



Neutral Citation Number: [2019] EWCOP 60

Case No: 13449481

IN THE HIGH COURT OF JUSTICE
COURT OF PROTECTION
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005
AND IN THE MATTER OF PS

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 November 2019

Before :

MRS JUSTICE JUDD

Between :

A LOCAL AUTHORITY
- and -
(1) PS (BY HER LITIGATION FRIEND
THE OFFICIAL SOLICITOR)
(2) HS

Applicant
Respondents

Mr Jack Anderson for the **Applicant**
Ms Katie Scott for the **First Respondent**
The **Second Respondent** appeared **in Person**
Hearing dates: 20 November 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MRS JUSTICE JUDD

This judgment was delivered in private. 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 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.

Mrs Justice Judd:

Introduction

1. In this case I am asked to make a declaration that PS lacks capacity to make decisions about contact. In the event that she does lack capacity, I am invited to order that it is in her best interests not to have contact with HS.

Background

2. PS was born in June 1939 and is now 80 years old. She was married to HS, and had two daughters, DS, who sadly died in 2018 and DB who she has a close relationship with and sees frequently. PS and HS were divorced some 25 years ago, and it is common ground that they lived independent lives thereafter until PS became ill at some point late in 2016 or early 2017. There was some contact between PS and HS over the years following the divorce, but it was limited to PS doing some secretarial or administrative work for him, and when they were both present at family gatherings such as weddings or christenings.
3. In the autumn of 2016 PS began to suffer from some anxiety, and things became so difficult for her that she spent some six weeks living with DB and her husband. In the summer of 2017, PS had a car accident and was unable to explain to her daughters how it had come about. According to DB, PS's memory reasoning and general awareness began to decline considerably during the course of the year and following assessments and a brain scan she was diagnosed with Lewy Body Dementia in January 2018.
4. This was an extremely difficult time for all the family, and in that I include HS, for DS, their younger daughter, became very ill with cancer. DB was providing support not only to her mother PS, but also her sister, brother in law and three nieces. DS died in March 2018.
5. During this time, it appears that HS was spending more and more time with PS, cooking for her and helping to look after her. This continued after DS's death for the rest of 2018, and into 2019. DB became more anxious about the amount of time that HS was spending with PS, especially as a consequence of comments that PS was making about him getting into bed with her. DB stated that PS was telling her that she did not want 'that man' to be there at her home.
6. On 21st February 2019 the local authority received a safeguarding referral from Charlotte Zittle, the DISP (Demential Intensive Support Practitioner) with concerns that PS was being sexually abused by HS, and also that he had a key to her home and had opened a joint bank account with her. In order to assess PS's care and support needs she was moved from her home to a care home, where she stayed for three weeks before moving to I Care Home where she remains. HS has not seen PS since February, although the police closed their investigation into whether or not he sexually assaulted her in March 2019. The plan is for PS to remain at I Care Home permanently, and she sees DB approximately three times a week.

The parties' cases

7. The parties to this case are the local authority, PS by her litigation friend, the Official Solicitor (through Ms Barrett of Irwin Mitchell), and HS. The local authority has been represented by Mr. Anderson, the Official Solicitor by Ms Scott, and HS has represented himself. I have read all the papers in the bundle supplied to me and the position statements of the represented parties. I heard evidence from HS, DB and the social worker, Ms Hunter Gordon. I heard submissions from counsel and HS, and watched some video clips of PS taken by DB in January and February of this year.
8. The local authority seeks a declaration that PS lacks capacity to make decisions about contact, and that it is in her best interests not to have contact with HS. According to Dr. Nina Holden, PS does not have insight into her dementia and the impact it has on her memory, orientation and visual perception. She is very disorientated with respect to time and intermittently with respect to space. She has comparatively well-preserved social skills and language but she has significant cognitive impairment, which markedly fluctuates during the day and from day to day. It is the local authority's case that PS does not know who HS is, does not realise that he is her ex husband, and that when she was seeing him in 2018 and early 2019 she exhibited anxiety about this 'man' being in her house. The Official Solicitor supports the local authority application on very much the same grounds. It is noted that PS has been pleased at times to see HS, but this is without cognisance of who he is, and is not consistent.
9. HS does appear to accept PS's diagnosis, but because he has not been able to see her since February he finds it difficult to appreciate her current state and does not readily accept the evidence of others who have seen her. He states that when he was still seeing her in February and before, she was capable of conversing lucidly for extended periods of time. He said that she was pleased to see him when he went around to her house, and when he saw her by chance in Waitrose in March 2019. He found it very difficult to accept evidence that contact with him either did, or would distress her. He believes that she certainly did recognise him and know who he was. He wished to see her again, and felt that he would know then whether or not she wished to see him. He therefore opposed the making of any declaration.

The Law

Capacity

10. Section 2(1) of the Mental Capacity Act 2005 provides that a person "lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in, the functioning of the mind or brain". Capacity determinations are specific to particular matters that arise for decision at the time a determination is required to be made about a person's capacity. Section 2(4) requires that questions as to lack of capacity are to be resolved on the balance of probabilities, and the burden lies on whoever alleges that the person does not have it in relation to the matter in issue. Section 3(1) provides that a person is unable to make a decision in relation to some matter if he or she is unable to understand, retain or use or weigh the information relevant to their decision, or is unable to communicate that decision. The relevant information is required to be presented to the person in a way that is appropriate to his or her circumstances (s3(2)), and the fact that a person may only be able to retain the information for a short time does not prevent a

finding of capacity (s3(3)). What is relevant information will depend on the particular decision to be made, but includes the reasonably foreseeable consequences of the decision or failure to make a decision (s3(4)).

11. The Court of Appeal considered the relevant information a person would need to understand, retain, use or weigh in order to have capacity to make decision about contact in the case of *B v A Local Authority* [2019] EWCA Civ 913, namely:-
- (I) Who they are, and in broad terms the nature of her relationship with them;
 - (II) What sort of contact she could have with each of them, including different locations, differing durations and differing arrangements regarding the presence of a support worker;
 - (III) The positive and negative aspects of having contact with each person. Theis J added “this will necessarily and inevitably be influenced by PS’s evaluations. His evaluations will only be irrelevant if they are based on demonstrably false beliefs. For example, if he believed that a person had assaulted him when they had not. But PS’s present evaluation of the positive and negative aspects of contact will not be the only relevant information. His past pleasant experience of contact with his father will also be relevant and he may need to be reminded of them as part of the assessment of capacity”.
 - (IV) What might be the impact of deciding to have or not to have contact of a particular sort with a particular person;
 - (IV) Family are in a different category; what a family relationship is.

Best interests

12. Section 4 MCA sets out the factors the court must consider when determining best interests. Under s 4(1) the person making the determination (in this case the court) as to what is the person’s best interests must not make it merely on the basis of (a) the person’s age or appearance, or (b) a condition of hers, or any aspect of her behaviour which might lead others to make unjustifiable assumptions about what is in her best interests. The person making the determination must consider all the relevant circumstances (s4(2)). She must consider whether it is likely that the person will at some time have capacity in relation to the matters in question, and if so, when, and so far as practicable, permit and encourage the person to participate or improve her ability to participate as fully as possible in any act done for her and any decision affecting her (ss(3),(4)). The decision maker must consider, so far as reasonably ascertainable, (a) the person’s past and present wishes and feelings (and in particularly any relevant written statement made by her when she had capacity); (b) the beliefs and values that would be likely to influence her decision if she had capacity; (c) the other factors she would be likely to consider if she were able to do so (s4(6)). Pursuant to s 4(7) the

decision maker must take into account, if it is practicable and appropriate to consult them, the views of (a) any person named by the person as someone to be consulted on the matter in question or matters of that kind, (b) anyone engaged in caring for the person or interested in her welfare; (c) any donee of a lasting power of attorney granted by the person, and (d) any deputy appointed for the person by the court as to what would be in the person's best interests and in particular as to the matters mentioned in s4(6).

Discussion

13. The material I have before me demonstrates that PS suffers from Lewy Body Dementia which is an impairment of the mind or brain. The diagnosis from Dr. Nina Holden as well as the evidence of the social worker and DB and the attendance note of Ms Barrett all demonstrates the significant difficulty that she has with her cognition. First and foremost, PS does not appreciate who HS is. In a discussion with the social worker in February, she said to DB "I haven't seen your dad in years. I don't have anything to do with him and I don't want to". She said that she thought he was called G 'as well' . When shown a picture of herself and HS she said that he was a nice man, and that she thought he was an old friend and 'oh his name is G too is it?'. She did not think he would want to help with any of her care (and nor would she want it), saying "I like having a cup of tea and a chat with him but I wouldn't want anything more". She was further confused about a man who came to help her and cook for her, thinking that this was yet another G.
14. The evidence is that PS has been pleased to see HS from time to time, albeit without knowing who he is. This was apparent when she and DB bumped into him in Waitrose in March 2019, and also from the video clips taken by DB which I have seen. HS is very much of the view that PS enjoyed seeing him and states in his evidence that she would unlock her door when he arrived, saying "I am so pleased it is you".
15. There is also evidence that HS's visits caused PS anxiety. DB (whose evidence I accept) said that during the period of time when her contact with HS was increasing, PS was making multiple phone calls to her asking for help with various things, and wanting reassurance as to the man or men that were coming to her house. This became her main topic of conversation. I note that after seeing HS in Waitrose, PS was distressed and spoke to the social worker on the phone saying "I saw a man I used to know in Waitrose. I used to know him years ago but he was a bit of a lad and I haven't seen him in years. I was daft enough to say when will I see you again? But it was a bit of a joke when I said that and I have made a terrible mistake saying that. I don't want to see him and I don't want him around my house and now I am scared stiff".
16. I am clear after hearing the social worker and DB that PS does not have capacity to make the decision as to contact with HS. She does not know who he is, and she is not able to appreciate the negative and positive effects that contact with him has upon her. She is not able to weigh up and retain information about what type of contact she could have and in what circumstances. There is no prospect that her capacity to make this decision will improve, and nor is there any way in which she could be assisted with this.
17. HS finds it extremely difficult to accept the evidence of others about PS's functioning, and harbours suspicions that DB and her husband have influenced the professionals against him, something which I do not accept.

18. Given my conclusion as to PS's lack of capacity to make a decision as to contact with HS, I must then go on to take the decision for her, based upon her best interests.
19. HS and PS were divorced many years ago and although there was some limited contact between them thereafter, I accept the evidence of DB that her mother was unhappily married, that the divorce was not amicable, and they did not remain friends. There are two letters in the bundle from HS to PS, one which is dated October/November 2016 and the other which is undated but probably also written during the autumn of 2016. Both these letters support DB's evidence that PS did not choose to have contact with HS or to spend time with him when she was well and able to make her own choices. In the undated letter HS clearly asks 'is it still your wish that we continue to have no contact with one another?' At all material times following the divorce PS remained very close to her daughters, their partners and grandchildren, particularly DB.
20. It was the combination of difficult events for this family that led to HS spending time with PS over the last two or three years. As PS's health began to decline, HS visited more. PS began to suffer from anxiety in 2016, and begged DB not to allow HS into her house on one occasion when she was there and saw him arrive. During 2017 the anxiety worsened and by the autumn it was apparent that PS was becoming confused too, and her reasoning and general awareness declined. In the early part of 2018, DS became ill, and DB was very stretched, trying to provide support to her sister and family as well as to PS. HS had earlier offered to help with the care of PS, and increasingly did so.
21. Whilst I accept that HS did provide assistance by looking after PS over what was a very difficult time and that there were times when she appeared pleased to see him, it is also clear that PS demonstrated some anxiety about his being around. She told DB that she did not want him to come and cook dinner at her house, and also that she did not want anyone to have a key. At one point PS said 'Why is DB letting this happen?'. What happened in Waitrose – namely that PS seemed very pleased to see HS and later became anxious about it is very likely typical of what happened more generally.
22. Since PS has no longer had contact with HS she seems more contented and settled. As would be expected given her illness, her cognitive functioning is deteriorating. She sees DB three times a week, and also sees her grandchildren and son in law. She seems to enjoy all these visits. She can still exhibit signs of restlessness, for example when visited by Caroline Barrett.
23. As I have stated above, I do not accept HS's contention that DB and her husband are hostile to him and that they have persuaded the professionals to their view that he should not have contact with PS. It was clear from his evidence that he finds it very difficult to accept the views of others about her condition and is also inclined to minimise and deceive himself about how serious it is. His statement shows he felt particularly affronted at being told what to do (as he thought) by young women and he very much gave the impression of seeing what he wished to see, and not what he did not. If he saw PS now and she smiled at him, I have no doubt he would convince himself that this was an indication that she wished to see him and that everyone else has got it wrong. I have every sympathy for HS (and indeed for the rest of the family) for he and they have lost a much loved daughter and sister, and he lives alone and no doubt feels isolated. His distress when giving evidence was palpable. The way in which the case commenced, namely with his being investigated for sexually abusing his former wife, was obviously

very distressing for him. However, it is PS's best interests I am concerned with, and not HS's.

24. I have to make the decision as to whether it is in PS's best interests to have contact with HS. I have come to the clear conclusion that it is not and that I should make an order to that effect. When she had capacity she did not want to see him other than very occasionally, and it seems impossible to believe that the values she held then would have changed now. I suspect that HS feels that the death of DS would have drawn them closer together, but that is very speculative. The fact that PS can demonstrate some superficial pleasure upon seeing HS is not achieved because of who he is but because she does not realise who he is. Also, the contact can cause her anxiety, as was demonstrated during 2018, 2019 and also after the chance encounter in Waitrose. PS's important relationships for the last 25 years have been with DB and DS when she was alive, and also with her son in law and her grandchildren. DB has been very close to PS for years, and her views about her mother's wishes, feelings and best interests deserve the greatest of respect.
25. Given my decision as to PS's capacity and best interests, there is no need for me to go on to consider the question of consent to sexual relations with HS, or to make any finding of fact as to what has happened in the past.