LIVERPOOL CIVIL AND FAMILY COURTS

35 Vernon Street,
Liverpool L2 2BX

Case No: 1193196

Friday, 21st January 2011

Before:

THE HONOURABLE MR. JUSTICE HEDLEY

B E T W E E N:

FP — Applicant

and

GM
By his Litigation Friend the Official Solicitor
1st Respondent

And

A Health Board — 2nd Respondent

Mr. STOCKWELL appeared on behalf of the Applicant.

Mr. ALLEN appeared on behalf of the Health Board.

Mr. GATENBY appeared on behalf of the Official Solicitor.

Transcript prepared from the official record by
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J U D G M E N T

(For Approval)

Friday, 21st January 2011

Mr. JUSTICE HEDLEY:

1. This case concerns an elderly gentlemen called GM who will shortly reach his 80th birthday. Some 17 years ago, GM was diagnosed with what is described as a mixed vascular dementia, provoked by alcohol damage. That condition is, of course, a deteriorating condition and there has been significant deterioration over the last 17 years or so.

2. We have reached the point where it is common ground that, GM lacks capacity to litigate and lacks capacity to make decisions about his care and residence, both as to where it should be and who should be responsible for it. Therefore, in broad terms, that decision now belongs to the court.

3. There are really two strands that run through this case. The first is that, GM for many years has made his home and family with FP, whose adult son also lives with her. At the same time it has been quite apparent that from time to time the demands of, GM's care have surpassed their abilities to meet them and there has been the need for hospital intervention.

4. I have in front of me a social work chronology that is in some detail from 24th March of last year. Inevitably, in a case such as this, for reasons I shall explain in a moment, there will be unresolved disputes about the details of it.

But it is the fact that in the autumn of this year, namely, on 5th November, GM was admitted to hospital under section 2 of the Mental Health Act for the purposes of assessment. That section 2 was in due course discharged and was replaced, so it is said, by an effective authorisation under schedule A1 of the Mental Capacity Act 2005, as amended.

5. There is no doubt that the matter came before the court before District Judge Coffey on 22nd December of last year. Various interim declarations were made, various directions were given but, in particular, the parties acknowledged that the deprivation of liberty should remain in force, approved by the court, until the matter could be considered further. The order of the District Judge required that the matter be placed before a High Court judge at an early date, and in fact was provisionally set down for 31st January, with a time estimate of one day.

6. In the meantime the parties on each side were accumulating their evidence, although the principal evidence of the health trust is that of Dr. Anderson, the consultant geriatric psychiatrist. Other witnesses too, in both medical and social care, have provided evidence. The family have provided evidence. The IMCA has produced a report and the Official Solicitor, who is the litigation friend of, GM, instructed and obtained a report in respect of best interests from Mr. Chris Wall, to whose report dated 18th January I have had access.

7. It was quite apparent from the face of the evidence that there was a fundamental dispute, on the one hand, as to whether GM should return home on a trial or permanent basis or, on the other, as to whether he should forthwith be admitted to EMI care.

8. Having regard to his age, and all that was known about him, that decision was clearly fundamental to the rest of his life. If the court ordered admission to an EMI, it is really inconceivable that, however much the court went into this case on some occasion when the requisite number of days could be found, that such a placement could be undermined, for all the reasons that are well recognised and were articulated by Dr. Anderson in his cautioning against further moves. Of course, if a decision is made to attempt a placement at home, that brings with it, or is pregnant with, all sorts of risks about breakdown and move, and it would be unrealistic to conceal that fact.

9. In those circumstances it was not surprising that the parties sought to have an extensive hearing based on oral evidence. Moreover, there are claims advanced on behalf of the Applicant for declarations as to the lawfulness, or otherwise, of the detention up to 22nd December and the means by which all that came about.

10. As a general rule, the court system is at the moment under acute pressure in relation to accommodating the demands of the users of the Court of Protection. When I asked for estimates about the length of hearing, I postulated what I

thought was a relatively generous estimate of three days. Having listened to counsel that was clearly wildly optimistic and I well recognise that the court would have to work hard to complete such a hearing in five days. The problem with that is self-evident. In order to obtain a hearing before a High Court judge, this matter would have to be transferred to London, and the provisional indication from London was that five day cases were now being listed next October. If it were proper for this matter to be heard by a Circuit Judge, I understand that Her Honour Judge de Haas Q.C. could hear it in May.

11. Whilst that is, no doubt, a considerable improvement on October, it is precious little use to anyone in this case because of one thing all parties are agreed, and that is that Mr. GM is ready for discharge from hospital and has to move somewhere. Accordingly, I indicated to the parties that whatever the disadvantages of such an approach were, and no doubt there are disadvantages, it was abundantly obvious the court was going to have to get to grips with this matter today and make a decision today. It was entirely fortuitous that the court was able to deal with this matter today as I am in the middle of a long trial in Carlisle but was able to schedule the evidence so as to free me for a day to come down here and do this.

12. Such fortuitous concatenations of events do not happen very often, and it seems to me that it is absolutely essential that the Court of Protection establishes a practice that these interim cases must be dealt with

quickly, and, having regard to the demands on the system generally, proportionately, that is to say almost certainly without detailed oral evidence. Whether that is correct, ultimately superior courts will have to decide, but speaking from my perspective as a judge of the High Court with considerable experience and responsibilities for organising judicial work both in this area many years ago, and in Wales and Cheshire and now in Greater London, it seems to me that to expect anything more in the present climate is a whistling after the wind, and the court has simply got to do the best it can in the circumstances in which it finds itself.

13. Accordingly, and with complete co-operation from counsel, for which I am grateful, that was the way this matter was dealt with. It is in form an appeal against the standard authorisation under schedule A1 of the Mental Capacity Act 2005. In substance, it is a request for a decision as to, when GM moves from hospital, whether he should move to an EMI, which, as I indicated, would, in effect, be a permanent move, or he moves home on trial with a view to that matter being further explored in the substantive hearing, should one become necessary.

14. That meant that the court had to have two quite separate considerations in mind. It had to consider, obviously, the best interests of GM as between those two placements, but it also had to consider whether it could be proper in the circumstances for an EMI placement to be made without so much as an attempt at a trial back at home because it was

abundantly clear that, if any attempt were ever to be made to place GM back at home, it would have to be now as it would be pretty well unthinkable to do it once he had been settled in a care home.

15. That is the context of the decision that has to be made by the court today. The Applicant, FP, says that there should be a move home. The health authority say that that is attended with far too many risks and the interests of GM can only be protected by an immediate transfer, effectively permanently, to an EMI home. The Official Solicitor, having considered all the issues that have been put forward, has expressed the view that there should be a trial at home but that it should be attended with various conditions, to which with certain qualifications Mr. Stockwell indicates that FP will agree.

16. What then is the law that the court must apply in these circumstances? It seems to me that that probably falls into two categories. The first is that the court must be satisfied that it has jurisdiction to entertain this matter at all, and it only has jurisdiction if the person concerned lacks capacity to make the actual decision which the court is called upon to make, for capacity is an issue specific concept and a person may lose capacity to litigate, he may lose capacity to decide his care needs, but he may retain capacity to decide who it is that he will or will not associate with. So when capacity is being considered it must always be considered on an issue

specific basis.

17. The issues which I have to address in this case, as I have indicated, are first the whole question of litigation, and it is beyond argument that he lacks the capacity to litigate and, secondly, whether he goes home or whether he goes into a long-term care home.

18. The statute reminds the court that the person must be assumed to have capacity unless the contrary is established. Importantly, the statute makes it clear that the fact that others regard a decision as unwise is not in itself any evidence of lack of capacity. I have considered these issues and the evidence and, in particular, I have had in mind section 3(1) of the Act which spells out the criteria for assessing inability to make decisions. It seems to me abundantly clear, and no-one argues to the contrary, that GM lacks capacity to make the relevant decisions. Accordingly, the court is vested with jurisdiction and is under a duty to make those decisions based on his best interests. Section 1(5) says:

> *"An act done or decision made under this Act for or on behalf of a person who lacks capacity must be done or made in his best interests."*

One then goes to section 4 in any consideration of best interests. Obviously everything under that section is important, but it may well be that subsections (6) and (7) are particularly important, as is the basic principle of section 1(6) which, in effect, is a principle of minimum intervention consistent with best interests.

19. Section 4(6) requires me to take into account, as far as reasonably practicable, GM's past and present wishes and feelings, and the beliefs and values that would be likely to influence his decision had he the capacity to do so, and to take into account any other matter which he, had he had capacity, would have wanted to take into account. Section 7 requires me to take other views into account. Clearly I have to take into account the views of the authorities, but I also must take into account the views of FP and her son, who are clearly persons within subsection (7)(a) and (b) of section 4.

20. Those seem to me the critical statutory provisions which govern the exercise of the court's powers in this case. There is, as I have indicated, another dimension of this of, it seems to me, some importance. Everybody accepts that Article 8 of the European Convention on Human Rights is engaged in this case, principally so far as GM is concerned, but to some extent in relation to FP. The effect of that is that the court is not to deprive a person of family life unless such deprivation can be justified under Article 8(2) of the Convention. The European jurisprudence has rather established that Article 8(2) and a broad welfare test in relation to children are compatible, the one with the other, and making a child's rights decisive is also compatible with the observance of the Article 8(1) rights. I see no reason at all why that parity of reasoning is not implied into the Court of Protection which, in effect, is faced with very similar

tasks.

21. Those matters give rise to extremely difficult questions of balance. If one asks what has to be taken into account in considering the best interests of any human being, but let us be specific about GM for these purposes, the answer is a very wide ranging one: his health, his care needs, his need for physical care and his needs for consistency. There is, of course, more to human life than that, there is fundamentally the emotional dimension, the importance of relationships, the importance of a sense of belonging in the place in which you are living, and the sense of belonging to a specific group in respect of which you are a particularly important person.

22. Very often in these Court of Protection cases those two matters pull in opposite directions, and this case is no exception. On the one hand, if the court goes down the line of authorising an admission to a care home, the court can be reasonably confident that all GM's physical and medical needs will be sufficiently and properly attended to. On the other hand, he will be one of several, many perhaps, depending upon the home, who are cared for by a staff which is not necessarily consistent in its personnel. It is well-known that care staff can often be quite transitory, coming, as they do, all too often, and no doubt regrettably, at the lower end of pay scales generally available, so that the emotional component, although not ignored, cannot begin to be met in the same way that it can if you achieve a placement within a family setting.

23. But, in this case one has to recognise that a placement within the family setting will, in all probability, result in what many would regard as a lesser quality of physical care, not through any lack of willing but simply because of the enormous demands which GM inevitably makes on those who care for him, and it carries with it risk of breakdown and conflict, and the like, none of which redound, ultimately, to his best interests.

24. On the other hand, in the history of this case, such a placement contains a formidable emotional component which GM for over 20 years has clearly regarded as being of profound importance to him. These are the single most important relationships in his life. This is the place where he belongs, and where he matters in a sense that he could never matter in an institutional care setting. So in this case, as in many others, the court has this difficult balance to strike, difficult because you cannot compare like with like. This is very much a comparison of apples and pears and trying in the context of it to strike the best interests with as broad a view of those interests as it is possible to do.

25. It seems to me that the starting point has to be the question: why should GM not return to the family home? And in the context of this case: why should GM be deprived of the opportunity of ever again returning to the family home? The answer to that has to be, for such an order not to be made, that it is so contrary to his interests to

return that the court must not even contemplate seriously a placement with the applicant. Of course, there is perfectly respectable evidence on which such an assertion can be based.

26. Sometimes in these cases I also find myself asking whether the undoubted detriments do outweigh the benefits. As I say, the benefits of an EMI home I have indicated, the detriments of it I have indicated, the benefits and detriments of a placement with FP I have indicated. I was greatly helped in this by some of the observations of Dr. Anderson, not because they provided me with an answer, but they sharpened up for me some of the issues which the court has to keep in mind. Of course I acknowledge, and specifically acknowledge, that it will be detrimental to GM's welfare were he to have to undergo more than one placement from now on. I acknowledge that there would be a risk to the improvements that have been made with his sleeping pattern if he were to be in a family home, as would be the alternative proposal, where neither he nor FP find sleep terribly easy.

27. Dr. Anderson pointed out the inevitable deterioration which will occur, and pointed out, helpfully, that whilst some of those deteriorations might actually assist in terms of compliance with care, that is entirely unpredictable and, in any event, there will be other aspects which will add to the demands of care, and that is particularly important in circumstances where carers have in the past been overwhelmed.

28. He was asked about life expectation and he said that the test he tended to apply was to ask whether he would be surprised if GM died during the current year, and he said he would not be surprised. Then in response to a question of mine, whether he would be surprised if GM survived another five years, he said he would be extremely surprised. Therefore, it seems to me for the purposes of thinking about this case I ought to think about GM as perhaps having a year or two only of his life left to him.

29. That for me, I am bound to say, actually weighs quite significantly. It underlines that if there is to be any attempt ever to allow GM to live at home it has to be done now, and it also tells me that we may well be dealing with a problem that is relatively short-term. Of course, I daresay, and indeed there is some suggestion in the papers, that GM had defied pessimistic prognosis in the past and I have long since learned that nothing is certain in this world.

30. I ought, before leaving Dr. Anderson's evidence, also acknowledge that the whole question of medication is going to be more difficult in the home setting than it is in a care setting, particularly the 'as required' medication, which is a relatively strong drug designed to address disturbed or aggressive behaviour, is one that requires a degree of informed judgment to be able to know when and how to administer it.

31. That seems to me to have set out every issue which the court has to take into account, bar just one, and that one is this: the Official Solicitor has asked for a number of conditions - that there should be four one hour calls a day, partly for observation, partly to assist with care; there should be consideration given to overnight provision, telecare provision and that certain clear expectations should be made of FP, namely, that she will seek help promptly, if necessary, comply with medical advice when given, recognise that any failure to co-operate may well result in a placement being brought to an end, as may any default in the obligations that she takes on. There is then the health authority being asked for weekly reviews for the first three weeks and monthly thereafter.

32. It seems to me that those are conditions which may have much good sense behind them which it would be very difficult to incorporate as conditions of an order, and may be better incorporated as recitals to an order setting out the expectations of the parties and the willingness of the parties to comply with those expectation. FP, through Mr. Stockwell, indicated a number of responses, the first was to say that what the Official Solicitor is asking for is more than his expert asked for, which is certainly true. Secondly, with the considerable number of visits it would be very important to have some continuity of person in terms of visitors. That seems to me eminent good sense and something that the authorities ought to consider. There is no doubt that calls of this sort are intrusive. It seems

to me, however, that that may be a price that has to be paid at this stage of development. The same applies in the consideration of overnight sleeping in care. I have, as I say, the evidence of Mr. Wall in relation to this.

33. I have thought carefully about this, well aware that I am making decisions on relatively limited information, and without the benefit of evidence being tested out, yet decisions which have a profound impact on the care of GM. I am aware too that either approach is redolent with potential risk to GM's welfare in the manner that I have set out, and I recognise entirely openly that there is much to be said against, as well as for, either approach. If there is a placement in a care home, we will probably never know whether that was right or not. If there is a placement at home, we most certainly will discover whether it was right or wrong, and I specifically acknowledge that the court may be shown to have been wrong in the decision that it takes.

34. Nevertheless, with all those matters set out and held in mind I have come to the conclusion that I ought not to continue this authorisation under schedule A1, but to permit GM to return to his home. I am very influenced, rightly or wrongly, but it is only right everyone should know it, by the timescales in the case. I am very influenced by the desire to allow people where it is at all possible to spend their end time within the family rather than in an institution, even if there are shortcomings in terms of care which an institution could address. It seems

to me though that it would be very unwise for anyone to insist on a discharge from care until some of the basic building blocks are in place.

35. I made it clear in the course of the evidence that I did not have any regard for the welfare of FP or her son. I say that, not because I do not think that is important, I think it is very important, but because it is simply no business of mine. They are entitled to take the decisions that they have taken about what they want to do in this case. Whether I think that wise or not, those are matters which are peculiarly for them and not for me. Their welfare is relevant to me only in so far as it impacts on that of GM.

36. Having said that though, and they having put forward the proposals that they have, they do inevitably engage with the jurisdiction of the court, and I think it is right that one or two matters are therefore said. First of all, this proposal will only work if there is a substantial professional involvement of the sort that the Official Solicitor postulates. If that is prevented or obstructed, then it seems to me that the entire placement is put at risk. On the other hand, the observations of FP as to some continuity of care seem to me entirely sensible and ones that should be taken seriously in its planning. I think it is right that there should be recitals in the order that FP will seek help promptly if it is required, will comply with medical advice, will seek advice in relation to medication, and recognise that any failure or

default may result in termination of the placement. I am not in the business, nor is it any part of my role, to predict the future, but it seems to me that if this placement did break down it is inconceivable that in the circumstances of this case it could be tried again. Therefore, it is of fundamental importance to the welfare of GM that this placement is properly planned and sympathetically and sensibly carried out.

37. There is no doubt that there is at the moment considerable antipathy between the family and certainly the medical professions. That is not uncommon in this kind of case. There is a significant obligation on the family at this stage to endeavour to swallow the resentments of the past and to resolve to work with the professionals, most of whom I suspect will be new, in terms of making this placement work.

38. In all those circumstances I have come to the conclusion that I should discharge the authorisation and permit the return home. As I indicated, it seems to me that the various conditions need to be recitals in the order. There need to be declarations of incapacity, both to litigate and to deal with care issues and where he should live. It seems to me we will now have to give some thought to future case management. It is not for me to say when GM should be discharged from hospital, that simply is not a matter on which the court is competent to pronounce, beyond saying that I hope everyone will see it as their role to make that transition as smooth as it can be, even if the view is

taken by the professionals that the court has gone the wrong way.
