Neutral Citation Number: [2022] EWCOP 14

Case No: 13615665

COURT OF PROTECTION

Swansea Civil Justice Centre, Swansea, SA1 1SP

Date: 15/03/2022

Before :

SIR JONATHAN COHEN

- -

Between :

MB	**Applicant**
- and -	
PB (by her litigation friend the Official Solicitor)	**1st Respondent**
- and -	
A Local Authority	**2nd Respondent**
- and –	
A Health Board	**3rd Respondent**

- -

Mrs C Collins (instructed by **Duncan Lewis Solicitors**) for the **Applicant**
Ms M-R McCabe (instructed by **CJCH Solicitors**) for the **1st Respondent**
Ms E Griffiths (instructed by **A Local Authority**) for the **2nd Respondent**
Mr B Tankel (instructed by **NWSSP - L&RS**) for the **3rd Respondent**

Hearing dates: 22 – 24 February 2022

- -

Approved Judgment

.....

SIR JONATHAN COHEN

This judgment was delivered in public. An anonymised version of this judgment will be made available to the public. In any published version of this judgment the anonymity of the incapacitated person and members of their family and the other parties must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Sir Jonathan Cohen:

1. This hearing concerns the welfare of PB ("P") a lady aged 65. In this litigation she is represented by the Official Solicitor ("OS"). The other parties are respectively her husband ("MB"), the applicant who is also aged 65, the local authority and the health board.

2. The local authority ("LA") is the supervisory body in accordance with the deprivation of liberty safeguards and has been the lead coordinator in respect of the adult safeguarding processes. The LA is not responsible for P's care and treatment which is commissioned by the health board ("HB").

Brief summary

3. In March 2018, P suffered a severe brain haemorrhage which has caused lasting injury. She suffers from impaired cognitive function and right sided weakness and spatial neglect. She has been assessed as lacking the capacity to make decisions about her residence and care, to make decisions about contact, and conduct these proceedings. She relies entirely on others for her care. Her lack of capacity in these respects is agreed by all parties.

4. Since April 2019, when she was discharged from hospital, she has lived in a specialist care home where she receives a significant package of care that she is likely to require for the rest of her life. P is subject to a standard authorisation at the care home.

5. Pursuant to the order of Francis J made on 21 April 2021, P's husband MB has had his access to the care home and contact with P very substantially restricted.

6. By these proceedings, MB challenges the standard authorisation and the contact restrictions. Although the proceedings have been brought as a challenge pursuant to section 21A of the Mental Capacity Act 2005, the court has the power pursuant to section 16 Mental Capacity Act to make decisions on behalf of P as an incapacitated adult applying a best interests test as set out in section 4 of the Act. That this is the appropriate jurisdictional route is made clear by Baker J (as he then was) in KK v CC [2012] EWHC 2136 where at paragraph 16 he said:

> *When a standard authorisation has been made by a supervisory body, s. 21A(2) empowers the Court of Protection to determine any questions relating to, inter alia, whether P meets one or more of the qualifying requirements. In particular, once the court determines the question, it may make an order varying or terminating the standard authorisation: s. 21A(3)(a). But once an application is made to the Court under s. 21A, the Court's powers are not confined simply to determining that question. Once its jurisdiction is invoked, the court has a discretionary power under s. 15 to make declarations as to (a) whether a person has or lacks capacity to make a decision specified in the declaration; (b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration, and (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person. Where P lacks capacity, the court has wide powers under s. 16 to make decisions on P's behalf in relation to matters concerning his personal welfare or property or affairs.*

7. From the early days of P's admission to hospital in 2018, safeguarding concerns have been raised in respect of MB's conduct towards her and there has been throughout significant concerns about his combative approach to the medical professionals involved in P's care. As a result, in February 2019 MB's contact with P was restricted to 2 hours supervised per day. That regime was still in place when P was transferred to the care home on 15 April 2019.

8. On 5 February 2020 it was alleged that MB had inappropriately touched P in a sexual manner. Soon afterwards Covid restrictions were imposed on contact with care home residents and from 3 April 2020 the decision was taken to restrict MB's contact with P to 2 video calls per week.

9. On 22 June 2020 MB commenced proceedings seeking an order that it was in the best interests of P to return to the family home and reside with him and that the contact restrictions placed upon P were not in her best interests.

10. On 26 March 2021 the care home served notice for the removal of P from their premises. This was nothing to do with P but everything to do with MB's overbearing treatment of the care home staff and the consequent interference with its ability to provide appropriate care for P and the other residents of the home.

11. On 21 April 2021, Francis J made an injunction prohibiting MB from having direct contact with P and from entering or approaching the care home and severely restricting communication with any care home staff. With these prohibitions in place, the care home has been prepared to continue to accept P as a resident and she remains there to this day.

12. Right up until closing submissions, it was MB's case that his wife both wanted to return to the matrimonial home and that it was in her best interests so to do. Failing that, the limitations on his communications with her and the care home should be removed. I have accordingly had to consider these matters throughout the hearing.

13. The context of the hearing is that MB did not and does not accept any of the criticisms that are made against him. It has therefore been necessary to hold a fact-finding hearing of the allegations made against MB so as to determine the ongoing lawfulness of the contact restrictions imposed upon MB. The fact-finding hearing was conducted in accordance with the principles identified by the Court of Appeal in re H–N & Others (children) (domestic abuse: fact-finding) [2021] EWCA Civ 448.

The issues

14. The issues which the fact-finding was to cover were agreed to as follows:

    i) Whether there was a pattern of coercive and controlling behaviour:

        a) Prior to P's admission into full-time care

        b) Since P's admission into full-time care;

    ii) The impact of MB's conduct upon caregiving staff at the hospital and the care home;

iii) Whether MB has interfered in the provision of care to P at the hospital and/or the care home;

iv) Whether MB has sought to undermine the relationship between P and her other family members, especially her children;

v) Whether MB inappropriately touched P on 5 February 2020;

vi) The immediate impact of MB's contact with P upon her;

vii) Considering all of the above, the impact of MB's conduct upon P.

15. In support of those matters, the HB, OS and LA prepared a schedule of allegations under the various headings with supporting references. They numbered 44 separate charges.

16. At a directions hearing it was agreed that it was necessary and proportionate to limit the number of witnesses to be called. It was neither necessary nor desirable that all 4 of the children of P and MB should be called to give evidence and S, the second of the 4 children, was selected as their spokesperson. I also heard the evidence of P's sister ("PD").

17. It was likewise felt that it was unnecessary to call large numbers of nursing professionals. The evidence that I heard was limited to PN, at that time the senior matron and safeguarding lead at hospital B where P was resident from July 2018 – April 2019; the general manager of the care home at which P has resided since April 2019; and ME, the nurse who was witness to an event on 5 February 2020. MB gave evidence at length but called no other witnesses.

18. Although it was agreed by all parties that P lacks the capacity to make decisions about her residence, care and contact with others, I have had to consider her ability to express wishes as to where she wished to be and what contact she wished to have with MB, and if so able what those wishes are. This arises from the requirements of s.4(6) Mental Capacity Act 2005 which requires that in determining best interests:

[the judge] must consider, so far as is reasonably ascertainable—

(a)the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b)the beliefs and values that would be likely to influence his decision if he had capacity, and

(c)the other factors that he would be likely to consider if he were able to do so.

19. I should conclude this section of my judgment by saying that all parties were represented with great skill and I am very grateful to counsel for their assistance.

The period up to 2018

20. P and MB married in 1981 and they are the same age. They have 4 sons ranging in age from their late 30s to mid-20s. P's sister has told me that from an early stage in the

marriage she noticed a considerable change in P. From being an outgoing and adventurous young woman, she became increasingly isolated from her friends. The pictures painted of married life by S and by PD are entirely consistent with one another. P told PD and later S and the other children how confined her life was by MB. When the oldest 3 children were small, and before the youngest was born, P was so unhappy in her marriage that she left with them and was placed in a refuge. She was there for several weeks or so until she concluded that the conditions there were worse than they were at home.

21. PD describes how her sister was on edge all the time and later confided that she was rarely allowed out by MB. The two sisters used to go out once a week together but P began to make excuses for not going and it eventually became clear to PD that MB had forbidden it.

22. P used to describe her discontent to the older children. This was something that S had observed himself. When MB was away on a trip abroad, or even when he had gone out to work for the day, there was a complete change in P's demeanour; she put music on, opened the windows and curtains and danced around the house. When MB came back, the mood changed completely. S says that he told his mother that she should leave the marriage but that she never had the confidence to do so; she felt that she could not leave, had nowhere to go and no money. She felt that she had no options.

23. On three occasions P obtained employment. She worked for Toys R Us, Argos and a sewing shop, all in the period between about 2000-2010. She enjoyed the work but told her sister and son that on each occasion she had to give the jobs up after a few weeks because MB would ostentatiously loiter either in her place of work or outside watching P, and if she smiled or looked at a man there was trouble. On one occasion when P was late finishing work, MB simply drove off leaving her to walk home as he felt that she was having a good time with a man.

24. In MB's evidence he said that the first two jobs were only Christmas jobs which were not due to last beyond Christmas and that her employment in the sewing shop was given up by P because of shoulder problems. None of this appeared in his statements and I unhesitatingly accept the evidence of S and PD. It would take a remarkable degree of artifice for P to have invented years ago a story of MB following her and harassing her at work and to have told that story to her sons and sister and in effect to have pre-planned her complaint of her husband's behaviour and control. I likewise do not accept MB's assertion that P voluntarily, rather than at his instigation as she told others, handed over to him everything that she earned. The account of the sewing shop manager deliberately holding back a small sum from P's wages to give to her covertly is compelling.

25. PD told the court how on several occasions P had arrived at her home saying that she was leaving MB and/or going to divorce him but that her nerve always failed her. I also accept PD's evidence that on the occasions that the two sisters were out together MB would ring P to check up where she was, what she was doing and what they were talking about. I accept that he wanted to know where P was at all times.

26. Not only was P's access to her sister restricted before the events of March 2018 but so was her access to her elder children who by then had their own homes because P felt

unable to face the atmosphere that would be created by MB after her return from seeing them.

27. In short, this was a relationship that had all the hallmarks of coercive and controlling behaviour, with MB monitoring P whenever she was outside the home and socially isolating her from friends and her sister.

28. In 2015 P suffered a brain haemorrhage. She was treated for it successfully and returned home quickly. She made what appeared to be a complete recovery.

The second brain haemorrhage

29. Towards the end of 2017 P suffered from headaches. She was sent for a head scan which took place in October 2017. It appears from what I have been told by MB that either the hospital failed to pick up from the scan what was happening or was unsure how to interpret the scan. P and MB went on holiday to Sudan over the New Year and the headaches continued. The hospital investigated P for high blood pressure in January 2018 but it appears that they failed to identify the problem.

30. In March 2018 P collapsed at home in front of her husband having suffered a sub-arachnoid haemorrhage and was taken to hospital. It is unsurprising in the circumstances how the family feel that with more prompt medical attention this catastrophic event might never have happened. It has to some extent, but not as much as he says, impacted upon MB's reaction to medical professionals.

P's admission to hospital

31. Between March – July 2018 P was an in-patient in the acute unit of hospital A before being transferred to the neuro rehabilitation ward at hospital B.

32. There are a number of themes that emerge from the early days of P's admission to hospital B which carried on throughout the duration of the stay at that hospital and during her time at the care home. One of them is that only MB knew what was best for P. He was completely unwilling to accept any sort of advice or comply with recognised procedures. A few examples will suffice:

    i) The hospital had a policy which it called PJ paralysis. The purpose of the policy was to get patients into a routine which would, as close as reasonably possible, replicate their former life at home and aid their recovery. One aspect of that was that when patients got up in the morning they would be encouraged to put on day clothes. MB would not accept that. The other members of the family would bring into the hospital day clothes for P but MB would take them home.

    ii) MB insisted that he wanted his wife to have her own single room even though he was continually being told that she responded very well to the stimulation of being with other people and that would be restricted if he had his way.

    iii) Patients were encouraged to have a lot of familiar things around them to help with their rehabilitation, items such as favourite belongings and games such as jigsaws from home or in P's case, as a keen musician, a keyboard. These would be brought in by the children but once again MB would take them home.

iv) The presence of family members was enormously important on the ward. MB discouraged the children and in particular the grandchildren from visiting. He told me that he was fearful that the children might pick up bugs on the ward and pass them on to P. He said that he feared that the presence of too many family members would make her overtired. He would not accept that the hospital staff were in the better position to judge that. He wanted to have control over who saw P and when. The result was that it was only a couple of times in 10 months that P got to see her much loved grandchildren. All the staff reported to PN, and she observed herself, P's pleasure and animation when she was with her sister, sons and grandchildren. P "lit up in their presence" and it was a matter of great regret to the hospital staff that this did not happen more often.

33. I reject entirely MB's argument that he took home the clothes and belongings which the children brought to their mother in hospital at her request. If he did discuss the matter with P I am certain that he did so to obtain her approval of what he had already decided to do. As the care home manager said, if presented with a leading question P will give the answer that the questioner wants.

34. All these seem to me to be important matters. They are symptomatic of MB's need to be in control.

35. Another aspect of his behaviour which was shown in hospital and which was mirrored in the care home was his tendency to seek out junior and inexperienced staff and either try to get them to do what he wanted done in terms of P's care or complain and intimidate them if they were doing something that he did not agree with. The picking on junior staff was something that made them feel uncomfortable and intimidated.

36. Yet another theme that is mirrored both in the hospital and in the care home is MB's insistence that only he can understand P and what her wishes are. He attributes to her sentences and expressions which the medical professionals say that she is simply incapable of giving. He insisted repeatedly that P had said things when it became apparent on investigation that in all probability what P was doing was agreeing with what MB had suggested.

37. It was at the hospital that the safeguarding concerns came to the fore. At a meeting held on 4 February 2019 the primary concerns were expressed as being:

i) MB consistently closing the curtains around P's bed while visiting despite nursing staff requesting repeatedly that this should not be done;

ii) Checking incontinence pads whilst the curtains are drawn;

iii) Despite there being no evidence that P was in pain, MB insisted that when he had asked P if she was in pain, almost certainly in a leading manner as I find, she had said that was the case. He would then ask for unnecessary medication to be given.

38. These concerns were to be seen alongside:

i) Emails from P's sons outlining their fears for her safety if she was discharged home with MB; and

ii) MB's behaviour on the ward as set out above.

39. The view of a large number of professionals at the meeting was that everyone was very anxious at the prospect of P going home. In addition the meeting took into account concerns that had been expressed by other patients and staff on the ward of what they described as MB's oppressive conduct towards her.

40. The meeting took the view that MB should not be allowed to have unsupervised access to P on the ward and that there was to be a set 2 hour daily visiting time for him. Personal care was not to be provided by MB in the light of anxieties expressed about his handling of P in intimate areas. For the remaining 2.5 months that P spent in hospital, this was the regime that was in place.

The care home

41. It is important to give a little by way of introduction. The care home to which P was admitted in late April 2019 is a unique resource in Wales. It has 56 rooms for patients suffering from serious brain assaults. It has a specialist staff and provides the highest levels of care in a building that is purpose built and designed. The manager of the home described it as being more like a small hospital. Every patient has their own room.

42. The care home staff is skilled in communicating with people with cognitive deficit brain injury and provides specialist neuro physiotherapy services. The home meets all P's needs and it is agreed that she has improved significantly during her time there.

43. The manager portrayed P as a very happy and cheerful person. She likes people and she likes to join in activities. She needs 24 hour nursing care.

44. MB would visit in the evenings between 5.30-7.30pm. The pressure that he put on the nursing staff was relentless. He would not believe what he was told about his wife's treatment and progress and accused staff of disrespecting him and not caring properly for P. In particular he would target younger staff members who were not able to answer all his questions.

45. The extent of the email traffic directed by him was enormous. He was not prepared to come in and see senior staff for a meeting because he felt that a meeting that he had been summoned to before in the hospital had been unfair to him. The manager said that she simply could not run the home if she was constantly being bombarded by challenging emails because dealing with them took staff members away from their jobs.

46. She described the problem as being that MB simply did not believe a word that he was told. He was accusatory to the staff so that they would try to avoid him and felt intimidated by him. The bombardment of mistrust was unmanageable.

47. One extraordinary aspect of MB's behaviour was his appearance at the care home with a solicitor in late May 2019 to obtain P's signature to a Lasting Power of Attorney. MB had already been told that she did not have capacity. The attempt was headed off by a nurse but is yet another example of MB's determination to have control of his wife's life.

48. From March 2020 the home went into lockdown due to the COVID-19 pandemic and accepted only essential visitors. As an alternative to face to face visits the home offered family members video calls, in MB's case twice per week.

49. As lockdown eased visits were restarted and took place out in the garden. This happened in summer 2020. MB was able to visit fortnightly and on the other week P's sons were able to visit. This continued until December 2020 when the increased risk of Covid brought an end to these visits.

50. As I understand it, face to face contact could have restarted in March 2021 but the home gave notice to P because of the difficulties that MB had created and their unwillingness to have MB on their premises. As a result, and following the order of Francis J, such contact as there has been between P and MB has been virtual and there has been no face to face contact since the end of 2020.

51. It is proper to record that MB has complied with the terms of the injunction imposed by Francis J.

The quality of the contact

52. Since direct face to face contact has stopped, the view of the care home is that P has become much more engaged and purposeful. She wants to come out of her room and be with other people. She becomes involved in activities and the view of the care home staff is that she is much happier. The staff are also of the view that the virtual contact works better than the face to face contact did. During face to face contact the staff observed that P often appeared to be subdued. This was not always the case. The OS has reviewed the care home diaries and makes the following broad observations which are agreed as being representative of what the notes record of the face to face contact visits:

    i) Occasionally P is described as being happy throughout face to face contact with MB;

    ii) More frequently P is described as appearing happy and not in pain before face to face contact starts but during contact she is described as appearing tired, withdrawn and/or disengaged. After contact when P returns to her room she is described as being wide awake, happy and laughing;

    iii) On a number of occasions P is described as rejecting physical contact from MB and either pushing him away or pulling herself away from him;

53. I accept the point made by Mrs Collins for MB that it may be that the face to face contact simply went on for a duration longer than P was happy to endure. I am sure that MB would not agree, but it may be that contact of a shorter duration than he enjoyed in the past would have been preferred by P.

54. Remote, supervised contact has resumed and has taken place weekly since November 2021. P is provided with a tablet or laptop, and the contact session is facilitated by a nurse assessor from the HB. She seems to derive at least initial pleasure from seeing MB on the screen. Although the nurse assessor does not limit the length of the sessions,

the average duration of the contact appears to be about 10 minutes before P indicates to the nurse assessor that she has had enough, or MB ends the call.

55. The Official Solicitor's representative has had 6 meetings with P to try and assess her wishes. He found that the task was impossible because she gave such contradictory answers. It is really only by assessing P's demeanour during contact that a safe guide may be found as to her wishes.

The incident on 5 February 2020

56. In the evening, MB was visiting P and was sitting with her in the foyer. She was sitting at a table with MB alongside. The nurse ME described how she saw MB put his hand down the front of P's clothing and rub his hand up and down her vaginal area, over her clothing. She says that she heard P saying "no, no, no".

57. MB's account, not contained in his statements, is that he was massaging her shin or calf to help her with pain and that what she was saying was "aha, aha, aha", as she obtained relief from the massage. MB said that his hand never went above her knee.

58. I cannot see that there is any scope for misinterpretation. The body areas are too distant from one another for there to have been a mistaken impression of what was going on. With P in a wheelchair, it would have been impossible for MB to have carried out the manoeuvre that he did from the position described by the nurse. I reject MB's account of shin massage and can think of no reason why the nurse should fabricate. That said, the presence of the intervening wheelchair tray and the table top may not have permitted her a clear, as opposed to an impeded, view.

59. I accept Mrs Collins' fallback description of this incident being one of inappropriate touching. I do not know what MB was trying to do but I am satisfied that he did touch her private parts or thereabouts over her clothes and that it was an unwanted touching in the area of somewhere between her thighs and abdomen.

60. I think it proper to be cautious about placing too much weight on this one incident. Whilst it should not have happened, it is only one small part of the much bigger whole and in the light of my decision on other matters my findings as to it, whatever they are, will not result in any different conclusion to the outcome.

My findings

61. I find:

i) That there was a pattern of controlling and coercive behaviour before P's admission into full-time care.

ii) That there was a pattern of coercive and controlling behaviour that continued after her admission into full-time care.

iii) That MB has a controlling and overbearing attitude towards the care staff.

iv) That MB has sought to interfere in the provision of care by his refusal to accept what professionals tell him and his insistence that he knows best about what care P should be receiving.

v) That MB has sought to limit and control the contact that P has had with other members of the family particularly her children and her sister.

vi) That at times P has found contact with MB to be upsetting and unwelcome. Equally at other times she has derived pleasure from it.

MB

62. No one can fail to have some sympathy with MB. His wife has had a catastrophic medical event. He has fallen out completely with his children. His description of arriving back at home where the two youngest children still live and taking himself up into his room and shutting the door, effectively confining himself in his own room in the house, paints a picture of a dismal life. After a long working life and over 40 years of marriage his future is bleak.

63. Part of the sadness of his plight is that he cannot see how the current situation has arisen and blames everybody else for it. He cannot see that it is to a very large extent of his own making. When asked about trying to build bridges with his children, he said that was a matter for him to deal with as and when he thought appropriate.

Welfare

64. It had been MB's case throughout the hearing that P wanted to go home and should go home. It was of course apparent from the very outset that there was no prospect of MB being able successfully to care for his wife at home. She needs specialist and permanent nursing care 24 hours a day. It was only in closing submissions that he came to recognise this.

65. P's children and sister strongly support P's continued placement in the care home.

66. It is apparent that the single most important factor in this case is to maintain P's position in the care home. There is no other venue in Wales that is felt able to meet her needs. Nothing would be worse for her than for the home to feel that it could no longer keep her because of the pressures and disruption created by MB. If the choice is between MB's contact with P and the maintenance of the home, the latter must prevail.

67. I am, however, concerned that the loss or cessation of all contact between P and MB may not be in her best interests. I explored this issue with the care home manager. She expressed the view that she would be content for there to be a trial of contact, face to face, between P and MB but that she was not prepared to have MB within the main building. I thought this not an unreasonable requirement in the circumstances, in particular when there is what she describes as a pod available which she would be content to see used by P and MB.

68. The pod permits two people to be together, albeit with a Perspex screen between them which would inhibit or prohibit, I am not sure which, touching between them. Whether the screen will remain when the Covid restrictions are relaxed in Wales is not yet known.

69. I would like consideration to be given by the parties to a trial period of contact over a number of visits whereby P's reaction to the resumption of contact could be assessed,

along with MB's ability to comply with the restrictions required and the contract of expectations which he must sign up to. The details of this would need working out and consideration at a further hearing if not agreed.

70. I make it clear that I am not making at this stage a best interests judgment that contact should take place but I am expressing a strong desire that its practicality should be explored with a hope that a trial might take place in which P's reaction may be observed.

71. In the meantime, P's virtual contact with MB shall continue.

72. I would also be prepared, if the care home will accept it, as the manager led me to believe they will, to agree to a resumption of email communication between MB and the home but strictly limited, the home giving a weekly report to MB as to how P is and MB being permitted to provide one email per week back to the home asking for information about his wife's condition. This would provide a manageable start of resumed communication and a test as to whether MB can obey ground rules.

73. I shall hold a further hearing when the parties have had the opportunity to consider this judgment.