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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: May 2013

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Introduction

Welcome to the May 2013 newsletter. In this issue we bring you the eagerly anticipated decision ***PC and NC v City of York Council,*** in which the Court of Appeal analyses the test for capacity with reference to the decision to cohabit with a spouse. We also include a case on litigation capacity in the context of costs proceedings and a decision where a dispute over contact arrangements led to the imposition of a penal notice.

We cover a number of developments in the property and affairs sphere, including a decision of the Court of Appeal on enduring powers of attorney, a case on gifts made by financial deputies and a decision on statutory wills as well as a note on appointing a deputy to run proceedings in the Employment Tribunal. We also refer to helpful new guidance on managing a bank account on behalf of another person.

We touch upon recent decisions of the Administrative Court concerning public funding for expert reports and the interface between public law and proceedings in the Court of Protection. We note that the Court of Appeal has overturned a decision we previously covered on the lawfulness of a local authority's assessment of risk. On the topic of deprivation of liberty, we refer readers to the recent CQC Report on DOLS in care homes and hospitals.

Finally, we bring you further details about the London meeting of the Court of Protection Practitioners' Association on 28 May 2013.

Readers will no doubt have seen the Daily Mail's coverage of ***SCC v LM***, which has been reported as the 'Maddocks case'. Much of what was included in the press bore little relation to the factual background. We summarised this case some time ago but the court's original decision has now been made public and is available on Bailii. Furthermore, the recent publicity seems to have persuaded the Government that a review of the private nature of COP proceedings is required, as well (it would appear) the Lord Chief Justice and the President of the Family Division to issue new Practice Guidance on Committal for Contempt of Court on 3 May 2013, which is applicable both to the Family Division and the Court of Protection.

Finally, we include with this newsletter a "*View from the coalface*" prepared by Ben Troke of Browne Jacobson reflecting on the ground concerns raised at the regular East Midlands MCA/DOLS Forum hosted by Browne Jacobson.

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

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

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.

PC and NC v City of York Council [2013] EWCA Civ 478

Mental capacity – Assessing capacity – Marriage, sexual relations, residence, contact

Summary

In 2006 PC married NC whilst he was serving a 13-year term of imprisonment for serious sexual offences. He had always denied his guilt and so never received any sexual offenders' treatment. She had always maintained that he was innocent and blamed the complainants – his previous wives – for framing him. It was not in dispute that, were the couple to resume cohabitation, he would pose a serious risk to her, although there was no evidence that serious harm had ever been suffered. Both had a unified wish to resume married life together and the local authority issued proceedings in anticipation of his release on licence. Whilst the central issue concerned the capacity of a married woman to decide whether or not she was going to live with her husband, the appeal raised more general issues relating to the character of decisions in respect of which capacity is to be assessed.

At first instance, Hedley J had accepted that the husband's guilt was potentially a highly relevant factor to the capacity assessment. However, the issue was 'not whether she is right in her rejection of his guilt, that is a classic and all too familiar unwise decision, but whether she was capable of the steps necessary to reach such a conclusion. Given her learning disability, her unwillingness to examine the issue of his guilt and her overwhelming desire to re-establish that relationship, and that that derives in significant part from her impairment, I accept that there may be evidence from which the court could conclude that she lacks capacity to decide on matters relating to her relationship with NC.' His Lordship proceeded to analyse the capacity issue as follows:

> *"19. There has been considerable debate as to whether the issue of capacity to decide on contact should or should not be person specific, that is to say whether it should or should not in this case focus on NC. This is in part derived from the terms of section 17 of the Act. However, it seems to me that what the statute requires is the fixing of attention upon the actual decision in hand. It is the capacity to take a specific decision, or a decision of a specific nature, with which the Act is concerned. Sometimes that will most certainly be generic. Can this person make any decision as to residence or contact or care by reason of, for example, their dementia? Or does this person have any capacity to consent to sexual relations by reason of an impairment of mind which appears to withdraw all the usual restraints that are in place? Such generic assessments will often by necessary in order to devise effective protective measures for the benefit of the protected person, but it will not always be so. There will be cases, for example, in relation to medical treatment where the attention is centred not only on a specific treatment or action but on the specific circumstances prevailing at the time of the person whose decision making capacity is in question. The hysteric resisting treatment in the course of delivering a child is an example from my own experience. Accordingly, I see no reason why in the construction of the statute in any particular case the question of capacity should not arise in relation to an individual or in relation to specific decision making relating to a specific person. In my judgment, given the presumption of capacity in section 1(2) this may indeed be very necessary to prevent the powers of the Court of Protection, which can be both invasive and draconian, being defined or exercised more widely than is strictly necessary in each particular case.*
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> *20. It follows that in my judgment, rather than making a general finding about whether the question to be considered should or should not involve in it any*

particular individual, my task, as I understand it, is to articulate the question actually under discussion in the case and to apply the statutory capacity test to that decision. The question in this case surely is this: should PC take up married life with NC now that, in terms of imprisonment and licence, he is free to do so? It is a decision which any wife in her position would be required to take and it is a decision that does not admit of only one answer. Thus, the question of capacity is important. All the other issues raised, care, residence and contact, are peripheral, save insofar as they bear on the question of the resumption of the long interrupted cohabitation of PC and NC. Although that is a narrow issue it is, in my judgment, a seriously justiciable issue to which the court should give its proper attention and make a decision.

21. In coming to dealing with the question of capacity on that central question I start by acknowledging three things. The first is that PC must be taken to have had capacity to marry in 2006. Secondly, she must be taken to have capacity to understand the obligations of marriage. Thirdly, the presumption of capacity under section 1(2) must, on the evidence that I have heard, prevail in relation to all issues other than the resumption of cohabitation with NC and its implementation. Then I need to say that the question that I have posed is narrower and beyond the question of the obligations of marriage. Any woman, however conscious of those obligations, nevertheless in the circumstances of PC and NC, would have a fresh and particular decision to make as to which there is more than one available answer. In the end I have concluded on the evidence that PC does not have the capacity to make the identified decision. She is undoubtedly within section 2(1) requirements of impairment. Applying the section 3(1) test I am not satisfied that she is able to understand the potential risk that NC presents to her and that she is unable to weigh the information underpinning the potential risk so as to determine whether or not such a risk either exists or should be run, and should, therefore, be part of her decision to resume cohabitation. I am satisfied too that that significantly relates to the impairment in section 2(1), though I do accept that there is an element in it of an instinctive impatience simply to bring about the desired result whatever, which, if it stood alone, would simply be an unwise decision. Accordingly, I find that in relation to the decision as to whether to resume cohabitation with NC, PC lacks capacity so to decide and thus the jurisdiction of the Court of Protection is engaged in respect of that particular issue."

This line of reasoning was challenged by both husband and wife. On behalf of the wife, the Official Solicitor's three primary grounds of appeal, as re-cast by the Court of Appeal, were:

(i) The judge wrongly identified the issue for determination as being whether PC had capacity to 'resume married life', rather than by reference to the established domains of care, contact and residence. As a result the judge conflated the relevant issues;

(ii) The judge failed to give proper weight to the fact that PC and NC had contracted a valid marriage in 2006 and there had been no relevant change in circumstances since that time to bring the validity of the marriage into question;

(iii) In any event, the judge wrongly applied a person-specific, rather than an act-specific, test in determining capacity. In particular:

A. As a matter of law a 'decision' to which MCA 2005, Part 1 applies can only be act-specific and can never be person-specific.
B. If, contrary to A, it is permissible for some 'decisions' to be person-specific, the decision of a wife to go to live with her husband is not one of those decisions.
C. If, contrary to A and B, it is permissible for the decision of a wife to go to live with her

husband to be person-specific, where, as here, the wife has had and maintains capacity to marry the outcome of the test for capacity to marry will be the same as that for the capacity to decide to cohabit.

Never person-specific? (Ground (iii) A)

The Court of Appeal began with this third ground as it had been the focus of the submissions. There was 'clear and settled authority that capacity to marry is act, rather than person, specific'; and 'some relatively solid ground for holding that the same is also true with respect to consent to sexual relations' (paragraph 21). McFarlane LJ accepted that 'capacity to marry is to be assessed in general and as a matter of principle, and not by reference to any particular prospective marriage' (paragraph 23). It was status, not spouse, specific. In relation to consent to sexual relations, the judgment noted the difference of judicial opinion, principally between Munby J (as he then was) in *Local Authority X v MM* [2007] EWHC 2003 (Fam) and Baroness Hale in *R v Cooper* [2009] 1 WLR 1786. In the former it was held at paragraph 86:

> *"The question [capacity to consent to sexual relations] is issue specific, both in the general sense and, as I have already pointed out, in the sense that capacity has to be assessed in relation to the particular kind of sexual activity in question. But capacity to consent to sexual relations is, in my judgment, a question directed to the nature of the activity rather than to the identity of the sexual partner."*

By contrast in *Cooper* it was held at paragraph 27:

> "*My Lords, it is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so."*

However, the Court of Appeal did not consider it necessary to resolve the matter because:

> *"27… Whilst consent to sexual relations forms part of the wider decision by a spouse whether or not to take up full cohabitation with her husband, the two decisions are not precisely the same. The fact that one may be act-specific does not mean that the other, wider, decision cannot be person-specific. In any event, for the purposes of this part of the Official Solicitor's argument it is sufficient that one major category of decision, namely capacity to marry, is act, rather than person, specific."*

After summarising the submissions of the parties, the Court concluded that the course adopted by Hedley J at paragraph 19 had been correct. Thus:

> *"35. … The determination of capacity under MCA 2005, Part 1 is decision specific. Some decisions, for example agreeing to marry or consenting to divorce, are status or act specific. Some other decisions, for example whether P should have contact with a particular individual, may be person specific. But all decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of MCA 2005, ss 1 to 3 which requires the court to have regard to 'a matter' requiring 'a decision'. There is neither need nor justification for the plain words of the statute to be embellished. I do not agree with the Official Solicitor's submission that absurd consequences flow from a failure to adopt either an act-specific or a person-specific approach to each category of decision that may fall for consideration. To the contrary, I endorse Mr Hallin's argument to the effect that removing the specific factual context from some decisions leaves nothing for the evaluation of capacity to bite upon. The MCA 2005 itself makes a distinction between some decisions (set out in s 27) which as a category are exempt from the court's welfare*

jurisdiction once the relevant incapacity is established (for example consent to marriage, sexual relations or divorce) and other decisions (set out in s 17) which are intended, for example, to relate to a 'specified person' or specific medical treatments."

The same regime and structure for evaluating capacity established in MCA 2005 ss 1 to 3 was to be applied to each and every individual decision which fell for consideration (paragraph 36). McFarlane LJ went on to hold:

"37. The central provisions of the MCA 2005 have been widely welcomed as an example of plain and clear statutory language. I would therefore deprecate any attempt to add any embellishment or gloss to the statutory wording unless to do so is plainly necessary. In this context the reference within the Official Solicitor's argument to 'domains' of decision-making is unwelcome and unnecessary. The court is charged, in relation to 'a matter', with evaluating an individual's capacity 'to make a decision for himself in relation to the matter' (s 2(1)); no need has been identified for grouping categories of 'matter' or 'decision' into domains, save where to do so has been established by common law or by the express terms of the MCA 2005 (for example, capacity to marry). It follows that the Official Solicitor's ground (i), which relies upon evaluation with respect to relevant 'domains', and which was not pursued during oral argument, cannot succeed.

38. I do not therefore accept Mr Bowen's submission that there is no basis for the court to adopt an act specific approach to the question of capacity to marry but to personalise the question of whether there is capacity to decide whether or not to have contact with, or reside with, a particular spouse. One, capacity to marry, involves understanding matters of status, obligation and rights, the other, contact and residence, may well be grounded in a specific factual context. The process of evaluation of the capacity to make the decision must be the same, but the factors to be taken into account will differ. As I have already observed, this distinction is expressly reflected in MCA 2005, s 17 and s 27 and, indeed, it is common place for the Court of Protection to be asked, for example in a case of dementia, to regulate the contact that one spouse may have with another.

39. It follows that I accept Mr Hallin's submission that the reference in MCA 2005, s 3(1)(a) to the ability to 'understand the information relevant to the decision' in this particular case must include reference to information specifically relevant to NC in the light of his conviction and its potential impact on the decision before the court."

Living with husband not person-specific? (Ground (iii) B)

Having rejected any act-specific or person-specific distinction, other than those established by common law and/or expressly provided for in the MCA 2005, his Lordship held that the decision of a wife to go to live with her husband was 'the matter' in relation to which the court must determine the issue of capacity. The information relevant to that decision 'must include that which is specifically relevant to the particular wife and the particular husband' and so this ground of appeal was similarly rejected (paragraph 41).

Marriage and cohabitation? (Ground (iii) C)

The Court accepted evaluating capacity to marry and to cohabit will involve consideration of very closely related factors and 'it may be impossible for the court to come to contrary conclusions on these two issues'. The statutory test was the same for both but it was not necessary on this occasion to determine whether, as a matter of law, it was permissible to come to contrary conclusions (paragraphs 42-43).

Impact of capacity to marry and the causative nexus? (Ground (ii) plus oral submissions)

Having found that she had maintained capacity to marry, it was contended on behalf of PC that Hedley J had failed to identify why she lacked capacity to cohabit. Importantly, it was also submitted that the finding that her inability to make the decision to cohabit was 'referable' to or 'significantly relates' to her learning disability fell short of finding that the inability was 'because of' her disability as required by MCA s 2(1).

Rejecting the 'outcome' approach to capacity assessments, the Court held:

> *"53. … There may be many women who are seen to be in relationships with men regarded by professionals as predatory sexual offenders. The Court of Protection does not have jurisdiction to act to 'protect' these women if they do not lack the mental capacity to decide whether or not to be, or continue to be, in such a relationship. The individual's decision may be said to be 'against the better judgment' of the woman concerned, but the point is that, unless they lack mental capacity to make that judgment, it is against their better judgment. It is a judgment that they are entitled to make. The statute respects their autonomy so to decide and the Court of Protection has no jurisdiction to intervene.*
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> *54. Mr Bowen correctly submits that there is a space between an unwise decision and one which an individual does not have the mental capacity to take and he powerfully argues that it is important to respect that space, and to ensure that it is preserved, for it is within that space that an individual's autonomy operates."*

McFarlane LJ observed that MCA ss 2 and 3 did not establish a series of additional, free-standing tests of capacity. Rather, s 2(1) was the single test, interpreted by applying the more detailed description given around it in ss 2 and 3. Hedley J was said to have considered them as separate, albeit related, tests rather than affording central prominence to s 2(1).

> *"58. … There is, however, a danger in structuring the decision by looking to s 2(1) primarily as requiring a finding of mental impairment and nothing more and in considering s 2(1) first before then going on to look at s 3(1) as requiring a finding of inability to make a decision. The danger is that the strength of the causative nexus between mental impairment and inability to decide is watered down. That sequence - 'mental impairment' and then 'inability to make a decision' - is the reverse of that in s 2(1) – 'unable to make a decision … <u>because of</u> an impairment of, or a disturbance in the functioning of, the mind or brain' [emphasis added]. The danger in using s 2(1) simply to collect the mental health element is that the key words 'because of' in s 2(1) may lose their prominence and be replaced by words such as those* deployed *by Hedley J: 'referable to' or 'significantly relates to'.*
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> *59. Approaching the issue in the case in the sequence set out in s 2(1), the first question is whether PC is 'unable to make a decision for herself in relation to the matter', the matter being re-establishing cohabitation with NC now that he is her husband and now that he is has regained his liberty. In this regard the fact that PC has capacity in all other areas of her life (save for litigation) and, in particular, has capacity to marry, is very significant. Hedley J's findings [paragraph 21] that PC is unable to understand the potential risk that NC presents and is* unable *to weigh up the relevant information [the factors in MCA 2005, s 3(1)(a) and (c)] are therefore distinct and apart from her capacity to undertake these tasks in relation to all other matters that fall for decision, including marriage itself. Against that background it was, in my view, necessary for the judge to spell out why*

he came to these conclusions, notwithstanding PC's capacity generally to make her own decisions. This the judge did not do. This omission is perhaps understandable as, in reality, the evidential basis for such a distinction had not been established."

Any finding that PC had capacity to marry but not to decide to perform the terms of the marriage contract required clear and cogent evidence which was found to be lacking. The finding that she was unable to make that decision was held to be simply not open to the judge and his conclusion was not sustainable. On that basis, the appeal was allowed:

"60. In the light of the finding that I have just made, the assessment of capacity under s 2(1) falls at the first of the two component parts. Insofar as the second part, the mental health element, is concerned, I have already questioned whether Hedley J's findings go so far as to hold that the inability to decide is 'because of' PC's compromised mental ability. In this regard the need to delineate why and how her mental impairment is insufficient to rob her of capacity in all other fields, yet is sufficient to be the cause of her asserted inability to decide to go to live with her husband is on all fours with the need for such clarity with regard to the first limb of s 2(1). For the reasons that I have already given, the evidence in the case is insufficient for this task and the judge's findings on this limb must also fall away."

Lewison LJ delivered a short concurring judgment, noting:

"63. Thus in 2006 PC had the capacity to enter into a contract the essence of which was an agreement to live together with her husband. If she had the capacity to make that promise, she must then have had the capacity to decide to keep her promise. There is no finding of any deterioration in her mental capacity since then. Nor has there been any relevant change of circumstances, because at the date of the marriage NC had already been convicted and imprisoned.

64. I well understand that all the responsible professionals take the view that it would be extremely unwise for PC to cohabit with her husband. But adult autonomy is such that people are free to make unwise decisions, provided that they have the capacity to decide. Like McFarlane LJ I do not consider that there was a solid evidential foundation on which the judge's decision can rest. We must leave PC free to make her own decision, and hope that everything turns out well in the end."

Richards LJ agreed with both judgments.

Comment

This is a significant judgment for a number of reasons. There is now a clear statement of law that, unless the common law and/or the MCA expressly say otherwise, there is to be no act- versus person- specific distinction in the evaluation of someone's mental capacity. Rather, capacity is *decision*-specific and whether the relevant information relates to an act or person depends upon the character of that decision. If the decision is whether a wife is to live with her husband, the relevant information *must* include that which is specifically relevant to that particular wife and that particular husband. Focusing the capacity inquiry on 'the matter' at the material time, rather than assessing the person's decisional capability in some abstract vacuum, devoid of circumstance, is welcomed. It represents a more fact-sensitive approach which, in our view, reflects the philosophy behind the MCA.

Whether a person decides 'to marry' in general – as opposed to deciding 'to marry person X' – was considered to be settled authority, although we would not be surprised if the matter is revisited in the future. Although the Court of Appeal's reluctance to settle the capacity test for consent to sexual relations is entirely understandable, given the facts of the appeal, it was perhaps a missed opportunity to resolve the judicial divergence on the issue. For the criminal law has doubted the correctness of the civil law and even judgments within the civil law appear to be irreconcilable. Indeed, it has been argued elsewhere that the analogy with marriage is not faultless, that sexual relations necessarily

involve contact – the relevant information for which includes the other person – and that Baroness Hale's approach is to be preferred: see 'The opacity of sexual capacity' (2012) *Elder Law Journal* 352.

Distinguishing the s 27 decisions from other decisions when determining the proper approach to be taken when assessing capacity is interesting. Section 27 contains a category of excluded decisions. It is welfare terrain that is excluded from best interests decision-making when the person is found to lack capacity to make those particular decisions. The rationale for not permitting a best interests decision is either because the decision is so personal to the individual or because the matter is governed by other legislation. Section 28 also excludes the best interests decision-makers from matters governed by Part 4 of the Mental Health Act 1983 and, by virtue of s 29, they cannot make a decision on the incapacitated person's behalf in respect of voting, at an election for any public office or at a referendum. Whether these decisions are excluded from the realm of best interests because the test for assessing their capacity is act-specific rather than person-specific is, however, open to doubt.

A minor, but perhaps important, point is that at paragraph 29, the Court of Appeal accepted as correct that *"a different level of capacity may be required depending upon the nature of the decision being taken, for example there is a difference between deciding to go to a foreign country for a short holiday or deciding to emigrate"*. We would suggest that the *level* of capacity is the same for both decisions; that is, the capacity assumption can only be disproved on the balance of probabilities. Rather, the difference between them is that they have different relevant information and different reasonably foreseeable consequences.

Finally, and very interestingly, the Court of Appeal's approach to applying the statutory capacity test differs to that in the Code of Practice to the MCA 2005 by re-ordering the stages of the capacity assessment. The Code explicitly states that the diagnostic question is 'stage 1' and the functional question is 'stage 2' (pages 44-45). This represents the orthodox approach to assessing capacity. However, the Court has now held that this sequence is the reverse of that in s 2 ('unable to make a decision … because of an impairment…'). Assessors must now evaluate the (in)ability to decide and then consider whether this is because of an impairment. In our opinion, the Court's approach sits comfortably with the scheme of the Act. In its 1995 report, the Law Commission had concluded that having a diagnostic hurdle first would ensure that the capacity test was stringent enough not to catch large numbers of people who made unusual or unwise decisions (paragraph 3.8). However, it might be argued that focusing on the functional aspect first and any impairment second is less prejudicial and more UNCRPD friendly.

The presence or absence of the causative nexus is clearly significant as this case demonstrates: Hedley J was satisfied of the link between PC's impairment and the inability and concluded she lacked capacity whereas the Court of Appeal was not so satisfied and concluded that she therefore had capacity. That the impairment is 'referable to' or 'significantly relates to' the inability to decide was too loose a test for causation: the Act says it must be 'because of'. Does this mean 'to the exclusion of all other possible reasons'? If, for example, the person cannot use and weigh the risks posed to them by their partner because (a) of their impairment and (b) undue influence, will they now have capacity for MCA purposes? The more exacting the test for capacity becomes, perhaps the more public authorities may turn towards the inherent jurisdiction to protect the vulnerable. Given the significance of this decision, we would particularly welcome the views of our readers.

Baker Tilly v Makar [2013] EWHC 759 (QB)

Mental capacity – Assessing capacity – Litigation

Summary

This case concerns capacity to litigate. Ms Makar was involved in proceedings in the Senior Court Costs Office, where it was said that she owed over £500,000 in costs to her accountants in connection with earlier litigation in which she

had been unsuccessful. During a hearing, she had behaved in such a way as to cause the Costs Officer to consider that she lacked capacity to litigate and required a litigation friend: “She went into the corridor and became very much distressed. She lay rolling on the floor of the corridor screaming. After a little, she calmed down.” The costs judge became concerned that Ms Makar lacked capacity to litigate the proceedings. Ms Makar refused to co-operate in an assessment of her capacity. The costs judge made an order in which he concluded that Ms Makar lacked capacity to litigate the proceedings, and stayed the proceedings pending appointment of a litigation friend. Baker Tilly appealed, and agreed to indemnify the Official Solicitor so that he could act as litigation friend to Ms Makar at the appeal. The court held that the costs judge had not been entitled to conclude that Ms Makar lacked capacity to litigate on the basis of the incident in which she had suffered what appeared to the costs judge to be an emotional breakdown. It was relevant that Ms Makar had been litigating other proceedings with no question of her capacity having been raised, and one incident the costs judge had been concerned by was insufficient to demonstrate that Ms Makar had a disturbance of the functioning of her mind, as required by s2(1) MCA 2005.

In reaching that conclusion, the court held that the principles in s.1 of the MCA 2005 applied to the provisions in part 21 of the CPR regarding the appointment of litigation friends, in particular the assumption in favour of capacity. The court also observed that:

The absence of medical evidence cannot be a bar to a finding of lack of capacity but where most unusually circumstances arise in which medical evidence cannot be obtained, the court should be most cautious before concluding that the probability is that there is a disturbance of the mind. The Master recognised that. Such a finding is a serious step for both parties. It takes away the protected party's right to conduct their litigation. It may constitute, and here would constitute, a serious disadvantage to the other party.

Comment

This case illustrates the difficulties that courts face when individuals whose capacity is under question refuse to undergo medical assessments. There is no power to order the individual to comply with an assessment of capacity, and in some cases, judges will have to form a view as to capacity without the benefit of any external expertise. If that happens, great care must be taken in ensuring that there is adequate evidence of mental impairment or disturbance, and the principles enshrined in the MCA must be carefully applied.

E & K v SB & JB [2012] EWHC 4161 (COP)

Best interests – Contact

Summary

These proceedings are an example of a case in which an order making provision as to contact arrangements was backed with a penal notice and injunctions.

E and K both suffer from Fragile x syndrome with associated learning disabilities. In April 2010, the Local Authority commenced proceedings in the Court of Protection in respect of both girls. The other parties were SB (their mother) and JB (their step-father). In January 2011, the Court made final declarations that E and K both lacked capacity to litigate and to make decisions about their residence, the care and contact arrangements with their immediate family (SB and JB). The expert evidence before the Court was that both E and K were able to contribute to the decision making process, but K was not consistent. The court approved a consent order declaring it to be in E’s and K's best interests to reside at and receive care at H House and to have contact with Mrs B restricted to pre-arranged supervised contact in a public place. Contact with JB was restricted to the extent that it should only take place in accordance with their articulated wishes and feelings and subject to the approval of the local authority. The order was supplemented by a ‘Memorandum of Understanding: Contact’ in which the detail of the contact arrangements were set out.

Within a relatively short timeframe, issues arose in relation to the contact arrangements and the local authority applied to have the matter restored to the Court of Protection in October 2011 on the grounds that Mrs B and JB were in breach of its terms and those breaches were not in E & K's best interests. The matter was not listed before the Court until March 2012.

In the interim, there was a serious incident which resulted in JB being convicted and sentenced for dangerous driving. The offence had been committed in the course of a supervised contact session and using a vehicle registered in K's name. The vehicle he was driving collided with the contact supervisor who was carried on the bonnet for some distance. JB was sentenced to a period of imprisonment and, was therefore unable to attend the Court hearing in March 2012. Mrs B arrived late. As a result, a contested fact-finding hearing was not possible. The contact arrangements were varied. Mrs B was permitted to have interim contact with E and K at the discretion of the local authority, taking into account E and K's wishes and feelings. An interim order was made prohibiting Mr B both from talking to E and K on the telephone and from contacting or attempting to contact either E or K without the express written permission in advance of the local authority. Any such contact was required to be in accordance with E and K's properly articulated wishes and feelings at the time such contact was proposed to take place. Interim injunctions were made preventing Mr B from coming within 100 metres of E or K without the prior permission of the local authority and prohibiting him from coming within 100 metres of the principal entrances of H House, E's work place and K's work place. A penal notice was attached.

The matter was then listed for a fact finding hearing in May 2012. The principal purpose was to determine to what extent there had been breaches of the 2011 order as to contact and to determine the contact arrangements going forwards. By the time of the fact finding hearing, a number of admissions had been made and the dispute had narrowed. One live issue was whether any order as to contact should be backed by a penal notice, in respect of both JB and Mrs B. The evidence was that in the period since the March 2012 hearing, Mrs B's contact had improved and she had been engaging on a better basis with the professionals involved with E and K. However, the Local Authority sought a penal notice against Mrs B and the Official Solicitor agreed that an order backed by a penal notice was more appropriate than simply allowing Mrs B to give undertakings.

District Judge Eldergill found that JB and SB had both committed serious breaches of the court's earlier order and injunctions and penal notices were appropriate in both cases.

The case for injunctions and penal notices against Mr B was overwhelming as the repeated and serious nature of the breaches means that "penal notices are required to ensure that the injunctions are as effective as possible, and in order to protect E's and K's best interests." With regards to Mrs B, he accepted that there had been improvements but found, nonetheless that, a penal notice directed towards her was also necessary. She had been involved in serious breaches of the court's order, and had behaved in a way that has harmed E and K. The Judge accepted the submission advanced on behalf of the Local Authority that allowing Mrs B simply to give an undertaking would not convey the seriousness of the breaches. He also took the view that the most serious test was yet to come (when JB was released from prison). District Judge Eldergill expressly recorded that he believed that that there are cases where prison is the appropriate sanction for contempt of court.

Comment

There are relatively few reported cases in which the Court has upheld an application for contact arrangements to be backed by a penal notice and injunction. Although the facts on this case were relatively extreme, there were a number of features of the case which are more common - a break down in the relationship between the local authority and the interested parties and a detailed memorandum of contact arrangements which subsequently is not respected. This is therefore a reminder of the range of the Court's powers to ensure that arrangements in P''s best interests are not compromised by family

members. The penal notice (particularly in the case of Mrs B) was imposed partly by way of indicating the Court's disapproval of the severity of the breaches in which she had been involved.

Day & others v Royal College of Music & Harris [2013] EWCA Civ 191

Enduring powers of attorney

Summary

The Court of Appeal considered two appeals arising from disputes relating to the estate of the late Sir Malcolm Arnold. The disputes were, in reality, between Sir Malcolm Arnold's two children and Mr Day who was Sir Malcolm Arnold's carer for the last 22 years of his life. Mr Day had been granted an enduring power of attorney in respect of Sir Malcolm Arnold in 1990. That EPA was registered with the Court in February 2002. The Royal College of Music took no active part in the proceedings. Although Mr Harris was a party to the proceedings and attended the hearings, he also took no active part.

While Sir Malcolm was still alive, a number of payments (totalling £36,000) expressed to be gifts were made to Mr Day from a joint bank account in the names of Mr Day and Sir Malcolm Arnold but in which Sir Malcolm Arnold held the beneficial interest. Mr Day was a signatory on the account and in accordance with a bank mandate was able to draw cheques. He had signed the cheques at issue. The payments were made in light of tax advice and had the effect of reducing Sir Malcolm Arnold's tax liability. The Judge below found that the monies had been given to Mr Day by Sir Arnold with his free and fully informed consent.

Sir Malcolm's two children sought an order that Mr Day should account to the Estate for those monies. They contended that (i) Mr Day was unable to make the gifts to himself as he held the EPA and (ii) in the alternative, the making of those gifts amounted to a breach of his fiduciary duties (owed as a result of the EPA). In relation to this second point, a further issue arose as to the relevance and nature of any consent Sir Malcolm Arnold may have given.

Section 3 of the Enduring Powers of Attorney Act 1985 ("the Act") confers a general authority on the attorney on the donor's behalf. However, it was common ground that the payments at issue could not be brought within the scope of section 3 and as such could not be justified under the EPA itself.

Mr Day contended that when signing the gifts he had been acting under the bank mandate and not in his capacity under the EPA.

The legal question was whether, as a matter of statutory construction, Mr Day could in effect take himself outside of the terms of the Act as he contended in reliance on the consent that had, as a matter of fact, been found to have been given.

The key provision is section 7 of the Act which provides:

> *"7 (1) The effect of the registration of an instrument under section 6 is that—*
> *(a) no revocation of the power by the donor shall be valid unless and until the court confirms the revocation under section 8(3);*
> *(b) no disclaimer of the power shall be valid unless and until the attorney gives notice of it to the court;*
> *(c) the donor may not extend or restrict the scope of the authority conferred by the instrument and no instruction or consent given by him after registration shall, in the case of a consent, confer any right and, in the case of an instruction, impose or confer any obligation or right on or create any liability of the attorney or other persons having notice of the instruction or consent.*
> *(2) Subsection (1) above applies for so long as the instrument is registered under section 6 whether or not the donor is for the time being mentally incapable."*

Counsel for the children contended that the effect of section 7(1)(c) is that, once an EPA is registered, a principal, even if of sufficient

mental capacity for the purpose, cannot validly give consent to the attorney to authorise something to be done which is not authorised under the EPA itself. That consent or authority can only come from the Court. Accordingly, the Act should be interpreted as excluding all possibility of the person who is the attorney under a registered EPA doing something which section 3(5) of the EPA prohibits, even if there is some other mechanism whereby, in other circumstances, he could do it, subject to having the consent of the donor of the EPA.

On this analysis, Mr Day did not have the power to sign the cheques once the EPA had been registered notwithstanding the mandate of the bank.

Lloyd LJ did not accept the Children's submissions. The Judge held that the effect of section 7 (1) (c) is to preserve the effect of the EPA once registered, so as to be immune from anything done by the donor which might otherwise either enlarge it or constrain it, or limit the scope of the acts which the attorney can lawfully or properly do under it. However, the argument that all aspects of Mr Day's ability to act on behalf of Sir Malcolm were embraced within the scope of the EPA, once it had been created, and were therefore all affected by section 7 of the Act once it was registered, failed. It remained open to Mr Day to draw cheques on the account after the registration (with the free and informed consent of Sir Malcolm Arnold) in the same manner as he had prior to the registration. If an individual has the consent of the donor and has two different capacities in which he can act on behalf of the donor, one of them permitting, and the other not permitting, him to do that which the donor has authorised or agreed to, there is no reason why he should not be regarded as using the power under which the operation can be valid and effective, rather than that under which it could not be done. The critical point is the donor's consent.

Lloyd LJ further declined to overturn the finding of the Judge below in relation to the issue of consent, noting that where the evidence as to consent is in general terms, the Judge's understanding of the evidence will be particularly significant.

The analysis on the point of statutory construction was supported by McFarlane LJ who agreed that the Act is intended to establish a category of agency which will endure and will not be revoked by the subsequent mental incapacity of the principal. Accordingly, "*It is …to be seen as a facility rather than a strait-jacket, permitting the agent to continue to act under the terms of the authority contained in the EPA, but not, of itself, preventing the individual who is the agent from continuing to act in another capacity or under a different authority in relation to the same principal as the factual circumstances may justify*." McFarlane LJ further held that section 7(2) of the Act contemplates that even after the date of registration of an EPA the mental capacity of the donor may fluctuate and that the purpose of section 7 as a whole is to establish the scope of the authority granted under the EPA with clarity from the date of registration onwards 'whether or not the donor is for the time being mentally incapable'. Macfarlane LJ concluded that "*the circumstances found by the judge in the present case to the effect that, in relation to making the five disputed gifts, Sir Malcolm had the necessary mental capacity to authorise payment out of the bank account is therefore a state of affairs, in terms of capacity, which is expressly tolerated by section 7(2).*"

Rix LJ dissented on this point. He considered that the premise of registration of an EPA is that the donor is suffering actual or incipient mental incapacity. The watershed of registration remains as long as registration survives, even if the donor's mental capacity should change for the better. Rix LJ considered that it is implicit in the whole structure of the Act that the donor could not seek to create another agency in the future or to give a new power of attorney, whether in the form contemplated by the Act, or in any other form. That must follow for the past as well such that a previous authority granted could not be maintained into this new regulated world as though there had not been a Court supervised registration. Accordingly, once registration had occurred, Mr Day could not take himself outside the scope of the EPA and rely on a bank mandate. To draw the cheques from the

account both the general consent and the specific consent of Sir Malcolm Arnold would have been required.

Comment

This decision is of particular interest as, in effect, the majority declined to find that an individual could be de facto deprived of their power to consent in all contexts by reason of a statutory mechanism (in this case the registration of an EPA). In rejecting the analysis of registration on an EPA amounting to a "watershed", the majority preferred a construction which allowed the Court to focus on the donor's on-going capability to consent to acts relevant to the management of their affairs. This finding was made in a context in which the Court explicitly recognised that the Act contemplated the possibility of fluctuating consent. This decision is therefore an endorsement of the primary importance to be attached to personal autonomy and a reminder that, where an individual's capacity (to consent or otherwise) may fluctuate, the Court should be slow to favour a conclusion or construction which would be inconsistent with that capacity ever being capable of being regained.

Re GM (unreported, case no.11843118)

Best interests – Deputy for property and affairs - Gifts

Summary

The case concerned an application by two joint financial deputies for the retrospective approval of gifts they had made to charities and to themselves and their relations, on behalf of GM. The facts of the case are fairly surprising. GM's deputies had spent around 44% of GM's assets on gifts. These included £57,000 on charitable donations, and around £50,000 each on such things as Rolex watches, designer handbags, perfume and jewellery. In addition, the deputies had purchased cars and laptops totalling around £50,000 which they claimed should be treated as expenses incurred in fulfilling their roles, as they had used the cars to visit GM, and the laptops to keep track of her finances. The deputies said that they felt the gifts were in accordance with what GM would have wished, and that since she was 92 years old and still had some £200,000 remaining, they were reasonable.

The court disagreed. The so-called 'expenses' were really unauthorised gifts. And the gifts themselves were not in GM's best interests. They were 'completely out of character with any gifts she made before the onset of dementia. There was no consultation with her before they were made and there was no attempt to permit and encourage her to participate in the decision-making process, or to ascertain her present wishes and feelings.'

The deputyship order permitted the deputies to make gifts 'on customary occasions to persons who are related to or connected with her, provided that the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of her estate'. A customary occasion is defined in s.12(3) MCA 2005 as an anniversary of a birth, a marriage or a civil partnership, or any other occasions on which present are customarily given within families or among friends and associates. The value of the gift must be 'not unreasonable' and Senior Judge Lush set out very clearly the approach to be followed in determining what is reasonable in a given case.

First, regard must be had to the totality of P's current and anticipated income and capital, expenditure and debts.
Second, consideration must be given to P's best interests, including the following factors:
o the extent to which P was in the habit of making gifts or loans of a particular size or nature before the onset of incapacity;

- P's anticipated life expectancy;
- the possibility that P may require residential or nursing care and the projected cost of such care;
- whether P is in receipt of aftercare pursuant to section 117 of the Mental Health Act 1983 or NHS Continuing Healthcare;
- the extent to which any gifts may interfere with the devolution of P's estate under his or her will or intestacy; and
- the impact of Inheritance Tax on P's death.

Third, any gift that is not de minimis, must be approved in advance by the Court of Protection. A de minimis gift is to be construed as follows:

"covering the annual IHT exemption of £3,000 and the annual small gifts exemption of £250 per person, up to a maximum of, say, ten people in the following circumstances:

(a) where P has a life expectancy of less than five years;
(b) their estate exceeds the nil rate band for Inheritance Tax ('IHT') purposes, currently £325,000;
(c) the gifts are affordable having regard to P's care costs and will not adversely affect P's standard of care and quality of life, and
(d) there is no evidence that P would be opposed to gifts of this magnitude being made on their behalf."

In GM's case, the reasonableness threshold for a gift, applying this approach, was £4,500 a year. This figure comprised the annual IHT exemption of £3,000 and the annual small gifts exemption of £250 per person for six other people related or connected to GM. The rest of the money the deputies had spent, had to be repaid.

Comment

This case sets out for the first time detailed guidance on how to assess whether a proposed gift by a deputy is reasonable, and whether court approval is required for it to be made. The guidance applies equally to those acting as attorney, and Senior Judge Lush made it very clear that ignorance of the law is no excuse. Anyone advising an attorney or deputy will need to ensure that he or she is aware of this case, in addition to the case of ***Re Buckley*** [2013] COPLR 39 and the Code of Practice.

NT v FS and others [2013] EWHC 684

Statutory wills

Summary

This was an application by NT ('the Deputy') for authority to execute a statutory will on behalf of F who was now 74 with Alzheimer's dementia. A former professional rugby league player in Leeds, F then qualified as an electrician before becoming a property developed. He was a secretive man who kept a compartmentalised life. The estimated worth of his estate was up to £3.1 million, although this would depend on the sellable value of his real property and tax deductions. With no recall of his assets or of his immediate and extended family, it was not in dispute that F lacked the relevant capacity and that it was in his best interests for the court to execute a statutory will for him.

Reviewing the relevant provisions of the MCA, the Judge noted that the powers conferred by s 16 included the execution for P of a will: s 18(1)(i). The decision to authorise its execution was a decision which must be made by the court itself, and cannot be entrusted to a deputy: s 20(3)(b). The will may make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if he had capacity to make it: Sched 2 para 2.

At paragraph 8 the Judge summarised the guidance from the main cases which, to paraphrase, consisted of the following:

1. The overarching principle is that any decision made on behalf of P must be in P's best interests which is an objective, not a substituted judgment, test.
2. The structured decision making process laid down by the MCA must be followed, considering all relevant circumstances, in particular the matters in ss 4(6)-(7).
3. There is no hierarchy between the various best interests factors and their weight will differ depending on the individual circumstances. One or more features may be of 'magnetic importance' in influencing or even determining the outcome.

4. There was some disagreement in the authorities as to whether there was a presumption in favour of implementing P's wishes, or whether those wishes were always a significant factor but their weight would depend on the individual circumstances.
5. Differing views were expressed in the authorities as to relevance to the decision maker of P "*having done the right thing*" by his will and being remembered for that after his death. In the present case, the Judge did not place any weight on this factor.

Although there was no previously executed will, a manuscript document in F's handwriting had been found in a Bible, headed 'Will of F… of …'. Thought to have been written in around 1986, it was not witnessed and did not create a valid will, although F had probably thought that it did. It was therefore a document within MCA s 4(6) which had to be considered but was not a 'magnetic feature' of the case. Nor was it a starting point for determining his best interests in relation to the terms of the statutory will (paragraph 77).

Amongst the factors considered were F's moral obligations to the parties and their moral claims on F's bounty, as well as the nature of their relationship with him and the extent to which they each contributed to his wealth. Having taken into account all of the circumstances, the Judge then made provision for F's legacy and authorised a gift to his mother.

Comment

This decision illustrates the continued nuances of judicial opinion over the impact of P's views and P's posthumous remembrance when evaluating best interests. It seems relatively well settled that P's past and present wishes and feelings will always be a significant factor whose weight will vary according to the particular circumstances. In *ITW v Z and M and others* [2009] EWHC 2525 (Fam), Munby J (as he then was) observed that, in considering their weight and importance, regard must be had to all the relevant circumstances including:

(a) the degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings: *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at para [124];
(b) the strength and consistency of the views being expressed by P;
(c) the possible impact on P of knowledge that her wishes and feelings are not being given effect to: see again *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at para [124];
(d) the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and
(e) crucially, the extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in her best interests.

How P should be remembered, however, seems less settled in the authorities with clear divergence of opinion. In *Re P* [2010] Ch 33 Lewison J (as he then was) said at paragraph 44:

> *"There is one other aspect of the "best interests" test that I must consider. In deciding what provision should be made in a will to be executed on P's behalf and which, ex hypothesi, will only have effect after he is dead, what are P's best interests? Mr Boyle stressed the principle of adult autonomy; and said that P's best interests would be served simply by giving effect to his wishes. That is, I think, part of the overall picture, and an important one at that. But what will live on after P's death is his memory; and for many people it is in their best interests that they be remembered with affection by their family and as having done "the right thing" by their will. In my judgment the decision maker is entitled to take into account, in assessing what is in P's best interests, how he will be remembered*

after his death."

With this Munby J entirely agreed in *ITW*, stating at paragraph 38:

> *"Best interests do not cease at the moment of death. We have an* interest *in how our bodies are disposed of after death, whether by burial, cremation or donation for medical research. We have, as Lewison J rightly observed, an interest in how we will be remembered, whether on a tombstone or through the medium of a will or in any other way. In particular, as he points out, we have an interest in being remembered as having done the "right thing", either in life or,* post mortem*, by will. Lewison J's analysis accords entirely with the powerful analysis of Hoffmann LJ in Airedale NHS Trust v Bland [1993] AC 789 at page 829. I respectfully agree with both of them."*

On the other hand, Morgan J in *Re G (TJ)* [2011] WTLR 231, [52]-[53], [64] and Senior Judge Lush *Re J (C)* [2012] WTLR 121 have expressed their doubts. In the latter, J had an appalling track record, spending his entire lifetime doing precisely the "wrong thing", and "it would be unrealistic to expect him now to undergo some sort of Damascus Road experience simply because he lacks capacity. The notion of doing "the right thing" generates some singularly unattractive arguments…' (paragraph 54). In the former, Morgan J pointed out the making of the gift and/or the terms of the will were being made by the court, and not be P, and unsuccessful members were not likely to think that P had done "the right thing".

It is also worth noting that HHJ Behrens did not use a balance sheet approach when determining the terms of the statutory will in the present case. This comes as no surprise because doubts about the effectiveness of that approach in the context of making such a will have been previously expressed in *Re J (C)* [2012] WTLR 121 at [53]. Its efficacy would appear to depend upon the need to engage in a risk analysis.

Appointing a deputy to run proceedings in the Employment Tribunal

Thanks to Steel and Shamash for informing us of a recent case in which they successfully obtained an order under s.18(1)(k) appointing a deputy specifically to conduct litigation on behalf of P in the Employment Tribunal. There is, somewhat mysteriously, no provision for a litigation friend to be appointed in the Employment Tribunal, which can make the conduct of proceedings in which one party lacks litigation capacity impossible (see *Johnson v Edwardian International Hotels Ltd* UK/EAT/0588/07/ZT). Fortunately, the Court of Protection can appoint a deputy for property and affairs with specific power to 'conduct legal proceedings in P's name or on P's behalf', and in this case, made such an order on the papers.

JG (A child) v The Legal Services Commission [2013] EWHC 804 (Admin)

Summary

JG, a ten year-old child acting by her litigation friend and guardian, sought to judicially review the Legal Services Commission's refusal to fund more than one third of the cost of an expert report. JG's parents' had separated and her father made an application under the Children Act 1989 to determine her residence and contact arrangements. The parties to the family law proceedings were JG's parents, both of whom were litigants in person, and JG, who was in receipt of public funding. JG's solicitors proposed to instruct an expert. In April 2009 the court directed that the cost of the expert's report was to be "*funded by the child, the court considering it to be a reasonable disbursement to be incurred under the terms of her public funding certificates*." JG's solicitors did not seek prior authority from the LSC in respect of the expert's fees. A report was prepared by Dr D at a cost of £12,000 and JG's solicitors made a claim to the LSC accordingly. Dr D recommended that an addendum report be undertaken to include a further assessment of the child's father in the context that he lived with his own parents. The Court made an order to that effect in May 2011 but Dr D refused to undertake that addendum report until his

outstanding fees were paid. This was a matter of particular concern to JG's father and a recital recorded that he "*will be handicapped in his presentation of his case without it*." In November 2011 the court ordered the LSC to explain its position in relation to the payment of fees. Upon consideration of representations made by the LSC, in December 2011 the Court purported to amend the order from April 2009 to read as follows:

> *"The cost of the expert [is] to be funded by the child the court considering them to be a reasonable and necessary disbursement under her certificate and the purpose of the report is solely to establish what arrangements are in her best interests. Furthermore, the court has carried out a means assessment of both parents and found that they are unable to afford any part of these fees …"*

The LSC maintained that it would not fund more than one third of the cost of the report. JG's father decided not to pursue his residence application so the addendum report was no longer required. Judicial review proceedings were brought by JG challenging the lawfulness of the LSC's decision not to fund more than one third of the cost of the original report. The Law Society and the Secretary of State for Justice intervened in those proceedings. Ryder J recognised that there were sound reasons, recognised in the decided cases, why there should be an apportionment of costs in cases where there is joint expert evidence and that it will only be appropriate to depart from the principle of equal apportionment in exceptional cases (at para 51). He went on to say at paras 75-76):

> *"Where the court has genuine reason to believe that a non-legally aided party may not be able to pay in full for the expert evidence on an equal apportionment basis, the court must undertake a robust scrutiny of that party's means. Courts should not accept that a person does not have sufficient means simply on the basis of an assertion to that effect by the party looking to avoid payment.*
>
> *What is a robust scrutiny will depend on the circumstances of the case. An important consideration, however, should be the party's financial eligibility for legal aid where that still exists. If the party would not qualify for legal aid on the basis of their means, this is a factor which should point very strongly in favour of that party having to pay their full share of the cost of an expert's report."*

Ryder J accepted that if the LSC pays the costs of a report on behalf of a person who does not satisfy the criteria for eligibility, that person in effect obtains the benefit of legal aid payments to which he or she is not entitled. He went on to consider the application of Articles 6 and 8 ECHR in the context of family law proceedings and commented (at para 87):

> *"… At the point where a court has exhausted all of the ordinary mechanisms to obtain evidence that is necessary in order to make a decision that is in the best interests of a child, an access to justice argument may arise. The court like the LSC is a public authority. The LSC (or more accurately now the Legal Aid Agency through the Director of Legal Aid Casework) is required by section 10 of the 2012 Act to make civil legal services available to an individual where it is necessary to make the services available if (a) failure to do so would be a breach of that individual's Convention rights or any enforceable EU rights to the provision of legal services or (b) it is appropriate that they should be provided having regard to the risk that failure to do so would involve such a breach. The saving provision in the new legal aid scheme succinctly reflects a similar obligation upon the court but the exceptionality of the language should be noted."*

Ryder J considered that the orders made by the court were unlawful because the court's decision was affected by the fact that JG was in receipt of

public funding. He summarised the relevant principles as follows:

(a) In the ordinary course, where a single joint expert is instructed, the parties should bear the cost of the report equally.
(b) The court may not make any different order from that which would ordinarily be made because a party is in receipt of legal aid.
(c) Where a court has made an order that a party in receipt of legal aid should bear a certain cost, the LSC has the power to refuse to provide funds for those costs, as long as its refusal is no irrational or otherwise unlawful in a public law sense.

On the facts of this case, the LSC's response was not unlawful. In the course of the judgment, Ryder J noted that was a duty on JG's guardian in the family law proceedings to "*obtain such professional assistance as is available which the children's guardian thinks appropriate or which the court directs be obtained*". The Court stated (at para 15):

> *"That obligation has been the most elusive component of this case, encapsulating as it does something which the children's guardian almost certainly intended in the suggestion made to the child's solicitors: a suggestion which was not carried through into the case management decisions of the court. Had a rigorous analysis occurred of the reason for the request for the expert i.e. its purpose and who wanted it and who might benefit from it, the order in the case would have reflected not what eventually appeared, namely that the child's father in this case would be hampered in the presentation of his case without the expert's report but, that the report was necessary to enable the children's guardian to perform her duties. Alas, the papers do not provide a clear answer to the question why the children's guardian could not advise the court from a social work perspective about family relations and functioning or the impact on the child as one would expect if a guardian was saying 'I need assistance to do my job'. There is no reasoning on the face of the orders of the court or in any record of its proceedings which provides an analysis of what the report was for and hence whether it should have been a report commissioned and funded by one party or a single joint expert report commissioned by all."* (Emphasis added)

Comment

Although this decision concerns public funding for an expert report in family law proceedings, there are some parallels with proceedings in the Court of Protection. As such, where an order for expert evidence has the effect of placing a disproportionately high cost burden on the party or parties in receipt of funding from the Legal Aid Agency, it would be prudent to record the reasons for this on the face of the order. Those readers with an interest in these issues may also wish to consider the judgment in *R(T) v Legal Aid Agency* [2013] EWHC 960 (Admin), which we will cover in the next issue of the newsletter.

DO v LBH [2012] EWHC 4044 (Admin)

Summary

EC cared for her brother DO, who had been diagnosed with ongoing paranoid schizophrenic illness and a degenerative disorder, and his children for a number of years. LBH decided to move DO to a care home. EC was strongly opposed this and made an application for permission for judicial review. Coulson J dismissed her application and told LBH that it had to make an application to the Court of Protection "*in order to determine the capacity of DO to make personal welfare decisions and to decide where he should live and how he should be cared for*." LBH duly applied to the Court of Protection and a series of interim orders were made for DO to continue to reside away from EC. EC sought to appeal some of these orders. EC also made two further applications for judicial review seeking orders that she should care for DO as she was his legal carer and did not need the permission of the Court of Protection to exercise her duties. In dismissing her claims, His Honour Judge Jarman QC (sitting as a

Deputy High Court Judge) said:

> *"18 … In my judgment, despite the multi various grounds relied upon and the relief sought in these claims, at the heart of them was the same issue which lays at the heart of the first claim, whether it is EC who should be caring for her brother and making decisions on his behalf as to accommodation, care and treatment or whether such decisions should be taken by others. These are questions, in my judgment, which are also crucial in the ongoing Court of Protection proceedings in which EC is a party and in which she can and does make her representation. These are questions, in my judgment, which the Court of Protection with its expertise is particularly suited to deal with.*
>
> *19. The discretionary remedy of judicial review is one of last resort where there is no other remedy available. In my judgment it is not usually appropriate for such proceedings to continue in tandem with Court of Protection proceedings where in essence the same questions are being considered. There is nothing in the grounds of the second or third claim in my judgment, which makes the grant of permission to proceed appropriate. EC may not agree with the order being made in the Court of Protection proceedings but that does not justify, in my judgment, proceeding by way of judicial review rather than by application or appeal in the Court of Protection proceedings."*

Comment

It is perhaps not surprising that a litigant in person would not appreciate that judicial review proceedings cannot be used to challenge best interests decisions made by public bodies under the Mental Capacity Act 2005. In this case EC escaped lightly in the sense that she was not ordered to pay costs, although the Deputy Judge considered that her claims were wholly without merit. In the exchange recorded at the end of the judgment he expressed disapproval that a costs application was raised by the Council and noted that no written application for costs had been made and EC had not been given notice of any such application.

ET, BT and CT v Islington LBC [2013] EWCA Civ 323

Summary

The Court of Appeal has overturned the decision of Cranston J in *R (ET) v (1) Islington LBC and (2) Essex CC* [2012] EWHC 3228 (Admin) (summarised here). The case concerned the lawfulness of Islington LBC's assessment of the risk posed to three children by a sexual offender, MB, who had a relationship with their mother. The assessment stated that the conclusions were based upon trusted information obtained from the police and probation services. In this respect there was a significant difference between what DS Watson told the local authority in September 2012 and in October 2012. Cranston J dismissed the application for judicial review, finding that the assessment carried out by the local authority was lawful.

The Court of Appeal disagreed. Black LJ (with whom Thorpe LJ and Longmore LJ agreed) stated (at para 40): "*I consider that the approach taken by the local authority to DS Watson's contributions was sufficiently flawed to render the assessment unlawful. The local authority did not ask themselves the right questions including whether DS Watson's more recent view of risk was reliable and what the risk to these particular children from MB really was*."

In the course of his judgment at first instance Cranston J remarked that the intensity of Wednesbury review is "*heightened under the Children Act 1989 in circumstances like the present, where the consequence of the council falling into error is the possible sexual abuse of children and young people*" (at para 26).

The respondent's notice filed by Islington LBC argued that the judge should have taken a conventional Wednesbury approach. Unfortunately, there was insufficient time for the Court of Appeal to hear argument on this point. Black LJ stated that "*My own consideration of*

the case has been shaped by ordinary Wednesbury principles and I have no doubt that the problems over DS Watson's contribution to the assessment are such as to cause the assessment process to fail the ordinary Wednesbury test" (at para.48).

Comment

The Court of Appeal's judgment in this case confirms that where a local authority receives information from external agencies, it must properly analyse that information before relying upon it in performance of its statutory duties. It is regrettable that the Court of Appeal did not hear argument on the intensity of review to be carried out by the court in such cases. The answer to that question continues to await authoritative determination.

Managing a bank or building society account on behalf of someone else

In recognition of the difficulties that are often experienced by people who need to manage someone else's financial affairs, a comprehensive framework for authorising people to operate someone else's bank or building society account has been published by the Law Society, the British Bankers' Association, the Building Societies Association, the Office of the Public Guardian and Solicitors for the Elderly.

'A framework for authorising people wanting to operate a bank account for someone else' is intended to assist financial institutions in providing fair, appropriate and consistent standards of practice. It deals with a range of third party mandates as well as ordinary, enduring and lasting powers of attorney as well as deputyship and appointees. Helpful practice point notes are incorporated into each section together with the applicable legal principles. A pamphlet for consumers has also been published, 'Guidance for people wanting to manage a bank account for someone else.'

Care Quality Commission – Annual DOLS Report

The CQC has produced a third annual DOLS report relating to the 2011-12 period.[2] It offers fascinating insights into the real life operation of the safeguards, with numerous examples and case studies. We cannot do justice to it in this brief summary but here are the main findings:

- Use of DOLS increased by 27% on the previous year and over half of the requests led to an authorisation;
- Significant regional variation continued;
- There is still a lack of understanding of the MCA among some staff in hospitals and care homes;
- The implications of DOLS in practice are not easy to understand, and staff in some mental health hospital wards did not understand the difference between powers under the Mental Health Act 1983 and DOLS;
- Use of restraint is not always recognised or recorded so it is not easy to monitor;
- Local authorities widely vary in how they carry out their supervisory body responsibilities;
- There was very little evidence in CQC's inspections of the involvement of people who use services and their relatives or friends in the processes of DOLS themselves, which was a significant omission.

Court of Protection Practitioners Association – London meeting

As announced in the April newsletter, a meeting of the Court of Protection Practitioners Association (CoPPA) will take place at Irwin Mitchell's London office from 5.30 to 7:00pm on 28 May 2013. To register to attend the meeting (or to express an interest in joining the group) please send an email to the following address - coppagroup@gmail.com - with 'London' in the subject line.

Clarification

We are happy to publish the following clarification received from Romana Canneti, Legal Department at The Independent, in response to our summary of *Re RGS* [2012]

[2] For transparency purposes, it should be noted that Neil is on the CQC's DOLS Advisory Group.

EWHC 4162 (COP) in the April edition of the COP newsletter:

> *"I would be grateful if you could kindly arrange for the record to be set straight in the next issue with regards to a couple of errors in your summary of this case. These are: that there was an "application by the media to lift the reporting restrictions on the case", and that "the application to lift the reporting restrictions was refused". In fact, as the judge makes clear, submissions on the ambit of reporting were not made by the media, nor were they refused. This was rendered unnecessary by District Judge Eldergill's comprehensive judgment which set out in full the matters which the media wished to be able to report."*

The published judgment states that there were "*applications by media organisations for permission to attend and report the substantive proceedings*" but, as Ms Canneti's email clarifies, the applications were not pursued at the hearing on 2 November 2012 and no ruling was made.

Our next update will be out in June 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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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 experience in MCA 2005 matters includes cases concerning deprivation of liberty, residence and contact arrangements, forced marriage, capacity to consent to marriage and capacity to consent to sexual relations. She is recommended as a "formidable presence" in the Court of Protection in Chambers and Partners 2013.

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