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Neutral Citation Number: [2021] EWCOP 5

**IN THE COURT OF PROTECTION
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2021

Before :

Mr Justice Poole

Between :

AMDC

Applicant

-and-

AG (By her ALR, Alison Kaye)

**First
Respondent**

CI

**Second
Respondent**

(No. 2)

Brett Davies (instructed by Elizabeth Machin, Senior Solicitor **AMDC**) for the **Applicant**
Joseph O'Brien (instructed by **Switalskis Solicitors**) for the **First Respondent**
Ben McCormack (instructed by **Cartwright King Solicitors**) for the **Second Respondent**

Hearing date: 20 January 2021

APPROVED JUDGMENT

Covid-19 Protocol: This judgment will be handed down remotely by circulation to the parties' representatives by email and by placing it on BAILII. The date and time for hand-down is deemed to be at 10.30 am on 22 January 2021.

Mr Justice Poole:

1. This case demonstrates how a thorough assessment and well-reasoned expert report on capacity can assist the resolution of difficult issues, saving time, resources, and anguish. AG is a 69 year old woman suffering from frontal lobe dementia who resides at a care home managed by the applicant local authority. The issue currently before the court is whether AG lacks capacity to make decisions as to:
 - a. The conduct of litigation.
 - b. Her place of residence.
 - c. Her care and support.
 - d. Her contact with other people.
 - e. Management of her property and affairs including termination of her tenancy.
 - f. Engagement in sexual relations.
 - g. Marriage.
2. Mr Davies represents the applicant. AG has an accredited legal representative, Alison Kaye of Switalskis Solicitors, and she is represented by Mr O'Brien. CI is another resident at the care home with whom AG has formed an attachment. He is represented by Mr McCormack.
3. This matter first came before me in October 2020 when, after hearing oral evidence from Dr Quinn, a jointly instructed expert Consultant Forensic Psychiatrist, I adjourned the case and directed that a new psychiatric expert be instructed. My interim judgment has the neutral citation [2020] EWCOP 58 and is reported at [2020] 4 WLR 166. I refer to that judgment for the background to the application and the reasons for the adjournment.
4. I now have the benefit of an expert report from Dr Mynors-Wallis, Consultant Psychiatrist, who has had access to the previous expert's reports, mental capacity assessments, records and witness evidence. He interviewed the care home manager and AG on 31 December 2020 and his report is dated 4 January 2021. Dr Mynors-Wallis was instructed jointly by the parties and they all accept his opinions in full. Those are that,
 - a. AG lacks capacity to make decisions as to the conduct of litigation, her place of residence, her care and support, management of her property and affairs including termination of the tenancy on the property in which she lived before she moved to the Care Home, and marriage and divorce.
 - b. AG has capacity to make decisions as to engagement in sexual relations and contact with others.
5. The key provisions of the Mental Capacity Act 2005 ("MCA 2005") which the court must follow are set out at sections 1 to 3:

“1 The principles

The following principles apply for the purposes of this Act.

- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) 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.
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision...."

2. People who lack capacity

- (1) For the purposes of this 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.
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.
- (3) A lack of capacity cannot be established merely by reference to -
 - (a) a 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 his capacity.
- (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
- (5) No power which a person ("D") may exercise under this Act—
 - (a) in relation to a person who lacks capacity, or
 - (b) where D reasonably thinks that a person lacks capacity,is exercisable in relation to a person under 16.
- (6) Subsection (5) is subject to section 18(3).

3 Inability to make decisions

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
 - (a) to understand the information relevant to the 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).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—

(a) deciding one way or another, or

(b) failing to make the decision.”

6. I adopt the guidance to which I referred in my interim judgment, from the Vice President Mr Justice Hayden in *London Borough of Tower Hamlets v PB* [2020] EWCOP 3. I bear in mind that it would be unfair to set the bar too high *Sheffield City Council v E* [2004] EWHC 2808, para. 144 per Munby J, as applied by Baker J in *PH v A Local Authority* [2011] EWHC 1704. A linked principle is that the person must understand the salient information but not necessarily all the peripheral detail: *LBC v RYJ* [2010] EWHC 2665.
7. The court is not bound to accept the opinion evidence of Dr Mynors-Wallis on AG’s capacity, even though it is adopted by all the parties, but I do so for the reasons set out in this judgment and which I gave briefly at a short hearing on 20 January 2021. I have approved a consequential order which records my findings as to AG’s capacity and gives directions with a view to consideration of AG’s best interests. Given the agreement of the parties there is no need for me to give detailed reasons for those findings but, because the interim judgment was reported and has attracted some interest, I hope that it will be helpful to provide brief reasons in this short written judgment.
8. I have taken into account all the evidence, including the reports of the previously instructed psychiatrist, Dr Quinn, who came to a different view about AG’s capacity in relation to sexual relations and contact with others. Nevertheless, for the reasons given in the interim judgment, I do not give great weight to his opinion evidence. Other evidence before the court includes previous capacity assessments, and evidence from AG’s social worker, her ALR, and the care home manager. I should record that at her request I met AG through a video link prior to the hearing in October 2020.

9. Dr Mynors-Wallis' report is very clearly set out. He refers to his detailed instructions and records the fundamental principles of the MCA 2005. He demonstrates throughout that he has assessed AG's capacity in relation to each decision separately, referring to the relevant information, and applying the tests within s. 3 of the MCA 2005, but he has also considered the coherence of his conclusions on capacity, having regard to the links between the different decisions in AG's case. He has considered separately the diagnostic and the functional tests of capacity, and the question of causation. He has quoted questions and answers from his interview with AG but has not annexed a full transcript. The interview lasted 90 minutes, including a cigarette break for AG, and it was not necessary for the court to be provided with a full note of the whole conversation.
10. Cognitive testing revealed evidence of significant cognitive impairment. Dr Mynors-Wallis concludes that based on the tests, evidence about AG's admission to the care home, her care needs including medication, his interview, and evidence of AG's behaviour, including her disinhibition and impatience, AG has dementia with frontal lobe impairment. He advises that in his opinion AG "does have an impairment of, or disturbance in the function of, her brain and mind as a result of her dementia." Her dementia is progressive and sadly, on the balance of probabilities, AG will significantly deteriorate further.
11. The extracts from the interview that Dr Mynors-Wallis has included in his report are illuminating. They show that AG was polite throughout but initially resistant to engage, sighing when asked questions and saying that she was fed up with having to speak with people like Dr Mynors-Wallis. However, with patience and good humour, Dr Mynors-Wallis managed to establish a rapport. Persistence paid off as his account of their discussion about sex reveals:

"The questions required to determine whether an individual has capacity to engage in sexual relations are very personal. They are difficult questions for an individual to answer to someone that they have only just met. Many people, whether or not they have capacity, would find such questions intrusive and impertinent. AG, however, after a reluctant start, answered my questions fully. I apologised about three times on separate occasions about the intrusive questions that I was going to ask and hoped they weren't going to be embarrassing or difficult. After the third time AG said, "just get on and ask me the questions you want to know the answer to.""

12. When politely pressed, AG did give answers which whilst not detailed, showed some basic understanding, and a blunt conversational style that I too encountered on meeting her. In relation to capacity to litigate I note that AG said that "the Judge makes the decisions not me, although it should be me." AG showed a consistent ability to communicate her thoughts but what she said revealed an inability to understand and process anything above a quite basic level. When it was needed, Dr Mynors-Wallis properly probed deeper to determine whether AG could understand, retain, weigh or use, and communicate more complex information. Consistently, she was unable to do

so. She by-passed complexity and reduced issues to a level of simplicity with which she could cope. For example, AG's understanding is that the present case is about only one issue, namely whether she is "intelligent enough to live on my own". She has fixed ideas that are often unreliable but which inform her thinking about decisions affecting her future. For example, she has consistently stated that she was duped into going to the care home by a relative and that, if only she were allowed to leave, she could return to a fully independent life. In fact, she was wholly unable to cope in the community even with considerable professional assistance.

13. Dr Mynors-Wallis considered the question of AG's disinhibition. He advises that it is a product of her frontal lobe syndrome but that whilst it reduces her social restraint, it is not fluctuating. In any event, as I read his evidence, AG's disinhibition does not indicate fluctuating capacity, a matter that had caused Dr Quinn much concern.
14. I am quite satisfied that Dr Mynors-Wallis has formed well-reasoned conclusions on AG's capacity in relation to all the decisions under consideration, and that his conclusions are fully supported by the evidence as a whole. In relation to decisions about the conduct of litigation, residence, care, and property and affairs including termination of the tenancy, there can be little doubt that the presumption of capacity is displaced. AG does not have insight into her own limitations, or her need for care and assistance. Her very simplistic belief is that since she was previously able to care for herself, find accommodation, and manage her affairs, she can do so in the future. She does not understand that she has dementia or that her cognitive functioning is impaired. Therefore, she expresses herself with confidence, even though her beliefs are patently ill-founded. She has no ability to process information relevant to more complex decision making such as would be involved in deciding where to live, the conduct of litigation, ways of providing the care she needs, or the advantages and disadvantages of different ways of managing her property or affairs. Her ability to retain anything more than basic information is severely impaired, and she is unable to weigh and use information relevant to these decisions.
15. Dr Mynors-Wallis did find that AG had capacity to decide whether to engage in sexual relations. Guidance was given by the Court of Appeal in *A Local Authority v JB* [2020] EWCA Civ 735. At [100] Baker LJ held that information relevant to the decision may include:

“(1) the sexual nature and character of the act of sexual intercourse, including the mechanics of the act;

(2) the fact that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity;

(3) the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent;

(4) that a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant;

(5) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom.”

Dr Mynors-Wallis provides extracts from his discussion with AG about these matters. Not all were relevant to her, as AG herself recognised:

“I asked whether she thought she was at risk of becoming pregnant. She laughed and said “I’m too old. There’s just as much a chance of him becoming pregnant as me” and laughed again.”

16. On open questioning AG demonstrated that she was aware of the risk of sexually transmitted disease. She said, “I have never had it and I don’t want it.” Asked how she could protect herself, she said “by not having it”. When asked what else could be done, she said, “wearing a condom”. She demonstrated a basic understanding of the nature and mechanics of sexual intercourse, and of consent. In relation to sexual relations, unlike most other areas of decision-making, AG had retained information that she needed to understand and weigh in order to make decisions. She has been consistent over many months about her desire to have sexual relations with CI. She was able to communicate her views and understanding. The evidence from Dr Mynors-Wallis establishes quite clearly that, notwithstanding previous opinions given to the court on this issue, AG does have capacity to make decisions about sexual relations.
17. Dr Mynors-Wallis reaches the same conclusion about AG’s capacity to make decisions about contact with others. He explored AG’s understanding by reference to contact with people about whom she would have to make decisions, including her family, and CI. She demonstrated understanding of the advantages and disadvantages of contact, and of what to do if she wanted to be alone. Again, his report sets out a well-reasoned justification for his conclusion which is endorsed by the parties and which I accept.
18. The issue on which Dr Mynors-Wallis had the most difficulty was capacity to make decisions about marriage and divorce. It is helpful to the parties and the court that he expressed and addressed his difficulties in his report. AG was not consistent in her account of her own marriage status (I am told that she remains married) but Dr Mynors-Wallis says that he was satisfied that she demonstrated a basic understanding of the marriage contract. What he considered was absent was any ability to understand, retain, weigh or use more complex information relevant to decisions about marriage and divorce, such as the financial implications. Accordingly, he concluded that AG lacked capacity to make decisions about marriage and divorce.
19. Here, the court must exercise caution. It is well established that for P to have capacity to enter into marriage, he or she must not lack capacity to engage in sexual relations. AG does have capacity to decide to engage in sexual relations. P must also have a basic understanding of the broad nature of the marriage contract. As to any further relevant matters such as the financial implications of marriage (and divorce) it is important that the court does not set the bar too high. I have regard to the judgment of Mostyn J in *Mundell v (Name 1)* [2019] EWCOP 50 in which he reviewed previous authorities on

capacity to enter into marriage. He noted that in *Sheffield City Council v E and S* [2005] 2 WLR 953, Munby J said at 141:

“The contract of marriage is in essence a simple one, which does not require a high degree of intelligence to comprehend ... There are thus, in essence, two aspects to the inquiry whether someone has capacity to marry. (1) Does he or she understand the nature of the marriage contract? (2) Does he or she understand the duties and responsibilities that normally attach to marriage?”

Mostyn J noted that until 2016 an appreciation of the financial implications of the breakdown of a marriage had not been mentioned as part of the requisite understanding in order to have capacity to marry, but Parker J in *London Borough of Southwark v KA and Others* [2016] EWCOP 20 held that whilst the degree of understanding of the relevant information is not sophisticated and need only be rudimentary,

“P must understand 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.”

20. Parker J said at paragraph 79 that there is no requirement that P must understand how financial remedy law and procedure works and the principles applied. P does not need to have litigation capacity in relation to financial remedy litigation in order to have capacity to enter into marriage. Mostyn J considered that “it would be inappropriate and, indeed, arguably dangerous to introduce into the test for capacity to marry a requirement that there should be anything more than a knowledge that divorce may bring about a financial claim.” [30]
21. In the light of this guidance, it is important not to apply too stringent a test for capacity to make decisions about marriage or divorce. Nevertheless, s 3(4) of the MCA 2005 provides that information relevant to a decision includes the reasonably foreseeable consequences of deciding one way or another, or not making a decision. A person with capacity to enter into a marriage may choose to disregard those consequences, but they must be able to understand and weigh such relevant information. A person may lack capacity in relation to decisions about residence, care or their financial affairs, but have capacity to make decisions about marriage. However, in this case, when determining capacity to marry, some consideration is required of AG’s capacity in relation to decisions about care, residence, and financial affairs. AG herself sees marriage as a way of changing her care and residence. Furthermore, although previous authorities may have focused on the necessity for P to understand information relevant to marriage, it is important also to consider P’s ability to retain, use and weigh such information.
22. Dr Mynors-Wallis reports that AG said she wished to marry CI because they loved each other. She said that one difference between being married and not being married would be that on becoming married she would be able to go out to work to support CI. She said that once married they would share their money and would find a bungalow in which to live but she did not know anything about her own finances, or CI’s finances, did not know in what town she currently lives, could not recall the fact that she is

currently married, and had no idea what would happen to money and property after any divorce, and so did not appear to understand that divorce may bring about a financial claim. She told Dr Mynors-Wallis, as recorded at paragraph 12.5 of his report, that she would have no difficulty living independently with CI because she had always been able to look after herself. She believes that becoming married would enable her to work, to look after CI, and to be fully independent. In fact, she is clearly unfit to work, and she was admitted to the care home because she was utterly unable to look after herself in the community even with considerable assistance. AG has no insight into her cognitive limitations or her physical health needs, and no real understanding of the financial and other implications of her entering into marriage so that she and her spouse could live together as she envisages. AG's view of her status as a married person is not at all grounded in reality.

23. I remind myself that the test is status specific not person specific, and that the wisdom of any particular marriage decision is irrelevant. However, applying the capacity tests from the MCA 2005, I agree with Dr Mynors-Wallis and the parties that AG lacks capacity to make decisions about marriage, and about divorce. Due to her inability to understand, retain and weigh information, she has fantastical beliefs that the act of getting married will result in her living independently in the community, free her of the need for care, and enable her to work. This is what married life was like for her in the past, and her impairments due to her frontal lobe dementia result in an inability to understand that marriage in the future will not return her to that same level of functioning and independence. AG is unable to retain information about her present married status – she does not consistently recall whether she is married, divorced or widowed. She cannot weigh or use relevant information to allow her to consider the advantages and disadvantages of marriage so as to make a decision about marriage. Dr Mynors-Wallis reminded himself, as I do, that the test for capacity for marriage should not be over-complicated, but he considers that AG's dementia “means that she doesn't have capacity to fully weigh up the pros and cons of a marriage” and she is “unable to retain key necessary information to make a decision about marriage”. I agree that AG does not have capacity to enter into marriage. I am also satisfied that she has no understanding of what divorce would entail financially or in relation to her status, not even in broad terms. In my judgment it is necessary to make a finding on AG's capacity to enter marriage because the finding that she has capacity to engage in sexual relations may well bring the contemplation of marriage, already remarked on by both respondents, into sharper focus.

24. Having found that AG lacks capacity in relation to decisions about litigation, residence, care, financial affairs and property, and marriage, but does have capacity to make decisions about contact with others and engagement in sexual relations, it is apparent that the applicant will have to reconsider the care plans for AG. The previous position that AG did not have capacity to engage in sexual relations had significant consequences for AG, for CI, and for the management of the care home. Restrictions were put in place to prevent AG entering CI's room for example. Any form of physical intimacy between them could potentially have been viewed as an assault upon AG given the view and interim findings that there was reason to believe that AG lacked capacity to consent to sexual relations. Those restrictions will now be reconsidered and the safeguarding adults protection plan will be withdrawn. The care home will follow the CQC's guidance on “Relationships and Sexuality in Adult Social Care Services.” The applicant will also consider what options are available to AG in terms of

accommodation and care and support packages, including the possibility that she and CI could reside together under some arrangement whereby sufficient care can be provided. A best interests meeting is to be convened in February, and further evidence filed and served regarding AG's wishes and feelings as well as proposals for decisions on residence and care that are in her best interests. In the meantime, I am satisfied that it is in AG's best interests to continue to reside and receive care and support at the care home in accordance with her assessed needs. There is no dispute that those arrangements amount to a deprivation of her liberty but that such deprivation is necessary and proportionate and in her best interests. I direct that the applicant has authority to terminate AG's tenancy agreement on her behalf but only if all parties agree or the court so orders. I have approved the agreed consequential order, accordingly.

25. It is regrettable that delay in resolving her case has prevented AG and CI from sharing intimacy when, as the court has now found, AG does have capacity to engage in sexual relations. However, the need for a new expert to look at this case afresh, has been proven. I am grateful to the parties' representatives for dealing collaboratively with the difficult situation that arose from the last hearing. I am grateful to Dr Mynors-Wallis for the great care he has taken with his assessment of AG and his report. I shall reserve the case to myself for the consideration of best interest decisions.