Court of Protection update: August 2010

All cases discussed below can be found on www.mentalhealthlaw.co.uk if not otherwise available. They are taken in (we hope) chronological order.

Re P [2010] EWHC 1592 (Fam)

Summary

Guidance in respect of applications for the appointment of deputies was provided in this judgment by Hedley J. The judge noted that s.16(4) of the MCA might at first glance suggest that the appointment of deputies was a rarity, since the provision states that a decision of the court is to be preferred. But, the judge found that this would be inconsistent with the aim of the MCA and said that, insofar as applications by family members are concerned, the courts should be sympathetic to their requests provided the family members are not embroiled in disputes with one another and appear able to carry out the functions of a deputy appropriately.

Hedley J stated that '*it must be appreciated that Section 16(4) has to be read in the context of the fact that, ordinarily, the court will appoint deputies where it feels confident that it can. It is perhaps important to take one step further back even than that, and for the court to remind itself that in a society structured as is ours, it is not the State, whether through the agency of an authority or the court, which is primarily responsible for individuals who are subjects or citizens of the State. It is for those who naturally have their care and wellbeing at heart, that is to say, members of the family, where they are willing and able to do so, to take first place in the care and upbringing, not only of children, but of those whose needs, because of disability, extend far into adulthood.* '

Comment

It is not clear how this might apply in cases where there is a dispute between family members (which, we suggest, is likely to be a substantial proportion of cases heard in the Court of Protection). Nor is it clear how this approach might be applied to deputyship applications by local authorities.

RT v LT and another [2010] EWHC 1910

This case of is of note because of the comments of the President regarding the role of caselaw given the existence of the MCA. The submission was made in the proceedings that the pre-Act learning was now all obsolete, and that all that was required was an examination of the terms of the Act. This rather extreme submission was, perhaps unsurprisingly, rejected. The President stated that wherever possible, the plain words of the Act should be directly applied to the facts of the case in hand, and that complicating factors should, if possible, be avoided. However, there would obviously be cases where pre- or post-Act authority would be relevant, for example the issue of what the appropriate test is for capacity to consent to sexual relations.

BB v AM & Ors [2010] EWHC 1916 (Fam)

Summary

In this case, Baker J was concerned with a thirty-one year old Bangladeshi woman known as BB. She was said to have very complex needs, being profoundly deaf and with a diagnosis of schizoaffective disorder and probable learning difficulties. It was accepted by all parties to

these proceedings that for material purposes BB lacked the capacity to decide where she should live.

On 19 April 2010, BB was removed from the family home by support workers employed by Tower Hamlets Community Mental Health Team following reports that BB had been assaulted by her parents. She was admitted to the Roman Ward at Mile End Hospital which is managed by the East London NHS Trust. On 29 April, the Official Solicitor filed an application in respect of BB in the Court of Protection. On 6 May, NHS Tower Hamlets (formerly Tower Hamlets PCT) authorised BB's deprivation of liberty under a standard authorisation under the Mental Capacity Act 2005. On 28 May, BB was transferred to the Old Church Hospital in Balham, managed by the South West London and St George's Mental Health NHS Trust. On 7 June, BB's, deprivation of liberty was authorised by that Trust under an urgent authorisation under the 2005 Act.

Following a sequence of events that are not relevant here, on 5 July, the Official Solicitor wrote to the other parties indicating that it appeared that there was no longer any lawful authorisation for BB's deprivation of liberty and that in the circumstances it would be necessary to restore the matter to court pursuant to the President's order. The matter came before Baker J on 7 July. At that hearing, a number of matters were resolved by consent, including residence and contact. Baker J was, however, asked to make a declaration that BB was currently being deprived of her liberty at Old Church. As he identified (paragraph 6), that was a necessary preliminary step because, if a person is ineligible to be deprived of liberty, a court may not include in a welfare order any provision which authorises that deprivation of liberty. Plainly this issue only arises if the circumstances in which the person is being accommodated amount to a deprivation of liberty.

Baker J held (at paragraph 12) that the statutory provisions contained in the MCA 2005 do not appear on their face appear to extend to making declarations as to whether or not circumstances amount to a deprivation of liberty. He concluded that it might be that the court's power to make such a declaration arose under its inherent jurisdiction, and noted both that no party sought to persuade me in this case that he had no power and clearly it was necessary to make a decision on the question whether circumstances amount to a deprivation of liberty and to recite that decision in the order seemed eminently sensible.

Baker J summarised the statutory provisions contained in the MCA, and in particular those in Schedule 1A relating to eligibility to be deprived of one's liberty, endorsing in the process the approach taken by Charles J in *GJ v Foundation Trust* [2009] EWHC 2972 (Fam). Having done so, he drew the points together as raising the following questions (paragraph 25):

"*(1) Are the criteria in sections 2 or 3 of the Mental Health Act met in BB's case and if so would the hospital admit her under the Mental Health Act if an application was made? In other words, is she suffering from a mental disorder warranting assessment or medical treatment? If yes, BB is ineligible to be deprived of her liberty. If not,*

(2) Do the circumstances of her detention considered together amount to a deprivation of liberty having regard to the guidance set out in the DOLS Code of Practice?"

On the facts of the case, Baker J that the medical evidence was that BB was not "*detainable under the Mental Health Act because she is happy to stay in hospital and take medication. She has made no attempts to leave. She reports being happy. She changes the subject when asked about her home and family but she does so without showing any negative emotion or particular interest… if she said she wished to be discharged or to return home, we would assess her mental state and assess for detention under the Mental Health Act. It might be she would be easily persuaded to stay; it might be she would be detainable*". In the circumstances, he found (paragraph 27) that she was not ineligible to be deprived of her

liberty within the meaning of the eligibility requirement in Schedule 1A of the Mental Capacity Act, and as a result the Court was not prevented from including in a welfare order provision which authorises deprivation of her liberty.

Baker J then concluded as follows on the question of whether BB was deprived of her liberty:

"30. *In considering the submissions, I have, as recommended in the guidance in the DOLS Code of Practice, had regard to the rapidly expanding case law in this field, including not only the decision of Charles J in GJ v Foundation Trust (supra) , and my own decision in G v E, A Local Authority and F (also supra), but also the recent decision of Parker J in Re MIG and MEG [2010] EWHC 785 (Fam) and the very recent decision of Munby LJ (sitting at first instance) in Re A, A Local Authority v A [2010] EWHC 978 (Fam). It is necessary to have regard to these authorities because, whilst all cases turn on their own facts, it is important that there should be consistency in the interpretation and the implementation of these complex provisions.*

31. Furthermore, it should be borne in mind that I am only deciding this case at an initial stage, on the basis of limited evidence, and with limited opportunities to consider the details of BB's circumstances. There is of course a danger that such an assessment will be somewhat superficial. It is, however, important to take a proportionate response to these matters. The courts simply do not have the time and resources to spend lengthy periods of time considering arguments at an interim stage as to whether or not detention amounts to a deprivation of liberty. The court has to make a quick and effective assessment at the interim stage on the best available evidence.

32. To my mind, having regard to all the factors identified in the DOLS Code of Practice and the circumstances of BB's current accommodation at Old Church Hospital as set out in the evidence before me, I conclude that she is being deprived of her liberty. She is away from her family, in an institution under sedation in circumstances in which her contact with the outside world is strictly controlled, her capacity to have free access to her family is limited, now by court order, and her movements under the strict control and supervision of hospital staff. Taking these factors altogether, the cumulative effect in my judgment is that BB is currently being deprived of her liberty and I so declare."

Comment

This case is of some importance both for its confirmation of the approach taken by Charles J to the interaction of the MHA and the MCA in *GJ*, and also for the clarification regarding the approach to be taken to assessments of the deprivation of liberty. The comments made by Baker J as to the need for consistency of approach is welcome although does, again, raise the stark issue of the difficulty of dissemination of judgments. Somewhat more troubling, perhaps, is the indication that the courts will take a robust approach to determinations of deprivation of liberty questions on an interim basis. Whilst limited judicial resources available (adverted to by the Court of Appeal in *G v E* [2010] EWCA Civ 822, discussed in our previous update) mean that this is a reality, in many cases, an interim conclusion as to whether or not a situation constitutes a deprivation of liberty is likely to hold sway for many months, with significant consequences in terms of the obligations upon the relevant local authority/PCT to review the position.

Re MN [2010] EWHC 1926 (Fam)

Summary

This case is the first in which the complex provisions of Schedule 3 to the MCA 2005 have been considered. These provisions relate, inter alia, to the recognition and enforcement of protective measures taken in foreign courts, and give rise to difficult problems of statutory interpretation.

The facts of the case are complex. However, in broad terms, Hedley J was faced with the question as to whether and, if so, according to what criteria, should the Court of Protection recognise and enforce an order of a court of competent jurisdiction in California requiring the return of an elderly lady with dementia, MN, to that State. She had been removed from California by her niece, PLH, to whom certain authority had been granted under the terms of an Advance Healthcare Directive. MN lacked capacity to make all relevant decisions and the Californian court had control of her property. Whilst the facts of the particular case meant that the order was not, in fact, capable of enforcement, Hedley J took the opportunity to consider the issues and given a reasoned judgment so that both the parties and the Californian courts would be aware of the approach which would be adopted by the Court of Protection.

Hedley J reviewed the provisions of Schedule 3. He found that the starting point was to ask where MN was habitually resident, as it was only if she was habitually resident in England and Wales or that the Court would exercise its 'full original jurisdiction' under the Act (paragraph 20 - finding there also that this was not a case where her habitual residence could not be determined, an alternative route to the exercise of such full jurisdiction under paragraph 7(2)(a)). He then considered how the question of habitual residence was to be determined, holding as follows:

"*22. ...Habitual residence is an undefined term and in English authorities it is regarded as a question of fact to be determined in the individual circumstances of the case. It is well recognised in English law that the removal of a child from one jurisdiction to another by one parent without the consent of the other is wrongful and is not effective to change habitual residence — see e.g. RE PJ [2009) 2 FLR 1051 (CA). It seems to me that the wrongful removal (in this case without authority under the Directive whether because Part 3 is not engaged or the decision was not made in good faith) of an incapacitated adult should have the same consequence and should leave the courts of the country from which she was taken free to take protective measures. Thus in this case were the removal 'wrongful', I would hold that MN was habitually resident in California at the date of [the Californian] orders.*

23. If, however the removal were a proper and lawful exercise of authority under the Directive, different considerations arise. The position in April 2010 was that MN had been living with her niece in England and Wales on the basis that the niece was providing her with a permanent home. There is no evidence other than that MN is content and well cared for there and indeed may lose or even have lost any clear recollection of living on her own in California. In those circumstances it seems to me most probable that MN will have become habitually resident in England and Wales and this court will be required to accept and exercise a full welfare jurisdiction under the Act pursuant to paragraph 7(l)(a) of Schedule 3. Hence my view that authority to remove is the key consideration."

In light of the approach outlined above, Hedley J was unable to proceed further without the issues of the construction of the Directive and the extent of the authority conferred and indeed the validity of its exercise (all matters to be determined under Californian) law either being determined in the California proceedings, or upon the basis of a single joint expert being instructed to advise the Court on the point.

In large part so as to assist the California court, Hedley J nonetheless went on to consider the position in the event that MN was found to be habitually resident in California, such that he was required to consider whether to recognise and enforce the protective measures taken in California. He noted that the starting point was that Paragraph 19(1) made recognition

mandatory unless that paragraph was disapplied in cases (other than those falling under the 2000 Hague Convention on the International Protection of Adults) by either Paragraphs 19(3) or (4). He identified that the only relevant sub-paragraphs could be Paragraph 19(4)(a) (i.e. that recognition of the measure would be manifestly contrary to public policy) or Paragraph 19(4)(b) (b) (i.e, that the measure would be inconsistent with a mandatory provision of the law of England and Wales). At paragraph 26 of his judgment he had little hesitation in dismissing Paragraph 19(4)(a) as being a relevant consideration on the facts of this case, noting that "[a] *decision of an experienced court with a sophisticated family and capacity system would be most unlikely ever to give rise to a consideration of 4(a); the use of the word 'manifestly' suggests circumstances in which recognition of an order would be repellent to the judicial conscience of the court*."

That left sub-paragraph 19(4)(b), which, as Hedley J, recognised, raised a matter both of importance and difficulty, namely the extent to which the court should takes best interests into account in recognition and enforcement proceedings. The submission of PLH, MN's niece, was that if recognition of an order was not in the best interests of MN then to recognise (and enforce) such an order would be contrary to a mandatory provision of the law namely Section 1(5) of the Act. Thus a best interests exercise must always be undertaken to ensure that Section 1(5) is not contravened.

However, as Hedley J recognised, if such an argument were right, it would drive "*a coach and four through the summary and mandatory nature of Part 4 of Schedule 3*," because, in essence, it would require a full consideration of whether the recognition and enforcement of the protective measure would be in the best interests of P. As he noted at paragraph 29, the problem was particularly stark on the facts of the case before him, because he would be required (by Paragraph 12 of Schedule 3) to consider MN's best interests in implementing any protective measure recognised and enforced by the Court of Protection. In so doing, he noted he had evidence before him that "*might well persuade*" him that a journey back to California could be undertaken consistent with MN's best interests. However, he then asked himself, rhetorically, how far ahead should he then look in determining whether a journey was in her best interests? To look too far would, in his view, come very close to a full best interests inquiry.

Hedley J therefore asked himself whether s.1(5) in fact applied. Section 1 provides in material part that "(*l) The following principles apply for the purposes of this Act (5) An act done, or a decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests...*" In his view, the words of s.1(5) gave rise to the question of whether a decision to recognise and/or enforce an order was a decision made for or on behalf of MN.

In the end, Hedley J concluded at paragraph 31 that "*a decision to recognise under paragraph 19(1) or to enforce under paragraph 22(2) is not a decision governed by the best interests of MN and that those paragraphs are not disapplied thereby by paragraph I 9(4)(b) and Section 1(5) of the Act. My reasons are really threefold. First, I do not think that a decision to recognise or enforce can be properly described as a decision for and on behalf of' MN. She is clearly affected by the decision but it is a decision in respect of an order and not a person. Secondly, this rather technical reason is justified as reflecting the policy of the Schedule and of Part 4 namely ensuring that persons who lack capacity have their best interests and their affairs dealt with in the country of habitual residence; to decide otherwise would be to defeat that purpose. Thirdly, best interests in the implementation of an order clearly are relevant and are dealt with by paragraph 12 which would otherwise not really be necessary*."

Hedley J recognised (at paragraph 32) that on the fact of this particular case his construction "*may lead both to hardship and artificiality. In cases involving abducted children the hardship of sending a child back for the parent to make a relocation application is (if the*

application succeeds) real but is probably no greater than a major inconvenience. Here, however, the position is different. MN may survive the return journey. PLH may have the right to submit to the Californian court that it is in MN's best interests to live with her in England. It may, however, be that she could not survive another trip and so any welfare enquiry in California would be rendered nugatory."

The remainder of his judgment is conveniently summarised at paragraph 38 as follows:

"*The basis of jurisdiction is habitual residence. In this case the key to that decision is whether PLH'S authority as agent permitted this removal to England. If it did not, MN remains habitually resident in California and the courts of that State should exercise primary jurisdiction. If, however, it did, I am likely to conclude that MN is now habitually resident in England and Wales and jurisdiction belongs to this court. If that is so, I could not enforce the order of the Californian court unless, having conducted a full best interests enquiry on evidence, I concluded that her best interests required a return to California. On the other hand if jurisdiction belongs to California, I am likely to recognise and enforce the Californian order (if un-amended and there is no stay) and to give directions for implementation unless either the carrier or Dr. Jefferys* [the psychiatric expert instructed before the Court of Protection] *were to advise otherwise. My best interests enquiry would essentially be confined to the journey essentially. However this court could adopt a full best interests jurisdiction at the invitation of the Californian court*."

Comment

Schedule 3 to the MCA 2005 is, on any view, a very odd piece of legislation. It was the subject of negligible debate in Parliament; no guidance or subordinate legislation has been issued to support it, and yet, on its face opens a very substantial can of worms. In particular, by Part 4 it mandates (subject to exceptions, some of which are outlined in the judgment in *MN*) recognition of protective measures taken in respect of adults abroad who may not, in fact, lack capacity within the meaning of the MCA 2005 (see Paragraph 4, which defines 'adult' as a person who "as a result of impairment or sufficiency of his personal faculties, cannot protect his interests," and who has reached 16). "Protective measures" are very broadly defined, and may well include measures taken following procedures that would not necessarily be followed in the Court of Protection (and could be taken by a court of *any* jurisdiction – it is another oddity of the Schedule that it brings into effect a unilateral regime of recognition of such protective measures even where they have not been taken in countries who have signed the 2000 Hague Convention).

Hedley J's judgment answers a number of important questions relating to Schedule 3, perhaps the most important of which is whether – inadvertently – a situation had arisen in which, in any application for recognition and enforcement was before the Court, the Court would be required to conduct a full best interests inquiry. Such a result would have been palpably at odds with the purpose of the Schedule that it is perhaps unsurprising that Hedley came to the conclusion that he did, but his decision in this regard is of considerable assistance. Nonetheless, as he recognised, difficult questions will continue to arise as to the depth and width of any best interests analysis engaged in for purposes of implementation of a protective measure to recognised and enforced. It may be further judgments in this matter will shed light on this question; it may on the other hand be that we need to await the (inevitable) appearance of other cases posing these dilemmas before further judicial guidance is given.

G v E, Manchester City Council and F [2010] EWHC 2042 (Fam)

In a judgment that will be of particular interest to local authority solicitors, Baker J decided that it was appropriate to make public the name of the local authority involved in ongoing proceedings, which had been criticised in an earlier judgment. The judge concluded that he

should name Manchester City Council in the spirit of openness and accountability, and because there was no significant risk that E or members of his family might be identified as a result, Manchester being a large city. He said '*it is important that the residents and council tax payers of the city of Manchester know what has happened so that the local authority can be held responsible. And it is to be hoped that the publicity given to this case will highlight the very significant reforms of the law implemented by the MCA and in particular the DOLS in schedule A1, and the consequent very considerable obligations imposed on local authorities and others by the complex procedures set out in those reforms*'.

The judge refused to make public the names of individual social workers because the criticisms he had made referred to failures higher up the chain of command, and refused to identify the company responsible for running the placement at which E had resided, since the company and its director had not been present at the hearing which resulted in criticisms being made, and since the concerns identified could properly be raised by the Official Solicitor with the Care Quality Commission instead.

LD v LB Havering (Case number No. 1144388/03; 25.6.10)

This case, decided by HHJ Turner QC (sitting as a Judge of the High Court), provides useful guidance as to the appointment of a welfare deputy has recently been provided. The court heard extensive submissions on the need for a welfare deputy in a case where a dispute about residence and care for a learning disabled adult had been determined by the court, but where the local authority contended that it should be appointed welfare deputy to deal with ongoing issues such as medical treatment and contact. There was a history of non-engagement by P's mother, who herself had mental health problems. Two social work experts had recommended the appointment of a welfare deputy on the basis of these mental health problems and the need to provide a stable and reliable decision-making framework for P. The experts' view was that a welfare deputy should extend to decisions about medical treatment and social care interventions, and should be indefinite, subject to improvements in the mental health of P's mother.

The court disagreed, and accepted the submissions of the Official Solicitor. It was held that a welfare deputy would be appointed only in extreme circumstances, and that *'mere convenience to a local authority in a legitimate desire to avoid having to come to court'* was not relevant. In the instant case, the matters it was proposed the welfare deputy would deal with were either routine and could be dealt with under s.5 MCA 2005, or were serious and would require the court's involvement.

The judge concluded that the evidence was not persuasive that an order appointing the local authority as welfare deputy was needed to ensure that proper and conscientious care was afforded to P.

Re RC (Case number 11639140; 5.8.10)

This case provides one of the few reported decisions on costs in welfare proceedings in the CoP.

Summary

The judgment was given in unusual circumstances, in the context of an appeal by P (RC)'s niece, SC, against a costs order made in favour of the London Borough of Hackney following proceedings, very shortly after which RC died. However, as Senior Judge Lush made clear in his judgment, he heard the appeal by RC's niece in significant part because he wished to give guidance as to whether the general rule in personal welfare proceedings necessarily applies to

proceedings in which the applicant is asking the Court to direct the Public Guardian to cancel the registration of an LPA for health and welfare.

In broad terms, the proceedings, before DJ Marin, were on two tracks: one for cancellation of the registration of a health and welfare LPA in favour of SC, and the second for declarations and orders regarding RC's future placement. An order was made in these terms following a hearing extending over three days in May 2009. LBH sought an order that SC pay its costs of the second and third days of the hearing; the charity Jewish Care (JC) (in whose care home RC resided) sought an order that SC pay the entirety of its costs. DJ Marin approached the question of costs on the basis that the proceedings relating to the cancellation of the LPA should be considered as if they were health and welfare proceedings, and hence that the general rule for such proceedings (rule 157) applied. Having regard as to SC's conduct, DJ Marin ordered that she pay the costs of LBH of the second and third days of the hearing, and 50% of the costs of JC from the date that it was served with notice of the proceedings.

Prior to the matter coming before Senior Judge Lush on appeal, JC and SC reached an out of court settlement, such that the only issue before him regarding costs was whether DJ Marin's order regarding the costs of LBH should be upheld.

Having conducted a review of the authorities, Senior Judge Lush confirmed that he had a residual jurisdiction to consider SC's appeal on costs, notwithstanding the death of her aunt, but that her other appeals against orders made by DJ Marin fell away because the jurisdiction of the Court of Protection lapsed upon the death of RC.

Senior Judge Lush concluded that DJ Marin was wrong to conclude that, because the LPA was a personal welfare LPA, consideration of issues of costs in proceedings relating to it should be approached by reference to Rule 157 (i.e. the general rule in welfare proceedings, namely that there be no order as to costs). Senior Judge Lush held that "*because the format, the procedures for both execution and registration, and the grounds of objection are identical in relation to both types of instrument, as a general rule, the incidence of costs in cases where there is an LPA for health and welfare should not necessarily differ from the general rule in property and affairs cases, subject of course to the provisions of rule 159, which allows the court to depart from the general rule if the circumstances so justify*."

Senior Judge Lush then went to explain why he thought the original decision on costs was unjust. He expressed concerns as to:

1. the fact that Hackney had not given any warning to SC that it might seek its costs. In the process, he expressed some disquiet with the reliance by Hackney on the case of *Orchard v. South Eastern Electricity Board* [1987] 2 W.L.R 102, [1987] 1 All E.R. 95, in which the Court of Appeal suggested that it is improper to threaten to seek an order for costs against someone in order to browbeat them into dropping a case or pursuing a particular line of argument. He held in this regard: "[o]*f course, the threat of an adverse costs order should never be used as a means of intimidation. However, if the London Borough of Hackney and Jewish Care genuinely believed that SC's conduct was improper or unreasonable, and that it was likely to result in a waste of costs, it may very well have saved time if they had alerted her to the risk that there was a possibility that the judge could award costs against her*."

2. The fact that the judge below had not considered SC's ability to pay the costs awarded against her, noting in this regard the guidance given in the case of *Cathcart* [1892] 1 Ch 549, at page 561, in which Lord Justice Lindley held as follows:

   "*The respective means of the parties and the amount of the costs cannot, in my opinion, be disregarded. If the Petitioner could well afford to pay the costs, and the alleged lunatic*

would be ruined if ordered to pay them, the Court would not, I apprehend, order him to pay them, whilst there might be no such reluctance if the reverse were the case. The Court ought to endeavour to do what is fair and just in each particular case. Even the amount of costs is not immaterial. Moreover, in considering these matters regard must be paid not only to the expenses incurred, but to the necessity for them, which will very often depend on the course taken by the Petitioner or by the alleged lunatic. Either party may by his conduct render an inquiry much more expensive than it might otherwise have been."

3. The fact that he was not satisfied when awarding costs against SC, the judge fully considered the nature of the relationship between her and her aunt, and whether she was acting in RC's best interests. Senior Judge Lush pointed again to *Cathcart*, at page 560, where Lord Justice Lindley made the following comments, in which he emphasised the importance of acting in good faith, *bona fide*, as well as in P's best interests, in cases of this kind:

   "*The relation in which the Petitioner stands to the alleged lunatic and the Petitioner's objects and conduct are the last matters to which I will refer. It is plain that these matters, although not relevant to the inquiry into the state of mind of the alleged lunatic, are very important in considering the question of costs. An unsuccessful inquiry promoted by a stranger for purposes of his own, perhaps mainly in the hope of getting costs, ought to be regarded very differently from an unsuccessful inquiry promoted, perhaps most reluctantly, by a husband or wife or some kind relative or intimate friend acting bona fide in the interest of the alleged lunatic and for the protection of himself and his property. Between these extremes there is room for many differences of degree; but it would be hopeless for the promoter of an inquiry which resulted in a verdict of sanity to ask the Court to order his costs to be paid by the alleged lunatic, unless there were reasonable grounds for the inquiry; that the inquiry was really desirable; that the Petitioner was under the circumstances a proper person to ask for it; and that he acted bona fide in the interest of the alleged lunatic*."

4. The fact that it appeared that the District Judge might have allowed the fact that SC was a litigant in person whose conduct was infuriating to sway him into considering that the case before him was exceptional when the reality was "*SC is not untypical of many of the litigants in person who appear on a regular basis in health and welfare proceedings in the Court of Protection and, despite what District Judge Marin and Bryan McGuire QC have said about this being an exceptional case, it is not. It could almost be said that this aspect of the court's jurisdiction was created to deal with situations of this kind, where a local authority, NHS Trust or private care home is experiencing problems with a particularly difficult and vociferous relative.*"

Senior Judge Lush concluded his judgment as follows:

"*Accordingly, the general rule (rule 157) should apply, and the court should only depart from the general rule where the circumstances so justify. Without being prescriptive, such circumstances would include conduct where the person against whom it is proposed to award costs is clearly acting in bad faith. Even then, there should be a carefully worded warning that costs could be awarded against them, and a consideration of their ability to pay. If one were to depart from rule 157 in all the cases involving litigants whom Mr Sinclair has described as "extreme product champions", the court would be overwhelmed by satellite litigation on costs, enforcement orders, and committal proceedings.*

I have an advantage over District Judge Marin. I can reflect on this case quietly and calmly, with the benefit of hindsight, and without the pressure and overwhelming sense of urgency with which he had to adjudicate at first instance. However, for the reasons given above, I consider that his decision to award costs against SC was partly wrong and partly unjust.

Accordingly, I allow this appeal and set aside the original order insofar as it related to the London Borough of Hackney's costs, and in its place I make no order for costs."

Commentary

Whilst it is perhaps not entirely clear from the face of the judgment, it is clear that the logic of Senior Judge Lush's decision was that: (1) the general rule in disputes regarding LPAs is that the aspect of the dispute concerning the LPA should be approached on the basis that the general rule regarding costs is Rule 156 (i.e. that P should pay for such proceedings), rather than Rule 157; and (2) that, on the facts of this case, there was insufficient evidence to depart from that general rule (which does not provide for an objector's costs to be paid) as regards the dispute regarding the LPA or from the general rule (Rule 157) regarding the remainder of the dispute, relating to P's residence and contact arrangements.

In any event, the general guidance given by Senior Judge Lush is of assistance in clarifying the costs position regarding disputes concerning personal welfare LPAs, and also in making clear the circumstances under which the general rule in personal welfare proceedings other than those concerning LPAs will be displaced. The need for giving a clear costs warning is one that is particularly significant, as is the consideration that needs to be given both to the ability of the person in question to pay and to their motives in so acting: it is clear that the latitude that will be given to litigants in person (at least) is likely to continue to be significantly greater in Court of Protection proceedings than before the remainder of the civil courts.

VAC v JAD & Ors [2010] EWHC 2159 (Ch)

This decision, handed down by HHJ Hodge QC on 16.8.10 following a determination on the papers, is of importance wherever the Court is considering the making of a statutory will.

Summary

In brief, and summarizing the procedural history wildly, the matter came before HHJ Hodge QC so that he could consider whether it would be appropriate for the Court of Protection to authorise a statutory Will for an incapacitated adult on the ground that this is in his or her best interests where there is a dispute or uncertainty as to the validity of a recent Will which departs from the terms of an earlier Will. DJ Ashton had earlier refused permission to the JAD's deputy apply for a statutory will, but upon reconsideration transferred the matter to one of Chancery Circuit Judges in Manchester (sitting as a nominated judge of the Court of Protection) for consideration of this point. In so doing, he had indicated that to exercise the jurisdiction in these circumstances "would encourage many applications where the substantive issue is the validity of a new will made when there was doubt as to testamentary capacity or concern as to undue influence and this Court would be ill-equipped to resolve these disputes."

After a careful examination of *Re P (Statutory Will)* [2009] EWHC 163 (Ch); [2010] Ch 33, and *Re M* [2009] EWHC 2525 (Fam), HHJ Hodge QC determined as follows upon the issues of principle:

> "*15.As recorded […] above, DJ Ashton was concerned that one consequence of exercising the jurisdiction to direct the execution of a statutory will in any case where there was a dispute or uncertainty as to the validity of a recent will due to concerns about a possible lack of testamentary capacity (or want of knowledge and approval) or the possible exercise of undue influence might be to encourage many applications to the Court of Protection raising issues which that Court would be ill-equipped to resolve. Given DJ Ashton OBE's unrivalled experience of the work*

of the Court of Protection outside London, that is a concern that cannot lightly be dismissed. Indeed, one of the points made by Munby J in Re M (cited above) at [50] was that the Court of Protection has no jurisdiction to rule on the validity of any will. It may well be impractical, and inappropriate, for that Court to embark upon a detailed investigation of all the evidence necessary to resolve a dispute as to the validity of a will made by a protected person. Nevertheless, as with the exercise of any jurisdiction under the 2005 Act, the overarching consideration, when deciding whether to direct the execution of a statutory will, must be a judicial evaluation of what is in the protected person's "best interests", having considered "all the relevant circumstances".

16. It would seem to me that the concerns outlined by the district judge are factors which the Court may take into account when deciding whether to order the execution of a statutory will; and they might, in an appropriate case, lead the Court to conclude that it should not exercise its power to do so. But, in my judgment, there can be no presumption, still less any principle of general application, that the Court should not direct the execution of a statutory will in any case where there is a dispute or uncertainty about the validity of a recent will, the terms of which depart from those of an earlier, apparently valid, will. The adoption of such an approach would tend to elevate one factor over all others, contrary to the structured decision-making process required by the 2005 Act. Like Lewison J in Re P (at [41]), I would prefer not to speak in terms of presumptions. Under section 4 (6) (a), one of the relevant factors to be considered by the Court in determining the protected person's best interests are that person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity). A previous will is obviously a relevant written statement which falls to be taken into account by the Court. But the weight to be given to it will depend upon the circumstances under which it was prepared; and if it were clearly to be demonstrated that it was made at a time when the protected person lacked capacity, no weight at all should be accorded to it. Moreover, Parliament has rejected the "substituted judgment" test in favour of the objective test as to what would be in the protected person's best interests. Given the importance attached by the Court to the protected person being remembered for having done the "right thing" by his will, it is open to the Court, in an appropriate case, to decide that the "right thing" to do, in the protected person's best interests, is to order the execution of a statutory will, rather than to leave him to be remembered for having bequeathed a contentious probate dispute to his relatives and the beneficiaries named in a disputed will. I therefore hold that the Court of Protection should not refrain, as a matter of principle, from directing the execution of a statutory will in any case where the validity of an earlier will is in dispute. However, the existence and nature of the dispute, and the ability of the Court of Protection to investigate the issues which underlie it, are clearly relevant factors to be taken into account when deciding whether, overall, it is in the protected person's best interests to order the execution of a statutory will."

On the facts of the case, HHJ Hodge QC considered (at paragraph 21) that "*sufficient doubts have been raised as to the validity of each of those Wills to lead me to conclude, on the specific facts of this case, that the best interests of Mrs D dictate that I should, here and now, set to rest all concerns about her true testamentary wishes by ordering the execution of a statutory will, rather than leaving her estate to be eroded by the costs of litigation after her death, and her memory to be tainted by the bitterness of a contested probate dispute between her children (which may extend to members of the next generation)*." A draft had, in fact, been agreed by Mrs D's deputy, the OS and all three of Mrs D's children.

Commentary

This case provides further evidence, if such is needed, of the sea change that has been brought about in the approach to property and affairs by the MCA 2005, and, in particular, of the primacy that is required to be given to the best interests of P in all acts done or decisions made for on P's behalf. It is to be hoped that the very real concerns expressed by DJ Ashton as to the potential expansion in scope of the role of the CoP in the realm of statutory wills (which, in the authors' view, remain real notwithstanding the correctness of the principled decision taken by HHJ Hodge QC) are not borne out by an expansion in the number of applications for statutory wills.

And in other news

The recommendations of the Committee set up to review of the Court of Protection Rules 2007 and the practice directions and forms which accompany them have now been published, and accepted in full by the President of the Court of Protection: see http://www.judiciary.gov.uk/publications-and-reports/reports/court-protection-rules-commitee-report. Highlights include:

1. Recognition that the practice of the court should reflect the differences in the nature of the following categories of its work, namely (a) non-contentious property and affairs applications, (b) contentious property and affairs applications and (c) health and welfare applications;

2. Recommendations for substantial reworking of the forms in order to cater for this recognition and also to cut down on the amount of duplication required (including the abolition of separate forms for applications for permission, such applications being incorporated into the main form);

3. A recommendation that strictly defined and limited non-contentious property and affairs applications should be dealt with by court officers (e.g. applications for a property and affairs deputy by local authorities and in respect of small estates that do not include defined types of property). The provisions will also have to provide for an automatic right to refer any such decision to a judge and internal monitoring and review by the judges.

4. A considerable number of amendments to PDs and Rules in order to cater for problems encountered during the first three years of the CoP's new life, to include reworking of PDs associated with health and welfare applications to give clearer guidance as to (inter alia) when applications should be brought, whom should be parties to such applications and the role of experts.

ALEX RUCK KEENE (alex.ruckkeene@39essex.com)
VICTORIA BUTLER-COLE (vb@39essex.com)
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