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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: April 2013

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Introduction

Welcome to the April 2013 newsletter. We cover in this edition the significant decision of the Court of Appeal on serious medical treatment in *Aintree University Hospitals NHS Foundation Trust v James*, as well as cases on capacity to litigate and disputes as to contact and residence. We also cover a decision on the making of findings of fact; the appointment of a deputy for property and affairs; disclosure from the police in the context of enhanced criminal record checks; the duty to draw up orders fairly after a hearing (which is likely to be of interest to anyone who has been drawn into a dispute over the contents of an order after a hearing); a report from the UN Expert on Torture on treatment without consent; parliamentary scrutiny of the Mental Health Act 2007; and the conclusions reached as a result of OCTET, the Oxford Community Treatment Order Evaluation Trial.

On the topic of lasting powers of attorney, we refer readers to invaluable guidance from the Office of the Public Guardian on avoiding invalid provisions and also summarise the effect of new regulations that came into force on 1 April 2013, reducing waiting times for LPA.

We are pleased to bring you news of the formation of a Court of Protection Practitioners' Association and to draw your attention to the mediation service offered by the Medical Mediation Foundation. We also note the plans to move the Court of Protection to First Avenue House, the premises of the Principal Registry of the Family Division.

We begin this edition by extending our congratulations to the recently appointed Lord and Lady Justices of Appeal, including Mrs Justice Macur and Mr Justice Ryder. The full list is available here with a short biography for each appointee.

As per usual, we include not only hyperlinks to publicly accessible transcripts of the judgments where they are available at the time of publication,[1] but also a QR code at the end which can be scanned to take you directly to the CoP Cases Online section of our website, which contains all of our previous case comments.

Aintree University Hospitals NHS Foundation Trust v James & Ors [2013] EWCA Civ 65

Best interests – Medical treatment

Summary

The Court of Appeal has provided the reasons for its decision before Christmas that the first instance judge had been wrong to refuse to make declarations sought by the NHS Trust that it was in Mr James' best interests to withhold

[1] As a general rule, those which are not so accessible will be in short order at www.mentalhealthlaw.co.uk.

life-sustaining treatments including CPR, invasive support for circulatory problems, and renal replacement therapy.

Mr James had become severely unwell in May 2012, and had been in intensive care since then. He had experienced a "*set of tentative recoveries interrupted by recurrent infections leading to lowering of his blood pressure, septic shock and multiple organ failure*", and a cardiac arrest. By the time of the Court of Appeal hearing on 21 December 2012, *"he had not managed more than 5 hours of spontaneous breathing since December 5th. Since 14th December he was completely dependent on mechanical ventilation. On 18th December he suffered a further dramatic deterioration which included worsening of his respiratory failure to the point that it was extremely difficult even to achieve good mechanical ventilation. This was accompanied by hypotension which was unresponsive to fluid and required intravenous vasopressors to maintain his blood pressure. He was given a further course of antibiotic therapy. His renal function had also deteriorated. He was at that time comatose or semi-comatose, responding only to painful stimuli by flexing his left arm."* The doctors were unanimous that any further interventions to sustain Mr James' life would cause him greater suffering with only very limited benefits. Mr James' family however felt that as he was still conscious and able to recognise them, and since he had already survived for longer than might have been expected despite his serious condition, it would be wrong to refuse to provide further interventions aimed at prolonging his life.

Mr James was said to be in a minimally conscious state, although it is apparent from the description of his interaction with his family, that he was substantially more aware of himself and his environment than M (in *W v M* [2011] EWHC 2443).

Lord Justice Ward held that Mr Justice Peter Jackson had erred in not finding that the treatment that the Trust proposed withholding from Mr James was futile:

> *"It follows that in my judgment the judge erred in law in adopting too narrow a view of futility. He was wrong simply to look at the past successful effect of the treatment without also having regard to the improvement, or lack of improvement, that such treatment will bring to the general health of the patient. He was wrong to concentrate on the usefulness of the treatment in coping with the crisis and curing the disease or illness, e.g. the cardiac arrest, and not also to be concerned instead with whether the treatment was worthwhile in the interests of the general well-being and overall health of the patient. The narrowness of the judge's focus undermines his judgment and I would allow the appeal on that basis alone."* (emphasis added)

Further, said Lord Justice Ward, the treatment in issue was overly-burdensome, contrary to the findings at first instance. There had also been a failure in the judge's approach to the issue of Mr James's potential for recovery:

> *"When it comes to a consideration of whether or not there was a prospect of recovery the judge held at [84](1)(d) that 'recovery does not mean a return to full health, but a resumption of a quality of life that DJ would regard as worthwhile.' Once again I respectfully conclude that the judge has applied the wrong test when considering the guidance in the Code of Practice. As I have indicated in my discussion on the meaning of futility, what the guidance is concerned with is answering the question, 'how should someone's best interests be worked out when making decisions about life-sustaining treatment?' As is stated at 5.30:*
>
> > *'It is up to the doctor or healthcare professional providing treatment to assess whether the treatment is life-sustaining in each particular situation.'*
>
> *In other words the focus is on the medical interests of the patient when treatment is being considered to sustain*

life. That is not to say the doctors determine the outcome for it is the court that must decide where there is a dispute about it and the court will always scrutinise the medical evidence with scrupulous care. Here we were necessarily dealing with a situation where life was ebbing away. In the context, therefore, 'no prospect of recovery' means no prospect of recovering such a state of good health as will avert the looming prospect of death if the life-sustaining treatment is given. DJ had a less than 1% chance of ever being released from the intensive care unit. He was slowly dying, not 'actively dying', as clinicians might describe his state had he been in such a condition that the Liverpool Care Pathway might have become appropriate. But there was no prospect whatever for this unfortunate brave man ever overcoming the multiple organ failure from which he had suffered with exponentially weaker prospects of recovery. This is a further reason for allowing the appeal."

On the subject of Mr James' wishes and feelings, Ward LJ said this:

"*His wishes, if they were to be the product of full informed thought, would have to recognise the futility of treatment, that treatment would be extremely burdensome to endure, and that he would never recover enough to go home. All this would be extremely distressing for his family."*

Ward LJ concluded by saying that:

"… a judgment on whether life is intolerable is a judgment on the quality of that life. It must, therefore, play some part in the assessment of best interests (as does the worthwhileness of treatments) but only as one of the many circumstances to take into account. Viewed objectively, DJ's life in the first months of his time in hospital was tolerable enough to require that all these treatment be tried and even that they be tried again but sadly the stage was eventually reached, as the medical evidence accepted by the judge demonstrated, that DJ's life would become quite intolerable were he to suffer a further crisis leading to a further setback in his health. Were that to happen the risks and burdens of trying to keep him alive would be disproportionate to the diminishing opportunities for him to take pleasure from his family. Thus there was no longer the need to try, try and try again to restore him to the state he was bravely fighting to achieve."

Arden LJ also allowed the Trust's appeal, but for different reasons, relying solely on the basis that Mr James, had he been fully informed of the situation, would have agreed with the Trust:

"Acting with humanity, and with respect for DJ's autonomy, I consider in the light of DJ's medical condition, his wishes would be unlikely to be to have the treatment of the kind in issue here, and that a reasonable individual in the light of current scientific knowledge would reject it."

Mr James died ten days after the Court of Appeal's decision to allow the Trust's appeal.

Comment

There are many notable features of this important decision by the Court of Appeal. It contains the clearest acceptance yet of the obvious truth that a best interests decision in a medical treatment case necessarily involves an assessment of quality of life. At the same time, it shows the route by which concerns about slippery slopes and making value judgments about the lives of other people are sidestepped by the MCA 2005 – namely the central focus on ascertaining the wishes of the particular person involved.

No doubt Mr James' family would say that the judges were wrong to say that Mr James would have supported the Trust's application, and Lady

Justice Arden's reference to what a 'reasonable' person would have wanted is unhelpful, since the MCA 2005 should not be used to impose rational decisions on people without capacity, if there is evidence that they would have chosen something different. Nevertheless, the principle that Mr James' likely wishes are of particular importance is firmly endorsed – in contrast to the position in ***W v M*** in which evidence of M's likely views was accorded very little weight.

The Court's approval of a narrow clinical definition of futility is also significant – although not establishing any new principle or approach, it is a very clear guide to proper approach to this critical question.

Re RGS [2012] EWHC 4162 (COP)

Mental capacity – Litigation

Summary

RGS was being cared for in a residential home. RBS removed him from the home unilaterally on the grounds that he was not being adequately cared for and was deprived of his liberty. In the complex Court of Protection proceedings that followed, the Court appointed, inter alia, a deputy to manage RGS's affairs having concluded that it would not be appropriate for continue to have access to RGS's assets as it had been shown that RBS had previously used his father's assets to his own advantage. The financial deputy appointed by the court reached the conclusion that a number of RGS's paintings and artworks should be sold to meet his on-going financial liabilities and the escalating costs of his care. RBS resisted this and reported the deputy's decision (and the proceedings more generally) to the media, who then wished to report on the case. He also reported the proceedings himself via Facebook and other social and local media outlets.

At this stage of the proceedings, there were two applications for determination, the second of which was an application by the media to lift the reporting restrictions on the case.

As RBS had a history of psychiatric illness and given his flagrant breaches of the Court order imposing reporting restrictions and his general conduct of the litigation, questions were raised as to whether he had litigation capacity. This was the issue that fell to be determined in the first application. RBS did not consent to a medical examination and maintained that he had capacity to litigate.

District Judge Eldergill set out in some detail the principles one has to apply when determining whether an individual lacks capacity in a relevant regard. Although there was no medical report, in light of a social worker report, the fact that RBS was receiving ongoing psychiatric treatment and his conduct, the Judge concluded that, on the balance of probabilities, RBS did suffer from "*an impairment or, or a disturbance in the functioning of, the mind or brain*." The Judge then proceeded to consider the evidence which indicates that RBS is unable to understand the information relevant to the litigation decisions, or is unable to retain that information, or is unable to use or weigh that information as part of the process of making the litigation decision(s), or is unable to communicate his decision(s). That evidence came from RBS's unconventional approach to the litigation itself, including the fact that he had made three applications for a writ of habeas corpus ad subjiciendum, an application to the European Court of Human Rights on the mistaken belief that the Strasbourg Court could suspend the ongoing proceedings and that he showed a complete unwillingness to make applications as appropriate to the Court of Protection in relation to RGS. The Judge further noted that RBS had "bombarded" the court with "emails, requests, demands and snippets of information, that he did not appear to understand the rights of other parties and that he had made repeated allegations against the deputy, the county council and the Court using social media. The Judge considered whether these breaches of the reporting restrictions could themselves be the consequence of the consequence of an impaired or disturbed mind or brain, as opposed to mere defiance.

RBS submitted witness evidence in support of his position (that he had capacity) but the Judge concluded that the weight that could be attached to that evidence was affected by the fact that the witnesses in question were unaware of recent

events and developments in the proceedings. District Judge Eldergill concluded that on the evidence available, RBS lacked the capacity to conduct the particular litigation. He emphasised that his decision was not premised on the fact that a few of RBS's litigation decisions 'would not be made by a person of ordinary prudence', but rather because of the link between RBS's mental illness and his conduct. The order was made on an interim basis, allowing RBS the opportunity to consent to a medical report, with the Judge indicating that if medical opinion concluded he had litigation capacity, the matter could be reviewed. The Judge also appointed his solicitor (who had been de-instructed) as his litigation friend (albeit acknowledging that this was unusual).

The application to lift the reporting restrictions was refused. The Judge acknowledged the importance of not restricting RBS's freedom of speech but noted that this could have a detrimental impact on his father. He concluded that anonymity is in RGS's best interests. D istrict Judge Eldergill emphasised the difference between secrecy and privacy, albeit acknowledging the "*high public interest in seeing that hearings which determine the rights of incapacitated people, and their families, are fair and properly administered*."

Comment

This decision highlights (albeit in an extreme factual scenario) the types of issues which can arise where a financial deputy is appointed in circumstances where family members are unwilling to cede control over P's assets or negotiate as to the appropriate way forward. On the facts, this was particularly complicated as a number of family members were shown to have been misappropriating P's assets. Nevertheless, some issues touched upon, such as the escalation of the costs of the legal proceedings themselves and the implications for being able to provide for P's welfare, are likely to be of more general application and serve to underscore the importance of trying to negotiate settlements where possible.

The case is also of interest in so far as it reinforces the primacy of P's right to anonymity where this is found to be in P's best interests. This is a case where one might say that the reporting restrictions had been totally undermined by virtue of the conduct of one of the parties and their use of social and local media to publicise details of the proceedings, and yet the press were not granted their application to lift reporting restrictions.

PS v LP (unreported, 6 February 2013)

Best interests – Contact

Summary

In June 2008 LP left her husband, BP, and her family to live with PP. LP told the police that she had been subject to abuse and domestic violence in the past and felt that she and PP were in danger from LP's family, who she felt would attempt to trace them. LP only contacted a few individuals after she left the family home, including her grandfather and one of her brothers, and had no contact with her husband or her children.

Less than three months after she left the family home, LP suffered a cerebral aneurism. As a result, LP currently resides at a care home and requires twenty four hour care. It was impossible to obtain any indication of LP's wishes following her injury. Although there was the potential for LP to undergo surgery in the future which might improve her ability to communicate, it was believed that any changes would only be minor.

LP's family discovered that she was living in the nursing home and were prevented from having contact with LP by the local authority, in accordance with LP's expressed wishes prior to her aneurism. The local authority made an application to the Court of Protection but by the time of the final hearing the only parties were PS (the daughter of LP) and LP, by her litigation friend the Official Solicitor. The sole issue for determination was whether it was in LP's best interests to have contact with her family. LP had written a will and a "letter of wishes" in July 2008 in which she was highly critical of her husband and children. PS and her family challenged the veracity of these documents, claiming that the

letter was not in her style of writing and had been written at a time when LP was subject to improper influence from PP. PS and her family were adamant that the criticisms made by LP were untrue and that she would have wished to see them.

Having heard the evidence of the parties, His Honour Judge Cardinal was in no doubt that LP's wish not to see her family was quite genuine and of her own volition at the time she expressed it. In considering the authorship of the will and the letter of wishes, His Honour Judge Cardinal did not feel it was appropriate to place great weight on the evidence of a forensic linguistic expert and found that, in any event, whoever may have written the documents, it could not be said that LP was incapacitous in 2008 at the time she signed the will and the letter of wishes. His Honour Judge Cardinal considered that LP's clear expression of her wishes was a magnetic factor in the case and, after weighing all the relevant matters, concluded that it was not in the best interests of LP to see her PS and her family unless there was a change in LP's situation at some point in the future.

Comment

This case illustrates the difficulty that arises where there is conflicting evidence as to a person's true wishes and feelings prior to their sudden loss of capacity. The Court derived great assistance in this case from LP's signed letter of wishes and the impression that LP gave to the detective sergeant who spoke to her shortly after she left the family home. In the absence of this evidence, the Court's task would have been significantly more difficult. It is suggested that anyone presented with a client who is considering a major break in their family ties may wish to consider advising them to record their detailed wishes and feelings in writing, and to sign and date the document in the presence of a suitably independent witness, preferably a solicitor, to avoid disputes about these matters in future.

HT v CK [2012] EWHC 4160 (COP)

Best interests – residence

Summary

These proceedings concerned the appropriate place of residence of Ms K, a 60 year old woman with Down's syndrome and severe learning disabilities. She had resided in the family home until the death of her mother in 1995. Thereafter, she resided in a number of different care settings. Her sister, HT, was involved in the decisions as to where she should be placed but there was a history of HT raising complaints as to the standard of care K was receiving. Nevertheless, HT had consistently visited K and there had been continuous contact.

In August 2008, K was moved to C care home. In 2009, HT moved house and wished K to be moved to a new placement nearer to her. K was taken on a home visit but refused to enter HT's home. HT raised concerns about K's care at C care home and complained to the Care Quality Commission in 2009. In August 2010, the Local Authority concluded that K's continued residence in C care home was appropriate. The evidence was that K was happy and settled. HT then applied to the Court of Protection seeking:

(i) an order that she be appointed as K's personal welfare deputy and property and affairs deputy; and
(ii) an interim order that K be moved to a suitable placement within a 20 mile radius of her home.

The application was opposed by the Local Authority.

It was not disputed that K lacked capacity in the relevant regards. By the time of the final hearing, the principal issue in dispute was that of residence. All parties, including HT, accepted that no suitable placement within a 20 mile radius of HT's home had in fact been identified.

The Official Solicitor, Local Authority and an Independent Social Worker all considered that it was in K's best interests to remain at C care home. The ISW reached this conclusion on the

basis that, whilst family relationships are important, the balance weighed in favour of maintaining the stable, consistent high quality care K had been receiving. In light of this (and other factors), the Official Solicitor sought a final declaration that it was in K's best interests to reside at C care home. HT accepted that in the interim K needed to remain there but did not wish the Court to make a final order lest a suitable placement be identified in the future.

District Judge Eldergill noted that it is not open to the Court to make a best interests determination on a speculative basis. As there was no suitable placement for K in the area where HT lives, it is in K's bests interests to remain living at C care home. The Judge set out in some detail the evidence as to K's wishes and the basis on which he had reached this conclusion. Whilst HT had been dedicated to K, there was evidence that K did not enjoy the contact in its current form and HT's attitude to the care home had not always placed K's interests first. Further, District Judge Eldergill concluded that a final declaration would be appropriate on the following grounds:

- The process of assessing placements has taken place and HT had already had the opportunity to suggest alternatives;
- A final order would bring finality to a lengthy process and enable the parties to engage with the proposed contact arrangements rather than continue to pursue alternatives;
- The interference with the Article 8 rights of K and HT were lawful, proportionate and justified.

Comment

This is an example of a case where the Court has to balance the rights of family members with P's interests in continuity of care. The editors note that this is not the only example of a case in which the Court has declined to find that it is in P's best interests to be moved where a family member has themselves relocated (see for example *NK v VW* in which Macur J rejected NK's application for his mother's place of residence to be changed at the permission stage). It is also of note that the Court favoured the certainty that would be afforded by a final declaration.

PB v RB and a local authority [2012] EWHC 4159 (COP)

Practice and procedure – Fact-finding

Summary

This judgment concerns a fact-finding hearing in respect of allegations that PB, who had a paranoid personality disorder, had behaved in an abusive and confrontational manner to people involved in the care of his mother, RB, the subject of the proceedings. The judgment should be of interest to local authorities, as it highlights the need to ensure that evidence to be relied on in such hearings needs to be of a high quality. Poor contemporaneous note-taking, scrappy witness evidence from care staff, and a failure to properly set out the circumstances in which disputed events took place, can all be major obstacles to the proving of allegations.

R(A) v The Chief Constable of Kent Constabulary [2013] EWHC 424 (Admin)

Practice and procedure – Other – Disclosure – Enhanced criminal record check

Summary

An application was made to the Chief Constable for information to be included in an enhanced criminal record certificate in respect of a registered nurse, A, ahead of her proposed employment by a nursing agency. The Chief Constable was required by s.113B(4) of the Police Act 1997 to provide any information which he reasonably believed to be relevant for the purpose described in the statement and, in his opinion, ought to be included in the certificate. The Head of the Vetting Unit at Kent Police decided to disclose allegations of ill-treatment and neglect that dated from A's previous employment at a nursing care home and which lead to four charges of ill-treatment and neglect of the residents. As was explained the certificate, no evidence was brought and the case against A was dismissed.

The decision to disclose the information was said to have been made on the basis that: "*the alleged incidents occurred less than two years*

ago and the injured parties were all vulnerable adults in a care home environment. There is concern that children and vulnerable adults under the care of [A] *may be subjected to mistreatment. It is therefore concluded that the impact of* [A]*'s right to privacy is outweighed by the potential risk posed to children and vulnerable adults and disclosure of this information is necessary, justified and proportionate to safeguard the vulnerable group*."

Mrs Justice Lang upheld A's application for judicial review, applying the decision of the Supreme Court in *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3. In that case the Court rejected the previous approach to disclosure, which gave priority to the social need to protect the vulnerable as against the right to respect for the private life of the applicant. In *L*, Lord Hope stated that the correct approach, as in other cases where competing Convention rights are in issue, is that neither consideration has precedence over the other.

In the present case, the Chief Constable argued that *L* did not apply as one of the allegations against A would, if proven, have amounted to inhuman and degrading treatment contrary to Article 3. As such, the absolute right in Article 3 took precedence over the qualified right in Article 8. Mrs Justice Lang described this submission as misconceived and went on to say (at para 35):

> *"The legitimate aim of protecting the rights and freedoms of others under Article 8(2) includes protection for all rights, including those under Article 3. It is not limited to the Article 8 rights of others, even though that may have been the position on the facts in L. Plainly, when considering necessity and proportionality under Article 8(2), the gravity of the risk to others is a critical consideration, as indicated by Lord Neuberger in L. at [81]. The more grave the risk, the greater the likelihood that the interference with an Article 8(1) right will be justified. But the risk of a breach of Article 3 does not avoid the legal requirement to justify the interference under Article 8(2) in each case."*

Nor did Article 3 impose any positive obligation to disclose the information.

Although, on a conventional judicial review approach, the role of the Court was limited to reviewing the relevant decision and leaving it to the Chief Constable to remake the decision, Mrs Justice Lang accepted that she was also required to decide whether or not the Chief Constable was right in deciding that disclosure was proportionate and would not be in breach of A's Article 8 rights. Mrs Justice Lang recognised that if she found that disclosure was not proportionate, the Chief Constable would, in effect, be required to re-make the decision in accordance with her assessment of proportionality, in the absence of a material change of circumstances.

Mrs Justice Lang considered that too low a threshold had been applied when considering the credibility of the allegations and that the evaluation of the evidence was inadequate (at paras 49-67). She found it was significant that the allegations had been considered by the care home at the time, as well as by the CPS, the Independent Safeguarding Authority and the Nursing and Midwifery Council, each of which found that the allegations were not a sufficient basis upon which to take action against N. Mrs Justice Lang concluded (at para 95):

> *"On the balance of probabilities, I consider that* [the allegations] *are either exaggerated or false. When assessing proportionality under Article 8(2), and balancing the need to protect vulnerable patients from the risk of ill-treatment, against the harm caused to* [N] *by disclosure, the balance tips in favour of non-disclosure when it is more likely than not that the allegations are either exaggerated or false. A fair balance must be struck between the interests of the community and the protection of the individual's rights, and it is disproportionate for* [N's] *professional life to be blighted in this manner when the allegations have been repeatedly found to be unreliable."*

The decision to disclose was found to have

breached N's rights under Article 8 accordingly.

Comment

Although this case does not directly concern the work of the Court of Protection, it has been included as a salutary reminder of the importance of ensuring proper respect is afforded to an individual's private life, including in the context of safeguarding allegations and investigations, and the need to adopt a rigorous approach to evaluating the credibility of such allegations before taking any decision to disclose such information.

Webb Resolutions Ltd v JT Ltd [2013] EWHC 509 (TCC)

Practice and procedure – Other – Costs

Summary

This decision from the Technology and Construction Court is of interest as an example of an award of costs against a party for adopting an unreasonable approach to drafting and agreeing an order after a hearing. The parties attended a case management conference at which it was decided, with the consent of the parties, that the case would proceed in a certain way. The Claimant's solicitors subsequently prepared a draft order that contradicted the directions that had been given at the case management-conference. The Defendant's solicitors would not agree to this draft order and, after extensive correspondence between the parties, the matter came back to Court three and a half months later, with agreement on the terms of the order having been reached only a few days previously. Mrs Justice Edwards-Stuart said (at para 19):

> *"If a party is charged with drawing up an order it is the duty of its solicitors and counsel to produce a draft that fairly reflects what they think the judge decided or directed. Save for the most complicated directions, this seldom presents any difficulty. What* [the Claimant's solicitors] *did in this case was to produce an order that reflected the directions that they or their clients would like to have, and not the directions that the court in fact ordered. That is wholly unacceptable: it is not just unreasonable, it is verging on the contumelious (to use an old fashioned, but completely apt, adjective)."*

The Claimant's solicitors were ordered to pay the costs unnecessarily incurred by the Defendant's legal representatives in their protracted attempts to obtain agreement to an order.

Comment

The extreme position adopted by the Claimant's solicitor and the long delay in submitting the agreed order mean that it is likely this case will be easily distinguishable. Nonetheless it may be of assistance in the event (which we hope is highly unlikely) that practitioners encounter sustained and unreasonable opposition in the course of attempting to agree the terms of an order after a hearing.

Re M, N v O & P (unreported, 28 January 2013)

Deputies – Property and financial affairs

Summary

This case concerned an application by M's work colleague to be appointed his deputy for property and financial affairs, in circumstances where it was anticipated that M's health problems would improve and he would regain capacity. M's wife contested the application and put herself forward as deputy.

Senior Judge Lush noted that pre-MCA authorities, which he considered to be still pertinent to the issue of the appointment of deputies, had set out an 'order of preference' in which P's relatives were preferred over strangers such as professional advisors or statutory bodies. Senior Judge Lush observed that:

> *"The court prefers to appoint a family member or close friend, if possible, as long as it is in P's best interests to do so. This is because a relative or friend*

will already be familiar with P's affairs, and wishes and methods of communication. Someone who already has a close personal knowledge of P is also likely to be better able to meet the obligation of a deputy to consult with P, and to permit and encourage him to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him. And, because professionals charge for their services, the appointment of a relative or friend is generally preferred for reasons of economy. There are, of course, cases in which the court would not countenance appointing a particular family member as deputy. For example, if there had been physical or financial abuse; if there is a conflict of interests; if the proposed deputy has an unsatisfactory track record in managing his own financial affairs; and if there is ongoing friction between various family members that is likely to interfere with the administration of P's affairs. This list is not exhaustive."

Applying the balance sheet approach to the competing potential deputies, the court held that M's colleague should be appointed. The various factors the court considered were: ability to act; willingness to act; qualifications; place of residence; security; conduct before and during the proceedings; nature of relationship with M; M's wishes and feelings; views of others; effect of hostility; conflicts of interest; remuneration; and the terms of M's will. Senior Judge Lush found that the factors of 'magnetic importance' were "*M's past and present wishes and feelings and the unanimous views of others, who are particularly close to him, as to what would be in his best interests. It would be wrong to frustrate his choice of N as his substitute decision-maker simply because his wife opposes it*."

Comment

This case is a useful illustration of the approach the court will take to considering whether a deputy should be appointed, in circumstances where his or her application is contested.

Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: No more treatment without consent

On 1 February 2013, the UN Special Rapporteur, Juan E. Méndez, reported to the Human Rights Council on forms of abuse in healthcare settings which may give rise to breaches of Article 3 ECHR. His report is available here.

Whilst the report is of sufficient interest to warrant reading in full, some of the key points arising are the following:

a. The report acknowledges that the conceptualisation of abuses in healthcare settings as torture or ill-treatment is a relatively new phenomenon and that this type of abuse presents particular challenges as actions may be defended on grounds of administrative efficiency, behaviour modification or medical necessity. However, ensuring special protection of minority and marginalised groups and individuals is a critical component of the State's obligation to prevent torture and ill-treatment;

b. The report emphasises the importance of informed consent and the intimate link between forced medical interventions based on discrimination and the deprivation of legal capacity. It reiterates the observation of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, that "*informed consent is not mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision. Guaranteeing informed consent is a fundamental feature of respecting an individual's autonomy, self-determination and human dignity in an appropriate continuum of voluntary health-care services*". The formal recommendations include ensuring that the importance of informed consent is communicated through training doctors, judges,

prosecutors and the police.

c. Torture presupposes a situation of powerlessness – deprivation of legal capacity is one such circumstance. Medical treatments of an intrusive and irreversible nature when lacking a therapeutic purpose may constitute torture or ill-treatment when enforced or administered without the free and informed consent of the person concerned. "*This is particularly the case when intrusive and irreversible, non-consensual treatments are performed on patients from marginalized groups, such as persons with disabilities, notwithstanding claims of good intentions or medical necessity*."

d. Different forms of abuse in health care settings have been recognised in the context of:

   i. Compulsory detention in rehabilitation centres including compulsory treatment centres that consist primarily of physical discipline;
   ii. Abuses of reproductive rights (genetic testing, access to abortion);
   iii. Denial of pain treatment – whilst this often involves acts of omission rather than commission, the failure to ensure access to controlled medicines for the relief of pain and suffering threatens fundamental rights to health and to protection against cruel, inhuman and degrading treatment. Governments must guarantee essential medicines – which include, among others, opioid analgesics – as part of their minimum core obligations under the right to health, and take measures to protect people under their jurisdiction from inhuman and degrading treatment;
   iv. People with severe psychosocial disabilities who continue to be victims of neglect, mental and physical abuse and sexual violence.

e. A number of steps are recommended by the Special Rapporteur and the formal recommendations are set out at pages 21-23 of the report. In summary, these include taking steps to promote rights through:

   i. the introduction of a new normative framework which looks specifically at the measures needed to prevent torture and ill-treatment against people with disabilities;
   ii. an absolute ban on restraints and seclusion - there can be no therapeutic justification for the use of solitary confinement and prolonged restraint of persons with disabilities in psychiatric institutions;
   iii. revision of domestic legislation allowing forced interventions in the context of an individual's best interests - to the extent that they inflict severe pain and suffering, they violate the absolute prohibition of torture and cruel, inhuman and degrading treatment
   iv. ensuring full respect of each person's legal capacity; and
   v. an examination of the practices of involuntary commitment in psychiatric institutions – inappropriate or unnecessary non-consensual institutionalisation of individuals may amount to torture or ill treatment as use of force beyond that which is strictly necessary.

Parliamentary Scrutiny

The Health Select Committee of the House of Commons has been scrutinising the Mental Health Act 2007. On 26 February 2013, it posed a number of questions that perhaps are on many people's lips. First, should there be a standard definition of "*deprivation of liberty*"? Second, "*Should hospitals and/or the GMC be interested when, for whatever reason, people not telling the whole truth indicate that a voluntary patient will be sectioned if they try to move?*". Third, "*Is there any reason why* [DOLS] *should not be applied in an independent living environment?*" Little in the way of concrete answers was available. However, in relation to the second, on 12 March 2013 representatives of the Department of Health stated:

"There are circumstances where voluntary

patients who are inpatients need to be detained, for whatever reason-their mental state has changed, the risks have changed or whatever circumstances have changed-and there are of course sections 5(2) and 5(4) in the Act in order to do that, but it is utterly unacceptable to threaten anyone with it. The code of practice makes very clear that it is unacceptable practice to threaten someone. If someone's circumstances have changed, they are thinking of leaving, they meet the criteria for detention and it is appropriate, then, yes, but what you don't do is threaten it and coerce people in that way. I am aware, as you obviously are, that it still happens."

The DOH also stated that, in legal terms, DOLS successfully addressed the issue it was trying to address by providing the legal framework; however its application remained patchy and "*One of the things we need to do is to talk to the CQC about potentially doing more to look at the outliers there*." In terms of the definition of "deprivation of liberty", after noting the Supreme Court case this October, it said: "*Our sense is that the real experts on this are the people doing the assessment. There is less evidence of people feeling confident about identifying when to make applications to the assessors*." A call was made for an easy read guide to help practitioners understand the case law.

OCTET Study

The interface between community treatment orders and the MCA has yet to feature in reported judgments of the Court of Protection. However, a number of our team have been involved in the interface with those on leave under section 17 of the Mental Health Act 1983. The eagerly anticipated results of the Oxford study, which tested whether CTOs reduce hospital admissions compared with the use of section 17 leave, was published in the Lancet on 26 March 2013. Its conclusion will no doubt be hugely significant:

"In well-coordinated mental health services the imposition of compulsory supervision does not reduce the rate of readmission of psychotic patients. We found no support in terms of any reduction in overall hospital admission to justify the significant curtailment of patients' personal liberty."

Avoiding Invalid LPAs

Jill Martin, Legal Adviser to the Public Guardian, has produced an invaluable guidance note entitled 'Avoiding Invalid Provisions in your LPA' which we strongly recommend to those involved in the creation of LPAs. The note can be found here.

Amongst the issues addressed are:

1. Attorneys appointed to act jointly and severally cannot be required by the donor to decide jointly for particular transactions. Nor can the donor require a minimum number of attorneys to at any one time. Other invalid restrictions include requiring a majority view to prevail, or one attorney to defer to another, or a particular attorney's decision will be final. This is because joint and several appointed attorneys must all be free to act at any time.

2. Attorneys appointed to act jointly means that they must all act together for all decisions. So if one of them can no longer act, the power vanishes. Invalid restrictions include requiring a majority decision, or preferential decision-making, or that a surviving attorney can continue if the others drop out. Appointing attorney to act jointly for some decisions and jointly and severally for others, it notes, can prove troublesome: "*Major capital expenses jointly. Day to day expenses attorney X*" would be invalid, therefore, because there were no decisions to be made jointly and severally.

3. The guidance also covers invalid provisions relating to gifts and helpfully details the case law which confirms that an attorney can only provide for the needs of a family member if the donor has a legal obligation to maintain them (eg wife, civil partner, child under 18).

4. Replacement attorneys can only take up

their post after a MCA s.13 trigger: examples are given of invalid triggers and the complicated situations where the donee attempts to provide for replacements for joint and several attorneys.

5. Third party delegation and other useful scenarios are also catered.

6. From April 2013 digital LPAs can now be completed online.

Reducing LPA waiting times

From 1 April 2013, the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations (S.I. 2013/506) amend the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (S.I. 2007/1253). The essential consequences are:

1. The length of time that must elapse between the OPG notifying the donor or donees that an application to register a LOA has been received and the date on which the LPA is then registered is reduced from 6 to 4 weeks.

2. The period during which a donee, donor, or named person must give notice of objection to registration is reduced from 5 to 3 weeks. Transitional provisions apply for LPA applications made close to 1 April 2013.

3. Where a new replacement security is given by a deputy, the original security will be automatically discharged after 2 years without the need for an application to court.

4. Amended Forms LPA 001, LPA 003A and LPA 003B are available to download from the OPG's website from 1 April 2013.

Court of Protection Practitioners' Association

Our readers may be interested to learn about a meeting of the Court of Protection Practitioners' Association (CoPPA) that will take place at Irwin Mitchell's London office from 5.30 to 7:00pm on 28 May 2013. We will bring you further information in our May newsletter, including details of how to register interest and RSVP. CoPPA was formed officially in September 2012, and was founded in Manchester. Regional sub groups are being formed under the CoPPA umbrella as awareness of the Association is raised. The meeting on 28 May will be to gauge interest in forming a London CoPPA group.

CoPPA was founded to bring together professionals working in the Court of Protection, and membership is not limited to lawyers. The Association aims to bring together those working primarily on health and welfare matters with those whose work is mainly concerned with property and affairs. Professionals working in the Court of Protection come from a wide range of backgrounds and a need was identified to bring together the various areas of expertise and experience. Current members include local authority staff, IMCAs, investment specialists as well as solicitors and barristers.

The aims of the group are:-

- to create a forum for discussion of matters of common interest;
- to provide relevant professional development and education to improve the knowledge of all persons involved and interested in the law and practice of relating to Court of Protection, mental capacity and mental health;
- to ascertain and represent views of members in relation to their professional interests;
- to protect and promote the efficiency of Courts in England and Wales in dealing with matters relating to the Court of Protection; and
- to further the understanding and development of the Court of Protection and mental capacity and mental health law.

Medical Mediation Foundation

Tor has been appointed as an advisor to the Medical Mediation Foundation, a not-for-profit organisation offering mediation and decision-support to health professionals and families to help resolve conflicts about the medical care of a child. Further information about the foundation and the services it offers is available here.

Plans to move the Court of Protection

Finally, our grateful thanks to Nicholas O'Brien of Coram Chambers for drawing our attention to the plans to move the Court of Protection to First Avenue House, home to the Principal Division of the Family Court, 42-49 High Holborn, WC1 6NP. It has been reported that this and other moves are set to take effect by April 2014.

Our next update will be out in May unless any major decisions are handed down before then which merit urgent dissemination.

Please email us with any judgments and/or other items which you would like to be included: credit is always given.

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Alex is frequently instructed before the Court of Protection by individuals (including on behalf of the Official Solicitor), NHS bodies and local authorities. Together with Victoria, he co-edits the Court of Protection Law Reports for Jordans. He is a co-author of 'Court of Protection Practice' (Jordans), the second edition of 'Mental Capacity: Law and Practice' (Jordans 2012) and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is one of the few health and welfare specialists before the Court of Protection also to be a member of the Society of Trust and Estates Practitioners.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell).

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Josephine is regularly instructed before the Court of Protection in welfare and financial matters. She acts for the Official Solicitor, family members and statutory bodies. She also practises in the related areas of Community Care, Regulatory law and Personal Injury.

Neil Allen: neil.allen@39essex.com
Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity.

Michelle Pratley: michelle.pratley@39essex.com
Michelle's broad range of experience in the Court of Protection encompasses deprivation of liberty, residence and contact, forced marriage, serious medical treatment, capacity to consent to marriage and capacity to consent to sexual relations as well as applications for financial deputyship. She is recommended as "responsive and approachable" and a "formidable presence" in the Court of Protection in Chambers and Partners 2013.

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