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Neutral Citation Number: [2020] EWCOP 15

Case No: 13407933

IN THE COURT OF PROTECTION

Civil and Family Court and Tribunal Centre
Barras Bridge
Newcastle upon Tyne

Date: 25/03/2020

Before:

THE HONOURABLE MR JUSTICE COBB

- -

Between:

A LOCAL AUTHORITY IN YORKSHIRE	**Applicant**
- and -	
SF	**Respondent**
(By her litigation friend the Official Solicitor)	

- -

Simon Burrows (instructed by **The County Solicitor**) for the **Local Authority**
Ben McCormack (instructed by **Simpson Millar** for the **Official Solicitor**) for **SF**

Hearing date: 6 March 2020

- -

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.

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THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in public. 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 of SF and members of her family 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.

The Honourable Mr Justice Cobb:

1. SF is a married woman, aged 45 years old. Her husband, AF, is significantly older than her, and is retired. The couple live together. SF suffers from mild learning disability, type 2 diabetes, depression, and frontal lobe dementia; her presentation has been described as "extremely complex". SF has difficulty communicating and expressing herself, and has difficulty in understanding language.

2. SF is the subject of proceedings which were issued in the Court of Protection in March 2019 by a Local Authority in Yorkshire (the 'Local Authority') by which it seeks declarations in relation to SF's capacity in a number of areas of SF's life, as a prelude, as appropriate, to court-determined best interests' decisions. AF was a party to these proceedings but was discharged as such by HHJ Anderson in January 2020.

3. The Local Authority and the Official Solicitor, on behalf of SF, agree that the expert and lay evidence taken as a whole displaces the presumption of SF's capacity in the following respects:

   i) to litigate;

   ii) to make decisions about her care;

   iii) to make decisions about her residence;

   iv) to make decisions about financial matters, and property;

   v) to enter and terminate a tenancy;

   vi) to make decisions about contact with others (except where this relates to her husband).

4. The issue for determination at this hearing focused on SF's capacity:

   i) to consent to sexual relations;

   ii) to have contact with AF (in distinction with contact with others).

   The Local Authority contended that SF *has* capacity in both these areas ((i) and (ii) above); the Official Solicitor did not, at the outset of the hearing, concede this. However, at the conclusion of the hearing, having heard the oral evidence, the Official Solicitor indicated that she no longer actively opposed the outcomes contended for by the Local Authority. As the orders will not strictly speaking be by consent, I give this short judgment to explain my reasoning for supporting the uncontroversial conclusions reached by the parties.

5. For the purposes of determining these issues, I read a number of social work statements, and a detailed report from Dr. Rebecca O'Donovan MBBS, BSc, MRCPsych, MSc, Consultant Forensic Psychiatrist, with an addendum report. I heard the oral evidence of Dr. O'Donovan. I received detailed written and oral submissions from counsel.

The Law

6. It is unnecessary for me to give a detailed summation of the relevant and uncontroversial law in this judgment. I apply the well-established principles enshrined in the opening sections of the *Mental Capacity Act 2005* ('*MCA 2005*'), and start from the assumption that SF has capacity in relation to her decision-making, unless it is established on the balance of probabilities that she lacks capacity (*section 1(2) MCA 2005*).

7. The burden of proving incapacity lies on the person/party asserting a lack of capacity, and the standard of proof is the balance of probabilities (*MCA 2005 section 2(4)* and see *KK v STC and Others* [2012] EWHC 2136 (COP) at [18]). A point of particular resonance on these facts is that determination of capacity is always 'decision specific' having regard to the clear structure provided by *sections 1* to *3* of the *2005 Act* (see McFarlane LJ in *PC v City of York Council* [2014] 2 WLR 1 at [35]). Capacity is required to be assessed in relation to the specific decision at the time the decision needs to be made and not to a person's capacity to make decisions generally.

8. SF is not to be treated as unable to make a decision merely because she makes an 'unwise' decision. And as McDonald J said in *Kings College Hospital NHS Trust v C and V* [2015] EWCOP 80 at [34]:

> "… it is important to remember that for a person to be found to lack capacity there must be a causal connection between being unable to make a decision by reason of one or more of the functional elements set out in *s 3(1)* of the *Act* and the 'impairment of, or a disturbance in the functioning of, the mind or brain' required by *s 2(1)* of the *Act*".

This point has a relevance in a case where SF, the subject of the proceedings, has a significant pre-morbid passive personality.

9. Any decision made under the *MCA 2005* for or on behalf of SF must be made in her best interests (*section 1(5) MCA 2005*), applying the overall empowering ethos and principles of the *2005 Act*. In making a best interests' decision, I must take into account 'all the relevant circumstances' (*section 4(2)* ibid.).

Background

10. After attending a school for children with special educational needs, SF secured a work placement in a café, waiting on tables and washing up, where she met her husband who was a customer. That was approximately 25 years ago. They married soon afterwards, and have been together ever since, residing in the area of the Applicant Local Authority. They have no children, although AF has children from a previous marriage. SF is able to undertake certain domestic tasks, including cooking, but requires increasing levels of support with most of her daily living activities. Since earlier this year, SF has received (and continues to receive) respite care at

Hawthorns[1], a residential supported care provision, which she enjoys. AF values the time which this affords him too.

11. It became apparent in 2018 that when AF was leaving home for work, a man known only as 'Dennis' was visiting the couple's home, and taking advantage of SF by engaging in sexual intercourse with her; the evidence strongly suggests that SF did not consent to this sexual activity. AF was advised of this, and agreed to work with the supporting agencies to prevent any recurrence of this exploitation of his wife. In these discussions, AF agreed that for the time being he would not engage in sexual intercourse with SF, until clarity could be achieved about her capacity to consent to sexual relations. Indeed, he advised that they had not engaged in sexual intercourse for 2-3 years, as he had lost his sexual desire. The police discussed the situation with Dennis, firmly advising him that to pursue a sexual relationship with SF further would be unlawful, as it did not appear that she could consent to sexual intercourse. Dennis agreed that he would no longer visit SF and, so far as is known, he has not done so.

12. This investigation into this sexual exploitation provoked more intensive adult social services involvement with the couple. Concerns were swiftly raised about SF's deteriorating mental health, and her diminishing level of functioning. She had, according to AF, experienced and displayed a recent change of personality, declining language skills, and a degree of hypersexuality. It was apparent that SF was suffering depression for which she was prescribed antidepressants. While an MRI scan in October 2018 had been unremarkable, a repeat scan in September 2019 revealed the presence of "atrophy that would be abnormal for a person of her age". The neurologist considered that this could be consistent with frontal lobe dementia and/or chronic mental illness. Capacity issues required determination, hence this application.

Dr. O'Donovan

13. Pursuant to a direction given by HHJ Troy (5 September 2019), Dr. Rebecca O'Donovan was instructed by the parties jointly to undertake a report on capacity issues. She is a forensic adult psychiatrist. She read the statements and reports, and met with SF.

14. The evidence from Dr. O'Donovan reveals that SF has a learning disability in the mild range, with a gradual decline in functioning since 2010, and a significant loss of skills, with notable behaviour changes, emerging during 2018. In particular, her communication skills have deteriorated over the last few years; she appears confused and often forgets basic words for ordinary objects and familiar people (including her husband). She struggles to understand and use vocabulary relating to time ('yesterday, today, tomorrow, week, month, year'). Dr. O'Donovan described SF's short-term memory at the time of assessment as "quite significantly impaired".

15. Dr O'Donovan was anxious to emphasise in her oral evidence that SF has a significant pre-morbid personality, which she described as "passive", and "apathetic". This underlies her learning disability and dementia, and to some extent complicates the results of the capacity testing. Dr. O'Donovan described SF as someone who has always been happy to 'go along with' a decision even if she would have her own opinion; she cannot now even formulate her own opinion, as the process of gathering

[1] A pseudonym

information is lost because of her frontal lobe dementia. This is not attributable simply to her passivity. In the past, SF is described by her husband as having been "funny and outgoing" but "has got no personality at all now". Dr. O'Donovan was influenced in her assessment by the fact that SF's husband has noted quite "a significant shift" in her presentation. This is important to an understanding of her responses to questions posed relevant to her capacity generally, and specifically in relation to her husband and her attitude to sexual intercourse.

16. I turn specifically to the two controversial areas in respect of which focus was brought at the hearing.

17. *Contact with her husband*: Dr. O'Donovan was clear that SF lacks capacity to decide on contact with strangers and people who are unfamiliar. She advised:

> "Given the deficits in SF's frontal lobe functioning, it is likely that she has difficulty interpreting the subtle verbal and non-verbal cues of others which will have an impact on her ability to process information and appraise the appropriateness and safety and behaviour of others, in order to make a decision about her interactions with them…".

She added in her addendum report:

> "[H]er ability to understand and appraise her own emotions and the non-verbal cues of others is impaired, as is her ability to engage in discussions with another to gather information about them. In order to gather such information, there needs to be a level of interest in another and oneself. However, in frontal lobe dementia this is often lacking, and individuals become increasingly introspective."

18. On the issue of her capacity to make decisions about contact with *her husband*, Dr. O'Donovan took a different view. She expressed the opinion that she *does* have capacity in this regard:

> "SF's difficulty managing contact with others applies to new relationships rather than existing ones such as her relationship with her husband. SF has a premorbid level of knowledge of her husband which she has retained and uses it to make decisions about her relationship with him. There is evidence in dementia that the understanding and conduct within well-established long-term relationships remains intact for some time, and this appears to be the case here. Whilst there are concerns that SF may be influenced by her husband, it is likely that this has been a feature of their relationship for many years. Whilst her apathy will have an impact on her decision-making, it would be difficult at present to determine how much of her decision-making is affected by this and to what extent her relationship with her husband has always been of such a nature. However, as her dementia progresses it is likely that this will have a more negative impact on her

> ability to make decisions about her relationship with her husband." (emphasis by underlining added).

19. Evaluation of this specific issue of capacity is rendered more complex by the fact that she is a biddable[2] woman: "she is happy to be led by her husband". It was necessary to disentangle what was attributable to her innate passivity and what was attributable to her disorder of the mind. This was usefully tested by the fact that while on the one hand, SF confirmed that she did not "want to be without him", SF could nonetheless see the benefits in being separated from him from time to time, and was able to confirm that occasionally her husband "drives her mad". In her discussions with Dr. O'Donovan, SF was able to comment on the quality of the relationships she has with AF, his personality, how he treats her, how he talks to her, how she negotiates that relationship. She could say what she feels like when he is there, and when he is not there. She was very non-committal about his rudeness of her, which was consistent with her passivity rather than her dementia. Dr. O'Donovan said this in her oral evidence:

> "…she was able to say that there were things that she did not like [about him]. That it may be helpful to have some time apart. She was able to infer things from her unconscious knowledge of him."

20. Dr. O'Donovan helpfully explained in her oral evidence that SF's capacity to make decisions about contact with her husband, in contrast to her lack of capacity to make decisions about contact with third parties/strangers, depended on the use of her *episodic* as opposed to her *semantic* memory. She explained that *episodic* memory is memory for the personally experienced events of a person's life, with retention of the details of time and situation in which they were acquired. *Semantic* memory, by contrast, is knowledge which is retained irrespective of the circumstances in which it was acquired; it derives (as I understood her evidence) from the 'feeling' around the memory rather than the 'facts' surrounding the memory. She described it as a "collection of one's experiences which moulds the way you respond … drawing on lots of cues in a very unconscious way". Put another way, Dr. O'Donovan said:

> "… she would need to have regular understanding of someone before she could reach a capacitous decision [about contact with them]. This would need to happen over a long period of time. She needs to be able to appraise what is not said, tones of voice, non-verbal cures, facial expressions."

21. Where her husband is concerned, she has a *semantic* memory, which enables her to know that she has feelings for him, that she knows how he makes her feel. She is able to tell if he is in a good mood or a bad mood. With strangers and others, she has no semantic memory, and cannot remember 'situations' around when she may have seen people in the past. Reliant on this distinction, Dr. O'Donovan opined that SF has capacity to make decisions around contact with her husband.

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[2] My word, not Dr. O'Donovan's.

22. *Sexual Relations*: Previous assessments had indicated that SF did *not* have capacity to consent to sexual relations. Dr. O'Donovan, however, was of the view that, while SF remains vulnerable to sexual exploitation outside of her marriage, she satisfies the legal test to make a capacitous decision. In this regard. Dr. O'Donovan opined as follows in her addendum report:

> "In my view, SF reported that in the wider context of sexual relations she knew that she was able to refuse to have sex and that she, like everybody else, did have a choice. Her view that males take the lead when in sexual relationships to decide about sexual relations and that women do not refuse to have sex with their partners, as this would negatively impact on the relationship, indicates that she is aware that she has a choice and has considered the perceived consequences of consent versus refusal. This in the context of her marriage does illustrate a degree of passivity. However, this is not unique to her mental disorder and pre-dates the onset of this. Furthermore, it is common view that is held in various relationships".

23. Dr. O'Donovan was crucially of the view that SF understands her right to give and withdraw consent. Dr. O'Donovan was asked how SF's (pre-morbid) passivity and personality characteristics play out in this regard; she explained that SF's passivity is currently the prevailing characteristic when she is processing information about sexual relationships; however, as her dementia progresses, this will materially affect her decision-making ability. At present, SF has:

> "… lots of information to draw on…. In terms of her decision-making process, she knows that sometimes she does not really want to have sex, but she does not want to have a discussion with AF about it and she does not want to upset him; she chooses not to upset him. This is part of her personality – the fact is that she could consider being in a position to negotiate in the relationship. This is quite different from her residence decision-making where cannot weight up the pros and cons."

Capacity conclusion

24. I find that the presumption of capacity is displaced in relation to the litigation and those areas of SF's life outlined in [3] (ii) to (vi) above, but is not displaced in relation to her contact with her husband and consent to sexual relations.

25. For the avoidance of doubt, I propose to declare that she *does* have capacity in these areas, given that interim declarations have been made during the currency of the proceedings, under *section 48 MCA 2005* to the opposite effect.

Best interests

26. It is agreed between the parties that it is in SF's best interests that she currently remain living at home with AF. It remains in her interests, in the interim, for her to

continue to receive respite care at the Hawthorns. As indicated above, she has capacity to decide on her maintaining contact and a relationship with her husband, and consent to sex with him.

Deprivation of Liberty

27. I am satisfied that when SF is at Hawthorns, and indeed when she is at home, she is deprived of her liberty. I am equally satisfied that, in each case, this is attributable to the arrangements set in place by the Local Authority. Specifically, when she is at Hawthorns, she is under constant supervision and control of the staff/regime there. My view is that Hawthorns should be authorising this deprivation of liberty going forward; I nonetheless consider that I should authorise this arrangement for the time being.

28. The fact that SF is deprived of her liberty in her own home has also been specifically raised and requires authorisation. I borrow the reasoning of Charles J at first instance (approved by the Court of Appeal) in the case of *Re SRK* [2016] EWCA Civ 1317 at §29, §30, §78: my conclusion (as per Charles J's conclusion) "is based on the premise that the State knows or ought to know of the situation on the ground". I further accept Mr Burrows' submission which, by a different route, leads to the same conclusion: namely that the imputation of the State is attributable to the court; once this case has landed on my judicial desk it is now in the "State's" hands.

Review

29. Dr. O'Donovan is of the view that SF's frontal lobe dementia is deteriorating reasonably rapidly, and the evidence of AF tends to corroborate that from his own daily experience of living with her. Dr. O'Donovan advised that there should be a review of SF's capacity again in three months' time. I shall in the circumstances direct a further assessment at that time, with a review hearing to follow.

30. That is my judgment.