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Case No: 11403416 (Court of Protection)
Case No: LV19D05890 (Family)

IN THE COURT OF PROTECTION
SITTING IN LANCASTER

IN THE FAMILY COURT
SITTING IN LANCASTER

Date: 01/03/2023

Before:

THE HONOURABLE MR JUSTICE HAYDEN

- -

Between:

D
(by his proposed litigation friend, F)

Applicant

- and –

S

1st Respondent

- -
- -

Neil Allen (instructed by Hill Dickinson LLP) for the **Applicant (Court of Protection proceedings)**
Emma Spruce (instructed by the Hill Dickinson LLP) for the **Applicant (Family proceedings)**
Dr Julian Sidoli (instructed by Birchall Blackburn Law) for the **Respondent (Court of Protection and Family proceedings)**

Hearing dates: 15th February 2023

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.

.....

THE HONOURABLE MR JUSTICE HAYDEN

The judge has given leave for this version of the judgment to be published.

MR JUSTICE HAYDEN:

1. There are two applications before this Court. The first to be determined (in the Court of Protection) relates to a best interests decision in respect of D, who lacks capacity in a wide sphere of decision-taking in consequence of a severe acquired brain injury. The injury which occurred in 2006, resulted in significant physical and cognitive impairment. The second application (in the Family Court), which as will become clear below, is contingent upon the decision in the first, is an application for a decree nisi of divorce.

2. D married S in August 1998. There is very little in the papers, either in the family proceedings or the Court of Protection statements, which concerns their family life. They have two children, now young adults, P, born in June 2001 and T, born in November 2005. By contrast, there is a great deal concerning the family's financial affairs. D and S became shareholders in a pharmacy company along with D's brother. By June 2006, I am satisfied that there were considerable strains, both within the business and in the marriage. D, whom I am satisfied was living separate and apart from his wife at the time, took an overdose which resulted in the very significant brain injury, which I have referred to above. In October 2007, S petitioned for Divorce on the grounds of adultery. It is important that I record that I have seen no coherent evidence in support of this alleged ground. In 2008 the Court of Protection appointed Mr Niall Baker, a solicitor, as D's Deputy for property and affairs.

3. In March 2009, S made an application, in the Family Court, for Financial Remedy. On 7th April 2009, DJ Anson heard the case and concluded that Mr Baker did not have authority to conduct Divorce proceedings on behalf of D. The District Judge invited the Official Solicitor to act as litigation friend for D, see *Re W* [1971] Ch 123 (determined prior to the present iteration of the Court of Protection). On 15th July 2009, the Divorce petition and Financial Remedy application were stayed pending the appointment of a Guardian for D. All future applications were reserved to DJ Anson. The Official Solicitor subsequently confirmed that he would accept the invitation if certain criteria were met, i.e., evidence that D lacked capacity to conduct proceedings; there was no other person to act for him and there was security for the Official Solicitor's costs. That security for costs was not provided. Accordingly, the invitation was declined.

4. On 12th September 2016, S issued a "supplemental" petition for divorce, on the grounds that the marriage had irretrievably broken down and the parties had been separated for a continuous period, amounting to at least five years. On 13th December 2018, DJ Anson lifted the stay on proceedings and gave directions which provided for a hearing on the 9th May 2019. On 9th May 2019, S's petition for divorce, on the grounds of adultery, dated 3rd October 2007, was dismissed by consent of the parties.

5. Nothing was done actively to pursue S's supplemental petition but, in July 2019, an application for Divorce was made by D on the same grounds i.e., 5 years separation. As a matter of chronology, the parties had been living apart for 13 years. D's petition was issued on 3rd August 2019 and proceedings were transferred to Preston County Court on 1st October 2019. At that stage, U, D's brother, was identified as his litigation friend. On 14th October 2019, DJ Anson, who managed to achieve a remarkable degree of judicial continuity in this case over a great many years, further

stayed proceedings, having been satisfied that the litigation friend had failed to comply with his duties, as required by PD15A of the Family Procedure Rules 2010. In particular, para. 2.1:

> ***2.1***
> *"It is the duty of a litigation friend fairly and competently to conduct proceedings on behalf of a protected party. The litigation friend must have no interest in the proceedings adverse to that of the protected party and all steps and decisions the litigation friend takes in the proceedings must be taken for the benefit of the protected party."*

6. This led to an amended application for Divorce, dated 23rd October 2019, issued on 7th November 2019. On the same date, DJ Anson lifted the stay and provided for the filing of an answer by S. Notwithstanding her earlier Petition, S responded by contesting that the marriage had irretrievably broken down and challenging D's capacity to pursue the divorce. Having heard S give evidence, I am satisfied that her change of position was entirely motivated to secure what she perceived to be her best financial advantage and that of her children. I have not seen any evidence or heard argument as to why it was thought that such a strategy might be advantageous and have seen no suggestion that it has been effective. Indeed, such evidence as is available suggests it has been disadvantageous both to S and the children.

7. On 16th February 2021, F, a longstanding friend of D, put himself forward as D's litigation friend in the Divorce proceedings and signed the necessary certificate of suitability. F has also given evidence before me. It is important that I record my impression of him. He struck me as an essentially decent man. I found him to be thoughtful, reflective, self-critical and genuinely striving to be objective. I noted that he listened very carefully to the entirety of the evidence. He was the only person who was able to bring D's character and personality into the court room. D's son, (P), listened respectfully to what he had to say. He was 5 years of age when his father suffered a brain injury and his sister only 12 months. I formed the impression that F held a real affection for his friend. I sensed that he also, as a young man, had great admiration for him too.

8. D, it transpires, was a talented sportsman and a really good tennis player. He played regularly and he was manifestly competitive. D and F played together on many occasions. When D was on vacation from university, the two would manage to play three or four times a week. F told me that he could not ever remember winning a match. F sought to mitigate his defeats by explaining that his primary sport was squash! F described D as a handsome man who was charismatic, charming and popular with both men and women. F also told me that he had not visited D since his accident to the extent that he thought he should have. He obviously felt guilty. Though I may be entirely mistaken, I sensed that F found it very hard to see his friend in the diminished state that he has now found himself. Having known D for decades, F told me he felt particularly sorry for D's parents, who have carried the burden and would certainly say the privilege of caring for him. He also said that before D's brain haemorrhage, which is the way the family refers to what has happened to D, he was aware that D and S had become estranged and that neither seemed interested in

repairing their relationship. I found that evidence entirely convincing. Even as he told me this, it was clear that F struggled to understand why this obviously attractive, successful young couple, with a beautiful son and a young baby, seemingly made no effort to retrieve their marriage. F's perception may or may not be accurate, nobody truly knows what goes on in a marriage, but I am entirely satisfied that his assessment was genuine.

9. On 20th January 2020, DJ Anson phlegmatically listed the matter for yet a further case management hearing on 1st April 2020. The court directed that U respond to the claim that he should not continue as litigation friend due to his conflict of interests. On 1st April 2020, DJ Anson further adjourned the hearing to 17th August 2020 with an order for costs against D. On 17th August 2020, the court directed the filing of evidence in respect of D's wishes and feelings relating to the divorce, to be prepared by his social worker and to be filed on 9th March 2021. The order also provided for the instruction of a single joint expert to provide a report addressing D's general medical condition and capacity for decision making by 9th March 2021.

10. On 27th October 2021, District Judge Anson, who has displayed a degree of patience vouchsafed to very few, noted that neither party had complied with the court's orders and redirected that the social work report be filed by 4th February 2022 and the expert report by 21st January 2022. The entire timetable for the filing of evidence was also amended and a further hearing listed on the first available date between 14th March and 29th April 2022.

11. On 13th April 2022, DJ Anson suggested to the parties that consideration be given to making an application to the Court of Protection given that all agreed that the petition had been presented at a time when D may have lacked capacity to make that decision or to conduct proceedings. At that hearing the court recorded the agreement by the parties that the issue requiring determination was:

> *"whether a litigation friend is required to show evidence of the protected person's wishes when making decisions on their behalf in conducting the proceedings."*

12. The court's order provided that the application be adjourned until 15th July 2022 and upon an application being made to the Court of Protection, before 4pm on 15th July, the proceedings would be stayed pending the outcome of those proceedings. In the absence of any such application, S was given permission to apply to strike out the petition by 4pm on 18th July 2022. The matter was listed for a further hearing on the first available date after 5th August 2022 with the case being re-allocated to a Tier 2 Judge in the Court of Protection.

13. On 3rd August 2022, HHJ Burrows, the Regional Lead Judge for the Court of Protection, sitting on that date as a Judge in the Family Court, made an order vacating the hearing on 5th August 2022, having been informed that D, via his litigation friend, had taken advice from Leading Counsel and on the basis of that advice, intended to make an application to the Court of Protection for a declaration as to whether a Divorce would be in his best interests. The court recorded that the parties agreed that the Divorce proceedings be stayed generally until the outcome of the Court of Protection application.

14. This is the application that comes before me. With respect to all involved, I was struck by the absence of any real attempt, or at least any success, in garnering material that cast meaningful light on the identified issue. As I have said, very little of D's character and personality emerged from the papers. Until I heard from F, I had no sense of D's dynamism, competitiveness and energy. I did, however, have some sense of his deep and unconditional love for his children. Whilst this evidence has brought D's personality into the court room, for I suspect the first time in all these years of expensive, unproductive and dispiriting litigation, it has also added poignancy to D's reality. D's life has become the very opposite of everything he was and wanted for himself and his children. I observe, and I emphasise that I do so without making any moral judgment or insinuating any censure, that D has had very few visitors for over a decade. He has not seen his children, his wife or his friends. This charismatic man lives in a world that is diminished. It is salvaged by the dedication and love of his mother and siblings, who visit him regularly and in circumstances that have latterly been very challenging. F was quite right to focus his sympathy and respect towards them.

15. Logically, the first question to resolve is that of capacity to conduct divorce proceedings. As McFarlane LJ observed in *PC v City of York Council*, [2014] [Fam 10], *"the determination of capacity under MCA 2005, part 1, is decision specific. Some decisions, for example agreeing to marry or consenting to divorce are status or act specific"*. Research has revealed a dearth of authority analysing what information might be regarded as relevant to a decision to divorce.

16. In Mason v Mason [1972] Fam. 302, Sir George Baker P observed:

> *"This is the first time, I think, that this question has arisen for decision, but I have no hesitation in coming to the conclusion that the test for the capacity of a man to give a valid consent for the dissolution of his marriage is exactly the same as the test for the validity of the contract of marriage, and that is the test propounded in In the Estate of Park, decd*.

17. Where any question as to the capacity of an individual arises, the starting point is that he or she *"must be assumed to have capacity unless it is established that he lacks capacity*" (MCA 2005 s 1(2)); or, as Kennedy LJ in the Court of Appeal explained, the common law doctrine which s 1(2) encapsulates in *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, [2003] 1 WLR 1511:

> *"[17] It is common ground that all adults must be presumed to be competent to manage their property and affairs until the contrary is proved, and that the burden of proof rests on those asserting incapacity."*

18. Chadwick LJ clarified the legal framework, thus:

> *"The authorities are unanimous in support of two broad propositions. First, that the mental capacity required by the law is capacity in relation to the transaction which is to be*

> *effected. Second, that what is required is the capacity to understand the nature of that transaction when it is explained. Those two propositions find expression in the passage from the judgment of Mr Martin Nourse QC in In re Beaney, decd [1978] 1 WLR 770, 774 E-F to which Lord Justice Kennedy has referred. But they can be traced from much earlier authority. In Ball v Mallin (1829) 3 Bligh N.S. 1, 12, 22, the House of Lords upheld a direction to the jury that what was required was that a person "should be capable of understanding what he did by executing the deed in question when its general import was fully explained to him". In Harwood v Baker (1840) 3 Moore 282, 290, the Judicial Committee of the Privy Council explained that "in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his Will, he is excluding from all participation in that property". In Manches v Trimborn (1946) 115 L.J.K.B. 305, Mr Justice Hallett pointed out that the answer to the question whether the mental capacity necessary to render the consent of the party concerned a real consent was present in any particular case would depend on the nature of the transaction. The cases were reviewed by the High Court of Australia in Gibbons v Wright (1954) 91 CLR 423. Sir Owen Dixon, in a passage at page 438, to which Mr Nourse QC referred in In re Beaney, decd, (ibid, at page 774D), stated the principle in these terms:*
>
> *". . . the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained."*
> *The same test was applied by this Court in In the estate of Park, decd [1954] P 112. At page 127 Lord Justice Singleton said this:*
>
> *"Was the deceased on the morning of May 30, 1949, capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? To understand the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract."*

19. In *Masterman-Lister* and more recently in *Dunhill v Burgin (Nos 1 and 2)* [2014] UKSC 18, [2014] 1 WLR 933 the Court of Appeal and Supreme Court respectively were concerned with the question of whether or not a person who lacked capacity was

in a position to accept settlement of their claim for damages. In the first case the answer was that the claimant had capacity to settle; and in the second, that she had not. The emphasis was on both the person and fact specific nature of the enquiry. In Dunhill v Burgin, Lady Hale explained the test of capacity as follows:

> *"[13] The general approach of the common law, now confirmed in the Mental Capacity Act 2005, is that capacity is to be judged in relation to the decision or activity in question and not globally. Hence it was concluded in [Masterman-Lister] that capacity for this purpose meant capacity to conduct the proceedings (which might be different from capacity to administer a large award resulting from the proceedings)…. In my view, the Court of Appeal reached the correct conclusion on this point in Masterman-Lister's case and there is no need for us to repeat the reasoning which is fully set out in the judgment of Chadwick LJ."*

20. In Mason (supra), Sir George Baker noted:

> *"A question canvassed by Mr. Swift, about which I think I ought to say something, although it is not strictly necessary for this case, is whether the consent must always be the consent of the respondent spouse, or whether it can be the consent of the guardian ad litem, the Official Solicitor, given on behalf of the respondent spouse. I am not going to venture into the question whether the Court of Protection could give a valid consent for the purposes of section 2 (1) (d). Under the Mental Health Act 1959 the Court of Protection has wide powers, and this interesting question can be decided if and when it arises. Suffice to say that my attention has been drawn to a passage in Heywood & Massey, Court of Protection Practice, 9th ed. (1971), p. 235, where it is said: "Presumably, consent on behalf of a respondent under mental disability for the purpose of paragraph (d), the two-year period, would be given by the guardian ad litem."*
>
> *Now if that is intended to mean what it appears to mean, in my view, it is wrong. I do not think that the Official Solicitor as guardian ad litem can give a consent for a patient. After all a consent is merely an expression of a state of mind, and I do not think that it is appropriate, of possible, for the Official Solicitor to express the state of a patient's mind to the court for the purposes of section 2 (1) (d) of the Act of 1969. I reach that conclusion on the simple basis that there is nothing that I know of, no statutory provision, no rule of practice, or anything else, which would enable the Official Solicitor so to act. Be it clear, the Official Solicitor is not suggesting that he should so act."*

21. Our modern approach to questions of capacity has evolved greatly since Sir George Baker's judgment but the above passage foreshadows the emphasis of the Mental

Capacity Act 2005 on the importance of respecting individual autonomy. It is plainly right that whilst the Official Solicitor or litigation friend may help in determining the question of 'consent', as it is termed above, neither is able to give consent on behalf of the protected party. Today, in a legal landscape, which is unrecognisable from that facing Sir George Baker, we formulate the question differently. We evaluate those features of the evidence, where available, that cast light on what the protected party would have wanted and assess it in the wider framework of Section 4 of the Mental Capacity Act. Though this provision is widely known and referred to, I set it out here in order that the stages of the process can be fully understood.

> *"**Section 4: Best interests***
> *(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—*
>
> *(a)the person's age or appearance, or*
> *(b)a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.*
>
> *(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.*
>
> *(3) He must consider—*
>
> *(a)whether it is likely that the person will at some time have capacity in relation to the matter in question, and*
> *(b)if it appears likely that he will, when that is likely to be.*
>
> *(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.*
>
> *(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.*
>
> *(6) He must consider, so far as is reasonably ascertainable—*
>
> *(a)the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),*
> *(b)the beliefs and values that would be likely to influence his decision if he had capacity, and*
> *(c) the other factors that he would be likely to consider if he were able to do so.*

> *(7) He must take into account, if it is practicable and appropriate to consult them, the views of—*
>
> *(a)anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,*
> *(b)anyone engaged in caring for the person or interested in his 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 subsection (6).*
>
> *(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—*
>
> *(a)are exercisable under a lasting power of attorney, or*
> *(b)are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.*
>
> *(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.*
>
> *(10) "Life-sustaining treatment" means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.*
>
> *(11) "Relevant circumstances" are those—*
> *(a)of which the person making the determination is aware, and*
> *(b)which it would be reasonable to regard as relevant."*

Capacity

22. Dr Krystyna Walton, Consultant in Neurorehabilitation, has been involved in D's care and medical management since 2007. In her reports, she confirms that D's acquired brain injury is 'severe' as now are his physical and cognitive impairments. D is unable to answer even the most simple and direct questions or indeed to follow simple requests. His capacity to communicate at all is characterised as *"extremely limited"*. Across a whole range of decision taking, including health, welfare or in relation to any financial matters, D has no ability to weigh, retain or balance the information that he is given.

23. Mr Allen has suggested that the criteria, identified by Munby J (as he then was) in *Sheffield City Council v E* [2004] EWHC 2808 (Fam), relating to capacity to consent marriage apply, by parity of analysis, to the decision to divorce i.e., can the protected party understand:

> *(i) The broad nature of the marriage contract;*
> *(ii) The duties and responsibilities that normally attach to marriage, including that there may be financial consequences and that spouses have a particular status and connection with regard to each other;*
> *(iii) That the essence of marriage is for two people to live together and to love one another.*

24. Whilst I broadly agree with these criteria, they are not to be regarded as set in stone but require to be tailored to the particular individual in the context of their own circumstances, see: *LB Tower Hamlets v NB & AU* [2019] EWCOP 27 at [42]-[43], approved by the Court of Appeal in *Re B* [2019] EWCA Civ 913 at [44]. In any event, given the devastating conclusions in Dr Walton's report, it strikes me that, so obvious is it, that D lacks the capacity to consent to divorce that it is, in effect, redundant of any alternative coherent argument. All but the most rudimentary decisions are now beyond him. No party has sought to question the expert opinion and, accordingly, I declare that D lacks the necessary capacity to consent to the decree.

Best interests

25. S's position, following the dismissal of her own petition, which was ultimately by agreement, has been to resist divorce proceedings, on the general basis that any interim step in relation to the dissolution of the marriage would be financially disadvantageous to her and therefore, to her children. It is important that I highlight that it is her children's financial welfare that she emphasises. Her contention is that D's brothers V and U, co-directors in the business, have been misappropriating funds and acted in breach of their duties as directors. She, as I understand her case, believes that D's lack of capacity provides an opportunity to manipulate control of the company, enabling changes of articles of association and potentially, winding up of the company. She believes, in a way that she has not been able clearly to articulate, that preservation of the marriage provides a defence against this financial misconduct, as she asserts it. However, such information as is available, which comes chiefly from D's son P, suggests that the preservation of the marriage has not prevented D's brothers circumventing his rights. P is concerned that they have already endeavoured to *"lock D out of his shareholding"*. When confronted with this apparent dichotomy, S was not able to resolve it. The challenges of the last 17 years and the stress of this grotesquely protracted litigation strike me as having taken its hold on her and, if she will forgive me for saying so, has impacted adversely on her ability to evaluate the present situation. The identification of D's share, its valuation and whether the co-directors have acted to defeat his interests will fall into focus in the course of the financial remedy dispute. It may even be that it is to S's financial advantage for the divorce proceedings to proceed.

26. In the months before D's overdose, his friend F had become aware of the couple's estrangement. As I have commented above (at para. 7), F was perplexed that neither seemed interested in nor prepared to save the marriage. I emphasise again that I found that evidence both genuine and entirely convincing. S told me in evidence that this was not, in truth, an estrangement, but a separation provoked by her convalescence with an injury to her foot. I did not, I regret to say, find that convincing. In any event, S has not visited or attempted to communicate with her husband for many years.

Indeed, there has been little, if any, contact for well over a decade. The core features of what constitutes a marriage have inevitably evaporated.

27. The institution of marriage holds an important place, both in our domestic law and in all the major faiths. There is something inevitably corrosive of the status and importance of that institution in preserving a legal framework which, for the parties, has become, in reality, an empty husk. If, for whatever reason, that is the choice of the parties then that decision requires to be respected. However, where one party has lost the capacity to consent either to the continuation or termination of the marriage, that provokes a more complex predicament. Here, the prevailing evidence indicates that D regarded the marriage as irretrievably broken down, at a time when he clearly had capacity to evaluate his life. S's conduct of her own life and affairs, in the intervening years establishes, at very least, that at some point, she too has come to regard the marriage as at an end. It is not necessary for me to conclude precisely when she came to that decision, beyond reiterating what I have said earlier concerning F's perception of the couple. In the early years, following the brain haemorrhage, D's general functioning, though significantly impaired was, as Dr Walton has told me, far less compromised then, than is presently the case. The file notes from D's solicitors, acting as his Deputy, reveal the following accounts, specifically addressing his wishes and feelings in relation to what will then have been his wife's petition for divorce. The following are pertinent:

> ***"1 April 2008***
>
> *[L and R, legal representatives] met with [D] and his brother, [U] and sister, [V]. Niall reported that [D] had improved immensely since their last meeting and was now sat out in a chair and alert. During this meeting [L] noted* ***"[D] was able to enthusiastically agree that he did want to be divorced."*** *His brother and sister added during the meeting that* ***"[D] did want to retain access to his children and that it was very important to him".*** *[L] explained that "when his divorce has come through, his assets will automatically pass to his children. [D] was happy with this." During the meeting, [L] also noted "that it may be appropriate to obtain a review of [D]'s capacity as it was obvious he was making more decisions himself." Upon concluding the meeting, [L] recapped and noted* ***"[D] is very clear that he does want to be divorced."*** *He also explained that [S] had petitioned on the grounds of adultery and noted* ***"[D] was very clear that this had never happened. He denied committing adultery immediately and it was apparent that he did have capacity to give instructions."***
>
> ***2 April 2009***
>
> *[L] met with Kelvin from the IM family law team. It was advised that the Official Solicitor would need to be instructed in the divorce proceedings. [L] advised that [D]'s condition had improve and he was clear during the meeting. Niall*

advised that ***"[D] was very clear that he did want to be divorced but that he would not consent to adultery."***

13 August 2009

[R] met with Kelvin from IM's family law team. The meeting was held to discuss the intention in relation to the former matrimonial home proceeds. [R] noted during the meeting it ***"was felt that [D] had capacity to give instructions in relation to the divorce as he was adamant he had not committed adultery."*** *It was agreed that [L] in the meantime could draft a letter to [S] regarding contact with the children and also an email to [S] to obtain her view on the sale proceeds being split.*

10 April 2014

Beth attends on [D]'s brother and sister. The purpose of the meeting was to discuss the shares. During the meeting, it was reiterated that the divorce process could not be kick started without funding and that the divorce process would include full financial disclosure from both sides, meaning there would be no guarantee [D]'s funds would not end up with [S]. Both [D]'s siblings reiterated throughout the meeting that they wanted to do what was best for [D] but wanted [S] to have nothing more to do with the company and family. During the meeting Beth advised ***"the last time he met [D] he was very adamant that he wanted a divorce."***

27 January 2016

[R] attended on [D] and his siblings. It was advised that there was a chance that [D]'s condition would now regress but there was no timescale for this. During the meeting it was noted that when the conversation turned to divorce, ***"[D] was slightly agitated and did not wish to engage in discussion about his children. It was obvious that he felt this distressing". Previously he had been very definite in wanting to divorce, but on this occasion he "perseverated over the name of an ex-girlfriend and did not wish to engage in conversation about [S]." It was noted that he "responding no when asked if he would marry [S] again."*** *Throughout the meeting his responses were unclear and he was unable to give direct answers to the queries raised.*

28. Ordinarily, I would afford these consistently expressed wishes very significant weight. The fact that there may be doubt as to whether D was capacitous at the time they were expressed, would not necessarily diminish the weight to be afforded to them. However, in this case the intensity of the family feud, causes me to draw back from a too easy assumption that they represent D's own genuinely held views. Here,

there is fertile ground for his being influenced either knowingly or inadvertently. Nonetheless, the statements entirely accord with what is recorded of D's pre-brain injury views. The likely accuracy of these views is, to my mind, also enhanced by the fact D's statements concerning his children are manifestly authentic and corroborated extensively throughout the entirety of the evidence. I am ultimately confident that they reflect D's views.

29. In these circumstances, and for all the above reasons, I consider that further to continue the status quo, would, ultimately, risk demeaning all involved. It is important to note that in this sadly dysfunctional family, what has plainly united this couple has been their love for and commitment to their children. Both parents would want to promote their children's future welfare in every conceivable way. At the very end of the hearing, which lasted only a few hours, S indicated that she would no longer oppose the decree nisi.

30. P prepared a detailed, moving, and articulate statement for this final hearing. It is, in many ways, an impressive document. He told me in his oral evidence that it took him three days to put it together and I do not doubt that. To a degree which I suspect he may not be entirely aware of, the statement reveals a young man who is struggling to cope with a life and childhood that has been characterised by conflict. His statement covers, in almost equal measure, his concerns regarding his personal and mental health and his anger with what he believes to have been a deliberate dissipation or misappropriation of his father's funds and his own inheritance. He believes that his father would have wanted him and his sister to inherit the financial assets which are the fruits of his labour and talent. I agree. The conflict surrounding the divorce adds, in my judgement, to this young man's burden unnecessarily. The granting of the decree nisi moves this unhappy family at least one step forward towards ending the conflict. This necessary step has been avoided for far too long. Having regard to everything that I have been told about D and set out above, I am clear that this is what he would want. Evaluated in these terms, within the aegis of Section 4, I come to the very clear conclusion that the granting of decree nisi is, for all of the above reasons, in D's best interests.

31. Finally, it is important that I record that during the course of the hearing, I asked counsel whether thought had been given in this case to a referral to the King's Proctor. It had not been. Ms Spruce, Counsel for D, has asked me to consider wider guidance when circumstances of this kind arise. Historically, situations such as that presented here, have been rare, at least within the case law. Though our understanding of the rights of the incapacitous has grown very considerably, particularly in the last decade and though I anticipate such issues are more likely to arise in the future, I am, with respect to Ms Spruce, not inclined to give wider guidance. The Court of Protection is a highly fact and issue specific jurisdiction in which prescriptive guidance runs the distinct risk of being actively unhelpful. That said, the case provides a useful opportunity to highlight the scope and ambit of the King's Proctor. The scope of the King's Proctor's intervention derives from Section 8 of the Matrimonial Causes Act 1973.

8 Intervention of Queen's Proctor

> *(1) In the case of a petition for divorce [an application for a divorce order] –*
>
> > ***(a) the court may, if it thinks fit, direct all necessary papers in the matter to be sent to the Queen's Proctor, who shall under the directions of the Attorney-General instruct counsel to argue before the court any question in relation to the matter which the court considers it necessary or expedient to have fully argued;***
> >
> > ***(b) any person may at any time during the progress of the proceedings or before the decree nisi is made absolute give information to the Queen's Proctor on any matter material to the due decision of the case, and the Queen's Proctor may thereupon take such steps as the Attorney-General considers necessary or expedient.***
>
> *(2) Where the Queen's Proctor intervenes or shows cause against a decree nisi in any proceedings for divorce, the court may make such order as may be just as to the payment by other parties to the proceedings of the costs incurred by him in so doing or as to the payment by him of any costs incurred by any of those parties by reason of his so doing.*
>
> *(3) The Queen's Proctor shall be entitled to charge as part of the expenses of his office –*
>
> > *(a) the costs of any proceedings under subsection (1)(a) above;*
> >
> > *(b) where his reasonable costs of intervening or showing cause as mentioned in subsection (2) above are not fully satisfied by any order under that subsection, the amount of the difference;*
> >
> > *(c) if the Treasury so directs, any costs which he pays to any parties under an order made under subsection (2).*

32. Ms Spruce has helpfully identified a number of cases illustrating the broad ambit of the Queen's Proctor's intervention: *Hussain v Parveen (The Queen's Proctor Intervening)* [2022] Q FLR 823; *Padero-Mernagh v Mernagh (Divorce: Nullity: Remote Hearing)* [2020] 2 FLR 585; *M v P (The Queen's Proctor Intervening)* [2019] 2 FLR 813. It is not necessary for me to burden this judgment with any discussion of those cases, other than to note that there is, as far as our research has revealed, as yet, no reported case relating to intervention predicated on concern for a protected person (FPR 15).