

Her Honour Judge Marshall QC
(On Appeal from District Judge Jackson)

28th May 2009

Re F

F (by her litigation friend)

Appellant
(*ex parte*)

JUDGMENT

Mr Stephen Cragg (instructed by Irwin Mitchell Solicitors) for the Appellant

No other party appeared on the appeal

This judgment was handed down in private, but the judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the patient and members of her family must be strictly preserved.

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

Hazel Marshall QC
26th June 2009

HH Judge Marshall QC

1. This judgment gives the reasons for my order allowing the appeal in this matter, made on 28th May 2009.

This appeal

2. This is an appeal brought with my permission by F, acting by her father as litigation friend, against an order of District Judge Jackson made on 27th November 2008. It raises an issue regarding the test which has to be satisfied with regard to a person's capacity, in order to found the jurisdiction of the Court of Protection to entertain an application for any order or direction to be made under s 48 of the Mental Capacity Act 2005.

Background

3. F is a lady of 52, who, according to the medical evidence, suffers from a "dissociative disorder of movement and a somatisation disorder", which has for a long time affected her by leaving her in a state of pain, and bed bound, largely unable to move.
4. However, the history of the care provided for her by the local authority has been troubled. It has previously even given rise to judicial review proceedings. The local authority found F's behaviour to be antagonistic and unco-operative making it effectively impossible for it to provide appropriate care services to her. It had therefore been reduced to providing only minimum nursing care of 45 minutes three times per day, thereby leaving F for long periods with her apparent physical needs unattended. It had, however, expressed concerns about her mental condition.
5. The issue of F's capacity therefore came to the fore. F was being treated as a person who could decide for herself whether to accept or reject care services and whether she wished to co-operate in this, which she was not doing. The question was whether this was a correct assessment of F. If it was, then the court had no power to intervene. If it was not, then the court would have power so to declare, under s 15 of the Mental Capacity Act 2005, and to go on, then, to decide what was in her best interests in that regard.

6. The evidence about F's capacity was mixed. In June 2008, a consultant psychiatrist, Dr T, had assessed F and opined that she did understand the effect of her behaviour on health staff, but was justifying it, and showed no intention of modifying it. Shortly afterwards, an experienced solicitor in mental capacity matters, Mr Alex Rook, interviewed F at some length, and formed the view that she did not have capacity to give instructions for litigation about the provision of social and care services for her, because she was not able to appreciate the complexities of her position, (although she was capable of expressing herself and her views).
7. In the circumstances it was decided that the issue of F's capacity needed to be determined by an application to the court for a declaration under s 15 of the Mental Capacity Act 2005. With the concurrence of the Official Solicitor, this was brought in the name of F by her father acting as her litigation friend. F was granted public funding for this purpose. The application proposed initially to join the relevant authorities (the local Primary Care Trust and the Local Authority) into the case in order to enable a report to be jointly instructed and obtained from a qualified mental capacity expert with regard to F's capacity in relevant areas.
8. Evidence was needed to support the application. Mr Rook's opinion was tendered. However, F's GP declined to complete Form CoP 3 (Assessment of Capacity) on the grounds that she was not an expert, and Dr T was unwilling to do so, either. The CoP3 was therefore completed by Dr M, a consultant neuro-psychologist, who had seen F on one occasion on a referral by Dr T.
9. His views, however, were tentative, and rather inconclusive. His general comment was that whilst the disorders with which F had been diagnosed were classed as mental illnesses, they did not necessarily involve impairment of reasoning, and whilst F's behaviour towards her carers raised the possibility of a personality disorder, there had as yet been no such formal diagnosis. Because of a relatively short examination, he could not be clear whether F lacked the capacity to litigate the care issues in her case but he considered that it was "certainly arguable that [her reported discussions with her solicitors] reflect a lack of capacity". With regard to her capacity in other areas, such

as how she was behaving towards the care services, his ultimate conclusion was expressed to be that he was “inclined to think it on balance more reasonable to retain the presumption of capacity in her case”. This was because he noted that at times F was either unwilling or unable to express opinions calmly clearly or concisely, but at other times she was able to be clear about what she wanted. He acknowledged, however, that F’s solicitor held a different opinion, at any rate with regard to litigation capacity, and felt it would be reasonable to request “a specialist assessment of that capacity”.

The order appealed

10. On this evidence, the matter came before DJ Jackson on paper, and then at an *ex parte* hearing on 27th November 2008. She declined to make any order, whether joining in the relevant authorities or directing a report under s 49 of the Act. She was willing only to adjourn the case to enable further medical evidence to be provided. If it were not, provided by 22nd December 2008, the application would be struck out.
11. Her reasons for taking this course appear only from a partial transcript of the hearing, as she gave no formal judgment. However, she seems to have taken the view that since the Act laid down that mental capacity was to be presumed, she had no jurisdiction to make an order unless and until this presumption was rebutted – and as to this, the evidence before her was insufficient, certainly since Dr M was *not* saying that F lacked capacity. In the face of that statement, she was not prepared to make an order directing any psychiatric assessment of F, under s 49 of the Act, or to join any other parties into the proceedings.
12. This decision therefore raises issues of the correct test to be applied for the court to assume jurisdiction under s 48 of the Mental Capacity Act 2005, to make “Interim orders and directions”.
13. F appeals on the grounds that either the test applied by the District Judge was wrong, in that she appears to have regarded it as necessary to rebut the presumption of capacity before the court could assume any jurisdiction, or, alternatively, that she applied too stringent a test for the engagement of the

court's initial or interim jurisdiction as a matter of degree, in holding that the evidence before her was insufficient.

14. I gave permission to appeal on 28th January 2009, on the grounds that the appeal stood a real chance of success, and/or that there was some other compelling reason for an appeal, namely that the issue of the true interpretation of s 48 was appropriate to be considered further. Following some administrative difficulties over listing the hearing and the question who, if anyone, would take the part of respondent to the appeal, the matter was listed for hearing before me on 28th May 2009.

Intervening matters

15. In the meantime, however, the situation moved on. Despite the lack of any order, the local authority joined with F's father to instruct a further independent psychiatric report on F, who was persuaded to co-operate sufficiently for this to take place. The deadline imposed in the order of 27th November 2008 was extended, and a report and supplemental report were obtained from further independent mental capacity specialist, Dr H, on 28th January and 4th February 2009.
16. I need not record the details or basis of Dr H's findings about F. In brief he concluded that she suffered from a mental disorder, and that she did lack capacity either to conduct litigation, or to make decisions with regard to her residence or her own care needs, including, specifically, capacity to refuse medical care or treatment. In the light of this, a care plan for F was devised by the local authority, and a further application was made to the Court of Protection on 5th March 2009, with the local authority and the relevant PCT and NHS Trusts being informed, as well as the Official Solicitor. On 19th May 2009, I was asked to (and did) make an interim order on paper, by consent, declaring F's lack of capacity in the relevant respects, and directing that it was in her best interests that the interim care plan (which involved her imminent assessment for admission to a specialist care unit) should be implemented, inviting the Official Solicitor to act on behalf of F as her

litigation friend, and directing that the matter be listed for further directions at the same time as the hearing of the appeal, on 28th May 2009.

17. This further hearing was attended by counsel for the local authority, and also by Mr Cragg on behalf of F, with the knowledge (but not formal instruction) of the Official Solicitor, in view of F's now accepted lack of litigation capacity. The order of 19th May 2009 was confirmed and continued, with further directions as to the course of the matter dependent on the imminent assessment of F and her reaction to the question of a course of in-patient treatment. Counsel for the local authority then withdrew, not being instructed with regard to the appeal.

The appeal

18. In the light of these developments, I therefore questioned whether there was still anything live in the appeal. Mr Cragg, however, invited me to deal with it nonetheless, for several reasons. First, he submitted that the appeal itself was not academic or hypothetical because it was apparent that F's state of mind was not only complex, but fluctuating. She might therefore regain capacity in the future, but if she then suffered some setback, the same kind of situation as had originally arisen could occur again. Second, he submitted that this was a point of substance and was not hypothetical, because if the learned District Judge's approach to the matter had been wrong, it could be seen to have caused practical problems of delay in obtaining appropriate reports and hindering access to relevant medical evidence and materials, which was undesirable. Third he submitted that in any event the point in issue on the appeal was a point of general importance, going to the correct interpretation of the statute, as to which there was no authority. Fourth, since his attendance had been necessary in any event, and since the costs of preparing the appeal had already been incurred with F being publicly funded, the balance of convenience favoured my deciding the point so as to provide guidance and not waste the resources already expended.
19. On balance, and with some hesitation, I decided that I would do so, since the point is a short one. However, I observe that the matter has been argued

on one side only, even though I do not think this would have affected my ultimate conclusion.

The law

20. It is by now well known that under the new regime of the Mental Capacity Act 2005, a person is to be assumed to have capacity unless the contrary is established: see s 1(2)). Furthermore, capacity is to be treated as ‘issue specific’ and not simply a blanket state of mind: see s 2(1), as reinforced by s 3(1).

21. Lack of capacity in relation to a matter or a decision is defined as

“being unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in, the functioning of the mind or brain” (s 2(1)).

Fortunately, s 3 (1) of the Act provides further guidance on what is meant by being “unable to make a decision”, since otherwise it would cause difficulty. Obviously it cannot mean literally “unable” to make a decision, since very few people fall into such an extreme category of feeble mindedness, and some people who have undoubted mental disorders affecting their thinking are perfectly well able to make decisions, albeit they may be bizarre ones. The “[inability] to make a decision for himself” refers to a defect or deficiency in normal powers of reasoning, ie a shortcoming in the ability to understand, or to retain, or to weigh up relevant information and/or to communicate a conclusion (s 3(1) (a)-(d)). Plainly the first three aspects go together, and can well be of a different character from the fourth.

22. By s 2(4), the issue whether a person lacks capacity as to any matter in the above sense is to be decided on the basis of the ordinary civil standard of proof, namely on balance of probability. The initial sections of the Act, and the comprehensive Code of Practice, which has statutory authority under s 42 of the Act, give guidance on particular aspects of the approach to deciding whether a person lacks relevant capacity. I am not concerned with these, but in general they are intended to underline the need to respect the individuality

of a person and avoid stereotypical or patronising assumptions when making the assessment.

23. By s 15 of the Act, the court is empowered to make declarations as to a person's lack of capacity to make decisions, either individually or of a class (ss 15(1)(a) and (b)). By s 16, where a person lacks capacity to make decisions relating to his personal welfare or to his property and affairs, the court is empowered to make decisions on his behalf in relation to those matters (s 16(1)). Alternatively, it can appoint a Deputy to do so (s 16(2)). Where a person lacks capacity, any act done or decision made on his behalf under the Act, ie whether by the court or a Deputy, must be made in his best interests (s 1(4)).
24. Paragraph 4.34 of the Code of Practice emphasises the importance of carrying out a sufficient psychiatric assessment if a person's capacity is in doubt. Likewise, the Code appears to assume that there will be expert evidence available to the court for evaluation, where an issue about a person's capacity requires resolution.
25. These are the basic general principles. However, it is obvious that situations can arise where the obtaining of a formal declaration or decision under s 15 or s 16 will take time, but common sense suggests that some action may be needed in the interim. Common sense also suggests that if lack of capacity in relation to any particular matter or decision is in issue (notwithstanding the presumption of capacity) then the court should have any necessary powers to enable the proper consideration and determination of that issue, even (and in fact inevitably) if this means making orders or giving directions which affect the person whose capacity is in issue, before that issue has been determined.
26. Section 48 of the Act is intended to provide for these situations. It states:

“48 Interim orders and directions

The court may, pending the determination of an application to it in relation to a person (“P”), make an order or give directions in respect of any matter if-

- (a) there is reason to believe that P lacks capacity in relation to the matter,
- (b) the matter is one to which its powers under this Act extend, and
- (c) it is in P's best interests to make the order or give the directions, without delay."

27. Mr Cragg argues that this is the provision which the court was here required to apply in order to determine whether or not it could and should assume jurisdiction to make an interim order upon F's application, joining the relevant public authorities and directing the joint commissioning of a psychiatric on F, for the purpose of then determining whether a declaration under s 15 should be made, and, if so, subsequently making any appropriate orders or decisions under s 16 on F's behalf.

28. Mr Cragg argues that the words "reason to believe that P lacks capacity" under s 48 are plainly a lower threshold test than "proof on balance of probability that P lacks capacity" under the combined effects of ss 2(4) and 15. He submits, further, that common sense says that it must be a relatively low threshold. The purpose of s 48 is to authorise the taking of urgent decisions which appear to be necessary in P's best interests "without delay", before there has been an actual determination that P does lack capacity. The "reason to believe" test is therefore met if there is evidence to suggest that there is a real possibility that P may lack capacity, as explained in s 3(1).

29. Mr Cragg argues, therefore, that the learned District Judge fell into error, because she in effect applied a higher test in declining jurisdiction. She applied the test whether there was in fact evidence before her sufficient to rebut the presumption of capacity, rather than only evidence suggesting that the presumption of capacity might be rebuttable.

30. Alternatively, if she did not apply the wrong test but applied the latter test, then she either erred in requiring too high a standard of possibility, or else she failed to analyse the evidence before her correctly. First, she appeared to have rejected or ignored Mr Rook's evidence, and looked solely at the medical evidence of Dr M. However, the evidence of Mr Rook, as an experienced mental capacity solicitor, had some weight. It clearly supported the view that

there was “reason to believe” that F lacked capacity at least (and directly) as far as litigation was concerned, but it also supported the view that there was reason to question and investigate other aspects of F’s capacity.

31. Second, as to Dr M’s evidence, he submitted that the District Judge had mischaracterised this as being evidence that F “had” capacity. Fairly viewed, his opinion was so tentative and circumlocutory that it still supported the “reason to believe” test, his eventual conclusion against pronouncing F to lack capacity being plainly driven only by the presumption of capacity which he felt obliged to apply because of the Act.
32. Mr Cragg’s submission was therefore, that, taking the evidence overall, there was clearly sufficient evidence to give “reason to believe” that F lacked capacity, certainly as regards litigation, and also sufficiently as regards other relevant matters such as appropriate care services for herself. This situation would therefore engage s 48 in principle. Thereafter, the second limb of the test for whether the court should intervene, namely whether it was in F’s best interests for some action to be taken without delay, would come into play. He submitted that a decision to commission a detailed psychiatric report to enable F’s wider capacity to be assessed without delay was a decision which could and (he submitted) plainly should then have been made under this section. .
33. Mr Cragg observes that the practical consequence of the approach adopted by the District Judge was that it would, apparently in all cases, be necessary to obtain a detailed or expert psychiatric evaluation before the court would accept that it had any jurisdiction to entertain proceedings under the Act at all. He submits that this cannot be right because Part 15 of the Court of Protection Rules, shows that it is envisaged that the Court itself will “manage” expert evidence, and plainly therefore assumes that it will be exercising jurisdiction before such evidence needs to be obtained, rather than only afterwards. The fact that expert evidence may only be filed with the permission of the court or a practice direction (rule 120) also shows that it is not intended that such evidence has to be obtained before the court can entertain an application regarding capacity in the first place.

Decision

34. I am satisfied from the transcript which I have seen, that the learned District Judge fell into error in dealing with this application at the initial stage, in one or other of the ways submitted by Mr Cragg.
35. The “presumption of capacity” reinforces the general approach of the Act, that “P’s” basic right to have the power to make decisions for himself is to be respected and protected, and can therefore only be displaced by sufficient evidence establishing that he does not have capacity in the relevant respect. However, such a finding is what ultimately grounds a formal declaration under s 15 of the Act, and s 48 expressly confers powers on the court to take steps “pending” the determination of that question. It follows that the evidence required to found the court’s interim jurisdiction under this section must be something less than that required to justify the ultimate declaration.
36. What is required, in my judgment, is simply sufficient evidence to justify a reasonable belief that P may lack capacity in the relevant regard. There are various phrases which might be used to describe this, such as “good” or “serious cause for concern” or “a real possibility” that P lacks capacity, but the concept behind each of them is the same, and is really quite easily recognised.
37. I therefore accept Mr Cragg’s submission that the “gateway” test for the engagement of the court’s powers under s 48 must be lower than that of evidence sufficient, in itself, to rebut the presumption of capacity. If and insofar as this was the test applied by the District Judge (as seems to have been the case), this was incorrect.
38. If the learned District Judge did not in fact ask herself whether the evidence before her was enough to rebut the presumption of capacity, but applied some lesser test, did she nonetheless apply too high a test? In my judgment she did, because it appears that she regarded nothing less than the positive opinion of a specialist medical practitioner to the effect that F did lack the relevant capacity as being sufficient to found her jurisdiction even to direct a psychiatric assessment of F.

39. This must, in my judgment, be setting too high a hurdle. The Act is meant to operate in a simple and practical way, and to facilitate any necessary determination about P's capacity if there is doubt. It is clearly intended at least that general medical practitioners and health professionals other than mental capacity specialists should be able to supply evidence which will enable the Court of Protection to decide whether it can or should intervene, and if so, how.
40. There is a danger, with the current spotlight on the new and more sophisticated approach to mental capacity contained in the Act and the very extensive Code of Practice, that general practitioners will think that that they cannot or should not complete such an assessment for the court because of lack of supposed expertise - as happened in this case. This would be likely to lead to their declining to do so in the very cases which are problematic, because there is doubt whether the borderline has been crossed, between decisions which are the product of impaired powers of reasoning, or are merely eccentric unwise or unreasonable decisions in the opinion of others. It would be unfortunate if a conclusive specialist assessment came to be regarded as necessary before the court would accept jurisdiction at all.
41. At a minimum this would cause delay and expense. More seriously, it would risk leaving a vulnerable person to slip through the net of protection intended to be provided by the Act. . This is especially so in the case of a person who, or whose family, could not readily afford the costs of a detailed psychiatric assessment, in which case it might then become very difficult or impossible to get the case before the court at all.
42. Second, it is in fact these very cases of difficulty, ie where lack of capacity is suspected but not clear, that the court needs to be called on to make an adjudication under s 15 at all. An example is where professionals disagree about a person's capacity to make a particular type of decision: see paragraph 8.16 of the Code. If lack of capacity is clear, the point will never be debated. If it is not, but is genuinely in doubt, then that is just the case in which the court should be able to intervene promptly, to enable a fast and efficient determination of the issue.

43. A lower threshold for engagement of the court's powers under s 48 is not at all inconsistent with the emphatic approach of the Mental Capacity Act 2005 that every adult is to be treated as entitled to make his own decisions, and is not to be interfered with in that regard without good reason to suppose that he is vulnerable through lack of capacity. The jurisdiction under s 48 has two stages, and, in my judgment, it is the second stage rather than the first which provides the real protection for P against undue interference with his affairs and his right to make his own decisions.
44. The proper test for the engagement of s 48 in the first instance is whether there is evidence giving good cause for concern that P may lack capacity in some relevant regard. Once that is raised as a serious possibility, the court then moves on to the second stage to decide what action, if any, it is in P's best interests to take before a final determination of his capacity can be made. Such action can include not only taking immediate safeguarding steps (which may be positive or negative) with regard to P's affairs or life decisions, but it can also include giving directions to enable evidence to resolve the issue of capacity to be obtained quickly. Exactly what direction may be appropriate will depend on the individual facts of the case, the circumstances of P, and the momentousness of the urgent decisions in question, balanced against the principle that P's right to autonomy of decision-making for himself is to be restricted as little as is consistent with his best interests. Thus, where capacity itself is in issue, it may well be the case that the only proper direction in the first place should be as to obtaining appropriate specialist evidence to enable that issue to be reliably determined.
45. The present case was, in my judgment, a case in which the threshold for engaging s 48 was clearly met. F's GP plainly regarded the issue of capacity as a difficult question, since he declined to get involved. Dr M's opinion was tentative and in reality was undecided, coming down to saying that, if he had to give an opinion one way or the other, he felt obliged to rely on the presumption of capacity. Mr Rook's evidence supported the view that F lacked capacity in relation to litigation, thus giving rise to the question how far such lack of reasoning capacity might affect other aspects of her behaviour.

As to this, an objective reading suggested that either F did not fully understand the implications of her attitude to her care providers, or that she did and was being deviously and deliberately overbearing or manipulative to try to get her own way. However, even if this latter were the case, it still gave rise to the rather more refined question whether this attitude was in itself the product of impaired reasoning powers within the meaning of the Act, or just of an individually unpleasant character.

46. To my mind, the unclear situation certainly suggested a serious possibility that F might lack capacity in relation to decisions about her own care needs, whether temporarily or on a more long term basis. That possibility was also, in my judgment clearly sufficiently serious, or real, that the court was entitled to take jurisdiction under s 48. The obvious matter needing determination was, in particular, whether F's attitude to her care arrangements did indeed stem from lack of capacity in that regard or not. The case therefore invited a direction appropriate to the circumstances, to enable this issue to be resolved with dispatch, even though the situation might not have been serious enough to justify making any further direction or order with regard to F's living conditions at that stage. .
47. It follows that I allow the appeal from the order of DJ Jackson in principle. However, in the light of the intervening events, no further order or direction is necessary or appropriate.

HH Judge Hazel Marshall QC