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IN THE COURT OF PROTECTION

Queen's Building
The Royal Courts of Justice
Strand
London
WC2A 2LL

BEFORE:

MR JUSTICE MOSTYN

BETWEEN:

MR ADRIAN STUART MUNDELL **APPLICANT**

- and -

(NAME 1) **RESPONDENT**

Legal Representation
Miss Ruth Hughes (Counsel) on behalf of the Applicant
(name 1) - Unrepresented

Other Parties Present and their status
(name 3) – Friend of Respondent
Miss Stern - Solicitor for Deputy
(name 2) - Fiancée of Respondent

Judgment

18 September 2019
Start and end times cannot be noted due to audio format

Reporting Restrictions Applied: Yes

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Mr Justice Mostyn:

1. The issue I have to decide is whether I have reason to believe that (name 1) lacks the relevant capacity to enter into marriage with (name 2) this coming Saturday, 21 September 2019. They became engaged in the early part of this year and the date of 21 September 2019 was agreed and booked with the registry office as long ago as March of this year. However, a question as to (name 1)'s capacity has been raised by Adrian Stuart Mundell, who is the Deputy for Property and Affairs of (name 1), by virtue of an appointment made by the Court of Protection on 13 November 2014.

2. I will set out the legal test for capacity to enter into a marriage a little later in this judgment. I will first set out the relevant background facts. (name 1) was born on Christmas Eve in 1990 and is 28 years old. From childhood he has suffered from learning difficulties.

3. As mentioned above, he is incapable of managing his property and affairs and, by virtue of that incapacity, Mr Mundell has been appointed as his deputy. (name 1) is a man of some means because he was awarded a substantial sum by way of compensation by virtue of a road traffic accident when he lost a leg while working as a refuse collector.

4. The award of damages was carefully calculated to meet his needs, and his needs alone. Part of the award has been used to purchase his home in March and the remainder has been invested on his behalf. The overall estate of (name 1), managed by Mr Mundell, is said to be around £1,500,000.

5. Although (name 1) has been found clearly to lack capacity to manage his property and affairs, he has not lacked testamentary capacity to make a will. On 17 October 2017, he made that will and nobody is disputing that, at the relevant time, he did not have the capacity to make it. In that will, he left his estate to his parents and he specifically indicated he did not want to benefit (name 2).

6. That will will be revoked if he marries on Saturday. However, it is open to him, between now and then, to execute a codicil to his will which provides that the will shall survive his marriage and be effective thereafter. I would suggest that it is in his interests, although it is not part of the decision I have to make, that he should execute a codicil to his will to that effect in the next couple of days, if I permit the marriage to proceed.

7. One of the immediate counterintuitive problems that I have to face is that I am being asked to declare today that I have, on an interim basis, reason to believe that (name 1) does not have the capacity to marry whilst, at the same time, to accept that he had the capacity to make a will in 2017 and has the capacity today to execute the codicil that I have mentioned. It would be surprising if the degree of mental capacity that is needed to execute a will is in fact less than the degree of mental capacity that is needed validly to contract a marriage. However, I will address the question of his capacity to contract a marriage independently a little later in this judgment.

8. (name 1) and (name 2) began their relationship approximately three years ago, since when she has moved into his home with her two children, now aged seven and sixteen. In so doing, she relinquished a council property, of which she had been a tenant for

about 12 years. She has written a letter to me, which I think was written yesterday, which reads as follows:

> "I've known (name 1) for just over three years. I believe he is fully capable of making his own decision to marry me. If I believed he was incapable, I would never have agreed to be his wife."

And then she describes his work and then she continues:

> "If he is proven to be incapable of making the decision to marry me, surely he is also incapable of making a will, which he's already done."

And then she continues but then concludes:

> "Please give us permission to do what any other couple in love are able to do and let us get married on Saturday as planned over six months ago."

9. At this point in the judgment, I will address the legal test for the threshold of capacity that is needed to be able to contract a marriage. The right to form a marriage is a fundamental right and has been so for centuries. If one was to draw up a hierarchy of human rights, one would have the right to enter into a marriage and found a family as being near the top of the list because the right to form a marriage has been in play in our society since the very dawn of time. So important is it that it has made its way into the European Convention of Human Rights, Article 12 of which states:

> "Men and women of marriageable age have the right to marry and to found a family according to … national laws governing the exercise of this right."

10. This is not to say, of course, that citizens have a right to marry whoever they like. If they are already married, they cannot commit bigamy. A man cannot marry his mother or his daughter or his sister. Children cannot get married, although it is relevant for the purposes of determining the threshold of capacity, for me to note that many of the relevant authorities were decided at a time before the Age of Marriage Act 1929, which set the current age of marriage. Before that, the age of marriage was 12 for a girl and 14 for a boy, which perhaps gives some indication as to the level of intellectual capacity that is needed in order to contract a valid marriage.

11. In 1885, Sir James Hannen, the then President of the Probate, Divorce and Admiralty Division, in *Durham v Durham,* [1885] 10 PD 80, said, at page 81:

> "I may say this much in the outset that it appears to me that the contract of marriage is a very simple one which does not require a high degree of intelligence to comprehend. It is an engagement between a man and a woman to live together and love one another as husband and wife to the exclusion of all others. This is expanded in the promises of the marriage ceremony by words having reference to the natural relations which spring from that engagement, such as protection on the part of the man and submission on behalf of the woman. I agree with the Solicitor General that a mere comprehension of the words of the promises exchanged is not sufficient. The mind of one of the parties may be capable of understanding the language used but may yet be affected by such delusions or other

symptoms of insanity as may satisfy the Tribunal that there was not a real appreciation of the engagement apparently entered into."

12. Now, that approach has since been treated as canonical. It has been followed in case after case, of which, perhaps the most prominent are the cases of *Park v Park* [1954] Probate 112 and the typically comprehensive decision of Munby J in *Sheffield City Council v E and S* [2005] 2 WLR 953. In the latter case, Munby J emphasised that, in making the decision in question, the Court was emphatically not exercising a best interest jurisdiction and it was making a decision as to the capacity of the person in question to marry anyone objectively and not a relative decision as to whether he could or should marry the particular person whom he was proposing to marry.

13. In his judgment, Munby J, at paragraph 141(viii), said this:

> "The contract of marriage is in essence a simple one, which does not require a high degree of intelligence to comprehend. The contract of marriage can readily be understood by anyone with normal intelligence."

In (ix):

> "There are thus, in essence, two aspects to the inquiry whether someone has capacity to marry. (1) Does he or she understand the nature of the marriage contract? (2) Does he or she understand the duties and responsibilities that normally attach to marriage?

Then, (x):

> "The duties and responsibilities that normally attach to marriage can be summarised as follows: Marriage, whether civil or religious, is a contract, formally entered into. It confers on the parties the status of husband and wife, the essence of the contract being an agreement between a man and a woman to live together and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance."

14. That was written in 2004 interpreting a body of jurisprudence that stretched back centuries. However, in 2019, it is questionable whether the duties and responsibilities as stated by Munby J in 2004 apply as fully as he then believed. I do not believe that it is the essence of a marriage contract that the parties should live together, let alone that they should love one another. There are plenty of examples, both in the distant past and more recently, of marriages being created where the parties like each other but could not be said to love each other: where their relationship is one of platonic friendship rather than one of passion. Moreover, there are plenty of examples in this modern age of parties marrying where they do not share a common home or a common domestic life but, nonetheless, their marriage is well and truly a marriage.

15. An example of this is given by Sir James Munby himself in a decision given on 13 March 2018 *In the matter of X (A Child)* [2018] EWFC 15. In that case, there was an application made by parents for a Parental Order in accordance with Section 54 of the Human Fertilisation and Embryology Act 2008. Section 54(2)(a) requires that, in

order to obtain a Parental Order, the applicants must be husband and wife. However, in that case, the relationship of the couple was described as being neither sexual nor cohabitative.

16. In paragraph 6, Sir James Munby described their marriage as follows:

> "The applicants were indeed, and remain, married to each other. Their relationship is deep and of long-standing. But, one of them is, as the other [one] has always known, gay, and their relationship and marriage is thus, as Ms Fottrell puts it, platonic and not romantic. Does this in any way affect their ability to satisfy the requirement of section 54(2)(a)? The answer, in my judgment, is a plain and unequivocal No."

At 7:

> "The marriage, which took place in this country, complied with all the requirements of the Marriage Act 1949. There is, as Ms Fottrell has demonstrated, no ground upon which the marriage could be declared voidable, let alone void. There can be no question of the marriage being a sham. In short, the marriage is a marriage. The fact that it is platonic, and without a sexual component, is, as a matter of long-established law, neither here nor there and in truth no concern of the judges or of the State. One needs look no further than Nigel Nicholson's Portrait of a Marriage, his acclaimed account of the unusual marriage of his parents, Vita Sackville-West and Harold Nicholson, to see how happy and fulfilling a marriage, more or less conventional, more or less unconventional, can be. But it is really none of our business. As the first Elizabeth put it, we should not make windows into people's souls."

At 8:

> "A sexual relationship is not necessary for there to be a valid marriage. The law was stated very clearly, if in Latin … by Sir James Wilde in *A v B* (1868) LR 1 P & D 559, 562.
>
> 'The truth is, *consensus non concubitus facit matrimonium.*'
>
> The law has always recognised that a couple may take each other as wife and husband tanquam soror vel tanquam frater (as sister and brother), as our ancestors would have put it applying the canonists' maxim."

And then he cites a number of cases where that principle has been enunciated.

17. I therefore do not agree with the younger Munby J when he stated that implicit in the marriage contract is an agreement to live together, to love one another as husband and wife or that it would necessarily, although it may well be commonplace, involve the sharing of a common home and a common domestic life.

18. Why is it suggested that (name 1) does not have the capacity to marry? In his witness statement, the Deputy, Mr Mundell, says this:

> "I have concerns regarding P's financial understanding of the marriage planned for 21 September 2019. P has stated, on more than one occasion, to both ourselves and his case manager, that he did not want to proceed

with the marriage and he wanted (name 2) to leave his property but he was scared of any consequences which may result in doing so. In December 2018, our family team wrote to (name 2) to advise the relationship was over and ask her to leave. (name 2) advised this was not the case. P then also confirmed that the relationship was ongoing and he didn't want to progress with requesting (name 2) to leave. Furthermore, P drafted a will in late 2017 and clearly stated in this that all of his estate is to be passed to his parents only and did not want anything left in it to his then partner, (name 2)."

19. Birgit Richardson-Rathje is a case manager and specialist neurological occupational therapist, has made a witness statement and has given oral evidence before me. In her witness statement she says this under the heading:

> "Relationship capacity to get married.
> When speaking to (name 1) about his relationship with (name 2) at various times since the beginning of March, he has always stated the relationship was so so. When asked what had prompted him to propose to (name 2), he advised, she had asked him. When asked why he wants to get married, (name 2) has only ever said to be happier. He struggles to understand and discuss the legal and financial implications of marriage/divorce when I have explored these with him."

20. (name 1) agreed to undergo an assessment of capacity which was undertaken by Dr Declan Gerrard McNicholl, a clinical neuropsychologist. The instructions were given by Mr Mundell. In the Assessment of Capacity, part A, Mr Mundell says that he is asking the Court to decide whether P has capacity to marry, including and appreciating the full consequences of entering into a marriage, including the financial ramifications. In the assessment completed by Dr McNicholl, he says this, at box 7.2:

> "In response to the question, what are advantages of marriage, (name 1) replied, 'Nothing. Don't know, maybe happiness.' But able to understand legal implications but not emotional aspects."

Then a little further down he says:

> "(name 1) is easily persuaded. He has difficulty saying no by his own admission. His reasoning is impaired. He is very vulnerable and would be open to being exploited. Grave concerns were expressed by almost all others about his ability to understand the ramifications [possibly] of this decision. He has not thought through the long term implications and possible outcome."

21. He says, in paragraph 7.3, that he gives his opinion that there is a lack of capacity based on his interview with (name 1), his parents, the case manager and partner. He says, in paragraph 7.5, that:

> "(name 1) believes he has the capacity to make this decision. He stated that, if things didn't work out, he would leave his home to his wife and to her children."

22. That is the extent of the evidence that I am asked to draw conclusions from, namely that I should have reason to believe today that (name 1) lacks the capacity validly to form a marriage next Saturday. (name 1) not only gave oral evidence to me but has written a letter to the Court. The letter was composed yesterday, I believe.

23. It reads as follows:

> "My name is (name 1) and I am here to get a positive outcome in allowing me to marry my fiancée of two years, (name 2). Marrying (name 2) means everything to me. It is showing everyone that we are committing our love to one another and being able to settle down as a family. Marriage is about love and commitment and being a family, being there to support each other in everyday life, making a commitment legally and also having a long lasting relationship for many more years. I have two step kids I am trusted with and capable of providing childcare for while (name 2) is at work. I have recently started a job as a steward at [an organization]
> and I am more than capable of searching bags as part of my job role and ensuring that everyone is behaving acceptably. I have brought some references from family members and friends who know me very well and all believe I am capable of deciding to marry (name 2)."

24. As has been identified by me in the evidence, there is concern that (name 1) does not understand the financial ramifications of marrying (name 2) next Saturday. (name 2) has been asked to sign a prenuptial agreement by Mr Mundell but has declined to do so. Whether an appreciation of the financial implications of the breakdown of a marriage, as opposed to the formation of a marriage, is part of the requisite understanding in order to be able to have the necessary capacity to contract the marriage in the first place, was not mentioned in any of the cases up to and including *Sheffield City Council v E* but was referred to in a decision of Parker J in *the London Borough of Southwark v KA and Others* [2016] EWCOP 20.

25. At paragraph 37, she says this:

> "The tests for capacity in respect of sexual relations and marriage are not high or complex. The degree of understanding of the 'relevant information' is not sophisticated and has been described as 'rudimentary', although Macur J's word 'salient' may be more apt. I must not set the test too high."

26. I, myself, would adhere to her initial description of the level of understanding as being rudimentary and, in my judgment, what Parker J here says in paragraph 37 is a mirror over 100 years after the decision of *Durham v Durham*. In paragraphs 76 to 77, Parker J said this:

> "The test for capacity to marry is also a simple one: a) Marriage is status specific not person specific. b) The wisdom of the marriage is irrelevant. c) P must understand the broad nature of the marriage contract. d) P must understand the duties and responsibilities that normally attach to marriage, including that there may be financial consequences and that spouses have a particular status and connection with regard to each other. e) The essence of marriage is for two people to live together and … love one another. f) P must not lack capacity to enter into sexual relations.

> The decision is about capacity and not welfare. Thus I do not take into account aspects of his decision making which affect the consequence of his decision making, so long as they do not affect the decision making process in itself."

27. For the reasons I have given earlier, I do not accept that the essence of marriage is for two people to live together and to love one another, although I would accept that that is how people would normally expect their married life to commence and to be conducted. The fact that it may be empirically the norm does not mean, of course, that they are essential features of the marriage contract.

28. (name 1) gave evidence before me. He was asked what his understanding of the marriage contract was and he replied by referring to the words of the marriage vows in the Anglican prayer book; that he perceived it as being a relationship that would endure in sickness and in health; and then he described how the obligations of marriage would require aid to the other spouse if he or she fell sick. He said that it involved a commitment to each other. The final chapter, he said, is becoming a family.

29. In relation to the financial consequences, he said he understood that it would mean that the finances on divorce would probably be halved but he accepted that, if there were to be a breakdown of the marriage and a divorce, that he would go to a lawyer and would accept the advice of a lawyer. He stated that he would probably have to go and live with friends if the marriage broke down and he accepted that he was not sure how a divorce would impact on his financial ability to care for himself.

30. In her decision of the *London Borough of Southwark v KA,* Parker J said, at paragraph 79:

> "It is not relevant to his understanding of marriage that he does not understand … how financial remedy law and procedure works and the principles are applied. The fact that he might lack litigation capacity in respect of financial remedy litigation does not mean that he lacks capacity to marry."

31. In my judgment, it would be inappropriate and, indeed, arguably dangerous to introduce into the test for capacity to marry a requirement that there should be anything more than a knowledge that divorce may bring about a financial claim. This, (name 1) plainly understands. However, what the extent of that claim should be is a mystery to even the most sophisticated and well educated of lay, as well as legal, persons and to suggest that there is needed an appreciation of what the result of a financial remedy claim might be, would be to set the test for capacity far too high.

32. In my judgment, (name 1) has the necessary appreciation of the financial ramifications of a breakdown of marriage, were he to contract one next Saturday. I am not satisfied that the evidence placed before me, as developed by the oral evidence from the witness box, comes close to giving me reason to believe that (name 1) does not have the capacity to enter into marriage on Saturday. The application is therefore dismissed.

33. I would say this, however: if this marriage happens and then later breaks down and a financial claim is made, then the scope of any claim by (name 2) is necessarily going to be extremely limited, given that the entirety of (name 1)'s means derive from a personal injury compensation payment which will have been calibrated by reference

to his needs. There are numerous authorities in the books which have effectively emphasised the near-immunity of personal injury awards from a financial claim. So, the extent of any claim that were to be made on the breakdown of this marriage, were it to happen, would be limited, in my provisional prognostication at this point, to alleviating serious financial hardship and no more.

34. That is my judgment.

This Transcript has been approved by the Judge.

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