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D v S [2023] EWFC 23: Capacity to Divorce

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Introduction

This judgment, handed down by Mr Justice Hayden on 1 March 2023 and in what he described as 'grotesquely protracted litigation' addressed the issue of capacity in the context of divorce and the Court of Protection's powers in respect of the same. Ending a marriage is an extremely important decision and has far reaching consequences, both financially and otherwise. Yet, and surprisingly, there is no clear guidance on how to approach a case whereby the proposed applicant to a divorce is assessed to lack capacity to make that decision. The judgment delivered by Mr Justice Hayden in D v S was, for this reason, greatly welcomed. However, for the reasons stated below, the guidance provided within the judgment has limited reach.

In D v S there were two applications before the court: one relating to a best interests decision in respect of D (in the Court of Protection) and another relating to an application for decree nisi (in the Family Court). D was assessed as lacking capacity in "a wide sphere of decision-taking" (§1) because of a severe acquired brain injury.

Factual background

In summary, D married S in 1998 and they have two adult children. D and S became shareholders in a pharmacy company along with D's brother. By June 2006, Mr Justice Hayden was satisfied that there were "considerable strains, both within the business and the marriage" (§2). As a result, D, who was living separate and apart from S at the time, took an overdose which resulted in the brain injury described above.

In October 2007, S petitioned for divorce based on adultery. Mr Justice Hayden recorded that he had seen "no coherent evidence in support of this alleged ground" (§2). In 2008 the Court of Protection appointed a solicitor as D's Deputy for property and affairs. In March 2009, S made an application in the Family Court for financial remedies and at a hearing the following month it was determined that the Deputy did not have authority to conduct divorce proceedings on behalf of D. The Official Solicitor was invited to act as a litigation friend for D and the divorce petition and financial remedy applications were stayed pending the appointment of a "Guardian" for D (it not being clear what is meant by Guardian in this context). The Official Solicitor confirmed that he would accept the invitation if certain criteria were met, i.e. evidence that D lacked capacity to conduct proceedings; there was no other person to act for him and there was security for the Official Solicitor's costs. The latter was not provided and therefore the invitation was declined. The absence of security for costs highlights another significant problem within family proceedings due to the removal of legal aid in the vast majority of cases.

On 12 September 2016, S issued a supplemental petition for divorce on the basis of five years' separation. On 13 December 2018 the court lifted the stay on proceedings, gave directions and listed the case for a hearing on 9 May 2019. No explanation is provided in the judgment for the gap of almost two years between the supplemental petition and the stay being lifted. At that hearing, S's previous petition was dismissed by consent of the parties (although it is unclear how D was able to give such consent in the absence of a litigation friend). Nothing was done to actively pursue S's supplemental petition but, in July 2019, a divorce petition was filed by D also on the basis of 5 years' separation. This petition was issued and D's brother, U, was identified as his litigation friend, although proceedings were then further stayed as a result of the judge being satisfied that the litigation friend had failed to comply with his duties A litigation friend's duties are addressed in para 2.1 of PD15A of the Family Procedure Rules 2010, which provides that:

2.1
"It is the duty of a litigation friend fairly and competently to conduct proceedings on behalf of a protected party. The litigation friend must have no interest in the proceedings adverse to that of the protected party and all steps and decisions the litigation friend takes in the proceedings must be taken for the benefit of the protected party."

It is apparent from the court's later direction that it considers there to be a conflict of interest precluding U from continuing as litigation friend, though the nature of this conflict is not addressed in the judgment. This is of great practical importance to family lawyers. Often they will be approached by a family member who wishes to act as litigation friend, however care needs to be taken by the lawyer to ensure they are satisfied that the prospective litigation friend fulfils the above criteria. Frequently this will turn on whether they have a financial interest in the outcome of the protected party's divorce (whether knowingly or otherwise) and if so then it is unlikely that they will be considered suitable.

This led to an amended petition for divorce which was issued on 7 November 2019 and the stay on proceedings was lifted (although it is unclear from the judgment what amendments were made and who was providing instructions on behalf of D). Notwithstanding her earlier petition, S responded by contesting that the marriage had irretrievably broken down and challenging D's capacity to pursue the divorce. Mr Justice Hayden was "satisfied that her change of position was entirely motivated to secure what she perceived to be her best financial advantage and that of her children" (§6).

In 2020 the court directed that U respond to the claim that he should not continue as litigation friend due to his conflict of interests and a hearing was listed. That hearing was adjourned and a costs order (perhaps surprisingly in circumstances where there were outstanding questions as to his capacity to litigate these proceedings) made against D. The court then directed the filing of evidence in respect of D's wishes and feelings relating to the divorce, to be prepared by his social worker, and the instruction of a single joint expert to provide a report addressing D's general medical condition and capacity for decision making. Neither party complied with the court's orders and on 13 April 2022, the judge suggested that consideration be given to making an application to the Court of Protection given that all agreed that the petition had been presented at a time when D may have lacked capacity to make that decision or to conduct proceedings. The court recorded the issue for determination by the Court of Protection as "whether a litigation friend is

required to show evidence of the protected person's wishes when making decisions on their behalf in conducting the proceedings" (§11).

On 16 February 2021, a longstanding friend of D, F, put himself forward as litigation friend of D and signed a certificate of suitability. Mr Justice Hayden described F as "an essentially decent man" who "was the only person who was able to bring D's character and personality into the court room" (§7). F also described how, before D's brain injury, he was aware that D and S had become estranged and that neither seemed interested in repairing the relationship, evidence that Mr Justice Hayden found "entirely convincing" (§8). F ultimately became the litigation friend for D in these proceedings.

The divorce proceedings were subsequently stayed as D, via his litigation friend and following advice from leading counsel, made an application to the Court of Protection for a declaration as to whether a divorce would be in his best interests. It was this application that came before Mr Justice Hayden.

Did D have capacity to divorce?

Mr Justice Hayden, having summarised the factual and procedural history, began by commenting that "with respect to all involved, in was struck by the absence of any real attempt, or at least any success, in garnering material that cast meaningful light on the identified issue" (§14).

Mr Justice Hayden identified that, logically, the first issue was whether D had "capacity to conduct divorce proceedings" (§15). It is notable that this is how the decision was characterised, no distinction seemingly being drawn between the conducting of such proceedings and the substantive decision to divorce. He referred to the observation by McFarlane LJ in *PC v City of York Council [2014] [Fam 10]*, 'the determination of capacity under MCA 2005, part 1, is decision specific. Some decisions, for example agreeing to marry or consenting to divorce are status or act specific.'

Mr Justice Hayden noted that "research has revealed a dearth of authority analysing what information might be regarded as relevant to a decision to divorce" (§15, it being necessary to identify such 'relevant information' for the purpose of assessing an individual's capacity to make that decision as per s3(4) MCA 2005). The learned judge noted, however, the decision of Sir George Baker P in *Mason v Mason [1972] Fam. 302* that 'the test for the capacity of a man to give a valid consent for the dissolution of his marriage is exactly the same as the test for the validity of the contract of marriage.'

Mr Justice Hayden further quoted authority in support of the fundamental principles that an individual is assumed to have capacity unless it is established that he lacks capacity, applicable in respect of *any* question of capacity, and that capacity is *decision*- or *transaction*-specific. Turning back to Mason (supra), Mr Justice Hayden noted that Sir George Baker determined that the consent given to divorce can not be provided by the litigation friend, only the person themselves (§20).

Mr Justice Hayden commented that while our modern approach to questions of capacity has evolved greatly since Mason, "it is plainly right that whilst the Official Solicitor or

litigation friend may help in determining the question of 'consent'…neither is able to give consent on behalf of the protected party" (§21). However, he then went on to say, in a passage that warrants reproducing in full:

"Today, in a legal landscape, which is unrecognisable from that facing Sir George Baker, we formulate the question differently. We evaluate those features of the evidence, where available, that case light on what the protected party would have wanted and assess it in the wider framework of Section 4 of the Mental Capacity Act." (§21)

This is a significant jump and, respectfully, fails to address the issue of whether the Court of Protection has the authority to make a best interests decision about divorce, and whether this applies differently to applicants and respondents. Further, and while this was not a live issue in the case based on the date of the petitions for divorce, a broader question arises as to the impact of the introduction of no fault divorce. These are important issues that will need to be grappled with.

Having set out s4 MCA 2005, Mr Justice Hayden addressed the issue of capacity, noting the evidence of the consultant in neurorehabilitation, who had been involved in D's care and medical management since 2007. The consultant confirmed that D's acquired brain injury was 'severe' and that he could not answer even the most simply and direct questions or follow simple requests. She concluded that he lacked capacity across a whole range of areas of decision-making, including health, welfare and financial matters, opining that D has no ability to weigh, retain or balance the information that he is given.

Counsel for D suggested that the "criteria" (i.e. the relevant information which P has to understand, retain and use or weigh), as identified by Munby J (as he then was) in *Sheffield City Council v E [2004] EWHC 2808 (Fam)*, relating to capacity to consent marriage apply, by parity of analysis, to the "decision to divorce" (though it was not clear whether this was considered to be different from the question of capacity to conduct divorce proceedings). The criteria were identified as follows:

(i) The broad nature of the marriage contract;
(ii) 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;
(iii) That the essence of marriage is for two people to live together and to love one another.

Mr Justice Hayden said that he broadly agreed with these criteria, but they are not to be regarded as set in stone and needed to be tailored to the particular individual in the context of an individual's own circumstances. It was, however, so obvious in this case from the evidence of the consultant that D lacks the capacity to consent to divorce (to which the court now returned despite its analysis that the question from *Mason* (supra) is now formulated differently), that Mr Justice Hayden did not need to consider further argument. He therefore declared that D lacks the necessary "capacity to consent to the decree".

Was a divorce in D's best interests?

Turning to best interests, Mr Justice Hayden described how S's position in resisting divorce proceedings had been driven by her concern that divorce would be financially disadvantageous to her and therefore to her children. She suggested that D's brothers, co-directors in the business, had been misappropriating funds and acting in breach of their duties as directors. She believed that the preservation of her marriage provided a defence to the brothers' financial misconduct. Mr Justice Hayden noted, however that "the identification of D's share, its valuation and whether the co-directors have acted to defeat his interests will fall into focus in the course of the financial remedy dispute" and "it may even be that it is to S's financial advantage for the divorce proceedings to proceed" (§25).

Mr Justice Hayden concluded that "the core features of what constitutes a marriage have inevitably evaporated" (§26) for D and S, however this came about, and he explained that "the institution of marriage holds and important place, both in our domestic law and in all the major faiths" (§27). He continued that:

"There is something inevitably corrosive of the status and importance of that institution in preserving a legal framework which, for the parties, has become, in reality, and empty husk. If, for whatever reason, that is the choice of the parties then that decision requires to be respected. However, where one party has lost the capacity to consent either to the continuation or termination of the marriage, that provokes a more complex predicament." (§27)

Mr Justice Hayden stated that the prevailing evidence indicates that D regarded the marriage as having irretrievably broken down at a time when he clearly had "capacity to evaluate his life" (§27) and that, at some point, S has come to regard the marriage at an end also. The learned judge highlighted a number of passages in file notes from D's solicitors, acting as his deputy, within which D consistently expressed a wish to divorce. Such wishes and feelings were expressed in the early years following his brain injury, when "D's general functioning was, although significantly impaired, far less compromised than now" (§27).

Mr Justice Hayden stated that, ordinarily, D's wishes and feelings would have been afforded very significant weight, irrespective of the fact there was doubt as to whether D was capacitous at the time they were given. He noted, however, that "the intensity of the family feud, causes me to draw back from a too easy assumption that they represent D's own genuinely held views". Ultimately, Mr Justice Hayden concluded that he was "confident that they reflect D's views" and considered that to further continue the status quo would risk demeaning all involved. It was noted that by the end of the hearing S also indicated that she would no longer oppose the decree nisi. It was concluded by Mr Justice Hayden that:

"...Having regard to everything that I have been told about D and set out above, I am clear that this is what he would want. Evaluated in these terms, within the aegis of Section 4, I come to the very clear conclusion that the granting of decree nisi is, for all the above reasons, in D's best interests." (§30)

What are the wider implications of this judgment?

Counsel for D in the family proceedings asked Mr Justice Hayden to consider wider guidance when circumstances of this kind arise. He responded as follows:

'Historically, situations such as that presented here, have been rare, at least within the case law. Though our understanding of the rights of the incapacitous has grown very considerably, particularly in the last decade and though I anticipate such issues are more likely to arise in the future, I am, with respect to Ms Spruce, not inclined to give wider guidance. The Court of Protection is a highly fact and issue specific jurisdiction in which prescriptive guidance runs the distinct risk of being actively unhelpful.' (§31)

Although there can be no disagreement with the proposition that the Court of Protection is a highly fact and issue specific jurisdiction, we respectfully argue that wider guidance would in fact be helpful for practitioners working in this area. For example: what is the distinction, if any, between capacity to conduct divorce proceedings and capacity to consent to divorce? What is the relevant information in respect of assessing capacity in either one of those areas of decision-making? What is the impact of s27 MCA 2005, which precludes best interests decisions in respect of *inter alia* "consenting to a decree of divorce being granted on the basis of two years' separation"? Who should be making such applications for determination by the Court of Protection, and in what circumstances should the court be approached? Of most significance, perhaps, is the potentially determinative impact of s27 MCA 2005, a provision that finds no place in the judgment of Mr Justice Hayden. As a catalyst for further consideration of these issues, the judgment of Mr Justice Hayden is welcomed.