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(subject to editorial corrections)\**

**Delivered: 05/03/2020**

**2019 No 21**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**FAMILY DIVISION**

**OFFICE OF CARE AND PROTECTION**

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**IN THE MATTER OF A MOTHER WITH SEVERE DEMENTIA:  
WHETHER HER DAUGHTER SHOULD VISIT**

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**O'HARA J**

**Introduction**

[1] In this case a lady who is approximately 70 years old has applied to the court for an order allowing her to visit her mother in a nursing home. That nursing home is run by a Health and Social Care Trust. The difficulty arises from the fact that the mother is now in her late 90s and suffers from dementia. Dr Best, psychiatrist, confirmed in a report in August 2019 that her dementia is severe, that she "is not able to communicate much about her care" and "is no longer capable of making decisions about who visits". Before she lost her capacity to make these decisions for herself the mother was not accepting visits from her daughter. In these circumstances the Trust has not allowed the daughter to visit – it is concerned that visits do or might distress her. The mother's other two children, her sons, are hostile to the daughter being allowed to visit.

[2] Ms Louise Maguire of counsel represented the daughter. Since the mother is not competent the Official Solicitor was appointed to represent her interests, with Ms Melanie Rice of counsel being instructed. Mr Andrew Magee represented the Trust and Ms Lorraine Keown, solicitor, of Cleaver Fulton Rankin Solicitors appeared for the brothers who were made Notice Parties. I am grateful to the legal representatives for their submissions, written and oral.

## Background

[3] I did not hear oral evidence about the breakdown in the family relationships which led to the mother not wishing to see her daughter. The brothers chose not to swear any affidavits. From two affidavits sworn by the daughter and from Trust documents it appears that the daughter played a very significant part, perhaps the leading role, in caring for her father and mother until the father died in 2013. The mother then lived on in the family home until she finally had to go into a nursing home in or about 2016. By then however the daughter was not seeing her.

[4] It appears that the family fell out completely within a few months of the father's death. By then the mother was about 90 years old and had lost her husband of 67 years. It is impossible (and unnecessary) for me to pick apart what went wrong and why things developed the way they did. It seems from the daughter's affidavits that there were longstanding tensions between the siblings independent of the parents' decline. Regrettably it also appears that after the father's death these tensions boiled over with allegation and counter-allegation of the mother being influenced against her daughter to the extent that she changed her will. (I note however that the solicitor who took her instructions in August 2013 to change her will prepared a note confirming her testamentary capacity.) There were also issues about the level of care provided by the daughter with her being criticised in relation to the mother's diet, clothes and personal care.

[5] What is most disturbing about all of this is that the mother does not seem to have been protected from these tensions as she should have been. There is no sense from the papers that the sons encouraged their mother to retain any level of contact with their sister. The fact that even now, more than 3 years after she went into the nursing home, they remain hostile to their sister seeing her is unimpressive.

[6] The daughter's case is summarised in one of her affidavits as follows:

"I believe my brothers bullied my mother and it is all motivated around money and her will. My main priority is to visit my mother and re-establish our relationship. I would beg the court to allow me to see my mother. I understand my mother will not recognise me but I cannot go through my life without seeing her again."

In fact the issue around money and the will is increasingly less important – the mother's home has been sold and the money realised is being used to contribute to the costs associated with her nursing care. It also seems to me to be unrealistic on the daughter's part for her to think that she might "re-establish our relationship" when the mother's dementia is so severe.

[7] After the mother went into the nursing home her daughter did not know where she was for some months – even that minimum level of information was

denied to her. On any occasion she has visited her since that time the staff have asked her to leave on the basis that until she lost capacity it had been the mother's declared position that she did not wish to see her daughter. I accept the mother did express that sentiment but that could have come about for a number of reasons, or a combination of those reasons, including:

- The mother did not want to see the daughter ever again.
- The mother did not want to see the daughter because her sons did not want her to.
- Seeing the daughter would raise again some of the arguments between her children which had caused distress to the mother.

### **Submissions**

[8] Against this unhappy background it is necessary to decide whether it is (or may be) in the mother's interests for her daughter to visit her in the nursing home. In some ways this may be an artificial exercise because the mother may not recognise her daughter, such is the severity of her dementia. In the light of that dementia there is little or no prospect of any meaningful reconciliation between mother and daughter. In fact on one analysis the person in whose interests a visit or visits is most likely to be of benefit is the daughter.

[9] For the daughter Ms Maguire supplemented her excellent written submission by emphasising the following:

- The mother is not reported to have said that she **never** wanted to see her daughter again.
- In not seeing her daughter the mother is bound to have been influenced by her sons who were and remain hostile to their sister.
- The Trust employees recorded that the mother did not want to see the daughter but the underlying reasons for this were not explored and the extent to which the brothers' hostility, while acknowledged, weighed on her mind is unknown.
- Once the mother lost capacity the Trust's approach was to regard the mother as being "locked in" to the last position she had expressed.
- Dr Best expressed the view in his report on capacity that a visit from the daughter "is likely to bring benefit to both daughter and mother".

[10] The Trust's position is now neutral as to whether the daughter should be allowed to visit the mother. Mr Magee acknowledged that the wishes and feelings

expressed by the mother when she had capacity but when family tensions were severe still has to be taken into account but whether they can be said to reflect her best interests is entirely uncertain.

[11] In a slightly different context (not yet applicable in Northern Ireland) section 4(6) of the Mental Capacity Act 2005 provides that in determining the best interests of a person who has lost capacity the decision-maker is required to do the following:

“He must consider, so far as is reasonably ascertainable –

- (a) the person’s past and present wishes and feelings (and, in particular, any relevant written statements 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.”

[12] For the Official Solicitor Ms Rice made the important point that because of her severe dementia there is little or nothing which can be done to prepare the mother for a visit from her daughter (as might be done in a case under the Children (NI) Order 1995 when a child is being prepared to be reintroduced to a parent after some time).

[13] The position of the Official Solicitor is that the mother had a clear view against seeing her daughter from 2014 until the time when she lost capacity. It would be wrong, the Official Solicitor says, to discount or disregard that view which she held for some years. There is some limited evidence about the mother becoming distressed in or about April 2019 when the daughter appeared unannounced in the nursing home. On that occasion she was asked to leave by staff.

[14] The position of the brothers is that their mother’s firmly held view about not seeing their sister, a view which they assert was formed without improper influence from them, should continue to be respected. They say she is content in the nursing home and should not be disturbed in any way.

## **Discussion**

[15] In reaching a decision about the best interests of this very old lady with severe dementia I must take into account her decision from 2014 to about 2016/17 not to see her daughter. The question however is whether I should conclude that this was a final irrevocable decision which she is therefore locked into. It is certainly weightier than an opinion reached in the course of an argument which is soon followed by an accident from which the victim cannot recover. On that scenario a court would be

extremely slow to decide that words spoken in anger are binding as to future actions. On the other hand the mother is not suggested to have uttered a considered final opinion that she would never see her daughter again.

[16] Dr Best saw the mother in August 2019 to assess her capacity to make decisions about visits from family. When he asked her about her children, she was able to name one son but not the other one nor her daughter and, according to his report, she “then rambled on about something else that was not connected to her children”. A nurse who has worked with the mother for 2 years said she has always been confused and there has been no recent change or deterioration. An illustration of the extent of that confusion is that “she likes her teddy bears, thinking they are children”.

[17] Dr Best said the following towards the end of his report:

“It is for the court to decide but one way forward may be to observe how (the mother) reacts to her daughter’s presence. It would be important that someone independent was then present to feedback on (the mother’s) reaction to her daughter’s presence. It would be important that this is not a member of staff or a current social worker working with (the mother) and family as that would put some strain on the client professional relationship as these professionals have to work with all parties including sons and daughters. If that visit went well and there was no sign of distress then surely it would be of benefit to all parties for visits from daughter to (the mother) to take place as this woman nears the end of her life.”

He then continued:

“No matter what has happened in the past, unless there had been some serious problem between (the mother) and her daughter, a simple visit from her daughter is likely to bring benefit to both daughter and mother. If this is supervised initially and all seems to go well that should be reassuring to the two sons that a visit from the daughter is not having a detrimental effect on (the mother).”

[18] While this suggestion from Dr Best was, strictly speaking, beyond his remit and he was only asked to assess capacity I agree with it as a way forward. I cannot know with certainty what the mother now thinks and feels though it may well be very limited. If she responds in a distressed way to a visit from her daughter, however unfortunate that may be, the visit will have to be brought to an end. That

distress would be an indication that seeing the daughter is not in the mother's best interests. However if the mother does not respond adversely it would be cruel to prevent the daughter from seeing her. And there would then be no reason to think that further visits would be contrary to her best interests. Accordingly, I endorse Dr Best's helpful suggested way forward.

[19] There was some reference in the course of the hearing to the right to family life enshrined in Article 8 of the European Convention on Human Rights. Article 8 was not however advanced by any party as an issue of significance, rightly so in my judgment, because I do not believe that it contributes anything of substance to the issues which have to be resolved.

[20] It would be premature to give any indication about the number of visits which the daughter might make in the absence of signs of distress from the mother. All that can be said with any confidence at this stage is that if the mother's first visit, or any subsequent visit, distresses the mother those visits cannot continue. If they go better than that then it might also be appropriate for the adult grandchildren to join their mother in visiting the grandmother they have not seen for years.