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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

OCP No: DJ 2021/49

Delivered: 13/12/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

IN THE MATTER OF MRS P (A PATIENT)

ROONEY J

Anonymity

[1] For the purpose of this application, the applicant, the first respondent and the applicant's mother have been anonymised. Nothing should be published which would identify the applicant and the said parties.

Introduction

[2] The applicant is the daughter of Mrs P (a patient) and a sister of the first respondent. Mrs P is a 74 year old lady with an established diagnosis of severe dementia currently living in a care home setting. The diagnosis of dementia was confirmed in 2013. The first respondent, the son of Mrs P, was appointed as her nominated person under the Mental Capacity Act (Northern Ireland) 2016 and is her devoted long term carer. The first respondent had been designated as his mother's "care partner" by the home in which she currently resides.

[3] For the reasons explored more fully below, the applicant has had no contact with Mrs P for approximately 9 years. The applicant brings an application for declaratory relief seeking:

- (a) disclosure of the address where Mrs P now resides; and
- (b) contact with Mrs P, her mother.

The first respondent opposes the application.

[4] Following an assessment on 4 November 2021 Dr English formed the opinion that Mrs P suffers from a mental disorder/mental illness (namely dementia) as

defined by the Mental Health (Northern Ireland) Order 1986. In Dr English's opinion, Mrs P lacks the mental capacity to understand the nature of the legal proceedings and also the mental capacity to provide a meaningful view regarding contact with her daughter, the applicant.

[5] Mr Fegan BL appeared on behalf of the applicant. Ms Melanie Rice BL is instructed by the Official Solicitor who was appointed to represent the interests of Mrs P. Ms Herdman BL appears on behalf of the first respondent and Mr Neeson BL represents the second respondent, namely, the South Eastern Health and Social Care Trust. I am most grateful to the legal representatives for their comprehensive oral and written submissions.

Background Circumstances

The applicant's version of events

[6] The applicant is estranged from her brother, the first respondent. Their father died in 2006. The applicant was exposed to severe traumatic experiences in her childhood and late teens. The applicant claims that she used alcohol as a crutch to deal with her mental health difficulties arising from the said trauma. From the age of 18 until she was 40 years old, the applicant suffered from chronic alcohol addiction. She is now aged 43 years old and has been abstinent from alcohol for the previous 2 years.

[7] The applicant states that her battle with alcohol has been a difficult and challenging journey. Her long term partner is terminally ill with cancer, but despite all the stresses and pressures which she confronts every day, she has not relapsed and remains confident that she will remain abstinent from alcohol.

[8] The applicant alleges that since her mother moved to live with the first respondent she has not seen or had any contact with her mother. The applicant claims that her brother has deliberately obstructed and prevented the applicant contacting him or his mother. She claims that prior to her mother moving in to live with her brother she had regular contact with her mother.

[9] The applicant states that she was never informed as to her mother's condition, nor of the fact that her mother had been placed in a care home and that she learned this from a newspaper article. The applicant claims that she was very distressed to learn that her mother suffered from dementia and lamented that she would never get to see her mother again.

[10] The applicant asserts that her determination to see her mother was deliberately thwarted by her brother. Accordingly, she states she had no option but to bring the said proceedings.

The first respondent's version of events

[11] In a detailed affidavit the first respondent states that he is totally opposed to the applicant being provided with any details about his mother's current residence or her health and considers that it would be contrary to his mother's best interests and welfare to have contact with her. Specifically he claims that any contact between the applicant and their mother would serve only to distress and cause her emotional harm and confusion, particularly given the passage of time since the last contact between their mother and the applicant and their previous fractured relationship.

[12] The first respondent acknowledges that the applicant is a chronic alcoholic and has suffered with this alcohol addiction and serious mental health issues all of her adult life. The first respondent denies that the applicant and their mother had a good relationship. Rather, he states that their mother was terrified of the applicant who was controlling and manipulative in her pursuit of access to alcohol.

[13] The first respondent recalled one particular incident when the applicant was in his mother's home. Mrs P contacted her son by phone and was in an agitated state. The first respondent alleges that the applicant was verbally and physically abusive to their mother and was in a drunken state. He called the police who attended at his mother's home. Not long after this incident, Mrs P came to live with the first respondent. He continued to care for her until she was placed in a nursing home with a diagnosis of dementia. The incident above will be considered in more detail below.

[14] The first respondent states that in or around 2015 or 2016 he was advised that his sister had contacted a television company which resulted in an invitation by the company for the first respondent and/or his mother to appear on a TV show. The invitation was declined.

[15] At paragraph 8 of his affidavit, the first respondent states as follows:

"8. I am clear that, prior to losing capacity, my mother's views were that she did not want to have contact with my sister. I believe those views should be respected now that she has lost capacity. Furthermore, I firmly believe that the contact that my sister now seeks is entirely self-serving and to benefit only herself and her conscience. It is not intended to better my mother's interests.

9. I visit my mother three times per week and I am a designated care partner at her nursing home because I assist staff with her care as well as visiting. I am acutely aware of her condition and her needs. I am clear that a visit from my sister would serve only to confuse and upset her in circumstances where she is already confused and distressed at times. My sister is a stranger to her

now, and a person who she was terrified of before she lost capacity.”

Decision

[16] The applicant’s application in this case is for declaratory relief pursuant to the court’s inherent jurisdiction for (a) disclosure of her mother’s residence and (b) contact with her mother.

[17] Mrs P suffers from severe dementia and lacks the mental capacity to understand the nature of these proceedings and the capacity to consent to contact with her daughter. The fundamental question in cases of this nature is whether it would be in the patient’s best interests to allow contact between the applicant and her mother.

[18] During the course of submissions, counsel referred me to a recent decision of O’Hara J, namely *In the matter of a mother with severe dementia (Whether her daughter should visit)* [2020] NI Fam 28. The facts are relevant and share a number of similarities with this case. The applicant applied for a declaratory order allowing her to visit her mother in a nursing home. Her mother suffered from severe dementia. Before she lost her capacity to make decisions in relation to her care, the mother refused to accept visits from her daughter. In the circumstances, the Trust would not permit the daughter to visit her mother due to a concern that such visits would cause the mother distress. The mother’s other two children, her sons, were hostile to the daughter being allowed to visit. In a carefully considered judgment, O’Hara J determined that a visit from the daughter would not be contrary to her mother’s best interests.

[19] In his determination to assess the best interests of a person who has lost capacity, O’Hara J sought guidance from the statutory criteria in section 4(6) of the Mental Capacity Act 2005. The same criteria are specified in section 7(6) of the Mental Capacity Act (Northern Ireland) 2016. Although the 2016 Act has not been fully implemented with regard to sections 112 – 116, it is my view that the following statutory criteria provide assistance to a court to make an assessment as to the best interests of a person who has lost capacity. Essentially, the decision maker is required to have regard, so far as they are reasonably ascertainable, to the following:

- (a) the person’s past and present wishes and feelings (and, in particular, any relevant witness statements made by the person when she/he had capacity);
- (b) the beliefs and values that would be likely to influence the person’s decision if he/she had capacity; and
- (c) the other factors that Mrs P would be likely to consider if able to do so.

[20] I will consider each of the above criteria seriatim in relation to the circumstances of this case.

(a) The mother's past and present wishes and feelings

[21] On the basis of discovery provided to the court by the Official Solicitor, the submission is made that Mrs P did not want contact with the applicant. Medical notes indicate that on 15 February 2011, Mrs P reported to her GP that she had been assaulted by the applicant. The records provide that Mrs P was struck on her head and had several punctuate abrasions and bruising to her right temple. It is also stated that Mrs P had changed the locks to her house and was suffering from significant sleep disturbance. The PSNI were investigating the incident.

[22] A further entry in the GP's computerised records dated 3 March 2011 states as follows:

"Getting a lot of trouble with daughter. Very upset re this. Does not feel she can cope any longer with it. Seriously considering moving permanently to live with son ... Answered all questions appropriately today with no evidence of thought disorder. Obviously very distracted re problems with daughter."

[23] An outpatient assessment letter relating to a psychiatric assessment carried out on 16 October 2011 records as follows:

"Thought content does describe (of) feeling upset about her relationship with her daughter."

[24] In her report, Dr English states that there is no subsequent medical entries in the extensive records which make direct reference to Mrs P's relationship with her daughter or expressing a wish with regard to future contact.

[25] A review of the social work records noted a visit to Mrs P in the company of the first respondent in the following record dated 4 September 2012:

"Called to see (Mrs P) today with son... (Son) has stated issue re his sister trying to make contact with (Mrs P) who again today says she wants no contact with daughter."

[26] Dr English also reviewed the extensive social work records and stated that they did not contain a subsequent record of a reported wish by Mrs P with regard to contact with her daughter.

[27] It is clear from a review of the above records that, at a time when Mrs P had capacity, she clearly expressed the view that the applicant was giving her significant trouble; she was distracted due to problems with her daughter; she was upset about her relationship with her daughter and she did not want any contact with her daughter. No evidence has been adduced to date to show that Mrs P's views waived or changed from 2011.

[28] On the basis of the said ascertainable wishes and feelings of Mrs P regarding the applicant and contact with her daughter, Ms Rice BL referred me to the case of *Wye Valley NHS Trust v B* [2015] EWCOP 60 at paragraphs 10 - 15 wherein Peter Jackson J discussed the importance of giving weight to the wishes, feelings, beliefs and values of a patient who lacks capacity. The learned judge stated at paragraph 11:

“11. As the Act and the European Convention make clear, a conclusion that a person lacks decision-making capacity is not an "off-switch" for his rights and freedoms. To state the obvious, the wishes and feelings, beliefs and values of people with a mental disability are as important to them as they are to anyone else, and may even be more important. It would therefore be wrong in principle to apply any automatic discount to their point of view.”

[29] In *Aintree University Hospitals NHS Foundation Trust v James* [2003] UKSC 67 the Supreme Court stated that in considering the best interests of a particular patient, the test to be applied was subjective not objective and decision makers had to try to put themselves in the place of the individual patient and to ask what his attitude to the treatment would be, and to that end should consult those who are looking after him or interested in his welfare to ascertain his wishes, feelings, beliefs and values and the things which were important to him. Although this case involved a patient who lacked capacity to give consent or to refuse treatment, this court is urged to accept that the relevant test applies to the facts of this case.

(b) The beliefs and values that would be likely to influence Mrs P’s decision if she had capacity

[30] The applicant urges the court to accept that if Mrs P had capacity, it is more than likely that Mrs P would want contact with her daughter. The applicant states that, armed with the knowledge that the applicant was no longer a chronic alcoholic and had remained abstinent for two years, it is probable that her mother would have wished for a resumption of contact.

[31] Ms Herdman BL emphasises that this thought process is totally speculative. In essence, Ms Herdman argues, such an assessment provides very little assistance to the court in ascertaining whether contact would be in the best interests of the mother. Rather, in this case, the reality is that the person most likely to benefit from the contact is the applicant, rather than her mother.

[32] The observation made by O’Hara J at paragraph [8] is apt to the facts of this case:

“[8] Against this unhappy background it is necessary to decide whether it is (or may be) in the mother’s interests for her daughter to visit her in the nursing home. In some ways this may be an artificial exercise because

the mother may not recognise her daughter, such is the severity of her dementia. In light of that dementia there is little or no prospect of any meaningful reconciliation between mother and daughter. In fact, on one analysis the person in whose interest a visit or visits is most likely to be of benefit is the daughter.”

[33] As pointed out by Ms Herdman in her oral submissions, it is significant that the applicant does not accept the allegation that she assaulted her mother. Nor does she accept the representations made by her mother as contained in the above stated medical records and social work record. I find this somewhat alarming. Although the applicant’s affidavit refers to the fact that she dearly wants to see her mother again, the impetus does not appear to be a focus on reconciliation or asking for forgiveness for the hurt, distress and anxiety caused by the applicant. Rather, the focus appears to be on showing her mother that she has battled and finally overcome her addiction to alcohol.

[34] Despite the assertion by the applicant that her mother, if she had capacity, would want to see her daughter again, I am not convinced that such would be the situation, particularly if the applicant showed no remorse for her behaviour towards her mother.

(c) The other factors that Mrs P would be likely to consider if she were able to do so

[35] I remind myself that the fundamental test is to ascertain the facts that will be in the best interests of Mrs P.

[36] In her report dated 4 November 2021, Dr English stated as follows:

“I observe that Mrs P was unable to recall that her son had been visiting her immediately after he had left the room. She was also unable to recognise a photograph of her late husband (but did appear to have some recognition of her son who visits her). Difficulty in facial recognition is a common feature of advanced dementia. On this basis I think it is unlikely that at this stage of her illness and after a period of more than nine years, Mrs P would recognise her daughter. Given the severity of her inability to recall new information, it is also unlikely that even if she did recognise her daughter AND if such recognition did cause her distress, that such distress would be more than transient once the visit had ceased.”

[37] In several respects, the facts of this case differ from the factual matrix considered by O’Hara J in *In the matter of a mother with severe dementia* [2020] NI Fam 28. In that case, a consulting psychiatrist prepared a report in which he stated that a visit from the daughter was likely to bring benefit to both the daughter and the

mother. In this case, however, Dr English refers only to the potential that a visit would cause distress to Mrs P in the event that she did recognise her daughter. If the focus is on distress to Mrs P, albeit transient, I simply fail to see how the circumstances of such a visit could ever be in Mrs P's best interests.

[38] Mr Fegan BL in his eloquent submissions, refers me to the final conclusion of Dr English's report, namely that "Mrs P is unlikely to experience any lasting detriment if one direct supervised contact was to be tried."

[39] The first respondent takes issue with this conclusion. He states that, based on his close and consistent relationship with his mother, he feels that he knows her condition best and that the proposed contact would serve only to cause distress and further confusion to an already disorientated and elderly lady.

[40] This court cannot ignore the fact that, at a time when Mrs P had capacity, she expressed a view that she did not want contact with the applicant. Mrs P's opinion and belief is clearly documented. The feelings and wishes of Mrs P are hardly surprising due to the fact that she had been assaulted by the applicant, was noticeably distressed, culminating in a decision to leave her home to live with the first respondent. This is a major factual difference from the circumstances of the case considered by O'Hara J. In this case, the first respondent, who has commendably looked after his mother for some considerable time, has sworn an affidavit detailing his concerns regarding any contact between the applicant and his mother. It is noteworthy that in the case considered by O'Hara J, the brothers who did not want contact between their sister and mother, failed to file any supporting affidavits.

[41] For the reasons given above, it is the decision of this court that it would not be in the best interests of Mrs P to allow contact with the applicant or to provide disclosure of Mrs P's residence. The onus is on the applicant to satisfy this fundamental test. The applicant has failed to do so.