UZ0120352 – COP NO: 12015615

IN THE COUNTY COURT

AT PRESTON

The Law Courts,
Openshaw Place,
Ring Way,
Preston PR1 2LL

20th July 2012

Before:

THE HONOURABLE MR JUSTICE HEDLEY

B E T W E E N

CYC — APPLICANT

AND

PC AND NC — RESPONDENTS

- - - - - - - -

(Transcribed from CD by Cater Walsh Transcription Ltd.,
1st Floor, Paddington House, New Road, Kidderminster DY10 1AL
Official Court Reporters and Tape/CD Transcribers)

- - - - - - - -

APPROVED JUDGMENT

- - - - - - - -

Friday 20th July 2012

THE HONOURABLE MR JUSTICE HEDLEY:

1. I propose to give this judgment in open court, partly so that it may if necessary be disseminated, and partly because in my view it raises issues which should be capable of public discussion. It will, however, be understood that nothing may be reported of this judgment which might reasonably lead to the identification of the protected person known in this judgment as PC. The judgment will be given in an anonymised form and I apologise to everyone, particularly those in court, for referring to them other than by their proper names, which are of course well known to me.

2. This case concerns a married couple wishing to resume married life. It raises questions of capacity and best interests under the Mental Capacity Act 2005. However, the identification of the true issue in this case has proved most elusive. In order to appreciate the difficulty it is important to know something of the background to the case. PC is a woman who was born on 29th June 1964, so that she is now aged 48. There is no doubt she had a troubled childhood and that the Local Authority Social Services were involved from about the age of six onwards. Part of her education was in a residential special school and there is no doubt that she was diagnosed with mild learning difficulties, a diagnosis that has been repeated on occasions since then. It fundamentally reflects an IQ assessment of somewhere between 66 and 69, and the word "mild" is used in relation to "moderate" and "severe" and should not be misunderstood as suggesting that PC's learning difficulties are other than quite significant in ordinary terms.

3. At the age of 15 she had a termination of pregnancy coupled with a denial that sexual intercourse had ever taken place, but the fact is that for much of her life she has lived more or less independently. She was married on 12th October 1987 but divorced the following year, and indeed sustained another termination in due course. She entered into a second relationship in October 1999, that ended in April 2001 because she appreciated (and this may be of some significance in this case) that the man concerned had convictions in relation to sexual matters with young boys and she was not willing to continue the relationship on that basis. She did, however, have a child of her own born on 10th November 2001 to this man, but although the child lived with her for a little while, in due course care proceedings were taken and most of his life has been spent living with PC's sister and she has contact from time to time with him.

4. In September 2001 she began a relationship with NC. That relationship ripened into cohabitation but was cut short in November 2002 by NC's arrest in respect of matters for which he was in due course convicted and on 18th July 2003 sentenced to a term of 13 years imprisonment. PC and NC married in August 2006 whilst NC was serving that sentence of imprisonment. In July 2011 NC was released subject to licence and it appears that the licence expires in August of this year. The Local Authority issued proceedings in the Court of Protection on 30th June 2011 in anticipation of NC's release.

5. It is important to set out a number of matters which are either common ground or are undisputed. First, the offences of which NC was convicted involved serious sexual offences in which both NC and his father were found to have been complicit. Secondly, NC has always denied his guilt of those offences and so has never been in receipt of

therapy or of any treatment in relation to sex offences. Thirdly, PC has always maintained, both that NC was innocent of all these matters, and that he was convicted because he had been framed by his previous wives, who were indeed the complainants in those offences. Fourthly, it is accepted on all sides that NC must be taken to pose a serious risk to PC in her capacity as a cohabiting wife. Fifthly, it is important to stress that there is no evidence that PC has in fact ever suffered serious harm from NC, nor is there any evidence to suggest that there has been other than substantial compliance with the protective regime that has been in place, both in terms of NC's licence and orders of the Court of Protection. Moreover, there is no evidence that to date there has been contact between NC and his father, though the question as to the future is unknown. Next, it is common ground that NC and PC have a unified wish to resume married life together.

6. It is obvious from all of that why the Local Authority should regard PC as a vulnerable adult, and rightly so, and why they should conclude that she is at significant risk of serious harm from NC, and hence these proceedings under the Mental Capacity Act 2005.

7. Whilst the court has jurisdiction under that Act to make orders in respect of a protected person's welfare, that jurisdiction is entirely dependent on a finding that the protected person lacks capacity to make the decision or decisions in question in the case, and that capacity is intimately related to the decision or decisions required to be taken, but in this case, for reasons that I readily understand and will no doubt become apparent, there has been no real agreement between the parties as to how those decisions are to be identified or defined.

8. Fundamental to the evidence in this case has been that of Dr. Payne, both in terms of his written evidence and his oral evidence. Dr. Payne is a distinguished consultant forensic psychiatrist at Broadmoor Special Hospital. He of course has wide experience of both the Mental Health Act and the Mental Capacity Act, but has no particular experience in relation to the work of the Court of Protection. His views can be summarised as follows. First, that PC suffers from an impairment of or disturbance in the functioning of the mind or brain by reason of her learning difficulties. Secondly, that PC lacks capacity to decide any issue which relates to her relationship with or contact with NC. Thirdly, that it is in PC's best interests to have no contact at all with NC.

9. Although Dr. Payne was jointly instructed by the Official Solicitor and the Local Authority, it is important to record that his views on both capacity and welfare were rejected by the Official Solicitor and by NC and that whilst his views as to capacity were partially accepted by the Local Authority, his views as to welfare were not. Therefore, it is important to set out Dr. Payne's views and to explain why it is that they are challenged.

10. The most important issue for Dr. Payne was that PC could not, or would not, accept the guilt, or even the possible guilt, of NC in respect of the matters of which he had been convicted. That for him demonstrated that she was incapable of understanding information relevant to her decision to have contact with him, or to weigh matters in relation to that decision. He went on to say in his oral evidence, although the connection is not explicit in his written evidence, that those matters were referable to her impairment or disturbance of the functioning of the mind or brain. Thus, in the circumstances he concluded that she lacked capacity in relation to issues of deciding contact between herself and NC.

11. He was asked both in writing and in his oral evidence as to whether he could express views about capacity to decide on contact, irrespective of, or divorced from, the question of NC, but he was unable to do so. His conclusion on best interests is effectively founded on the same propositions.

12. I do not for one moment doubt Dr. Payne's general professional competence but I do approach his evidence with great care in this case. Section 1(4) of the Act says that a person is not to be treated as unable to make a decision merely because he makes an unwise decision. Although Dr. Payne explicitly disavowed it, his expression of views came, in my view, very near to an infringement of section 1(4). Moreover, his refusal to attempt to separate issues of capacity from NC specifically rather fortified that impression and betrayed a lack of familiarity with the wider workings of the Mental Capacity Act in the Court of Protection. Nevertheless, there was a train of reasoning which was potentially relevant to what might be the issue or issues in hand. I accept his assessment that section 2(1) is satisfied. I accept that NC's guilt is potentially a highly relevant factor. The issue is, however, not whether she is right in her rejection of his guilt, that is a classic and all too familiar unwise decision, but whether she was capable of the steps necessary to reach such a conclusion. Given her learning disability, her unwillingness to examine the issue of his guilt and her overwhelming desire to re-establish that relationship, and that that derives in significant part from her impairment, I accept that there may be evidence from which the court could conclude that she lacks capacity to decide on matters relating to her relationship with NC. In my view, however, the court would have to be very cautious about reaching conclusions generally on her capacity to decide about issues of residence, care

and contact, in the light both of the presumption in section 1(2) of the Act and in the unwillingness of Dr. Payne to express any views on those subjects that were not intimately connected with NC's role in the relevant decision.

13. There are two further short observations to be made about Dr. Payne's evidence. The first is, I accept his assessment that she lacks capacity to litigate and that also derives from her impairment. Secondly, I will deal with his issues on welfare insofar as they are relevant a little later in this judgment.

14. I also had evidence from the social worker in the case who, because this judgment is anonymised, will not be named. The social worker concerned has dealt with PC throughout the relevant period. She told me that PC's primary relationships within the Local Authority are with the residential staff. She told me that PC had been essentially compliant with the protective regime that has been set up in this case, as indeed had NC. She was satisfied that both were seriously committed to married life together. She understood that there was a clear risk involved in the carrying into effect of that desire. She was of the opinion that monitoring may help to manage the risk but cannot guarantee that it will be avoided. She was of the view that if things went wrong in the marriage, particularly in sexual matters that PC did not like, she thought it likely that PC would make her views known to any member of the Local Authority, direct or indirect, with whom she had retained a relationship, and of course there is some evidence for that derived from her reaction to her previous relationships.

15. The social worker was satisfied that PC would be devastated if she were not enabled to resume married life. She took the view that that would result in PC becoming much less co-operative and much more confrontational and that that would lead to a requirement for serious restrictions on PC's liberty and, indeed, no doubt for injunctive orders against NC. It was for those reasons that the Local Authority had concluded on balance that her best interests were more served by a resumption of marriage than by the no contact option. If I may say so, I regarded the social worker's evidence as thoughtful and balanced with a real desire to do what was best for PC and that she had a real understanding of PC. The question remains, assuming the court has jurisdiction, as to whether she or Dr. Payne are right in the assessment and balance of risk.

16. Let me then turn specifically to the issue of capacity. By section 1(2) a person must be assumed to have capacity unless it is established that he lacks capacity. By section 1(4), as I have indicated, a person is not to be treated as unable to make a decision merely because he makes an unwise decision. By section 2(1), as I have already indicated, the want of capacity must be attributable to an impairment of or disturbance in the functioning of the mind or brain. Thirdly, the inability to make decisions must be assessed in the light of the matters set out in section 3 of the Act, namely in subsection (1) an ability to understand information relevant to the decision, to retain that information, to use or weigh that information as part of the process of making the decision, or to communicate the decision. Nothing turns on the last, there being no doubt about PC's ability to do that. It is perhaps important to have in mind that the information relevant to a decision may include the reasonably foreseeable consequences of deciding one way or the other or failing to make a decision.

17. It is important that the court should be clear about its function. In my judgment the function of the court in a case like this is to discern the facts of the individual case, to discern the question in respect of which the issue of capacity is to be analysed, to apply the statutory criteria that I have already set out to the facts of the case, and to reach a conclusion about capacity. Having done that, if the court has concluded that a person has capacity, to dismiss the proceedings, and if the person does not have capacity, then to consider the issue of welfare.

18. I am aware that much has been raised in submissions and I have had my attention drawn to a number of comparative or illustrative cases decided at first instance, but it seems to me that there are difficulties enough in this case in analysing the issues concerned without ranging wider than is strictly necessary. For example, amongst the matters raised in submissions were the following. Has this whole question been rendered sterile by what must be taken to have been a capacitous marriage in 2006? Or is this an issue which can only be addressed by the inclusion of NC in the question? Or is this a question that has to be determined by removal of any reference to a specific person and the addressing of a question generically? I fear that this judgment will not begin to do justice to the learning and the submissions that were deployed before me. That should in no way be taken as a criticism of such submissions, indeed the very fact that the matters were considered on a wide ranging basis, both in skeleton arguments and oral submissions, has enabled me greatly to clarify my own thinking on this difficult issue. But at the end of the day it seems to me that I need to apply the statute to the facts of this case.

19. There has been considerable debate as to whether the issue of capacity to decide on contact should or should not be person specific, that is to say whether it should or should not in this case focus on NC. This is in part derived from the terms of section 17 of the Act. However, it seems to me that what the statute requires is the fixing of attention upon the actual decision in hand. It is the capacity to take a specific decision, or a decision of a specific nature, with which the Act is concerned. Sometimes that will most certainly be generic. Can this person make any decision as to residence or contact or care by reason of, for example, their dementia? Or does this person have any capacity to consent to sexual relations by reason of an impairment of mind which appears to withdraw all the usual restraints that are in place? Such generic assessments will often be necessary in order to devise effective protective measures for the benefit of the protected person, but it will not always be so. There will be cases, for example, in relation to medical treatment where attention is centred not only on a specific treatment or action but on the specific circumstances prevailing at the time of the person whose decision making capacity is in question. The hysteric resisting treatment in the course of delivering a child is an example from my own experience. Accordingly, I see no reason why in the construction of the statute in any particular case the question of capacity should not arise in relation to an individual or in relation to specific decision making relating to a specific person. In my judgment, given the presumption of capacity in section 1(2) this may indeed be very necessary to prevent the powers of the Court of Protection, which can be both invasive and draconian, being defined or exercised more widely than is strictly necessary in each particular case.

20. It follows that in my judgment, rather than making a general finding about whether the question to be considered should or should not involve in it any particular individual, my task, as I understand it, is to articulate the question actually under discussion in the case and to apply the statutory capacity test to that decision. The question in this case surely is this: should PC take up married life with NC now that, in terms of imprisonment and licence, he is free to do so? It is a decision which any wife in her position would be required to take and it is a decision that does not admit only of one answer. Thus, the question of capacity is important. All the other issues raised, care, residence and contact, are peripheral, save insofar as they bear on the question of the resumption of the long interrupted cohabitation of PC and NC. Although that is a narrow issue it is, in my judgment, a seriously justiciable issue to which the court should give its proper attention and make a decision.

21. In coming to dealing with the question of capacity on that central question I start by acknowledging three things. The first is that PC must be taken to have had capacity to marry in 2006. Secondly, she must be taken to have capacity to understand the obligations of marriage. Thirdly, the presumption of capacity under section 1(2) must, on the evidence that I have heard, prevail in relation to all issues other than the resumption of cohabitation with NC and its implementation. Then I need to say that the question that I have posed is narrower and beyond the question of the obligations of marriage. Any woman, however conscious of those obligations, nevertheless in the circumstances of PC and NC, would have a fresh and particular decision to make as to which there is more than one available answer. In the end I have concluded on the evidence that PC does not have the capacity to make the identified decision. She is undoubtedly within section 2(1) requirements of

impairment. Applying the section 3(1) test I am not satisfied that she is able to understand the potential risk that NC presents to her and that she is unable to weigh the information underpinning that potential risk so as to determine whether or not such a risk either exists or should be run, and should, therefore, be part of her decision to resume cohabitation. I am satisfied too that that significantly relates to the impairment in section 2(1), though I do accept that there is an element in it of an instinctive impatience simply to bring about the desired result whatever, which, if it stood alone, would simply be an unwise decision. Accordingly, I find that in relation to the decision as to whether to resume cohabitation with NC, PC lacks capacity so to decide and thus the jurisdiction of the Court of Protection is engaged in respect of that particular issue.

22. Let me then turn to best interests. Section 1(5) says that an Act done or decision made under this Act for or on behalf of a person who lacks capacity must be done or made in his best interests. Section 1(6) provides that before the act is done or the decision is made regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action. Then there is what I think can probably be fairly described as a checklist in section 4, which any decision maker (here the judge) must have in mind in coming to a conclusion about best interests.

23. Although the parties were wholly unable to agree on the question to be considered in this case, they were in the end all in agreement on the answer, namely that there should be a structured resumption of cohabitation and of monitoring thereafter of PC. It is important to make clear that NC has throughout this hearing made it plain that he accepts these

restrictions because he accepts that others are bound to regard him as posing a significant risk of serious harm to PC. However, there was a very strong dissenting voice from Dr. Payne as to cessation of contact. As it is the court that now takes responsibility for the outcome, the two starkly contrasting options must be considered.

24. Let me deal first with the no contact option. If we were not where we are, this option would undoubtedly represent the conventional wisdom, a risk avoided is a risk guaranteed of management. But this option, as the evidence of the social worker satisfies me, simply does not take account of the realities in this case. Dr. Payne assumed that this could be done simply by a restriction of liberty for some 12 months or so, after with PC would have accommodated herself to the decision taken. In my view that seriously underestimates both PC's commitment to NC and PC's determination to see that commitment put into action. A direction of no contact would involve, in my judgment, a long restriction of PC's liberty of an undefinable length. It would involve serious risks of deterioration, both in terms of her relationship with those who support and protect, and in terms of her own wellbeing. It would also require the making of open-ended injunctive orders against NC. All this in the context of a valid marriage where no intervention on the basis of nullity by reason of the matters of 2006 can now be contemplated because it is time expired and in respect of which neither party seeks to bring their marriage to an end, quite the contrary. It seems to me that the consequences of making a no contact direction are so serious, so invasive of the rights to family life and the rights to married life, that though undoubtedly they lie within the powers of the court, they would require the weightiest justification. That said, of course, one could construct circumstances not very far from here where that could be justified.

25. Let us then look at the resumption of cohabitation option. The deficiencies of this option are obvious to all except PC. They bring with them the risk of sexual oppression, they bring with them an aggravation of that risk by the absence of either acceptance or treatment, and they bring a risk of grooming which would not be recognised by PC. In short, as NC recognises, there is a serious risk of long-term harm to PC.

26. On the other hand, one has to have regard to other matters. For example, section 4(4) of the Act says that the decision maker: "...must, so far as is reasonably practicable, permit and encourage the person to participate so as to improve his ability to participate as fully as possible in any act done for him and any decision affecting him." So it seems to me that there is an obligation, so far as reasonably practicable, for the court to enable PC to share in this fundamental decision making. Furthermore, section 4(6) provides that the decision maker "...must consider, so far as is reasonably ascertainable, the person's past and present wishes and feelings; the beliefs and values that would be likely to influence the decision if he had capacity; and other matters that she would be likely to consider were she able to do so." It follows that the court must not only have regard to PC's wishes and feelings about the resumption of cohabitation but must have regard to her desire and commitment to support the obligations of marriage that she freely entered into, and all those are matters that must be brought into the equation. Moreover, it is my view that faithfulness to the policy behind section 4(4), and potentially behind section 4(6), is that it may be necessary from time to time to leave open to the protected person the option of taking an unwise decision which others, who are fully capacitous in her position, may themselves have taken. Again, one has to factor into all this that, in my view, PC's commitment is such that

she will not rest until this cohabitation has been tried. She has, moreover, potentially protective relationships with the Local Authority. The court should give weight to the fact that PC and NC have complied with all the restrictive provisions to date, irksome though they no doubt were, and the court must give full weight to the fact that PC has suffered no harm from NC thus far. Of course none of those matters offers any guarantees against the eventuating of the risk identified, but it does provide some foundation for thinking that NC's compliance may continue and, indeed, it may be, although I do not know, that NC will see some of these restrictions as actually affording him some protection against any unwarranted inferences that might be drawn. Moreover, the court must not lose sight of the fact that PC has demonstrated an ability in the past to seek help if she does not like what is going on in intimate relationships in which she is involved. Finally, in relation to the option for resuming marital cohabitation, it means that the position of marriage is upheld in circumstances where both parties wish to resume both the benefits and obligations of that state.

27. Those seem to me all the issues that the court is required to take into account in relation to best interests and the factual context in which those matters are to be considered. I have decided that it is in PC's best interests to allow PC and NC to resume married life. In so deciding I acknowledge the existence of a significant risk to PC, whose management depends in large part on PC disclosing any evidence of abuse herself. There is no escape from that conundrum other than the use of the no contact option. I have rejected the no contact option on two grounds. First, it is impracticable and effectively unenforceable. Secondly, and connected with that, it is an unsustainable intrusion on the right of willing and consenting parties to enjoy married life together. I have accepted the marriage option

partly because it was the only practical option at present but, more importantly, because it accords with the strongly expressed views of PC, who only lacks capacity in very limited areas, and, moreover, it recognises and gives proper weight to the institution of marriage, which remains a foundational building block of our society. I am satisfied that the benefits of marital cohabitation significantly outweigh its detriments, and that the detriments of the no contact option significantly outweigh its benefits for the reasons that I have endeavoured to set out in this judgment.

28. For those reasons I propose to declare that PC lacks capacity to litigate and lacks capacity to decide whether to resume married life with NC but that the resumption of married life with NC is lawful as being in her best interests and I propose accordingly so to declare.

_____