IN THE COURT OF PROTECTION **CASE NO: 12584003**

Before :

DISTRICT JUDGE MARIN

Between:

LONDON BOROUGH OF HILLINGDON **Applicant**

- and -

PS **First Respondent**

CS **Second Respondent**

- -

Mr Lee Parkhill (instructed by Hillingdon Legal Services) for the Applicant
Mr J O'Brien (instructed by Scott-Moncrieff Associates) for the Second Respondent
The attorneys of PS attended in person.

Hearing dates: 2 December 2014
Judgment: 4 December 2014
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Approved Judgment

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

DISTRICT JUDGE MARIN:

1. PS is 93 years old. He has dementia and lives in a care home. CS is his son. His wife died earlier this year.

2. In 2002, PS made an enduring power of attorney wherein he appointed S, F and A as attorneys. They had been associated with PS for some time and were therefore best placed to deal with his finances.

3. M is a friend and former employee of PS. CS and the attorneys believed that she had acted inappropriately in her financial and personal dealings with PS. M's employment ended about three years ago although M remained in contact with PS. M had concerns about PS' welfare last year so she informed the local authority.

4. Meanwhile, PS moved to his present care home and responsibility for his welfare passed to the London Borough of Hillingdon ("Hillingdon"), the Applicant in these proceedings.

5. After considering M's concerns, they concluded that there were no welfare issues of concern which M accepted. However, an issue remained about M's contact with PS.

6. When PS lived at home, M visited regularly but contact stopped after his move to the care home in May 2013. PS' treating consultant advised against further contact and this was supported by CS and the attorneys. M did not accept this decision.

7. As Hillingdon was already involved with PS, they attempted to resolve the contact issue. They convened a best interests meeting in September 2013 which concluded that contact between PS and M was not appropriate.

8. In January 2014, Hillingdon agreed to a review of the fairness of this decision by an independent social worker who concluded that the process followed was "sound" and complied with the principles of the Mental Capacity Act 2005 although some weaknesses in the process were highlighted.

9. In June 2014, a further best interests meeting took place to consider further evidence from M. This reached the same conclusion as the earlier meeting.

10. M then proposed that an independent social work be appointed to consider the whole issue of contact. Hillingdon agreed to the proposal and also to fund it. CS opposed it.

11. Faced with this impasse about contact, Hillingdon applied to the court in October 2014 once it was clear that no way forward could be agreed. Hillingdon asks the court to determine what is in PS' best interests with regard to contact with M.

12. Section 50 of the Mental Capacity Act and rules 50 and 51 of the Court of Protection Rules 2007 provide that in some situations, the court's permission is required before an application can be made.

13. To put this requirement in context, applications relating to a persons property and affairs do not normally require permission. In 2013, approximately 25,000 such

applications were made. An application relating to personal welfare matters does, however, require permission and in 2013 around 1,200 such applications were made.

14. When permission is required, the court will consider whether or not to grant it on the papers.

15. If there is a welfare issue to decide, the court usually grants permission as the court's decision is needed.

16. The typical case where permission is refused is where there is no welfare issue that requires determination, the court has no role to play and the application is unnecessary: see for example *G-v-E (Deputyship and Litigation Friend*) (2010 COPLR Con Vol 470). In such cases, the applicant can ask for the order to be reconsidered at a hearing and this happens from time to time.

17. What is rare is for there to be an objection to permission being granted when on the face of it there is an issue in dispute that an applicant needs the court to resolve. This is what arises in this case.

18. Hillingdon asks the court to resolve the issue of contact and seeks permission to make its application. CS and the attorneys oppose permission being granted. In these circumstances, a hearing was listed to deal with this preliminary issue.

19. Counsel for Hillingdon and for CS have both filed erudite and well argued skeleton arguments in support of their client's positions which I have carefully considered. I shall not reproduce them in this judgment but will instead just highlight some of the points they make.

20. I shall turn first to CS' objections which the attorneys adopt.

21. CS argues that the application amounts to an abuse. If M wants contact, M has solicitors who can make an application for her. For its part, Hillingdon has already followed a best interests process to determine contact and has no further role to play.

22. Section 50(3) of the Mental Capacity Act 2005 sets out factors the court must consider when deciding whether or not to grant permission. It provides that:

> "(3) In deciding whether to grant permission the court must, in particular, have regard to—
>
> (a) the applicant's connection with the person to whom the application relates,
>
> (b) the reasons for the application,
>
> (c) the benefit to the person to whom the application relates of a proposed order or directions, and
>
> (d) whether the benefit can be achieved in any other way."

23. CS submits that none of the criteria in section 50(3) are made out.

24. Hillingdon has no connection with PS as it provides no care services to him, it does not manage his money or income, it has no historical connection to PS and has already determined that there are no safeguarding issues. It is only involved as PS lives in its area.

25. The only reason for the application is because Hillingdon feels that restrictions on contact should be imposed by the court. CS says that this is using the court as an insurance policy to reinforce its own decision that there should be no contact and if Hillingdon really felt that the court should be involved, it should have made its application in September 2013 when the issue first fell for determination.

26. There is also no benefit to PS from this application because before September 2013, contact was stopped on the advice of PS' doctor and in September 2013, the decision was made on a more formal basis to stop contact. Future contact decisions can be made without the court's intervention by CS, the attorneys and those caring for PS on a daily basis. Counsel for CS made the point that decisions about incapacitated adults are made every day of the week in care homes and "where special privacy arrangements are central to residents' needs". None of this requires a court decision.

27. The final argument is that the whole court process in the context of this particular dispute is disproportionate and costly such that it is not in PS' best interests to allow this litigation to proceed especially as M has made no application and the effect of it could seriously deplete PS' finances and impact the staff at his residential home.

28. Hillingdon disagrees with the position taken by CS. The Department of Health (March 2000) guidance "*No secrets, Guidance on developing multi-agency policies and procedures to protect vulnerable adults from abuse*" obliged Hillingdon to become involved when safeguarding concerns were raised and this led to its continuing involvement regarding contact between PS and M.

29. The need for Hillingdon to remain involved is further reinforced first by section 42 of the Care Act 2014 which places a statutory duty on a local authority to become involved where inter alia an adult has support needs. Although the Act is not to be implemented until April 2015, section 42 reflects an existing duty owed to PS now. Second, the need for local authority involvement in certain situations was also highlighted by Russell J in *London Borough of Redbridge –v- G and others* (2014 EWCOP 485).

30. Hillingdon maintains that the contact dispute is not capable of being resolved outside the court. They have tried but it has not worked. It may be that M has a hopeless case for contact but this does not stop Hillingdon from asking the court to approve or enforce its decision.

31. Two of the attorneys were present in court. They spoke briefly to confirm that they support CS.

32. M's solicitors sent a letter to the court dated 25 November 2014 although it was only seen by me on the day of the hearing. M supports permission being granted to Hillingdon so the court can deal with the issue of contact which M wants to maintain.

33. M's solicitors refer to M not being invited to take part in the permission hearing.

34. Rule 56 of the Court of Protection Rules 2007 envisages that not every person will be given notice of a permission hearing because it provides that the Applicant is notified and "such other persons as [the court] thinks fit". A permission hearing is a preliminary first step in a case and my view (fortified by the language of rule 56) is that there can be no expectation that the court will hear from every person. Who should attend depends on the facts and the needs of a case in the context of the permission application.

35. In this case, Hillingdon's application was opposed by CS. If his opposition was successful, the case would not go further. M would not be prejudiced in any way as M herself had not sought to involve the court. If unsuccessful, the case would proceed and at that beginning stage, the court would have to consider M's position and involvement in the proceedings. In circumstances where M had made no contact application herself and had observed Hillingdon's directive that she not contact PS, it was decided that the most proportionate and cost-effective way of dealing with this preliminary stage was to hear CS' objections only at a hearing.

36. At this point, I should express my gratitude to Counsel for Hillingdon and CS. As their skeleton arguments were short but focused, they used the hearing to expand upon their arguments. This resulted in a very much shorter hearing and I am satisfied that I have heard and read everything that is required to make a decision.

37. I grant permission to Hillingdon to make this application. In doing so, I do not accept the position taken by CS.

38. In my judgment, Hillingdon has a connection with PS for the purposes of section 50(3)(a) of the Mental Capacity Act 2005 as they have been trying to resolve the issue of contact between PS and M in the face of opposition to contact by CS and the attorneys. CS recognised and allowed this local authority involvement concerning PS and he cannot now say they have nothing to do with this dispute. Hillingdon rightly in my view identified that there was an issue important to PS that required their input. To say that Hillingdon therefore has no connection with PS is to ignore reality.

39. The reason for the application is also clear (section 50(3)(b)). There is a conflict over whether M should have contact with PS with whom she was associated for a number of years. M wants to see him; CS and the attorneys object. Given the failure of mediation and best interests processes, Hillingdon is right to ask the court to intervene in circumstances where they have been involved in this issue. It is immaterial that M has not herself made an application. I also reject the suggestion that Hillingdon is merely trying to enforce its decision; its application goes beyond that.

40. The obvious benefit (section 50(3)(c)) to PS is that the issue of whether he should see M will be adjudicated once and for all avoiding any more arguments and wastage of his funds in legal costs and associated expenses dealing with this issue. PS' best interests will be properly considered which in real terms means that a decision will be made whether someone who PS knew very well should be excluded now from his life or not.

41. It is to the credit of Hillingdon that they tried everything to resolve the matter to avoid coming to court but their attempts have failed through no fault of their own. CS and M still take different positions. There is therefore no other way to resolve the contact issue (section 50(3)(d)).

42. This means that the factors in section 50 of the Mental Capacity Act 2005 are satisfied. However, that is not the end.

43. The court must also give effect to the rules which deal with permission in accordance with the overriding objective as defined in rule 3 of the Court of Protection Rules 2007. This means that a case must be dealt with justly which includes having regard to proportionality.

44. It seems to me that this case has the potential to incur the parties (and potentially PS) in prolonged litigation and excessive costs. CS gives this as a reason to refuse permission. It is true that costs in Court of Protection litigation can escalate as can the complexity of and the number of hearings in cases (see for example, Peter Jackson J in *Cases A and B (Court of Protection Delay and Costs)* 2014 EWCOP 48 and Roderick Wood J in *A Local Authority –v- ED* (2013 EWHC 3069 COP).

45. It seems to me, however, that with proper case management and judicial continuity, these problems can be avoided in this case especially as so much expert and lay evidence is already available. I therefore do not see this as a reason to refuse permission.

46. It was suggested to me that a fact finding hearing might be appropriate. I reject this because a major enquiry as to alleged financial and other impropriety is not necessary in the context of this case where M says that she merely seeks a weekly social visit and no more.

47. I therefore propose to give the following directions. M shall be served with a copy of the application and joined as a party. CS shall also be a party with permission to the attorneys to intervene which will allow them to attend hearings and participate. I shall list a final hearing of this application and make provision for all parties and the attorneys if they wish to file a statement dealing with the issue of contact which shall exhibit all relevant documents, in advance of the hearing. I shall also order a Court of Protection Visitor to visit PS to ascertain his wishes and feelings and to gather information relevant to the issue of contact in the same way Cafcass would report in a children's case. This way, PS will have a voice in these proceedings.

48. My hope is that these directions will allow this case to be concluded expeditiously and fairly in accordance with the overriding objective. I would remind the parties that to further the overriding objective, they are obliged to act reasonably which includes co-operating with each other to ensure this case proceeds properly to a final hearing and not indulging in lengthy and unproductive correspondence.

49. This judgment will be sent to the parties and time for any appeal for Hillingdon and CS shall run from 8 December 2014 and any representations on any matter arising in this judgment shall be made by 16 December 2014. A copy of this judgment shall be served by the Applicant on M together with the evidence filed with the application.

50. With regard to the costs of the permission hearing, I shall reserve them and deal with them at the conclusion of this case. As to costs generally, I put all parties on notice that the court will not hesitate to depart from the usual costs rules both in respect of the permission hearing and for the rest of this case if it concludes that a party has acted unreasonably.

51. Finally, I would sincerely hope that given my decision, the parties may feel the time is right to have one last attempt to resolve matters in a cordial manner. If not, early in the new year, the court will instead.