Case No: FD04P01830

Neutral Citation Number: [2004] EWHC 2808 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
PRINCIPAL REGISTRY
(In Private)

In the matter of the inherent jurisdiction of the Family Division of the High Court
And in the matter of E (an alleged patient)

The Law Courts
Quayside
Newcastle-Upon-Tyne, NE1 3LA

Date: 2 December 2004

Before :

THE HONOURABLE MR JUSTICE MUNBY

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Between :

SHEFFIELD CITY COUNCIL	**Claimant**
- and -	
(1) E	
(2) S	**Defendants**

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Mr Robert Jay QC (instructed by Legal and Administrative Services) for the claimant
Mr Adrian Whitfield QC (instructed by Irwin Mitchell) for the first defendant E
Miss Janet Waddicor (instructed by Howells) for the second defendant S

No Hearing
Decision without oral argument on the basis of written submissions

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Judgment

Mr Justice Munby :

1. I have before me a preliminary issue arising in proceedings brought under the inherent jurisdiction of the Family Division of the High Court of Justice in relation to an alleged patient E. The proceedings were commenced by a Part 8 claim form issued on the application of Sheffield City Council ("SCC") on 8 September 2004. SCC is the local social services authority with responsibilities for E. SCC commenced the proceedings because of its concerns about E's relationship with an older man S.

The background

2. E is a young woman of 21. She has hydrocephalus and spina bifida. SCC alleges that E functions at the level of a 13 year old, that she has limited independence skills and that she is very vulnerable to exploitation. S is 37. He is a Schedule 1 offender and has a substantial history of sexually violent crimes, including convictions for buggery of a minor for which he received a total sentence of 8 years' imprisonment.

3. E and S met in January 2004. E moved in to live with S in June 2004. At the beginning of September 2004 SCC discovered that E and S were planning to be married on 18 September 2004. Concerned that E's relationship with S had become abusive, and that E was at risk of domestic violence and sexual exploitation at S's hands, SCC began these proceedings, wanting to stop them marrying or associating and asserting that it is in E's best interests neither to marry nor to associate with S. SCC invokes the inherent jurisdiction: see *In re F (Adult: Court's Jurisdiction)* [2001] Fam 38 and *Re S (Adult's Lack of Capacity: Carer and Residence)* [2003] EWHC 1909 (Fam), [2003] 2 FLR 1235. SCC's case is that E lacks the capacity to make decisions about where she should live, about whether she should have contact with S and about whether she should marry S.

4. The matter came before Coleridge J on 14 September 2004 when an ex parte order was made which, amongst other things, prohibited S from marrying E without the leave of the court. The Official Solicitor was ordered to conduct enquiries as to E's capacity "to conduct this litigation … to decide where she should live … to decide whether she should have contact with [S], and the extent of that contact … [and] to get married to [S]". Coleridge J also directed that, if "satisfied by medical evidence that [E] lacks capacity to conduct this litigation", the Official Solicitor, subject to his consent, be appointed E's litigation friend.

5. On 16 September 2004 a letter of instructions was sent to Dr M, a Consultant Psychiatrist in Learning Disabilities, inviting her to address each of these issues. Under the heading 'Assessment to capacity', the letter, which I understand was in a form agreed between SCC and the Official Solicitor, set out what I am bound to say was a not particularly helpful analysis for Dr M of the law relating to capacity. Reference was made to *Re MB (Medical Treatment)* [1997] 2 FLR 426 and

Masterman-Lister v Brutton & Co (No 1) [2002] EWCA Civ 1889, [2003] 1 WLR 1511. The letter continued:

> "In the Official Solicitor's view the information material to a decision about where E should live, whether or not she should marry and whether or not she should have further contact with [S] is:
>
> 1 Information about E's understanding of the implications of marriage, the concept of marriage, sex, the ability to care for any children resulting from the relationship, the legal relationship between husband and wife, implications of marriage on finance and property rights.
>
> 2 Information about any physical, psychological or emotional harm or distress which may be sustained as a result of further contact with [S] and/or the marriage.
>
> 3 Information about the advantages and disadvantages for the individual and in her lifestyle or about the opportunities which further contact with [S] and/or marriage will provide in the short term, medium term and long term.
>
> 4 Information about E's understanding of the gravity and implications of [S]'s previous criminal convictions, his acceptance of or lack of acceptance of guilt and the risk [S] poses of committing further sexual or violent offences in the future.
>
> 5 Information about E's understanding of the weight to be attached to allegations made against [S] that may not result or have resulted in criminal convictions to date."

6. In relation to issues of capacity, Dr M was asked to answer the following questions:

> "1 Does E have the mental capacity to conduct litigation?
>
> 2 Does E have the mental capacity, in accordance with the re MB test to decide:
>
> > (a) whether or not she should have contact with [S] and whether she is able to assess the risk of contact with [S],
> >
> > (b) where she should live in the light of such a risk assessment,
> >
> > (c) whether or not she should marry [S] in the light of such a risk assessment?

> 3 Is it likely that E will acquire capacity to make her own decisions in respect of these matters and if so, what is the likely timescale and what help or support could be given to that end?"

7. Dr M was also asked to advise as to E's best interests. The letter correctly pointed out that:

> "The issue of capacity to make the relevant decision should be determined first. Only if the person is found not to have decision making capacity will it be necessary to address the best interest issue."

In relation to best interests, Dr M was asked to answer a number of questions including these:

> "If E lacks capacity to make her own decisions, please then advise as to best interests as follows: …
>
> Marriage
>
> (a) Is it in E's best interests to enter into a marriage with [S]?
>
> (b) If not please (1) indicate why not (2) indicate whether any steps can be taken in the form of education or otherwise."

8. On 24 September 2004 Dr M produced a written report. She said "At the present time I do not have sufficient information to complete my assessment in all the areas in which I have been instructed to complete a report". She went on to say of E: "At the present time I would only be prepared to give my opinion that she has the capacity to litigate." That opinion was expressed generally and appears to have applied to all aspects of the litigation.

9. On 30 September 2004 the Official Solicitor filed a statement saying that he accepted Dr M's conclusion that E does have capacity to conduct the litigation and pointing out that he was therefore not able to act as her litigation friend. He left open for further consideration the question of E's capacity on the matters which are the subject of the litigation, saying, hardly surprisingly in the light of Dr M's report, that he was not in a position to present the court with a concluded view. Later the same day (30 September 2004) the proceedings came before Hogg J. She made an order declaring that E "has the capacity to litigate" and directed that Dr M was to file a final report on E's capacity by 28 October 2004. She also directed that the matter was to be listed for a final hearing on the first open date after 10 December 2004. (I understand that it has in fact been listed for hearing on 31 January 2005.) The order recited that E and S had agreed not to marry until further order or conclusion of the proceedings.

10. On 6 October 2004 E's solicitors wrote to SCC proposing that the following questions should be put to the experts, including Dr M:

> "1 Has [E] the capacity to understand the nature of the contract of marriage generally (as opposed to the implications of marriage to [S])?
>
> 2 Has [E] the capacity to understand the responsibilities created by the contract of marriage generally?
>
> 3 Has [E] the capacity to give valid consent to marriage generally?"

SCC's solicitors replied on 13 October 2004, saying that Leading Counsel considered that Dr M and the other experts

> "should be asked to address the issue of capacity in the context of the particular decisions [E] apparently wishes to take. Your approach is, in his view, against principle and authority."

As has been pointed out, no authority was cited.

11. On 18 October 2004 E's solicitors issued an application seeking an order for the determination as a preliminary issue of the appropriate questions to be put to Dr M and the other experts. On 21 October 2004 Her Honour Judge Finnerty ordered that the case was to be listed before me on 4 November 2004, with a time estimate of 3 hours, "for the determination of a preliminary issue of the definition of capacity to give a valid consent to marriage." That date proved not to be convenient to SCC's Leading Counsel and I was asked if the hearing could be moved. Such was the press of business in my list that this was simply not possible. But I told the parties that, if they were all agreed, I was content to deal with the matter on written submissions and without the need for an oral hearing. Failing that it would be necessary to re-fix the hearing of the preliminary issue, with no assurance that an early hearing would be possible. In the event all parties agreed that I should decide the preliminary issue on the basis of written submissions.

12. I subsequently received written submissions from Mr Robert Jay QC on behalf of SCC, from Mr Adrian Whitfield QC on behalf of E, and from Miss Janet Waddicor on behalf of S. Somewhat later the Official Solicitor, with the consent of the parties, raised a further matter for my consideration. I now (2 December 2004) hand down judgment.

The central issue

13. Mr Jay, in his skeleton argument, helpfully identifies the central issue as follows:

> "The nature of the issue between the parties may be shortly stated. [SCC] says that the issue of capacity to marry should be considered in the context of E's apparent wish to marry [S]: in other words, does she have capacity to make that *particular*

> decision? [E] says that the issue should be posed in non case-specific terms: in other words, has E the capacity to understand the nature of the marriage contract *generally* as well as the responsibilities created thereby."

14. Mr Whitfield formulates the same point more crisply: Is the test, as he would have it, whether E is "capable of understanding the nature of the contract into which she is entering" (the formulation in *Rayden & Jackson's* Law and Practice in Divorce and Family Matters (ed 17) at para 5.59), or is the test, as SCC appears to submit, whether E has the capacity to understand the implications of marriage to S.

15. The point arises because, as Mr Whitfield and Miss Waddicor point out, SCC appears to be unwilling, or at least reluctant, to assert that E does not have the capacity to marry anybody. SCC's case appears to be that E lacks the capacity to marry S because of her inability, as SCC would assert, to understand the implications of marriage to him.

16. Mr Whitfield on behalf of E and Miss Waddicor on behalf of S make common cause. They submit that the questions to be asked were properly formulated in the letter from E's solicitors dated 6 October 2004. Mr Jay, for his part, submits that the proper formulation is this:

> "Has E capacity to make decisions as to (a) whether she should have contact with [S], (b) as to the extent of that contact, and (c) whether or not she should marry [S]?"

SCC, he says, is content with the way in which matters were formulated in the letter of instructions to Dr M dated 16 September 2004. That formulation, he says, was correctly drawn, being in line with what he calls principle and settled practice.

17. I should make it clear that the present application comes before the court entirely without prejudice to E's contention:

    i) that SCC has no statutory power over either her or S; and

    ii) that SCC cannot invoke the inherent jurisdiction of the court on the basis of *In re F (Adult: Court's Jurisdiction)* [2001] Fam 38, as it seeks to do, because E is simply not an 'adult patient'.

Capacity

18. At the outset there are two points to be made which are not, I think, in any way controversial. The first is that every adult (that is, everyone who has attained the age of 18 years) is presumed to have capacity, and that the burden of proof is on those

who assert the contrary. It follows that E does not have to establish that she has capacity to marry; the burden is on SCC to prove that E does not have capacity to marry.

19. The other is this. The general rule of English law, whatever the context, is that the test of capacity is the ability (whether or not one chooses to exercise it) to understand the nature and quality of the transaction. The classic statement of principle goes back to the advice of the judges to the House of Lords in *M'Naghten's case* (1843) 10 Cl&F 200. That, of course, was a criminal case where the judges were concerned to define the ambit of the defence of insanity. But on this very general level of abstraction – that capacity is dependent upon the ability to understand the nature and quality of the transaction – the same basic principle applies whether the question is as to capacity to enter into a contract, to execute a deed, to marry, to make a will, to conduct litigation, to consent to a decree of divorce, or to consent to medical treatment: see, for example, the various cases collected together by Chadwick LJ in *Masterman-Lister v Brutton & Co (No 1)* [2002] EWCA Civ 1889, [2003] 1 WLR 1511, at paras [57]-[61].

20. This general point was explained by Sir James Hannen in *Boughton and Marston v Knight* (1873) LR 3 P&D 64 at p 71:

> "Some years ago the question of what amount of mental capacity was required to make a man responsible for crime was considered in *McNaughtens Case* (1843) 10 Cl&F 200. No doubt the question is treated somewhat differently in a criminal suit to what it is here (the difference I will explain presently); but there is, as you will easily see, an analogy between the cases which will be of use to us in considering the points before us. Lord Chief Justice Tindal, in expressing the opinion of all the judges, said – "In all cases every man is to be presumed to be sane until the contrary is proved, and it must be clearly proved, that at the time of committing or executing the act the party was labouring under such defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."
>
> That, in my opinion, affords as nearly as possible a general formula which is applicable in all cases in which the question arises, not exactly, perhaps, in the terms I have read, but to the extent I will explain to you. It is essential, to constitute responsibility for crime, that a man shall understand the nature and quality of the thing he is doing, or that he shall be able to distinguish in the act he is doing right from wrong. Now a very small degree of intelligence is sufficient to enable a man to judge of the quality and nature of the act, and whether he is doing right or wrong, when he kills another man; accordingly he is responsible for the crime committed if he possesses that amount of intelligence. And so in reference to all other concerns of life, – was the man at the time the act was done of

> sufficient capacity to understand the nature of the act? Take the question of marriage. It is always left in precisely the same terms as I have to suggest in this case. If the validity of a marriage be disputed on the ground that one or other of the parties was of unsound mind, the question will be, was he or she capable of understanding the nature of the contract which he or she had entered into. The same will occur in regard to contracts of selling and buying. Again, take the case suggested by counsel, of a man, who, being confined in a lunatic asylum, is called upon to give evidence. First, the judge will have to consider, was he capable of understanding the nature and character of the act that he was called upon to do, when he was sworn to speak the truth? Was he capable of understanding the nature of the obligation imposed upon him by that oath? If so, then he was of sufficient capacity to give evidence as a witness."

21. Hoffmann J (as he then was) said much the same in *In re K (Enduring Powers of Attorney)* [1988] Ch 310 at p 313:

> "It is well established that capacity to perform a juristic act exists when the person who purported to do the act had at the time the mental capacity, with the assistance of such explanation as he may have been given, to understand the nature and effect of that particular transaction".

That was approved by the Court of Appeal in *In re W (Enduring Power of Attorney)* [2001] Ch 609 at p 613.

22. The same point was made by Chadwick LJ in *Masterman-Lister v Brutton & Co (No 1)* [2002] EWCA Civ 1889, [2003] 1 WLR 1511, at paras [57]-[58]:

> "English law requires that a person must have the necessary mental capacity if he is to do a legally effective act or make a legally effective decision for himself … The authorities are unanimous in support of two broad propositions. First, that the mental capacity required by the law is capacity in relation to the transaction which is to be effected. Second, that what is required is the capacity to understand the nature of that transaction when it is explained."

He added at para [62]:

> "The authorities … provide ample support for the proposition that, at common law at least, the test of mental capacity is issue specific: that … the test has to be applied in relation to the particular transaction (its nature and complexity) in respect of

> which the question whether a party has capacity falls to be decided."

23. The importance of this last observation is that someone can have capacity for one purpose whilst simultaneously lacking capacity for another purpose. As Chadwick LJ went on to say at paras [73]-[74]:

> "The answer to [the] inquiry does not turn on whether or not the person has the requisite mental capacity to make some other legally effective decision … The test is issue specific; and, when applied to different issues, it may yield different answers."

Kennedy LJ made the same point at para [29] when observing that:

> " … in law capacity depends on time and context … inevitably a decision as to capacity in one context does not bind a court which has to consider the same issue in a different context."

24. Chadwick LJ pointed out that an example is to be found in cases where a claimant who lacks the capacity to litigate, and accordingly acts by a litigation friend, nonetheless has the capacity to decide to refuse the medical treatment which is under consideration in the proceedings. As he said at para [74]:

> "There is no inconsistency between the requirement that a party to legal proceedings comply with RSC Ord 80 and a decision that he has an understanding of the nature, purpose and effects of the medical treatment which is under consideration in those proceedings. The test is issue specific".

(The Lord Justice's point, if I may say so with all due diffidence, is plainly correct even if he seems to have been mistaken as to what had actually happened in the case to which he refers: compare Chadwick LJ's comments at para [74] with what Thorpe J said in *In re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290 at p 295.)

25. Another, very striking, example is the deceased who was found by Karminski J to have had capacity to marry at 11.30 am on 30 May 1949 (*In the Estate of Park deceased, Park v Park* [1954] P 89), having previously been found by Pearce J and a jury not to have had capacity to make a will early in the afternoon of the same day (*In re Park, Culross v Park* (1950) The Times December 2). Karminski J's decision was upheld by the Court of Appeal (*In the Estate of Park deceased, Park v Park* [1954] P 112), Hodson LJ commenting at p 136 that the jury's answer to the question put to them by Pearce J "cannot be treated as if it were a certificate of insanity".

26. It is for this reason that Hogg J's declaration on 30 September 2004 that E has the capacity to litigate is not necessarily determinative of the question whether she has capacity to marry. It is for this reason also that the letter of instructions to Dr M dated

16 September 2004 was not particularly helpful, for its analysis of the law was inadequate and it failed to draw Dr M's attention to the fact that different answers might properly be given to the different questions she was being asked.

27. In the light of Mr Jay's submissions, and bearing in mind the point raised by the Official Solicitor, there are two other topics which it is convenient to consider before turning to the central issue of capacity to marry: first, capacity in the context of medical treatment and, secondly, capacity to litigate.

Capacity in relation to medical treatment

28. Mr Jay has helpfully taken me through the well-known line of cases dealing with the question of capacity in the context of medical treatment.

29. First there is the judgment of Lord Donaldson of Lymington MR in *In re T (Adult: Refusal of Treatment)* [1993] Fam 95 at p 113:

> "Doctors faced with a refusal of consent have to give very careful and detailed consideration to the patient's capacity to decide at the time when the decision was made. It may not be the simple case of the patient having no capacity because, for example, at that time he had hallucinations. It may be the more difficult case of a temporarily reduced capacity at the time when his decision was made. What matters is that the doctors should consider whether at that time he had a capacity which was commensurate with the gravity of the decision which he purported to make. The more serious the decision, the greater the capacity required. If the patient had the requisite capacity, they are bound by his decision. If not, they are free to treat him in what they believe to be his best interests."

Lord Donaldson returned to the same point at p 116:

> "What matters is whether at that time the patient's capacity was reduced below the level needed in the case of a refusal of that importance, for refusals can vary in importance. Some may involve a risk to life or of irreparable damage to health. Others may not."

30. Next is the decision of Thorpe J (as he then was) in *In re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290 at pp 292, 295:

> "For the patient offered amputation to save life, there are three stages to the decision (1) to take in and retain treatment information, (2) to believe it and (3) to weigh that information, balancing risks and needs.

> … submissions divide over the definition of the capacity which enables an individual to refuse treatment. Mr Gordon argues for what he calls the minimal competence test, which he defines as the capacity to understand in broad terms the nature and effect of the proposed treatment. It is common ground that C has the legal capacity to initiate these proceedings without a next friend, within the terms of RSC, Ord 80. Mr. Gordon contends that the capacity to refuse treatment is no higher and is equally no higher than the capacity to contract. I reject that submission. I think that the question to be decided is whether it has been established that C's capacity is so reduced by his chronic mental illness that he does not sufficiently understand the nature, purpose and effects of the proffered amputation.
>
> I consider helpful Dr. Eastman's analysis of the decision-making process into three stages: first, comprehending and retaining treatment information, second, believing it and, third, weighing it in the balance to arrive at choice."

31. That approach was approved and applied in *Re MB (Medical Treatment)* [1997] 2 FLR 426 where at p 437 Butler-Sloss LJ (as she then was) said this:

> "A person lacks capacity if some impairment or disturbance of mental functioning renders the person unable to make a decision whether to consent to or to refuse treatment. That inability to make a decision will occur when:
>
> (a) the patient is unable to comprehend and retain the information which is material to the decision, especially as to the likely consequences of having or not having the treatment in question;
>
> (b) the patient is unable to use the information and weigh it in the balance as part of the process of arriving at the decision."

32. The law in this context can now be taken to be clear and well-established.

Capacity to litigate

33. In the light of the point raised by the Official Solicitor I must also consider the question of capacity to litigate.

34. The leading authority is *Masterman-Lister v Brutton & Co (No 1)* [2002] EWCA Civ 1889, [2003] 1 WLR 1511. I go first to what Chadwick LJ said at paras [75], [79]:

> "the test to be applied … is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in

> other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a next friend or guardian ad litem …
>
> a person should not be held unable to understand the information relevant to a decision if he can understand an explanation of that information in broad terms and simple language; and … he should not be regarded as unable to make a rational decision merely because the decision which he does, in fact, make is a decision which would not be made by a person of ordinary prudence."

35. It is important also to note what Kennedy LJ said at para [26]:

> "the mental abilities required include the ability to recognise a problem, obtain and receive, understand and retain relevant information, including advice; the ability to weigh the information (including that derived from advice) in the balance in reaching a decision, and the ability to communicate that decision."

The resemblance of this approach to that earlier adopted in the context of medical decision-making in *Re MB (Medical Treatment)* [1997] 2 FLR 426 will be apparent.

36. Kennedy LJ went on to observe at para [27]:

> "What, however, does seem to me to be of some importance is the issue-specific nature of the test; that is to say the requirement to consider the question of capacity in relation to the particular transaction (its nature and complexity) in respect of which the decisions as to capacity fall to be made."

He added:

> "It is not difficult to envisage claimants in personal injury actions with capacity to deal with all matters and take all 'lay client' decisions related to their actions up to and including a decision whether or not to settle, but lacking capacity to decide (even with advice) how to administer a large award. In such a case I see no justification for the assertion that the claimant is to be regarded as a patient from the commencement of proceedings."

37. Chadwick LJ addressed the same point at para [83]:

> "I reject the submission that a person who would be incapable of taking investment decisions in relation to a large sum received as compensation is to be held, for that reason, to be incapable of pursuing a claim for that compensation. I accept that capacity to pursue a claim requires capacity to take a decision to compromise that claim; and that capacity to compromise requires an understanding of what the effects of a compromise will be – in particular, an understanding that it will be necessary to deal with the compensation monies in a way which will provide for the future. But that does not, as it seems to me, require an understanding as to how that will be done."

38. It is apparent from all this that the question of capacity to litigate is not something to be determined in the abstract. One has to focus on the particular piece of litigation in relation to which the issue arises. The question is always whether the litigant has capacity to litigate in relation to the particular proceedings in which he is involved. Chadwick LJ in the passage I have quoted from para [75] of his judgment formulated the test as being "whether the party to legal proceedings is capable of understanding … the issues on which his consent or decision is likely to be necessary in the course of *those* proceedings" (emphasis added). And Kennedy LJ in the passage I have quoted from para [27] of his judgment, having identified the "issue-specific nature of the test", went on, as we have seen, to pinpoint the requirement to consider the question of capacity "in relation to the *particular* transaction (its nature and complexity)" (emphasis added).

39. Someone may have the capacity to litigate in a case where the nature of the dispute and the issues are simple, whilst at the same time lacking the capacity to litigate in a case where either the nature of the dispute or the issues are more complex. In this sense litigation is analogous to medical treatment. Some litigation, like some medical treatment, is relatively simple and risk free. Some litigation, on the other hand, like some medical treatment, is highly complex and more or less risky. Someone may have the capacity to consent to a simple operation whilst lacking the capacity to consent to a more complicated – perhaps controversial – form of treatment. In the same way, someone may have the capacity to litigate in a simple case whilst lacking the capacity to litigate in a highly complex case. Just as medical procedures vary very considerably, so too does litigation.

40. The point which concerns the Official Solicitor did not arise for consideration in *Masterman-Lister v Brutton & Co (No 1)* [2002] EWCA Civ 1889, [2003] 1 WLR 1511, where the question of the claimant's capacity to litigate arose in the context of an action in tort – a claim for damages for personal injuries – which did not itself raise any issue as to the claimant's capacity. But in the present case, and typically in cases of this kind, the underlying issue in the litigation relates to the litigant's capacity: sometimes his capacity to consent to medical treatment; sometimes, as here, capacity to decide where to live and capacity to marry. The Official Solicitor is concerned to explore the relationship between these two different types of issue as to capacity. The point is far from academic, for the Official Solicitor is often engaged in litigation where questions arise in relation to each type of capacity. Not infrequently, for

example, as he tells me, he agrees to act as guardian ad litem of a parent, the respondent to adoption proceedings, who lacks the capacity to litigate but who, on investigation, is nonetheless found to have capacity to give agreement to the making of an adoption order in accordance with section 16(1)(b)(i) of the Adoption Act 1976.

41. Correctly, in my judgment, the Official Solicitor accepts that the tests for what I will call "litigation capacity" and "subject-matter capacity" are not identical, and that an adult who lacks the capacity to litigate – lacks "litigation capacity" – may nonetheless have capacity with regard to the matters which are the subject of that litigation – "subject-matter capacity". One example is provided by the kind of adoption case to which I have just referred. And as Chadwick LJ pointed out in *Masterman-Lister v Brutton & Co (No 1)* [2002] EWCA Civ 1889, [2003] 1 WLR 1511, at para [74], another example is to be found in cases where a claimant who lacks the capacity to litigate, and accordingly acts by a litigation friend, nonetheless has the capacity to decide to refuse the medical treatment which is under consideration in the proceedings.

42. There is no particular difficulty with such cases. They merely serve as graphic and telling examples of the fundamental principle that the test of capacity is issue specific. And little mental agility is required to understand how someone who lacks "litigation capacity" may nonetheless have "subject-matter capacity". Someone may lack the mental ability to understand, evaluate and weigh all the complicated information and expert psychiatric opinion which bears on the question of whether he has capacity to consent to a particular form of surgical intervention – and thus may lack the capacity to litigate that question – whilst being perfectly able to decide whether or not to agree to a simple surgical procedure, for example the setting of a broken arm or the removal of an inflamed appendix.

43. The Official Solicitor's concern arises in relation to the converse situation. He puts the point very simply:

> "I accept that the tests for litigation capacity and capacity are not identical and that an adult who lacks litigation capacity may nonetheless have capacity with regard to the matters which are the subject of that litigation …. I am not, however, persuaded that the converse can hold true, namely that an adult who lacks capacity on the matters which are the subject of litigation may nonetheless have litigation capacity with respect to that litigation. It seems to me that a person who lacks capacity, whether in a medical treatment, adult welfare or as in this case an issue over capacity to marry, must also be unable, in any litigation which relates to that decision, to receive, consider and assess advice and to weigh it in the balance before giving instructions to his or her lawyers."

44. The Official Solicitor suggests that this may be a very real issue in this case. As he puts it:

> "If Dr [M] is instructed to carry out an assessment of [E]'s capacity and was to report that in her view [E] does lack such capacity on one or more of the matters which are the subject of this litigation, it seems to me that her conclusion would inevitably cast doubt on her earlier conclusion that [E] has litigation capacity. I would then need to reconsider my original decision not to consent to act as [E]'s litigation friend."

45. The Official Solicitor has helpfully referred me to Bracewell J's very recent decision in *The NHS Trust v Miss T* [2004] EWHC 2195 (Fam). That was a medical treatment case where the issue of capacity arose because, although there was no problem in respect of Miss T's intellectual capacity, and indeed she was able to acknowledge intellectually that her belief was delusional, Miss T's wishes, as expressed to her legal advisers, were solely driven by a desire to kill herself, which desire arose from mental disorder, that disorder involving a delusional belief that the blood within her body was evil and that any transfusion would only add to the evil circulating within her system.

46. The issue which Bracewell J had to resolve was whether Miss T had capacity to litigate, it being Miss T's application to discharge the Official Solicitor as her litigation friend so that she could be represented by a solicitor and counsel of her choice. Bracewell J held that Miss T did not have the capacity to litigate and confirmed the appointment of the Official Solicitor as her litigation friend.

47. What is important for present purposes are certain observations Bracewell J made about the relationship between litigation capacity and subject-matter capacity. At para [2], having referred to *Masterman-Lister v Brutton & Co (No 1)* [2002] EWCA Civ 1889, [2003] 1 WLR 1511, she said this:

> "capacity to litigate … is a separate issue from capacity to make decisions about medical treatment, although in many cases … if there is no capacity to litigate, then by reason of the underlying matrix of factual evidence it would follow that there is no capacity to make decisions about treatment."

At para [5] she added that:

> "although in some circumstances there may be a different answer to the question of capacity to litigate and capacity to make decisions about medical treatment, this is one of those cases in which the evidence is overwhelming that she lacks capacity to make medical treatment decisions, and it follows that a person who has a very unshakeable delusional belief about the very subject matter of the litigation cannot possess the ability to understand, retain, assimilate or act upon advice received as to the conduct of the litigation."

In other words, in that particular case Miss T did not have the capacity to litigate because she did not have the capacity to make medical treatment decisions.

48. Bracewell J was not there concerned with the situation postulated by the Official Solicitor, namely whether someone who has litigation capacity can nonetheless lack subject-matter capacity. Some of her comments can, however, be read as suggesting that such a situation is unlikely. That said, Bracewell J was properly careful to recognise that the two are quite separate issues and that in some circumstances there can be different answers to the two questions.

49. I agree entirely with Bracewell J's analysis. The question, as we have seen, is always issue specific. There may be different answers to the questions, Does this person have litigation capacity? and, Does this person have subject-matter capacity? As Bracewell J said, it all depends on the circumstances. There is no principle, either of law or of medical science, which necessarily makes it impossible for someone who has litigation capacity at the same time to lack subject-matter capacity. That said, however, it is much more difficult to imagine a case where someone has litigation capacity whilst lacking subject-matter capacity than it is to imagine a case where someone has subject-matter capacity whilst lacking litigation capacity. Whilst it is not difficult to think of situations where someone has subject-matter capacity whilst lacking litigation capacity, and such cases may not be that rare, I suspect that cases where someone has litigation capacity whilst lacking subject-matter capacity are likely to be very much more infrequent, indeed pretty rare. Indeed, I would go so far as to say that only in unusual circumstances will it be possible to conclude that someone who lacks subject-matter capacity can nonetheless have litigation capacity.

50. In that practical sense there is, I think, much force in the Official Solicitor's point. Specifically, and referring to the present case, I agree with his observation that if Dr M was to report that, in her view, E lacks capacity on one or more of the matters which are the subject of this litigation, that would inevitably cast doubt on her earlier conclusion that E has litigation capacity. It seems to me that Dr M should now be asked to report on all aspects of the case, including the question of whether E has litigation capacity, and that in relation to this latter question her preliminary report dated 24 September 2004 should not necessarily be treated as determinative of the issue.

51. Against this general background I turn to consider the competing submissions on the central issue of capacity to marry.

<u>Capacity to marry: the case for E and S</u>

52. Mr Whitfield and Miss Waddicor, as I have said, make common cause on behalf of E and S. They rely upon Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. But the lynchpin of their argument is the decision of the Court of Appeal in *In the Estate of Park deceased, Park v Park* [1954] P 112, affirming the decision of Karminski J at [1954] P 89.

53. The question in that case, as we have already seen, was whether the deceased had capacity to marry. The key statement of principle is to be found in the judgment of Singleton LJ at p 127:

> "Was the deceased ... capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract."

That passage, expressly adopted by Birkett LJ at p 133, was treated as a correct statement of the test by Lord Somervell of Harrow giving the advice of the Privy Council in *Hill v Hill* [1959] 1 WLR 127 at p 130. It was likewise treated as correct by Chadwick LJ in *Masterman-Lister v Brutton & Co (No 1)* [2002] EWCA Civ 1889, [2003] 1 WLR 1511, at para [58].

54. I have no doubt that Singleton LJ's observations remain an entirely accurate statement of the law. Indeed, until now, so far as I am aware, no-one has ever suggested the contrary. But the issue canvassed before me is obviously extremely important. And since it is also, I think, important to understand exactly what Singleton LJ was saying – though I have to say that his words seem perfectly clear – I feel that I must go through the relevant authorities. I take them in chronological order.

55. The starting point is the judgment of Sir William Scott in *Turner v Meyers (orse Turner)* (1808) 1 Hagg Con 414 at p 415:

> "It is, I conceive, perfectly clear in law that a party may come forward to maintain his own past incapacity, and also that a defect of incapacity invalidates the contract of marriage, as well as any other contract. It is true that there are some obscure dicta, in the earlier commentators on the law … , that a marriage of an insane person could not be invalidated on that account, founded, I presume, on some notion that prevailed in the dark ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character. In more modern times it has been considered, in its proper light, as a civil contract, as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons."

56. I go next to the judgment of Sir John Nicholl in *Browning v Reane* (1812) 2 Phill Ecc 69 at p 70. Having referred to Blackstone's observation that "modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, was absolutely void", he continued:

> "Here then the law, and the good sense of the law, are clearly laid down; want of reason must, of course, invalidate a contract, and the most important contract of life, the very essence of which is consent. It is not material whether the want of consent arises from ideotcy or lunacy, or from both combined: nor does it seem necessary, in this case, to enter into any disquisition of what is ideotcy, and what is lunacy; complete ideotcy, total fatuity from the birth, rarely occurs; a much more common case is mental weakness and imbecillity, increased as a person grows up and advances in age, from various supervening causes, so as to produce unsoundness of mind. Objects of this sort have occurred to the observation of most people. If the incapacity be such, arising from either or both causes, that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecillity, to take care of his or her own person and property, such an individual cannot dispose of her person and property by the matrimonial contract, any more than by any other contract. The exact line of separation between reason and incapacity may be difficult to be found and marked out in the abstract; though it may not be difficult, in most cases, to decide upon the result of the circumstances; and this appears to be a case of that description, the circumstances being such as to leave no doubt upon my mind."

57. The next authority is *Harrod v Harrod* (1854) 1 K&J 4 at p 14, where Page Wood VC said:

> "It is worthy of remark that infants of the age of twelve years being females, and of the age of fourteen years being males, are competent to contract marriage, though incapable of entering into any other contract."

He continued:

> "As I have said, persons of very youthful age are capable of entering into the marriage contract. The contract itself, in its essence, independently of the religious element, is a consent on the part of a man and women to cohabit with each other, and with each other only. All that is required by the law of Scotland is that the consent should be given in a solemn manner; and that is all that is necessary in a marriage before a registrar in England, according to recent legislation."

A little later at p 16 he said this:

> "When the hands of the parties are joined together, and the clergyman pronounces them to be man and wife, they are married, if they understand that by that act they have agreed to cohabit together and with no other person. I can have no doubt

> that this woman understood this. She has been residing previously with a married couple, and must have known that they lived together in a manner differently from unmarried persons like herself. She remained up to the time of her own marriage perfectly respectable and chaste; she went through the solemnity in which the hands of herself and her husband were joined. A child was born of the marriage in due time and not sooner. She, who was aware of what the proprieties of life required, and had remained chaste until this time, after the celebration of this marriage and not before, allowed the communication of her husband. That shews that she was aware she had performed a solemn act, imposing new duties, and she was constant to her husband during the rest of her life – a period of nearly thirty years. Am I then to say that this person, whose soundness of mind it is impossible to impeach, was so dull of intellect as not to be capable of contracting marriage?"

58. Next there are three decisions of Sir James Hannen. In *Boughton and Marston v Knight* (1873) LR 3 P&D 64 at p 72, as we have seen, he said that:

> "If the validity of a marriage be disputed on the ground that one or other of the parties was of unsound mind, the question will be, was he or she capable of understanding the nature of the contract which he or she had entered into."

59. In *Hunter v Edney (orse Hunter)* (1881) 10 PD 93 at p 95 Sir James Hannen, by now the President of the Probate, Divorce and Admiralty Division, said this:

> "The question which I have to determine is not whether she was aware that she was going through the ceremony of marriage, but whether she was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusions upon the subject."

Holding that the wife lacked capacity at the time of the marriage he found at p 96 that:

> "she was not able to know and appreciate the act she was doing at that time, but … took an entirely morbid and diseased view of it."

60. In *Durham v Durham* (1885) 10 PD 80 the same judge said this at p 81:

> "All the authorities bearing on the subject have been brought to my notice, but I do not think it necessary to review them, as I am of opinion that every case of this kind must be decided upon its own facts. Nor do I consider that it would be useful to borrow from my predecessors, or to attempt myself to form any exact definition of what constitutes soundness of mind. I accept

> for the purposes of this case the definition which has been substantially agreed upon by the counsel to whom I have to express my obligations for the very able assistance they have given me, namely, a capacity to understand the nature of the contract, and the duties and responsibilities which it creates. It is to be observed, however, that this only conceals for a moment the difficulties of the inquiry, for I have still to determine the meaning to be attached to the word "understand." If I were to attempt to analyse this expression, I should encounter the same difficulties at some other stage of the investigation with reference to some other phrase, and I should still have to determine, on a review of the whole facts, whether the respondent came up to the standard of sanity which I must fix in my own mind, though I may not be able to express it. 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 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 the part 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."

61. The later cases show that Sir James Hannen's approach was treated as definitive. In *Jackson (orse Macfarlane) v Jackson* [1908] P 308 at p 310 Bargrave Deane J said:

> "I propose, before considering the evidence, to call attention to the language of the President (Sir James Hannen) in *Hunter v Edney (otherwise Hunter)*, as follows: "The question which I have to determine is not whether she" (the respondent) "was aware that she was going through the ceremony of marriage, but whether she was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusions on the subject." Those words are short, concise, and clear, and I think I may fairly use them in applying my mind to the particular facts of the present case."

62. To much the same effect are the interesting observations of Sir Henry Duke P in *Forster (orse Street) v Forster* (1923) 39 TLR 658. The first was during the course of evidence when, at p 659, the witness was asked:

> ""'Assume that for three weeks before the ceremony he had been drinking large quantities of whiskey, was he, on February 8, 1923, in your opinion, in a condition to understand all the consequences of matrimony." (The President): "Did you ever know anybody who was in a condition to understand all the consequences of matrimony?" (The witness): "No, my Lord"."

Then during his judgment the President said this at p 661:

> "This case is one, it seems to me, of the very greatest difficulty. The position of the petitioner is most deplorable; there can be no question that she has gone through a ceremony of marriage with a mental degenerate. But that is not the question. The question is whether the respondent was mentally capable of understanding the nature of the marriage contract, and the duties and responsibilities which it creates. As Sir J Hannen said in *Durham v Durham*, 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. Now that the respondent knew that he had proposed marriage and the effect of the ceremony and its primary consequences I cannot doubt, but whether his mind at the time was in such a condition that he appreciated and understood the effect of the ceremony is more doubtful. The evidence of members of his family has satisfied me that he was not normal, and that there have been in the past recurrent periods during which he behaved in an unaccountable way after consuming large quantities of alcohol. I have had before me, too, a number of mental specialists, who tell me on their responsibility, and indeed on their oath, that there were with the respondent recurrent periods in which he was the victim of what are called "grandiose delusions." If I had believed that the petitioner had been imposed upon by a rascal – as I was at one time much inclined to believe – I must have refused her the relief which she sought. But I have come to the conclusion that at the end of January and the beginning of February the respondent really held the deluded belief that he was an officer holding a responsible and trusted command, and that he suffered from delusions as to his own *persona*, as to his position in the world, and as to his capacity to perform any of the obligations which he undertook – delusions which rendered his life at that time an unreal thing. On that finding I hold that he was mentally incapable of entering into the contract of marriage and I pronounce a decree nisi of nullity of marriage."

63. Willmer J in *In the Estate of Spier deceased* [1947] WN 46, having referred to *Browning v Reane* and *Durham v Durham*, said that:

> "it was not sufficient merely to be able to understand the words of the ceremony or even to know that the party was going through a ceremony. There must be a capacity to understand the nature of the contract and the duties and responsibilities which it created, and from *Browning v Reane* … there must also be a capacity to take care of his or her own person and property … But as pointed out in *Durham v Durham* marriage was a very simple contract which did not require a high degree of intelligence to contract".

He continued:

> "the deceased, though he knew perfectly well that he was going through a ceremony of marriage, was lacking in a proper capacity to take care of his own person and property, and … the very nature of the disease was such as to act towards incapacitating him from deciding whether his own health justified him in taking this very important step."

64. With that we reach *In the Estate of Park deceased, Park v Park* [1954] P 89 where Karminski J said this at p 100:

> "It is clear, then, that marriage is in its essence a simple contract which any person of either sex of normal intelligence should readily be able to comprehend. I ask myself the question asked in *Hunter v Edney (orse Hunter)* by Sir James Hannen P: was the deceased capable of understanding the nature of the contract he was entering into?"

Having commented that "no high intellectual standard [is] required in consenting to a marriage", he said much the same again at p 111:

> "I prefer in this case to answer the question posed to himself by Sir James Hannen in *Hunter v Edney (orse Hunter)*: was the deceased capable of understanding the nature of the contract he was entering into, free from the influence of morbid delusions on the subject?"

65. In the Court of Appeal it was held that Karminski J had applied the right test. Having gone through all the earlier authorities, Singleton LJ summarised the test at p 127 in the passage which I have already set out. Birkett LJ at p 133 expressed the same point in the following words:

> "on the facts of this case is it shown that this man was not of the mental capacity to understand the nature of the contract?"

Referring to Sir James Hannen's observations in *Durham v Durham* he added:

> "It was said, and with truth … that the contract of marriage is in its essence one of simplicity".

Hodson LJ made the same point at p 136:

> "It is true, as Sir James Hannen pointed out in *Durham v Durham*, that the contract of marriage is a very simple one which does not require a high degree of intelligence to comprehend".

66. I have already referred to the more recent authorities on the point: *Hill v Hill* [1959] 1 WLR 127 at p 130 and *Masterman-Lister v Brutton & Co (No 1)* [2002] EWCA Civ 1889, [2003] 1 WLR 1511, at para [58], both of which, as I have said, treat the test as having been correctly stated by Singleton LJ.

67. Thus the authorities. What do they establish?

68. In my judgment the authorities are quite consistent and have been so ever since Sir James Hannen P's judgment in *Durham v Durham*. The law, as it is set out in these authorities, can be summed up in four propositions:

    i) It is not enough that someone appreciates that he or she is taking part in a marriage ceremony or understands its words.

    ii) He or she must understand the nature of the marriage contract.

    iii) This means that he or she must be mentally capable of understanding the duties and responsibilities that normally attach to marriage.

    iv) That said, 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 of normal intelligence.

69. There are thus, in essence, two aspects to the inquiry. The first is whether the person understands the nature of the marriage contract. But this, as the authorities show, merely takes us to the central question: Does he or she understand the duties and responsibilities that normally attach to marriage? This in turn leads on to two further questions: (1) What are the duties and responsibilities that normally attach to marriage? In other words, What are the essential attributes of the contract of marriage that the person has to be mentally capable of "understanding"? To this question, as we have seen, Sir James Hannen P sought to provide an answer in *Durham v Durham*. (2) What is meant for this purpose by "understanding"? To this question, the President chose not to provide an answer. For, having defined the test as being "capacity to

understand the nature of the contract, and the duties and responsibilities which it creates", he continued:

> "It is to be observed, however, that this only conceals for a moment the difficulties of the inquiry, for I have still to determine the meaning to be attached to the word "understand." If I were to attempt to analyse this expression, I should encounter the same difficulties at some other stage of the investigation with reference to some other phrase, and I should still have to determine, on a review of the whole facts, whether the respondent came up to the standard of sanity which I must fix in my own mind, though I may not be able to express it."

70. But before turning to deal with these two questions I must first summarise the case put forward on behalf of SCC and then consider the opposing submissions which have been put before me on the central issue.

Capacity to marry: the case for SCC

71. It is a somewhat surprising fact that Mr Jay has not sought to address any of the authorities to which I have just referred. Instead he has, as I have said, taken me through the cases dealing with the question of capacity in the context of medical treatment. I have already set out the key passages he relies upon.

72. In addition, Mr Jay referred me to what Wall J (as he then was) said in *Re S (Adult's Lack of Capacity: Carer and Residence)* [2003] EWHC 1909 (Fam), [2003] 2 FLR 1235, at paras [4]-[5]:

> "On 15 January 2003, at a hearing at which Mr S was represented, Hughes J continued the interim declarations made by Johnson J, provided for Mr S's contact with S and gave a number of directions, including the appointment of the Official Solicitor as litigation friend; the joint instruction of a consultant psychiatrist to advise on S's capacity to make decisions as to where she should live and as to contact with Mr S; and the joint instruction of an independent social worker to advise as to her best interests in relation to residence and contact with Mr S. He also laid down a timetable, as a result of which the hearing of the local authority's claim began before me on 21 July 2003.
>
> The relief sought by the local authority is set out in a detailed draft order prepared by the Official Solicitor, a copy of which is annexed to this judgment. In essence it seeks a declaration that S lacks the capacity to decide where she should live and who should provide her with care. It seeks consequential declarations that it is lawful, as being in her best interests, for her to reside at accommodation arranged for her by the local authority. It also seeks a declaration that S lacks the capacity to

> decide whether to have contact with her father, and upon the nature and extent of that contact, together with a consequential direction that it is in her best interests for contact with her father to be agreed with the local authority in accordance with the detailed schedule attached to the order."

73. Mr Jay's submission in a nutshell is that the approach in *Re MB (Medical Treatment)* [1997] 2 FLR 426 is the proper one, whether the issue be capacity to consent to medical treatment or capacity to marry, and that the proper application of the *Re MB* approach leads to the conclusion that capacity to marry has to be assessed by reference to the particular marriage proposal in question.

<u>Capacity to marry: the opposing submissions</u>

74. Referring to the medical treatment cases, Mr Jay submits that in all these cases the role of the court exercising the inherent jurisdiction is not to consider solely abstract questions (can Z understand the nature of medical treatment *in general*?) but, rather, to consider concrete questions in the context of the *particular* decision which is sought to be made. The answers to these questions, he says, must depend on whether the medical treatment under discussion is minor or life-threatening, anodyne or controversial. Z, for example, might well understand the nature of simple and risk-free treatment to remove a wart on his or her finger, but might well not understand the nature of complex and/or controversial treatment.

75. Mr Jay accepts that, as he puts it, "decisions in relation to marriage cannot be as readily conceptualised as lying along any notional spectrum" but submits that, even so, "the court cannot be required to move away from the circumstances of an individual case and address the matter solely at the abstract or theoretical level." This, he says, would be "an artificial exercise leading to hidebound judicial decisions." Although, he concedes, there may be more room for value-judgements in this area than in the realm of medical decision-making, it is, he says, the decision in question which really needs to be addressed, as well as scrutiny being given to the individual's ability to understand the consequences of *that* decision.

76. He submits that the cases he has referred me to – what he calls "the weight of authority" – supports SCC's approach. He then says, rather curiously, that he has not been able to find a case in which an expert was asked to address the relevant question at E's suggested higher level of abstraction (or rather, solely at such a level) or, indeed, any dicta from the courts which chime with such an approach. (That may be so in relation to the modern and still developing case-law relating to "best interests" decision-making in respect of medical treatment, residence and contact but as we have seen it certainly is not so in relation to the well-established case-law which Mr Whitfield and Miss Waddicor pray in aid.) Mr Jay draws attention to *Re S (Adult's Lack of Capacity: Carer and Residence)* [2003] EWHC 1909 (Fam), [2003] 2 FLR 1235, as a case where what he calls the following fact-specific questions were asked of the expert, tailored to the relief being sought in that case by the local authority:

> "the … instruction of a consultant psychiatrist to advise on S's capacity to make decisions as to where she should live and as to contact with Mr S".

77. He submits that to pose the questions in this way does not elide the boundary between capacity on the one hand and best interests on the other. He adds:

> "The boundary is in any event not always clear: a local authority usually intervenes precisely because the individual apparently wishes to proceed in a way which is obviously inimical to his or her best interests, thereby immediately raising issues as to his or he capacity."

The assessment of capacity, he says, necessarily entails an examination of the individual's ability to comprehend the significance of that which is currently in issue, not questions which are purely general, hypothetical or abstract.

78. Mr Whitfield's submissions are short and simple. He says that the law is correctly summarised in the passage in *Rayden & Jackson* at para 5.59 which I have already set out. He says that the law is accurately stated in the passage from Singleton LJ's judgment in *In the Estate of Park deceased, Park v Park* [1954] P 112 at p 127 which I have also set out and which, he submits, is still good law. He says that the fact that a woman may not understand all the implications of the character of a man whom she wishes to marry is completely irrelevant unless, perhaps, it demonstrates that her want of understanding is so profound that she lacks the capacity to marry anybody at all. He says that it is not the business of SCC or even the court to adjudicate on the wisdom of contracts to marry. If a woman of 21 has the capacity to marry a 'suitable' partner then she has the capacity to marry anybody, and that is her business and nobody else's.

79. Miss Waddicor makes much the same submissions. She submits that the appropriate question is simply whether E has capacity to marry. If the answer is yes, then that is the end of the matter. She suggests that the original formulation of the question in the letter dated 16 September 2004 confuses the question of capacity with the nature of E's decision, the very confusion, she says, which was highlighted by Dame Elizabeth Butler-Sloss P in *Re B (Consent to Treatment: Capacity)* [2002] EWHC 429 (Fam), [2002] 1 FLR 1090, and which is wont to arise (and she submits has arisen in this case) where the course of action contemplated by an individual meets with the disapproval of those in authority who see the consequences as harmful. But this, she says, is to confuse welfare and capacity. There is, as she rightly says, no room for the application of any welfare test, whether by SCC or by the court, unless and until incapacity has been established.

80. In *Re B (Consent to Treatment: Capacity)* [2002] EWHC 429 (Fam), [2002] 1 FLR 1090 the President at para [100] stressed the importance of distinguishing between capacity and best interests:

> "If there are difficulties in deciding whether the patient has sufficient mental capacity, particularly if the refusal may have grave consequences for the patient, it is most important that those considering the issue should not confuse the question of mental capacity with the nature of the decision made by the patient, however grave the consequences. The view of the patient may reflect a difference in values rather than an absence of competence and the assessment of capacity should be approached with this firmly in mind. The doctors must not allow their emotional reaction to or strong disagreement with the decision of the patient to cloud their judgment in answering the primary question whether the patient has the mental capacity to make the decision."

81. Miss Waddicor points out that if SCC is saying that E lacks the capacity to marry anybody, then this means she could not even marry the boyfriend of whom her family eventually approved and welcomed into the family. Unless SCC is prepared to go this far – and she suggests that in truth it is not – then the reality, she submits, is that the court is being invited to reserve to itself the right to vet not merely S but also any of E's future suitors. The logical conclusion of SCC's argument that the court should determine whether E has the capacity to marry S is, she says, that E's right to marry must be subject to the approval by SCC and/or the court of any potential suitor. There is, she says, no basis in law for this and no basis in law for discriminating in this way between potential spouses. What if E were undecided between two suitors? Is it suggested that SCC or the court should be able to select one over the other? SCC's case, she says, is, in essence, that it is not in E's interests to marry S. But even if SCC is correct on that point, it is, she says, quite different from alleging that E lacks the capacity to marry.

82. Responding to Mr Jay's submissions Mr Whitfield submits that the analogy of capacity to consent to medical treatment is, as he delicately puts it, "unhelpful". Medical procedures, as he rightly says, vary; the contract of marriage, he says, is the same for everyone.

<u>Capacity to marry: discussion</u>

83. In my judgment Mr Whitfield and Miss Waddicor are right, and essentially for the reasons they give. The law remains as set out in *In the Estate of Park deceased, Park v Park* [1954] P 112. The question is whether E has capacity to marry. That is not, with respect to Mr Jay, some hypothetical or abstract question. It is a very specific question to be addressed by reference to the state of affairs existing at the time by reference to which the inquiry is made. It is, if you like, a general question, in the sense that the question is whether E has capacity to marry, not whether she has capacity to marry X rather than Y, nor whether she has capacity to marry S rather than some other man.

84. It is, moreover, a question quite distinct from the question of whether E is wise to marry: either wise to marry at all, or wise to marry X rather than Y, or wise to marry

S. In this context, just as in the very different context in which Dame Elizabeth Butler-Sloss P made the observation in *Re B (Consent to Treatment: Capacity)* [2002] EWHC 429 (Fam), [2002] 1 FLR 1090, at para [100]:

> "it is most important that those considering the issue should not confuse the question of mental capacity with the nature of the decision made by the patient, however grave the consequences. The view of the patient may reflect a difference in values rather than an absence of competence and the assessment of capacity should be approached with this firmly in mind."

85. There is, so far as I can see, no hint in any of the cases on the point – and I have gone through them all – that the question of capacity to marry has ever been considered by reference to a person's ability to understand or evaluate the characteristics of some particular spouse or intended spouse. In all the cases, as we have seen, the question has always been formulated in a general and non-specific form: Is there capacity to understand the nature of the contract of marriage? Two things about this formulation are noticeable. The test is capacity to understand the *nature* of the *contract of marriage*. The test is not capacity to understand the *implications* of a *particular marriage*. Putting the same point somewhat differently, and this is really Mr Whitfield's core submission, the *nature of the contract of marriage* is necessarily something shared in common by all marriages. It is not something that differs as between different marriages or depending upon whether A marries B or C. The implications for A of choosing to marry B rather than C may be immense. B may be a loving pauper and C a wife-beating millionaire. But this has nothing to do with the nature of the contract of marriage into which A has chosen to enter. Whether A marries B or marries C, the contract is the same, its nature is the same, and its legal consequences are the same. The emotional, social, financial and other implications for A may be very different but the nature of the contract is precisely the same in both cases.

86. Furthermore, Mr Whitfield and Miss Waddicor are right, in my judgment, when they say that the analogy of consent to medical treatment is not helpful. It is not, in my judgment, an appropriate analogy at all, not least for the reason Mr Whitfield gave, namely that medical procedures, as he rightly says, vary whilst the contract of marriage is the same for everyone. As Mr Jay points out, medical treatment may be minor or life-threatening, anodyne or controversial. Someone with what one may call borderline capacity might well, for example, as he comments, understand the nature of simple and risk-free treatment but not the nature of complex or controversial treatment. (In the same way a child may have 'Gillick' capacity to consent to dental treatment, the mending of a broken arm, a tonsillectomy or even an appendicectomy, whilst lacking the capacity to consent to more serious treatment: see *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at pp 169, 201.) But it is this very point that Mr Whitfield correctly turns against Mr Jay. One can sensibly say that marriage is marriage; one cannot in the same way simply say that medical treatment is medical treatment. Medical procedures vary. The contract of marriage is necessarily, and indeed as a matter of law, the same for everyone.

87. There is a further reason why there is, as it seems to me, no true analogy between capacity to marry and capacity to consent (or refuse consent) to medical treatment or, indeed, capacity to litigate. Marriage – as opposed, perhaps, to its fiscal consequences – is not something on which the average person needs to obtain either expert advice or expert assistance. Litigation and medical treatment, in contrast, are both activities where the average layman needs, and is accustomed to obtaining from an appropriately qualified professional person, expert information, advice and assistance. The contract of marriage, as Sir James Hannen P observed in *Durham v Durham* (1885) 10 PD 80 at p 82, is in essence a very simple one which, as Karminski J pointed out in *In the Estate of Park deceased, Park v Park* [1954] P 89 at p 100, "any person of either sex of normal intelligence should readily be able to comprehend." Medical treatment and litigation, on the other hand, are of their very nature complex, technical and capable of being properly understood by a layman only with the benefit of appropriate expert advice.

88. Professional advice typically culminates in the performance by the expert of some activity – surgery or advocacy, for example – which is simply outside the technical competence of the patient or client. In a marriage, by contrast, the principal undertakes the central activity – participation in the marriage ceremony – himself. He does not require an expert to perform the ceremony on his behalf. That is one very obvious difference. But there is another difference which is even more important for present purposes.

89. Typically, where a doctor or a lawyer is retained to act for a patient or a client, he will, prior to that culminating activity (the surgery or the advocacy), have given the patient or the client, to use the language of medicine, a diagnosis, a prognosis and advice as to treatment. (Although the conventional terminology may be rather different a lawyer's professional activities in the course of litigation can be analysed in very much the same way.) Thus in the simple case the doctor will give a diagnosis (you are suffering from appendicitis), followed by a prognosis (unless treated you will die) and then advice as to treatment (you need surgery: an appendicectomy). In the more complex kind of case there may be a number of possible diagnoses (I think you are suffering from X, but there is a chance you are actually suffering from Y). And there may be a number of possible outcomes depending upon various treatment options (treatment X, if successful, gives you a 90% chance of a cure, but carries with it a 30% risk of failure; treatment Y, if successful, gives only a 40% chance of a cure, but carries with it only a 5% risk of failure; and it is not possible to attempt treatment Y if treatment X has already been tried unsuccessfully). So the information and advice that the patient has to be able to obtain, receive, take in, comprehend, retain, believe and weigh (to borrow the language of *In re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290 and *Re MB (Medical Treatment)* [1997] 2 FLR 426) will typically be both technical and complex – sometimes highly technical and exceedingly complex – reflecting an art or a science which the doctor may have had to spend many years mastering and which is often expressed in an unfamiliar and very technical 'jargon'. The contract of marriage, in contrast, is very simple. The marriage ceremony is expressed in words which even if they date from the age of Shakespeare can be understood by anyone of normal intelligence. Of more direct importance, the nature of the marriage contract – the concept of marriage – can likewise be expressed in simple words which anyone of normal intelligence can understand. And there is simply no equivalent, in the case of a

decision to marry, to the expert's diagnosis, prognosis and advice which typically precedes a decision to undergo surgery (or the similar professional activities which typically precede a decision to litigate).

90. There is yet another, and quite distinct reason why there is no direct analogy between the issue with which I am alone concerned – the issue of whether E has capacity to marry – and the best interests jurisdiction as it arises both in the context of medical treatment and also in the context of decision-making as to where an incompetent adult should live, who he should see, and the circumstances of such contact.

91. The point is suggested by Miss Waddicor's very pertinent rhetorical question: Can it seriously be suggested that the court has the right to vet E's suitors, to decide that X is suitable but that Y is unsuitable, to select who E is to marry? The answer to that question, in my judgment, is that the court quite clearly has no such role.

92. There is, it seems to me, a significant confusion underlying an important part of the present case. SCC is inviting the court to decide, amongst a number of other questions, whether it is in E's best interests to marry S. The court, in my judgment, has no business – in fact has no jurisdiction – to embark upon a determination of that question.

93. It so happens that whilst preparing this judgment I had to give directions in a remarkably similar case relating to W, a woman of 23. That case involves, amongst other issues, the question of whether W has capacity to marry, though in that case the question seems to have arisen more generally and not in relation to any specific identified suitor. There, as here, proceedings under the inherent jurisdiction have been commenced by a local authority, though in that case it is not SCC. The same solicitors act in that case for W as act here for E. In that case a very similar letter of instructions, dated 3 August 2004, was sent to another Consultant Psychiatrist, Dr E. The questions posed of Dr E were in terms very similar, though not identical, to those asked in the present case of Dr M. In particular, Dr E was asked whether, if W lacked capacity to make her own decisions, it was in W's best interests to enter into a marriage.

94. What is interesting for present purposes, and the only reason I mention the other case at all, is because of something Dr E says in his report dated 8 November 2004. In relation to marriage he says:

> "I confess that I have some difficulty separating the assessment of best interests from that of capacity in a matter such as a decision whether or not to marry, although I can easily see how it would apply in a decision concerning medical treatment. In my opinion, it cannot be in the best interests of the person to enter into a marriage where they do not have capacity to make such a decision."

95. Now if I may be permitted to say so, Dr E, albeit approaching the point from a medical rather than a legal perspective, has actually put his finger on the fallacy that seemingly underlies an important part not merely of the case in which he is involved – W's case – but also of the case – E's case – with which I am here concerned. For in each case the court is being invited to consider whether it is in the patient's best interests to marry. And that exercise is, in my judgment, fundamentally misconceived. The court simply has no business embarking upon such an investigation. There is no purpose in it doing so. The whole endeavour is an exercise in futility.

96. It is elementary that the Family Division does not have, and never has had, any parens patriae jurisdiction in relation to incompetent adults: see *A v A Health Authority, In re J (A Child), R (S) v Secretary of State for the Home Department* [2002] EWHC 18 (Fam/Admin), [2002] Fam 213, at para [35]. Its only jurisdiction is the recently re-discovered inherent declaratory jurisdiction.

97. It is equally elementary that the Family Division, when exercising its inherent declaratory jurisdiction in relation to an adult incompetent, has no power to give consent on behalf of the adult, in the way in which it does when exercising its inherent or wardship jurisdiction in relation to a child. There is, in law, no-one who can give a valid consent on behalf of an adult incompetent in relation to matters falling outside the limited – and for present purposes irrelevant – jurisdiction of the Court of Protection. All that the Family Division does when exercising the inherent declaratory jurisdiction in relation to an incompetent adult is to declare that something is lawful – lawful not because the court has given its consent but lawful *notwithstanding the absence of any valid consent* because and by virtue of the operation of the doctrine of necessity: see the discussion in *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, at paras [20]-[23], [50]-[53] of the seminal decision of the House of Lords in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

98. Put very shortly the key point is that the Family Division has no power to supply any consent on behalf of an adult who lacks the capacity to give his own consent.

99. Now the absence of a lawful and valid consent is no obstacle in those situations in which the doctrine of necessity applies, for the whole point of the doctrine of necessity is that it renders lawful that which, absent consent, would otherwise be unlawful. And the doctrine of necessity is capable of operating not merely in relation to questions concerning a patient's surgical, medical or nursing treatment but also in relation to questions of where he should live, who he should see, and the circumstances of such contact: see *A v A Health Authority, In re J (A Child), R (S) v Secretary of State for the Home Department* [2002] EWHC 18 (Fam/Admin), [2002] Fam 213, at paras [39]-[40], *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, and *Re S (Adult's Lack of Capacity: Carer and Residence)* [2003] EWHC 1909 (Fam), [2003] 2 FLR 1235. So the absence of any lawful or valid consent is no obstacle to decision-making in relation to medical matters or in relation to what can for convenience be called issues of 'residence' or 'contact'.

100. But the doctrine of necessity has and can have no operation in relation to marriage. An adult either has capacity to marry or he does not. If he does, then, at least in relation to that issue, the Family Division cannot exercise its inherent declaratory jurisdiction, because it is fundamental that this jurisdiction can be exercised only in relation to those who lack the relevant capacity. But if he does not have capacity to marry then that is that. No court – neither the High Court of Justice nor the Court of Protection – has any jurisdiction to supply consent to marriage on behalf of an adult who lacks the capacity to give consent himself. If an adult lacks the capacity to marry he cannot marry. And if, nonetheless, he purports to marry, the validity of the "marriage" can be challenged in the usual way. And if an adult lacks the capacity to marry, a purported "marriage" is no better than it would otherwise be merely because the Family Division has granted a declaration that it is in that person's best interests to marry or even if it has granted a declaration (I adapt the form of declaration used in 'residence' and 'contact' cases) that "it is lawful, as being in his best interests, for him to marry X".

101. The distinction is really very simple. There cannot be a valid marriage in the absence of consent. That rule is absolute and unqualified. On the other hand there can be circumstances in which, consistently with the doctrine of necessity, medical treatment can be administered notwithstanding the absence of consent. It follows that although it is proper for the Family Division, once incapacity has been established, to inquire into such questions as whether it is in an adult's best interests to have a surgical operation, or whether it is in his best interests to live here rather than there, there is simply no purpose in the Family Division even embarking upon an investigation of whether or not it is in his best interests to marry. The lawfulness of surgical treatment depends either upon consent or, where the doctrine of necessity applies, upon best interests. The lawfulness of a marriage depends exclusively upon consent. Best interests are neither here nor there. So it would be a purposeless exercise in futility for the Family Division even to embark upon an investigation of whether or not it is in an adult's best interests to marry – either to marry at all or to marry X.

102. In relation to her marriage the only question for the court is whether E has capacity to marry. The court is not concerned – has no jurisdiction – to consider whether it is in E's best interests to marry or to marry S. The court is concerned with her capacity to marry, not with the wisdom of her marriage in general or her marriage to S in particular. As Karminski J said in *In the Estate of Park deceased, Park v Park* [1954] P 89 at p 107:

> "I have to remind myself here that I am considering the question not of the wisdom of the deceased's marriage in general or his marriage to the plaintiff in particular, but of his capacity to marry."

Birkett LJ said much the same thing in the Court of Appeal at p 129:

> "the marriage took place, and the question before this court is not whether it was wise; nor even whether, in all the circumstances, it was decent. The simple question is … whether at the time of the ceremony the deceased was mentally capable

> of understanding the nature of the contract of marriage so that the marriage could be regarded as valid."

It makes no difference that in that case the High Court was exercising its probate jurisdiction whereas in the present case I am exercising the High Court's inherent declaratory jurisdiction. In whatever jurisdiction the issue arises, the question – the only question – is the same: Does E have capacity to marry? And that question, in my judgment, has to be answered by reference to the test formulated by Singleton LJ in *In the Estate of Park deceased, Park v Park* [1954] P 112 at p 127.

103. The only observation in any of the cases that might be thought to throw the slightest doubt on this, or that might be thought to suggest a link between the capacity to marry and capacity to look after oneself, is Sir John Nicholl's statement in *Browning v Reane* (1812) 2 Phill Ecc 69 at p 70, adopted by Willmer J in *In the Estate of Spier deceased* [1947] WN 46, to the effect that not only must there be a capacity to understand the nature of the contract but "there must *also* be a capacity to take care of his or her own person and property" (emphasis added).

104. This was a point much stressed in the Court of Appeal in *In the Estate of Park deceased, Park v Park* [1954] P 112 (see at pp 115, 118, 131, 137) by counsel seeking to overturn Karminski J's judgment; not surprisingly, it might be thought, given that the deceased in that case had already been held to lack testamentary capacity. But it is notable that none of the three judges in the Court of Appeal said anything to indicate that they saw this – the ability to take care of one's person and property – as a separate ingredient of capacity to marry. And it formed no part either of the test which Karminski J had applied (correctly as the Court of Appeal held) or of the tests formulated by Singleton and Birkett LJJ. On the contrary, Singleton LJ, immediately after quoting Sir John Nicholl's words, continued at p 122:

> "It must depend, of course, on the degree of mental imbecility; a person may be slovenly or wildly extravagant, but still capable of entering into a contract of marriage."

And Hodson LJ at p 137 was even more dismissive of the argument based on Sir John Nicholl's words, saying of them:

> "Although this language may, no doubt, be interpreted in such a way as to lend support to the defendant's argument based on the facts of this case, I do not think that the judge can be said to have erred in arriving at the conclusion in favour of the plaintiff on this point."

105. Capacity to marry is not the same as capacity to look after oneself or one's property. Often, of course, someone who lacks the capacity to do the one will also lack the capacity to do the other. But not necessarily. As Chadwick LJ said in *Masterman-Lister v Brutton & Co (No 1)* [2002] EWCA Civ 1889, [2003] 1 WLR 1511, at para [74]:

> "The test is issue-specific; and, when applied to different issues, it may yield different answers."

The question is, Does E have capacity to marry? If she does, it is not necessary to show that she also has capacity to take care of her own person and property.

106. Before leaving this part of the case there is one other argument that I must address. Picking up a point that had earlier been made by E's solicitors in their letter dated 6 October 2004, Mr Whitfield submits, by reference to what is said in *Rayden & Jackson* at para 5.61, that "errors as to fortune, status or moral character of the other party do not affect the validity of a marriage". That, I do not doubt, is still as good law now as it was both when laid down by Sir William Scott in *Wakefield v Mackay (orse Wakefield)* (1807) 1 Hagg Con 394 at p 398 and when later confirmed by Sir Francis Jeune P in *Moss v Moss (orse Archer)* [1897] P 263. But, as Mr Jay correctly submits, this has nothing to do with the issue of mental capacity.

107. The passage in *Rayden & Jackson* relied on by Mr Whitfield relates to the quite different question of whether a prima facie valid marriage can be avoided, in the same way as an ordinary contract, on grounds of mistake, misrepresentation or non-disclosure – generally speaking it cannot. The distinction is brought out very clearly by Sir William Scott in *Sullivan v Sullivan (orse Oldacre)* (1818) 2 Hagg Con 238 at p 248 in a passage cited with approval by the President in *Moss v Moss (orse Archer)* [1897] P 263 at p 269:

> "I say the strongest case you could establish of the most deliberate plot, leading to a marriage the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this Court to release him from chains which, though forged by others, he had rivetted on himself. If he is capable of consent, and has consented, the law does not ask how the consent has been induced. His own consent, however procured, is his own act … The law looks no further back."

This argument does not assist Mr Whitfield. But he does not need it in order to succeed.

108. There is one final point. In deference to Miss Waddicor's careful submissions, and because the point is fundamental to what this case is all about, I have dealt in some detail with the role of the court and the extent of its jurisdiction in cases where what is in issue is an adult's capacity to marry. One question which I have not been asked to consider is whether the court can, and if it can whether it should, grant an injunction to restrain the marriage of someone who lacks capacity to marry. There is no doubt that, generally speaking, this branch of the court's inherent jurisdiction extends not merely to declaratory relief but also to the grant of injunctive relief: see *A v A Health Authority, In re J (A Child), R (S) v Secretary of State for the Home Department* [2002] EWHC 18 (Fam/Admin), [2002] Fam 213, at para [44]. And notwithstanding

the qualification which I there expressed it is now, in my judgment, clearly established that the jurisdiction in such cases is not limited to the grant of interlocutory injunctions but extends to the grant of final injunctions. I have myself granted such injunctions in previous unreported cases involving incompetent adults. That said, I prefer to express no views, one way or the other, as to whether this jurisdiction is exercisable or properly exercisable to restrain a marriage. It should not be assumed I am suggesting that it cannot be. But equally it should not be assumed I am saying that it can be. This is an issue which may have to be resolved at trial. I prefer to say no more about it. Nor do I express any views about the proper approach to the question of capacity in relation to matters of 'residence' and 'contact'. That, again, is not a matter which is before me.

The duties and responsibilities of marriage

109. As we have seen, there are, in essence, two aspects to the inquiry whether someone has capacity to marry. The first is: Does he or she understand the nature of the marriage contract? But this, as the authorities show, takes us to the central question: Does he or she understand the duties and responsibilities that normally attach to marriage? And that leads in turn to the question: What are the duties and responsibilities that normally attach to marriage?

110. Our ancestors had little difficulty with his question. Today the answer is somewhat more difficult because, as Dr Stephen Cretney has pointed out (*Cretney, Masson and Bailey-Harris's* Principles of Family Law (ed 7) at para 3-001), although marriage creates a status from which certain legal rights and duties automatically stem, "it is virtually impossible to give an account of the legal consequences of marriage which is coherent, much less comprehensive."

111. In *Harrod v Harrod* (1854) 1 K&J 4 at p 16, as we have seen, Page Wood VC said:

> "they are married, if they understand that by that act they have agreed to cohabit together and with no other person."

And in *Durham v Durham* (1885) 10 PD 80 at p 82, as we have seen, Sir James Hannen P described the contract of marriage in these terms:

> "It is an engagement between a man and 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 the part of the woman."

112. That, not surprisingly, echoes Lord Penzance's famous definition of marriage in *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130 at p 133:

> "Marriage has been well said to be something more than a contract, either religious or civil – to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite lights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."

113. It is perhaps useful to note what Lord Penzance added at pp 135, 137:

> "The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created. Thus conjugal treatment may be enforced by a decree for restitution of conjugal rights. Adultery by either party gives a right to the other of judicial separation; that of the wife gives a right to a divorce; and that of the husband, if coupled with bigamy, is followed by the same penalty. Personal violence, open concubinage, or debauchery in face of the wife, her degradation in her home from social equality with the husband, and her displacement as the head of his household, are with us matrimonial offences, for they violate the vows of wedlock. A wife thus injured may claim a judicial separation and a permanent support from the husband under the name of alimony at the rate of about one-third of his income … Offences necessarily presuppose duties. There are no conjugal duties, but those which are expressed or implied in the contract of marriage."

114. Karminski J considered the point in *In the Estate of Park deceased, Park v Park* [1954] P 89 at p 99:

> "It must be borne in mind, as Sir James Hannen P reminded himself in *Durham v Durham*, that a mere comprehension of the words of the promises exchanged is not sufficient. The minds of the parties must also be capable of understanding the nature of the contract into which they are entering. The precise nature of that contract may vary with the religious beliefs which the parties practise or profess. Some people may regard marriage as a sacrament; others, while still regarding marriage

> as a sacred and solemn obligation, do not believe in its sacramental nature. But as Sir James Hannen P pointed out, the essence of the contract is an engagement 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 may be in the present times that submission on the part of the woman is no longer, as it was in 1885, an essential part of the contract. But so far as the husband is concerned there remains the duty to maintain her which is, I think, implicit in what Sir James Hannen P described as the duty to protect."

115. Birkett LJ in the Court of Appeal at p 131 seems to have agreed that a husband's obligations included a duty to maintain his wife. Some further light is also thrown on the matter by Hodson LJ's comment in the Court of Appeal at p 137:

> "The evidence also showed that he was aware of the duties and responsibilities to her in the sense that he took steps to make a home for her with him at the flat in which he had previously lived, and took steps to make room for her there by securing the removal of other persons; the evidence also shows that he was aware of his duty to make financial provision for her."

116. It seems to me that all these observations about the husband's duty to protect and maintain and the wife's duty of submission have now to be read with very considerable caution. Indeed, I doubt that they any longer have any place in our contemporaneous understanding of marriage – marriage, that is, as a civil institution whose duties and obligations are regulated by the secular courts of an increasingly secular society. For, although we live in a multi-cultural society of many faiths, it must not be forgotten that as a secular judge my concern, to adopt Sir William Scott's words, is with marriage as a civil contract, not as a religious vow.

117. We tend to forget the astonishing extent to which society's views about marriage, and about the place of women, not merely in society but also in the home and in marriage, have changed; not only, and most obviously, since Sir James Hannen P was speaking in 1885 but also in the fifty years and more that have elapsed since the Court of Appeal gave judgment in *In the Estate of Park deceased, Park v Park* [1954] P 112. It is an effort now to imagine the role of the married woman in the nineteenth century, or even fifty years ago for that matter.

118. In *Place v Searle* [1932] 2 KB 497 at p 499 McCardie J explained how:

> "Broadly speaking, it was the view of lawyers and of the law in the middle of the eighteenth century that the property of a woman became her husband's on marriage, that her body belonged to him, that he could restrain her liberty at his pleasure, and that he could administer physical correction at his discretion, subject, of course, to the rule of moderation. The law was concisely stated in Bacon's Abridgement in these words:

> "The husband hath by law power and dominion over his wife." She was his creature and his possession. She was debarred from the suffrage. She was excluded from the professions. She was restricted and controlled in many ways."

Not for nothing did John Stuart Mill when writing in 1869 on *The Subjection of Women* say that:

> "If married life were all that it might be expected to be, looking to the laws alone, society would be a hell upon earth."

119. But, as McCardie J went on:

> "Today … the position of a married woman has undergone a revolutionary change. Under the Married Women's Property Acts her property is now her own. She can exclude her husband from enjoying any part of it. It is recognised that her body is not her husband's, but her own. The husband cannot restrain her physical liberty. He cannot administer any physical punishment. Her freedom of occupation cannot be restricted by him. All professions (save the ecclesiastical) are open to her. She possesses full political rights. The Sex Disqualification Removal Act, 1919, is significant in the breadth of its implications. By virtue of the Matrimonial Causes Act, 1884, no decree for the restitution of conjugal rights can be enforced by attachment, with the result that neither husband nor wife can force the other to return to conjugal association."

120. Two years earlier in *Gottliffe v Edelston* [1930] 2 KB 378 at p 384 the same judge had remarked that:

> "Husbands and wives have their individual outlooks. They may belong to different political parties, to different schools of thought. A wife may be counsel in the courts against her husband. A husband may be counsel against his wife. Each has a separate intellectual life and activities. Moreover, as Lord Bryce has said, the modern notion is that it is one's right to assert one's own individuality".

He added:

> "We are probably completing the transition from the family to the personal epoch of women"

121. In that view subsequent events show McCardie J to have been overly optimistic. If much had been achieved by the time he was speaking in the early 1930s much remained to be done, and there are many who would say – it might be thought with

justification – that even in 2004 much still remains to be done to achieve complete equality between men and women, between husband and wife.

122. True it is that Sir James Hannen P was speaking of marriage at a time after – even if only very shortly after – the Married Women's Property Act 1882 and the Matrimonial Causes Act 1884 had revolutionised so many aspects of the relationship between husband and wife. But the famous decision in *R v Jackson* [1891] 1 QB 671 still lay in the future. And it has to be remembered that not until *R v Reid* [1973] QB 299 was it finally established that a husband could be guilty of the common law offence of kidnapping his wife and not until *R v R* [1992] 1 AC 599 that the husband's immunity from prosecution for rape was finally swept away.

123. Even in the twentieth century a judge sitting in what is now the Family Division could say (Bargrave Deane J in *Pretty v Pretty* [1911] P 83 at p 87):

> "Some people think that … you must treat men and women on the same footing. But this Court has not taken, and, I hope, never will take, that view. I trust that … it will ever be remembered that the woman is the weaker vessel: that her habits of thought and feminine weaknesses are different from those of the man".

He added at p 89: "this Court is always willing to recognize the weakness of the sex" – a comment that stands in striking contrast with the views more recently expressed by Oliver J (as he then was) in *Midland Bank Trust Co Ltd v Green (No 3)* [1979] Ch 496 at p 527.

124. It was only in 1923 that the discriminatory divorce laws described by Lord Penzance in *Hyde v Hyde and Woodmansee* were reformed, when the Matrimonial Causes Act 1923 equated the rights of the spouses to petition for divorce. It was only in 1925 that the Guardianship of Infants Act 1925 established the principle that mothers and fathers, wives and husbands, have equal rights with respect to their children.

125. By 1932 a more modern view had seemingly been adopted in relation to consortium – the concept of living together as husband and wife with all the incidents (insofar as these can be defined) that flow from the marital relationship. Even as late as the middle of the nineteenth century, the view would probably have been taken that although the husband had the right to his wife's consortium, she had not so much a reciprocal right to her husband's consortium as a correlative duty to give him her society and her services. However in 1932 Scrutton LJ was able to say in *Place v Searle* [1932] 2 KB 497 at p 512 that:

> "at the present day a husband has a right to the consortium of his wife, and the wife to the consortium of her husband".

126. Yet as late as 1941 it could still be asserted that the husband, as the head of the household, had the right to determine where the matrimonial home was to be. As Henn Collins J said in *Mansey v Mansey* [1940] P 139 at p 140:

> "The rights of a husband as they used to be have been considerably circumscribed in favour of the wife without very much, if any, curtailment of his obligations, but we have not yet got to the point where the wife can decide where the matrimonial home is to be, and if the husband says he wants to live in such and such a place then, assuming always that he is not doing it to spite his wife and the accommodation is of a kind that you would expect a man in his position to occupy, the wife is under the necessity of sharing that home with him. If she will not, she is committing a matrimonial offence: she is deserting him."

His views were endorsed by Lord Merriman P in *King v King* [1942] P 1 at p 8. And even as recently as 1969 Lord Denning MR in *Gurasz v Gurasz* [1970] P 11 at p 16 could still say:

> "Some features of family life are elemental in our society. One is that it is the husband's duty to provide his wife with a roof ever her head; and the children too. So long as the wife behaves herself, she is entitled to remain in the matrimonial home."

127. I express no views as to whether or not that remains technically the law today, though the husband's duty, even if it still survives, would seem to be largely if not indeed wholly irrelevant in modern conditions, having for all practical purposes been supplanted by the statutes which give both spouses the right to apply to the court for financial relief and which, in particular, give both spouses reciprocal rights to seek maintenance from each other. But the thinking that underlies Lord Denning's observations is now surely completely obsolete.

128. In *White v White* [2001] 1 AC 596 at p 605 Lord Nicholls of Birkenhead famously pronounced that:

> "there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day."

That may have been said in the context of how the court should exercise its discretion under section 25 of the Matrimonial Causes Act 1973, but it surely has a much wider and more general resonance.

129. True it is, as indeed the judgments in *In the Estate of Park deceased, Park v Park* [1954] P 89, 112, show, that the rule of the common law obliging a husband both to house and to maintain his wife remained of real significance until well into the twentieth century. But in my judgment it is no more relevant today to talk of the husband's duty to protect and maintain his wife than it is to talk of his wife's duty of submission. Karminski J, as we have seen, was prepared to concede in *In the Estate of Park deceased, Park v Park* [1954] P 89 at p 99 that:

> "It may be in the present times that submission on the part of the woman is no longer, as it was in 1885, an essential part of the contract."

But he thought that:

> "so far as the husband is concerned there remains the duty to maintain her which is, I think, implicit in what Sir James Hannen P described as the duty to protect."

It seems to me that the continuing historical processes in our society during the fifty years since Karminski J made those observations leave us today in a situation where it is no more appropriate to talk of the husband's duty to protect or maintain than it would be to talk of the wife's duty to submit.

130. The fact is – the modern view is – that the wife is no longer the weaker partner subservient to the stronger. To describe the "natural relations" which spring from marriage as being "protection on the part of the man, and submission on the part of the woman" sounds almost ludicrous to the modern ear, however appropriate it no doubt seemed 120 years ago to Sir James Hannen P.

131. Today both spouses are the joint, co-equal heads of the family. Each has an obligation to comfort and support the other. It is not for the husband alone to provide the matrimonial home or to decide where the family is to live. Husband and wife both contribute. And where they are to live is, like other domestic matters of common concern, something to be settled by agreement, not determined unilaterally by the husband. Insofar as the concept of consortium – the sharing of a common home and a common domestic life, and the right to enjoy each other's society, comfort and assistance – still has any useful role to play, the rights of husband and wife must surely now be regarded as exactly reciprocal.

132. To have the capacity to marry one must be mentally capable of understanding the duties and responsibilities that normally attach to marriage. What then are the duties and responsibilities that in 2004 should be treated as normally attaching to marriage? In my judgment the matter 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.

<u>"Understanding" the contract of marriage</u>

133. As we have seen, in the medical context the issue of capacity is addressed by asking three questions: (i) can the patient take in, comprehend and retain the information which is material to the decision; (ii) does the patient believe it; and (iii) can the patient use it and weigh it in the balance, balancing risks and needs, so as to arrive at a decision? And as we have also seen, Kennedy LJ's formulation of the corresponding questions in the context of capacity to litigate is very similar: (i) does the litigant have the mental ability to recognise the problem; (ii) can the litigant obtain and receive, understand and retain relevant information, including advice; and (iii) can the litigant weigh the information (including that derived from advice) in the balance in reaching a decision.

134. Now on one level of abstraction each of these formulations is simply a statement of a general theory – a theory, it is to be noted, formulated not by lawyers but by psychiatrists – of what is meant by "understanding" a problem and having the capacity to decide what to do about it. "Understanding" a problem, so as to have the capacity to decide what to do about it, requires, on this approach, the mental ability: (i) to recognise the problem; (ii) to obtain, receive, take in, comprehend and retain information relevant to the problem and its solution; (iii) to believe that information; and (iv) to weigh (evaluate) that information in the balance so as to arrive at a solution (decision).

135. In these rather abstract terms, and since it applies, as I have suggested, to all 'problems' and to all 'decisions', this general theory is in principle as applicable in a situation where the question is whether X has the capacity to marry as it would be if the question was whether X has the capacity to litigate or the capacity to consent (or refuse consent) to medical treatment. But there is, in my judgment, an important – in truth a crucial – distinction between, on the one hand, the capacity to litigate or to consent (or refuse consent) to medical treatment and, on the other hand, the capacity to marry. And it is a distinction which makes this analysis much less important in practical terms in the case of capacity to marry than in the two other situations. The distinction, as I have already said, is that marriage is not something on which the average person needs to obtain either expert advice or expert assistance. Litigation and medical treatment, in contrast, are both activities where the average layman needs, and is accustomed to obtaining from an appropriately qualified professional person, expert information, advice and assistance.

136. The contract of marriage is in essence a very simple one which any person of normal intelligence can readily comprehend. Medical treatment and litigation, on the other

hand, are of their very nature complex, technical and capable of being properly understood by a layman only with the benefit of appropriate expert advice. Where the issues are as complex as typically they will be if the question is whether someone has the capacity to litigate or has the capacity to consent (or refuse consent) to medical treatment, then it is appropriate and helpful to approach the issue by reference to the analyses in *In re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290 and *Re MB (Medical Treatment)* [1997] 2 FLR 426. But I doubt whether such a refined analysis is either necessary or indeed particularly helpful where the issue is as simple as the question whether someone has the capacity to marry. Medical science has no doubt made immense strides since Sir James Hannen P first formulated the relevant question in *Hunter v Edney (orse Hunter)* (1881) 10 PD 93. And in this post-Freudian world we have – or think we have – a much greater understanding of how the human mind operates than was vouchsafed to our Victorian ancestors. But Sir James Hannen's test remains as clear and workable today as it was in 1881. The question remains as it was in 1881, Is E capable of understanding the nature of the contract of marriage? There is no need, as it seems to me, to over-analyse that simple question by bringing to bear on it the analyses in *In re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290 and *Re MB (Medical Treatment)* [1997] 2 FLR 426. I do not say that these analyses are irrelevant; they are not. I merely say that in this particular context it is unlikely to be either necessary or even particularly helpful to refer to them.

<u>Article 12</u>

137. As I have said, Mr Whitfield and Miss Waddicor rely upon Article 12 of the Convention. This provides that:

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

138. They draw attention to the decision of the Commission in *Hamer v United Kingdom* (1979) 4 EHRR 139 and, in particular, to the Commission's observations at paras [60]-[62]:

> "As to the general question of interpretation it is clear, as both parties are agreed, that Article 12 guarantees a fundamental 'right to marry'. Whilst this is expressed as a 'right to marry ... according to the national laws governing the exercise of this right', this does not mean that the scope afforded to national law is unlimited. If it were, Article 12 would be redundant. The role of national law, as the wording of the Article indicates, is to govern the exercise of the right.
>
> The Court has held that measures for the 'regulation' of the rights to education (Article 2 of Protocol No. 1) or access to court (Article 6) 'must never injure the substance of the right'. In the Commission's opinion this applies also to the national laws which govern the exercise of the right to marry.

> Such laws may thus lay down formal rules concerning matters such as notice, publicity and the formalities whereby marriage is solemnised. They may also lay down rules of substance based on generally recognised considerations of public interest. Examples are rules concerning capacity, consent, prohibited degrees of consanguinity or the prevention of bigamy. However, in the Commission's opinion national law may not otherwise deprive a person or category of persons of full legal capacity of the right to marry. Nor may it substantially interfere with their exercise of the right."

139. Prima facie, they say, both E and S, as adults, have a right to marry which is protected by Article 12. They submit that the approach advocated by SCC is plainly a substantial interference not merely with E's right to marry S but also with S's right to marry E. They submit that whilst the test in *In the Estate of Park deceased, Park v Park* [1954] P 112 is entirely consistent with Article 12, the test advocated by SCC would involve contravention of Article 12. If E has the capacity to marry then any attempt to vet her potential spouses would, they say, be a substantial – indeed impermissible – interference with her right to marry.

140. In view of the conclusions I have already come to by reference to our domestic case-law there is no need for me to come to any concluded decision in relation to Article 12. I think in the circumstances it is better that I do not.

<u>Conclusions</u>

141. I can accordingly summarise my principal conclusions as follows:

i) The question is *not* whether E has capacity to marry X rather than Y. The question is *not* (being specific) whether E has capacity to marry S. The relevant question is whether E has capacity to marry. If she does, it is not necessary to show that she also has capacity to take care of her own person and property.

ii) The question of whether E has capacity to marry is quite distinct from the question of whether E is wise to marry: either wise to marry at all, or wise to marry X rather than Y, or wise to marry S.

iii) In relation to her marriage the only question for the court is whether E has capacity to marry. The court has no jurisdiction to consider whether it is in E's best interests to marry or to marry S. The court is concerned with E's capacity to marry. It is not concerned with the wisdom of her marriage in general or her marriage to S in particular.

iv) In relation to the question of whether E has capacity to marry the law remains to day as it was set out by Singleton LJ in *In the Estate of Park deceased, Park v Park* [1954] P 112 at p 127:

> "Was the deceased ... capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract."

v) More specifically, it is not enough that someone appreciates that he or she is taking part in a marriage ceremony or understand its words.

vi) He or she must understand the nature of the marriage contract.

vii) This means that he or she must be mentally capable of understanding the duties and responsibilities that normally attach to marriage.

viii) That said, 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 of normal intelligence.

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?

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.

142. It follows, in my judgment, putting matters very shortly (and obviously the experts are entitled to an explanation of the relevant legal principles going beyond such a bald formulation) that the proper questions to be put to Dr M and the other experts are those set out in the letter from E's solicitor dated 6 October 2004.

A final observation

143. There is one final observation I should like to make. There is in fact, as it seems to me, an important public interest – an important element of public policy – lurking behind the questions I have been considering. Marriage creates a status from which certain legal rights and duties automatically stem. Marriage also carries with it not merely all those intensely human, personal and emotional advantages that are obviously so important for so many but also a wide range of legal, social and fiscal advantages, many of which, of course, enure not just for the benefit of the married couple themselves but also for the benefit of their children. I do not enter into the debate about whether it is better for children to be brought up by parents who are married rather than by parents who are unmarried. I merely observe that, even in this day and age, and despite everything that has been done to eliminate the disadvantages of illegitimacy, there are still many respects in which the children of the married enjoy benefits and advantages denied to the children of the unmarried.

144. There are many people in our society who may be of limited or borderline capacity but whose lives are immensely enriched by marriage. We must be careful not to set the test of capacity to marry too high, lest it operate as an unfair, unnecessary and indeed discriminatory bar against the mentally disabled.

145. Equally, we must be careful not to impose so stringent a test of capacity to marry that it becomes too easy to challenge the validity of what appear on the surface to be regular and seemingly valid marriages. Singleton LJ in *In the Estate of Park deceased, Park v Park* [1954] P 112 at p 126 quoted with apparent approval what an American judge, Caruthers J, had said a hundred years before (see *Cole v Cole* (1857) 5 Sneed's Tennessee Rep 56 at p 58):

> "every consideration of policy and humanity admonishes us that a contract so essentially connected with the peace and happiness of individuals and families, and the well-being of society, should not be annulled on this or any other ground, not clearly made out. The consequences, in many cases, would be most deplorable. The rights of property would be unsettled and the peace of families destroyed, to say nothing about the effects upon the innocent offspring. The annulment of other contracts would only affect property; but this would do that, and more – it would tell upon the happiness, character, and peace of the parties. The appalling character of these consequences is well calculated to impress the courts with the solemn duty of requiring a clear case for the application of the general principle to this delicate and important contract."

If the language now appears somewhat extravagant, the point seems to me to remain as valid in Britain today as it was in Tennessee in 1857.