

No. 1155573T-01

IN THE COURT OF PROTECTION

AND IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

AND IN THE MATTER OF MM (an adult born on 25 June 1927)

BETWEEN:

THE CITY OF SUNDERLAND

Applicant

and

MM (BY HER LITIGATION FRIEND, THE OFFICIAL SOLICITOR)

RS

SB

MP

SA

First Respondents

JUDGMENT

1. This is an application by RS to the Court of Protection for a declaration that the Article 8 rights of RS have been breached by the denial of contact between MM and RS. The Official Solicitor who acts on behalf of MM has made it clear that he does not seek a declaration on her behalf and seeks to assert that the response of the Local Authority was a proportionate and reasonable response to ensure the protection of MM. Mr O'Brien states that there is no benefit to MM in a declaration being made in respect of her thus it is RS who pursues the application before me.
2. The substantial issue in the case, namely whether contact between MM and RS was in MM's best interest was determined by the court on 20 October 2008 when a declaration was made that it would be in the best interests of MM to have weekly direct contact with RS.
3. The issue in respect of the Article 8 rights was adjourned to be determined at a later date and directions were given to enable that matter to be heard in January of 2009. The matter came before me on 9 January 2009 and judgement was reserved to be provided at a later date. It is a matter of considerable regret that it has taken me so long to complete this judgment and I apologise to the parties concerned. I

have had to deal with a number of complex and urgent cases and can only apologise that the judgment has been unavoidably delayed.

4. The Applicant Local Authority Sunderland City Council commenced proceedings in the Court of Protection on 4 March 2008. MM had been diagnosed as suffering from vascular dementia. She had been admitted to hospital on 19 February 2006 and had been transferred for assessment to Farnborough Court on 13 April 2008. Subsequently she was transferred to a care home with elderly mental illness facilities on 27 May 2008. She has remained within that accommodation to date.
5. RS ceased to have direct contact with MM on 15 August 2006 and did not resume contact until the court made an order that a period of observed contact should take place on 10 July 2008.
6. The background to this matter is that set out in the various statements filed within the Court of Protection proceedings. (RS) is 80 years of age as is (MM). MM was married to her husband RM for 51 years until his death in 1998. RS was married to his wife for 47 years. Following upon the death of their respective partners it seems RS and MM rekindled an acquaintance dating back to childhood and a relationship developed between them. It is not clear exactly what circumstances prompted MM's move into RS's accommodation, but in or about 2002 MM moved into RS's property and they cohabited until MM's admission to hospital. It is the contention of SB and MP (who are MM's daughter) that the relationship was one of friendship only and not an intimate personal relationship as alleged by RS.
7. The Local Authority accept that the relationship between RS and MM, "was such that it gave rise to the right to a family life under Article 8." I am satisfied upon the evidence before me that RS and MM shared a home and MM chose to remain living with RS despite being repeatedly offered alternative accommodation by her daughters. On balance I accept that it was an intimate personal relationship which gave rise to a positive obligation upon and on behalf of the Local Authority to respect the right to private and family life of both MM and RS. The Local Authority accept that as a public authority it has a duty to respect the Article 8 rights of RS and MM.
8. Article 8 states, "everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".
9. However it is the contention of the Local Authority that any interference with the rights of RS and MM for which the Local Authority was responsible was

proportionate to the need (ie the protection of MM), which makes it legitimate (Re W -v- B (Careplan) [2001] 2 FLR 582 per Hale LJ).

10. Following up on the admission of MM to the care home on 27 May 2006 RS visited her on a regular basis until August 2006. The documentary evidence provided to the court sets out that in or around June 2006 SB and MP (the daughters of MM) became concerned that, "negative behaviour and verbal comments made by RS during his visits to MM were having a detrimental effect upon her wellbeing". Further the manager of the care home also expressed the view that RS had spoken to MM and other residents in, "a harsh tone".
11. A meeting was arranged for 13 June 2006, at which discussions took place about the concerns raised in respect of RS's behaviour and its impact upon MM. RS accepted that he had behaved inappropriately in some ways and agreed to refrain from this sort of behaviour and to reduce his visits from daily to every other day. Thereafter the Local Authority attempted to ascertain MM's wishes with regard to contact and Mr H, the Social Worker, met with MM on a date in June and two dates in August. The stated purpose of the meeting between Mr H and MM was to establish, "who MM wishes to remain in contact with in her personal and social networks". Initially it was recorded that MM was, "distressed disorientated and anxious and not able to communicate her wishes clearly". But on 8 August 2006 when Mr H visited MM and discussed with her whom she wished to see it is recorded that her response was, "she was happy for both her daughters and RS to visit her at the care home and to support her out in the community with the support of both her own daughters and RS's daughters". Further Mr H recorded that Miss L, the care home manager, had stated to him, "MM has anxious periods where she wanders stating that she misses RS. This happens when RS leaves the building after a long visit".
12. However, SB and MP reported that upon 11 August 2006 MM had stated to SB that she no longer wished to see RS. When Mr H discussed the matter with MM on 14 August 2006 she again indicated, as she had before, that she was happy for both her daughters and RS to visit her at the care home and to support her out in the community. It is further recorded that she stated, she has not had contact with family or RS for a while but they can come and see her whenever they want to"
13. There were also further discussions with RS and his daughters and a concern was expressed that RS continued to talk negatively about MM's daughters, the home and the residents. The care home manager was concerned that RS's behaviour appeared to unsettle MM and make her anxious and frustrated. It is therefore clear that there were legitimate concerns which needed careful investigation. It was appropriate for the Local Authority to consider the behaviour of RS and its impact upon MM and further it was appropriate that the Local Authority should attempt to resolve matters by discussion with RS. A planning meeting took place on 15 August 2006 to which SB, MP, RS and RS's daughter CC were all invited. Miss L the care home manager also attended the meeting which was convened by

the Social Worker with responsibility for MM, namely Mrs D and Mr H. The minutes of that meeting are set out at D1 in the bundle. It is recorded that, Mrs D advised that Social Services are taking a mediator role in this situation but have sought advice as to the legalities of the situation much of which rests upon whether MM has capacity to make her own decisions". The conclusion of the meeting is set out at D4 in the bundle. It is recorded, Mrs D explained that in the current situation we need to try and establish a way forward which is suitable for all parties, but which protects MM's best interest –

- Need to establish whether MM has the capacity to make decisions as to who visits her – Mr H to write to GP to explain the situation and ask for his opinion.
- If MM is assessed as having capacity to make a decision on who she sees
- However the decision as to who is able to come in and out of her home rests with the manager who ultimately has the right to restrict access to the home.
- Should [the care home] come to this conclusion if MM is deemed to have capacity and still wishes to see RS then she would need to do this outside the home
- If MM is assessed as not having capacity to make her own decisions about who she sees, then her family as next of kin would make decisions in her best interests

Conclusion

- Staff at The Care Home to monitor MM to record any anxious behaviour due to RS being absent
 - Staff at The Care Home to report to Ms L if MM is asking for RS
 - Mr H to contact GP for medical opinion re capacity as identified.
 - MM's daughters are adamant that RS and his family should not be visiting MM at this time
 - Ms D asked MM's daughters to keep this decision under review.
 - Mr H to maintain contact with all parties."
14. At the end of the meeting RS was informed that he and his family would no longer be permitted to visit MM pursuant to the decision of SB and MP. It is clear that Mr H and Mrs D based their views about forbidding RS to visit MM

upon their understanding that as next of kin SB and MP were entitled to make a decision about who was able to visit MM. There is no evidence that Mr H or Mrs D made their own professional assessment of MM's best interests or that they gave any guidance to the care home or to MM's daughters as to how MM's best interest would be determined. Further neither considered whether an outright ban on MM having any direct contact with RS was a proportionate response to the risks to MM that might arise from RS's alleged conduct. The identified risk, was distress and upset, not physical harm.

15. Mr Brown on behalf of the Local Authority submits that by the time the planning meeting took place on 15 August 2006 the care home had taken the decision that as a consequence of RS's behaviour and the effect which it had on upon MM they would not allow RS access to the home. It should be noted that at this stage the Local Authority were attempting to resolve a dispute between private individuals. The Local Authority emphasised that, "the decision to exclude RS from the care home was a decision taken by the home and as a consequence the Local Authority had no control over the decision." It does seem that there is a lack of clarity as to who took the relevant decision, and is therefore responsible for the termination of direct contact between MM and RS. The minutes of the planning meeting on 7 August 2007 record, "The outcome of the previous meeting was summarised, in that the decision was made by MM's daughters that RS should not be allowed to visit their mother and that care home as a private business took the decision not to allow RS access to the home in view of the upset that had been caused when he had been visiting MM. It was explained that after considerable time in obtaining a medical opinion of MM's capacity Dr S the locum Consultant Psychiatrist had assessed her and stated that she does not have the capacity to make decisions in her own best interests. Mrs D advised that today's meeting had been called by Adult Services to try and move the situation forward. She reiterated that Adult Services have taken on a, "mediation" role in this matter and were not instrumental in any decisions taken about access to MM".
16. RS was obviously very unhappy at the decision reached. He had indicated that he would do whatever was best for MM as long as she was happy, but he and his daughter felt that MM had been denied any choice in the matter and CC wrote to the Director of Adult Services on 15 August 2006 setting out very clearly their concerns about the termination of contact and notifying a formal complaint about the matter. The letter specifically sought that an investigation should be undertaken into the circumstances surrounding the denial of contact between RS and MM. A letter in response from Mr F, Head of Adult Services, dated 12 September 2006 set out, "With regard to the decision made to prevent your father from visiting MM at The care home as you acknowledge Adult Services staff did their utmost to achieve an amicable solution to this difficult situation. However, our Legal Services have advised us that until the issue of MM's capacity is determined the Local Authority are adhering to the wishes of her daughters as next of kin and those wishes are that there should be no contact between RS and MM. However once the issue of capacity is determined I shall come back to you.

As was discussed at the meeting you attended, the decision was taken by MM's daughter and the care home following a number of incidents that occurred when RS visited MM in the care home, and which have been discussed in detail with RS who has not denied his actions. The care home have decided that facilitating access between MM and RS is not in her best interests and therefore have taken the decision to deny him access to the home. The care manager involved in MM's care will be monitoring the situation to see whether your father's absence is noted to have a detrimental effect on her and to maintain contact with her daughters to see whether they are willing to reconsider their decision. Obviously this is something that will be reconsidered once the capacity issue is resolved. With regard to MM's wishes and views at this time it is the opinion of the professionals involved that MM may lack the capacity to make an informed decision. Clarification of this is being sought from her GP and should this medical opinion identify that MM does have capacity the appropriate steps will be taken at that time. However, I am of the understanding that there is little dispute regarding MM's lack of capacity".

17. Following upon this response the Local Authority sought to obtain a medical assessment, which of course was necessary, although the view of those professionals who were charged with MM's care was expressed to be that she lacked capacity. No medical assessment was obtained until June 2007, some ten months later. The Local Authority set out length the efforts they made to attempt to obtain a medical assessment. It is submitted on behalf of the Local Authority that, "The attempts of the Local Authority to obtain helpful medical opinion on the issue of capacity were regularly thwarted by factors beyond the control of the Local Authority".
18. It is said that the Local Authority were reliant upon the co-operation of the Health Services. The chronology of the attempts to obtain a medical opinion makes very sorry reading. It is not a matter of allocating blame between the Health or Local Authorities. The reality of the situation is that for a period of ten months the whole issue of contact between RS and MM was put on hold and no contact took place. The view held was, "It is the opinion of the professionals involved that MM may lack capacity to make an informed decision.... I am of the understanding there is little dispute regarding MM's lack of capacity". Therefore, the Local Authority were clearly alerted to the very real possibility that MM lacked capacity. If there is a doubt about an individual's capacity the presumption of capacity will prevail and it is her declared wish that should be respected, MCA 2005 Section 1 (2). Where the capacity is in issue and if it has been determined that a medical opinion is necessary before taking any action or steps in respect of determining either the Article 8 rights or the best interests of that person, then it is incumbent on the Local Authority to act with all expediency in securing the determination of that capacity. Either the declared wish should be respected and MM had indicated a wish at various stages to see RS or if the Local Authority sought to take action to impose their view of her best interests, then it is unacceptable to allow a period of ten months to pass without determination of the

issue of whether or not MM did indeed lack capacity, which lack of capacity would then entitle them to pursue a course of action to secure what was in the view of the Local Authority in MM's best interests.

19. Miss Dolan submits that where administrative difficulties arise, such as securing a psychiatric assessment of capacity, the fact of those difficulties does not render the continued and extended infringement of ECHR rights necessary and proportionate, see *Olsson -v- Sweden* [1998] 11 EHHRR 259. "There is nothing to suggest that Swedish authorities did not act in good faith in implementing the care decision. However, this does not suffice to render a measure necessary in convention terms. An objective standard had to be applied in this connection. Examination of the government's arguments suggests that it was partly administrative difficulties that prompted the authorities' decision; yet, in so fundamental an area as respect for family life, such considerations cannot be allowed to play more than a secondary role."
20. Thus there is a necessity that any issue in relation to the upholding of rights must be determined expeditiously as delay in the decision-making process may itself amount to an infringement of rights. It is regrettable that there was no policy, procedure or service agreement in place between the Local Authority and local NHS Trust in respect of securing an assessment of capacity of a person for whom the Local Authority were responsible. Thus I find there was unacceptable delay. RS was not informed within this period that MM had stated that she would like to see RS if he made the initial move to visit and both MM and RS continued to be denied the opportunity to see each other. This expressed interest did not prompt the Local Authority to consider if continued cessation of contact was a necessary or proportionate interference with the rights of MM and RS under Article 8. The views of RS were not canvassed as to whether or not he would agree to having limited contact or supervised contact. There were continuing discussions with SB and MP, who maintained their opposition to any contact between their mother and RS but there was no discussion with RS.
21. The reality of the situation is that the view had been taken erroneously, by Mr H and Mrs D and the care home, that as next of kin SB and MP were entitled to make a decision about who visited MM. By letter dated 14 May 2007 the Company Secretary of the care home wrote, "We are in receipt of your letter dated 26th April 2007 and have noted its content. MM came to our home on 27th May 2006 and she is now a very settled resident. She was entrusted to our care by MM's daughters. In August 2006 we were instructed by MM's daughters that RS was to have no contact with their mother and as such we are obliged to carry out the instructions of MM's family. We therefore believe that it is not our place to influence the situation and as such any further correspondence should be directed to MP and SB". The Local Authority maintain that the decision to exclude RS from the care home was a decision taken by the home and as a consequence the Local Authority had no control over the decision. The care home have made it

clear by their letters and correspondence that they would say it was not their decision.

22. The Local Authority submit that they were attempting to monitor a dispute between private individuals. That does not address adequately the circumstances or situation which arose in this particular case. No one at the relevant time was asserting that MM had capacity, and thus if that was the view generally held by those involved with MM the Local Authority had a duty to act upon what they considered to be the last capable wish that she expressed and consider how MM's best interests and welfare could be served and protected. It was not sufficient to merely promote the wishes of the next of kin without any consideration of MM's wishes or exploration of her best interests. Additionally the Local Authority had assumed some responsibility for MM and therefore should have sought to guide the care home as to the correct approach which the care home should take. They did not do so. They did not undertake the exercise of seeing if a total ban was proportionate, or whether supervised contact may be feasible. Mr Brown argues that at that stage supervised contact did not seem feasible due to RS's apparent inability to control his negative outbursts despite constant reminders. In those circumstances Mr Brown argued that supervision could not prevent causing distress to MM as once the sentiment was expressed the damage would be done. I do not accept that it was impossible to devise some form of supervised contact which would have ameliorated any such difficulties.
23. The Local Authority had, quite rightly involved themselves in the care of MM and had a duty to act positively to protect the rights of MM and their actions needed to be proportionate to the legitimate aim pursued, namely the protection of MM's welfare. There is no argument and cannot be any argument I find other than that the Local Authority acted in good faith and with a proper motive, but those considerations are not relevant to the test of proportionality. Further they failed to undertake any exercise to weigh up the detriment to MM's welfare in losing the opportunity to see the person with whom she had been living, and with whom she had a settled and intimate relationship. The harm that they were seeking to prevent was harm through words, there was no question of any violence, and after there had been discussions and meetings in June and July 2006 where RS was instructed that he must not upset MM by saying such things as she should not be in the home, or making derogatory comments about her daughters, there is no recording that MM was upset by RS, indeed the only recording was a file note on 27 July 2006 saying, "MM appears happy with RS's daily visits but becomes quite distressed when he leaves". The reported incident prompting the meeting was a report from MP and SB that MM did not want to see RS.
24. Mr Brown argues that RS could have taken steps himself to bring the matter to the attention of the court. In fact RS did attempt to achieve some resolution of the matter. On 30 November RS contacted Mrs S (MM's social worker who replaced Mr H) to ask why he was still not allowed to visit MM and in January 2007 representations were made to the Local Authority on behalf of RS by Age

Concern Advocacy Services requesting contact to MM. It seems that the Local Authority themselves in May 2007 wrote to MM's GP requesting an urgent referral for assessment of MM's capacity, and that Local Authority then stated that they recognised that denial of contact may be a breach of MM's Article 8 rights. Dr S was instructed to provide a capacity report, which he did very quickly, and the report dated 18 June was made available to the Local Authority it seems on 25 June 2007. The report as I have indicated dated 18 June 2007 stated that in his opinion MM lacked capacity and that lack of capacity included lack of capacity to decide upon contact with RS but Dr S stated, "If RS's visits were supervised to ensure he did not raise any matters upsetting to MM I believe this would be in MM's best interests. His visits may introduce moments of pleasure and happiness into her life if correctly supervised".

25. A meeting was held on 7 August 2007, in which the Local Authority Solicitor expressed the view that MM's rights may be being infringed by her being denied to RS and that RS's Article 8 rights might also be being infringed. Thus the Local Authority recognised that a referral to court may be necessary. In my view bearing in mind their knowledge and involvement in the case they should have recognised that any possibility of an agreement in relation to contact by RS to MM by MM's daughters was highly unlikely and that further delay should be avoided. RS confirmed his willingness to use an IMCA but SB and MP indicated that they would not accept the views of an IMCA if the result of the involvement of the IMCA was that contact was suggested. It is difficult to see in those circumstances why it was thought that referral to an IMCA was a helpful measure. It seems that RS was willing to accept the views of the IMCA, but unless both sides in the dispute were willing to accept such guidance, it seems difficult to argue that the delay occasioned by the referral to the IMCA was justified in an attempt to mediate a settlement. Obviously if a settlement can be achieved it is desirable, but there was no indication that a settlement was a possibility, and further it took another two and a half months before it was ascertained that the use of the IMCA service was inappropriate in any event.
26. It was then determined that an application should be made to the Court of Protection. The application was made on 23 November, but returned on 10 December as it was incomplete. On 31 January 2008 the Local Authority reapplied to the Court of Protection. In the application it was set out that the Local Authority requested, "determination as to whether or not contact between MM and RS is lawful and in MM's best interests and determination as to whether or not the Article 8 rights of both MM and RS are being breached by the denial of contact between them". The Local authority then went on to include within the COP3 form that, "In the opinion of the applicant (the Local Authority) the continued denial of contact is likely to infringe both MM and RS's Article 8 rights to a private and family life under the Human Rights Act".

27. It is apparent, of course, that the Local Authority did not pursue their application for a determination of the Article 8 rights and oppose the application of RS for a declaration that his Article 8 rights were breached.
28. Once the application to the Court of Protection was made, the court ordered observed contact and thereafter the independent social work expert recommended that contact between MM and RS should continue in the future. A declaration was made that there should be weekly contact between MM and RS in the presence of RS's daughter, such contact being in MM's best interests. It is of note that when contact did take place, being observed by the independent Social Worker, Mr F recorded, "As soon as she saw RS her face lit up in a smile. She called him by name and when asked if she recognised him she commented I knew him as soon as I saw him. She held his hand firmly and asked what he had been doing with himself MM interacted extremely well with RS".
29. This has been a complex and lengthy matter, and not without its difficulties for the Local Authority in their role within this difficult family dispute, but I am satisfied that the Local Authority should have come to the view that MM and RS's rights were likely to be infringed by preventing contact between them without a short period of time following upon the meeting in August 2006, and must have come to that view in June of 2007 when the report from Dr S was received which recommended that supervised visits would be in MM's best interests.
30. The focus of the court must be upon the welfare of MM but in looking at the welfare of MM it is right to consider her rights and in conjunction with those rights, the rights of RS. I am satisfied that the history of the circumstances, events and actions and inactions of the Local Authority entitles RS to a declaration that his Article 8 rights were breached by denial of contact between MM and RS and I am satisfied that the particulars set out at (a) to (h) in the Skeleton Argument provided by Miss Dolon are made out. The details of those particulars shall be appended to this judgment.
31. The application to the Court of Protection could and should have been made much sooner. The outcome of the case has resulted in an order whereby MM and RS are able to enjoy contact. RS has stated that he does not seek damages, and Miss Dolon confirmed that what he sought was a recognition that both RS and MM were unjustly denied the opportunity to enjoy each other's company in an appropriate manner. I apologise again for the time it has taken to provide this judgment, and hope that the continuing contact between RS and MM proves beneficial to both of them. There shall be no order as to costs save for detailed assessment of 1st & 2nd Rs costs. I give leave for an anonymised version of this judgment to be reported.

Approved by HHJ Moir on 4 November 2010.

Appendix to the Judgment (pursuant to para 30).

From August 2006 the Local Authority failed to carry out its positive obligation to respect the right to private and family life of MM and RS and failed to take appropriate measures to secure respect for the right to private and family life of both MM and RS.

Particulars of Breach of Art 8 rights

The Local Authority through its employees servants and agents:

- a. took no or no adequate steps to consider or ascertain whether either MM's or RS' Article 8(1) rights were being breached by prevention of contact between them;
- b. took no or no adequate steps to consider whether the interference with either MM's or RS's Art 8(1) rights by means of a total ban on contact between them was a necessary and proportionate measure under Art 8(2);
- c. Prior to 18 June 2007, took no or no adequate steps to consider whether the avoidance of any potential detriment to MM arising from RS' alleged behaviour could be achieved with the adoption of less restrictive and more proportionate measures, such as supervision of contact between them.
- d. wrongly endorsed and adopted the position that SB and MP were entitled to prevent direct contact between MM and RS;
- e. took no steps to carry out an assessment of MM's best interests by their own social workers/care managers.

- f. failed to secure timely assessment of MM's capacity;
- g. wrongly believed that consideration of whether MM's and RS's Art 8 rights were being breached and whether such breach was necessary and proportionate could not take place without a medical assessment of MM's capacity having been completed;
- h. after 18 June 2007, failed to implement the supervised contact between MM and RS that the Local Authority were advised by Dr S would be in MM's best interests.