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Supreme Court hands down decision in Re MN (N v ACGG and ors) [2017] UKSC 22

The Supreme Court has given judgment in the father's appeal in Re MN. The case concerned a disabled adult known as MN. During his childhood MN had been cared for by the Local Authority ('the LA'). He had been due to reach the age of 18 in November 2011. During the course of his childhood the LA and his parents had disagreed on many aspects of his care.

Predicting that a dispute would arise when he attained his majority, the LA issued proceedings in the Court of Protection seeking orders about MN's care and residence. When MN became an adult responsibility for his care shifted to the respondent Clinical Commissioning Group ('the CCG'). Following his 18th birthday MN moved to a care home, the placement being commissioned by the CCG.

By the time of the first substantive hearing, the issues between the CCG and the parents had narrowed to whether MN should visit the parents at the family home and whether MN's mother should be permitted to assist the carers commissioned by the CCG with MN's intimate care. Shortly before that hearing the CCG stated their position that they would not in any event commission care in the manner sought by the parents; that such options were therefore '*not on the table*'; that the Court of Protection had jurisdiction only to decide between the available options and that it was inappropriate to use the Court of Protection proceedings to obtain a best interests declaration to influence a public law decision.

At first instance Eleanor King J essentially accepted the arguments of the CCG. She noted that the Court of Protection had no greater powers than the relevant person

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would have had if they had capacity. Judicial review was the only proper vehicle to challenge the CCG's public law decisions. The options desired by the parents were at present only hypothetical and hence she was satisfied that the present care plan proposed by the CCG was in MN's best interests and made declarations approving it. The judge's decision was upheld by the Court of Appeal.

The same arguments were canvassed by the father on appeal to the Supreme Court. It was accepted by the father that the Court of Protection had no power to order the CCG to fund whatever the Court considered to be in MN's best interests. However, it was argued that the CCG would give careful consideration to the Court of Protection's views as to what would be in MN's best interests. The substantive submission appears to have been that the Court of Protection was therefore wrong not to hold the extensive hearing necessary to decide whether the hypothetical provision was in MN's best interests. The CCG and the Official Solicitor on behalf of MN supported the approach of the courts below.

The Supreme Court reviewed the development of the jurisdiction of the Court of Protection and High Court in the protection of adults. The Court however, noted that it was unfortunate that the dispute had come to be referred to as a jurisdictional one as the Court of Protection patently did have jurisdiction to hear the case and make such best interests declarations as it saw fit. The question was not one of jurisdiction but of how the case should be managed in light of the limited powers of the Court of Protection.

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The Supreme Court held that what may often follow comparable applications in the Court of Protection is a process of independent investigation and negotiation and potentially mediation in which modifications are made to the relevant care plan however, it did not follow that the Court was obliged to hold a hearing to resolve every dispute where to do so would serve no useful purpose.

In the instant case the Court was entitled to decide whether any useful purpose would be served by holding a hearing to resolve the relevant issues. If the Court had considered matters in that structure, its conclusions would have been that the issues had narrowed; the issues were important for MN but not as important as the issue of where he should live; there were good reasons for thinking that the parents' wishes were impracticable and that the CCG had good reasons for rejecting them; the Official Solicitor supported the CCG; in the light of the proceedings thus far it was unlikely that investigation would bring about further modifications to the care plan and it would be disproportionate to devote any more of the Court's time to the issues.

In the light of the above the Supreme Court held that the Court of Protection was perfectly entitled to decide that no useful purpose would be served by a hearing and conclusion on the hypothetical provision. Despite the fact that the trial judge had not put the question in that manner it was the substance of what she was doing and she was entitled to act thus. The parents' appeal was dismissed.

The Supreme Court's decision is unsurprising. It was accepted, as must be correct, that the Court of Protection has no power to order provision greater than that to which the incapacitated person would in any event be entitled. It is not surprising as a matter

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of general law that the Court is entitled to decide on the discretionary management of its own cases. The judgment applies these two principles.

The decision will nonetheless reassure public service providers that in most cases they will not have to debate the merits of options that they are not willing to put '*on the table*' both in the Court of Protection as well as in any public law arena. However, those providers who wish to avoid contested hearings in the Court of Protection on any such options should ensure that they can demonstrate that time spent on the issues in court will serve no useful purpose.

Factors demonstrating that are likely to include the fact that the provider has already properly considered the provision sought and made a reasoned decision not to provide it and that the provider's decision is unlikely to be changed by anything that may come to light at the hearing. In addition, it is suggested that the usual case management factors will be highly relevant: both proportionality and the efficient use of court time as allocated for the individual case are likely to be key.

There is a link to the judgement [here](#).