

NEUTRAL CITATION NUMBER 2011 EWHC 3932 (COP)
IN THE COURT OF PROTECTION

Case No: BT10C10205

Court 42

Strand
London
WC2A 2LL

Tuesday, 25th October 2011

Before:
THE HONOURABLE MR JUSTICE HEDLEY

B E T W E E N:

A LOCAL AUTHORITY
and

F G
A G
H G

Transcript from a recording by Ubiquis
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MR MCGUIRE appeared on behalf of the LOCAL AUTHORITY
MRS G appeared IN PERSON

JUDGMENT
(Approved)

MR JUSTICE HEDLEY:

1. These are proceedings which concern a young woman called H G who was born on 28th September 1993 and is now 18. The proceedings involve H's family on the one hand and the Local Authority on the other. They began life as care proceedings, but for reasons that do not presently concern us; they are now being dealt with within the context of the Mental Capacity Act 2005.
2. The essence of the dispute is the provision that ought to be made for the purposes of securing H's welfare into the future, but of course the court cannot embark on a welfare enquiry unless it has jurisdiction to do so, and jurisdiction can be acquired in this case only through the Mental Capacity Act 2005. Jurisdiction arises under the Mental Capacity Act 2005 where a person lacks capacity to make the decision with which the court is asked to concern itself. In this case there are a number of matters: does H have capacity to conduct litigation; does she have capacity to decide where she should live, or capacity to decide where she should be educated, or capacity to decide on the extent of the contact and relationship she should have with her natural family; capacity to deal with her financial affairs, or to enter into what has been described as a tenancy agreement, and capacity in a sense to judge her own best interests in those respects? Inevitably such a question is preliminary to a welfare enquiry, and it seems to me that the court must deal with the issue of capacity before it embarks on any enquiry into welfare.
3. Where, as here, the parties have sensibly listed all matters to be considered together, it follows that capacity must be dealt with as a preliminary issue. It follows from that that the court will have to decide and give reasons for its decision on the basis of its being a preliminary issue, and thus every decision in that context is necessarily made extempore, and is necessarily focussed fundamentally on the facts of the instant case.

4. Now the position in relation to H is this: when a very young baby something happened, the details of which I do not know, and which do not, for these purposes, matter. She acquired a permanent injury to her brain. The consequences of that injury bring her within the category that is described as cerebral palsy. It is the fact that cerebral palsy covers a very wide range of conditions, and nothing that is relevant to the Act and the question of capacity can be deduced solely from the fact that a person comes within the cerebral palsy category.
5. In H's case the damage is extensive, and I had the evidence of Mr Mike Davis, a Clinical Psychologist with very wide experience in the field of cerebral palsy, who carried out a number of assessment tests, conventional tests for the purposes of ascertaining H's level of intellectual function. Inevitably, when tests of that sort are applied, the results are not entirely consistent, but the picture that emerged was one of a person who functions somewhere around the chronological age of six or seven. Mr Davis pointed out that there were some areas, particularly in relation to numeracy, where she would fall short of that, but other areas, particularly when assisted by a multiple choice structure of questions, where she could attain levels equivalent to a chronological age of nine. However whatever the variance may be, the results lie within that field.
6. Now what makes this case difficult is that anyone who meets H would not, I think, realise that that was the case at all. I can say that not only from the evidence of those who know her well but from my own experience because I was asked on the first day of this trial to meet with H, which indeed I did, and dictated to the court thereafter a short summary of our conversation. As I indicated, she used language well, particularly well bearing in mind that English is her second language and Turkish her first. She has considerable social skills. She was easy to talk to, easy to feel that one was at ease with her. Now Mr Davis acknowledged all those matters, but strongly asserted that, to use his words: 'We should not be fooled by them in terms of arriving at views about her capacity which her true level of

functioning do not permit.’ In my judgment those warnings were well made, and that it is important on the one hand to acknowledge the particular skills that she has, but on the other, to give full weight to the limitations which the psychological evidence showed up in terms of her capacity to function.

7. It is of course not open to a court to say that because someone functions at a chronological age of seven, and because no one would dream of ascribing capacity to a seven-year-old, therefore you do not ascribe capacity to the person in question; it is a more subtle process than that. However by the same token it is essential to retain that piece of information as an important guide in the assessment of capacity.
8. Well H at the moment lives in the care of the Local Authority, and has contact to her parents and family. Those are important matters in the context of this case because it means that the range of choice and the range of decision that is required of her is wider than it would be were she an 18-year-old living in the family home without any, as it were, active involvement of the Local Authority other than in the provision of conventional services in that context. That again is a factor that the court has to take into account in reaching views about capacity.
9. Well that is the context, the factual context in which the court must make a judgment about capacity. Let me then turn to the principles that are set out in the statute which the court is required to apply. Those are found in Part 1 and indeed for the purposes of this case really in the first four sections of the Act. Section 1 sets out the principles that have to apply, and the first three of those principles are relevant to the issue of capacity. Section 1(2) says: ‘A person must be assumed to have capacity unless it is established that he lacks capacity.’ That is important. No one has to establish that they have capacity to make a decision. It is for the person, or the institution that challenges capacity to establish lack of capacity, and the statute requires that that is done on the balance of probabilities.

10. The second principle is found in Section 1(3): ‘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.’ I do not intend to impose any restrictions on the meaning of that subsection, because circumstances wholly unforeseen will always arise in other cases, but it is clearly designed to ensure that all steps to assist in both understanding, and importantly, communication have been taken to assist the person whose capacity is under question. It will not do for example to say: ‘This person cannot speak, therefore they cannot communicate a decision, therefore they lack capacity.’ No doubt it has more subtle applications than that in specific factual circumstances.
11. The third principle in Section 1(4) is this: ‘A person is not to be treated as unable to make a decision merely because he makes an unwise decision.’ Of course, that subsection is probably more commonly applied where one is dealing with much older people who have lost capacity through illness or deterioration of the brain than it is in dealing with younger people, not least of which is that one of the privileges of being 18 is normally to be able to make unwise decisions and learn from them, and there is no reason why someone who is disabled should be in any different position to any other 18-year-old. Therefore perhaps with the younger person Section 1(4) is likely to have less weight.
12. Well those are the principles that the court is obliged to apply, and then they are further developed. First, Section 2(1) provides the qualifying condition for a consideration of incapacity:

‘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 or a disturbance in the functioning of the mind or brain.’

The medical evidence and the psychological evidence in this case establishes that H’s decision making capacity is adversely affected by an impairment of or disturbance in the functioning of the mind or brain, namely the permanent irreversible damage to the brain that

she suffered in the earliest part of her life. Thus the qualifying condition for the question of capacity is made out. Then the court is bound to go to Subsection 3 which deals specifically with inability to make decisions.

13. Subsection 1 says that:

‘For the purposes of Section 2,’ that to which I have just referred, ‘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 in making the decision, or (d) to communicate his decision whether by talking, using sign language or any other means.’

I pause to say the evidence establishes a sufficient capacity to retain information and communicate decisions, and so the focus of the enquiry is on subparagraphs (a) and (c).

14. Section 3 continues again to deal with the communication issue, and to deal with the length of time for which information may be held, but Subsection 4 is important in the context of this case: ‘The information relevant to a decision includes information about the reasonably foreseeable consequences of: (a) deciding one way or another, and (b) failing to make the decision.’ That is the statutory framework within which decisions about capacity have to be made, and it is clear and well established that capacity is an issue-specific consideration, and so a person may have capacity to make some decisions and lack capacity to make others.

15. I find it helpful in considering capacity just to remind myself about the provisions of Section 4 even though that relates to best interests. The reason that I find it helpful is because it sets out in Section 4 the matters that a decision maker has to take into account, and the effect of it, in my judgment, is to make the capacity bar a little bit higher than might at first appear, because in Section 4.4 it provides that the decision maker:

‘Must, so far as is reasonably practicable, permit and encourage the person to participate or to improve his ability to participate as fully as possible in any act done for him, and any decision affecting him.’

Subsection 6 says the decision maker:

‘Must consider, so far as is reasonably ascertainable, (a) the person’s past and present wishes and feelings, beliefs and values that would be likely to influence the decision, and other factors that the person concerned would be likely to consider if he were able to do so.’

It follows from that that the decision maker will have to make a careful judgment about the extent to which an incapacitated person can participate in decisions about their welfare. It is clear from a reading of that section that the range of participation may vary between the almost decisive at one end, and non-participation entirely at the other. It will all depend on the facts of the case, and so a finding in relation to capacity is not a finding in relation to the extent to which a person may participate in the making of decisions. The finding of capacity is a finding which determines whether the person has responsibility for making and living with the consequences of any decision which they choose to make. That is of course a very significant issue.

16. If one then, in that context, comes back to the questions that are raised in this case. Does H have capacity to decide where she should live? That means that she, in order to make that decision, which is a profound one in this case because it is in the first instance a choice between family and Local Authority provision, and if the latter, in the second place, the multiplicity of provision that Local Authorities can and do offer. That involves an ability to understand what the issues are that determine family or Local Authority provision, what the consequences of any such decision are, and how they are likely to impact on the person’s emotional, physical and educational welfare. That is a relatively sophisticated process, and in the context of this case is, it seems to me, a difficult one.
17. In one sense it can be said on the evidence that H does understand the provision of information relevant to the decision, but it is apparent that for the most part that is confined ordinarily to saying yes or no to a specific offer, or, slightly more sophisticated, a choice of one between two, but clearly does not extend beyond that, because the evidence of those

who know her is that she would simply be overwhelmed if required to digest information relating to multiple choices. Moreover it seems to me this is where Section 3(4) comes in to play because the evidence seems to suggest fairly clearly that H would struggle to understand the reasonably foreseeable consequences of whatever decision it was that she was to make. That is not to say that she is not clear in her own mind about what her preferences would be, and it is not to say that they necessarily lack a reasonable base, but it is to say that the complexity of the decision, both in terms of what is fed into it and the consequences of it are beyond her capacity to deal with, and it is at this point that a reminder about the chronological level of her functioning ability is important. Moreover the Section 3(1)(c) draws the court's attention to the ability of a person to use or weigh that information as part of the process of making the decision. Again in some cases that will be relatively simple to do. Do I wear this bracelet or that when I get up in the morning? She clearly has capacity to make decisions and to weigh up what she thinks looks nice and what is appropriate and so on, but with the much more sophisticated decisions with potentially very long term implications like the choice of where to live, as I think one of the social workers put it, she is simply likely to be overwhelmed if too much is given to her. Therefore for those reasons I am satisfied that she does not have capacity to decide where she should live.

18. By the same token, I do not think that she has capacity to decide where she should be educated, because, again, although there is a lot of professional view that Treloar would be the right place, and that may turn out to be right or not, but the complexities of the information required to make a decision, and the understanding of the consequences of such a decision are in my judgment entirely beyond H, but, as I have said, and risk saying all over again, that does not for one moment mean that she does not have an important role in participating in the decision making that is ultimately done.

19. The question of contact with her parents and sisters is again a complicated one because it involves an understanding of quite complex emotional issues. I do not believe that she has the capacity to make judgments about whether she should or should not see her parents and sisters, or indeed in relation to the context in which she should do so, although she may have entirely legitimate and important preferences that need to be considered by the decision maker or makers in due course. On the other hand she would have, in my judgment, capacity to be able to decide on any individual occasion whether or not to take up the offer of contact that has been made. She clearly does not have capacity to manage her financial affairs. That is the area in which she has the greatest functioning difficulty, and the evidence of Mr Davis and Dr Chin were effectively at one on that.
20. It is common ground, and does not require any further elaboration from me that she does not have capacity to litigate, and the last matter that needs consideration is the capacity to enter into a tenancy agreement. I have, no doubt, entirely unhelpfully managed to launch an argument about whether these tenancy agreements are tenancy agreements at all, but that does not matter for these purposes because the question is really: does she have the capacity to enter into legal relations with another? The answer to that is a resounding no, because she would entirely lack the capacity to appreciate the detailed consequences of a failure to comply with legal obligations and indeed would probably not appreciate the nature of a legal as opposed to a moral obligation upon her, the latter of which she undoubtedly understands in a basic but significant way. Therefore my own view would be, if it is specifically about tenancy agreements, she does not have capacity, but my own view is that she does not have capacity to enter into legal relationships at all.
21. Now that, I think, deals with the questions of capacity with just this comment to be added: I have been referred to the decision of Mr Justice Baker in *PH v A Local Authority* [2011] EWHC 1704 (Family). This is a considered decision on capacity, and one that is

undoubtedly helpful, particularly in relation to its analysis of the law between paragraphs 13 and 16. I have deliberately not referred to it in this judgment, not because it is unhelpful or because I disagree with it, but because it seems to me that unless and until there is any binding authority available, courts may be safest in an approach to this case by ascertaining the facts, applying the statutory principles and reasoning a conclusion from that, and treating each case as one to be decided on its own facts. I say that so as to avoid a multiplicity of first instance judgments being cited as a matter of course in these cases. It may be that parties and advisors and those who have to operate this system will find the individual expressions of judges helpful, but debates in proceedings about saying the same thing in many different ways does not seem to me helpful, particularly, where, as here, no doubt increasingly so in the future, the question of capacity will be determined summarily as a preliminary issue prior to the determination of welfare which is probably, in most of these cases, what is going to be upper most in the minds of all those who engage in them. Therefore, for the reasons I have given, I find that H lacks capacity in the areas identified, and that accordingly the question of her welfare falls to be decided by the court.

End of judgment.
