

Tuesday, 9th November 2010

Before:

THE HONOURABLE MRS. JUSTICE KING

B E T W E E N:

The Council	<u>Applicant</u>
- and -	
X (by her litigation friend the Official Solicitor)	<u>1st Respondent</u>
- and -	
Y	<u>2nd Respondent</u>
- and -	
Z	<u>3rd Respondent</u>

Transcript prepared from the official record by
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Mr. JOSEPH O'BRIEN (instructed by The Council's Legal Dept) for the Applicant.

Ms. AMY STREET (instructed by Langleys Solicitors, acting for the Official Solicitor) for the
First Respondent.

Y appeared in person.

Z did not attend court

J U D G M E N T (As Approved)

MRS. JUSTICE KING:

1. This is an application made by the Council for a declaration that contact between X, a 94 year old lady, who lives at QM, and lacks capacity due to her advanced dementia, and her daughter Y, is no longer in her best interests.

2. A trial took place earlier in the year, which led to this court making various declarations as follows:

(1) X lacks the capacity to litigate.

(2) X lacks the capacity to make decisions as to her residence.

(3) X lacks the capacity to make decisions as to the contact she should have with others.

(4) X lacks the capacity to make decisions as to the care package that she should receive.

(5) It is in X's best interests that she resides at QM ("the care home") and no other person shall seek to remove X from QM save for the Applicant or health authority in an emergency.

(6) It is in X's best interests that she has contact with the Third Respondent in accordance with the contact schedule attached to this order.

(7) It is in X's best interests that she receive the care package in accordance with her assessed needs.

3. Attached then to those declarations was a contact schedule which provided as follows:

"(1) Contact shall take place between X and Y once per week at the care home or some other facility as is deemed necessary by the local authority to meet X's best interests.

(2) The contact between X and Y shall be for up to one hour.

(3) The contact shall be supervised by staff from the local authority who may halt the contact at their discretion if deemed necessary to meet X's best interests.

(4) The contact arrangements shall be kept under regular review by the Applicant and shall also be reviewed at the periodic review meetings of X's placement held at least six monthly.

(5) The Applicant will notify Y in writing of any change to the current contact arrangements."

4. At the conclusion of that trial this court gave a lengthy judgment; this short *ex tempore* should be read against the backdrop, history and findings contained and detailed therein.

5. Contact was dealt with in the judgment specifically at paragraph 155 onward: "Dr. S. and Miss S.", [I should interpose that they were the experts called in the original case]:

“were both of the opinion that the attitude of Y during contact often causes X distress. X becomes very upset when certain topics are raised, for example, when X thinks her father is alive and speaks of him Y tells her abruptly that her father is dead. Y cannot or will not see that this is unkind and wholly unproductive. Y says she believes in telling the truth, but at X’s stage of dementia there is no truth but only what beliefs where ravaged memory have left her. In her mind she is a young girl who lives at home with her mother and beloved father. Each time she is told he is dead she is distressed. I have been referred to numerous contact records, these regularly record inappropriate behaviour on Y’s part. Dr. S has read all the contact sheets, she regards them as very balanced. She noted that it had been reported when contact had gone well and both had enjoyed it. Since the hearing on 30th November 2009 X has had contact with Y once a week, supervised by two local authority home care staff. Happily, the quality and contact has shown some recent improvement, with Y showing more tolerance of X’s disorientation. Unfortunately, she persists in telling X that she is being kept in QM against her will and that she has been put there by Social Services and Z. Miss S. recommends that contact continues on the same basis. Despite the improvement in quality she is of the view that Y needs clear and consistent boundaries regarding her visits, I agree. Having said that, however, I hope very much that if the quality of contact continues to improve, that the length and frequency of contact can be increased and the level of supervision can be reviewed. In any event, it is most important that contact is kept under review. In making that decision I have in mind the observations of Sedley L.J. in *Re: F* (Adults Courts: jurisdiction) and those of Mumby L.J. (as he then was) in *R: S* (Adult Patients).”

6. Although that judgment is dated 24th June, in fact it was available to all the parties in April 2010. Y was therefore well aware of my findings and also of my hope expressed in that judgment, that the contact would improve, allowing the issue of supervision to be reviewed. Unhappily, that has not proved to be the case. Concerns continued over the four months between April and July, which culminated in an incident at QM on 27th July 2010. This incident led the local authority to inform Y by a letter dated 29th July 2010, that contact would be suspended.

7. On 5th August 2010, again as a consequence of the incident on 27th July, the owners of QM, TLL, notified Y that she would no longer be allowed to come to the home or enter the premises.

8. On 9th August 2010 the local authority invited the court to make further directions. This matter was then listed *ex parte* for further directions. That was necessary, contact having been suspended by the local authority, in order to ensure that as soon as practicable the local authority had appropriate authorisation permitting them to continue that suspension. The court made an interim declaration that contact was not in X’s best interests, but ordered the local authority to give detailed consideration to what contact could take place away from QM. Permission was also given to the local authority and the Official Solicitor (who continued to represent X) jointly to instruct Miss S, the independent social worker who gave evidence in the original trial to prepare an updated report specifically dealing with the issues of contact. This she has done and the report is dated 28th September 2010. Her conclusion is that continued face to face contact is not in the best interest of X.

9. The issue of contact came on yesterday for trial. Y as at the original trial, was unrepresented. As at that trial, W once again attended with a view to acting as her McKenzie Friend.

10. In the judgment at the substantive trial in, I think 2010, I had cause to make some adverse comments about a number of intemperate letters, comments W had made, together with my concern that he had stepped outside the role of McKenzie Friend as set

out in the Practice Direction applicable at that time (now replaced in largely identical terms by a Practice Direction dated July 2010).

11. Mr. O'Brien, on behalf of the local authority, whilst not objecting to W again acting as a McKenzie Friend, did bring to my attention a letter written by W. The letter is dated 19th September 2010 and is addressed to a Dr. G, a Senior Research Fellow in neuropsychology. That letter arises directly out of findings the court made about Y's presentation during the course of the trial in March. Attached to his letter was a document headed "Foreign Accent Syndrome" written by W. It said *inter alia*:

"With Y I recently attended a hearing before the Court of Protection but had no right of audience and could not act as an advocate. Y who has only limited financial resources has been denied legal aid and had to represent herself. The contest was a highly competent character assassin, totally without scruple, was an unequal one. I was shocked when Y was required to remove her glasses in court to display her speech disability and have it portrayed as evidence of mental disorder."

12. I should say for accuracy two things arising out of that passage:

(i) very unusually, I allowed W to address the court and, indeed, to give evidence; and,

(ii) my recollection of the evidence was that, whilst initially reluctant to remove her glasses, when that was not pressed by Mr. O'Brien on behalf of the local authority, Y then offered to, and did remove her glasses of her own volition.

That is as may be. It is most regrettable that W is still writing letters in such intemperate terms, and in terms which come perilously close to, if not in fact disclosing information from these private proceedings to third parties without the leave of the court.

13. Contact: April 2010 to July 2010

I have heard evidence from JH, social worker and principal practitioner of the Council, and JA, the manager of QM

14. JH took me to the contemporaneous contact sheets which provide a detailed account of each and every contact visit that has taken place.

15. Any court hearing matters relating to contact must bear in mind that supervised contact is, by its very nature, both unnatural and inhibiting. In this case, due to the concerns about Y's behaviour there have been not one but two supervisors. However, whatever may have been the frustrations of that situation, Y had been and should have been encouraged by me to behave in an appropriate manner. She had been given by the court the hope, and indeed expectation, that if only (during the course of contact) she could put her mother first and not think of her personal grievances she could look forward to less oppressive, or even no supervision. The contact sheets, unfortunately, show that Y was totally unable to maintain the improvement in contact which had been observed in March. Save for one good visit in April, the recordings make depressing reading.

16. The notes reveal many of the same themes upon which I commented in my judgment, for example Y constantly telling her mother that her parents were dead when X asked to go home. She also continues to be very personally abusive about her brother Z, blaming him for X being in QM, and referring to his wife as "that bitch".

17. In addition, Y has, and remains it would seem, incapable of restraining herself in her dealings with the employees of the QM or the supervisors at contact. She is rude and abusive. On occasion this has resulted in X becoming distressed and on occasion the contact has been brought to a premature end, see, for example, a very distressing contact visit on 25th May 2010.

18. Y has referred to employees of the local authority as “looking like a pervert”, and that certain employees “make her feel sick”, that other employees were “paranoid” and “paid to spy”.
19. On 28th June I am satisfied that Y referred to the supervisors as “hard faced crows”. She has regularly taped contact visits without permission.
20. In addition to these personal and abusive remarks, in the same way as was recorded in my judgment, Y has continually complained about the quality of care of her mother and has telephoned both QM and Social Services incessantly.
21. On 23rd July 2010 the local authority wrote to Y about the constant telephone calls. She was told her that arrangements were being made for there to be a single point of contact, a SH, who would contact Y twice each week to provide her with an update as to X’s health and well-being. Despite meetings and attempts to get Y to moderate her behaviour, by May of this year QM was considering serving notice on X.
22. Given my findings that X is happy and settled in QM and that it should be her home for the rest of her life, that is a matter of very considerable concern and significantly undermines her best interests if the threat had been carried out.
23. Y continued to contact the home outside agreed timescales. I am satisfied that she made frequent lengthy telephone calls and turned up at the home on a virtually daily basis. She alleged that the care staff and another resident had physically abused her mother.
24. Matters came to a head on 27th July 2010. I heard oral evidence from JA, who told me in her own words of the events of that day. JA said that it had been a normal visiting day, the carers had arrived and she was in her office. One of her staff came down and asked her to speak to Y as Y had asked to speak to her. JA left the office to go to speak to Y, who was concerned about the state of X’s legs. She asked for her mother to be taken to hospital. JA said in evidence that she had explained to Y that X’s legs were being treated by the local general practitioner and the District Nurse and it was therefore neither possible nor appropriate for Y to escort her to hospital. In order to placate Y, JA said that she would speak to the general practitioner again, and went to the office in order to do that.
25. Whilst she was in the office making the telephone call, another member of staff came in, saying that the supervisors were now asking for the visit to stop due to Y’s behaviour. In those circumstances, JA told me, she went back in and helped X to get into her wheelchair and explained to Y contact had to stop.
26. By this time X was upset and wanted to be out of the room. The supervisors left the room as X was going to be taken into the lounge. By this time Y, JA explained, was very upset, she was being verbally aggressive and her voice was raised. She called her incompetent, JA tried to dampen matters down by simply saying that she was not going to argue. Y was not to be placated and rang 999. Y was asked to leave by JA but refused to do so.
27. There then followed some comings and goings whilst JA spoke to the ambulance operators and Y maintained her decision that she would not leave. In the meantime, Y had spoken to Social Services to tell them what was going on and they were sufficiently concerned to call the police and ask them to attend.
28. The ambulance crew eventually arrived and spoke to and saw Y. They were satisfied with the care that she was getting. Before that happened, however, matters came to a head in X’s room. The scene was described by JA as follows:

“The ambulance crew arrived and at that moment Y tried to run into me to get past me to the ambulance crew. I was in the door well and Y was in the

side. She ran her mobility scooter into me. I said to her: 'You just hit me', and she said: 'Well, get out of my way then', and she hit me again, and she hit another member of staff, RS."

JA described how she had bruising to the bottom of her right foot and to the shin of her right leg. She was asked whether or not J had offered an apology and she said she had not. The parties then spoke to the ambulance crew, the police arrived and escorted J off the premises.

29. Such an incident is wholly unacceptable. It is unacceptable for any number of reasons. It is unacceptable that something like that should happen in a care home where elderly people should be having a calm environment and should not be distressed by raised voices, by ambulance crews arriving and the police coming to the premises. It is wholly unacceptable, so far as I am concerned, because it must have been deeply distressing and confusing for X. It is unacceptable that JA, who was doing her level best to manage matters, should have been treated in such a way by Y.

30. Unfortunately, Y declined to cross-examine JA. She said that she could not do so because of matters which she declined to detail, but she said it made the matter "pre-justice". It transpired in fact she is referring to a hearing in the Magistrates' Court due to take place in a couple of weeks' time when, as I understand it, she is to answer her bail in respect of charges of common assault arising out of her having driven her mobility scooter at JA on the afternoon of 27th July.

31. I urged Y to reconsider her position and reassured her as to the private nature of these proceedings. Mr. O'Brien explained that in the event that there was no challenge to the evidence he would be asking the court to accept it in its entirety. I rose to allow Y to discuss the prudence of her decision with W.

32. Y has maintained her position, and although she subsequently went into the witness box and was sworn, she responded to any attempts by either the local authority or the Official Solicitor to question her with "no comment". Instead, she spoke of the case going to Europe and said that the police are to be prosecuted for assault.

33. I am left, therefore, with no challenge to the local authority evidence and, in particular, the evidence of JA. I bear in mind that that evidence has not been tested, but having heard and seen the witnesses, and having read all the contact sheets, I have no hesitation in accepting the evidence of both JH and JA. In particular I accept that on 27th July 2010 Y deliberately hit JA with her scooter. The whole unpleasant and distressing incident was unhappily typical of the disinhibited, angry and aggressive behaviour of which Y is capable, and which was a feature of the history which led up to the removal of X from Y's care in the first place.

34. Due to Y's behaviour the court is left in an invidious position. QM, as they are entitled to do, have banned Y from their premises. There is nothing the court can do about that. They have, however, said that when it comes to the end of X's life they will allow Y unrestricted access to her mother at QM (if she is not in hospital at that time). Unfortunately, and sadly, Y tells me that under no circumstances will she go to QM for what she refers to as "her own safety". I hope very much that when the time comes she will change her mind.

35. Y has seen her mother only once since July on 1st October 2010, that visit went well and was all that contact should and could have been. It took place in hospital where X was an in-patient for a period of time. Y approved of the supervisor, a CM. CM is a very senior manager, no longer operational, and even if it was practical in other ways, she cannot be made available and it would not be appropriate for her to supervise contact.

36. X is now 94. She is immobile. She has to be lifted into her wheelchair by a hoist and to have two carers with her. She is frail and inevitably her dementia, as expected, has further progressed. I am satisfied that it is not in her best interests to be moved for the purposes of contact. She does not know Y any more, and moving her from her familiar environment will confuse and potentially distress her, even apart from the physical difficulties it presents.

37. At my direction, the local authority has made enquiries at a number of possible venues so that if the court did decide that it is in X best interests for there to be continuing contact, information about the practicalities could be put before the court. The local authority has been unable to identify anywhere where contact could take place, either because the venue itself is unsuitable, or because they have declined to have Y on their premises due to her behaviour.

38. If I believed that X could make the journey, or that contact was otherwise in her best interests, I would not let the practicalities deter me, and I would have held the matter over for other options to be explored by the local authority, perhaps with the assistance of the Official Solicitor.

39. I have had the assistance of a report prepared by Miss S specifically to consider contact. For the purposes of that report, Miss S visited X, saw Y and made detailed enquiries of all those who care for X. For the purposes of preparing her report Miss S spent approximately two hours with Y.

40. During the course of their discussions Miss S asked Y how the new arrangement for a single point of contact was working. She said as follows:

“Y said she was not interested in what anyone else says about her mother. Y told me that she had written a letter of complaint to the Council about SH, Y’s social worker, for a single point of contact, whom she claimed was very flippant in her manner and not acting correctly. Y said that SH was on holiday this week but another social worker would telephone this afternoon during our visit, and if he didn’t telephone before a certain time she would ring him. In fact, the social worker did telephone and Y very quickly became confrontational, telling him not to refer to his colleague, SH, by her first name. After this Y seemed to challenge anything the social worker was trying to tell her. It was impossible to see how the telephone call could have achieved its purpose in terms of keeping Y up to date with her mother’s situation and well-being. At one point Y held the phone into the centre of the table for some few minutes while the social worker was talking to her, and shortly after this she terminated the call with him. Y consistently and persistently returned to the time when her mother lived with her, and her version of events which led to X being admitted to QM. When I reminded Y about the Court of Protection final order regarding her mother, Y said she did not accept what had happened in court. I again reminded Y that the issue to be addressed today was solely that of contact, Y’s response was to say that it was disgraceful the way the court had treated her and W, who are both disabled people.”

41. Miss S went on to record that Y still does not accept that her mother has dementia of the type that has been diagnosed, and indeed only yesterday Y told me that she could bring her mother “back”. Miss S has concluded that the combination of the inability to move X and Y’s inability to behave appropriately in contact lead her to conclude that contact is not in X’s best interests. It is not possible, she has concluded, for Y to contain herself, even for an hour, without the risk of her becoming confrontational or abusive, with the inevitable effects that has on X. I agree.

42. Whilst Y declined to cross-examine Miss S she did suggest that contact could be supervised with different independent third parties. Having now been involved with this case for many months, and having seen and heard Y in court over a number of days, I am

of the view that no matter who supervised contact, Y would in all probability rapidly fall out with them and her behaviour, even if better in the first instance, would deteriorate to the type of behaviour recorded and observed in the contact notes.

43. In those circumstances, with considerable regret, I conclude that direct contact is not in X's best interests. In reaching that conclusion I have, when balancing all the factors which together make up the bundle of X's best interests, weighed also in the balance the Article 8 rights of both X and Y.

44. I am told that indirect contact will be made available and I hope very much that Y takes that up.
