulate oxygen in his body. He is unable to communicate verbally and communicates by body language, such as grabbing techniques, hand signals and noises.

5. He lives alone with his mother RD, who is in her eighties. He has scarcely been seen by anyone in the last three years. He requires cardiology review, but has not been seen for cardiology assessment since 2018. He has 24 hour care needs. He requires full support:

   - with all personal care, including showering and bathing;
   - with eating, preparation and feeding;
   - to mobilise and, if going out (which he has not, for a long time), use of a wheelchair;
   - to take medication;
   - with toileting, as he is doubly incontinent;

- to attend health care appointments and to access the community and social opportunities;
- with dressing; and
- with communication.

He is very seriously impaired.

6. RD has in the past generally engaged with social care and health care professionals, mainly through telephone conversations. She has previously accepted some limited support, in the form of day care services. From 2015 LD attended a private day care facility at two day centres for 2 days per week; however he had sporadic attendance, sometimes having weeks or months off, especially in the winter period.

7. The Covid 19 pandemic led to RD isolating herself and LD, which stance has persisted despite the lifting of restrictions. RD no longer lets anyone into her home. Save for a heating engineer who visited to repair the boiler on 20 April 2023, and who briefly saw LD sitting in a chair, LD has not been seen since 2020.

8. Neither RD nor LD are believed to have had a Covid-19 vaccination.

9. During the pandemic they received support from carers in the form of two visits per week and in the past 6 months they have received support from a care agency. Since the pandemic RD will only allow carers to meet with her on the doorstep of her home and collect a shopping list, do the shopping and then return to drop off the supplies they have bought for her. She will not allow the carers to see LD, who is kept upstairs at all times confined to his bedroom and bathroom. It is believed that LD sleeps in a chair with no daily/night time routine. RD has reported that she has not taken him downstairs or to their garden as she is concerned that "he will get excited and want to go outside".

10. A safeguarding referral was made on 4 April 2023 by SR, Adult Congenital Nurse Specialist of the adult congenital cardiac services team at the local Hospital. LD was supposed to be attending a clinic in April 2023 for a face-to-face review with the Consultant, and for an ECHO and ECG. As stated, he was last seen in the clinic in 2018 and all appointments since then have been by telephone. SR spoke to RD on 4 April 2023 and was told that RD will not be bringing LD to the hospital in the near future as they are confined at home due to the risk of COVID, and also from other bugs which pose a risk to LD; and she was not prepared to put him at risk of those.

11. On 11 April 2023 LG, a senior case social worker for RD, made contact with her to check on her well-being; she discussed the problems with the boiler and the need for a cardiac assessment of LD. LG discussed the plan for a GP visit, which RD said she did not want. On 17 April 2023 LG visited the home to request to see LD, but this was refused. LG reported that RD's general demeanour was very unkempt; she was wearing a dirty dressing gown with hood up and grubby coat over the top. She was, however, very talkative and agreed that LG could update LD's Care Act assessment, but only from the doorstep. LG noticed the house was in darkness, the garden weed-ridden and overgrown. On 19 April 2023 a visit was attempted by the GP and the duty social worker, but RD would not answer the door, and by telephone explained that she would not accept a visit. On 20 April 2023 SG, a senior social worker, telephoned RD to discuss the concerns raised by the hospital and asked if she would be willing to allow a visit; but RD was again very clear that she would not let anyone in the house and would

remain housebound, until she feels it is necessary. LG tried on further occasions to engage RD over the phone, but on 24 April 2023 RD asked her not to call again.

12. RD is believed to be unable to meet LD's care needs, which include continence care. LD requires health checks to ensure he is not in pain, due to possible pressure sores and risk to his health due to his heart condition. He is at risk of falls. He requires a general health assessment by a GP. In particular, he may be at risk of pressure sores and he will need to be assessed for appropriate treatment. He requires a cardiology assessment (ECHO and ECG). He requires Speech and Language Therapy with regard to his dysphagia. He requires Occupational Therapy and possibly physiotherapy to look at mobility issues. He will need a medication review and to be supported to ensure he takes medication. He needs to be gradually supported to engage in social activities.

The application

13. The applicant has grave fears that LD is suffering emotional and physical harm and that his health and welfare are being seriously impacted. It applies to the court for an order which authorises his removal to a place of safety where his capacity, and health, welfare and caring needs can all be assessed.

14. The application was initially made by the applicant on the premise or footing that the evidence was not sufficient to meet the standards of s.48. But in her witness statement SG stated:

> "5.1 We have not been unable to obtain a Mental Capacity Assessment in regard to LD's ability to make decisions as to his residence and Care and Support Needs, because we are unable to gain access to see LD. RD is very clear that she is unwilling to let anyone into the home to meet with LD and continues to prevent access to LD.
>
> 5.2 However, from discussions with his previous support workers and from reviewing his records, my professional opinion, is that it is highly likely that LD lacks capacity to make decisions in these domains. Support workers that have worked with LD describe him has having a severe learning disability with very limited verbal communication. LD will for example use some single words, but only if prompted to do so. They report that LD has limited ways of communicating his needs and this was confirmed by a previous day service, who worked with him in 2015."

15. If s.48 does apply there is no doubt that the Court of Protection has power to make an injunction requiring RD to permit the applicant to enter the dwelling, by forcing the front door if necessary, and to permit the removal of LD to the place of safety.

16. In his written argument Mr Hallin stated:

> "As it has been impossible to assess LD in recent times (including as to his mental capacity), the applicant considers the most appropriate application to make at this juncture, is for Court

> authorisation to move LD pursuant to the Court's inherent jurisdiction to safeguard vulnerable adults whose ability to make decisions has been overborne by his mother. It may be that following assessment LD if found to lack capacity in the relevant areas, in which case transfer to the Court of Protection for any necessary further orders of the case is likely to be indicated."

17. The implication was that there had to have been a recent assessment of LD's mental capacity before s.48 could be invoked. I queried this at the first hearing on 15 May 2023. I appointed the OS to act as LD's litigation friend, without determining in what capacity (i.e. incapacitated or vulnerable adult) he would have such a litigation friend. At the next hearing on 19 May 2023 the OS through Ms Hirst accepted and acknowledged that the existing evidence was just sufficient to satisfy the s.48(a) condition.

The meaning and scope of s.48

18. Section 48 provides:

> **"Interim orders and directions**
>
> The court may, pending the determination of an application to it in relation to a person ("P"), make an order or give directions in respect of any matter if:
>
> (a) there is reason to believe that P lacks capacity in relation to the matter,
>
> (b) the matter is one to which its powers under this Act extend, and
>
> (c) it is in P's best interests to make the order, or give the directions, without delay."

19. The natural construction of these terms, without referring to any case-law or principles of statutory construction, suggests the following meanings.

    i) The provision is not confined to emergency situations. It applies where the court considers it necessary to regulate the arrangements for P in relation to any matter pending the final hearing of the substantive application. It does so by making an interim order or direction.

    ii) But to be able to make such an interim order or direction all three of the specified conditions must be met.

    iii) Logically the first one to be considered is (b): the court must be satisfied that the matter that needs regulating is something that the court has substantive power to determine. As the court has power to make decisions about an incapacitated person's welfare and property and affairs, it is hard to think of something that falls outside the court's powers. A religious decision? Possibly.

iv) Second, the court has to be satisfied that there is **reason to believe** that P lacks capacity in relation to the matter. As a matter of plain English these words suggest that there has to be some evidence that goes beyond mere suspicion that P lacks capacity to make his own decision about the matter in question. On the other hand, the words suggest that the evidence does not have to be so strong that the court is certain P lacks capacity, or even that it is more likely than not.

v) Third, the Court has to be satisfied it would be best for P to make the order "without delay" i.e. here and now. If the court is not satisfied that it would be best to make the order now, but that it would be better to wait, then it cannot make such an order to take effect in the future.

vi) Where all three conditions are met the Court still has a discretion whether or not to make an interim order, although the decision under the third condition will almost always answer that question.

20. I now turn to the authorities.

21. In *DP (By His Accredited Legal Representative) v London Borough of Hillingdon* [2020] COPLR 769 at [62] Hayden V-P held that:

> "(i) The words of … s.48 require no gloss;
>
> (ii) The question for the Court remains throughout: is there reason to believe P lacks capacity?;
>
> (iii) That question stimulates an evidential enquiry in which the entire canvas of the available evidence requires to be scrutinised;
>
> (iv) Section 48 is a permissive provision in the context of an emergency jurisdiction which can only result in an order being made where it is identifiably in P's best interests;
>
> (v) The presumption of capacity applies with equal force when considering an interim order pursuant to s.48 as in a declaration pursuant to s.15;
>
> (vi) The exercise required by s.48 is different from that set out in s.15. The former requires a focus on whether the evidence establishes reasonable grounds to believe that P may lack capacity, the latter requires an evaluation as to whether P, in fact, lacks capacity;
>
> …
>
> (viii) The objective of s.48 is neither restrictive, in the sense that it requires a high level of proof, nor facilitative, in the sense that it is to be regarded as a perfunctory gateway to a protective regime, and
>
> (ix) There is a balancing exercise in which the Court is required to confront the tension between supporting autonomous adult

> decision making and to avoid imperilling the safety and well-being of those persons whom the Act and the judges are charged with protecting."

22. I largely agree with this analysis. I agree entirely that the words of s.48 should not be glossed. I therefore quibble with sub-para (iv). There is nothing in s. 48 to suggest that it is reserved for emergency situations. Nor does the court have to be satisfied that it is "identifiably" (which I take to mean "strongly") in P's best interests for the interim order to be made. Similarly I respectfully quibble with the statement in sub-para (vi) that the question is whether the evidence establishes reasonable grounds to believe that P **may lack** capacity. Section 48(a) uses the present tense of the verb "to lack" not the present tense of the modal verb "may" followed by the infinitive "lack", a construction which imports a further degree of unlikelihood into the meaning of the phrase, on top of that uncertainty already reflected in the "reason to believe" part of it.

23. The key question is what is meant by "there is reason to believe that P lacks capacity in relation to the matter" Obviously, as Hayden V-P explains, it requires the court to alight on a degree of likelihood which falls short of the civil standard of proof. For if it meant that "it is more probable than not that P lacks capacity in relation to the matter" then the provision would be otiose because the Court would already have reached the required degree of probability or likelihood to find that incapacity is proved and could go straight to making a substantive declaration under s.15.

24. Westlaw's Key Legal Concepts on Levels of Certainty usefully states that:

> "1. Legislation often makes the exercise of a power conditional on a court having a particular level of certainty about something: as in "the Secretary of State may make an order if satisfied that …" or "a constable who suspects that a parcel is about to go bang may …".
>
> 2. **Variety of expressions:** Provisions of this kind use a variety of language: "thinks", "considers", "suspects", "believes", "in the opinion of", "it appears to" and "is satisfied" being the most common.
>
> 3. It is not possible to be dogmatic about how each of these expressions is to be construed, partly because it depends on the context in which it is used and partly because there is no precise technical scale of meaning according to which they are used consistently by the drafters of legislation.
>
> 4. It is, however, possible to make some limited assertions, based partly on observable legislative drafting practice and partly on the natural English meaning of the words used.
>
> 5. **Spectrum**: In particular, it is possible to identify the two ends of the spectrum. A requirement to "suspect" something before acting is the lowest level, and a requirement to "be satisfied" is the highest."

25. Where a statute makes the exercise of a power conditional on the court having a particular level of certainty about something, the condition in question will often be a future event. The future event could be the result of the final trial of the case. It could be the future peril that the litigation is trying to forestall. It could be a future event that has been stymied and where the litigation is about recompense for its loss. So, where an interlocutory injunction is sought by a claimant to prevent the use pending trial of a product said to have been developed in breach of a patent, the future event condition to be satisfied is whether the claimant will succeed at trial (see *American Cyanamid v Ethicon* [1975] AC 396). A familiar future event condition is where a care order is sought under s. 31(1)(a) of the Children Act 1989 relying, under s.31(2)(a), on the averment that the child concerned is likely to suffer significant harm if there is no intervention (see *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563). In *Davies v Taylor* [1974] AC 207 the future event condition was the (hypothetical) possibility of a reconciliation between the deceased and his widow who had separated 5 weeks before the fatal accident. In that case Lord Reid stated at 213:

> "But here we are not and could not be seeking a decision either that the wife would or that she would not have returned to her husband. You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100%; sometimes virtually nil. But often it is somewhere in between."

For each type of case where a future event condition has to be satisfied, the law marks on the scale of chances the minimum level of probability "somewhere in between" that has to be achieved in order to obtain the sought-after relief. Nearly always the level is less than 50% although where the application is for an injunction against the media the House of Lords has held that s. 12(3) of the Human Rights Act 1998 almost invariably requires a level of probability of success at trial of >50% (*Cream Holdings Ltd v Banerjee* [2005] 1 AC 253), and I have suggested in *AO v LA* [2023] EWHC 83 (Fam) that a similar degree of certainty is needed when judging the grave risk referred to in Article 13(1)(b) of the 1980 Hauge Convention on International Child Abduction. The question in the case in hand is always whether the evidence takes the needle beyond the applicable mark.

26. The only other place where I been able to locate the exact phrase "there is reason to believe" is in CPR 25.13(2)(c). This provides that:

> "(1) The court may make an order for security for costs under rule 25.12 if –
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and ….
>
> (2)(c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) **and there is reason to believe** that it will be unable to pay the defendant's costs if ordered to do so …"

27. The phrase was considered in detail in *Jirehouse Capital v Beller* [2008] EWCA Civ 908, [2009] 1 WLR 751 where Arden LJ held:

> "26. In my judgment, there is a critical difference between a conclusion that there is "reason to believe" that the company will not be able to pay costs ordered against it and a conclusion that it has been proved that the company will not be able to pay costs ordered against it. In the former case, there is no need to reach a final conclusion as to what will probably happen. In the latter case, a conclusion has to be reached on the balance of probabilities.
>
> …
>
> 29. I do not accept the argument, advanced by Mr Auld, that the test of "reason to believe" must be elevated to a test of balance of probabilities simply because the matter to which the test relates is something which … must be established and not simply identified as a possibility. That which has to be established is something that will occur only after the order for security is made. It can therefore only be a matter of evaluation. A person can have a reason to believe that a future event will occur.
>
> …
>
> 33. In my judgment, Buxton LJ (in *Phillips v Eversheds* [2002] EWCA Civ 486) was not formulating a different test from that of "reason to believe" but simply expressing those words in his own words. In the sense in which Buxton LJ was using the term, there was no real distinction between significant danger and reason to believe. Since the event in question (non-payment of an order for costs) is a future one, what the court has to do was to evaluate the risk, or the danger, of that event occurring. That said, however, there may be contexts in which a test of significant danger does produce a different result from "reason to believe" and so it would be much safer to use the statutory words in future.
>
> 34. Mr Auld submits that the reason to believe test will set the threshold too low and encourage satellite litigation. I do not accept that submission. As Sir Donald Nicholls V-C held in the *Unisoft case* [1993] BCLC 532 , the court has to look at the evidence put forward on the application as a whole and form an assessment on the basis of the evidence as a whole as to whether there is reason to believe that the company will not be able to pay costs ordered against it. Thus the jurisdiction is not triggered, as counsel sought to persuade Sir Donald Nicholls V-C in the *Unisoft* case, simply by the evidence of one party only. It is open to the company to rebut the evidence of the applicant for security. As Sir Donald Nicholls V-C said in the *Unisoft case*, at

> p 534, the court "will not let common sense fly out of the window".

28. While the Court of Appeal is clear that the requisite degree of likelihood does not have to be more than 50%, it does not tell us, at any rate not numerically, what that minimum degree of likelihood is.

29. In my judgment, the requisite degree of likelihood that will satisfy the criterion "has reason to believe" is not high and will be approximately the same as that for obtaining an interim (non-freezing) injunction or permission to appeal i.e. "a real prospect of success". I would say that the level is not less than 25%, or odds of 3/1 (see *AO v LA* at [26] – [42]).

30. In this case the future event is whether the applicant will show at the final hearing that LD lacks capacity. That question will be answered by a formal capacity assessment. So, in order to satisfy the s.48(a) condition the applicant has to satisfy me, at this stage, that the present evidence demonstrates there is at least a 25% chance that such an assessment will find LD to be incapacitous. That degree of proof would be met even if the evidence were to suggest that it is more likely than not that LD is not incapacitated; it would be met even if it were as much as three times more likely (that is, of course, the effect of a 75% chance of LD not being incapacitated, which is the other side of the coin of a 25% chance that LD is incapacitated).

31. Plainly, assessment of the competing probabilities is not the be-all and end-all of the exercise. Obviously, proof involves something more than just probability. Before evidence can be weighed to determine if the requisite degree of likelihood has been shown, it must have a minimum critical mass: see *R (Maughan) v Senior Coroner for Oxfordshire* [2018] EWHC 1955 (Admin) at [56] – [57] per Leggatt LJ and *Davies v Taylor* per Lord Simon of Glaisdale at 219-220. Otherwise, cases could be decided absurdly and unjustly as illustrated by the nonsensical finding in *The Popi M* [1985] UKHL 15, and by the famous Blue Bus paradox (memorably explained by Brachtenbach J in the Supreme Court of Washington decision of *Herskovits v. Group Health Cooperative of Puget Sound* (1983) 664 P.2d. 474). As Sir Donald Nicholls V-C put it, the court has to look at the evidence put forward on the application as a whole and form an assessment on the basis of the evidence as a whole as to whether there is reason to believe that LD lacks capacity to make a decision about his health and care needs. In so doing the court will not let common sense fly out of the window.

32. Here, the witness statement of SG has an evidential minimum critical mass and satisfies me that there is a real prospect of a capacity assessment demonstrating that LD is incapacitated in relation to decisions about his health and welfare. I would put the likelihood rather higher than 25% or at odds rather shorter than 3/1 (but not odds-on). The mental impairments suffered by LD are irreversible and so the fact that SG has not got much contemporaneous material on which to base her opinion is not as damaging to its validity as it would otherwise be. SG is qualified to give expert evidence as to mental capacity and so her opinion, that it is highly likely that LD is incapacitated in these domains, is admissible under s3(1) of the Civil Evidence Act 1972.

33. That opinion, taken with the other material in SG's witness statement literally gives me reason to believe that LD lacks capacity to make decisions in relation to his health and

welfare. Inasmuch as the condition is a term of art governed by legal principles I am satisfied that the evidence is such as to meet the s.48(a) condition as a matter of law.

34. The s. 48(b) condition is unquestionably satisfied. The matter in question, namely the removal of LD for assessment, is plainly within the jurisdiction of the Court of Protection, which has power to make coercive orders by way of injunction to that end against RD: *see Re G (Court of Protection: Injunction)* [2022] EWCA Civ 1312.

35. The question whether the s.48(c) condition (i.e. it is in LD's best interests to make the order without delay) would be satisfied by making the order sought remains undecided and will be subject of a separate judgment.

The reach of the inherent jurisdiction

36. In his original written submission Mr Hallin argued that the High Court's powers under the inherent jurisdiction extended to making the order sought, which would unquestionably involve LD suffering a deprivation of his liberty by being removed from his familiar home to a place of safety for assessment.

37. I queried this argument drawing attention to the speech given by Sir James Munby to the Court of Protection Bar Association on 10 December 2020: *Whither the inherent jurisdiction? How did we get here? Where are we now? Where are we going?*

38. In that speech the former President argued that under the inherent jurisdiction the High Court had no power to make an order which had the effect of depriving a vulnerable, but capacitous, adult of his liberty.

39. At the hearing on 19 May 2023, I asked counsel to give me further written submissions on this issue.

40. They have done so, although the issue is now academic and irrelevant as I have decided that the s.48(a) and (b) conditions are satisfied in this case and that there is therefore power, provided that it is in LD's best interests and that it is necessary to do so without delay, to make the order sought.

41. The question that needs to be answered is whether there is any room to make an interim order under the inherent jurisdiction which holds the ring pending a full hearing but which has the effect of depriving a capacitous adult, who does not suffer from a mental disorder, of his liberty. I accept that when making an interim order, which holds the ring, the court may not observe, pending further investigations, with rigorous exactitude the boundary between capacity and incapacity. However, if the evidence clearly shows that the person who is being sought to be protected is obviously clearly capacitous, like Mr Mazhar (see *Mazhar v Birmingham Community Healthcare Foundation NHS Trust* [2020] EWCA Civ 1377, [2021] 1 WLR 1207) and clearly does not suffer from a mental disorder as defined by the Mental Health Act 1983, then I just cannot see how he could ever be described as being of "unsound mind" so as to justify his deprivation of liberty under Article 5. Put another way, where the evidence is clear, I cannot see that there could ever be room for a class or type of unsoundness of mind for the purposes of Article 5 which does not amount to mental incapacity under the Mental Capacity Act 2005 or a mental disorder under the Mental Health Act 1983.

42. I accept that this may leave a gap in the law in that there may be out there fully capacitous, yet extremely vulnerable, adults being ruthlessly victimised and exploited by members of their family, or their carers, who the state cannot protect by forcibly removing them from their homes. That is a gap which, in my opinion, should be filled not by judicial legislation but by parliamentary legislation.
