

Neutral Citation Number: [2013] EWHC 1234 (COP)

Case No: 11932292

IN THE COURT OF PROTECTION

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

22 January 2013

BEFORE:

THE HONOURABLE MR JUSTICE PETER JACKSON

BETWEEN:

AB

Applicant

and

LM

LCC

LPCT

IM

Respondents

MR ADAM FULLWOOD appeared on behalf of AB

MR JONATHAN BUTLER appeared on behalf of LM

MR MACHIN appeared on behalf of LCC

MR CARWRIGHT appeared on behalf of LPCT

MR MATTHEW STOCKWELL appeared on behalf of IM

APPROVED JUDGMENT

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(Official Shorthand Writers to the Court)

MR JUSTICE PETER JACKSON:

1. I will give my decision and the reasons for it now, at the immediate conclusion of this short hearing, conscious of the fact that what I say will not do justice to the sensitivity and detail of the submissions that I have received or of the full complexities of the issue that arises in a case such as this; nevertheless I will explain in broad terms why I come to the conclusions that I reach.
2. The proceedings are about Lisa (as I will call her), who is now 40 years old, and they were brought by her long-term close friend Tony (as, without disrespect, I will call him). For many years Lisa lived a life which has been described in these proceedings as being extremely chaotic with all manner of difficulties. During the course of that time she gave birth to three children who have fallen to her family to raise.
3. Matters came to a most unhappy head in the summer of 2011 when Lisa suffered a catastrophic injury which led to her hospitalisation and leaves her with significant impairment in her ability to lead an independent life. She has been at a supportive therapeutic unit for much of the time since then and the evidence is that she is now functioning about as well as she can be expected. The plan is that she will move to independent supportive living as soon as arrangements can be made and funding agreed.
4. There are levels of agreement between the parties who represent all the interests that are concerned about Lisa. I have followed her recent progress through a series of hearings which have dealt with, in the main, the question of what level of contact Tony should have with Lisa consistent with her recovery.
5. Lying behind that question is a fundamental difference of opinion between Lisa's own family, present in court today in the form of her mother, her aunt and her sisters, on the one hand; and Tony, on the other hand. Although there is an understandable depth of feeling on both sides, I have observed that in their various ways each of them has managed over the time that I have been concerned to do their best to keep Lisa's interests at the forefront, or at least near the forefront, of their own approach and behaviour.
6. So it is that a level of agreement has been reached and I will make final orders about Lisa's capacity in these respects. She is not, I find, capable of making decisions about where she should live; about how her care should be provided or about how much time she should spend with others. Those are decisions which need to be made on her behalf and that is what has been happening since her injury. Those declarations will continue and can be drafted by the parties in agreed form.
7. The next question which is all but agreed is the definition of what is in Lisa's best interests in terms of her contact with Tony. That has been increased during the course of these proceedings so that it is available twice a week. Sometimes it happens; sometimes it does not happen. Tony has almost always

been available and has almost always behaved very appropriately, but there are a considerable number of times, at least half, when Lisa simply cannot motivate herself to attend. But looking at the matter overall and thinking back to how things were a year or more ago, I congratulate the parties on creating something that has worked for Lisa and has enabled her recovery in so far as that has been possible to continue without being interfered with by conflict of one type or another. And, as I have said, I do consider that to have been an achievement and a reflection of the regard in which Lisa is held by everybody who is concerned with her and not just by one party or the other. That has called for a degree of patience and forbearance and I recognise that.

8. The only matter that needs some further comments and direction by the court is how that is going to progress in the future. It is to be hoped that the plan for Lisa to move to a more normal living environment, albeit not to live either with family or with Tony, will come to pass in the foreseeable future. There will be a period of time when she will still be at the current unit and the intention of the unit is to test out some slightly more relaxed contact arrangements which do not involve close supervision all the time, but at the same time maintain contact in a relatively public place. It is not for the court to get involved in the details of whether contact should be taking place in a park or in a coffee house, though there might be much to be said for both. But what I will say is that there is an expectation that some further relaxation of Tony's contact with Lisa will be attempted during the period that she remains at the unit. Whether or not once it has been attempted it will be continued or further relaxed will be a matter that will remain under the advice of Dr P while Lisa remains at the unit. And once Lisa moves to independent living, then it will be subject to further discussions with those who are then responsible for her and with her family and Tony.
9. So I hope that that deals with the slightly different positions put on the one hand by the family, who suggest that there should be no expectation of any kind of an increase and, on the other hand, by Tony who says that there should be an expectation of an increase. I say that there will be an expectation of a trial of increased time which will then put everybody in a position to decide: is it going well or not?
10. At the moment, the situation I think has been just about right for Lisa, namely that it allows her a reasonable amount of time with Tony. To offer more would have been pointless because she is not taking up as much as is on offer at the moment; to offer less would, I think, not have done justice to the importance of that relationship in addition to Lisa's other relationships and in particular her family ties. So that will be my decision in relation to contact.
11. Until around November and the arrival of a report by Dr G, which I have closely read and need not repeat in this judgment, that would have been an end to the matter, but for reasons which I understand Dr G raised the question of Lisa's ability to make decisions about sexual activity on her part; whether with Tony or indeed with anybody else. That question is legally a very sensitive one and for good and proper reasons it has received a very fair amount of consideration by other judges of this Division; at least four of whom have

delivered fully reasoned judgments on the question of what the appropriate test is for a person's capacity to make decisions about sexual relations. I wish to make clear that I propose to follow the conclusions reached in the decisions to which I have been referred; all of which are cited extensively in the written submissions and I intend neither to depart from them, nor to add in any way to what has been said.

12. One of the reasons, as Dr P, who is the clinical neuropsychologist responsible for Lisa, has rightly said, why this issue is so sensitive is because unlike questions such as money, residence and care, it is almost impossible (my words not his) to make decisions in the best interests of a person where sexual matters are concerned, and I therefore subscribe to the view reflected in the decisions to which I have been referred that it is an area in which the court must tread very carefully indeed. Of course there will be cases where a person's capacity to participate in sexual activity and make decisions for themselves to participate is so absent that the prospect of them doing so would be repugnant to anybody with any care for their welfare. But this is an area in which it is doubly right to remind oneself that the burden of proving incapacity rests on those who assert it, and I agree in this respect with the submissions made on behalf of the Official Solicitor and on behalf of Tony.
13. The threshold for satisfying the requirement under section 3 of the Act "to understand, retain, use and weigh information" is not available, whilst in contrast the threshold for those that wish to establish that a person cannot make a decision because they are overborne by influences from others must be a high one in relation to an act which is so very hard to rationalise.
14. I find on paying close attention to Dr P's advice, but also considering the contribution of Dr G, that Lisa does possess the abilities required to lead to the conclusion that she has capacity to make decisions about whether or not to have sexual relations. She is somebody who has been full to sexually active in the past; she has had children; she understands the rudiments of the sexual act; she has a basic understanding of issues of contraception and the risks of sexually transmitted diseases. The area in which she is weakest is her ability to understand the implications for herself should she become pregnant. Pregnancy for Lisa would be an extremely serious state of affairs; there can be no doubt about that. But her weakness in that respect does not, for me, lead to the conclusion that her capacity is absent; it argues for her to receive continued safeguarding and help, advice and explanation as and when the question of sexual activity might become a reality.
15. In fact, a declaration of incapacity whilst having huge implications for Lisa's individual future would not, to my mind, provide her with very much protection. What will provide her with protection is the fact that she needs continued close support, amounting at times to supervision, in how she goes on with her life. And taking Tony's position as an example, the opportunity for sexual activity will for at least some time to come be limited. But even so as time has passed, the respect that a person with disabilities such as Lisa is entitled to must mean that she is given opportunities which may carry with them at least some levels of risk and it seems to me that a declaration that Lisa

has the capacity to make decisions for herself about sexual activity, combined with the declarations that I will be making about her residence, care and contact amount to an overall package that is likely to meet the test of time in the same way that the arrangements to which the parties have subscribed over the past year or two have shown themselves to be centred on Lisa's welfare.

16. So acknowledging all the points that have been made in evidence and submissions, and the fact that my remarks do not fully do justice to them, that is my decision and those are my reasons.
