

IN THE COUNTY COURT AT CANTERBURY

The Law Courts,
Chaucer Road,
Canterbury, Kent, CT1 1ZA

Date: Monday 8th November 2021

Before:

HER HONOUR JUDGE SARAH DAVIES

Between:

CA

Applicant

- and -

(1) A LOCAL AUTHORITY Respondents

(2) MA

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CHRISTINE COOPER (instructed by Irwin Mitchell LLP) for the Applicant
SCOTT STOREY for the First Respondent
The Second Respondent was not represented

Approved Judgment Approved

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

HER HONOUR JUDGE SARAH DAVIES:

1. This case concerns a lady called CA, who is a 46-years old. Her brother GB is her litigation friend. She survived a viral infection as a child and she is deaf, registered blind, uses British Sign Language, she has cerebral palsy on her left-hand side and a mild learning disability. She has also been diagnosed with schizophrenia.
2. CA was placed since September 2019 in a British deaf home, and since then she has been asking to leave it. I have to consider under section 16 of the Mental Capacity Act whether this lady does have capacity to consider where she should live, and also in relation to her accommodation and decisions about whether she should move and where to go and also that would of course then affect the Deprivation of Liberty application.
3. The position of the parties is as follows. The Local Authority, after an assessment by Dr Baker, consider that at the moment it is too difficult to say whether CA has capacity and they say there should be a further assessment by Dr Baker. Dr Baker assessed CA, , in January of this year and he found that she had fluctuating capacity, but on the day he assessed her he said that she did have capacity.
4. CA has been given notice and needs to move from her placement in which she currently resides, so although there is no place for her at the moment this hearing was set up to consider issues of capacity.

5. The Local Authority had decided, following Dr Baker's report, that CA did have capacity, and it is said that the support and help that she might have been entitled to in relation to these issues has not been apparent. On behalf of CA herself I am asked to find that she does not have capacity because of her current mental state. Her mother, MA, also supports that view.

6. I heard evidence from her brother, GB, and from Dr Baker. GB told me that, in his view, his sister has been depressed. He says that he has regular phone contact with her and video contact with her. I have seen exhibited to his statement a list of times that they phone each other. He says those phone calls can last from either two to three minutes to up to fifteen minutes. He says that he has known her all his life and he feels that on many occasions, he says up to half of the occasions when he speaks to her, that she is depressed, She is spending a lot of time asleep and, of course, whilst he cannot clinically diagnose depression, he can give us a view as to how she is. He says that she has often just got up, and it might be very late in the day, she is spending more time in bed, she is not eating so much. Whilst the care records say that she is relaxing in her room, and he says that for some of that time she might be. However, that for quite a lot of the time that she is simply very unhappy and is in her room. He says that he is concerned about her mental state, the lockdown has not been kind to her, as to many people in this situation, but particularly, having the difficulties that she does have. He says that there are clear signs of her being upset. He says that she has broken her iPad, thrown her phone charger and iPad and got rid of them and broken some of her things. These are very important things for CA, because it is how she communicates with her family.

7. He also says that there are a large number of agency staff at this home. Some of them cannot communicate very well with CA and she has found this very frustrating. He says that when she is rude or angry or acts out this is typically when she is very unhappy. He thinks that she has suffered greatly during the last year and the home records perhaps do not always reflect how she has been because obviously there is a big difference between sitting in her room relaxing and sitting in her room being very unhappy. He has said that she has said that she has heard voices again and she has had a number of bad weeks. That view is echoed by her mother, who has not given evidence but who has provided a witness statement.

8. Dr Baker gave evidence and confirmed his report. Dr Baker confirmed his report and said in evidence that CA has fluctuating capacity. He said that on the day he saw her he felt that she was able to make decisions and had capacity and would be able on that day to give a view as to where she wanted to live and to have capacity to do that. He accepted that when she is unwell, when she has mental health issues, when she is upset or stressed, that whilst she can have support to make decisions it would be very difficult for her, and he accepted that she had suffered during lockdown and he accepted from GB that her mental health appeared to have suffered greatly during this time. Whilst he accepted that every support should be given to CA to make a decision by having somebody she knows calming her down, he did accept that it would be difficult for her to make a decision when things are highly charged, there are emotional issues such as where she would live, and he I think accepted, after questions from me, that she may not have capacity in those situations. Whilst he accepted that every attempt should be made to ensure she is given the correct support, his views were that, whilst she may appear to understand the salient features, she would struggle, because of the issues in relation to making decisions, understanding the ramifications of things, and whilst she could make some decisions, when she is unwell it would be impossible for her to do so.

9. The Local Authority have proposed that I adjourn this case to allow Dr Baker to make a further assessment of CA. They say they are uncomfortable with a decision today that she lacks capacity because the assessment was carried out so long ago in January of this year.

10. Fluctuating capacity is an extremely difficult issue to deal with. I have been helpfully referred to the law and I have been referred to Sir Mark Hedley's judgment in *Cheshire West v PWK* [2019] in which a longitudinal approach was recommended. By that I mean I am not looking at a snapshot decision, but I am looking at an overall view, if I can put it like that. In that case he said: "It is important to recognise in this case that there is likely to be a particular focus on understanding relevant information, retaining it and using or weighing it. There will be many occasions when PWK is hampered by anxiety when those grounds are clearly made out. However, that will not always be the case. It may fluctuate. The question is how the law deals with that".

11. In *Royal Borough of Greenwich v CDM* [2010] Cohen J made a declaration of fluctuating capacity, but of course there are, as it was said, two difficulties with that and Sir Mark Hedley dealt with that. The first question is whether you can make a declaration in those terms, and Sir Mark Hedley said no, and there are practical problems of those responsible for someone's care with such a declaration. Sir Mark Hedley deals with issues such as making a will or power of attorney and cases where decisions may readily have to be taken, sometimes at short notice, as, for example, in managing one's own affairs; and on behalf of the applicant it was said in this case that when CA was offered an alternative placement in the New Forest she was unable to organise herself so that she could go and view it in time. She had been told she had to do so quickly and it seemed that, for whatever reason, she was unable to do that and by the time she had viewed it, of course, somebody had taken it.

12. Sir Mark Hedley said in respect of the person he was dealing with: "I am satisfied on balance that he lacks capacity to manage his own affairs. In so finding I acknowledge, as I have done in relation to the other matters, there would be times when a snapshot of his condition would reveal an ability to manage his affairs. But the general concept of managing affairs is an ongoing act and therefore quite unlike the specific act of making a will or making an enduring power of attorney. Management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent. In the context of evidence that I have I am not satisfied that he has capacity to manage his affairs."

13. In this case the applicant urges me to follow this line of judicial argument and they say that, whilst of course she can make decisions about many things, that this is a very difficult point. Dr Baker said that when there are emotional issues or when she is upset that she is unable really to make a proper decision and so does not have capacity. Also, what is said is that the Local Authority in deciding that she did have capacity then has not put the support in place to help her make a decision.

14. The law is clear that a person is presumed to have capacity. In this case of course we have Dr Baker's evidence that she has fluctuating capacity. I have also considered the evidence of GB, her brother. It seems clear to me that since lockdown her mental health has suffered. Whilst of course GB accepts he is not a psychiatrist, the behaviour he describes and CA's mother's description of her behaviour is that of a person who is very unhappy, who seems to be sleeping a lot and is possibly depressed, is refusing at times to take medication for schizophrenia, has presented to them as delusional and is clearly unwell on occasions.

15. Whilst on behalf of the Local Authority it is said that she would be able to make a decision or be able to have capacity to make a decision about where she would live if she is properly supported, I am satisfied in this case that this is a very emotive decision; it is I think a decision that would be extremely stressful for CA. I do not think it would be helpful to adjourn the case to allow Dr Baker to have a further assessment of her because as far as I can see that would be a snapshot. I accept GB's and MA's evidence, and Dr Baker accepted that during lockdown, because she has been isolated like many people, her mental health has suffered. I bear in mind Sir Mark Hedley's judgment, and whilst she may understand some of the features of a move I do not think that she has capacity to understand it completely or to understand the nuances of a move to be able to make a decision. I think the New Forest placement illustrates that, and as far as I can see her mental health has deteriorated since that time. This is not to say that she will never have capacity, but I think in this situation now it is unlikely. As far as I can see, because of the ongoing nature of these matters, it is not a specific act of doing one thing, it relates to a continuous state of affairs, and demands may be unpredictable. placements may come up at very short notice and she would, I think, struggle to be able to make a decision or to be able to weigh up the relevant parts of that decision. In that respect I do not accept that CA has capacity to decide where she should live and to manage her affairs.

16. I have taken a longitudinal view. This is an ongoing act deciding about where she should live, her care and support. At times she might be able to decide some of those things, but I think overall she does not have capacity for making that decision and on that basis I declare that CA does not have capacity to decide where she would want to live and her care. Whilst I accept that the Local Authority have tried their best in terms of considering this issue, I am not satisfied that she would be able in a very short space of time or in the time that she would have to make the decision to be able to do so, and on that basis I make a declaration that she does not have capacity to manage her affairs.
