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Court of Protection update

Welcome to the Thirty Nine Essex Street Court of Protection Newsletter

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Introduction

Welcome to our October update, which includes a mix of freshly decided cases and cases which have only recently been reported/brought to our attention. With one exception, transcripts of all cases discussed below can be found on www.mentalhealthlaw.co.uk (the former Wikimentalhealth) if not otherwise available.

Re MIG and MEG [2010] EWHC 785 (Fam)

Summary

One might have been forgiven for thinking that deprivations of liberty were the norm in care homes and supported living placements for incapacitated people who require assistance with most activities and access the community unaided. Certainly, in the authors' experience, in the great majority of cases, the parties and often the court have erred on the side of caution and sought declarations authorising placements even if they amount to a deprivation of liberty. Generic declarations of that sort avoid dealing with the prior question of whether there is in fact a deprivation of liberty in the particular case. *Re MIG and MEG* looked in detail at this issue in respect of two sisters, one living with a foster family and one living in a small residential unit:

MEG was "*incapable of independent living. She is largely dependent on others. She needs to be looked after save for basic care needs. She lacks capacity to make decisions as to her care, education, social and family contacts and health care. She cannot go out on her own. She shows no wish to go out on her own. She can communicate her wants and wishes in a limited manner. There are no restrictions on her social contacts save by way of court declaration. She goes to college. She is transported to and from college. Whilst there she is not under the control of JW or the Applicant and there are no restraints on her social contacts. She has a lively social life both in the home and at college and outside the home accompanied by staff and other residents*"

MIG was "*a young woman of 18... She has a severe learning disability with the cognitive ability of a 2-3 year old and has hearing, visual and speech impediments. She is incapable of independent living. She is largely dependent on others. She needs to be looked after save for basic care needs. She lacks capacity to make decisions as to her care, education, social and family contacts and health care. She cannot go out on her own. She shows no wish to go out on her own. She can communicate her wants and wishes in a limited manner. MIG is living in an ordinary domestic environment which she regards as home. She is not restrained in any way. She is not locked in in any way, (although she does refuse to keep her bedroom door open, causing some concern to her foster parents). She does not wish to leave. She wants to stay with JW. She loves JW and regards JW as her "Mummy". Continuous supervision and control is exercised so as to meet her care*

needs. Limitations on movement are generally dictated by limitations in MIG's ability, or her lack of awareness of danger. She has never sought to leave the home. If she were to try to leave she would be restrained for her own immediate safety."

Contrary to the submissions of the Official Solicitor on behalf of both sisters, Parker J held that there was no deprivation of liberty in either case.

Comment

The judge applied the decision in *Austin (FC) & another v Commissioner of Police of the Metropolis* [2009] UKHL 5, in which the House of Lords held that cordoning protestors for a period of hours and preventing them from leaving the cordoned area was not a breach of Article 5. Some elements of the judgments in *Austin* are susceptible to criticism (see for example the surprising statement by Lord Hope that 'there is room, even in the case of fundamental rights, for a pragmatic approach to be taken which takes full account of all the circumstances where the interests of public safety have to be balanced against the rights of the individual'). Parker J seems to have taken from *Austin* that a relevant factor in determining whether there is a deprivation of liberty is the reason for P's detention. Thus she held that "*it does seem to me to be realistic to put into the equation...that both girls were placed in their respective placements are children in need, because they need homes, rather than because they require restraint or treatment. It is also relevant in my view to consider the reasons why they are under continuous supervision and control*." However, in many previous cases where a deprivation of liberty has been found, the reason for the detention was similarly that P needed care and/or treatment. It appears to the authors that there were two key factors in the judge's decision:

a. First, no-one was objecting to the sisters' placements. They were not 'free to leave', but no-one was seeking to move them.

b. Second, because of their cognitive limitations, they would have been subject to similar constraints in any placement and even if they were living with their own family. Again, the latter point applies with equal force to many cases in which a deprivation of liberty has been found, which tends to suggest that perhaps the most important factor is whether there is a dispute about where P should live, and in particular, whether P herself is expressing a desire to leave.

The case has been appealed by the Official Solicitor and will be heard by the Court of Appeal in November 2010.

The PCT v P, AH and a Local Authority (Bailii citation [2009] EW Misc 10 (EWCOP); COP Case No: 11531312)

Summary

Although this case was, in fact, decided some time ago (21.12.09), the judgment of Hedley J has only recently been made public. In this case (which was, in fact, one of the very first ever issued in the newly constituted COP, and the subject of one of the first directions hearings), Hedley J had to determine two central issues: (a) a "fairly routine" (paragraph 1) issue relating to P's capacity in relation to his medical treatment, his best interest, residence, what kind of contact he has and the ability to conduct litigation; and (b) a determination of his best interests and, in particular, in relation to where he should live, which posed "*an essential conflict between representatives of the State who owe statutory duties to P on the one hand, and the view of his carer of 18-plus years standing on the other. Furthermore, it raises issues of significance in relation both to Articles 8 and 5 of the European Convention of Human Rights*."

P, aged 24, lived for the majority of his life with a lady called AH. He suffers from a severe form of uncontrolled epilepsy. Hedley J accepted that there was evidence in relation to him of a mild learning disability, although he noted that AH did not necessarily accept that. Having been born into a severely dysfunctional family, and having had a substantial number of foster placements, he was ultimately placed with AH, who adopted

him in October 1993. Although it was unclear precisely when his epilepsy started to manifest itself, by March 1996 Hedley J noted that there was there the first clearly recorded disputes over the medical treatment that he ought to be receiving in relation to his epilepsy. These disputes escalated, to encapsulate a dispute as to whether P suffered from ME and on 7.7.07, P was admitted as an emergency to hospital with what was accepted to be life-threatening and prolonged epileptic seizures in circumstances where AH had without medical advice withdrawn all his anti-epileptic medication some few days before. Proceedings were issued in the Court of Protection on the 15th November 2007. The matter came on before the President on the 4th and 5th of June 2008 ([2008] EWHC 1403 (Fam)) when amongst other things, the President made an Order that P should be admitted to Dr Chaudhuri's clinic in Romford for the purposes of a full assessment as to whether or not he suffered from ME and what was required by way of his treatment.

By the time the matter came before Hedley J, the position had boiled down to two conflicting proposals (paragraph 23 of the judgment). On the one hand, the Primary Care Trust supported by the Local Authority and the Official Solicitor, wished to provide P with independent living accommodation with limited contact with his mother. On the other hand, AH wanted to resume the care of P on a full time basis although accepting in theory at least, a need for a gradual move to independence at a pace which he can accommodate. A further complicating factor was that AH was, as is not infrequently the case in proceedings such as this, a complex character who, whilst single-mindedly devoted and committed to the care of P, had become enmeshed into a vicious spiral of mutual interdependence which has resulted in each of them fulfilling the fantasies of the other, and, further, held bizarre beliefs about the motives of the professionals involved in P's care.

In addressing the question of capacity, Hedley noted (paragraph 31) that he had tried wherever possible, to confine himself to a consideration of the MCA 2005 without importing into it glosses from earlier decided cases under the inherent jurisdiction. At paragraphs 34-5, he cited s.3(1) of MCA 2005 before noting that "[g]*enerally, it can be observed that cases where a)* [P is unable to understand the information relevant to the decision], *b)* [P is unable to retain that information] *and d)* [P is unable to communicate his decision whether by talking using sign language or any other means] *are clearly made out, are usually cases that are beyond argument. The really difficult cases, and this is an example of one, is where the attention is principally on sub-section c), that is to say the capacity actually to engage in the decision-making process itself and to be able to see the various parts of the argument and to relate the one to another*."

Having reviewed the evidence, Hedley J concluded (at paragraphs 36-8) that P does indeed lack capacity in relation to the litigation, in relation to making decisions about his assessment of his health and current social care needs, about the ability to make decisions about the care and treatment, to make decisions as to where and in what sort of accommodation he should reside, to make decisions as to the social, education or other activities he should undertake, and to make decisions about the nature, extent and frequency and location of his contact with AH. He found this on the basis of a cumulative series of factors, including (a) P's epilepsy and its impact on his functioning, (b) P's learning disability which is at the lower end of mild, (c) the enmeshed relationship that he has with AH which severely restricts his perspective in terms of being able to think about his future, (d) P's inability, frequently articulated by him to those who have interviewed him, to visualise any prospect of having a different view to his mother on any subject that matters and his inability to understand what the other aspects of the argument may be in relation to his expressed wishes simply to return and live undisturbed with his mother. He further noted a certain disparity that had emerged between his words and his actions and attitudes in dealings with staff.

Hedley J therefore found that he was required to make a decision as to P's best interests on his behalf. In so doing, he expressed (at paragraph 44) his "respectful and fulsome agreement" with the approach outlined by Munby J (as he then was) to the weight to be placed upon P's wishes

in *ITW v Z & M* [2009] EWHC 2525 (Fam), and used that approach when considering P's wishes. Importantly, he found (at paragraph 58) that:

"*It is very important in this case that the Court should be alert to the danger of using P's wishes to return to AH as itself continuing evidence of incapacity. That is of course, wholly impermissible. It is of the essence of a free society that people who have capacity, can choose lifestyles of which those with health or care responsibilities for them do not approve without on that basis alone being at risk of forfeiting capacity, that is the essence of the Article 8 protection*."

He then continued

"*It is right to observe that the Article 8 rights of AH and P are fully engaged in this case, and it is right also to observe that the Order sought by the PCT is a manifest breach of Article 8(1) of the Convention. However, Article 8(1) is a qualified right and its breach can always be justified under Article 8(2) and in particular, it can be justified where the interference with that right is in accordance with the law, that is to say the Mental Capacity Act, 2005 and is a proportionate response to the problem presented.*

In my view, that can only arise where as here, P lacks capacity and will only be proportionate where the best interests of P compellingly require a placement away from AH. Thus, I consider the best interests."

Having reviewed the evidence, Hedley J noted that the decisive factors for him in preferring the position of the PCT (supported by the Official Solicitor) were twofold: "[f]*irst, given that P may have to live many years in this world without AH, that the need to experience so much more than has ever been on offer in the past is crucial and secondly, I feel that a return to AH will on the balance lead to the return of the pre-July 2007 position, with P being required to become a sick, weak and wholly dependent human being, to be protected at all costs from an intrusive and misguided state, in the shape of medical and care professionals, and to his being treated as AH and she alone thinks best*."

In the circumstances, he considered (at paragraphs 68-9) that the combination provided the compelling requirement that is required in order to justify under Article 8(2) what is undoubtedly a major incursion under the Article 8(1) rights of the parties, and also an action which appeared contrary to the expressed wishes of P (noting in this regard that those expressed wishes did not, in fact, necessarily square with the action and attitude he manifested towards staff at the accommodation at which he had been placed).

Finally, Hedley J noted (at paragraph 71) that:

"[his] *conclusions on the one hand that his best interests lie in an alternative independent living arrangement and on the other hand, that his expressed view is of a desire to return to his mother, give rise for the need to consider whether a deprivation of liberty is involved as contemplated by Section 4(A) of the Mental Capacity Act, 2005*."

Hedley J considered (at paragraph 73) that five factors were present such that the case should be treated as a deprivation of liberty: (a) the degree of control to be exercised by staff; (b) the constraint on P leaving if it is his intention to go back to AH; (c) the power of the staff to refuse a request of AH for the discharge of P to her care; (d) necessary restraints on contact between P and AH; and (e) it involved a fairly high degree of supervision and control within the placement. Whilst he accepted (at paragraph 74) that "*independent living in a flat is not a usual expression of deprivation of liberty, yet the presence of the facts as set out above does in my view have just that effect. That is the more so since that proposal which the Court has it in mind to approve, is indefinite in its duration and thus the consequences are indefinite too. I think that approach is confirmed by a consideration of some of the questions raised in paragraph 2(6) of the relevant code of practice*."

Although he considered (at paragraph 75) that, whilst the conclusion might initially appear odd, the conclusion that the PCT's proposed

placement was in P's best interests in effect compelled the conclusion that the deprivation of liberty inherent therein was in his best interests. He noted, though, that the real deprivation of liberty was in respect of P's dealings with AH (paragraph 76), the restrictions on P's general freedom being modest. He continued at paragraph 77:

"*That raises questions of review. This is likely to be a long-term placement and that is certainly its intention. It raises rather different problems to the medical or social crises type of case which is rather more common. It must take into account the significance of a deprivation of liberty, the rather specific nature of it in this case and the practicalities of Court capacity and litigation generally. In particular, it must ensure that in effect, the same ground is not argued over and over again*."

In the circumstances, Hedley J concluded (at paragraph 78) that there the Court should review the case nine months after actual placement in independent living, or 12 months from the date of his judgment, whichever is the earlier. He did not anticipate that oral evidence would be required, and proposed a two hour time-marking. Thereafter, he proposed an annual review that should initially be on paper with evidence of continuing incapacity and prognosis as to capacity with proposals for future care and contact, and with a statement from AH and on behalf of P from the Official Solicitor. He provided (at paragraph 79) that any application made under the general liberty to apply provisions made otherwise than in an emergency or by agreement should initially be made without notice to other parties so that the Court can satisfy itself that there exists a matter with which it ought to be concerned; he further provided that all hearings should initially go to a local nominated District Judge who may of course, transfer the case if he or she thinks it appropriate, save that the first review and any interim application pending the first review should be reserved to himself.

In concluding his judgment Hedley J indicated a number of provisional views as to contact, on the basis that he was prepared to deal with it by way of a separate order once AH had had an opportunity to indicate whether, and if so which, of requested undertakings she was willing to give, since she could not be ordered to give them. These provisional views are entirely fact specific and do not need to be set out here.

Comment

This case of some considerable interest for three reasons: (a) Hedley J's comments about the assessment of capacity and the particular difficulty in the case of those falling under s.3(1)(c); (b) his clear statement that it is only where the best interests of P compellingly require placement away from the family environment that such placement can be justified as a proportionate interference with the rights of both P and the relevant family members under Article 8(1) ECHR; and (c) his comments upon the deprivation of liberty in this case, and, in particular, his willingness to identify restrictions upon contact as giving rise to a situation of a deprivation of liberty. As to (b), it would appear that, whilst couched in terms of a reference to the particular facts of this case, Hedley J's statement should in fact be read as a wider statement of principle: it is certainly one that is in line with the consistent statements of Munby LJ as to the circumstances under which it is appropriate for the state to interfere in the private and family lives of incapacitated persons: see, for instance, *Re MM; Local Authority X v MM and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443.

In the matter of Mark Reeves (COP Case Number 99328848) (transcript available on the website of 7 Bedford Row at http://www.7br.co.uk/uploads/court-of-protection-judgment-mark-reeves.pdf)

Summary

In another case that was determined some time ago (5.1.10) but which, again, has only recently come to the attention of the authors, Senior Judge Lush had cause to consider the consequences of the decision of the Court of Appeal in *Peters v East Midland SHA & Ors* [2009] EWCA Civ 145, and, in particular, the observations of Dyson LJ regarding double recovery in personal injury proceedings, where

(at paragraphs 64 and 65), he stated that:

"*Mrs Miles has offered an undertaking to this court in her capacity as Deputy for the claimant that she would (i) notify the senior judge of the Court of Protection of the outcome of these proceedings and supply to him copies of the judgment of this court and that of Butterfield J; and (ii) seek from the Court of Protection (a) a limit on the authority of the claimant's Deputy whereby no application for public funding of the claimant's care under section 21 of the NAA can be made without further order, direction or authority from the Court of Protection and (b) provision for the defendants to be notified of any application to obtain authority to apply for public finding of the claimant's care under section 21 of the NAA and be given the opportunity to make representations in relation thereto.*

In our judgment, this is an effective way of dealing with the risk of double recovery in cases where the affairs of the claimant are being administered by the Court of Protection. It places the control over the Deputy's ability to make an application for the provision of a claimant's care and accommodation at public expense in the hands of a court. If a Deputy wishes to apply for public provision even where damages have been awarded on the basis that no public provision will be sought, the requirement that the defendant is to be notified of any such application will enable a defendant who wishes to do so to seek to persuade that the Court of Protection should not allow the application to be made because it is unnecessary and contrary to the intendment of the assessment of damages. The court accordingly accepts the undertaking that has been offered."

The matter came before Senior Judge Lush in the following circumstances. Mr Reeves had obtained a substantial judgment at trial in 2003 for personal injuries sustained in an accident during which he had suffered a traumatic brain injury. The Court had concluded that his future care would be best met at a rehabilitation unit, TRU, rather than in his own home, and an award was made in respect of future care. In December 2006, Mr Reeves' property and affairs Deputy approached the relevant local authority, St Helen's Council, to ascertain whether it was potentially liable to contribute towards the costs of Mr Reeves' care at TRU. In July 2009, St Helen's wrote to the Deputy, noting that Mr Reeves had been awarded a personal injury award on the basis that he would be paying for future care himself, and formally requesting (on the basis of *Peters*), that the Deputy apply to the Court of Protection for authority to make a request of St Helen's Council to make a request for public funding for future care. The Deputy did so.

Having set out the rival submissions, Senior Judge Lush concluded that the application was misconceived in seeking to apply the *Peters* decision retrospectively to a personal injury claim resolved some six years before *Peters*. Senior Judge Lush noted that Mr Reeves' Deputy had a duty to act in his best interests, including "*claiming all state benefits to which Mr Reeves may entitled and, if appropriate to do so, applying to a local authority under the National Assistance Act 1948*." He found that, in most cases, the order appointing a Deputy would give sufficient general authority to them to allow them to apply for social security benefits and to a local authority for a care needs assessment without having to obtain specific authorisation; he noted that he considered that it was implicit in the judgment in *Peters* that the Deputy had such authority – the purpose of the undertaking given in *Peters* was therefore to remove this authority from the Deputy and give it to the Court. Senior Judge Lush considered that the *Peters* undertaking was specific to that case, and noted that no such undertaking had been given in Mr Reeves' case; further "*there is no obligation upon the Court of Protection to adjudicate as between the claimant and defendant, or the claimant and local authority on the issue of double recovery*."

Senior Judge Lush then outlined his views as to the general position regarding such undertakings and the consideration of double recovery as follows:

"*Notwithstanding the undertaking that was approved in Peters and other undertakings of a similar nature, I am of the view that the Court of Protection is no longer really the appropriate forum to adjudicate on matters of this kind. Its*

primary function is to act in the best interests of a protected beneficiary and, even though it would strive to be impartial, there may be a perception of bias for this reason. Furthermore, the close links which the court had with personal injury litigants generally were effectively severed when the Mental Capacity Act 2005 came into force on 1 October 2007, and the court's approval was no longer required in cases involving settlements out of court on behalf of incapacitated claimants. Additionally, the court no longer supervises deputies: that is one of the functions of the Office of the Public Guardian.

In the absence of any order of the Court of Protection restricting the authority of a claimant's deputy from applying for public funding of the claimant's care under section 21 of the National Assistance Act, the correct procedure would seem to be for the deputy to apply to the local authority and, if he is dissatisfied with the response he receives, to consider the merits of an application for judicial review."

Senior Judge Lush ordered that there be a departure from the ordinary costs rules because the Deputy was compelled to make the application by St Helen's Council on a misconceived basis. In view of the Council's conduct before as well as during the proceedings, he ordered that the costs of both parties be paid by the Council.

Comment

This judgment reinforces the OPG guidance that was already in place to the effect that *Peters* undertakings are not retrospective. It further reiterates the obligations upon property and affairs Deputies to ensure the maximisation of P's assets by drawing upon the resources of the state where appropriate – creating tensions that are already apparent in cases before the Court of Protection and are only likely to increase as public funding is squeezed.

Furthermore, the question of the validity of so-called *Peters* undertakings and of the appropriate forum to adjudicate upon issues of double recovery is a fraught one, and this judgment provides some welcome clarification as to the nature of disputes upon which Court of Protection will *not* adjudicate in this regard. In the views of the authors, serious questions arise about the extent to which the undertaking given in *Peters* was one that was properly accepted by the Court of Appeal. Those concerns go beyond the scope of this newsletter, but can be explained upon application; in summary, they relate to the extent to which the Court of Appeal had fully in mind both the complexities of the legislation governing community care provision and the role of Deputies under the MCA 2005. However, for present purposes, it is clear that the forum in which disputes as to how to prevent double recovery in future should be conducted is the civil court in which the personal injury claim is being advanced, rather than before the Court of Protection on any subsequent application by the deputy in line with a *Peters* undertaking.

EG v RS, JS and BEN PCT (COP Case number 10237109)

Summary

In this judgment, delivered on 29.6.10, HHJ Cardinal heard an appeal by a solicitor (EG) against an order made that she pay the costs of her failed application for permission to apply to be appointed the health and welfare deputy of RS. She was ordered to pay the costs of JS, the sister of RS, BEN PCT (the Primary Care Trust involved) and the OS representing RS as litigation friend.

The case arose out a complex and acrimonious dispute regarding the welfare and finances of RS, a man severely injured in a road traffic accident and brain damaged as a result. In addition to those identified above, CH, the brother in law of RS and estranged husband of JS, was a key player, as property and affairs deputy of RS. At the material time, EG was CH's solicitor. In Feburary 2009, she applied for permission to be appointed health and welfare deputy for RS. By her application, EG sought permission to apply to be Deputy and in that application raised the potential conflict arising out of her role as CH's solicitor. That application was considered by District Judge Owen initially at a directions hearing in May 2009, at which the Official Solicitor queried the need for a health and welfare to be appointed at all. The hearing

was adjourned for EG to set out why an appointment was appropriate and why she considered she was the suitable applicant. EG filed a witness statement setting out these matters in August 2009. The response of JS's solicitors was that she was open though undecided as to the suggestion that a Deputy should be appointed but that EG was not suitable because of a conflict of interest. Their skeleton argument invited the court to dismiss EG's application. BEN PCT indicated it did not take a position as to whether or not a Deputy should be appointed or whether it should be JS or EG or another. The OPG filed a position statement as to its application only and was not concerned with welfare matters.

At the hearing on 25.8.09, District Judge Owen refused the application for permission of EG to be appointed and ordered her to pay costs of JS, Official Solicitor and BEN PCT. HHJ Cardinal, having directed himself as to the appropriate test regarding appeals set down in Rules 173 and 179 of the Court of Protection Rules 2007 and costs set down in Rules 157 and 159, set out the competing submissions of EG on the one hand RS and JS on the other (the appeal against BEN PCT having been conceded by consent; furthermore, JS limited herself upon appeal to seeking her costs of the hearing on 25.8.09). In setting out the submissions of EG, HHJ Cardinal made a number of pertinent comments, including (at paragraph 27) that he had been caused the gravest concern by the statement in the permission form she completed that she had advised CH and would like the "*court to determine whether in its opinion this causes any conflict of interest for me due to the current application. I believe my duties in advising CH and in acting as health and welfare deputy would not conflict but would ask the court to give specific consideration to this issue.*" HHJ Cardinal noted that "[i]*t is just not possible to act as honest broker on one hand and firmly on the side of one party alone on the other. It should have been clear even then to EG that she simply could not realistically pursue the application. Later on in his submissions to me Mr O'Brien* [for RS] *posed the question what would an ordinary member of the public think? The obvious answer is that the appointee has a prejudice, a bias, in favour of his/her client. I am disappointed that EG did not see this at the outse*t".

HHJ Cardinal further noted (at paragraph 28) that he considered that EG had been naïve to apply, because it was or should have been obvious "*that she simply could not be seen by the family of RS as an impartial Deputy in the light of past events and of the current litigation*." His concerns as to her ability to act impartially were only further heightened by a letter that she had sent (as CH's solicitor) on 17.8.07, in which she set out contact arrangements between JS and RS that would be acceptable to CH. Indeed, he noted (at paragraph 35) that he could not think of a case "*where the involvement of the solicitor had hitherto been more clearly on one side only*." Whilst HHJ Cardinal (at paragraph 37) acquitted EG of acting in bad faith, he found that she was naïve and "*pressed on with an application which she ought to have known was doomed to fail*."

In the circumstances, HHJ Cardinal found (at paragraph 38(iii)) that he could not see how District Judge Owen had strayed outside the terms of the Rules or the dicta in *Re Cathcart* [1893] 1 Chan 466, long regarded as the touchstone for applications for costs in cases involving those without capacity. Importantly, whilst he accepted (at paragraph 38(iv)) that as a matter of public policy the Courts should not discourage professionals from seeking appointments as Deputies by way of costs sanctions, he noted that there should be a limit to such applications "*where there is clear opposition and acrimony given the role of the would-be Deputy hitherto. It seems to be that such an applicant ought to ask him or herself am I in any way compromised by my intervention to date? Is there any evidence of my taking sides too strongly? Can I be sure that all parties will indeed regard me as a neutral arbitrator? Am I really suitable given the history of conflict with my client and my support of him? Would my appointment mean more conflict?*" HHJ Cardinal endorsed the comments of the District Judge that the application had been an "*unfortunate*" one and declined even to grant permission to appeal his decision (save in respect of BEN PCT, and in respect of whether EG or her firm should pay, it having been conceded by the

respondents that it should be her firm).

Comment

As HHJ Cardinal noted at the outset, the appeal was "*a cautionary tale for all those who put themselves forward as professional deputies when too closely associated with one party in a dispute before the Court of Protection*." It is in retrospect more than a little surprising that EG chose to advance her application at all, let alone that she persisted with it beyond the directions hearing in May 2009, and the facts of the case illustrate clearly how careful professionals must be in ensuring that they both are and seen to be independent and impartial when advancing themselves as deputies. It is not beyond the bounds of possibility that a solicitor who has provided advice to one party could then advance themselves as a professional deputy; however, this judgment makes it very clear that they do so at their peril where there could be any suggestion that they were 'tainted' by their prior association, especially where (as so often) they put themselves forward in the context of a dispute between family members. Merely being a professional is not, in such a circumstance, enough.

D County Council v LS [2010] EWHC 1544 (Fam)

Summary

This case is the first the authors are aware of to consider the test for capacity to have sexual relations following *R v C* [2009] 1WLR 1786, in which doubt was cast on the earlier decisions of Munby J (as he then was) in *X City Council v MB, NB and MAB* [2006] 2 FLR 968 ("MAB") and *MM v Local Authority X* [2007] EWHC 2003 Fam ("*MM*"), both of which set out a very low threshold. In order to understand the decision in *LS*, it is necessary first to summarise briefly the ratio of these three cases.

In *MAB*, Munby J defined the test as follows:

"*Does the person have sufficient knowledge and understanding of the nature and character – the sexual nature and character – of the act of sexual intercourse, and of the reasonably foreseeable consequences of sexual intercourse, to have the capacity to choose whether or not to engage in it, the capacity to decide whether to give or withhold consent to sexual intercourse (and, where relevant, to communicate their choice to their spouse)?*"

In *MM* Munby J explained further that in his view, capacity to consent to sexual relations was act-specific, not person-specific, saying that:

"*A woman either has capacity, for example, to consent to 'normal' penetrative vaginal intercourse, or she does not. It is difficult to see how it can sensibly be said that she has capacity to consent to a particular sexual act with Y whilst at the same time lacking capacity to consent to precisely the same sexual act with Z*."

R v C was a criminal case, and thus the decisions in *MM* and *MAB* did not fall directly to be considered. However, in those cases and in *R v C,* it has consistently been said by the courts that the tests should be the same in both criminal and civil contexts. In *R v C*, Baroness Hale criticised the approach of Munby J in the civil cases, saying that:

"*I am far from persuaded that those views were correct, because the case law on capacity has for some time recognised that, to be able to make a decision, the person concerned must not only be able to understand the information relevant to making it but also be able to 'weigh* [that information]*' in the balance to arrive at* [a] *choice*"

And further:

"*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*."

In *LS*, Wood J considered the effect *of R v C* on the earlier decisions and concluded that "*it is impossible for me to come to any other conclusion than that the approach adopted in those paragraphs of R v C apply to questions of*

*the capacity, or lack of it, to make decisions on the issue of sexual relations (and indeed of marriage), in both the civil and the criminal arena and, in particular, are, in my judgment, wholly consistent with the statutory requirements of section 3 of the 2005 A*ct." In other words, he accepted that to the extent the judgments in *MM* and *MAB* might be seen to have ignored the third requirement under s.3 MCA – the ability to use or weigh information – they were not correct.

Roderick Wood J went on to consider in what circumstances there might be a lack of capacity and to emphasise the importance of separating 'best interests' considerations from the issue of capacity. He said:

"*What is necessary is that the particular sexual partner* [...] *impedes or undermines or has the effect of impeding or undermining the mental functioning of a person when that person makes their decisions, so as to render them incapacitous*"

Comment

The position, it appears to the authors, is that the test for capacity to consent to sexual relations is that set out in *MM* and *MAB*, with the added requirement that the individual be able to use or weigh relevant information, and in particular should not be prevented from such using or weighing of relevant information by the particular influence of their partner.

The judgment in *LS* does not completely demystify the issue, and the authors are aware of at least one case presently before the court in which the matter will be considered further. One difficulty with *LS*, *MM* and *MAB* is that they concern what might be thought the more simple cases. When complicating factors such as exploitative relationships, allegations of abuse, simultaneous criminal proceedings, and infection with sexually transmitted diseases exist, the 'low threshold approach' may not be thought to give adequate protection to vulnerable adults.

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