



Neutral Citation Number: [2021] EWCA Civ 992

Case No: B4/2020/2156 and 2157

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
The Honourable Mr Justice Hayden
COP1337884

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 July 2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE BAKER
and
LORD JUSTICE WARBY

IN THE MATTER OF P (DISCHARGE OF PARTY: COSTS OF APPEAL)

Between :

AA	<u>Appellant</u>
- and -	
LONDON BOROUGH OF SOUTHWARK (1)	<u>Respondents</u>
P (by her litigation friend	
The Official Solicitor) (2)	
SOUTH LONDON AND MAUDSLEY NHS	
FOUNDATION TRUST (3)	

Timothy Nesbitt QC and Alex Cisneros (instructed by Bindmans LLP) for the Appellant
Katherine Barnes (instructed by Local Authority Solicitor) for the First Respondent
Fiona Paterson (instructed by Edwards Duthie Shamash) for the Second Respondent
Nicola Greaney (instructed by Bevan Brittan LLP) for the Third Respondent

Hearing dates : 9 March 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on 2 July 2021.

LORD JUSTICE BAKER (with whom Lord Justice Peter Jackson and Lord Justice Warby agreed):

1. On 16 April 2021, we allowed an appeal against an order made in the Court of Protection discharging the appellant as a party to the proceedings. Following our decision, the appellant applied for costs to be awarded against the respondents.
2. The arguments put forward by the appellant were as follows.
 - (a) Whilst the normal rule in welfare cases in the Court of Protection is that there should be no order as to costs, it was held by this Court in *Cheshire West v P* [2011] EWCA Civ 1333 that this does not apply to appeals from the Court of Protection which are governed by CPR Part 44. Under r.44.2(2), the general rule is that, if the court decides to make an order about costs, the unsuccessful party will be ordered to pay the costs of the successful party. That rule should have been followed in this case.
 - (b) As a result of the decision of the court below, the appellant was obliged to bring this appeal to secure fundamental rights. Although the decision to remove her as a party was taken by the judge without any prior application by any of the parties, it had been open to the respondents to propose a different order which would have protected P without infringing the appellant's fundamental rights.
 - (c) Furthermore, once the appellant had filed her appeal notice, it was open to the respondents to concede the appeal and/or propose a different order, having seen the way the appeal was put.
 - (d) Although the appellant was publicly funded, the appellant owed a duty to the Legal Aid Agency to seek to recover costs.
 - (e) This Court should have regard to the observations of Lord Hope *R (on the application of E) v Governing Body of JFS & Anor* [2009] UKSC 1 at [25], in which he emphasised the importance of costs orders for those who are publicly funded in the event that they are successful.
3. Having considered the submissions, we concluded that the right order in this case was to make no order for costs of the appeal, for the following reasons.
 - (a) As the appellant recognised in her submissions, whilst CPR 44.2 establishes the normal rule to be followed where a court decides to make a costs order, the court has a discretion under r.44.2(1) as to whether costs are payable and, under r.44.2(2), if it decides to make an order, to make a different order to that described by the general rule. Under r.44(3), in deciding what order (if any) to make about costs, the court must have regard to all the circumstances.
 - (b) In the *Cheshire West* case, Munby LJ stressed that he was not intending to lay down any principle, save that every case had to be decided by reference to what is now CPR 44.2. He also acknowledged that, whilst an appeal from the Court of Protection fell within CPR Part 44, the fact that it concerned a vulnerable adult was one of the circumstances to be taken into account under r.44.2(2) and that in some cases it may be one of the more important circumstances.
 - (c) In the present case, the vulnerability of P was manifestly a central feature of the proceedings and of the appeal. It was P's high degree of vulnerability that led the judge to take the step of discharging the appellant as a party. The protection of P was the focus of the proceedings and of all parties thereto.
 - (d) The decision to discharge the appellant as a party was made by the judge without application from any party at a hearing which had been listed to consider different applications by the respondents which were brought because of their concerns about

threats to P's safety and welfare. In our judgment when allowing the appeal (paragraph 65), we concluded that the judge would have been fully entitled to make the order which the respondents were asking for.

- (e) Although it would have been open to the respondents to oppose the judge's proposal at the hearing, and/or to concede the appeal, we concluded that it was not unreasonable of the respondents to seek to uphold the judge's order for this Court, given their responsibilities towards P and their concerns about her safety and welfare.