IN THE COURT OF PROTECTION **CASE NO: 13699739**

Before
Sir Mark Hedley

BETWEEN

LIVERPOOL CITY COUNCIL

Applicant

And

CMW
(By her litigation friend, the Official Solicitor)

Respondent

Mr. Sam Karim QC appeared on behalf of the Applicant.

Miss Leoni Hirst appeared on behalf of the Respondent.

J U D G M E N T

1. The question in this case is whether CMW has capacity to make certain decisions in seven specific areas: the conduct of proceedings, the management of her affairs, her residence, her care, her contact with others, the use of social media and the Internet and whether she can engage in sexual relations. If, and only if, the court is satisfied that she lacks capacity in one or more of those areas, can the court go

on to consider her best interests in that area. Incapacity is the only gateway to the exercise of the court's welfare jurisdiction.

2. This case is brought under the Mental Capacity Act 2005. It is subject to the principles set out in Section 1 of that Act. Of particular importance in this case is the presumption in favour of capacity, the "right" to make a foolish decision and the place of help in decision-making. Capacity itself is determined pursuant to Sections 2 and 3 of the Act both of which must be satisfied.

3. To his Position Statement Mr Sam Karim QC for the Local Authority has most helpfully appended a document entitled Legal Framework, which covers the areas set out above. Miss Leone Hirst instructed by the Official Solicitor who acts as Litigation Friend to CMW accepts its content as accurate, as do I. In those circumstances I do not propose to set out the law at any greater length than is required to explain my conclusions on the relevant questions.

4. CMW is a young woman who was born on 7th March 2003 and is thus now an adult. She has had a very troubled history (having been subject to a Care Order from 13th May 2008), which again I propose to set out at no greater length than is necessary to explain my conclusions. That life remains very troubled is shown by a very serious attempt at suicide on the 1st July 2021. Much that is relevant can be inferred from the fact that when she moved placement on achieving her majority, that was her 16th move.

5. She now resides in supported living accommodation in Liverpool (which is all that the Local Authority presently has to offer) and is subject to one-to-one supervision and significant restrictions on her contact with others. Much of this was put in place under the Care Order but has been continued in the Court of Protection by orders for her welfare based on interim findings of incapacity.

6. On 11th May 2021 CMW gave birth to a baby boy RCJ whose father is RJ with whom CMW has had a relationship for some time. For CMW this birth was probably the most important event in her life. However, because of the many difficulties already adverted to, the child is the subject of proceedings under Part IV of the Children Act 1989 and is currently in foster care, though CMW sees him regularly. These events have inevitably had a significant effect on the well-being of CMW.

7. The relationship with RJ has been very important to CMW, though many have questioned whether it has been in her best interests. Recently, however, RJ has been arrested in connection with sexual offences. There has been no contact since and at present it appears that neither RJ nor CMW desire contact with each other.

8. The court has had the advantage of two written reports from Dr. Angela Rippon (dated respectively 9th April 2021 and 5th July 2021), a consultant psychiatrist with considerable experience and expertise in this field. She also gave oral evidence. Beyond that the court has had the written evidence from Social Services and the Official Solicitor's representative's notes of conversations with CMW. Save for the last occasion when very understandably she felt unable to do so, CMW has always been online for these remote hearings and has on each occasion had a conversation with me.

9. That was the evidence available to me. I was asked (and agreed) to deal with the issue of capacity only. Having heard the submissions of Counsel, I reserved judgment with a view to putting it into writing and handing it down without need for attendance by the parties. This I now do by courtesy of His Honour Judge Gregory.

10. In approaching the individual questions in this case, there are some matters that are common to all. It is accepted that there must be functional incapacity pursuant to Section 3 of the Act as well as an impairment of the functioning of the mind under Section 2. There must also be a causal nexus between the two as required by the Court of Appeal in *PC v City of York Council [2014] 2 WLR 1*. Dr Rippon diagnosed CMW as having ADHD, foetal alcohol spectrum disorder as well as specific difficulties with cognition and speech and language. Her expressive language is quite good but her receptive and processing skills are only those of a child aged 7 to 9. She does not have a learning disability; it is Dr Rippon's view that her IQ would be in the 80s and thus properly described as low average but well above that which would justify the diagnosis of a learning disability. Rather she had what Dr Rippon described as a functional disorder. It is accepted that this medical evidence would satisfy the requirements of Section 2 if the requirements of Section 3 were made out. It follows that the real focus in the case is Sections 1 and 3 of the Act.

11. Does CMW lack capacity to conduct these proceedings? No-one seeks actually to argue otherwise in this case. However, it is to be noted that she has that been found to have capacity to conduct the family proceedings. Dr Rippon does not regard these two conclusions as inconsistent. The issues in the family proceedings are clear and can be shortly stated. The issues in the Court of Protection are potentially much more complex and much longer lasting. I am quite satisfied that she lacks capacity to conduct these proceedings not only in terms of being unable to weigh the relevant issues but also of being unable to understand some of the key ingredients that would require to be weighed. Given the position of the parties, more than that does not require to be said.

12. Does CMW lack capacity to manage her own affairs? Once again no-one actually seeks to argue otherwise in this case. I have considered whether for example her use of money is merely illustrative of making unwise decisions but I am satisfied that viewed generally, she is unable to grasp all the key ingredients that will have to be weighed in order to make decisions as to her own affairs. Once again, given the position of the parties, more than that does not require to be said.

13. Much more difficult and more controversial is CMW's capacity to make decisions about her residence and care. In this respect I have considered with care the decision of Theis J in *LBX v K and L [2013] EWHC 3230 (Fam)* and especially comments at paragraph 43 commended to me by both counsel. Generally speaking questions of care and residence are considered separately but there are cases in which they would be intimately related. If one took the example of a person with serious physical disabilities for whom the issue of residence would be inseparable from that of care, and one heard that the protected person was rejecting of care because they were unwilling or unable to recognise the necessity for it, that would inevitably impact on the question of capacity to make decisions about residence where care would be a key ingredient.

14. That I find is the position here. On any view CMW is incapable of wholly independent living, though she is able to make most of the decisions listed in that authority under the heading of residence. She is, however, unable to understand that she needs the care that she has because she seriously overestimates her own ability to keep

herself safe and to control her life and seriously underestimates the consequences for her welfare of independence. This is in fact less a question of weighing matters but more a question of being able to understand some of the essential ingredients that need to be weighed. To draw on the list set out by Theis J under care, I find that she does not understand the support that she needs or why she needs it and, more importantly, what would happen if she did not have that support or refused it.

15. When dealing particularly with severe emotional difficulties and deficits, it can be very artificial to assign the relevant questions to individual pigeonholes. They are deeply interrelated and have to be considered in the round. It would be artificial, and indeed wrong, in the case of CMW not consider residence and care together. It is her fundamental inability to grasp why she needs support and what would happen if she did not have it that underpins my finding that she lacks capacity in both these areas. She could not choose between packages of care because she seriously overestimates her ability to protect herself and seriously underestimates her own vulnerability.

16. Does CMW have capacity to decide questions of those with whom she is to have contact? Her social contact is in fact very limited, no doubt because of her dysfunctional family background. The view of Dr Rippon that she lacks capacity in this regard is essentially based on CMW's inability to understand her vulnerability and the emotional consequences of abuse and how she may be taken advantage of, coupled with her serious overestimation of her ability to protect herself and keep herself safe. In my view those concerns are well justified by the evidence in this case both in relation to her family and to RJ. That evidence is both clear and essentially unchallenged and thus does not need to be recited here. It is fair to note that she has withdrawn from contact with RJ out of concern for her child's welfare but my assessment has to consider a much wider timescale and is not specific to any particular relationship or incident. For those reasons I am satisfied that CMW lacks the relevant capacity. In respect of all these matters the evidence clearly demonstrates that her functional incapacity is the result of the impairment of mind described by Dr. Rippon.

17. I should advert at this point to three matters raised by Miss Hirst. The first related to fluctuating capacity. Now, of course, CMW's

potential capacity will fluctuate depending on the extent to which she is either calm or distressed and this may indeed be something which has to be considered in future years, as there are grounds to anticipate improvement. At present, however, I am persuaded by Dr. Rippon's view that, although potential capacity does fluctuate, even at her calmest, CMW does not achieve a level of functioning that would amount to having capacity in relation particularly to residence, care and contact.

18. The second matter is Miss Hirst's apt reminder that CMW is only 18 and decisions about her capacity should take that into account. Of course teenagers are prone to make unwise decisions; it is often the most effective way to learn. However, in this case I am satisfied that CMW's functioning is affected by matters far more profound than teenage angst. The driving forces are the consequences of ADHD and foetal alcohol spectrum disorder all compounded by complex trauma and language processing difficulties. In coming to that conclusion I have borne in mind the third factor namely the importance and relevance of support. That is certainly currently available to her and even with the advantage of that she remains unable to understand issues of risk and danger to herself.

19. Does CMW have capacity to deal with social media and the Internet? In this regard counsel invited my attention to *In Re B [2019] EWCOP 3*. I am satisfied that there is only one matter in that decision the exercises me in this case: the question of understanding risk and danger to self. On all other heads, the evidence suggests that she has capacity. Dr. Rippon initially thought that she had capacity but changed her view in her oral evidence because she felt she should have probed further in relation to risk and danger under this head.

20. I do not think it right simply to infer from her difficulties in appreciating safety and risk in relation to care, residence and contact that it automatically deprives her of capacity in this area. This is a much more precise and restricted area and indeed with less call on abstract thought. Whilst I appreciate Dr. Rippon's concerns, my conclusion on reflecting on this particular issue and the evidence around it is that I am not satisfied that it is been established that she lacks capacity in this area. It follows that I must conclude that she has capacity.

21. Does she have capacity to engage in sexual relations? The parties agree that the court's approach to this question is now governed by the decision of the Court of Appeal in *A Local Authority v JB [2020] EWCA Civ 735.* Dr. Rippon's view was that she did have capacity and having considered the requirements in that case in the context of the evidence of this case, I firmly agree with that view. Neither party sought to argue to the contrary and accordingly the Court concludes that she does indeed have capacity to engage in sexual relations.

22. Should the Court reach that view, the Local Authority accepts that they will have to provide a care plan in accordance with the requirements set out by Baker J (as he then was) in *A Local Authority v TZ [2013]EWCOP 2322 and [2014] EWCOP 937*. This they will do in advance of the best interests hearing.

23. It follows from this that I have reached the following conclusions. CMW has capacity to engage in sexual relations and in relation to social media and Internet. CMW lacks capacity to conduct this litigation or to manage her own affairs and further lacks capacity in relation to issues of her residence, care and contact. A best interests hearing for all those latter issues will be required and has been fixed for 11th October 2021 as, in effect, a part-heard trial. The parties have agreed the relevant directions required. The interim arrangements will continue till then subject to the local authority having permission not to arrange contact with RJ at present and a further interim declaration that contact between RJ and CMW is not in her best interests.

24. I recognise, as do the parties, that those arrangements amount to a deprivation of liberty, as explained by the Supreme Court in *P v Cheshire West and Chester Council [2014] UKSC 19*. No party had any specific submission to make. I am satisfied that the restrictions currently in place are necessary and proportionate and are in the best interests of CMW. Accordingly I authorise their continuance until 11th October 2021.

25. This case has been for me far from easy. It evokes my deepest sympathy for CMW who is essentially the victim of the doings of others over 18 years and more. I have reminded myself that I have to decide issues of capacity without regard to the welfare consequences, as required by the decision of the Court Appeal in the York case (supra). Hard though I have found that, having reminded myself of

the words of Baker J (as he then was) in *PH v A Local Authority [2011] EWHC 1704 (COP)* (at paragraph 16), that is what I have sought to do. I cannot part with this case without expressing gratitude to counsel and indeed to all involved for the sustained and invaluable assistance that they have given to the court.

Mark Hedley: 15th July 2021