



Neutral Citation Number: [2011] EWHC 2894 (COP)

IN THE HIGH COURT OF JUSTICE
COURT OF PROTECTION

Case No: COP 11557954

Before:

DISTRICT JUDGE RALTON

Between:

HN

Applicant

- and -

FL

(by her litigation friend the Official Solicitor)

First

Respondent

HAMPSHIRE COUNTY COUNCIL

Second

Respondent

Hearing dates: 27th to 30th September 2011

The Applicant appeared in person
Ms Scott Counsel for the First Respondent (on 30th September 2011 only)
Ms Butler-Cole Counsel for the Second Respondent

Approved Judgment
(Anonymised version for publication)

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

District Judge Ralton:

This judgment is being handed down in private on 11th October 2011. It consists of 19 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported in anonymised form and a copy may be supplied to IPL.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them and Hampshire County Council may be identified by name or location.

Introduction

1. This is the judgment of the Court of Protection upon an application by HN, against Hampshire County Council, “HCC”, for the following decisions of a personal welfare nature to be made on behalf of HN’s sister FL”:
 - (1) to move FL from her current residence at “the Z Home”, into a new residential nursing home in South London
 - (2) removal of all restrictions imposed on HN by a consent order made on 20th July and issued on 27th July 2009 “the consent order” relating to HN’:
 - (a) contact with FL
 - (b) interaction with FL’s care and carers.
2. This application comprises the second set of personal welfare proceedings concerning the same parties. The first set of proceedings were concluded by consent order in which the parties (all of whom were represented by counsel) agreed that:
 - (1) FL should live at the Z Home.
 - (2) Stringent restrictions should be placed on HN’s contact with FL and her involvement with FL’s care as set out in that order.
3. HCC opposes HN’S current application and considers that there should be some additional restrictions on contact but that otherwise the consent order of 27th July 2009 should generally be adhered to.
4. Once again the Official Solicitor, “OS”, has accepted the court’s invitation to act as FL’s litigation friend. The OS opposes HN’s application and considers that subject to some amendment the terms of the consent order should prevail.
5. Given the consent order, the initial approach of the court was to treat HN’s application as a review of contact only, no material changes having occurred since the consent order to cause the matter of FL’s residence to be reviewed; see the order of 31st March 2011.

6. Unfortunately it became apparent that HN considered she had entered into the consent order under duress and she was insistent upon re-opening all issues. The primary issues requiring determination by the court were as follows:
 - (1) FL's capacity to make personal welfare decisions
 - (2) FL's mental health needs
 - (3) FL's medication
 - (4) The Z Home's ability to meet FL's physical and mental health needs
 - (5) Whether HN had conducted herself inappropriately or whether such conduct was justified
 - (6) Whether HCC and or The Z Home conducted themselves inappropriately or whether such conduct was justified.
 - (7) Depending on the outcome of (5) and (6) whether restrictive orders should be made.
7. The findings sought by HCC and HN with respect to each other's conduct are found in schedule form in Part A of the hearing bundle.
8. This hearing took place over four days beginning on Tuesday 27th September 2011. Further to an order made by myself the OS was excused from appearing on the first three days which were occupied primarily with the giving of evidence relating to the findings of fact sought by HN and HCC. At the conclusion of the fact finding hearing on 29th September 2011 I informed the parties that although I would give a written judgment in due course the court would generally be finding in favour of HCC and that I would hear from all parties, including OS, on the terms of any final order on Friday 30th September 2011.
9. Further to an order made by myself on 27th September 2011, IPL (publishers of The Independent newspaper) were permitted to attend the hearing by one of its journalists and further to an order made by myself on 30th September 2011 IPL were permitted to publish details about the case subject to the restrictions in that order. Oral reasons were given but in brief I found that IPL made out both:
 - (a) good reason and
 - (b) a case on balancing of competing rights to privacy and freedom of expression¹for attending the hearing by a journalist and reporting (subject to restrictions) because:

¹ Per the test in A v Independent [2010] EWCA Civ 343

- (a) This is a case in which:
- (i) an intractable dispute had arisen between a family member and a local authority with respect to how an incapacitated person should be cared for
 - (ii) the family member and local authority each considered the other and their behaviour to blame
 - (iii) tremendous responsibility is put onto the Court of Protection which is tasked with making the decisions the incapacitated person cannot make and the making of those decisions can be an agonising process
- (b) the Court of Protection has received adverse publicity and been described as secretive
- (c) there is legitimate public interest in the role and workings of the Court of Protection in determining the case at hand which, in many ways, is more about the relationships between HN, HCC and others than FL herself.

Background

10. FL was born in 1943 so she is now 68 years old. HN is FL's younger sister and is now 63 years of age. HN and her son, DB, appear to comprise FL's only immediate family. I understood there to be other relatives who live in X. They have taken no part in any of the Court of Protection proceedings.
11. As a teenager FL formed a lasting friendship with AC, (HN challenged the quality of that friendship and I return to that matter later).
12. In about 1976 FL was diagnosed as having multiple sclerosis and she retired from her final employment in 1986 on medical grounds. In 1987 FL went to live with and be cared for by her parents; her mother died in 1994 and by 1996 FL was wheelchair bound.
13. It is thought that FL began to suffer from memory impairment in the 1980's and by the late 1980's there was concern that FL was displaying psychotic symptoms described by Dr M as 'schizophrenia like' secondary to her multiple sclerosis. A low dose anti-psychotic was prescribed.
14. By 1994 a diagnosis was being made of serious mental impairment as a direct consequence of progressive brain damage caused by multiple sclerosis.
15. FL entered residential accommodation at Y Nursing Home on 1st October 1996 when her father was no longer able to care for her. FL formed a relationship with EN at the Y Home and they shared a room together.

16. HN was vocal about the poor quality of care she perceived the Y Home as giving to her sister. It was the Y Home who gave FL notice to leave the home which resulted in FL living at BCH pending identification of a more suitable placement.
17. From 1st February 2003 to 31st March 2003 FL lived at BCH and from 1st April 2003 to 14th April 2003 she lived at RH. These were temporary placements pending identification of a more suitable home.
18. Notwithstanding the distance between her home and the care home, HN identified The Z Home as suitable for FL and FL moved there on 14th April 2003. At this time FK was deputy matron and described as an “experienced community mental health nurse” in ON’s statement of 23rd July 2008.
19. At all relevant times BC was an owner of the Z Home.
20. The relationship between the Z Home and HN swiftly began to break down.
21. In 2006 there was evidence of depressive illness resulting in anti-depressant medication being prescribed. Unfortunately there were signs of serious depression and a second anti-depressant was added following review in September 2007. The evidence to the court revealed a good response noted by Dr A amongst others.
22. Other than a nephrectomy in 2008 at the X Hospital FL has been generally well but such is her illness that FL’s mental capacities have continued to decline.
23. Whilst FL was in hospital in May 2008 HN was advocating Q House as a suitable home for FL although it was not EMI registered.
24. FL has remained living at the Z Home to date and has therefore lived there for nearly eight and a half years.

Past Court Proceedings

23. By 2002 FL’s financial resources derived from two trusts leaving only income from the trusts, pension income and state benefit to be managed.
24. On 10th December 2002 FL made an enduring power of attorney appointing HN and a family friend, BX as attorneys. They applied to register the power on 21st February 2003 but the application was opposed by a former attorney YZ on the ground that HN was unsuitable.
25. By consent an order was made on 29th August 2003 for registration of the power subject to production of an annual account by HN.
26. On 26th February 2007 the trustees of the two trusts, LM and AC applied for an order to cancel registration of the power and to revoke it on the ground of HN unsuitability. That application succeeded before Master Lush (as he then was) on 1st June 2007 and a copy of the judgment is found at page B61 in the bundle.

27. The evidence taken into account by the court is identified in the judgment of Master Lush and I note the evidence included written observations and representations from BC the owner of the Z Home.

28. Master Lush made certain adverse findings against HN:

(1) On page 12 he found:

"There has been an effective challenge to [HN] honesty and integrity. She has not acted entirely in FL's best interests, and the hostility between her and others who have a legitimate interest in FL's welfare has had, and is continuing to have, a detrimental effect on the proper use of her funds. HN has also contravened her authority as attorney by assuming decision-making powers of a personal welfare nature."

(2) On page 13:

"In my judgment HN has consistently failed to interact satisfactorily on a personal level with almost everyone else who has an interest in FL's well being, these include, but are not limited to the proprietors of a number of nursing homes in which FL has been placed from time to time; FL's GP and Hampshire County Council Social services.

HN's failure to function satisfactorily on a personal level has had various detrimental effects so far as FL is concerned

(3) On page 15:

"... and that she {HN} has deliberately manoeuvred her way into an unassailable position of control over FL's finances."

29. In 2007 the first set of personal welfare proceedings came about further to cross applications by HCC and HN:

(1) HCC sought an order that FL move from the Z Home to GH; it then changed stance and supported FL staying at the Z Home, HN sought orders that FL be moved from the Z Home to either S Home or T Home it being her case that the Z Home did not meet FL's needs particularly her mental health needs;

(2) HCC also sought orders to regulate contact and for the appointment of a property and affairs deputy for FL.

30. The first personal welfare proceedings came before the court for a final hearing beginning 20th July 2009. All parties were represented by counsel and a consent order was made on the first day the terms of which may be summarised as follows:

- (i) A panel deputy was to be appointed for FL's property and affairs
 - (ii) FL was to live at the Z Home and HN was not to remove FL or seek to remove FL from the Z Home
 - (iii) Direct contact between FL and HN was to be limited to once per week and supervised unless it took place in a public part of the Z Home
 - (iv) HN was not to bring food and drink to the Z Home for FL to consume without the permission of the Z Home
 - (iv) HN was not to behave in an aggressive or threatening manner towards staff at the Z Home, any employee of HCC or any deputy
 - (vi) HN was to direct any complaint about FL's care or welfare to HCC's legal department
31. Notwithstanding the past orders made it is apparent that HN and DB sought to:
- (1) oppose the appointment of WN, a panel deputy, as deputy for FL's property and affairs; that opposition was unsuccessful; see the orders of 15th January 2010 and 7th June 2010 (which included a costs order made against DB)
 - (2) challenge the Trustees' costs; that challenge was unsuccessful; see the order of costs judge Master Haworth dated 17th May resulting in a costs order against HN and DB for £1,762.50
32. Notwithstanding the conclusions in the property and affairs proceedings HN has remained involved laterally; see her application of 26th April 2011 to view the deputy's report (which was refused). In the meantime it appears that they have not cooperated with the professional deputy WN; see the correspondence from the Deputy to HN. During the course of these proceedings it has been necessary to steer HN away from property and affairs issues.
33. When HN brought her personal welfare application I hoped that this might be a case where the issue of contact could be reviewed with a view to restrictions being reduced rather than increased; see my order of 31st March 2011. Unfortunately that is not the case and HN seeks to reopen all relevant personal welfare issues in these proceedings.

The Current Proceedings

34. The papers in this case fill four lever arch files and amount to some 1,644 pages to which one must add position statements and additional material introduced by the parties.
35. Much of the evidence comprised that obtained for the previous proceedings concluded by the consent order of 27th July 2009.

36. No oral expert evidence was requested or given. Although HN did not accept the expert opinion of Dr J (the jointly instructed expert in the first proceedings) no written questions were put and Dr J did not attend the hearing.
37. Further to a witness template² oral evidence was taken over the first three days from:
 - (1) For HN:
HN herself and her son DB
 - (2) For HCC
 - (i) ON, Team manager and Social Worker
 - (ii) PX, Senior Practitioner and Social Worker since 23/11/2007
 - (iii) ML, Social Worker who supervised contact from 13th April 2011
 - (iv) HK, Social Worker who supervised contact
 - (iv) BC (owner (via a company) of and principal at the Z Home)
 - (v) LM (solicitor and Trustee since 17th November 2004)
 - (vii) AC (FL's long standing friend and a Trustee since 2000).

The only witness who HN wished to cross examine but was not called due to ill health was CF and in the circumstances I place a little less weight on her witness statement but must observe that her statement was consistent with the rest of HCC's evidence generally.

38. Further to the court's order of 19th March 2009 in the first set of personal welfare proceedings, Dr J was instructed jointly by HN, HCC and OS; his expert evidence in reports dated 1st June and 25th June 2009 stood as expert evidence in these proceedings.
39. It struck me that all witnesses who gave evidence:
 - (a) sought to assist and not mislead the court
 - (b) were motivated by their concern for the welfare of FL

It is inevitable that recollections and impressions may differ and all the more difficult to make specific findings when the court is given written evidence only therefore the statements of CF (for HCC), PY (for HN) and GL (for HN) NT (for HN) and TS (for HN) were of less value.

² Approved by order of Senior Judge Lush on 22nd September 2011 due to disagreement between HCC and HN

40. However I must add some qualifications in respect of HN; as will be apparent from the findings I make later in this judgement I consider her to:
 - (a) be motivated additionally by her wish to control all aspects of FL's care and
 - (b) be so determined to ensure that her opinion prevails that she conducts herself vexatiously in her sister's affairs and
 - (c) be implacably hostile to the holder of any opinion with which she disagrees or to any person she perceives as obstructive such that her evidence and submissions had to be considered in that unfortunate light. For example, it was apparent that:
 - (i) HN was determined to move FL from the Z Home in the belief that the Z Home could not provide appropriate care to FL
 - (ii) There is a plethora of evidence that the Z Home met FL's needs well
 - (iii) HN had no evidence to contradict (ii); at its highest the evidence collated by HN showed:
 - (a) some imperfections in the Z Home's general service and some room for improvement.
 - (b) an opinion that there may be other care homes more able to meet FL's needs but she has persisted in allegations of malice and has continued in a campaign of groundless complaints.
 - (iv) HN was convinced and sought to argue, without evidence, that all professionals asked to give opinion in this case who gave an opinion with which she disagreed were acting in concert with each other;
 - (v) HN behaviour during the hearing itself with interruptions, muttering and refusal to follow the court's guidance was consistent with her general approach even after full allowance is made for the emotion in the case. When invited to address the court at the conclusion of the case on best interests HN sought to raise groundless issues of capacity and deprivation of liberty for the first time.
41. In stark contrast I found the other witnesses, including DB, to be much more measured and thoughtful in their evidence. I was impressed that HCC's witnesses including BC had not allowed any understandable exasperation with HN to pollute their evidence. The one witness whose feelings did come to the fore was AC and so I treated her evidence with a little more caution.

Findings on Conduct

42. Having heard the evidence it seems to me that the findings sought by HCC and HN can be categorised as follows:
 - (1) Did HN undermine the placement at the Y Home?
 - (2) Is HN conducting herself inappropriately viz a viz:
 - (i) The Z Home
 - (ii) Other professionals
 - (iii) Other interested persons
 - (iv) FL?

The Y Home

43. There is a pre-existing finding that HN failed to interact satisfactorily on a personal level with the proprietors of a number of care homes.
44. Whilst it is right to observe that HN was not alone in possessing concern with the quality of care being provided by the Y Home (see the oral evidence of LM and letters from DS) it is apparent that FL was settled in the home and had formed a relationship with EN; see the letter from FL's GP Dr A dated 11th October 2001. In oral evidence HN told me she did not approve of the room being shared although FL's father was content.
45. Dr A, FL's GP, wrote to HN on 11th October 2001 to state that:

"My renewed assessment of FL's position at the Y Home remains unchanged, in that she receives good quality care and is happy with her situation there. The companionship that she receives from EN, I think is also of huge significance to her."

In oral evidence HN told me she thought HCC put the GP

"up to this letter".

46. Unfortunately HN chose to adopt a confrontational approach with respect to her concerns and FL's placement was put at risk; see the letter from MN dated 9th October 2001.
47. It is also the case that HN involved herself inappropriately with staff at the Y Home; see MN's letter of 26th June 2002 (this sort of behaviour was to continue at the Z Home). This resulted in the care home giving FL a notice to quit; see its letter of 26th June 2002. Although this was not actioned it does seem to be the

case that FL's placement at the Y Home was terminally damaged; see S's letter of 23rd December 2002. I find that that damage was caused by HN.

48. The result of the damage referred to above is that FL had to be placed into temporary accommodation pending identification of a new suitable home.

The Z Home

49. Although it was HN who identified the Z Home as an appropriate long term home for FL, HN soon became dissatisfied with the Z Home and approached her concerns by way of confrontation and complaint rather than civilised discourse.
50. As with the Y Home it became apparent in her oral evidence and line of questioning that HN had sought to involve herself inappropriately with staff at the Z Home. HN found herself talking about power of attorney matters with a cleaner "RX" and about staffing matters with "TY". No good explanation was offered to me by HN for having conversations about such matters with staff at the Z Home.
51. It is apparent from the detailed notes kept by the Z Home staff such as SX that HN was in frequent communication questioning the manner in which FL was being cared for (see for example the copious notes in the bundle at G127 ff)
52. HN queried the qualifications of the Z Home's mental health nurse FK without there being any evidence that FK's abilities were in question. In fact FK was registered as a mental health nurse in SA. HN became so fixated on the matter of qualification that she took the matter up with professional bodies but there is no evidence that such conduct could assist FL.
53. FL suffered bruising to her finger(s)/ hand in early January 2007. HN complained. I am satisfied that the Z Home acted appropriately with respect to this minor injury. To this day HN relies on the injury as evidence of abuse and will not contemplate accidental injury as a cause. There was no evidence before the court to suggest abuse.
54. At one time HN arranged for services such as hairdressing to be provided to FL and paid for. One can see the merit in the Z Home arranging such services for all their residents so as to bring about the least disruption possible. Notwithstanding her lack of standing once the EPA was revoked HN argued about who should be arranging services when FL's trustees were content for the home to provide them.
55. HN has sought to blame BC for the situation which has arisen. She alleged that he was a bully and paranoid. I had the opportunity of forming my own view of BC and have read various pieces of correspondence sent by BC such as his letters to HN dated 14th December 2006 and 1st February 2007. Whilst I perceive a justified element of exasperation in BC I found no evidence of bullying or inappropriate behaviour on his part and BC impressed me with the way that on paper and in evidence he remained measured and objective. In my judgement the restrictions that the Z Home started to impose on HN in 2008 (see for

example BC's letter of 26th June 2008) were reasonable in the circumstances and the result of HN conduct.

Did HN have grounds to be concerned with the Z Home?

56. In evidence it was put to HN that her default assumption is that the Z Home do not provide properly for her sister as she states in paragraph 4 of her statement of 10th July 2009.
57. The following persons have assessed the Z Home and concluded that FL is being cared for well notwithstanding HN' assertions to the contrary:
 - (1) HX, Senior Social Worker at HCC who carried out a reassessment in November 2006; see her letter of 30th January 2007
 - (2) Dr Q who completed an assessment dated 18th September 2007
 - (3) Dr D who completed the psychiatric report dated 22nd July 2008
 - (4) All present at a best interests meeting on 11th June 2008 (when FL was in hospital) excluding HN and her solicitor
 - (5) SX, FL's IMCA on 21st July 2008
 - (6) All of HCC's social workers involved in this case
 - (7) All GP's at W Surgery, the most recent opinion being given by Dr M on 27th September 2011
 - (8) FL's current psychiatrist, Dr C in his report of 27th September 2011
 - (9) The joint expert Dr J
58. HN complained to CSCI in late 2006 about the care provided to FL by the Z Home; CSCI were content with HCC's positive assessment. The Care Quality Commission has assessed the Z Home as a whole; in their letter of 1st July 2011 they said:

"When the inspection team (which included a qualified pharmacist) inspected the Z Home in March of this year, they looked at your sister's care plan. They were satisfied that her care plan, including her medication records, were well maintained And indicated appropriate levels of support and care"

HN has sought to continue the battle by complaining about the Z Home's statement of purpose; the CQC have looked into this and once again there seems to be nothing that could be achieved beneficially for FL by making this complaint.

59. HN sought to rely on the views of Dr M and Dr A. It is right to note that in Dr M's letter of 29th August 2007 and Dr A's report of 13th April 2008 both practitioners brought into question whether the Z Home had the necessary expertise. Both practitioners were involved at a time when FL was suffering from serious depressive symptoms; see paragraph 7.4 of Dr A's assessment of 14th May 2008 and paragraph 8 of the report prepared on 19th June 2008 in which he concluded it was in FL's best interests to be placed in an EMI nursing home.
60. However, HN's evidence raised no more than a debate about where FL's needs might best be met in the future. There was no evidence that remaining in the Z Home was likely to cause harm to FL and regard must be had to the preponderance of professional views and the conclusions of Dr J.

Effect of HN' Behaviour

61. Unfortunately the atmosphere that HN brings about when visiting FL at the Z Home can cause upset to FL; see for example the account of the visit of 16 March 2011 in which HN was noted as self absorbed. HN's fixation on negatives as described by CK (social worker) in his statement of 8th June 2011 at paragraph 6 is unlikely to help. Generally, I accept HCC's social workers' accounts of the visits between HN and FL which appear to have a common theme of excessive intensity and negativity.
62. Further HN's behaviour causes FL's placement at the Z Home to be insecure. There is no legal obligation upon the Z Home to keep FL as a resident. HN behaviour and demands have taken up much of the Z Home's (and HCC's) resources as is evident by the sheer quantity of paper and persons involved in this case.

Relationship with Other professionals

63. In about September 2006 HN sought to change FL's GP; see the letter from PO NHS Trust dated 18th September 2006
64. By letter dated 13th November 2009 HN complained to Dr D, Senior Partner of W Surgery about Dr JT on the basis that she was obstructive. It would appear Dr JT was respecting her patient's privacy notwithstanding HN's threat to take the dispute to the NHS Ombudsman.
65. HN has continued to assert that FL is over medicated. There is no medical opinion to support this contention at all. HN put the point to FL's GP in September 2009 Dr JT who was content with the medication, see Dr JT's letter of 2nd September 2009. HN'S reaction appears to have been to pursue Dr JT. HN was also unhappy that Dr JT did not agree with a further assessment of FL in London. I was provided with the opinion of FL's current GP dated 27th September 2011 and the report of Dr C, Consultant Psychiatrist dated 27th September 2011 both of whom are content with FL's current treatment regime.

66. HN complained to the Chief Executive of HCC; she did not accept the response dated 12th February 2010 and complained about HCC and the court proceedings generally to the Local Government Ombudsman; the LGO concluded that the complaints were outside of his remit; see the response of 10th November 2010.
67. FL was admitted to hospital in the late spring of 2008. HN's solicitors threatened injunction proceedings to prevent FL from being discharged from the hospital back to the Z Home before a best interests meeting took place; see their letter of 3rd June 2008. HN sought to impress me that her solicitors wrote this letter without her instructions but there was no later attempt to retract the threat or to apologise for it. It is difficult to see why FL's discharge from hospital should await the best interests meeting given there was no evidence at all that the Z Home could not continue to provide a home to FL until that meeting took place.
68. The best interests meeting duly took place on 11th June 2008 and the minutes show the following conclusions:

"It is in FL's immediate best interests for her to return to the Z Home as soon as possible"

...

"An EMI Nursing Home placement will be sought for FL if her Mental Health needs increase to the extent that the Z Home and Community Support are unable to met {sic} her needs"

Those conclusions are wholly unsurprising and I cannot see there was ever any ground for forcing FL to remain in hospital pending this meeting. I find that the threat of injunctive proceedings was a deliberate tactical move on the part of HN.

69. At all relevant times DY was the Multiple Sclerosis Practitioner for P Community Health Services. HN made complaints about DY resulting in the latter withdrawing her service from FL. However, as far as I can see, the only criticism that could have been made of DY was a reference by herself to a power of attorney. There is no evidence of lack of ability but HN conduct had the effect of driving this person away from FL.
70. A fair amount of time was explored in the hearing regarding the imposition by X Hospital of a DNR. Without evidence, HN insisted it was HCC that somehow imposed or brought about the DNR notwithstanding:
 - (i) they had no authority so to do
 - (ii) it was in fact HCC who obtained a review of the DNR .

HN took this up with the Hospital but she did not accept their reply of 23rd June 2011. I do accept that HN was not informed of the DNR by the hospital which was a most unfortunate oversight but I do not consider there to have been any

bad faith on the part of the hospital and I note from HCC's letter to Dr S of 7th June 2011 that it sought to ensure HN was kept informed in the future.

Relationship with other interested persons

71. HN sought to involve DS, a former emotional partner of FL, who on investigation did have some concerns about DH but sought to disassociate himself from HN. According to his letter of 27th March 2002, HN became offensive to him.
72. HN has a hostile relationship with AC and it is clear from the evidence that HN historically has not accepted AC's status as friend of FL and trustee. One manifestation of this attitude was the dispute over the clothing to be worn by FL at Christmas 2006 (see the note of 26th December 2006 made by XY). A more recent manifestation of the hostility arose in a phone call that HN made to the Z Home on 9th February 2011 in respect of which both HN and AC gave evidence. I accept AC's account of a tirade from HN followed later by HN telephoning AC's husband and subjecting him to a tirade. AC wrote about the phone conversation on 28th February 2011 soon after the incident took place.

Other Behaviour

73. All parties accept that FL cannot feed herself and that she has swallowing problems such that food must be given by someone with appropriate skill/training to avoid FL choking. The food must also be soft or processed so that FL can swallow it.
74. In her statement of 10th July 2009 HN accepted that she had been forbidden from bringing food to FL (and see paragraph 25 of the consent order).
75. However, on 27th September 2009 HN brought some crackers, cheese and figs to the Z Home and fed the same to FL notwithstanding the absence of permission (which HN accepts she did not have)
76. Notwithstanding the response of the Z Home and HCC to the incident above HN fed FL a digestive biscuit on 13th January 2011. HN says she had the permission of 'V' (a staff nurse at the Z Home); the contemporaneous notes show HN did not have permission and I consider HN to be incorrect.
77. HN continued to hold herself out as a person with authority to act for FL when this was plainly not the case given the consent order; see HN appeal dated May 2010 in respect of the refusal to not award NHS continuing care. It was for FL's property and affairs deputy to decide whether or not to pursue continuing healthcare.
78. Lastly HN chose to track down MP, husband of another resident at the Z Home. She identified his village and ascertained his address at a pub. She then went to MP's home. I accept that MP made objections to the Z Home about HN's behaviour.

Conclusions on conduct

79. As I indicated on 30th September 2011 I generally found those allegations made by HCC and pursued to be made out on the balance of probability and in turn those made by HN to not be proved.

Capacity

80. It was common ground until Friday 30th September 2011 that FL lacks capacity to make decisions with respect to her personal welfare and her property and affairs.
81. There is no doubt from the many reports before me that the Multiple Sclerosis which afflicts FL has caused brain damage and dementia such that she has lost the ability, in particular, to retain sufficiently and weigh information in order to make primary decisions of a personal welfare nature. There is no evidence other than HN's belated assertion on 30th September 2011 to suggest that FL does have capacity.
82. Past appropriate declarations as to capacity have been made and nothing has occurred to cause me to revisit capacity in any further detail.

Best Interests

83. I remind myself that I must determine best interests in accordance with section 4 of the Mental Capacity Act 2005. Although HN sought to rely on Articles 5 and 8 of the Convention as incorporated into domestic law by the Human Rights Act 1998 I was not drawn to any conflict between section 4 and those articles and I am not aware of any conflict arising in these proceedings.
84. No case law was cited to me but I have in mind the decision of Hedley J in Re GC [2008] EWHC 3402 (Fam) which is authority for two propositions:
- (1) The State should not intervene in an individual's private family life unless the continuance of that private family life is clearly inconsistent with the welfare of the person whose best interests the court is required to determine
 - (2) When determining best interests the court must draw up a balance sheet of the positives and negatives of the courses of action proposed.

FL's Wishes & Feelings

85. HN has said that FL has expressed a wish to not be at the Z Home; Dr J noted that FL had spontaneously expressed such a view to staff at the Z Home but when in a negative mood. The preponderance of evidence is that FL is happy with and comfortable at the Z Home and forms relationships with staff; it was noted that FL had a particularly positive relationship with FK the matron.

86. When seen by Dr J on 13th May 2009 FL was describing a good relationship with HN but with some caveats; I note in particular that when Dr J asked:

“Has HN had any arguments or disagreements with the staff here?”

FL's response was

“I don't know, but she can be very determined”

Further, when Dr J asked:

“Do you think you need to go somewhere new now?”

FL replied:

“I would like to go somewhere else, but I am not sure it is necessary. HN says to me “FL, get a move on, you have to move”. But it is up to me to move, not her.”

HN's Proposed Course

87. HN seeks to move FL to a care home which:

- (i) is closer geographically to HN and
- (ii) is able, in HN's opinion, to meet FL's mental health needs as HN perceives them to be.

There are two primary advantages to this course of action:

- (i) Closer proximity to HN (and DB), by removing some of the strain and expense of travel, would be beneficial to all
- (ii) It would give HN the opportunity to bring an end to her relationship with the Z Home and start anew with a different home

The disadvantages are as follows:

- (i) The Z Home has been FL's home for some eight years; she is settled there
- (ii) The Z Home meets FL's needs and she is comfortable there having formed relationships with other residents, personnel and other professionals concerned with her welfare
- (iii) All persons interested in FL's welfare other than HN and DB are content with the Z Home
- (iv) The evidence shows there would be considerable risk to FL's comfort and welfare if she were to be moved to a new home

- (v) I think it highly probable that the relationship between HN and any new care home would break down because of HN's inability to engage in constructive objective discussion and to take a proportionate view with respect to her sister's needs.
- (vi) There is no current wish or evidence of feeling on which any weight can be put on the part of FL to move
- (vii) Save for DB there is no other person supportive of such a course.

Contact

88. There is an issue upon whether the period of contact between HN and FL should be restricted because of:
 - (a) FL becoming fatigued by contact and
 - (b) HN' demands upon the Z Home and her use of contact time for purposes other than simply seeing her sister.
89. All parties agree that FL swiftly tires although HN persists in her belief that the tiredness is due to excessive sedation.
90. FL's upper limit for a visit appears to be about 1 hour. There may be days when she is tired after 30 minutes. HN accepts that this may be the case but would like to be with her sister to keep her company for the rest of the time.
91. HCC asked for contact to be reduced to a period of 30 minutes; it then moved to 45 minutes. The OS remained with a period of 1 hour.
92. Given the control there will be on contact I could see no benefit to FL by reducing the period of contact to 30 or 45 minutes but I can see the benefit of retaining the upper limit. It is of note that the Z Home has offered and continues to offer HN the opportunity to be with FL during afternoon activities; to date HN has not availed herself of this offer.

Conclusions

93. I wholly accept a number of points that have been made by HN or should be made by me on her behalf:
 - (i) FL has a right to respect for her family life and this entails ensuring that she can be visited by her family;
 - (ii) it is healthy and beneficial for FL to have a family friend who scrutinises the care she receives;
 - (iii) it is beneficial for FL for there to be healthy debate about how her care is provided, how she is fed, medicated and generally looked after;

- (iv) a professional is not, by reason of his or her profession or qualification, automatically right and opinions may be questioned and second opinions sought.
94. The ethos of the Mental Capacity Act 2005 and the Code of Practice is collaboration in the decision making for those persons who no longer have the capacity to make the decision in question. Section 4(7) of the Act sets out the persons whose views should be obtained; those persons include:
- “anyone engaged in caring for the person or interested in his welfare”
95. This collaborative process is successful in most cases. Disputes can and do arise and the Court of Protection is there to resolve disputes but with as little intervention as possible.
96. Sadly this is a case in which it is HN who frustrates the collaborative process. She will not collaborate and it is her extreme and vexatious conduct which results in this court concluding on behalf of FL that it is in FL's best interests for very serious restrictions to be placed on HN and the contact she has with FL for otherwise:
- (i) FL's placement at the Z Home will be in jeopardy;
- (ii) FL's comfort and quality of life will be strained and prejudiced by HN' continual and unjustified investigations and interventions
97. HN past disobedience of court orders and her conduct generally persuade me that penal notices are appropriate in this case.
98. Any new application to the Court by HN would require the grant of permission under the Rules. I do not think it appropriate nor can I find authority to add a further permission hurdle but I can see that any application in this case ought to be made on notice to all other parties.
99. Therefore I have made the order which is dated the same date as this judgment. Whilst not a facsimile of the consent order, in is very similar in substance.
100. I express the hope that HN will conduct herself with decorum in the future and that she focuses upon spending quality time with her sister. Such a change in conduct may diminish or extinguish the need for the current strictures.

District Judge Ralton

DISTRICT JUDGE RALTON
Anonymised judgment for publication

11th October 2011
Court of Protection, Archway Tower.