MENTAL CAPACITY REPORT:
CASE REPORTS
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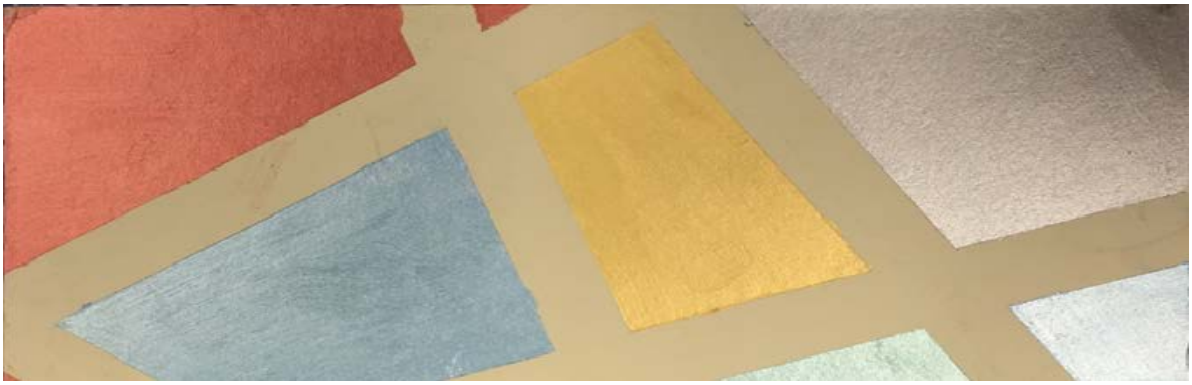

As the Court of Protection Law Reports series has been discontinued by LexisNexis, the Court of Protection has lost a dedicated series of headnoted reports. Pending any other publisher picking up the baton, we are stepping into the breach with this new series of headnotes, of which this is issue 2.

This series, which has its own citation [2023] 39ECMCR [xx], is unofficial, but we hope that it will be of assistance. Cases which appear in this series of headnotes are ones which meet the criteria of:

- containing an authoritative interpretation of the Mental Capacity Act 2005; or
- addressing a point of practice or procedure of wider significance.

The series of headnotes stands alongside our ordinary Mental Capacity Reports, in which you will find a longer summary and comment on the cases headnoted here, together with summaries and comments on cases which do not meet the criteria for inclusion here. The case report that you can find on our database will include both the headnote and the summary/comment.

For each case, you will find the headnote, together with a hyperlink to the case entry on The National Archives database.

Previous issues in the series can be found here.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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[2023] EWCOP 15
Court of Protection
Senior Judge Hilder
14 April 2023

Jurisdiction – injunction – whether jurisdiction to make injunctions to prevent third parties from disposing of assets in which others allege a protected person has an interest

In the context of a dispute about the proceeds of sale of a house which had previously been owned by the donor of a power of attorney, an application was before a Deputy District Judge for an order under s.22 Mental Capacity Act 2005 ('MCA 2005'). The Deputy District Judge held two Dispute Resolution Hearings, the first having been identified as 'not effective.' The Deputy District Judge further made a proceeds of sale injunction (a 'freezing injunction') preventing the disposal of the proceeds of the sale, and an order requiring disclosure by one of the parties explaining where his share of the proceeds of the sale were held. On appeal by the parties against whom the injunction had been granted, it was common ground between that the Court of Protection had no jurisdiction to determine the extent of the donor's interest in the proceeds of sale.

Held – allowing the appeal and discharging the injunction and the disclosure order –

(1) Because the decision-maker under the MCA 2005 can only make the decision which P himself could make, the Court of Protection could not determine disputes about whether or not P had a beneficial interest in a property or the proceeds of its sale. If a capacitous person ('X') was in dispute with another capacitous person ('Y') about beneficial interest in a property, the forum for determination of that dispute was the County Court or the appropriate division of the High Court. The civil judge would hear the competing claims and decide the issues according to the evidence. Determination of the dispute was not a decision which X or Y can make for themselves (*N v A Clinical Commissioning Group* [2017] UKSC 22 applied) (see paras [35] and [76]).

(2) On the application formally before the court, orders had been sought pursuant to s.22 Mental Capacity Act 2005, not s.16. That section had no direct equivalent of s.16(5), providing that the court "may make such further orders or give such directions […] as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2)." Instead, s22(4) MCA 2005 specified the court's powers. It would stretch the s.47 MCA 2005 concept of giving the Court of Protection the powers of the High Court "in connection with" the s.22 MCA 2005 jurisdiction beyond what it could bear to suggest that a freezing injunction was so linked to a

determination of the validity of lawful authority as to be ancillary to preventing frustration of the validity decision. Both of the powers of s22(4) MCA 2005 could be fully implemented irrespective of what happened to disputed assets (*Re G (Court of Protection: Injunction)* [2022] EWCA Civ 131 applied) (see paras [68] and [78]).

(3) If the Deputy District Judge had been granting authority to conduct proceedings on behalf of P in respect of the property dispute, then at least there had been potential for a s.16 order (as provided by s. 18(1)(k) MCA 2005 Act) so s.16(5) would apply. However, a freezing injunction was not "necessary or expedient" for giving effect to, or otherwise "in connection with" the granting of authority to conduct proceedings. Litigation could be properly conducted irrespective of what happened to disputed assets. A freezing injunction went materially beyond the conduct of litigation, into its determination. It was not within the realms of effectively conducting litigation to freeze disputed assets, even when the conduct of litigation had reached the point of enforcement; so such an order cannot be ancillary to preventing frustration of such authority. In substance and intent, a freezing injunction was ancillary to a power to determine the dispute, which the Court of Protection did not have (*Re G (Court of Protection: Injunction)* [2022] EWCA Civ 131 applied) (see paras [69] and [79]).

(4) The disclosure order had been to provide the court with evidence as to where the relevant party's share of the proceeds of sale was being held. Clearly this was further to the Proceeds of Sale Injunction, with a view to determination of the property dispute and preventing frustration of any order which may be made upon such determination. If the injunction was improperly made, then the Disclosure Order should fall with it (see para [73]).

Per curiam

Once a judge has engaged in dispute resolution, whether successfully or not, that judge cannot properly engage in substantive decision-making in the case beyond what the parties agree. It would be procedurally unfair to do so because the judge has expressed views without any party having had the opportunity to give their evidence. Further, there was no provision in the Rules or Practice Direction for multiple dispute resolution hearings, and adopting such a practice would not serve the purposes for which such a hearing was devised, namely early conclusion of unnecessary litigation. The court was not a mediation service. If a dispute resolution hearing was unsuccessful, normal procedure should thereafter apply (see paras [62] and [64]).

Statutory provisions considered

Mental Capacity Act 2005, ss.1, 10, 15, 16, 18, 22, 23, 47

Cases referred to in judgment

Aintree University Hospitals NHS Foundation Trust v James [2013] UKSC 67
London Borough of Enfield v Matrix Deputies Limited [2018] EWCOP 22
N v A Clinical Commissioning Group [2017] UKSC 22
Re ACC [2020] EWCOP 9
Re G (Court of Protection: Injunction) [2022] EWCA Civ 1312
Re SF Injunctive Relief [2020] EWCOP 19

Faye Collinson (instructed by Stephensons Solicitors) for the appellants

John Buck (instructed by Topstone Solicitors) for the respondents

Full judgment available on The National Archives database here.

Reported by Alex Ruck Keene KC (Hon)

Re Public Guardian's Severance Applications [2023] 39ECMCR 4

[2023] EWCOP 24
Court of Protection
Hayden J
9 June 2023

Lasting Powers of Attorney – construction – whether commonly appearing provisions required severance

The Office of the Public Guardian brought an application involving nine consolidated cases presenting interpretative questions relating to statute and regulations which had recurred with sufficient frequency to cause the Public Guardian to seek clarification.

Held – determining each of the questions –

(1) It was the wording of the Mental Capacity Act 2005 which must prevail, not the wording used on the forms prepared by the Office of the Public Guardian. It was self-evidently a recipe for confusion where the forms posed a different question to that posed by the form (*Re Public Guardian's Severance Applications* [2017] EWCOP 10 and *Re DA* [2019] Fam 27 considered) (see para [34]).

(1) The question of whether it was lawful to give primary power to one attorney ahead of other attorneys when appointed on a joint and several basis had been comprehensively resolved in *Re DA* [2019] Fam 27. The court endorsed the practice of the Public Guardian of applying for severance where there is an instruction for a primary/original attorney with others unable to act (save where the primary attorney ceases to do so) (*Re DA* [2018] EWCOP 26 applied) (see para [39]).

(2) It was not possible to read s.10(4) MCA 2005 as rendering it lawful to have joint and several appointments with instructions for attorneys to deal with separately defined areas of the donor's affairs or include restrictions to this effect. Section 10(4) was strikingly short, succinct, and clearly intended, unambiguously, to be exhaustive. A 'purposive' interpretation would require, in effect, a significant rewriting of the statutory provision and offend each of the conventional principles of statutory construction. Further, given the practical challenges involved in dividing personal and business responsibility for the donor's estate, the need for separate LPAs would, in fact, provide a clearer and more effective route for the donor, requiring, of necessity, a more intense focus on the specific duties and obligations involved in each and a concentration on their ultimate feasibility. The court was not persuaded that a wider interpretation would be either purposive or beneficial (*Miles & Anor v The Public Guardian* [2015] EWHC 2960 (Ch) considered) (see para [41]).

(3) Severance applications should continue to be made in relation to instruments that sought to instruct multiple (original or replacement) attorneys to act on a majority basis. A 'majority rule' provision was inconsistent with the statutory provision. The provisions of s.10(4) were drafted so tightly that they left very little, if any, scope for a purposive approach to the contrary. The court was, however,

sympathetic to the frustration effervescing in the judgment in *Re Public Guardian's Severance Applications* [2017] EWCOP 10 as to the cumbersome and legally unattractive position that resulted (*Re Public Guardian's Severance Applications* [2017] EWCOP 10 and *Re DA* [2019] Fam 27 considered) (see para [46]).

(4) Whether the word 'should' or similar words should be understood as constituting a binding instruction or a non-binding preference on the part of the donor was a highly fact specific question and its significance and force would be dependent on context. However, its use would not automatically give rise to severance. It was the wording on the forms that generated the ambiguity (see para [46]).

(5) There was an inherent ambiguity in s.10(8)(b) MCA 2005. An interpretation which permitted the appointment of a secondary replacement attorney was to be preferred, Senior Judge Lush's decision to the contrary in *Re Boff* (2013) MHLO 88 having focused rather too heavily on the pre-legislative material. The alternative question of whether a replacement attorney can be reappointed to act solely was therefore otiose. Had it been necessary to resolve it, the court would have concluded that such a reappointment could be made, for the same reasons as in relation to the potential for the appointment of a second replacement attorney (*Re Boff* (2013) MHLO 88 distinguished) (see paras [51]-][53]).

(6) Insofar as aspects of the court's analysis might raise the prospect of the need for legislative amendment, the court recognised that the practical and political reality was such that it would not be possible in the near future. However, the clarifications required to the LPA forms did not provide quite the same difficulties. The amendments that they required were limited in scope and ought easily to be manageable. In many respects, they would serve to complete the constructive work that had already been done (see para [54]).

Statutory provisions considered

Mental Capacity Act 2005, ss 9, 10, 11, 22, 23, 57, 58,
Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007/1253)

Cases referred to in judgment

Bogdanic v Secretary of State for the Home Department [2014] EWHC 2872 (QB)
Miles & Anor v The Public Guardian [2015] EWHC 2960 (Ch)
R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2022] UKSC 3
R (on the application of Quinatavalle) v Secretary of State for Health [2003] UKHL 13
Re Boff (2013) MHLO 88
Re Public Guardian's Severance Applications [2017] EWCOP 10
Re DA [2018] EWCOP 26
Spillers Ltd v Cardiff Assessment Committee [1931] 2 KB 21
XZ v Public Guardian [2015] EWCOP 35

Neil Allen (instructed by the Public Guardian) for the Public Guardian
Ruth Hughes (instructed by the Official Solicitor) as Advocate to the Court

Full judgment available on The National Archives database here.

Reported by Alex Ruck Keene KC (Hon)

Baker & Anor v Hewston [2023] 39ECMCR 5

[2023] EWHC 1145 (Ch)
Chancery Division
HHJ Tindal (sitting as a Judge of the High Court)
5 May 2023

Testamentary capacity – common law and statutory tests – whether Banks v Goodfellow and Mental Capacity Act 2005 tests could be reconciled

A man had had three children and eight grandchildren and had had two partners who had died before him. He made six wills (with one in 2009 and drafts in 2017 and 2019) in one decade with family beneficiaries shifting in and out of inheritance. In 2014, his partner's daughter had been assured of her half of the home he had shared with her mother which had been provided for in a will made in 2010. She was then disinherited in a will made later in 2014. A further will was made in 2020, shortly before the testator died. The partner's daughter objected to the 2020 will being admitted to Probate on the basis that the man had been diagnosed with dementia for several years and did not have mental capacity to make any wills from 2014 onwards. She required the executors to prove the validity of the 2020 will, which disinherited the man's son. She withdrew her objections at trial as part of a compromise that she would receive a payment from the man's estate. The man's son did not participate in the proceedings.

Held – recording the compromise –

(1) It was appropriate for the court to give a judgment, rather than simply making an order ending the proceedings because (1) it would be unfair to pronounce on the 2020 will without considering the others in circumstances where the partner's daughter had invited the court to pronounce upon the earlier wills of which the son was a beneficiary, and the son was affected by the validity of the 2020 will, such that it was appropriate to give him an opportunity to object within 28 days to pronouncement of its validity by sending him the judgment, failing which he would be bound by it under CPR 19.13; (2) whilst the son had not participated in the litigation and the partner's daughter had now settled it, it was understandable why she was concerned that the testator's chopping and changing may have been related to his dementia diagnosis, so it was necessary to explain why his decisions in his last decade had more to do with his caprice than his capacity; (3) the specific facts of the case raised acutely whether or not there was a 'presumption of testamentary capacity' and the significance of the absence of explanation of the will to the man, on which issues the approaches of the common law and the Mental Capacity Act 2005 ('MCA 2005') were said to be different. Since the litigation was compromised (but a judgment was still needed), it seemed to the court a good opportunity to discuss in a little detail a potential compromise between *Banks v Goodfellow* (1870) LR 5 QB 549 ('*Banks*') and ss.2-3 MCA 2005 (see paras [6]-[10]).

(2) A polarised view had developed between Chancery and Court of Protection lawyers as to regards the interaction between *Banks* and the MCA 2005. Pending the Law Commission's work on wills, the court tentatively proposed a 'compromise' solution, based upon five points: (1) ss.2-3 MCA 2005 did not strictly apply to testamentary capacity in Probate cases; (2) ss.2-3 and general common law on capacity were aligned (and consciously so); (3) ss.2-3 were broadly consistent with the common law on testamentary capacity; (4) ss.2-3 and the *Banks* criteria were consistent and could 'accommodate' each other; (5) ss.2-

3 were 'appropriate', in a similar sense as in *A Local Authority v MM* [2007] EWHC 2003 (Fam) to be included by analogy within the common law approach to testamentary capacity in Probate cases (see paras [20]-[22]; [23]-[50]).

(3) Applying the compromise position to the facts of the instant case as a 'worked example,' on the evidence before the court, looking at the wills from 2010 onwards individually; and standing back and considering them together in the light of all the evidence, including his medical notes and the diagnosis of dementia, the testator had testamentary capacity throughout the relevant period. The execution of the 2020 will in the context of the COVID pandemic – involving witnessing of the testator's will through a car window - was an ingenious arrangement amounting to valid execution; it was therefore valid, superseded all previous wills and was admitted to Probate. The son had 28 days from service of the judgment to object, otherwise he would be bound by it (see paras [22] and [75]).

Statutory provisions considered

Administration of Justice Act 1985, s 49
Mental Capacity Act 2005, ss 1, 2, 3, 16, 18, Sch 2

Cases referred to in judgment

A Local Authority v JB [2021] UKSC 52
A Local Authority v MM [2007] EWHC 2003 (Fam)
Black-Clawson v PWA [1975] AC 591
Burgess v Hawes [2013] WTLR 453
Burns v Burns [2016] WTLR 755
Dunhill v Burgin [2014] 1 WLR 933
Fischer v Diffley [2013] EWHC 4567 (Ch)
Fuller v Strum [2001] EWCA Civ 1879
Gorjat v Gorjat [2010] 13 ITELR 312
Hoff v Atherton [2005] EWCA (Civ) 1554
Hughes v Pritchard [2022] EWCA Civ 386
IM v LM [2014] EWCA (Civ) 37
James v James [2017] WTLR 1313
Johnson v Unisys [2001] UHKL 13
Kicks v Leigh [2015] 4 All ER 329 (Ch)
Knox v Gye (1872) LR 5 HL 656
Parker v Felgate (1883) 8 PD 171
Perrins v Holland [2009] EWHC 1945 (Ch)
N v A CCG [2017] UKSC 22
Public Guardian v RI [2022] EWCOP 22
R v McCool [2018] UKSC 23
R(O) v SSHD [2022] UKSC 3
Re Clitheroe [2021] EWHC 1102 (Ch)

Re Clarke [2023] EWHC 14 (Ch)
Re MB (Medical Treatment) [1997] EWCA Civ 3093
Re Key [2010] EWHC 408 (Ch)
Re Templeman [2020] WTLR 441
Scammell v Farmer [2008] EWHC 1100 (Ch)
Sharp v Adam [2006] EWCA Civ 449
Simon v Byford [2014] WTLR 1097
Walker v Badmin [2015] WTLR 493

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Full judgment available on The National Archives database here.

Reported by Alex Ruck Keene KC (Hon)

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Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, ICBs and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click here.

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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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