

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

IN THE MATTER OF BS

STEPHENS J

Introduction

[1] The lady who is the subject of these proceedings, BS, is now aged 88. She resides in a nursing home and has done so for a period of approximately 3 ½ years. Her arm was badly fractured in a fall and it has never healed sufficiently to enable her to have full use of it again. She is no longer able to live alone due to that physical restriction and the assistance that she requires as a result. She is still able to enjoy foreign holidays going for instance to the Mediterranean in July 2008. Her husband, a successful businessman, died over a decade ago. BS has a son and a daughter who for the purposes of this judgment I shall refer to as KS and SR (the daughter having married TR). Unfortunate differences have arisen between KS and SR as to whether their mother BS is capable of managing her own affairs. KS believes that she is but SR believes that she is not. SR would however accept the outcome, whatever it may be, of an independent medical examination. BS for her own part believes that she is capable of looking after her own affairs.

[2] SR has applied to the court under Article 101 of the Mental Health (NI) Order 1986 and pursuant to Order 109, Rule 4(1) of the Rules of the Supreme Court (Northern Ireland) 1980 for a Controller to be appointed in respect of her mother's affairs. BS is the respondent to that application. KS is a notice party. In the course of that application SR has sought an Order pursuant to Order 109, Rule 45, of the Rules of the Supreme Court (Northern Ireland) 1980 that her mother attends for a medical examination. It is the application for a medical examination which I have to determine. BS opposes that application contending that the court in the exercise of its discretion should not order a

medical examination and that such an examination would amount to an interference with respect for her private life under Article 8 of the European Convention on Human Rights.

[3] Ms Grattan appeared for SR and Mr Horner QC and Mr Colmer appeared for BS. I am grateful to counsel for their careful preparation of the case and their well-marshalled written and oral submissions. KS though represented in relation to the substantive proceedings and on notice of this application before me, was not represented in relation to it and played no part in it except to file an affidavit on the morning of the hearing.

Factual Background

[4] I should say at the outset that there is great deal of resentment and bitterness involved as between KS and SR. This has spread to involve SR's husband, TR and their daughter EF together with other members of BS's extended family. The factual evidence has been by way of affidavits with the most recent affidavit being filed on the morning of the hearing before me. It is not necessary for the purposes of the present application to come to any final conclusion in relation to the factual disputes as between KS and SR. The factual summary which I set out is a summary for the purposes of this application only and not otherwise.

[5] BS is a wealthy woman with assets of approximately £3 million. She has a financial adviser AB and solicitors C & D.

[6] In July 2005 BS executed a Will and an Enduring Power of Attorney. Both of her children KS and SR were to be her attorneys.

[7] SR has been concerned for some time as to confusion and loss of short term memory on the part of her mother, BS. SR has deposed to various illustrations of her mother's deteriorating condition including an inability to appreciate the present day value of money and forgetting to write cheques and forgetting appointments.

[8] On 10 January 2007 BS had a meeting with her financial adviser AB. He noted that during that meeting BS could not recall receiving a sum of £48,000 being the proceeds of a recent sale of property. She also did not recall a previous discussion she had had with AB, her financial adviser, as to gifts that should have been made to KS and SR at Christmas as part of inheritance tax planning. Finally she could not recall signing papers in relation to another investment. Included in AB's note of that meeting was a reminder to contact BS's son, KS, to get a copy of the Power of Attorney from BS's solicitors. AB also suggested to BS that her son and daughter KS and SR should attend client meetings from then on. BS was content that they did so.

[9] At this stage KS and SR had similar views as to the steps to be taken in relation to their mother BS. They would both be her attorneys in the event of her incapacity under the Enduring Power of Attorney. They were both aware of and involved in the decision taken by BS at the start of 2007 to sell her bungalow. It may be that SR's decision to allow the sale of the bungalow to continue despite her concerns as to her mother's capacity can be explained on the basis that all three, namely BS, KS and SR, were agreed as to what would happen and in any event if BS was not capable of managing her own affairs then KS and SR would be her attorneys under the then enduring power of attorney.

[10] On 1 February 2007 Dr S, General Practitioner, wrote to Dr T, Consultant Neurologist, thanking him for (agreeing to) see BS who gives a history of memory loss. Dr S wrote that the family were concerned and had noticed her short term memory getting a lot worse over the past months. She would repeat herself a lot when talking to you. The letter requested that Dr T, Consultant Neurologist assess BS to see whether she was suitable for treatment. I do not have sufficient information to determine how much of this history comes from SR alone or from KS as well or how much of it is the independent observations of Dr S.

[11] Dr T, Consultant Neurologist replied on 15 February 2007 having seen BS that day. He referred to BS's history of Parkinson's disease, the physical aspects of which were very well controlled. He stated that he would be hard pressed to actually say that she has Parkinson's disease. He stated that she was managing quite well in the nursing home but that her main problem appears to be her memory. That she appeared to have short term memory difficulties. He suspected that she had mild age related dementia. The question was whether she would benefit from some form of the newer dementia type drugs to try to preserve her memory. In that respect he referred her to Professor A. He wrote to Professor A on the same day asking him to see BS "with a view to assessing whether she would benefit from some of the new anti dementia drugs". Again an issue to be determined is as to how reliant Dr T, Consultant Neurologist has been on the histories given to him as to BS's memory loss and who gave those histories.

[12] The main focus of the referral by the General Practitioner, Dr S, to Dr T, Consultant Neurologist, and the second referral by Dr T, to Professor A, was in respect of treatment for BS. They were not asked to advise as to whether she was capable of managing her own affairs.

[13] On 11 April 2007 and 20 April 2007 BS had further meetings with her financial adviser AB. These meetings were in the presence of both her son and daughter KS and SR.

[14] The sale of BS's bungalow was being undertaken by a firm of estate agents. On 16 April 2007 a sales advice note was received by BS's solicitors C & D from the estate agents. Shortly after this was received (no precise date being given) one of the solicitors, C, received a telephone call from BS telling her that she did not want C to discuss her private affairs with her daughter SR.

[15] On 17 April 2007 BS attended Belfast City Hospital for a CT brain scan. This showed moderate generalised cerebral atrophy and changes in keeping with chronic small vessel white matter ischemia.

[16] On 20 April 2007 a business development director of a private wealth management company met KS and SR to explain to them an inheritance tax savings scheme which could be undertaken for BS. It appears that at this stage KS and SR were co operating with each other in respect of the financial affairs of BS.

[17] On 4 May 2007 BS's solicitor C attended upon BS and her son KS to go through the pre contract enquiries in relation to the sale of BS's bungalow. C was quite satisfied that BS knew what she was doing.

[18] C arranged a further appointment with BS which took place on 23 May 2007. On this occasion BS was accompanied by her daughter SR. C was surprised at this in view of what BS had said at an earlier stage that her private affairs were not to be discussed with her daughter SR. C checked with BS who said that she was happy for SR to be present. During the course of that meeting BS was under the misapprehension that the bungalow was being sold for £169,000 as opposed to £860,000. C did not have any concerns as to BS's mental capacity. SR did not suggest to C that her mother BS did not have capacity.

[19] On 1 June 2007 KS and his wife and SR and TR appeared to have had a major disagreement at a social night in a golf club.

[20] On 13 June 2007 BS's solicitors C & D wrote to Dr U, Consultant Psychiatrist, asking him to assess BS. Dr U visited the nursing home on 20 June 2007. He found mild absent mindedness. However he considered that she had full insight into the matters at hand. In his view BS entirely fulfilled conventional tests of mental capacity with regard to understanding the nature and implications of an Enduring Power of Attorney and also of testamentary capacity. That she was presently capable of managing her own affairs. His report is short and addresses testamentary capacity and capacity to execute an enduring power of attorney. However in relation to Dr U's view that BS was capable of managing her own affairs there is no evidence before me that when he formed that opinion he had been provided with full details as to the nature

and complexity of those affairs or of the transactions that she was carrying out or proposing to carry out.

[21] On 21 June 2007 BS revoked the enduring power of attorney dated 5 July 2005. She executed a further enduring power of attorney on the same date appointing KS as her sole attorney.

[22] At 7.30 am on 2 July 2007 BS telephoned her son in law TR to say that SR should not go to see her that day. She later rang and said that SR was not to go that week. The following week on 9 July 2007 there was then a message from BS on the SR's and TR's answering machine enquiring why SR had not visited and saying that she missed her daughter.

[23] The reason why BS telephoned TR on the 2 July 2007 may be connected to the fact that 2 July 2007 she met in the nursing home with the business development director of the private wealth management company together with KS, her son and AB, her financial adviser. The purpose of the meeting was for the development director to introduce himself and to explain to her the services which his company could provide.

[24] On 3 July 2007 TR is alleged to have gone to the home of KS. It is alleged that an unpleasant conversation ensued between them and questions were raised as to a cabinet containing confidential papers of BS. These allegations are contained in an affidavit filed on the morning of the hearing before me and accordingly TR has not had an opportunity to respond.

[25] On 10 July 2007 TR visited BS and found her to be subdued, confused and quite tearful. He has given illustrations of this in his affidavit.

[26] In the affidavit filed on the morning of the hearing KS stated that he met with his sister, SR, on 1 August 2007 in an effort to sort out problems but the conversation rapidly deteriorated.

[27] Again in the affidavit filed on the morning of the hearing KS stated that on 31 August 2007 BS wrote a cheque for a substantial sum in favour of SR and TR. SR and TR have not had an opportunity to respond to this allegation. KS puts it forward to undermine the proposition that SR believes that BS is incapable of managing her own affairs. However even if true this incident could potentially demonstrate that BS is incapable of doing so, not appreciating the value of money and being swayed by transitory events. The allegations in relation to this cheque and the comments alleged to have been made about it are most serious. I repeat that SR and TR have not had an opportunity to respond. I emphasise that I cannot at this stage and have not, come to any concluded views about the allegations except the obvious, including that this family is ripping itself apart and that there is enormous potential for emotional harm to BS and therefore harm to her health.

[28] On 24 September 2007 Professor A sees BS in the presence of KS and SR. There is a dispute as to how settled BS was during the course of the examination by Professor A. Professor A's report is dated 28 September 2007. In that report he gives his opinion that BS did have mild dementia of mixed aetiology. That eventually there would be deterioration. The main reason for the referral to Professor A had been for treatment. He recommended treatment with a drug called Reminyl. He did not specifically address the question as to whether BS had capacity to manage her own affairs.

[29] On 13 October 2007 Dr B, General Practitioner, visited BS and wrote to her solicitors C & D stating that there was no evidence of dementia.

[30] On 5 November 2007 and 7 November 2007 Dr U, Consultant Psychiatrist, again assessed BS. He prepared a report dated 7 November 2007 in which he adhered to his previous views as to BS's mental capacity.

[31] By letter dated 2 November 2007 SR requested Professor A to comment on BS's ability to manage her financial affairs. He replied on 8 November 2007 and stated:-

"I did not directly ask her about issues relating to management of her finances or about Power of Attorney and what she would understand by that. It is difficult therefore to be categorical about those issues. Her short term memory was very poor as evidenced by the objective testing, by the fact that she had forgotten my name and why I was along, despite this having been pointed out to her a very short time before. In the light of this, together with the overall assessment and information provided, I would have concerns about the effects of her short term memory in particular, on her capacity and possibly her ability to manage her financial affairs. . ."

In a situation like this where doubt may exist about the above or where there are conflicting views, either from family members or specialists opinions, I would suggest a formal referral to the Office of Care and Protection."

As can be seen the opinion of Professor A is expressed in relatively cautious terms however on the same date he signed a certificate for the purposes of an application to appoint a Controller for BS. At paragraph 2 of that certificate he stated:-

"I examined the patient on 24 September 2007, and in my opinion, the patient is incapable by reason of mental

disorder as defined in the Mental Health Order 1986, of managing and administering his/her property and affairs.”

[32] On 26 March 2008 SR brought an application to appoint a Controller for BS.

[33] On 10 April 2008 Dr U, Consultant Psychiatrist, again visited BS and found her to be fully mentally capable.

[34] On 9 June 2008 EF gives birth to a son. BS sends a cheque for her great grandson and EF rang her on 26 June 2008 to thank her. BS was very tearful and said that she would like to see her great grandson as soon as possible. EF visits BS on 27 June 2008 and finds BS to be confused and forgetful.

[35] On 1 July 2008 the business development director met BS at the nursing home together with her financial adviser AB and her son KS.

[36] On 15 August 2008 AB met BS again to discuss her financial affairs. He has deposed:-

“It is my view that BS is fully capable of managing her affairs. She has a general appreciation of her financial affairs and their aims. However she may not be able to fully explain the intricacies of investing in an off shore investment bond using a discounted gift trust and an absolute trust for the purposes of minimising her potential inheritance tax bill. She is conversant with her property, investments and assets. She is able to tell me how she wishes them to be managed.”

[37] During the course of the hearing before me I sought an explanation as to the nature of the transactions that were being entered into by BS and as to whether there were any one of a different number of vehicles which could be used for those transactions. In response there was a general but brief description of an off shore investment bond, a discounted gift trust and a absolute trust together with an acceptance that there could be numerous different vehicles for obtaining the same result. In arriving at a conclusion in relation to this application I take into account that BS’s affairs are complicated. I also take into account that there is no evidence that Dr U, Consultant Psychiatrist, or Dr B, General Practitioner, were aware that BS was considering transactions involving an off shore investment bond, a discounted gift trust and an absolute trust.

Legal Principles and Conclusions

[38] Order 109, Rule 45 of the Rules of the Supreme Court (Northern Ireland) 1980 provides:-

“In any proceedings relating to a patient a judge or the Master may make an order for the patient's attendance at such time and place as he may direct for examination by the Master, a Visitor or any medical practitioner.”

[39] The term “patient” is defined in Order 109, Rule 1(1) as including:-

“a person who is alleged to be or who the Court has reason to believe may be incapable by reason of mental disorder of managing and administering his property and affairs”

[40] Professor A has stated that in his opinion BS *is* incapable by reason of mental disorder as defined in the Mental Health (Northern Ireland) Order 1986 of managing and administering her property and affairs. This opinion is not accepted by Dr U, consultant psychiatrist, amongst others but at this stage BS is a patient within the meaning of Order 109, Rule 1(1) as based on Professor A's evidence the court has reason to believe that BS *may* be incapable of managing and administering her property and affairs. That conclusion is supported by the findings of Dr T, Consultant Neurologist and the affidavits sworn by SR, TR and EF. In arriving at that conclusion I bear in mind the complexity of the affairs of BS.

[41] In exercising the power to order a medical examination the court must seek to give effect to the overriding objective in Order 1, Rule 1A of the Rules of the Supreme Court (Northern Ireland) 1980.

[42] BS's right to respect for her private life is interfered with if she is subjected to a medical examination against her will, see *Matter v. Slovakia* [2001] 31 EHRR 32 at paragraph 64. There should be no interference with the exercise by BS to the right to respect for her private life except such as is in accordance with the law and is necessary in a democratic society for one of a number of legitimate aims namely in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of rights and freedoms of others. The notion of necessity implies that the interference complies with a pressing social need and, in particular, that it is proportionate to the legitimate aims pursued.

[43] Mr Colmer for BS accepted that any interference will be in accordance with law see Order 109, Rule 45 the Rules of Supreme Court (Northern Ireland) 1980 but contended that it did not pursue any of the legitimate aims set out in

Article 8(2) of the Convention. In *Matter v. Slovakia* the applicant was deprived of legal capacity because he was suffering from a serious mental illness. In the course of determining whether his capacity could be restored, he was forcibly examined in a mental hospital for two weeks after refusing to submit voluntarily. Article 8(2) refers to one of the legitimate aims as the protection of the rights and freedoms of others but the European Court of Human Rights in *Matter v. Slovakia* held that the forced medical examination “pursued the legitimate aim of protecting the applicant’s own rights and health” and accordingly pursued a legitimate aim. On the basis of that decision I conclude that a medical examination in this case will pursue two legitimate aims within Article 8(2) of the Convention, namely the aim of protecting the health of BS and the aim of the protection of the rights of BS. It is for the protection of her health in that if she does suffer from a treatable condition then treatment can be provided and that she is not subjected to emotional harm. It is for the protection of her rights in that if she is incapable of managing her own affairs then her property rights should be protected.

[44] Any interference must be necessary in a democratic society which introduces the principle of proportionality. In relation to a judicial review application (*The Christian Institute and Others* [2007] NIQB 66) challenging the validity of subsidiary legislation, a different area of law than the present application, Weatherup J summarised the issue of proportionality at paragraph [83] as follows:-

“In summary the approach to proportionality requires consideration of-

- (1) The overarching need to balance the interests of society with those of individuals and groups.
- (2) The recognition of the latitude that must be accorded to legislative and executive choices in relation to the balance of public and private interests.
- (3) The legislative objective being sufficiently important to justify limiting the fundamental right.
- (4) The measures designed to meet the legislative objective being rationally connected to it, that is, the measures must not be arbitrary, unfair or based on irrational considerations.
- (5) The need for proportionate means being used so as to impair the right or freedom no more than necessary to accomplish the objective, that is, that the measures are the least intrusive, in light of both the legislative objective and the

infringed right. _ The Court should consider whether the measures fall within a range of reasonable alternatives, rather than seeking to ascertain whether a lesser degree of interference is a possibility.

- (6) The need for proportionate effect in relation to the detrimental effects and the advantageous effects of the measures and the importance of the objective. ”

[45] In considering the issue of proportionality I start with the detrimental effects of a medical examination. A medical examination of BS will be an imposition for her overriding her express wishes and feelings. That medical examination is to be seen not only in the context of her age and the consequences that flow from that, but also in the context that she has already attended a number of medical examinations so that the further examination is yet another burden on her in addition to those that have already occurred. I also consider that a medical examination will lead to a loss of privacy on the part of BS. The question that the court and therefore the medical examiner, has to address is the capacity of BS to manage *her affairs*. Accordingly the medical examiner has to know the nature and complexity of *her affairs*. In the circumstances of this case if I was to order a medical examination then in order for the examiner to properly address the issue as to whether she is capable of managing her affairs I will require BS, KS and SR to make disclosure to the court of the details of all property presently owned by BS, the transactions into which she has entered since 10 January 2007 (being the date of the meeting with AB) and the present transactions, if any, about which she is being advised or is considering. Accordingly BS would have to endure not only the distress of being subjected to a medical examination against her will but also that intrusion into the privacy of her financial affairs which is in itself an interference with her Article 8 rights. That intrusion would occur in a situation where there is a substantial body of evidence supporting the proposition that she is capable of managing her affairs, including the medical evidence of Dr U and Dr B, the evidence of KS her son, the evidence of C & D her solicitors, the evidence of AB her financial advisor, the evidence of the business development director of the private wealth management company and a Belfast employee of a bank. However when considering the detrimental effects of ordering a medical examination I also take into account that the medical examination in this case would not involve any invasive examination of BS. It would probably involve no more than BS's attendance at one or two sessions with a nominated specialist and this could take place if she desired in the nursing home. In addition when considering the detrimental effects of a medical examination I distinguish between the stress to BS caused by that examination and the stress caused to her by the family dispute, though I recognise that there is a degree of overlap.

[46] I do consider that a medical examination is a proportionate response in this case. In arriving at that conclusion I have considered the evidence of Professor A, Dr T, Consultant Neurologist and Dr S, General Practitioner. I consider the objective of determining by an independent medical examination the capacity of BS to be an important objective. That important objective has not so far been achieved in that the previous medical examinations in respect of BS have not proved to be conclusive. Professor A was mainly addressing the question of treatment rather than testing for her capacity to manage her affairs. Dr U and Dr B were not fully aware of the complexities of BS's financial affairs. Dr U's reports are relatively short and the underlying assessments performed by him have not been disclosed to date. None of the reports are up to date. When SR's application to appoint a Controller is heard the court will have to come to a conclusion as to the mental capacity of BS at the date of the hearing. The medical reports from Professor A, Dr U, Dr B and Dr T do not bear on that date and this has to be seen in the context that dementia, if present, is a deteriorating condition. The court in arriving at an assessment as at the date of the hearing would be substantially assisted by an up to date independent medical opinion and by an opinion informed by details as to the nature and complexities of BS's affairs, such details being placed before the examiner in a full and impartial manner together with appropriate information as to any relevant history as to what has been observed. One of the advantages of ordering a medical examination is that SR has undertaken to the court that if the independent medical examiner concludes that BS is capable then she will not contest that finding. Accordingly if that was the outcome of a medical examination it would avoid all the costs of a contested hearing. At an earlier stage BS was content that both KS and SR knew about her affairs. The intrusion into her privacy is to be seen in that context, in the context that the information will be available only to her close family members and will be kept confidential to them (with undertakings to that effect). The disclosure of transactions prior to the medical examination, is mutual on both BS, KS and SR so that there will be disclosure, for instance, as to what has happened to the papers of BS, to the jewellery of BS and what, if any, cheques have been written by BS.

[47] I order an examination by an independent medical expert. There is a clear imperative to conclude this litigation at the earliest date and accordingly I will set time limits for the production of the relevant information and the examination by the medical expert. The instructions to the expert will be settled by the court. The identity of the expert will also be settled by the court. I will hear counsel in relation to the necessary directions and those directions will be given on the basis of the least intrusive measures to achieve the objective.

[48] I will hear counsel in relation to the costs of this application.

[49] The time imperative for disposing of these proceedings is such that I consider it doubtful as to whether the court will facilitate an opportunity for mediation as between KS and SR by delaying the final hearing. However I take this opportunity to encourage both of them to set about in some structured, dispassionate and as open a way as possible, the question of resolution of the differences that have arisen between them. It may be that BS would not accept any such resolution but at least she would have the consolation that her son and daughter were capable of arriving at some sensible and agreed suggestions.