CASE NO. 13382064

IN THE COURT OF PROTECTION
IN THE MATTER OF GP
AND IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

B E T W E E N:

A Local Authority

Applicant

-and-

GP
(by his litigation friend, the Official Solicitor) (1)

RP (2)

Respondents

JUDGMENT

Background

1. GP is a 19-year-old man with a diagnosis of autism and learning disability. He lives with his 52-year-old mother and 70-year-old father RP. RP is a party to these proceedings.

2. GP has diagnoses of autism, anxiety and severe learning difficulties. He attended a special school from 2012. The Applicant local authority became concerned in September 2018 when RP indicated that GP would be removed from the school. The allocated social worker was not able easily to engage the family in respect of GP's care and education needs [G7].

3. GP has not attended school since July 2018. There are concerns as to what meaningful activity GP is participating in, and his community access [G24].

4. The local authority is concerned that GP needs some targeted support that continues to develop his social skills and prevents his social skills from deteriorating. It considers that :

    a. GP has the potential to benefit from continuing in education, even if that education is targeted towards life skills and is largely delivered in the community on a 1:1 basis and
    b. if GP does not avail himself of these opportunities and continues to retreat into his family home he is likely to become more withdrawn and isolated, lose his social skills and become more anxious as the years go on.

5. By virtue of s.9 Care Act 2014, where it appears to a local authority that an adult may have needs for care and support, the authority must assess— (a) whether the adult does have needs for care and support, and (b) if the adult does, what those needs are.

6. S.11 of the same Act provides that where an adult refuses a needs assessment, the local authority concerned is not required to carry out the assessment. On the other hand, the local authority must carry out a needs assessment despite a refusal if the adult lacks capacity to refuse the assessment and the authority is satisfied that carrying out the assessment would be in the adult's best interests.

7. This hearing was listed to determine whether GP is able to make a capacitous decision to accept or refuse care, support and education.

8. On 20 August 2020 I heard evidence from Dr Lisa Rippon and submissions from Ms. Clark, counsel for the applicant and Mr Brownhill, counsel for the first respondent **(**the second respondent RP had not attended and was not represented).

9. Whilst the only live witness at the hearing was Dr Rippon, the hearing bundle also contained the following witness statements and reports:

    a. Statement of SS social worker 28 January 2019 [G1-25], 12 April 2019 [G26-32], 17 June 2019 [G48-51], 14 November 2019 [G56-61]
    b. Statement SL, Post-16 LDD officer 6 March 2020 [G94-116]
    c. Statement LA social worker 8 July 2020 [G121-136]
    d. Statement Emily Gent solicitor for first respondent 25 April 2019 [G33-38] 7 June 2019 [G39-47] [27 September 2019 [G52-55] 20 March 2020 [G117-120]10 July 2020 [G137-148]
    e. Dr Rippon 20 November 2019 [I22-41], addendum 7 January 2020 [I45-54], 17 January 2020 [I55-64]
    f. Dr W 22 May 2020 [I65-74]

10. At the conclusion of that hearing, in the light of the evidence :

    a. the applicant and first respondent agreed that the presumption in respect of GP's capacity to conduct these proceedings had been displaced and I made a final declaration to that effect;
    b. In respect of the other declarations sought –
        i. the applicant invited the Court to grant only interim declarations in the light of GP's age and potential to mature;
        ii. the Official Solicitor contended that in any event there was insufficient evidence for final declarations;
    c. I gave directions for the filing and service of written submissions with a view to handing down judgment on the question of interim declarations today, recording my hope that RP would attend and also encourage and support GP to attend to enable them to hear the judgment.

11. Sadly, neither GP nor RP have attended Court today.

12. The applicant specifically seeks interim declarations that GP lacks capacity:-

a. to refuse an assessment of his needs by the local authority pursuant to s.11 Care Act 2014;
b. to make decisions as to his care and support needs pursuant to S.9 Care Act 2014;
c. to request or refuse an assessment of his education and health care needs for an education, health and care plan (EHC plan) pursuant to s.36 (1) of the Children and Families Act 2014;
d. to make decisions about his education and health care needs pursuant to the Children and Families Act 2014.

Legal framework

13. The burden of proof in relation to capacity is on the local authority; the standard of proof is the balance of probabilities.

14. I am grateful to Counsel for the Official Solicitor for the following summary of the legal framework underlying the determination of the issue of capacity, which appears to be uncontentious.

15. The following key principles flow from sections 1 to 3 MCA 2005 (the Act) (*PH v A Local Authority* [2011] EWHC 1704 (COP) at [16]):

a. A person must be assumed to have capacity unless it is established that they lack capacity (section 1(2) of the Act). The burden of proof lies on the person asserting a lack of capacity and the standard of proof is the balance of probabilities (section 2(4) of the Act and *KK v STC and Others* [2012] EWHC 2136 (COP) at [18])

b. A determination of capacity under Part 1 of the Act is always 'decision specific' having regard to the clear structure provided by sections 1 to 3 of the Act (*PC v City of York Council* [2014] 2 WLR 1 at [35]): '*The determination of capacity under MCA 2005, Part 1 is decision specific. … all decisions, whatever their nature, fall to be evaluated within the*

straightforward and clear structure of MCA 2005, sections 1 to 3 which requires the court to have regard to 'a matter' requiring 'a decision'. There is neither need nor justification for the plain words of the statute to be embellished' (MacFarlane LJ)

c. 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

d. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success (section 1(3) of the Act)

e. A person is not to be treated as unable to make a decision merely because he or she makes a decision that is unwise. As stated by Peter Jackson J in *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP) at [7]: *'The temptation to base a judgment of a person's capacity upon whether they seem to have made a good or bad decision …… is absolutely to be avoided. That would be to put the cart before the horse or, expressed another way, to allow the tail of welfare to wag the dog of capacity. Any tendency in this direction risks infringing the rights of that group of persons who, though vulnerable, are capable of making their own decisions. Many who suffer from mental illness are well able to make decisions …. and it is important not to make unjustified assumptions to the contrary'*

f. The outcome of the decision made is not relevant to the question of whether the person taking the decision has capacity for the purposes of the Act (*R v Cooper* [2009] 1 WLR 1786 at [13] and *York City Council v C* [2014] 2 WLR 1 at [53] and [54])

g. Pursuant to section 2(1) of the Act, 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 (the so called 'diagnostic test'). It does not matter whether the impairment or disturbance in the functioning of the mind or brain is permanent or temporary (section 2(2) of the Act)

h. The question is not whether the person's ability to take the decision is impaired by the impairment of, or disturbance in the functioning of, the mind or brain but rather whether the person is rendered unable to make the decision by reason thereof (*Re SB (A Patient: Capacity to Consent to Termination)* [2013] EWHC 1417 (COP) at [38])

i. Pursuant to section 3(1) of the Act, a person is 'unable to make a decision for himself' if he is unable (a) to understand the information relevant to decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision whether by talking, using sign language or any other means (the so called 'functional test'). An inability to undertake any one of these four aspects of the decision-making process set out in section 3(1) of the Act will be sufficient for a finding of incapacity provided the inability is because of an impairment of, or a disturbance in the functioning of, the mind or brain (see *RT and LT v A Local Authority* [2010] EWHC 1920 (Fam) at [40])

j. The information relevant to the decision includes information about the reasonably foreseeable consequences of deciding one way or another (section 3(4)(a) of the Act)

k. The order in which the relevant terms of the Act are drafted places the 'diagnostic test' in section 2(1) before the 'functional test' in section 3(1). However, having regard to the wording of section 2(1), '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', the order in which the tests are in fact applied must be carefully considered. In *York City Council v C* [2014] 2 WLR 1 at [58] and [59]

McFarlane LJ (with whom Richards and Lewison LLJ agreed) held as follows:

> *'There is ..... a danger in structuring the decision by looking to s.2(1) primarily as requiring a finding of mental impairment and nothing more and in considering s.2(1) first before then going on to look at s.3(1) as requiring a finding of inability to make a decision. The danger is that the strength of the causative nexus between mental impairment and inability to decide is watered down. That sequence — 'mental impairment' and then 'inability to make a decision' — is the reverse of that in s.2(1) – 'unable to make a decision ... because of an impairment of, or a disturbance in the functioning of, the mind or brain' ..... The danger in using s.2(1) simply to collect the mental health element is that the key words 'because of' in s.2(1) may lose their prominence and be replaced by words such as those deployed by Hedley J: 'referable to' or 'significantly relates to'...'*

l. 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 section 3(1) of the Act and the 'impairment of, or a disturbance in the functioning of, the mind or brain' required by section 2(1) of the Act

m. Within the context of section 3(1)(c) of the Act, it is not necessary for a person to use and weigh every detail of the respective options available to them in order to demonstrate capacity, merely the salient factors (*CC v KK and STCC* [2012] EWHC 2136 (COP) at [69]). Even though a person may be unable to use and weigh some information relevant to the decision in question, they may nonetheless be able to use and weigh

other elements sufficiently to be able to make a capacitous decision (*Re SB* [2013] EWHC 1417 (COP))

n. Section 3(1)(c) of the Act is engaged when a person is unable to use and weigh the relevant information as part of the process of making the decision. What is required is that the person is able to employ the relevant information in the decision-making process and determine what weight to give it relative to other information required to make the decision;

o. Where a court is satisfied that a person is able to use and weigh the relevant information, the weight to be attached to that information in the decision-making process is a matter for the decision maker. Thus, where a person is able to use and weigh the relevant information but chooses to give that information no weight when reaching the decision in question, the element of the functional test comprised by section 3(1)(c) will not be satisfied;

p. Whilst the evidence of psychiatrists is likely to be determinative of the issue of whether there is an impairment of the mind for the purposes of section 2(1) of the Act, the decision as to capacity is a judgment for the court to make (*Re SB* [2013] EWHC 1417 (COP)). Furthermore, *in PH v A Local Authority* [2011] EWHC 1704 (COP) Baker J observed as follows at [16]:

> *'In assessing the question of capacity, the court must consider all the relevant evidence. Clearly, the opinion of an independently-instructed expert will be likely to be of very considerable importance, but in many cases the evidence of other clinicians and professionals who have experience of treating and working with P will be just as important and in some cases more important. In assessing that evidence, the court must be aware of the difficulties which may arise as a result of the close professional relationship between the clinicians treating, and the key professionals working with, P.*

In Oldham MBC v GW and PW [2007] EWHC 136 (Fam), a case brought under Part IV of the Children Act 1989, Ryder J referred to a 'child protection imperative', meaning 'the need to protect a vulnerable child' that for perfectly understandable reasons may lead to a lack of objectivity on the part of a treating clinician or other professional involved in caring for the child. Equally, in cases of vulnerable adults, there is a risk that all professionals involved with treating and helping that person – including, of course, a judge in the Court of Protection – may feel drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to carry out an assessment of capacity that is detached and objective

16. The Applicant refers in addition to the helpful observation of MacDonald J in *AA Local Authority v RS (Capacity)* [2020] EWCOP 29.

'*With respect to the relevant information to be understood, retained, and used or weighed with respect to each domain of decision making with which the court is concerned the court must bear in mind (a) that there may be an overlap between the various different decisions to be made and (b) that relevant information outlined in lists contained in the authorities is to be treated and applied as no more than guidance to be adapted to the facts of the particular case, to be expanded or contracted or otherwise adapted as the facts of the particular case require (see Re B [2019] EWCA Civ 91).*'

The Court's Approach

17. I agree with the Official Solicitor's suggestion as to the correct approach to the question of interim declarations. It involves three steps:

    a. Identify the relevant decisions within the meaning of sections 3(1) and 15(1)(a) MCA 2005

b. Determine the relevant information in respect of each of those decisions which GP must be able to understand, retain, use or weigh in accordance with section 3(1) MCA 2005

c. Determine whether there is sufficient cogent evidence to make an interim declaration that GP lacks capacity in respect of that decision.

The Relevant Decisions

18. The parties agree the broad themes of the relevant decisions but not their precise drafting. I will deal with each in turn.

(a) To refuse an assessment of his needs by the local authority pursuant to s.11 Care Act 2014

19. The Official Solicitor contends, and I agree, that it would be more precise to define the decision as "*To Refuse an assessment of his care and support needs pursuant to the Care Act 2014*". This recognises that the requirement to carry out an assessment arises from s.9 (rather than 11) of the Act and the relevance of the Care and Support (Eligibility Criteria) Regulations 2015.

20. The Applicant and the Official Solicitor agree that the information relevant to this decision will include:

a. A local authority has a statutory duty to meet a person's eligible care needs, which may be to prevent or delay the development of needs for care and support or reducing needs that already exist.
b. The assessor may speak to other adults or professionals involved in GP's care and that GP may refuse to consent to this.
c. The local authority will assess how GP's wellbeing can be promoted and whether meeting these needs will help GP achieve his desired outcomes.

21. The Applicant contends in addition for the following:

a. The importance of GP participating as fully as possible in decisions related to the assessment of his needs and how those needs can be met.

22. In my view, this is a value judgment rather than information relevant to GP's decision to refuse a Care Act assessment and is in any event too nebulous to amount to "the reasonably foreseeable consequences of deciding one way or another".

(b) To make decisions as to his care and support needs pursuant to S.9 Care Act 2014

23. The Official Solicitor contends, and again I agree, that GP's decision will not be pursuant to s.9 Care Act 2014 (which requires the Local Authority to make an assessment of those needs). The decision, in my view, is more accurately formulated as: "*To make decisions as to his care and support*".

24. Guidance on what information is relevant to this decision was formulated by Theis J in *LBX v K, L and M* [2013] EWHC 3230 (Fam) and approved by the Court of Appeal in *B v A Local Authority* [2019] EWCA Civ 913:

a. With what areas GP needs support;
b. What sort of support GP needs
c. Who will provide such support;
d. What would happen without support, or if support was refused;
e. That carers may not always treat GP properly, and the possibility and mechanics of making a complaint if GP is not happy.

25. The Applicant suggests in addition that in GP's case the relevant information will include:

a. why having a support worker is important to GP to access the community;

b. the importance of structure and routine in GP's day;
c. the importance of regular access to the local community to build and maintain his confidence in daily life and independence and to avoid a deterioration in his anxiety;
d. the importance of developing relationships with others outside of his close family to build and maintain his confidence in daily life and independence and to avoid a deterioration in his anxiety, to avoid a dependency upon his close family members and to develop his own interests and opportunities for a social life with peers;
e. the opportunities that may be available to engage in training, education, volunteering or employment.

26. With one exception, these additional factors strike me as comprising (or at least incorporating) not facts but somewhat nebulous value judgments. The desire to ensure that GP takes full advantage of the services potentially available to him is laudable but has resulted, in my view, in the tail of welfare beginning to wag the dog of capacity.

27. The exception is: "*e. the opportunities that may be available to engage in training, education, volunteering or employment*." This is certainly information, but it is not a salient feature of a decision about care and support.

(c) To request or refuse an assessment of his education and health care needs for an education, health and care plan (EHC plan) pursuant to s.36 (1) of the Children and Families Act 2014

28. I prefer the Official Solicitor's suggestion: "*To request an EHC needs assessment under section 36(1) of the Children and Families Act 2014",* which has the attraction of greater simplicity and the omission of the reference to GP deciding to refuse an EHC assessment: as I understand it, if the obligation to carry out such an assessment is triggered under s.36, GP would not be entitled to decide that it should not be carried out.

29. The Applicant and the Official Solicitor now agree that the following information is relevant to this decision:

    a. An EHC plan is a document that says what support a child or young person who has special educational needs should have;
    b. Other people will be consulted during the assessment process including parents, teachers and other professionals;
    c. If assessed as requiring an EHC the young person has enforceable right to the education set out within their plan.
    d. An EHC plan is only available up to the age of 25 years.

30. The Applicant contends for a further two pieces of information:

    a. If assessed as requiring an EHC plan, social care and health needs may be included on the plan and this may be advantageous to GP in having his needs met.
    b. The local authority would agree to 'lapse' GP's EHC plan this year, and he may reconsider next year but it may be difficult to seek an EHC plan after that.

31. In my view, the information set out at paragraph 30 a. of this judgment adds nothing concrete to that set out at paragraph 29 a.

32. As to the Applicant's agreement to lapse the plan this year: the possibility (of uncertain extent) that "*it may be difficult to seek an EHC plan*" is too nebulous to amount to relevant information.

(d) to make decisions about his education and health care needs pursuant to the Children and Families Act 2014

33. Again, the Official Solicitor contends for a simpler formulation – "*To make decisions as to his education*" - and I agree: GP might be provided with education outside the scope of a EHC plan, so the reference to the 2014 Act is unduly restrictive; by contrast, a declaration with a reference to "health care needs" might be misunderstood as one relating to consent to medical treatment and is therefore too wide.

34. The Official Solicitor contends that the information to this decision is :

    a. The type of provision.
    b. The type of qualifications, if any, on offer.
    c. The cohort of pupils and whether P would match the profile of other pupils at the provision.
    d. That P has additional rights up to the age of 25 because of his special educational needs.

35. The Applicant's case is that there is a substantial overlap between the information relevant to GP's care and support needs and his educational needs and has not formulated a separate list of information relevant to this decision. However, the Official Solicitor's list was not unchallenged. Dr Rippon said in evidence:

    "*I think education is broader than just qualifications. I think education also has an important component in supporting a YP's social and emotional needs. YP who are having education via remote working are missing a key component of what school is. It is about supporting their development as an individual and it supports their emotional wellbeing in addition to just being somewhere you gain qualifications*."

    She then agreed with the suggested formulation: *GP would need to understand there is a social and personal development opportunity available through education.*

36. The Official Solicitor's response to this suggestion is that :

    a. the concept of social and personal development opportunities is relatively nebulous compared to types of provision/qualification which are more concrete;
    b. in practice, it is improbable that an assessor would be able to adequately identify the social and personal development opportunities offered by the various options available for GP's education;
    c. this ought not to be included in the relevant information.

37. On this issue I have found useful the following passage from the decision of Macur J (as she then was) in In LBL v RYJ and VJ [2010] EWHC 2665 (at paragraph 58)

> "*In Dr Rickard's view it is unnecessary for his determination of RYJ's capacity that she should understand all the details within the Statement of Special Educational Needs. It is unnecessary that she should be able to give weight to every consideration that would otherwise be utilised in formulating a decision objectively in her 'best interests'. I agree his interpretation of the test in section 3 which is to the effect that the person under review must comprehend and weigh the salient details relevant to the decision to be made. To hold otherwise would place greater demands upon RYJ than others of her chronological age/commensurate maturity and unchallenged capacity*."

38. Whilst I do not doubt the accuracy of Dr Rippon's observation that "*education is broader than just qualifications*" (indeed, it is almost a cliché), I fear that to require GP to understand and weigh the nature and extent of the social and personal development opportunities which might be available to him would be to do precisely what Macur J decided against, namely placing greater demands upon him than others of his chronological age/commensurate maturity and unchallenged capacity.

39. I therefore propose to adopt the formulation of the decisions and relevant information as either agreed by the Applicant and the Official Solicitor or (if not agreed) as suggested by the Official Solicitor.

Conclusions on the issue of capacity

40. In the course of giving her oral evidence Dr Rippon stated, *inter alia*, that GP did not understand:
    a. that if he refused to consent to the care and support needs assessment, his needs would not be assessed and he would not receive the appropriate support;
    b. or use or weigh information concerning, the areas of care and support;
    c. what an EHCP is and could not make a request for an assessment;
    d. that he has special educational needs or the additional rights arising from this.

41. This evidence was not challenged. I therefore conclude that, in the case of each decision, GP does not understand the relevant information and/or is unable to use or weigh it and propose to make interim declarations that GP lacks capacity to:
    a. Refuse an assessment of his care and support needs pursuant to the Care Act 2014
    b. Make decisions as to his care and support
    c. Request an EHC needs assessment under section 36(1) of the Children and Families Act 2014
    d. Make decisions as to his education.

42. After making the declarations, I will invite counsel to address me as to next steps.

HHJ Christopher Dodd 29th September 2020

19th October 2020

Dear GP

Your court case

My name is Judge Dodd and I am making decisions about where you go to college and what help you might get at home.

On 20th August 2020, there was a court hearing about you and your future. You had two lawyers represent you, Mr Brownhill and Miss Last.

Mr Brownhill said that the court could not make decisions for you about college or what help you should get. Instead, he said that I should have more information about you and about what you want for your life.

The council said that you are still growing up and are worried that you don't go out and about very much.

The lawyers asked questions to a Doctor, Lisa Rippon. I asked her questions too.

I have thought about what everyone said. I think you might be able to make decisions about your college and what help you need. Before I make my mind up, I would like you to meet some more people and talk to them about college and going out and about.

I have asked your Dad to help me. He will bring you to meet people.

I have asked Miss Last to go and see you, so you can tell me if you want to go to college and what you like doing. If you want, I can come to your house and meet you, or you can come to court and meet me.

If you have any questions then you can telephone Miss Last on REDACTED

Thank you

Judge Dodd