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Case No: 12 09 4294

IN THE HIGH COURT OF JUSTICE
COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 30th July 2012

Before:

MR JUSTICE HEDLEY

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Between:

(1) A	**Applicants**
(2) B	
(3) C	
- and -	
(1) X	**Respondents**
(2) Z	

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The Applicants, the First Respondent and the Official Solicitor were represented by Counsel and Solicitors.
The Second Respondent appeared in person.

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Approved Judgment

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Mr Justice Hedley :

1. The Court is required to determine a number of questions in this case in relation to an elderly gentleman known as X. The questions which the Court is required to determine are whether he has capacity to marry; whether he has capacity to make a will; whether he has capacity to revoke or grant an enduring or lasting power of attorney; whether he has capacity to manage his affairs; whether he has capacity to litigate; and whether he has capacity to decide with whom he has contact, although the last issue is not one for current determination. Each of those questions requires an answer, but each must be considered individually.

2. I propose to approach this judgment by dealing with the background to the case, most of which is uncontroversial. I will then make any necessary observations about witnesses and about the medical experts and, in the light of that, to set out X's position today as I find it to be. I propose to deliver this judgment in open Court, but in a strictly anonymised form, with an order that nothing may be reported which might tend reasonably to lead to the identification either of X or any member of his family or others who may be parties to these proceedings.

3. Before I embark on the substance of the judgment, it seems to me that there are two lessons which this case teaches. The first is the need in the Court of Protection for a much greater emphasis on the importance of judicial continuity and, secondly, for the need for a pre-hearing review in respect of any case which is estimated to last three days or more. Either or both of those matters may have had the effect of avoiding the rather bruising experience of the first afternoon, when it seemed at least to me, rightly or wrongly, that there was a lack of clear direction in terms of the trial. In the event, the parties, including the Second Respondent, whom I shall call Z and who has acted in person as a result of an earlier decision not to allow her costs to be funded from X's estate (although X would no doubt have consented to that course), are to be congratulated on their trial management, which has resulted in a focused and relatively expeditious hearing. It has enabled the Court to absorb the difficulties created by the late filing of quite substantial amounts of evidence.

4. It is important in every Court of Protection case for the Court to remind itself of the legal framework in which it is required to operate. When dealing with issues of capacity, the Court, first, must bear in mind section 1(2) of the Mental Capacity Act 2005, which provides:

> "A person must be assumed to have capacity unless it is established that he lacks capacity."

And in subsection (4):

> "A person is not to be treated as unable to make a decision merely because he makes an unwise decision."

5. Section 2(1), which is fundamental, although in this case uncontroversial, provides:

> "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."

When I say "uncontroversial", I mean it in the sense that there is established in the medical evidence the necessary impairment or disturbance, to which I will come in a little detail shortly.

6. Next, the Court must have in mind section 3 of the Act, which sets out the tests for determining whether a person can make a decision. Subsection (1) is in these terms:

> "(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 …"

Then subparagraph (d) is irrelevant here, as are subsections (2) and (3). Subsection (4) provides:

> "(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."

7. That is the essential framework within which the case is to be determined. Unless and until issues of capacity are resolved, questions of welfare do not arise and, therefore, the welfare implications of the case are no business of the Court unless and until the Court has made a finding of lack of capacity and incurs the duty to make decisions in accordance with X's best interests.

8. The first of two key events in this case occurred on 24th April 2008, when X's former wife died. They had been married for 56 years. It is clear that her death was not only a great shock to X and to the whole family, but it forced into the open a state of affairs which had hitherto been managed within the family. The immediate family consisted of three adult children known as A, B and C ("the Applicants"), all of whom were themselves married with children. Even making all allowances for family loyalty and respect, it is quite clear that this was a close and trusting family, in which X held a revered role as a loved and respected husband, parent and grandfather. It is also the case that he was a man of significant means deriving from the family business. X was clearly a skilled and highly intelligent man. However, he was bored by, and therefore not very effective at, routine business administration, which he usually entrusted to others, whether a secretary, a professional or a family member. However, by 2007, the family were becoming anxious because of X's increasing tendency to forget things and to get lost; so much so that, in November 2007, Mrs B, the Second Applicant,

took over the running of his affairs. However, personal relations within the family appeared to be unaffected by these matters.

9. On 6th May 2008, after the death of his wife, X was diagnosed with dementia. On 13th September 2008, he executed lasting powers of attorney in favour of A, B and C.

10. In 2010, Z came on the scene. This marks the second key shift in events in this case. On 4th July 2010, she was employed as a full-time carer. In October 2010, X said that he would like to marry Z. From that point on, relationships within the family deteriorated badly quite rapidly and ultimately found expression in this litigation. The unedifying details of all that has occurred are only recorded in this case to the extent that they are necessary to explain any aspect of this judgment. Otherwise, they should be confined to the privacy of the family.

11. I fear it is not too difficult to see how all this came about. X is a man who has always taken pride in his personal competence and the management of his life and affairs. He resents as an intrusion on that any attempt by others to run his life. However, it is the case (and this has in the past been recognised by him) that he is no longer able to do all that he once did. As the dementia has progressed, he has been less able to appreciate his own limitations and has become increasingly frustrated and distressed when others seek to do things for him.

12. I am satisfied that the three Applicants are wholly honourable in their intentions towards X and seek his best interests in all matters, but that has not always been recognised by X himself. Mrs A in particular is an able business-like and effective woman, but I think may not have fully appreciated how difficult X found some of her dealings with his affairs. I am quite satisfied that she did no more than she felt was required, nor indeed do I cast doubt on her judgment, but X did not, because of his dementia, always see it like that.

13. Z too, I am satisfied, is honourably disposed towards X. She is a persistent, effective and somewhat strident woman with a style that the others have come to resent. She and A were designed to clash, and clash they did; a clash made more toxic by each entertaining serious doubts about the good faith of the other towards X. I hope that each may now wish to take into consideration my rather more generous assessment of the other.

14. All this, of course, put X in an impossible position. He clearly believes himself to be in love with Z, and indeed they are cohabiting. He clearly looked to Z to help him and, in my view, became highly influenced by her and increasingly dependent on her. Unsurprisingly, therefore, he has taken her side on many issues, including, I fear, her ungenerous assessment of A. He was further confused and polarised by his understanding of his children's assessment of Z, which he rejected; hence his apparent estrangement from the family as a defensive response to a conflict that he could neither understand nor control.

15. What is sad in this case is that, whilst all have sought X's best interests, no one appears to have understood how their conflict appears through his eyes. Moreover, so entrenched have they become that, sadly, I do not think anyone has even tried seriously to do so, as opposed to simply assuming that he would react as they would have done were they in his position. However, we are where we are. Peace for X lies

only in the gift of the other parties in this case, should they be willing to co-operate with each other in its bestowal. Certainly the foment generated has clouded the issue of capacity with which the Court must deal and which in this case is the Court's sole concern. I add only this. I described his estrangement as "apparent". That is because I accept the evidence that, in the absence of Z, he enjoys a warm and close relationship with his family, as he does with Z in the absence of A, B and C. Remove confrontation and you remove many of X's problems.

16. I turn then to the medical evidence. I have evidence from two psychiatrists, both written and oral: Professor Jacoby and Dr Prabhakaran. It was in many ways difficult to compare them. Professor Jacoby is a distinguished academic, who retains a small clinical practice, and it was clear from Dr Prabhakaran's evidence that the Professor enjoys very considerable standing within the profession. Dr Prabhakaran is a busy and highly skilled practising psychiatrist, fully familiar with NHS routines and procedures and has a large clinical practice. In expressing my regret that each appeared as one instructed by the side whose views they supported, I recognise that that was not in fact so and I cast no aspersion on the professional integrity of either of them. It was simply an unfortunate impression that emerged in the course of the hearing.

17. That of course applied in no way to Dr Poz, a neuropsychologist whose views were manifestly neutral and whose instruction was advised by the other two psychiatrists. I am satisfied that she was expert in her field and I find myself able to rely on her evidence.

18. Although X's medical records have not been disclosed, there are other medical reports which I have noted, but used them essentially as background material in evaluating the forensic psychiatric evidence.

19. Dr Prabhakaran took an essentially pragmatic approach. He applied screening tests to X and noted that his scores were such that in everyday practice he would not warrant further investigation. Indeed, I think I am bound to accept that would be so. However, for the purposes of my enquiry I have attached weight to the more detailed findings of Dr Poz and weight to the views of Professor Jacoby based on those findings. Although each psychiatrist expressed, as of course they were entitled to, views on capacity, they acknowledged that in the end they were a matter for the Court. In reaching my views, I have not relied on their views, but only on the steps of reasoning and the factual basis which led them to their views. I do not uniformly prefer one to the other, but take serious account of the views of both in respect of each issue to be decided. I recognise, as Dr Poz observed, that their assessments, though different, may well have been accurate when made.

20. The psychiatrists disagreed about diagnosis. Professor Jacoby said that the cause of dementia was simply Alzheimer's disease; whereas Dr Prabhakaran said it was Alzheimer's with elements of vascular dementia. I do not need to resolve this because I am satisfied on the balance of the evidence that it makes no difference to the issues to be decided in this case as to whether the dementia is caused by Alzheimer's or whether there is an element of vascular dementia in it.

21. I turn then to the medical position of X himself. There is nothing in his medical condition or history which is of relevance save that which relates to his dementia. A

critical issue is the nature and extent of the deterioration of his condition since diagnosis in 2008. I accept Professor Jacoby's evidence that the underlying pattern of decline would be a straight downward sloping line on a graph. However, I also recognise that there would be a number of variables which would impact on that straight line. First, the question of medication. It is clear on the evidence that I have that the medication recently taken has arrested the steepness of the decline, but I accept the evidence of Professor Jacoby that this medication has probably done its best work and future decline will ultimately lead to the place X would have been without the medication. In other words, its effect is one of delay of onset of symptoms.

22. Secondly, stimulus and assistance. There is no doubt that X has had access to considerable stimulus and considerable assistance. This has been readily available, if anything perhaps rather too much, but it has had the effect of slowing down decline and, to some extent, of concealing the true limitations which afflict X.

23. Thirdly, as Dr Poz pointed out, there are some therapies, especially in relation to memory, which are available but which have not yet been explored or tried. They may have a further beneficial effect in deferring the steepness of decline.

24. The last issue which undoubtedly is relevant is that of a life surrounded by conflict. This cannot possibly have helped; and the medical evidence seems to suggest that it may have accelerated deterioration.

25. All these matters must be allowed for in assessing the decline as much as in the actual decline itself. On the latter point, Dr Poz gave some stark evidence. Based on narrative evidence from within the family, which I find broadly reliable, she said that X was naturally equipped to the extent of two standard deviations above normal; in other words, he was a particularly gifted person. Her conclusion, which I again accept, now places him two standard deviations below normal in respect of his executive functioning as opposed to more generalised functioning. To put it another way, in his executive function, the effect of dementia has been to move him from the top 2½% of the population to the bottom 2½% and that is quite a dramatic decline. It is relevant, not perhaps directly to assessment of capacity but to a reminder of the effect of further decline, which all doctors accept in the long term is inevitable even if ameliorating steps are available and are taken.

26. It should be made clear that all this relates to complex abstract thinking, to what Dr Poz described as "executive functioning". At present, his grasp of simple concrete matters remains within the average range. Interestingly, Dr Poz observed that her experience of X lay somewhere between that of the other two psychiatrists, one of whom formed a higher and one of whom formed a lower view of his functioning. She was, however, aware that fatigue may have played a role in her assessment.

27. I am satisfied that in respect of some issues of capacity the areas of complex thought abilities may play a more significant role than in others. Moreover, I am satisfied that in some respects X's capacity may fluctuate. That explains differences in experience that are, as I find, accurately reported and assessed by the three forensic experts.

28. With that general background in mind, let me turn to the specific issues which the Court is required to consider and let me come first to the question of capacity to

marry. The parties were keen that I should fully acquaint myself with the judgment of Munby J (as he then was) in Sheffield City Council v E & Anr [2005] 2 WLR 953. The essence of the judgment is accurately summarised in the head note in the following manner:

> "The question whether there was capacity to marry was not to be considered by reference to a person's ability to understand or evaluate the characteristics of some particular spouse or intended marriage, but rather it was about the ability to understand the nature of the marriage contract and the duties and responsibilities that attached to marriage, namely that marriage was a contractual agreement between a man and a woman to live together, to love one another to the exclusion of all others in a relationship of mutual and reciprocal obligations involving the sharing of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance; though the contract of marriage was essentially a simple one which did not require a high degree of intelligence to understand; that the court was only concerned with capacity to marry and it had no jurisdiction to consider whether a particular marriage was in a person's best interests."

29. A succinct statement of that can be found in paragraph 68 of the judgment, where the learned Judge says this:

> "The law, as it is set out in these authorities, can be summed up in four propositions:
>
> (i) It is not enough that someone appreciates that he or she is taking part in a marriage ceremony or understands its words.
>
> (ii) He or she must understand the nature of the marriage contract.
>
> (iii) This means that he or she must be mentally capable of understanding the duties and responsibilities that normally attach to marriage.
>
> (iv) That said, the contract of marriage is in essence a simple one, which does not require a high degree of intelligence to comprehend. The contract of marriage can readily be understood by anyone of normal intelligence."

30. Having considered these matters, I find myself in complete agreement, if I may respectfully say so, with the approach of Munby J in this case. It seems to me that, as a result of the copious learning which was deployed in that judgment, he has correctly discerned the basis on which the capacity to marry is to be assessed. I should add that I am in entire agreement with what he calls "the final observation" in paragraphs 143 to 145. In particular, am I in agreement with the words that appear at 144 as follows:

> "There are many people in our society who may be of limited or borderline capacity but whose lives are immensely enriched by marriage. We must be careful not to set the test of capacity to marry too high, lest it operate as an unfair, unnecessary and indeed discriminatory bar against the mentally disabled."

31. It seems to me to be within the framework of the law as discerned in that judgment that the Court should consider the question before it, which is, have the Applicants satisfied me that X lacks capacity to marry? The question is formulated that way because of the terms of section 1(2) of the Act.

32. In my judgment, they have failed to do so. Although I accept that X has suffered a significant decline in executive function, he retains many aspects of his intelligence in the fundamental level and it is at that point that it is important to have in mind that the requirements of capacity to marry are comparatively modest. I actually think it highly probable that he retains an understanding of the marriage contract and that his 56 years of beneficent experience of marriage has firmly etched upon his understanding the duties and responsibilities that go with it. Certainly I am not satisfied to the reverse and I decline to make any declaration that he lacks capacity to marry. I add only this, inevitably. Whether any decision that he might take to marry is wise or unwise, whether it leads to happiness or regret, is simply none of my business and I am simply unable to take into account any specific plans he might have in that direction.

33. Let me turn then to the second issue, which is the question of capacity to make a will. The law is long established in this case, deriving as it does from a decision of the full Court of the Queen's Bench on 6th July 1870 in Banks v Goodfellow [1870] LR 5 QB 549. There is a helpful observation at page 565 in the judgment of the Lord Chief Justice which deals with the question of testamentary capacity, thus:

> "It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

34. It is also important, although it does not actually apply in this case, to bear in mind that an eccentric disposition of property is not of itself evidence of incapacity by reason of section 1(4), but it is the whole picture that needs to be looked at, as described by the Lord Chief Justice.

35. Again, the question for the Court is have the Applicants satisfied the Court that X lacks testamentary capacity?

36. I am bound to say I have found this issue quite difficult. On the one hand, if one looks at X's statement, he demonstrates an understanding of his obligations and

makes perfectly sensible and proper proposals as to what should be in his will. On the other hand, I am impressed by the medical evidence, which points out a dramatic decline in executing functioning in the context of further inevitable deterioration, and that seems to me to raise serious concerns as X's own affairs are relatively complicated. I have also borne in mind the differing impressions of the doctors in relation to this question of testamentary capacity and the factors that I set out earlier in this judgment which may have the affect of retarding on the one hand or accelerating on the other the deteriorating progress of this disease.

37. In the event, I have concluded that I cannot make a general declaration that X lacks testamentary capacity, but that needs to be strongly qualified. There will undoubtedly be times when he does lack testamentary capacity. There will be many times when he does not do so. The times when he does lack such capacity are likely to become more frequent. It follows that, in my judgment, any will now made by X, if unaccompanied by contemporary medical evidence asserting capacity, may be seriously open to challenge. I draw attention, if I may, to a helpful passage in *Heywood & Massey*, provided by Counsel for the Applicants, at paragraph 4046, which deals with borderline capacity. It seems to me that the advice contained in that is very much applicable to this case.

38. Let me then turn to the question of revocation or creation of enduring or lasting powers of attorney. First, I am not satisfied that it has been established that X lacked capacity to revoke the power of attorney in favour of the Applicants, even indeed if that was still a live issue given that the revocation has been accepted and the registration has been cancelled. I found the issue of power to create a new enduring power of attorney very much more difficult for all the reasons that apply in relation to testamentary capacity. In the end, I have reached exactly the same conclusion. I am unwilling to make, on the evidence, a general declaration that he lacks capacity, but qualify that immediately by saying that the exercise of such a power, unless accompanied by contemporary medical evidence of capacity, would give rise to a serious risk of challenge or of refusal to register. It seems to me, for exactly the same reasons as I endeavoured to set out in relation to testamentary capacity, that X's capacity is likely to diminish in the future and there will be times when undoubtedly he lacks capacity, just as there will be times when he retains it.

39. Let me turn then to the question of the management of affairs. For the most part, concentration has been focused on the decision of the Court of Appeal in Masterman-Lister v Brutton & Co & Ors [2003] 1 WLR 1511. I start with that passage in the judgment of Kennedy LJ between paragraphs 18 and 20 where he sets out the basis, which is very much in relation to the question of a person's capacity to manage their property and affairs. Having that in mind, I have considered what the position is in relation to X.

40. In this case, it seems to me that one has to take particular account of the deterioration of executive function in the context of the complexity of his business affairs. It is true that much of the details of his affairs are delegated to professional advisers; and that is perfectly proper and normal practice. But it has to be borne in mind that professional advisers are precisely that – they are advisers and not decision-makers. Decisions on principle, decisions relating to the discharge or avoidance of tax liabilities and those kinds of matters have to be taken by X himself, even if the decision is no more than an informed decision as to whether to rely on advice, but he cannot, like any other

person, escape personal responsibility for a number of decisions that relate to his own affairs.

41. In the light of Dr Poz's evidence, I am satisfied, on balance, that he lacks capacity to manage his own affairs. In so finding, I acknowledge, as I have done in relation to the other matters, that there would be times when a snapshot of his condition would reveal an ability to manage his affairs, but the general concept of managing affairs is an ongoing act and, therefore, quite unlike the specific act of making a will or making an enduring power of attorney. The management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent. In the context of the evidence that I have, I am not satisfied that he has capacity to manage his affairs.

42. I turn then to the question of capacity to litigate. I have in mind particularly the observations of Chadwick LJ at paragraph 75 of Masterman-Lister, where the learned Lord Justice says this:

> "The test to be applied, as it seems to me, is whether the party to the legal proceedings is capable of understanding, with the assistance of proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a next friend."

That is the heart of the test.

43. In one sense, this inevitably follows closely on the question of management of one's own affairs, but it requires in this case, in my judgment, separate consideration because it does operate in a separate and more restricted time frame, but a time frame quite different to the decision to make a will or to grant a power of attorney.

44. I am reminded, quite rightly, that I must take account of X's hearing difficulties and not allow those to intrude on the question of capacity, for, in truth, they have no real bearing on capacity. I have in mind in particular section 1(3) of the Act, which provides that:

> "A person is not to be treated as unable to make a decision unless all practical steps to help him to do so have been taken without success."

The issue is that the question of hearing has been addressed and X has been able to hear the essence of what has gone on in this hearing.

45. Clearly, there are aspects of the case that X can understand and follow. However, I am satisfied that viewed in the round he lacks capacity to conduct this litigation, even with the skilled advice available to him. This assessment is made in the light of factors already indicated in this judgment, and I find that the balance of probabilities favours a finding of lack of capacity. I should add that, in relation to the findings both

on managing own affairs and capacity to litigate, that the causal link to the question of the impairment or disturbance in the functioning of the mind or brain is satisfactorily established in the medical evidence.

46. No finding is now sought on the current evidence in relation to capacity to decide with whom he should have contact. I would not want to make any such finding if I could avoid it. The idea that this distinguished elderly gentleman's life should be circumscribed by contact provisions as though he was a child in a separated family is, I have to say, deeply unattractive. I believe that, on reflection, the parties may be inclined to think so too.

47. My conclusions are that X has capacity to marry, that he has what I have called a qualified capacity to make a will and execute a power of attorney, but lacks capacity to manage his own affairs and to conduct litigation.

48. It seems to me that the parties now need to take stock. His capacity and wellbeing are at the mercy of the stress generated by this family dispute. The greatest gift that anyone can bestow on him would be bringing such conflict to an end and allowing the time that is left to him to be one that can be enjoyed by family old and, if circumstances so decide, new as well. That is the judgment I propose to give.

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