Case Nos: 14277452, BL-2025-000099

Neutral Citation Number: [2025] EWCOP 11 (T3)

IN THE HIGH COURT OF JUSTICE
COURT OF PROTECTION
MENTAL CAPACITY ACT 2005

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 13 March 2025

Before :

MR JUSTICE RAJAH

- -

Between :

W

Applicant

- and –

P

(acting by his litigation friend, the Official Solicitor)

Respondent

- -
- -

Georgia Bedworth (instructed by **Enable Law**) for the **Applicant**
Ruth Hughes (instructed by **the Official Solicitor**) for the **Respondent**

Hearing date: 5 March 2025

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APPROVED JUDGMENT

This judgment was delivered in private following a hearing in private of proceedings under the Mental Capacity Act 2005. 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 the parties and members of their family 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.

Mr Justice Rajah :

1. A question has arisen whether this application in the Court of Protection should be heard in private, and consequential questions arise as to whether the press should be notified of this hearing and whether a written judgment of all or part of it could and should be published with appropriate anonymisation and redaction.

2. P is a figure who used to be in the public eye, and in whose affairs there is likely to be natural public curiosity. He has severe dementia and lacks any meaningful cognitive capacity. He is unable to comprehend, retain or use information presented in any form, relevant to a decision to make a gift or manage his affairs. He is unable to communicate at all. His life expectancy is limited. His condition is not generally known to others outside his immediate family.

3. P is represented in these proceedings by his litigation friend, the Official Solicitor. The application is brought by his wife ("W") with the support of his family.

4. P has significant assets in his own and joint names as well as significant trust assets in which he is interested. W applies for authorisation to make a statutory will and enter into a number of lifetime dispositions on behalf of P. The objective of these arrangements is to ensure a more orderly and tax effective succession to assets which P owns, or has an interest in, than would come to pass on his death if nothing was done. The assets involved have a value of approximately £20 million.

5. Under COPR 4.1 the general rule is that Court of Protection proceedings are to be heard in private. Only P and the parties, their legal representatives, litigation friends, rule 1.2 representatives and court officers may attend a hearing in private unless the Court makes an order under COPR 4.1(3) permitting other persons to attend.

6. Pursuant to section 12(1)(b) Administration of Justice Act 1960 it is a contempt of court to publish information relating to Court of Protection proceedings where the court is sitting in private. COPR 4.2 provides for exceptions to that rule, one of which is where the court orders otherwise.

7. COPR 4.3 makes clear that the Court can make an order departing from the general rule, by ordering that a hearing be held in public, with such restrictions on publication of information about the proceedings as the court may specify. COPR 4.3(3) envisages a practice direction being made to provide for circumstances and the terms in which the court will ordinarily make such an order.

8. COPR 4.4 provides that subject to provision in a practice direction under rule 4.3 (3) any order under rule 4.1, 4.2 and 4.3 (in other words any departure from the general rule) may only be made where there is good reason for making the order (or departure).

9. The reasons for the statutory regime in COPR 4.1 to 4.3 were explained in the Court of Appeal in *Independent News Media v A* [2010] 1 WLR 2262 in relation to their predecessor provisions. Those who have mental capacity can deal with their private affairs confidentially and in private. The general rule in COPR 4.1 recognises that a person who lacks mental capacity to deal with their private affairs should similarly be entitled to the same privacy. The Court of Protection is only involved because the person's reduced capacity requires interference in their personal autonomy. Court of Protection hearings should therefore be held in private unless there is a good reason not to. The provisions of COPR 4.1 to 4.3 encapsulate the Article 8 rights of persons who are vulnerable, and whose involvement in court proceedings arises from their vulnerability and not their choice. The provisions rearticulate a longstanding common law exception to the principle that justice should be done in open court: see for example *Scott v Scott* [1913] AC 417. The jurisdiction for good reason to depart from these provisions recognises that there will be cases where the public interest in an individual case outweighs the privacy considerations. These propositions are derived from the judgment of Lord Judge CJ particularly at [18] – [19], [26] – [27], [34] – [35].

10. Practice Direction 4C has been made pursuant to COPR 4.3(3). The normal practice now, pursuant to PD4C, is for the court to make an order (a transparency order) of its own motion under COPR 4.3 for the hearing to be a public hearing but with reporting restrictions to prevent the identification of P; unless it appears to the court that there is good reason for not making such a transparency order. The lawfulness of the making of such an order as a matter of routine has been questioned by Mostyn J; *Re EM* [2022] EWCOP 31. In this case, no order has been made either as a matter of routine or by the court of its own motion because W issued a COP 9 application asking that the Court not do so without hearing from W because she said there were good reasons not to make such an order. That application was listed to be heard in private before me immediately before the substantive application.

11. The effect of PD4C is that there is a "*supposition*" (see *Hinduja v Hinduja* [2022] EWCA 1492 at [27]) that ordinarily a public hearing with reporting restrictions to prevent the identification of P strikes an appropriate balance which allows P's right to privacy to be sufficiently protected while providing sufficient transparency to satisfy the public interest in subjecting the Court of Protection to public scrutiny and accountability. An application that the Court

should not make such a transparency order must therefore show a good reason why it is not an appropriate balance in the particular case.

12. The public interest lies in knowing what goes on in the Court. It is primarily about ensuring public scrutiny and accountability of court process and decision making. There may be features of a particular case which enhance or raise the public interest in transparency. There is, however, a clear distinction between the public interest and what the public is interested in. The public may be curious about the private affairs and the wills of those in the public eye. It does not follow that there is a legitimate public interest in those matters. In *Re the Will of His Late Royal Highness The Prince Philip, Duke of Edinburgh* [2021] EWHC 77 (Fam), Sir Andrew Mcfarlane held at [59] that there was no public interest (as opposed to public curiosity), in knowing private information concerning the disposition of the Duke of Edinburgh's estate. That was said in the context of a Royal estate, but it applies in principle to everyone in whom there may be public curiosity: see *XW v XH (No.2)* [2019] 2 FLR 559. The fact that the family may be in the public eye does not mean that their right to respect for private and family life in relation to matters which are *not* in the public domain deserves any less respect than anyone else: *XW v XH (No. 2)* at [20].

13. In this case, a public hearing which identified P would inevitably result in significant publicity to satisfy public curiosity. That would be a serious intrusion in the private life of P and his family. For reasons on which I will not elaborate here, this could have serious consequences for P and his family. The "supposition" that a transparency order would protect P's privacy is, in this case, displaced. I am satisfied that it is not possible to craft reporting or other restrictions which would protect P's identity and the privacy of P and his family. There is a very significant risk of jigsaw identification unless the reporting restrictions (and other measures such as exclusion of the public from parts of the hearing) were so stringent as to make a public hearing meaningless. This substantially outweighs any legitimate public interest in this hearing being in public, even with reporting restrictions, and amounts to a good reason for the matter to be heard in private.

14. It is for essentially the same compelling reasons that I have reached the conclusion that there will be no published judgment on the substantive application (in accordance with the Practice Guidance of 16 January 2014: Transparency in the Court of Protection - Publication of Judgments). Any judgment would have to be so heavily redacted that it would make little sense. I will authorise only the publication pursuant to COPR 4.2(2)(b) of this summary of the judgment relating to privacy, delivered *ex tempore* in private, and shorn of the details which are relevant to why jigsaw identification is such a risk, why public curiosity is inevitable and as to the unjust impact publicity would have on this particular family.

15. No notice was given to the press of this hearing. Section 12 Human Rights Act 1988 provides:

> "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied:
> (a) that the applicant has taken all practicable steps to notify the respondent; or (b) that there are compelling reasons why the respondent should not be notified."

16. In *Re EM*, Mostyn J expressed the view that s. 12 was not engaged if the proceedings remained in private but the Court was asked to consider making a permissive order under COPR 4.1(3) permitting the press to attend. The press would not need to be notified of an intention to seek such an order. Practice Direction 4A takes the same approach- see paragraph 8. Such a permissive order does not restrict the right to freedom of expression, it enables it, and thus s. 12 is not engaged.

17. In this case, there is not an application for such a permissive order. I am not considering granting any relief at all. I am being asked not to make an order of my own motion under PD 4C. I am asked not to interfere with the general rule under COPR 4.1. In such circumstances, s. 12 HRA 1988 is not engaged. This may seem a fine distinction, and in another case a judge may baulk at such niceties bearing in mind the important principles involved. But I am satisfied that this is a case in which notice to the press would itself undermine the purpose of the proceedings being in private.