ThirtyNine
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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: June 2012

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Editors

Introduction

Welcome to the June 2012 issue of the 39 Essex St newsletter, which includes two significant cases relevant to the increasingly difficult question of public funding in the Court of Protection.

As ever transcripts should be found on www.mentalhealthlaw.co.uk if not otherwise available.

Re HA [2012] EWHC 1068 (COP)

Procedure – public funding – Legal Services Commission

Summary

This matter came before the Court by way of two applications, a section 21A challenge brought by P, and a separate application by P's daughter to be appointed P's property and affairs, and welfare deputy. P was being accommodated in a care home by the Local Authority in circumstances which the parties agreed amounted to a deprivation of P's liberty on account of P's continued expressed wish to return to her home. Charles J described the central issue for the court to determine being whether or not the restrictions in a care home best promote P's welfare in the least restrictive way, and whether there is a support package that could warrant her return home in her best interests. The Court noted that those welfare issues can fall for consideration under a number of sections of the MCA and are important to the consideration of the best interests assessment under the DOLS regime and s. 21A.

The issue for the Court on this interim application was what if any interim declarations should be made by the Court on a section 21A application pending the final hearing. In particular whether they should be declarations made pursuant to section 21A (ie to extend the statutory scheme if that is possible) or pursuant to section 16 of the MCA. The Court acknowledged the importance as a matter of practice in this distinction as a result of the different funding available from the Legal Services Commission in respect of an application under s.21A, and other applications before the court, albeit that they can often raise the same central issues.

Charles J took the view that the court should exercise its own powers to hold the ring whilst it determines the application and therefore give appropriate interim authorisations of any deprivation of liberty and make appropriate interim orders pursuant to section 16. If, when it determines the application, the court concludes that the relevant person should live in a care home, or be in a hospital, it should generally

direct that the statutory DOLS scheme should apply again to any deprivation of liberty. That regime has checks and balances that generally should be preferred to review by the court.

Despite making the declarations under section 16, his Lordship stated that the application remained one under s. 21A MCA. Even though the court is exercising powers conferred by other sections and the central issue is what available regime of care will best promote P's best interests, the proceedings remain s21A proceedings because they were issued under s. 21A and, in the exercise of the jurisdiction conferred by that section, the court has to consider amongst other things the best interests of P.

Comment

This important judgment provides some assistance for anyone who has had to grapple with the Legal Services Commission in a s.21A challenge which persists beyond a first hearing. Mr Justice Charles was clear that the proceedings should be seen as s.21A proceedings, notwithstanding that the court may, as an interim measure, make declarations under its general welfare jurisdiction. It is to be hoped that the LSC will accept this analysis, and will not continue to withdraw non-means-tested funding in cases where a standard authorisation lapses during the course of proceedings and is not renewed, and/or where interim declarations are made by the court.

Re G [2012] EWCA Civ 431

Inherent jurisdiction – interim injunctions – Court of Appeal

Summary

This case concerned interim injunctions and case management directions made by the High Court in respect of a young adult with Down's Syndrome. The local authority with responsibility for G had applied to the court to prevent the publication of confidential information about G. Interim orders had been made under the inherent jurisdiction which included injunctions against named individuals, and provision for an assessment of G's capacity to be conducted. G's mother had repeatedly failed to facilitate that assessment or to file evidence in support of her position, and a considerable period of time had therefore elapsed during which the interim injunctions remained in place. The mother sought permission to appeal on the basis that the orders were paternalistic and were not underpinned by adequate evidence that G lacked capacity or was a vulnerable adult. The Court of Appeal refused permission to appeal, observing that:

> '*In situations like this, where on three specific occasions invitations or orders for the production of a contrary case have been ignored, the trial judge is entitled to draw inferences that there may be an ever increasing need for judicial investigation into the reality. The greater the need for investigation the greater the need for caution in the interim. Not to impose protection, in perhaps regard for assumptions which would otherwise be made as to capacity and as to good faith, only expose the admittedly vulnerable adult to an unnecessary risk.'*

Comment

The publication of the Court of Appeal's reasons for refusal of permission is of interest because of the robust approach taken to the powers of the court to investigate capacity and undue influence where an issue is raised.

Re DS & Ors (Children) [2012] EWHC 1442 (Fam)

Procedure – public funding – Legal Services Commission

Summary

This case, in the Family Division, is nonetheless relevant to practitioners in the Court of Protection because the guidance given by the President regarding the appropriate wording to adopt in orders in which permission for expert evidence is given has some applicability in the

Court of Protection.

The original wording that had been used in the family proceedings was the familiar '*the the court deems this expert report to be a reasonable and necessary disbursement on the certificates of the publicly funded parties…..'.*

The President considered Schedule 5 of the Community Legal Services (Funding) Order 2007 which contains the relevant provisions on the funding of expert reports, and the imminent change in approach in family proceedings which will mean that expert evidence must be 'necessary' rather than 'reasonably required', and gave the following guidance (which has been paraphrased and modified to focus on issues relevant to the Court of Protection):

i) The standard wording cited above should not be used. It does not bind the LSC. Instead, wording such as the following should be adopted:

   a) The proposed assessment and report by X are vital to the resolution of this case.

   b) The costs to be incurred in the preparation of the report are wholly necessary, reasonable and proportionate disbursements on the funding certificates of the publicly funded parties in this case.

ii) If the court takes the view that the expert's report is necessary for the resolution of the case it should say so, and give its reasons, either in a preamble or short judgment, even where the order is by consent.

Comment

Although at present the test for the commissioning of expert evidence in the Court of Protection remains one of 'reasonably required' (COPR r.121), it would be as well to follow the President's guidance in order to minimise problems with securing public funding for expert reports. This will require the parties seeking expert evidence to persuade the court that additional evidence is required, beyond that available from the relevant statutory bodies involved and/or P's treating psychiatrist, in order that the court can satisfactorily explain why permission has been given. While this process no doubt occurs in most cases already, it may be that having to give reasons for the decision might focus the court's mind more sharply on the need for, and scope of expert evidence, as well as the stage at which it should be obtained.

Sedge v Prime (unreported, 25 April 2012)

Best interests – personal injury proceedings

Summary and comment

We mention this case in passing as an example of the interface between personal injury proceedings and the Court of Protection's welfare jurisdiction. It concerned a man who had suffered substantial injuries in a road traffic accident, and who was likely to receive significant damages. An application for an interim payment was made, to fund a trial of community living, instead of continued placement in residential care. The Defendants opposed the application in part on the basis that it was not in S's best interests to live (at greater cost) in the community, according to experts instructed by them in the personal injury proceedings. There was clearly a dispute as to S's best interests, and the QBD judge noted that he was not the person to resolve the dispute, which was a matter for those caring for S, subject to the supervision of the Court of Protection. Applying the relevant case-law on the issue of interim payments, and not having regard to best interests considerations, the judge ordered the interim payment but observed that '*Claimant's solicitors should not regard by decision as in any way encouraging trial runs of community living at insurers' expense'*.

Taking Stock: The MHA 1983 and MCA 2005 in Practice

This year's conference will be held in Manchester on 12 October 2012 and will include a Key Note Address by Mr Justice (Sir Peter) Jackson and consideration of the *Cheshire West* case by Katie Scott. For further details, please

email Neil.

Our next update should be out at the start of July 2012, unless any major decisions are handed down before then which merit urgent dissemination. Please email us with any judgments and/or other items which you would like to be included: credit is always given.

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

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