IN THE COURT OF PROTECTION

Claim No: 11987961

7TH OCTOBER 2011

B e f o r e:

THE HONOURABLE MR JUSTICE BAKER

- - - - - -

SC

APPLICANT

V

BS

1ST RESPONDENT

A LOCAL AUTHORITY

2ND RESPONDENT

Tape transcription by Exigent Group Limited
11 Argyll Street, London W1F 7TH

MR JOHN MCKENDRICK appeared on behalf of the Applicant
MR JOSEPH O'BRIEN appeared on behalf of the First Respondent
MS LAURA DAVIDSON appeared on behalf of the Second Respondent

JUDGMENT

MR JUSTICE BAKER:

1. An issue has arisen in these proceedings in the Court of Protection as to the selection of an appropriate expert psychiatrist to prepare a report as to the mental capacity of BS (the subject of these proceedings). It is unusual for the appointment of an expert to generate the degree of controversy and difficulty that has arisen in this case but on this occasion I have heard argument from counsel on this and other issues stretching over two days and I now give this short judgment setting out my decision that Dr Dene Robertson should be appointed in preference to two other alternatives and the reasons for that decision.

2. BS was born on the 17th October 1993 and will be 18 years old in ten days' time. She is one of four children of SC. She has been accommodated under Section 20 of the Children Act for a number of years and is said in one report to have had "a very turbulent adolescence, including episodes of aggression, violence and substance abuse". She was for a time between October 2009 and March 2010 admitted to a psychiatric unit for adolescents called AV and during that admission she was diagnosed as suffering from Asperger syndrome and post-traumatic stress disorder. She had prior to that displayed a number of worrying behaviours, including drinking, smoking cannabis and (it is alleged) episodes of aggression, both physical and verbal. In November 2008 BS was raped. Her attacker was convicted and he is now serving a prison sentence.

3. Following her release from AV, BS attended a college in Sunderland run by ESPA. At a review at that college it was confirmed that she had symptoms of Asperger syndrome and post-traumatic stress disorder. Her stay at ESPA College in Sunderland was difficult. In January 2011 she was asked to leave. In a report a few weeks later, the deputy principal of that establishment stated her view that BS required a small and more structured and consistent environment with a higher staff ratio than the college was then able to provide. It was said that she would need considerable support for her key life skills, particularly making safe choices and with much more focus on her social and life skills, learning how to look after herself. She is reported as lacking in the understanding of human relationships and the rules of social convention.

4. A few weeks later, on the 23rd February 2011, BS was admitted to a psychiatric hospital under Section 2 of the Mental Health Act 1983 but discharged within two weeks although she remained as an informal patient in that hospital until later in March. On the 7th April 2011 she was placed with foster parents. Later that month, on the 29th April, she made a suicide attempt and was readmitted to hospital where she remained for about a week before being discharged back to the care of the Local Authority in early May.

5. A few days later, on the 10th May, it is said that she made a suicide pact with another female friend. Between them, they took an overdose of some 14 Diazepam tablets. However, it is said on the papers that BS's friend said

that she did not wish to die, so BS took her to hospital. Whilst waiting outside the Accident and Emergency Department, it is said that BS cut her wrist and was found in that condition by security staff. Shortly afterwards she (it is said) cut her wrist again in the lavatory of the Accident and Emergency Department. She was then admitted to an adult ward of the hospital before being transferred again to a young people's psychiatric unit and admitted to that hospital under Section 2.

6. Shortly before this, an application had been made by her mother to the Court of Protection for a declaration that BS lacked capacity and for orders as to her welfare. At an interim hearing on the 5th May, Mr Justice Mostyn had made interim declarations that BS may lack capacity to litigate and the capacity to make decisions as to residence, whether to accept care and support, contact with others, disclosure of medical and other records, disclosure of her whereabouts and conditions and whether or not she could take prescribed medication.

7. At a further hearing on the 26th May before Mr Justice Roderic Wood, a Consent Order was approved by the court renewing the interim declarations and, *inter alia*, giving permission to the parties to jointly instruct a psychiatrist, Professor T, to report on BS' capacity in the relevant areas of decision-making. A further direction was given in the Consent Order for the instruction of an independent social worker, Mr Stewart Sinclair, to report on BS's best interests. However, as BS was at that time subject to orders

under Section 3 of the Mental Health Act, the instruction of the experts was suspended.

8. By the end of August 2011, it was being considered that BS should be discharged from the mental health young people's unit in the light of the clinicians' judgment as to her condition and also her wishes and feelings. However, disagreement arose between BS's mother, SC, and the treating clinicians as to the proposed placement for BS. The Local Authority and the clinicians proposed that BS should be accommodated in accommodation in Lincolnshire but SC strongly opposed this on the basis that placement in that location exposed BS to the vulnerable situations which had led to problems in the past.

9. Whilst the Official Solicitor had no objections to the proposed placement, there were aspects of the proposed care plans which caused him concern. In particular, bearing in mind the evidence from the clinicians that BS had a high risk of suicide in addition to a risk of absconding, the Official Solicitor considered that the care plan for BS' admission to the unit in Lincolnshire was insufficiently robust.

10. Once the matter was brought back before me, sitting in the Court Protection, on the 15th September 2011, after extensive negotiations took place outside court between the parties' representatives, an order was eventually arrived at by agreement whereby interim declarations were made renewing the declarations that had been made on earlier occasions, together with the

declaration that it was lawful and in BS's interests that BS should reside at the property in Lincolnshire on certain terms as to the care package set out in the order.

11. In particular, it was declared that she should receive a care package in accordance with her assessed needs "which shall include 24 hour one-to-one supervision, whether at the unit or away from there and which provided for her deprivation of liberty". It was further provided that 24 hour one-to-one supervision was not required when BS was attending college but that she should be supervised on journeys to and from college and when having contact with her mother, the Applicant. Orders were made under Sections 4 and 16 of the Mental Capacity Act 2005 permitting BS's deprivation of liberty on the basis of that care plan.

12. At that hearing the Local Authority made it clear that it did not accept the assertion made by the Applicant that BS lacked capacity and thus the court renewed the direction for an independent assessment and furthermore renewed the instruction of Professor T, the psychiatrist who had been identified at an earlier stage in the proceedings and indeed suggested initially by the Applicant. I directed that an interim report should be filed by Professor T on 3rd October for a hearing on the 5th October.

13. Thus the matter came back before me on the 5th October (earlier this week). As on the previous occasion, there was a sharp divergence of opinion between the parties as to whether BS has capacity. Her mother holds that

she does not and the Local Authority holds that she does. The Official Solicitor wishes to reserve his position until a final expert report is available. The parties' position is made more complex by the fact that the Local Authority makes serious criticisms of the mother, asserting that these proceedings are misconceived; that the mother has a lengthy history of vexatious litigation and complaints to and against the Local Authority and other professionals; that she (the mother) appears to have "hypochondriacal" concerns about BS which have led her to seek the opinion of a variety of doctors in an effort to obtain a diagnosis of which she approves.

14. In short, there is more than a hint in the Local Authority's submission that the mother has exaggerated BS's symptoms and herself exhibited signs of factitious illness syndrome. The Local Authority goes so far as to assert that the mother would benefit herself from a psychological assessment. Thus the issue of capacity is disputed in the context of a very difficult history, not only between BS and the professionals but also between her mother and professionals.

15. The issue of capacity itself falls to be determined under the law as set out in the Mental Capacity Act 2005 and the accompanying Code of Practice. The Act provides that there is a presumption of capacity and a burden on the party contending that a person lacks capacity to establish that incapacity (see Section 1(2)). Furthermore *"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"* (see Section 1(3)). Furthermore *"a person is not to be*

treated as unable to make a decision merely because he makes an unwise decision" (see Section 1(4)).

16. The statutory test for capacity is set out in Section 2 of the Act. Specifically a person lacks capacity in relation to a matter if at the material time they are unable to make a decision for themselves in relation to it because of *"an impairment of or disturbance in the function of the mind or brain"* (see Section 2(1)). This is known generally as the "diagnostic test". In addition, Section 3(1) provides that: *"For the purposes of Section 2, 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 of making the decision; or (d) to communicate his decision, whether by talking, using sign language or any other means"* (see Section 3(1)). In addition, extensive guidance as to the question of the termination of capacity is given in the Mental Capacity Act 2005 Code of Practice, in particular Chapter 4 thereof.

17. For the hearing before me this week an interim report was prepared by Professor T. In fact, it was filed later than directed on the 4th October. In preparation of that report, Professor T saw BS at the unit in Lincolnshire for two hours on the 29th September. He had received extensive documentation, including the social care records and medical records, but had not read them prior to preparing his report. In this interim report, he expressed some doubt as to the diagnosis of autism spectrum disorder. He indicated that he would consider whether or not BS had that disorder and, in addition, was suffering

or had suffered from post-traumatic stress disorder in his further report, which he described as his "definitive" report.

18. He continued: *"BS clearly does have a disorder that is associated with impulsive behaviour, leading to actions whose consequences are not thought out and are sometimes to her own harm. These actions are often in the context of a high level of anxiety, fear or other kind of arousal and are associated with either a flight from a current situation or a desire to find security or comfort even if it is offered by exploitative others and at a personal cost to her. I understand that there are times when BS is so highly aroused that she cannot or does not exert her capacity for judging what is in her best interests. I understand that the carers in the house in which she is currently living have been given powers to restrain her should she try to get out at one of these times and they judge her to be a danger to herself. My initial opinion is that these powers are needed to ensure BS's safety.*

At the time I examined BS, she was calm. She was informed about the ongoing proceedings and the roles of the judge, the lawyers and the witnesses in them. She was able to explain her point of view about why she thought it important to be able to make up her own mind and make her own choices but was also able to explain to my why other people might think she could not. She accepted that she lacked social judgment when younger but pointed out that this had improved. She explained that the medication that she was taking helped her to remain calmer."

19. Later in his interim report, Professor T concluded: *"I did not consider that BS was unfit to plead or lacked the capacity to instruct her solicitor although I have not yet had the opportunity to speak to her solicitor. She was aware of the consequences of her actions and of her past all judged actions. She was able to make a strong case for being given the responsibility to make decisions for herself. I do not therefore think that she lacked the capacity to make any decisions about her life at the time I saw her although I accept that at times of high arousal she might lack this capacity temporarily. However, there are many young people of whom this might be true when they are in a rage, in a panic or intoxicated."*

20. Professor T kindly attended to give oral evidence at the interim hearing on the 5th October. In the course of that evidence, he said that he had become familiar with the Mental Capacity Act as advisor to the National Autistic Society when a bill was passing through Parliament. He did not think that he had ever appeared in the Court of Protection and had not had any training in the Mental Capacity Act but he told me that he had considered the Code of Practice in detail and it was "very much part of my everyday work". He told me that, although he had no experience of the Court of Protection, he had experience in criminal and other proceedings and was applying some of the criteria he had used in criminal proceedings to establish whether BS lacked capacity to litigate.

21. It had emerged in the course of discussions between the Professor and the representatives of the parties that he had spoken to BS about the question

whether or not she had capacity. He told me that he had indeed told her that he was going to look at the records and, until he had done that, he could not possibly make a judgment. He did say to her that, at the time he spoke to her, she seemed to him to be demonstrating capacity but he needed to read the papers.

22. At the conclusion of his evidence, I adjourned overnight to give counsel the opportunity to consider the way ahead. The following morning the parties returned and their representatives delivered submissions to me as to the way forward.

23. Whilst the Local Authority's principal position remained that BS had capacity and that the court could resolve the issues on the basis of the interim report and should consider doing so, Ms Davidson, on behalf of the Local Authority, accepted that, as Professor T had read none of the papers nor spoken to anyone else involved in the case, except for BS herself, and given the fact that the issue remained hotly disputed, in practice it was not possible for the court to proceed to make a final determination of the question of capacity on the basis of that interim report alone.

24. It was therefore agreed by the parties, albeit reluctantly by the Local Authority and by the court, that the question of capacity could not be resolved until a final report was available and that, accordingly, BS would have to remain in her current unit for the next few weeks, although all parties agreed that it would be appropriate to reduce the level of restriction

upon her. Following Professor T's report, a further problem had emerged in that both the mother and, for somewhat different reasons, the Official Solicitor, on behalf of BS, had concluded that Professor T was not, in fact, an appropriate expert to advise on the question of capacity in this case.

25. Two alternative psychiatrists, Dr Rippon and Dr Robertson, were suggested. The appointment of one or other of these alternatives would, however, add to the difficulties because, whereas Professor T, who is already instructed and has started work, could complete his final report by 2nd November, thereby enabling a hearing in the week of the 7th November, neither of the other two experts could complete a report until the 8th December, thus postponing the hearing until the week of the 19th December.

26. The arguments advanced by the mother against the continuing instruction of Professor T were as follows. Mr McKendrick, on behalf of the mother, submitted that the case was a complex one and that there was evidence as to capacity going both ways. It was submitted that the question of capacity needed to be considered by an expert who was experienced in, and fully familiar with, the concept of capacity within the meaning of the Act. In particular the expert should have expertise in applying that concept to the question of the patient's functioning and understanding. It was submitted that Professor T did not have that level of expertise or experience. He had, as he admitted, received no training in the Mental Capacity Act.

27. Subsequent to giving his evidence, a message had been received from Professor T that he would be able and willing to undergo training in the Mental Capacity Act next week. Mr McKendrick, on behalf of the Applicant, considered that this was a worrying sign and further evidence that Professor T lacked the necessary experience. Mr McKendrick pointed out that Professor T had on more than one occasion in his written report and orally referred to "fitness to plead", which is, of course, not the appropriate test of capacity under the Mental Capacity Act. He had plainly applied his knowledge acquired in other proceedings, including criminal proceedings, to determine whether or not BS had litigation capacity. Plainly, said Mr McKendrick, this was an incorrect approach.

28. Furthermore, Mr McKendrick, on behalf of the Applicant, criticised Professor T for giving BS an opinion, albeit a provisional opinion, that at the date he saw her she appeared to have capacity. It was submitted on behalf of the Applicant that it was inappropriate for the Professor to make that observation to BS, given that he had read none of the papers in the case.

29. On behalf of the Official Solicitor, Mr Joseph O'Brien submitted that it was a finely balanced decision as to whether or not Professor T should be retained. On the one hand, there were a number of factors which supported the retention of Professor T as the expert. The instruction of an alternative would, on any view, lead to a further delay of several weeks. The consequences of that delay would be that BS would continue to be detained in circumstances which amounted to a deprivation of liberty. Furthermore,

there is clear evidence that BS is unhappy with the restrictions on her liberty imposed under the current regime.

30. Mr O'Brien warned against the dangers of "over-expertising" the case. He expressed concern as to BS's reaction should another expert now be instructed with whom she would have to discuss difficult and sometimes intimate matters. Very much as a secondary point, but nonetheless one which he rightly cited, Mr O'Brien pointed out that the instruction of an alternative expert would be likely to lead to additional costs. On the other hand, Mr O'Brien, on behalf of the Official Solicitor, pointed out that the question of capacity was unquestionably a live issue in the case and a complex issue. He submitted that it was one which required not just expertise on paper but experience in applying the test in practice.

31. It is furthermore, said Mr O'Brien, a crucial question because, if BS has capacity, then this court has no jurisdiction over her and no lawful jurisdiction can be exercised by the Court of Protection so as to restrict her movements in any way. Furthermore, if the court concluded that she did lack capacity, it is likely that there would continue to be some restriction on her movements for at least the short to medium term. Therefore, submitted Mr O'Brien, the significance of the decision which the court has to take as to capacity could not be under-estimated.

32. Mr O'Brien submitted that Professor T's evidence had been a matter of some concern to the Official Solicitor. Although the Professor had

recognised the limitations of what he had done up to that point and that he had not had an opportunity to read the papers and although the Professor recognised that his view was indeed a provisional view, it was a matter of some concern to the Official Solicitor, as to the Applicant, that he saw fit to share his initial thoughts with BS. Mr O'Brien stressed that, for the Official Solicitor, a greater concern lay in the question mark over Professor T's experience and expertise in assessing capacity.

33. On behalf of the Local Authority, Ms Davidson strongly argued the contrary position. She submitted that Professor T was not to be criticised unduly for his decision to discuss his provisional view as to BS's capacity with BS herself. Furthermore, she reminded me that the Professor had said in the course of his evidence that, although he had had no training in the Act, the Code was very much his everyday work. Ms Davidson stressed also the fact that it had been Professor T's expertise in autism that had led to his instruction, incidentally and ironically initially at the suggestion of the mother.

34. Ms Davidson submitted that he was therefore supremely fit (and I paraphrase her submission) to advise at least as to the diagnostic test and submitted that the functional test under Section 3 was something which was also well within his capabilities in all the circumstances. But Ms Davidson put at the forefront a submission that any further delay, even a matter of six or seven weeks, would be manifestly contrary to the best interests of BS and, in addition, would be a significant and severe restriction or the

deprivation of her liberty. Given BS's very strong wishes and feelings, Ms Davidson's submission was that should be the decisive factor in the decision. In all the circumstances, the Local Authority supported the retention of Professor T as the expert in the case.

35. So far as the alternatives were concerned, it was initially proposed on behalf of the Official Solicitor that Dr Rippon should be instructed. She is a psychiatrist not only experienced in autism but also an expert who has advised the Official Solicitor and given evidence in a number of cases concerning capacity. At the end of submissions, however, the mother very properly told her counsel, Mr McKendrick, that Dr Rippon had a connection with ESPA, the organisation that runs the college in Sunderland at which BS had resided for some time, where her diagnosis of autism and PTSD had been confirmed. It transpires, on further enquiry, that Dr Rippon is indeed a director of ESPA although she has had no direct dealings with BS herself. I have no reason to doubt Dr Rippon's professionalism and integrity. The concern is, however, that her connections with ESPA might be perceived as indicating a lack of independence and, in a case where there are a number of hotly contested issues, it was forcefully submitted by Ms Davidson that such perceptions could be very damaging.

36. The third alternative, Dr Dene Robertson, has no connection with this case and, although the Official Solicitor has less experience of his work, it is clear that he has great experience in autistic spectrum disorders and also experience in assessing capacity under the Act. Indeed, he has given

evidence in a number of cases, most notably the well-known *Neary* litigation.

Conclusion

37. I accept Professor T is a nationally recognised expert in autism, with an impressive range of published work on the topic and a long and distinguished clinical career. I also accept his evidence that he has professional experience of capacity under the Mental Capacity Act but he did not, in my judgment, demonstrate that he has the experience in applying that test in the context of litigation in the Court of Protection. I found his evidence somewhat troubling in this respect, especially his repeated references to "fitness to plead", and I found that his offer to undergo training in the matter next week merely confirmed my view. It cannot be satisfactory to seek the expert opinion from someone who perceives the need to undergo training before he can give that opinion.

38. BS has a history of very challenging behaviour and self-harm. If she lacks capacity, this court will have discretionary power to make declarations and orders in her best interests, including (if it thinks fit) orders which amount to a deprivation of liberty. If, on the other hand, she has capacity, this court will have no power over her at all. The issue of capacity is therefore of literally vital importance. The court must get it right. It would be irresponsible to make that decision on the basis of expert evidence from a witness whose expertise on the issue of capacity under the Act was open to very considerable doubt.

A

39. I also say in passing that I think it was unwise of Professor T to give any indication to BS that he thought she had capacity. He was in no position to express any concluded view without reading the very extensive records. Although his comments to her were hedged with qualifications, it was highly probable that BS's hopes were raised that she would shortly be allowed to leave her current accommodation. No expert should give a patient a "provisional" view of their capacity without reading the patient's history.

B

C

40. There are strong arguments against retaining Professor T. Ms Davidson, on behalf of the Local Authority, rightly stresses the very important argument for continuing his instruction, namely that BS is being deprived of her liberty, that she strongly resents this and has clear wishes and feelings that she should be allowed to leave her current unit (see the various attendance notes from the Official Solicitor put before me at the conclusion of the hearing) and that replacing Professor T would involve a further delay of six or seven weeks. Ms Davidson relies on the fundamental principle that decisions made must follow the least restrictive option. That principle points in favour of retaining Professor T.

D

E

F

41. I recognise the importance of this principle but, in my judgment, the balance in this case fully comes down in favour of instructing another expert, namely Dr Robertson. The decision concerning capacity is crucial and complex and the court needs the best evidence it can get on the matter.

G

H

Professor T is widely respected as an expert in autism but has not satisfied me that he has sufficient experience in applying the capacity test in proceedings under the Mental Capacity Act. I expect in due course he will apply that expertise but not in time for this case, which is one in which the issue of capacity is unusually complex and of fundamental importance.

42. I therefore conclude that Dr Dene Robertson should be instructed. The Official Solicitor will act as the lead solicitor. Similar directions will be given to support this instruction and Dr Robertson will be directed to file his report on or before the 8th December. A three day hearing can be fixed before Mr Justice Hedley on the 19th to 21st December.

***