Mental Capacity Law Newsletter June 2014: Issue 47

Compendium Issue

Introduction

Welcome to the June issue of the Mental Capacity Law Newsletter family. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: the Court of Appeal revisits capacity (and the role of precedent); prohibiting contact; and advance decisions to refuse treatment;

(2) In the Property and Affairs Newsletter: the sequel to the infamous *Rolex* case;

(3) In the Practice and Procedure Newsletter: a rare award of costs in welfare proceedings; the proper place of the press in CoP proceedings; revisiting decisions on appeal; judicial contact with the subject of proceedings; joint instruction of experts in publicly funded cases, and a plea for assistance with streamlining directions hearings;

(4) In the Capacity outside the COP newsletter: two important cases involving capacity and children and two book reviews;

(5) In the Scotland Newsletter: a vitally important decision of Sheriff John Baird which casts significant doubt upon the validity of very many powers of attorney entered into in Scotland and upon the standard template available on the Scots OPG website.

We are also delighted to include with this newsletter a discussion paper on the Convention on Persons with Disabilities and an analysis of both the MCA 2005 and the AWIA 2000 by reference to its requirements. This discussion paper, written by Lucy Series, Anna Arstein-Kerslake, Piers Gooding and Eilionóir Flynn, is vital reading for all practitioners (of whatever hue) seeking to understand the implications of this Convention for domestic law and practice in both England and Scotland.

ThirtyNine ESSEX STREET

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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

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Capacity in the Court of Appeal (again)

RB v Brighton and Hove Council [2014] EWCA Civ 561 (Arden, Jackson and Fulford LJJ)

Mental capacity – deprivation of liberty

Summary

In June 2007 RB sustained a serious brain injury in an accident. He was treated for eight months in hospital and then transferred to a care home, S House. In 2011 RB ceased participating in rehabilitation programmes and proposed to leave S House. The staff at S House considered that RB was not capable of independent living. Because of his physical and mental disabilities he was likely to (a) resume his former chaotic lifestyle, including using alcohol to excess and (b) to suffer serious or fatal injuries in consequence.

The Council granted a standard authorisation pursuant to Schedule A1 to the MCA 2005. RB brought an application under s.21A MCA 2005 to terminate the standard authorisation. At first instance, District Judge Glentworth accepted that although RB's wish to consume alcohol pre-dated his brain injury, he was unable to weigh up information to make a decision because of his brain injury, and was therefore in a different position to a non-brain injured alcoholic. It was in his best interests to remain in the care home despite his objections. On appeal, HHJ Horowitz refused to interfere with the District Judge's reasoning and conclusion on either capacity or best interests. Before the Court of Appeal, RB argued that two preconditions for deprivation of liberty were not satisfied, namely the mental capacity requirement (set out in paragraph 15 of Schedule A1) and the best interests requirement (set out in paragraph 16 of Schedule A1).

In relation to the first ground, the core submissions were that:

1. RB's inability to control his drinking was the same now as it was before the accident. RB's brain injury is not the cause of his propensity to injure himself through excessive drinking. Furthermore the judge erred in applying s.3(1) MCA 2005: the third of the specified skills, namely using and weighing information, does not and cannot be expected to come into operation when an alcoholic is considering whether to have a drink.

2. Reliance was placed upon the fact that RB preferred S House to alternative accommodation which was offered at a place called V, and RB had capacity to make that decision.

3. As a separate strand of argument it was pointed out that by 2013 RB had ceased participating in rehabilitation at S House. Therefore the "care and treatment" referred to in the mental capacity requirement could only be day to day personal care. RB was aware that he needed that. He had capacity to decide that he wished to receive that in a flat, rather than at S House.

In relation to the second ground of appeal, the core submission was that the personal care which RB currently received could equally well be provided in a flat. The sole purpose of RB's detention at S House was to stop him drinking. It was therefore submitted that it was a misuse of the "best interests" provision to incarcerate an alcoholic so as to stop him drinking. On the evidence, it was submitted, there was no basis for concluding that detention in S House accords with RB's best interests.

These arguments were described by Jackson LJ (giving the sole reasoned judgment on behalf of the Court of Appeal) as "formidable." In the course of his judgment, Jackson LJ observed that:

> *"40. The cases which arise for decision under Part 1 of the MCA (including the present case) tend to be acutely difficult, not admitting of any obviously right answer. The task of the court is to apply the statutory provisions, paying close heed to the language of the statute. Nevertheless, as judges tread their way through this treacherous terrain, it is helpful to look sideways and see how the courts have applied those statutory provisions to other factual scenarios. This has nothing to do with either the doctrine of precedent or the principles of statutory interpretation. The purpose is simply to see how other judicial decisions have exposed the issues or attempted to reconcile the irreconcilable."*

The judge went on to dismiss the submission made on behalf of RB that, as in the sphere of sexual relations, a decision (by an alcoholic) whether to have a drink is not one that generally involves a complex process of reasoning, and so the ability to use or weigh information should have little or no significance in assessing capacity in this context, noting that:

> *"64 […] What the court must do in the present case is apply the clear statutory provisions to the facts as found by the first instance judge, District Judge Glentworth. It is inappropriate for the court to start comparing the decision which RB wishes to make in this case with the decisions which other disabled persons sought to make in other cases.*
>
> *65. That approach sucks the court into convoluted reasoning. It also drives up costs. There appear to be innumerable 'capacity' cases out there in the law reports and on the*

websites... If lawyers are going to trawl through previous cases looking for factual similarities or analogies and then debate these in their skeleton arguments, that will involve a substantial waste of costs and time."

The Court of Appeal rejected RB's case, holding that:

"70. The decisions which RB wishes to make require a process of using and weighing up relevant information. On the basis of the expert evidence and of the district judge's findings of fact, RB is not capable of carrying out that mental process. The difficulties which RB has in using or weighing information and making consequent decisions accord closely with the situation described in paragraphs 4.21 and 4.22 of the Code of Practice. RB is unable to appreciate and weigh up the risks which he will run if he resumes his former way of life and goes out on drinking bouts. Therefore, applying MCA section 3(1)(c), RB does not have capacity to make this decision.

The Court of Appeal went on to hold that all appropriate steps had been taken to assist RB to make a capacitous decision, and that it was clearly in his best interests to remain deprived of his liberty in the care home despite his objections.

81. Both the Council and the court are aware of RB's wishes, namely to live independently in the community. The MCA section 4(6)(a) requires both the Council and the court to take those wishes into account. I do so. Unfortunately it is not possible for the time being to comply with those wishes.

82. RB is not thereby condemned to a lifetime of incarceration without hope of release, as Mr Gordon submits. If only RB would continue to co-operate in rehabilitative programmes (as he did up until 2011) he may well become capable of independent living in the future. In order to comply with the MCA section 4(4), the staff at S House must continue to offer rehabilitation to RB and must encourage him to participate.

83. Without proper safeguards a regime of compulsory detention for medical purposes would be unacceptable, indeed Orwellian. However, the carefully drawn provisions of the MCA together with the reviewing function of the court ensure that the power to detain is not misused. In the present case deprivation of liberty is necessary in order to protect RB from seriously injuring himself. That must be in his best interests."

Comment

This judgment is very significant in terms of the approach that is to be adopted by judges to the MCA 2005 and to the use of case-law to amplify the provisions of the statute. It is, clearly, correct that the starting point must be the plain words of the Act. However, almost every word in Sections 1-4 (in particular) is loaded with significance going far beyond the plain terms; especially given the seriousness of the consequences of a conclusion that a person lacks capacity in one or more domains, it is hardly surprising that both lawyers and in turn judges have sought to look sideways for assistance.

While it is certainly correct that judges in the CoP should not seek to strive to shoe-horn the very sensitive facts of one case into the ratio of another; we hope that this decision is not taken as a licence to abandon attempts to achieve consistency between decisions where such can properly be achieved. This would, apart from anything else, have a disastrous impact upon the already difficult task of bringing about understanding of the MCA 2005 outside the courtroom. The issue of capacity, in particular, is one in which, in the editors' view, there both can and should be consistency of approach. It is far from obvious why a higher level of sophistication

as regards the using or weighing of information should be required in relation to decisions about care, residence or contact, as compared to decision about whether to have a sexual relationship, or whether to marry. (See also the *RC* case covered in this newsletter, in which the ability to weigh information was held to be of little relevance where an individual had strongly held religious beliefs on an issue). Without a clear and consistent approach being taken to the often critically significant requirement of using or weighing information, there is a serious risk that the capacity bar will be set too high in spheres of decision-making in which the state has fewer qualms about intervening.

What does 'prohibiting contact' mean?

PB v RB and Ors [2013] EWCOP B41 (HHJ Altman)

Summary

RB was a 71 year old woman with Alzheimer's disease who lacked capacity to make decisions about contact, including with her son, PB. Proceedings in the CoP took a sadly familiar path, with PB objecting to the care being provided to his mother and voicing those objections to professionals in a way which the court found placed her care at risk. Restrictions were placed on PB's contact with RB, and in due course, DJ Eldergill determined that a member of the local authority should be appointed as welfare deputy for RB, with the power to make decisions about contact between RB and PB. In particular, the deputy was to be permitted to prevent contact beween RB and PB taking place for up to a maximum of 7 days in the event that PB became embroiled in conflict once again which threatened to put RB's care at home at risk. PB appealed on the basis that it was ultra vires s.20 MCA 2005 for the court to provide the Local Authority deputy for welfare with the power to suspend contact for up to one week, because the Act provides that a welfare deputy cannot '*prohibit*' contact.

The appeal was dismissed. The court noted that s.17 MCA 2005 distinguished 'deciding what contact, if any P, is to have with any specified person' and 'making an order prohibiting a named person from having contact with P'. The latter was not within the power of a deputy by virtue of s.20(2)(a) MCA 2005. But 'prohibiting contact' did not mean a permanent ban on contact, as the judge had found at first instance. That being the case, how could the 7 day ban which the deputy was permitted to impose be distinguished from the prohibition of contact?

The difference between the two provisions was determined by asking if the period without contact could be part and parcel and an incident of an on-going management and monitoring of contact in a flexible way for a proportionate period of time and as a proportionate adjustment to the arrangements that would otherwise have taken effect in the particular family, or would it be more of a specific response, standing alone, to a situation with the consequence of a set pattern of no contact probably for a more substantial period of time commensurate with an application to court (paragraph 24)?

In the instant case, it was within the scope of the deputy's powers to prevent contact between RB and PB for up to seven days at a time as part of the day to day management of contact without having to refer back to the court, the court having determined itself the limit to the cessation of contact but allowing the deputy to exercise his discretion in deciding whether to cease contact for short periods within that framework. The deputy had not been given a power to prohibit contact within the meaning of the statute.

Comment

The explanation of the difference between prohibiting contact and a 7-day ban on contact in this decision is somewhat tortuously worded, and yet captures a readily understandable distinction on the facts of the case. The deputy is attempting to manage a dynamic situation on the ground by exercising a power, approved by the court, to stop visits where it is clear that problems are otherwise going to arise for P, without having to apply to the court first. If the deputy (or any decision maker) had to apply to the court for a declaration each time a contact visit needed to end early, or to be postponed or cancelled due to X's conduct, the *Cheshire West* flood would rapidly start to look like a small puddle. No doubt it would be simpler if 'prohibition' meant 'permanent ban', but the formulation adopted in this case gives more protection to P (and P's visitors), as the crucial aspect of the deputyship order which ensured the validity of its time-limited suspension of visits was the court's preliminary authorization of a framework for contact which followed a full investigation of RB's best interests.

Advance decisions to refuse treatment

Nottinghamshire Healthcare NHS Trust v RC [2014] EWHC 1317 (COP)

Summary

This is the sequel to the case of *Nottinghamshire Healthcare NHS Trust v J* [2014] EWHC 1136 (COP) that we reported in our May newsletter.

The case concerned RC (known as J in the first judgment), a young man aged 23 who was in prison but detained under the Mental Health Act 1983. He suffered from what was described as a serious personality disorder, a symptom of which was that he had engaged in significant self-harm on a number of occasions which resulted in profuse bleeding (he was on anticoagulant drugs because of a history of thrombosis). He was a Jehovah's Witness and had made what purported to be an advance decision to refuse specified medical treatment, namely blood transfusions.

The matter came on by way of an urgent ex parte application before Holman J on 9 April 2014.

The first limb of the Trust's application asked for a declaration that a written advance decision was valid and was applicable to the treatment described in the advance decision. The judge considered sections 24 – 26 of the MCA 2005 and declared on an interim basis that the written advance decision was valid and applicable to that treatment notwithstanding that (a) the young man's life may be at risk from the refusal of treatment and (b) that he was a patient detained under the Mental Health Act.

The second limb of the application brought by the NHS Trust related to the interrelation of the provisions of the MCA 2005 in relation to advance decisions to refuse treatment and the applicability in this case of section 63 of the Mental Health Act 1983 which provides: "*the consent of a patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering…if the treatment is given by or under the direction of the approved clinician in charge of the treatment.*" The second limb of the application asked the judge to make an interim declaration that "*it is lawful for those responsible for the medical care of the respondent to act in accordance with his written advance decision and withhold treatment by blood transfusion or with blood products in accordance with his expressed wishes notwithstanding the existence of powers under section 63 of the Mental Health Act 1983.*"

Holman J held that he did not feel equipped or willing to make the declaration as he had only heard representations from one side without notice to the patient or any other person. The substantive hearing was ultimately heard before Mostyn J on 24 April; he gave his decision at the hearing, with his reasons following in a judgment dated 1 May 2014.

Mostyn J noted that if a self-destructive course is being pursued by an incapacitated person (who has not made a valid advance decision) then pursuant to Court of Protection Practice Direction 9E life saving measures will likely amount to "serious medical treatment" requiring the issue to be determined by the Court of Protection (paragraph 16). A decision imposing equivalent measures on a vulnerable adult would require a hearing in, and an order of, the High Court (paragraph 17).

A positive decision to impose non-consensual medical treatment pursuant to section 63 of the MHA is a public law decision susceptible to judicial review – which takes the form of a full merits review. As Mostyn J noted, however,

> *"19.* […] *a decision made by the approved clinician in charge of the treatment in respect of a patient detained under the MHA not to impose any treatment on him or her is not accompanied by any procedure for judicial scrutiny of it. This is surprising, especially as Article 2 of the European Convention on Human Rights is (as here) likely to be engaged…*
>
> *21. In my judgment where the approved clinician makes a decision not to impose treatment under section 63, and where the consequences of that decision may prove to be life-threatening, then the NHS trust in question would be well advised, as it has here, to apply to the High Court for declaratory relief. The hearing will necessarily involve a "full merits review" of the initial decision. It would be truly bizarre if such a full merits review were held where a positive decision was made under section 63, but not where there was a negative one, especially where one considers that the negative decision may have far more momentous consequences (i.e. death) than the positive one."*

As to the principles that the court should apply when conducting a full merits review on an application for declaratory relief in circumstances where a decision has been made not to impose potentially life-saving treatment under s.63 MHA 1983, Mostyn J held that:

> *"26.* […] *Obviously the expressed wishes of the patient will be highly relevant. If there is an advance decision in place under sections 24 and 26 of the MCA then this will weigh most heavily in the scales. The Hippocratic duty to seek to save life, or the benign but paternalistic view that it is in someone's best interests to remain alive must all surely be subservient to the right to sovereignty over your own body. Beyond this, considerations such as whether the treatment would be futile will no doubt be relevant; for example, if the repair of a laceration would inevitably be followed by a new one or if the patient was suffering from another unrelated terminal disease."*

In this case, the treating clinician, Dr S, and the independent forensic psychiatrist Dr Latham made written reports were almost unanimous. They agreed (paragraph 27) that:

1. RC suffered from a mental illness namely antisocial and emotionally unstable personality disorders. This was a disturbance of the functioning of the mind, which was one of the classic definitions of mental disorder.

2. However, he had full capacity to refuse blood products. His refusal derived almost

exclusively from his religious faith. Further, he had full capacity to enter into the advance decision on 4 April 2014. Further still, his decision to adopt the religion of the Jehovah's Witnesses was made with full capacity.

3. So far as RC's capacity to harm himself was concerned on occasions he did so with full capacity. However, on other occasions, particularly at times of severe emotional distress, it was likely that he did so without the capacity to choose to self-harm.

4. RC harmed himself with the intention of distracting himself from distressing thoughts and feelings. He did so without really thinking about the consequences and dangers. However his view was that it is his body and therefore his choice to damage it.

Where they disagreed was whether the administration of a blood transfusion amounted to treatment which prevented the worsening of a symptom or manifestation of RC's mental disorder. Dr S was of the opinion that it plainly was. Dr Latham disagreed.

On that question, Mostyn J concluded that:

> *"31… It cannot be disputed that the act of self harming, the slashing open of the brachial artery, is a symptom or manifestation of the underlying personality disorder. Therefore to treat the wound in any way is to treat the manifestation or symptom of the underlying disorder. So, indisputably, to suture the wound would be squarely within section 63. As would be the administration of a course of antibiotics to prevent infection. A consequence of bleeding from the wound is that haemoglobin levels are lowered. While it is strictly true, as Dr Latham says, that 'low haemoglobin is not wholly a manifestation or symptom of personality disorder', it is my view that to treat the low haemoglobin by a blood transfusion is just as much a treatment of a symptom or manifestation of the disorder as is to stitch up the wound or to administer antibiotics."*

When it came to capacity, having noted the fundamental principle of the presumption of capacity contained in s.1(2) MCA 2005, Mostyn J noted that:

> *33. […] In this case Mr Francis QC correctly argues that the only the possible question relates to whether RC is able to weigh information in the balance. In his report Dr Latham says:*
>
> > *'His ability to weigh the risks of refusing blood against his religious beliefs is difficult to describe because his religious beliefs effectively create, in his mind (and others) an absolute prohibition on blood products and so there is relatively little 'weighing' when it comes to this decision.'*

But, as Mostyn J noted:

> *"34. This aspect of the test of capacity must be applied very cautiously and carefully when religious beliefs are in play. In his essay [On Liberty] John Stuart Mill speaks of the prohibition in Islam on the eating of pork. He describes how Muslims regard the practice with 'unaffected disgust'; it is 'an instinctive antipathy'. There can be no circumstances where a Muslim could 'weigh' the merit of eating pork. It is simply beyond the pale. So too, it would appear, when it comes to Jehovah's Witnesses and blood transfusions. But it would be an extreme example of the application of the law of unintended consequences were an iron tenet of an accepted religion to give rise to questions of capacity under the MCA.*
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> *35. I therefore place little emphasis on the fact that a tenet of RC's religious faith prevents him from weighing the advantages of a blood*

> *transfusion should his medical circumstances indicate that one is necessary.*
>
> *36. I am completely satisfied on the evidence and so declare that RC has full capacity to refuse the administration of blood products."*

Mostyn J further held that the advance decision was valid, complying as it did with all the requirements in ss.24-5 MCA 2005.

The decision

Having conducted his full merits review, Mostyn J concluded that the decision made by Dr S not to use the MHA 1983 to override RC's capacitous wishes was entirely completely correct:

> *"In my judgment it would be an abuse of power in such circumstances even to think about imposing a blood transfusion on RC having regard to my findings that he presently has capacity to refuse blood products and, were such capacity to disappear for any reason, the advance decision would be operative. To impose a blood transfusion would be a denial of a most basic freedom. I therefore declare that the decision of Dr S is lawful and that it is lawful for those responsible for the medical care of RC to withhold all and any treatment which is transfusion into him of blood or primary blood components (red cells, white cells, plasma or platelets) notwithstanding the existence of powers under section 63 MHA."*

Comment

This is a very interesting judgment, not least in its clear upholding of the principle that a person with capacity should be able to refuse medical treatment even if – as here – there is a legal framework which could on its face be used to impose it against their will. This is so even where the result of that refusal is either inevitable or likely death. We would also respectfully endorse the proposition that circumstances such as that arose in this case should be brought to the Court.

The case also sits neatly with that of *A County Council v MS and RS* [2014] EWHC B14 (COP) (the tithing case) that we covered in the May newsletter, in which District Judge Eldergill was at pains to distinguish between the aspects of MS's decision-making that reflected his deeply-held religious beliefs and those aspects that might be said to relate to an impairment or disturbance of the mind or brain.

For further discussion of the questions relating to the inherent jurisdiction touched upon by Mostyn J, please see the comment by Alex here.

Treatment and MCS

Sheffield Teaching Hospitals NHS Foundation Trust v TH & Anor [2014] EWCOP 4 (Hayden J)

Summary

TH is a 52 year old man who is in a minimally conscious state. He was admitted to hospital in February 2014 with a pre-existing serious neurological disability called Central Pontin Myelinolysis, Wernicke-Korsakoff syndrome, suffering from epileptic seizures thought to be due to alcohol withdrawal and hyponatremia. This interim judgment sets out the court's reasoning for adjourning a decision as to whether the continued provision of ANH to TH is in his best interests, despite the apparently clear evidence that whatever the precise details of TH's conscious awareness, he would not have wanted to be kept alive in this condition, which was said by his treating clinician to be permanent and irreversible. The judge stated, having heard from a number of TH's friends and his ex-partner of 20 years that he was "*left in no doubt at all that TH*

would wish to determine what remains of his life in his own way not least because that is the strategy he has always both expressed and adopted. I have no doubt that he would wish to leave the hospital and go to the home of his ex-wife and his mate's Spud and end his days quietly there and with dignity as he sees it. Privacy, personal autonomy and dignity have not only been features of TH's life, they have been the creed by which he has lived it. He may not have prepared a document that complies with the criteria of section 24, giving advance directions to refuse treatment but he has in so many oblique and tangential ways over so many years communicated his views so uncompromisingly and indeed bluntly that none of his friends are left in any doubt what he would want in his present situation." However, further medical evidence including a SMART assessment was required in order that the court had the best medical evidence before it in order to determine whether fulfilling TH's likely wishes was in his best interests.

In his concluding remarks, Hayden J noted that:

> "55. *I must record that the Official Solicitor's lawyers appear not to share my analysis of the cogency and strength of TH's wishes regarding his treatment. I confess that I have found this surprising. If I may say so, they have not absorbed the full force of Baroness Hale's judgment in Aintree and the emphasis placed on a 'holistic' evaluation when assessing both 'wishes and feelings' and 'best interests'. They have, in my view, whilst providing great assistance to this court in ensuring that it has the best available medical evidence before it, focused in a rather concrete manner on individual sentences or remarks. To regard the evidence I have heard as merely indicating that TH does not like hospitals as was submitted, simply does not do justice to the subtlety, ambit and integrity of the evidence which, in my judgment, has clearly illuminated TH's wishes and feelings in the way I have set out.*
>
> *56. I reiterate that whatever the ultimate weight to be given to TH's views it is important to be rigorous and scrupulous in seeking them out. In due course the clarity, cogency and force that they are found to have will have a direct impact on the weight they are to be given. 'Wishes' and 'best interests' should never be conflated, they are entirely separate matters which may ultimately weigh on different sides of the balance sheet."*

Comment

This interim judgment is of particular interest in light of the efforts made by the court to ascertain TH's likely wishes about the continuation of ANH, despite the absence of any written advance decision to refuse treatment in such circumstances. Some readers may wonder why, having ascertained with some clarity what TH would likely have chosen, the further evidence and continued court proceedings are required – could it really be in TH's best interests for the end of his life to be determined by others in a way that he would have rejected, notwithstanding his inability to appreciate what is happening? The case has already received some coverage in the media, and it is to be hoped that when the court's final decision is made, publicity is given to the significance of creating an advance decision to refuse treatment, or a welfare LPA, in order to avoid drawn out court proceedings at the end of one's life.

The case that got away – the MCA/the MHA and the inherent jurisdiction

Finally, we note that the editors' day jobs have prevented us covering the important decision of

Hayden J in *Northamptonshire Healthcare NHS Foundation Trust and Anor v ML & Ors* [2014] EWCOP 2. We will cover it in the next issue, because it has a number of important observations about the proper dividing line between the MCA and the MHA, as well as the place of the inherent jurisdiction.

Tidying up after errant deputies

Re Gladys Meek; Jones v Parkin and ors [2014] EWCOP 1 (HHJ Hodge QC)

This case is the follow on from proceedings before Senior Judge Lush in April 2013, reported as *Re GM, MJ & JM v The Public Guardian* [2013] EWHC 2966; [2013] COPLR 290. That well known case concerned unauthorised gifts by deputies and resulted in the deputies being stripped of their deputyship and ordered to repay to P's estate sums in excess of £200,000. This subsequent case was brought by the new deputy and heard by His Honour Judge Hodge QC, and concerned the making of a statutory will on P's behalf, an application for an order calling in the former deputies' security bond and the question of whether or not the conduct of the former deputies should be referred to the police.

So far as the statutory will is concerned, the new deputy proposed that P's estate should be left equally between two charities. The other parties to the application were relatives who would otherwise be entitled under an intestacy, the former deputies and the Official Solicitor as litigation friend. Differing views were put forward as to the appropriate destination of P's estate. The value of P's estate (not counting the possible recovery from the security bond, which was in the sum of £275,000) was just over £114,000. Something over £92,000 had been incurred by all parties in respect of the costs of the applications before the court.

So far as the court's approach to the making of a statutory will is concerned, the court first referred to the relevant authorities, in particular the summary of the authorities in *NT v FS* [2013] EWHC 684 (COP); [2013] COPLR 313 at paragraph 8 of the judgment of His Honour Judge Behrens, and to the observations of Baroness Hale of Richmond in the Supreme Court in the medical treatment case *Aintree University Hospitals NHS Trust v James* [2013] UKSC 67; [2013] COPLR 492 at paragraph 45 which was cited as authority for the proposition that where, in section 4 Mental Capacity Act 2005, the statute refers to wishes and feelings and beliefs and values that are to be considered, those are of the incapacitous person himself and not those of a reasonable person in that person's position.

Referring to the potentially differing views that have been expressed on the relevance of the weight to be attached to P having "done the right thing" by his will and being remembered for that after his death, at paragraph 34 the judge said that the "right thing" is to be judged by reference to the standards of the incapacitous person himself and not by what the reasonable incapacitous person might have thought. He also, at paragraph 35, endorsed the "balance sheet" approach to the making of statutory wills.

So far as the actual disposition is concerned, the court followed the submissions of the Official Solicitor, excluding from the will those who would have benefitted under an intestacy principally because P's estate had been very substantially augmented by the unexpected death of P's sole statutory heir, namely her daughter. Her daughter had died at a time when P lacked capacity to make a will. Further, P had fallen out with one of the intestacy beneficiaries and had had no contact for many years with the other.

The court also had little difficulty in holding that the former deputies should not benefit under the statutory will because of their behaviour. In the result, the court ordered a quarter of P's estate to go to P's daughter's god-daughter with the remainder to charities (along the lines suggested by the Official Solicitor).

So far as a security bond is concerned, the court had little hesitation in ordering it to be called in and at paragraph 93 held that in cases of default by a deputy, the security bond should be called in "almost as a matter of course".

Finally, the court held that it was not in P's best interests for the deputies to be reported to the Police.

That judgment was given on 10th April 2014 and the statutory will was subsequently executed. On 21st April 2014, after the execution of the statutory will, P died and in a post-script to the judgment, the judge ordered that the judgment be published in an un-anonymised form. The judgment does not record what happened in respect of the costs of the application. No doubt at least some part fell on P's estate.

Comment

The application of the best interests test is not easy in the case of statutory wills. That is because at the time when the will comes into effect, P is dead and no longer has any interest in the disposition of his estate. P, of course, has such an interest during his lifetime, hence the reference in the cases to P's best interests being served by his "doing the right thing" in his will as this is something that P would have wanted to do had he had capacity.

In this case, it was possible for the court to conjecture on what P might have wanted to do in the changed circumstances after she inherited a large sum from her daughter's estate when P lacked capacity. Usefully, the court adopts what Baroness Hale said in the Aintree case about the need to look to what P's wishes and beliefs would have been on a subjective basis, not an objective basis of what a reasonable person might wish and believe.

The way in which that can be applied in a case where P has always lacked capacity, however, is more problematic. That would arise in cases where, for example, P has lacked capacity from birth because of, say, birth injuries and is the recipient of a large personal injury award.

Practitioners should also note that contested statutory will applications are costly and, where the estate is likely to be relatively modest, may well not be worth pursuing.

Simon Edwards

Costs in welfare proceedings

North Somerset Council v LW and others [2014] EWCOP 3 (Keehan J)

Summary

This case considers circumstances in which the court will depart from the ordinary rule that there be no order for costs in welfare cases (save that the relevant statutory body should pay 50% of the Official Solicitor's costs, in medical treatment cases).

The case concerned a young woman (LW) who was 24 years old and diagnosed with hebephrenic schizophrenia. The case first came before the court on 11 April 2014 when LW was in the late stages of pregnancy. North Somerset Council applied for permission under the inherent jurisdiction not to disclose the care plan for the unborn child to LW, namely removal into care at birth. At the hearing an issue arose as to whether an application should be made to the Court of Protection to permit the hospital at which she was due to give birth to perform a caesarean section if it were established that she lacked capacity to consent to medical treatment. Baker J therefore directed that the University Hospitals Bristol NHS Foundation Trust ("UHBT") to attend the hearing listed for 15 and 16 April 2014.

On 15 April 2014 the judge dealt with the application under the inherent jurisdiction and an application for a restricted reporting order. UHBT did not attend and was not represented. It was only when the judge threatened to telephone the Chief Executive of UHBT in open court to ask why the order of Baker J had not been complied with that counsel was instructed. The balance of the hearing on 15 April and the 16 April and 23 April dealt with the COP application.

At the hearing on 23 April 2014 all parties agreed that LW did not lack capacity to consent to medical treatment, including an elective caesarean section. No order was made on the Court of Protection application. An issue arose as to costs and the judge directed that the parties file written submissions.

On 1 May 2014 LW gave birth by elective caesarean.

The Official Solicitor and the local authority both sought an order for costs against one or more of the hospital trusts. The judge held that no substantive criticism could be made of the Third or Fourth Respondents but that the position was different in respect of the Second Respondent (UHBT).

In a judgment that was highly critical of the behaviour of UHBT, the judge held that it had fallen well short in meeting their duties to LW and her unborn child for the following principal reasons:

1. No comprehensive plan or contingency plan had been devised until after the court had been seized of the matter;

2. There was an unacceptable delay in arranging and/or undertaking a capacity assessment of LW's ability to consent to medical treatment;

3. On the evidence of the midwife the unborn child was at serious risk of death or very serious harm;

4. In the light of that evidence and evidence given by the midwife about a meeting on 7 April which concluded that an application needed to be made to the COP to seek

authority to give medical treatment to LW, the judge did not understand why:

a. An urgent capacity assessment was not undertaken on 9, 10 or 11 April; and

b. If it found LW lacked capacity to consent to medical treatment, an urgent application was not issued in the CoP.

5. Until the court was seized of the matter, no psychiatrist and in particular no psychiatrist familiar with LW, had been invited to attend the capacity assessment;

6. The response of the Trust to the order of Baker J of 11 April was wholly inappropriate and unacceptable (UHBT did not apply to discharge or vary the order but informed the local authority that it did not intend to attend or be represented); and

7. There appeared to have been little or no planning or communication between component parts of the trust responsible for LW's medical care and/or between the clinical staff and its legal department and certainly none which reflected the complexity, seriousness and urgency of the matter.

The cumulative effect of the above factors was that part of the hearing on 15 April 2014 and the whole of the hearing on 16 April 2014 were completely ineffective. It followed the court was justified in departing from the general rule that there be no order as to costs.

The judge ordered that UHBT pay the whole of the Official Solicitor's costs of 15 and 16 April which were ineffective for the purposes of the CoP application due to the failings of the trust. The hearing on 23 April was effective and the judge therefore held that the normal rule should apply and UHBT should pay half of the Official Solicitor's costs for that hearing.

UHBT was ordered to pay one half of the local authority's costs for the hearing on 15 April and the whole of its costs for 16 April.

Comment

The case is a cautionary tale for parties who consider that they do not need to attend court hearings where they have been directed to do so. UHBT's overall position that it was awaiting a capacity assessment and would make an application to the COP following that assessment if necessary was defensible but its failure to comply with the initial order to attend court and a lack of awareness of the apparent urgency of the case led to a highly critical ruling and substantial cost consequences. While there is a presumption of capacity under the MCA 2005, when an issue as to capacity is raised, the requirements of the MCA and Code of Practice must be diligently followed – whether or not the case happens to be before the Court of Protection at the time!

The press and the CoP

Re G [2014] EWCOP 1361 (Sir James Munby P)

Summary

In our report upon this case in the May Newsletter, we noted that we were awaiting with great interest the judgment of the President in the hearing we knew had occurred. That judgment was sent to us just as the Newsletter went to press.

The underlying facts relate to the applications made by the London Borough of Redbridge ('Redbridge') in relation to an elderly lady, G, considered to be a vulnerable adult, arising out of concerns regarding the behaviour of her live-in carer, C, and another carer, F, and their influence over G, her home and her financial affairs and with respect to her personal safety. In February 2014, Russell J held that G lacked the capacity to take the material decisions, such that proceedings relating to her welfare (and, in particular, as to the continued residence of G with her) were to continue in the Court of Protection.

Subsequent to that decision, Redbridge became increasingly concerned as to the fashion in which G appeared to be used by C and F in a campaign involving the press. They sought by an application issued in the Court of Protection on 18 March an order "*forbidding C and F, whether by themselves or instructing or encouraging others, from making any decision on behalf of or in relation to G, other than those in relation to day to day care without first discussing the same with G's litigation friend or litigation friend's representative*." That general form of relief was distilled down and adapted into more specific provisions, of which the most material was the order sought that: "*until further order C be forbidden, whether by herself or instructing or encouraging others, from taking G or involving G in any public protests, demonstrations or meeting with the press relating to any aspect of these proceedings*…" And further: "*requiring C and F to facilitate visits by an employee of the applicant authority to G twice weekly on Tuesdays and Fridays. For those purposes C and F would be required to provide full and unfettered access to G and ensure they do not remain in the property during the visits*."

The matter came on for a hearing before Cobb J which was attended (with his permission) by authorised accredited members of the press, subject to a Reporting Restriction Order. Much of the hearing was dedicated to consideration of what, if any, orders he should make in relation to G's (or C's) contact with the press concerning the proceedings. Cobb J concluded that he had, as a first step, to determine whether G had capacity to communicate directly with the press, and ordered a capacity assessment by an independent expert upon the point "*specifically directed to the question of whether or not G has the capacity to communicate, and engage, with members of the press, with all the implications of so doing*" (paragraph 26).

In the interim, Cobb J made an order under s.48 MCA 2005 that it was not in G's best interests for her to be able or permitted to communicate with the press at this stage; she has expressed at least ambivalent feelings, it appears, about the engagement of the media. Further directions were given leading towards a hearing to determine the question of G's capacity and, if relevant, best interests, as regards contact with the press. These included service on Associated News Limited ('ANL') a summary of the key conclusions and recommendations of the capacity assessor and (if applicable) the local authority's decision on best interests.

ANL then made an application seeking (a) to be joined as a party to the proceedings and (b) to be permitted to provide their own instructions to the capacity assessor "*to ensure that all issues relating to capacity are fully considered and covered by the letter of instructions to him*."

ANL sought orders that (1) ANL be joined as an interested party to the proceedings on the issues of (a) G's capacity to communicate with third parties including the media; (b) in the event G is assessed as lacking capacity, whether it would be in G's best interests to communicate with third parties including the media; and (c) the Reporting

Restriction Order in place dated 17th February 2014; and that ANL are served with all information in these proceedings in respect of these issues and has permission to make representations on these issues in these proceedings; (2) that the local authority serve on ANL a copy of the report of the capacity assessor; and (3) that ANL have permission to make representations to the capacity assessor within seven days of being served with his report and for the capacity assessor to take these representations into account and revise his report if appropriate.

ANL's application was opposed by the Official Solicitor on behalf of G and by the local authority. It was supported by C and, up to a point, by F, who although not advocating that ANL be joined was concerned that ANL be permitted active participation in relation to those issues in which it had an interest.

The legal framework: Article 8

The President noted the following core principles:

1. The private life protected by Article 8 includes the right of a person to define the 'inner circle' in which he chooses to live his life, including in particular the right to decide who is to be excluded from his 'inner circle'. Article 8 therefore embraces both X's right to decide to establish and develop a relationship with Y (qualified, of course, by Y's right to decide that he does not wish to establish a relationship with X) and X's right to decide not to establish or continue a relationship with Z. The State also has a positive obligation under Article 8 to ensure that X's right to respect for private life is not violated as a result of press intrusion or harassment: see, for example, Von Hannover v Germany (2003) 40 EHRR 1,[2004] EMLR 379, para 57, and Rekos v Greece [2009] EMLR 290, paras 35, 41;

2. Secondly, if for whatever reason, good or bad, reasonable or unreasonable, or if indeed for no reason at all, X does not wish to have anything to do with Y, then Y cannot impose himself on X by praying in aid his own Article 8 rights. For X can pray in aid, against Y, X's own Article 8 right to decide who is to be excluded from X's 'inner circle', and in that contest, if X is a competent adult, X's Article 8 rights must trump Y's. It necessarily follows from this that, absent any issue as to X's capacity or undue influence, X's refusal to associate with Y cannot give rise to any justiciable issue as between Y and X;

3. Thirdly, if X lacks capacity, Y's Article 8 rights can no more trump X's rights than if X had capacity. Y cannot impose himself on X by praying in aid his own Article 8 rights. Y's Article 8 rights have to be weighed and assessed in the balance against X's Article 8 rights. If Y's rights and X's rights conflict, then both domestic law and the Strasbourg jurisprudence require the conflict to be resolved by reference to X's best interests. X's best interests are determinative.

Importantly, Sir James Munby P continued,

> *"26. In the event of dispute, it is for the court – here the Court of Protection – to determine on behalf of X what X's best interests require. What is the nature of that process? As Baker J aptly put it in Cheshire West and Chester Council v P and M [2011] EWHC 1330 (COP), [2011] COPLR Con Vol 273, para 52:*
>
> > *'The processes of the Court of Protection are essentially inquisitorial rather than adversarial. In other words, the ambit of the litigation is determined, not by the parties, but by the court, because the function of the*

> *court is not to determine in a disinterested way a dispute brought to it by the parties, but rather, to engage in a process of assessing whether an adult is lacking in capacity, and if so, making decisions about his welfare that are in his best interests.'*
>
> *I agree. I add that, as Mr Millar* [on behalf of G] *points out, the court, in coming to a decision on best interests must proceed in accordance with sections 1(6), 4(6) and 4(7) of the Act.*
>
> *27. Given the nature of the conflicting rights under Article 8 as I have described them, and given the nature of the Court of Protection's functions and procedures, it follows in my judgment that the identification by the Court of Protection of X's best interests does not give rise to any justiciable issue as between Y and X. Section 4(7) of the Act may in appropriate circumstances require the Court of Protection to consult Y and take into account Y's views on the question of what would be in X's best interests (and in any event Y's views may be a "relevant circumstance" within the meaning of section 4(2): see In re M (Statutory Will), Practice Note [2009] EWHC 2525 (Fam), [2011] 1 WLR 344, para 36), but that is far removed from suggesting that there is any justiciable issue as between Y and X. There is not. Nor is there any justiciable issue as between Y and X in relation to the question of X's capacity."*

The legal framework: Article 10

Turning to Article 10, Sir James Munby P noted that it protected two distinct rights, the right to "receive" and the right to "impart" information and ideas. In other words, as he held at paragraph 29, when a journalist, J, publishes a story received from a source, S, Article 10 is engaged in four distinct ways: (i) S is imparting information to J; (ii) J is receiving information from S; (iii) J is imparting information to J's readers; and (iv) J's readers are receiving information from J.

This meant that, where the court is being asked to make orders designed to prevent something being published in the media, the desired objective can in principle be achieved in two quite different ways:

1. If there is some appropriate legal basis for doing so, for example, if S is threatening to disclose information in breach of a duty of confidence owed by S to T, or, when a family court makes a specific issue order against a parent forbidding the parent from disclosing information about the parent's child, the court can grant an injunction restraining S from imparting the information to J. Unless J has already received the information from S, there is no need to obtain any order against J, for the story has been cut off at source. In such a situation, the court is concerned only with S's Article 10 right to impart information; it is not concerned with J's Article 10 right to receive information, let alone with J's right to impart information which J has not in fact received. The President noted the gradual emergence in the Strasbourg jurisprudence of the idea that Article 10 may perhaps in some circumstances confer a right of access to information, but (whatever the precise scope of the right), nothing turned upon it in the case before him because on any view the right of access to information, if it exists at all, arises only in relation to information held by a public body, and the information in issue here is that held by G, C and F, that is, by private individuals.

2. Alternatively, or additionally, the circumstances may justify an order restraining J from imparting to others information received by J from S. Here, J's Article 10 rights are directly engaged: both J's right to receive information from S and, most of all, J's right to impart that information to others.

In a 'receiving' case such as this one, the starting point is that if S, as a competent adult, declines to disclose information to J – if S, as it were, shuts the door in J's face – then that is that. S is deciding not to allow J into S's 'inner circle'. S's right to be left alone by the media, if that is what S wishes, is a right which is protected by Article 8 and it trumps any rights J may have, whether under Article 8 or Article 10. J cannot demand that S talks to him and J's reliance on Article 10 will avail him nothing. From this, the President held (at paragraph 38), it must follow that S's refusal to talk to or impart information to J cannot give rise to any justiciable issue as between J and S.

What, if any difference, did it make that S (in this case G) arguably lacks capacity? It was relevant for two reasons:

1. because the Court of Protection has jurisdiction only in relation to those who lack capacity;

2. second, and more fundamental, because if S does have capacity then the decision as to whether or not to impart information to J (or, if the information has already been imparted by S to J, the decision by S as to whether or not to bring proceedings against J) is exclusively a matter for S.

If S lacks capacity the next question for the court is whether or not it is in S's best interests to impart the information to J (or, if that has already happened, whether or not S's best interests require that an injunction is granted against J). This is because best interests is the test by which the Court of Protection on behalf of S takes the decision which, lacking capacity, S is unable to take himself. As the President noted (at paragraph 43) , for essentially the same reasons as in relation to Article 8, it followed that the identification by the Court of Protection of S's best interests does not give rise to any justiciable issue as between J and S. Nor is there any justiciable issue as between J and S in relation to the question of S's capacity.

> *"the reason for this is simple: before J's right to receive information from S arises, S must, to use the language of Leander [(1987) 9 EHRR 433], "wish or be willing" to impart the information to J. Where S lacks capacity, what the court is doing when deciding whether or not it is in S's best interests for the information to be imparted to J (or, if already imparted to J, whether or not it is in S's best interests for it to be imparted by J to others), is doing what, if S had capacity, S would be doing in deciding whether or not to impart the information to J (or, as the case may be, in deciding whether or not to seek an injunction to restrain J imparting it to others). As Mr Millar points out, J would have no right or interest in relation to such a decision by S, if S had capacity. Why, he asks rhetorically, should it make any difference that, because S lacks capacity, the very same decision is being taken on behalf of S by the court. I agree." (paragraph 44)*

The President noted that the court's best interests decision in relation to S is not necessarily determinative:

> *"If the court decides that it in S's best interests for information to be imparted to J (or, if that has already happened, that S's best interests do not require the grant of an injunction) then that is the end of the matter. There is no conflict between S's best interests and J's rights. If, however, there is a conflict between S's best interests as determined by the court and J's rights as protected by Article 10, the court moves on to the third and final stage of the inquiry. But at this stage S's best interests are not determinative. There is a balancing exercise. The court is no longer exercising its protective jurisdiction in relation to S but rather its ordinary jurisdiction under the Convention*

as between claimant and defendant. Accordingly it has to balance the competing interests: S's interest under Article 8 (as ascertained by the court), and therefore her right under Article 8 to keep her private life private, and J's rights under Article 10. And at this stage, if relief is being sought against J (or against the world at large), J's Article 10 rights are directly implicated. So J will be entitled to be heard in opposition to the order being sought" (paragraph 45).

The application

Against this detailed analysis of the rights in play, and the precise way in which they arose for consideration by the court, Sir James Munby P was able to dispatch the application by ANL with some speed:

1. ANL's application to be joined as a party was misconceived, he found, because:

    a. the relief being sought by the local authority gave rise to no justiciable issue as between ANL and G, or between ANL and anyone else. So there was no reason for ANL to be joined;

    b. further, applying *Re SK* (By his Litigation Friend, the Official Solicitor)[2012] EWHC 1990 (COP), Sir James Munby P held ANL could not be said to have a 'sufficient interest' to apply to be joined as a party under COPR r75(1), nor could it be said that its joinder was desirable for purposes of COPR r73(2);

    c. finally, even if ANL's rights under Article 10 were to be engaged (as they plainly are in relation to the reporting restriction order), the President held that would not give ANL a "sufficient interest" in the proceedings, as distinct from the discrete application within the proceedings, nor would it make it "desirable" to join ANL as a party to the proceedings. As Sir James Munby held (paragraph 51), "[*o*]*n the contrary, it would be highly undesirable for ANL to be joined, because as a party it would be entitled to access to all the documents in the proceedings unless some good reason could be shown why it should not, and the grounds for restricting a party's access to the documents are very narrowly circumscribed: see RC v CC and another [2014] EWHC 131 (COP). Nor, as I have pointed out, would there be any need for ANL to be joined as a party. It would, as Mr Millar concedes, be entitled to be heard as an intervener.*" Indeed, the President noted that there appeared to be no case in either proceedings involving children or incapacitated adults where a journalist or media organisation has been joined as a party to the proceedings, as distinct from being permitted to intervene. This is surely suggestive of a well-founded assumption that joinder is as unnecessary for the protection of the media as it is undesirable from the point of view of the child or incapacitated adult whose welfare is being considered by the court.

2. ANL's other applications fell away in light of the President's decision upon their first application: if it were not to be joined as a party, he held that there was no basis upon which it could claim either to see the capacity assessor's full report or to ask him questions (paragraph 53).

3. Further:

"54. […] in relation to the insinuation by ANL that it should be joined as a party or allowed to intervene in relation to the issues of G's capacity and best interests because otherwise relevant arguments may not be adequately put before the court. There is no basis for this. Quite apart from the rejection by those to whom this comment appears to be directed of any factual foundation for what is being said, this cannot be a ground for being allowed to participate in the proceedings. Either ANL has some basis for being joined as a party or it does not. If it does, all well and good. If it does not, then it is a mere interloper, an officious busybody seeking to intrude in matters that are of no proper concern to it, seemingly on the basis that it can argue someone else's case better or more effectively than they can themselves. Moreover, if it is to be said that the Official Solicitor is, in some way, not acting appropriately in G's best interests, then the remedy is an application for his removal as her litigation friend, not the intrusion into the proceedings of a self-appointed spokesman for G."

Comment

This is a characteristically robust judgment by the President; and is particularly interesting in light of the clear line it draws between:

1. increased transparency within Court of Protection proceedings (including both greater publication of judgments and the mooted access of journalists both to proceedings and – in due course – documentation); and

2. the very limited role of the press in the taking by the Court of Protection about decisions in relation to those alleged to lack capacity to determine whether they wish to have contact with journalists.

The judgment is also of interest for its very clear endorsement of the proposition that the Court of Protection is an inquisitorial jurisdiction, operating in a very different forensic sphere to the civil courts.

Circumstances in which an appeal court can re-make a decision

MB v Staffordshire County Council, KM, B (A Child) [2014] EWCA Civ 565 (Court of Appeal (The Chancellor of the High Court, Black and Ryder LJJ)

Summary

In this case the Court of Appeal restated the circumstances in which an appeal judge in public law family proceedings could re-make a first instance decision, and the circumstances in which such an exercise was inappropriate.

The local authority made applications for care and placement orders in respect of B. The Family Proceedings Court heard the case and made the care and placement orders. The parents appealed and the case came before Her Honour Judge Clarke who held that the magistrates' decision was flawed but that she could re-make the decision herself. She then held that despite errors the magistrates' decision was correct and dismissed the appeal.

Lord Justice Ryder set out some general principles in relation to appeals in such cases:

- On an appellate review the judge's first task is to identify the error of fact, value judgment or law sufficient to permit the appellate court to interfere.

- In public law family proceedings there is always a value judgment to be performed which is the comparative welfare analysis and the proportionality evaluation of the interference that the proposed order represents and accordingly there is a review to be undertaken about whether that judgment is right or wrong.

- Once the error is identified the judge has a discretionary decision to make whether to re-make the decision complained of or remit the proceedings for a re-hearing.

- The judge has power to fill the gaps in the reasoning of the first court and give additional reasons in the same way that is permitted to an appeal court when a Respondent's Notice has been filed.

- In the exercise of its discretion the court must keep firmly in mind the procedural protections provided by the Rules and Practice Directions of both the appeal court and the first court so that the process which follows is procedurally fair.

- If in its consideration of the evidence that existed before the first court, any additional evidence that the appeal court gives permission to be adduced and the reasons of the first court, the appeal court decides that the error identified is sufficiently discrete that it can be corrected or the decision re-made without procedural irregularity then the appeal court may be able to rectify the error by a procedurally fair process leading to the same determination as the first court. In such a circumstance, the order remains the same, but the reasoning leading to the order has been added to or re-formulated but based on the evidence that exists and the appeal would be properly dismissed.

- If the appeal court is faced with a lack of reasoning it is unlikely that the process above would be appropriate although it should be borne in mind that the appeal court should look for substance not form and that the essence of the reasoning may be plainly obvious or be available from reading the judgment or reasons as a whole. If the question to be decided is a key question upon which the decision ultimately rests and that question has not been answered and in particular in evidence is missing or the credibility and reliability of witnesses already heard by the first court but not the appeal court is an issue, then it is likely that the proceedings will need to be remitted to be re-heard. If that re-hearing can be before the judge who has undertaken the appeal hearing, that judge needs to acknowledge that a full re-hearing is a separate process from the appeal and that the power to embark on the same is contingent upon the appeal being allowed, the orders of the first court being set aside and a direction being made for the re-hearing.

- The two part consideration to be undertaken by a family appeal court is heavily fact dependent. What might be appropriate in one appeal on one set of facts might be inappropriate in another.

All three Lord Justices held that on the particular facts of this case (including significant evidential shortcomings) the appeal judge should have remitted the case for re-hearing.

Comment

Lord Justice Ryder's principles are a useful framework for assessing whether a decision on appeal should be remitted or re-made by the appeal judge. They apply with equal force in the context of appeals from welfare decisions made in the Court of Protection. The overwhelming message from the Court of Appeal is that every case will be different and will fall to be considered in detail on its own particular facts.

Judicial contact with the subject of proceedings

Re KP (A Child) [2014] EWCA 554 (Court of Appeal (Moore-Bick, Black and McFarlane LJJ)

Summary

This case, which concerned proceedings under the Hague Convention in relation to a child, is of interest because, although some of the principles it sets out may resonate with CoP proceedings in which it is proposed that P should meet the judge, rather than give formal evidence.

In this case, the Court of Appeal found that the judge at first instance had strayed beyond the acceptable parameters, while noting that best practice as to the right way to hear the child's voice in such cases was still developing. (At least there was some guidance to assist practitioners and the court – in the CoP, there is as yet no guidance about hearing from P, cross-examination of P, or P meeting with the judge).

The Court of Appeal set out a number of 'themes', as follows:

a) *There is a presumption that a child will be heard during Hague Convention proceedings, unless this appears inappropriate;*

b) *In this context, 'hearing' the child involves listening to the child's point of view and hearing what they have to say;*

c) *The means of conveying a child's views to the court must be independent of the abducting parent;*

d) *There are three possible channels through which a child may be heard:*

   i) Report by a CAFCASS officer or other professional;

   ii) Face to face interview with the judge;

   iii) Child being afforded full party status with legal representation;

e) *In most cases an interview with the child by a specialist CAFCASS officer will suffice, but in other cases, especially where the child has asked to see the judge, it may also be necessary for the judge to meet the child. In only a few cases will legal representation be necessary;*

f) *Where a meeting takes place it is an opportunity:*

   i) for the judge to hear what the child may wish to say; and

   ii) for the child to hear the judge explain the nature of the process and, in particular, why, despite hearing what the child may say, the court's order may direct a different outcome;

g) *a meeting between judge and child may be appropriate when the child is asking to meet the judge, but there will also be cases where the judge of his or her own motion should attempt to engage the child in the process.*

54. None of the reported cases goes further than the guidelines by suggesting that a judicial meeting might be used for the purpose of obtaining evidence from the child or going beyond the important task of simply hearing from the child that which she may wish to volunteer to the judge. As Lord Wilson SCJ describes in Re LC at para 55, where a child's evidence might prove determinative of an issue, it may be adduced by an appropriate process into the full proceedings by witness statement, report from a CAFCASS officer or, where the child is a party, by her advocate's cross-examination of the adult parties and closing submissions. Going further, where oral evidence is required, Lord Wilson indicated that an age appropriate process should be deployed.

The Court of Appeal went on to accept submissions that:

i) During that part of any meeting between a young person and a judge in which the judge is listening to the child's point of view and hearing what they have to say, the judge's role should be largely that of a passive recipient of whatever communication the young person wishes to transmit.

ii) The purpose of the meeting is not to obtain evidence and the judge should not, therefore, probe or seek to test whatever it is that the child wishes to say. The meeting is primarily for the benefit of the child, rather than for the benefit of the forensic process by providing additional evidence to the judge. As the Guidelines state, the task of gathering evidence is for the specialist CAFCASS officers who have, as Mr Gupta submits, developed an expertise in this field.

iii) A meeting, such as in the present case, taking place prior to the judge deciding upon the central issues should be for the dual purposes of allowing the judge to hear what the young person may wish to volunteer and for the young person to hear the judge explain the nature of the court process. Whilst not wishing to be prescriptive, and whilst acknowledging that the encounter will proceed at the pace of the child, which will vary from case to case, it is difficult to envisage circumstances in which such a meeting would last for more than 20 minutes or so.

iv) If the child volunteers evidence that would or might be relevant to the outcome of the proceedings, the judge should report back to the parties and determine whether, and if so how, that evidence should be adduced.

v) The process adopted by the judge in the present case, in which she sought to 'probe' K's wishes and feelings, and did so over the course of more than an hour by asking some 87 questions went well beyond the passive role that we have described and, despite the judge's careful self-direction, strayed significantly over the line and into the process of gathering evidence (upon which the judge then relied in coming to her decision).

vi) In the same manner, the judge was in error in regarding the meeting as being an opportunity for K to make representations or submissions to the judge. The purpose of any judicial meeting is not for the young person to argue their case; it is simply, but importantly, to provide an opportunity for the young person to state whatever it is that they wish to state directly to the judge who is going to decide an important issue in their lives.

Comment

The Court of Appeal specifically noted the position in the CoP where a judge may well meet with P on occasion. It appears that they considered that

there were strong analogies to be drawn between the two situations (see paragraph 35).

There is an increasing tendency for judges to meet with P – and considerable support from Strasbourg for what may even amount to a rule (or at least a presumption) that a judge considering taking a decision with significant consequences flowing from a declaration of incapacity in a material regard must meet P (see e.g. *X and Y v Croatia* ((Application No. 5193/09, decision of 3.11.11). This case shows the care that judges must exercise when they undertake this important exercise.

Joint instruction of experts – funding and the LAA

JG v the Lord Chancellor and Ors [2014] EWCA Civ 656 (Court of Appeal (Richards, Black and Fulford LJJ)

Summary

In a very important decision whose ramifications extend well into the CoP field, the Court of Appeal held that a decision by the Legal Services Commission (now the Legal Aid Agency) not to fully fund the cost of an expert report ordered in private law proceedings under the Children Act 1989, where the child had a public funding certificate but the parents did not, was unlawful (the High Court on a judicial review application had held the decision to be lawful).

A father made an application for a residence and/or contact order in respect of his daughter who was living with her mother. Neither parent was in receipt of public funding and both acted in person. The child was later joined as a party and granted a public funding certificate (which is only done in exceptional circumstances). The child was represented by a solicitor and a children's guardian. According to the judgment in the judicial review claim, shortly after the child became an assisted person, the children's guardian suggested to her solicitors that it might be appropriate to seek expert evidence. The child's solicitors identified an expert, compiled draft instructions and served them on the parents. The District Judge hearing the case subsequently gave directions about the expert report, including that "*the cost of the report to be funded by the child, the court considering it to be a reasonable and necessary disbursement to be incurred under the terms of the public funding certificate*". The expert produced a report and sent an invoice to the child's solicitors in the sum of £12,000. The LSC refused to pay the invoice in full, stating that the cost should be shared equally between the parties. It relied on section 22 (4) of the Administration of Justice Act 1999 ("section 22(4)") which held (in summary) that the fact that a person is publically funded should not affect (a) the rights or liabilities of other parties to the proceedings or (b) the principles on which the discretion of any court or tribunal is normally exercised. The LSC refusal to pay delayed the case (the expert had been asked to provide an addendum report and was refusing to do so until payment was made on her first invoice). The apparent impasse led to a judicial review claim brought by the child against the LSC for refusing to pay the invoice.

Ryder J heard the judicial review claim. He found against the child in relation to the specific issue under scrutiny, namely the refusal of the LSC to fund the whole of the costs of an expert instructed to assist the family court in its determination of the welfare issues in the case. He also addressed what was described as a question of general importance, which concerned the approach that could be taken where the family court considered that expert evidence was necessary but the only means to pay for it was through the child's public funding certificate. In relation to the general

question, Ryder J again found against the child and accepted the approach suggested by the Lord Chancellor which proceeded on the basis that normally a single joint expert should be used and the expert's costs should be apportioned equally between the parties. Only in exceptional circumstances where the court forms the view, on proper scrutiny of a party's means, that one or more of the non-legally aided parties is unable to fully pay the costs the court would otherwise expect that party to pay may the court consider that whether other parties should pay more than an equal share so as to ensure that the evidence which is necessary may be adduced in the child's best interests.

Black LJ gave the reasoned judgment of the Court of Appeal with which Richards and Fulford LLJ agreed.

The Court of Appeal's judgment addressed both the general question and the specific question posed by Ryder J in the judicial review proceedings but in respect of the general question it was noted that it did not form part of the ratio of the decision and that there was no universally applicable answer and everything depended on the facts of the case under consideration.

The general question

The judge first considered the question of whether the expert was, in fact, a single joint expert or was, more properly analysed, the child's expert. If the expert was, on a proper analysis, the child's expert then the issues in relation to funding did not arise in the same way.
In considering this aspect the judge referred to the facts of the case, noting that neither parent had raised the possibility of an expert prior to the involvement of the guardian despite litigation having been on foot for a significant period of time. The idea seemed to have come from the guardian and the child's solicitors identified the expert and drafted instructions. The guardian would only initiate such an instruction if it were for the benefit of the child. The judge held that on facts such as those, the correct starting point would be that the expert's report was genuinely sought by the child alone with the result that it would fall in the category of case in which the Lord Chancellor had accepted that it was legitimate for the legally aided party to bear the full costs.

The judge then addressed the question of whether the involvement of the other parties in the instruction of an expert would make a material difference and concluded that the answer will be fact sensitive. It was clear that the mere service of the expert's CV on parents or the service of draft instructions would not change the child's expert into a single joint expert. The expert was only a single joint expert if he provides expert evidence for use in proceedings on behalf of two or more of the parties (Rule 25.2 FPR 2010). The rules explicitly acknowledged that parties may communicate with and even take the benefit of an expert instructed by another party without that expert becoming a single joint expert. Making use of another party's expert report as evidence at a hearing did not convert the expert into a single joint expert.

The judge concluded that it may not be all that infrequent that an application by a child/guardian for permission to instruct an expert will genuinely be for an expert on behalf of the child as opposed to a single joint expert, notwithstanding that the other parties have some input into the process of approval by the court and into the format of the expert's instruction.

The judge then addressed the situation where the expert was not the child's expert but a single joint expert and the other parties were unable to contribute to the cost of the expert. The issue was

in what circumstances public funds could be required to meet the whole cost.

The judge first held that equal apportionment was not the 'normal rule' when there was no issue over resources. The court had a discretion as to what order was made as to the cost of instructing experts in family proceedings and that discretion must be exercised bearing in mind all the circumstances of the particular case. The judge held that Rule 25.12(6) FPR 2010 did not establish a 'normal rule' that the cost be apportioned equally. It followed that in order to decide whether a court order has fallen foul of section 22(4) it was not enough to say that the 'normal rule' had not been followed in order to take advantage of the fact that someone was publically funded, instead a more sophisticated exercise was required. It was necessary to ask what order the court would have made in its discretion on the particular facts of the case, leaving aside any resource problems. The answer might be equal apportionment but it might also, depending on the particular facts, be that the publically funded party should pay a greater share of the costs.

The judge then considered the question of when the court could depart from the order that it would otherwise have made, to the greater cost of a publicly funded party or parties.

Given the role of the child's guardian in family proceedings, by the time the guardian has endorsed the instruction of an expert as appropriate and the court has approved it as necessary there were the beginnings of a strong foundation for an argument that the child's Article 8/Article 6 rights would be violated if the court could not be provided with the expert assistance. Whether that argument ultimately succeeded would depend on the precise nature of the decision to be taken in relation to the child. There was no requirement for an additional hurdle or test of "exceptionality". It was also not necessary for parties to satisfy the financial criteria for legal aid in order to be treated as impecunious. However, eligibility for legal aid was a relevant factor in determining a party's means.

Given the difficulty in forecasting when financial information would be available to the court the stage at which the court can reach a final determination as to whether a departure from the order it would usually have given for Convention reasons is likely to vary. There may be cases in which the decision can be taken before the expert is even instructed. There may be others in which the absence of readily available financial information would or may import harmful delay into the proceedings and in which it would be necessary to require the guardian to instruct the expert in the first instance but with the intent of revisiting the question of cost, on proper financial information, later by means of a conventional costs order. The court would require cogent evidence that other parties would not be able to pay their way before going down that route.

The specific question

The idea of the expert was the guardian's and what was before the district judge giving directions was the guardian's proposal that the expert should be instructed. The district judge agreed that such an expert report was necessary. Had matters stopped there, there could have been no possible objection to the cost of that expert evidence being attributable to the child because it was the child who was going to put that evidence before the court. The guardian then went on long term sick leave and there was a gap before a new guardian was appointed. At a subsequent hearing the district judge made an order that the parties jointly instruct an expert with the guardian taking the lead and the cost being funded by the child. It

did not appear that the parents contributed anything on the subject of the expert and there was nothing to suggest that they were seeking to have an expert involved. It followed that the report was, in substance, ordered at the request of the guardian in order to address issues that needed to be addressed in the interests of the child. The fact that other parties may have an input into the report does not convert it into their report or necessarily render them liable for the costs of it. What mattered was the substance of the transaction. It was solely the child's expert report and should have been paid for fully by the LSC.

The appeal against Ryder J's dismissal of the child's judicial review claim was allowed and a declaration made that the LSC's decision not to meet the cost of the expert's report was unlawful.

Where judges have to deal with difficult issues such as this it would be prudent for them to explain their reasons for each decision that they take in a short judgment and for their orders to be precisely spelled out. Solicitors should be careful to avoid disputes such as this by seeking prior authority for an instruction of an expert.

Comment

Despite Black LJ stating expressly that her remarks on the general question were obiter and may not be of much assistance, there is no doubt that lawyers will draw on the judgment in future to resolve cost disputes in family proceedings (and to inform the instruction of experts in general). We also sure that her comments will also be used in other areas – most obviously the Court of Protection – where there is a similar overriding requirement that the decision be taken in someone's best interests and the failure to have access to an expert's views would infringe a person's Article 6/Article 8 rights (despite the focus on the FPR 2010).

The answer in the end in this case was that the expert report was solely the child's report (sought by the guardian in the interests of the child) and not, properly analysed, a joint report. We think there will be many instances in the COP where an expert report is sought by P's litigation friend (for example to assess capacity) where it could be said that the report is solely P's and not that of the other parties. We await the repercussions, and any examples of the case being cited in argument or in judgments before the CoP would be very much appreciated.

Reducing or streamlining directions hearings in the CoP

We are also inviting readers to contact us with ideas as to how to reduce or streamline directions hearings in the Court of Protection, following a discussion at the most recent High Court Users Group meeting. Would colleagues support the adoption of standard directions along the following lines?

> *The Applicant shall circulate to the parties a draft order not less than 10 days before the next directions hearing, and all parties shall use their best endeavours to agree the directions no later than 5 working days before the hearing. The Applicant shall inform the court promptly, and in any event not less than 48 hours before the hearing, if an order is agreed and the hearing may be vacated.*

Do others have alternative ideas or suggestions? Please let us know – the LAA and the courts will be very grateful!

Capacity in relation to children: self-harm

An NHS Foundation Hospital v P [2014] EWHC 1650 (Fam) (Baker J)

Summary

This was an out of hours urgent application under the inherent jurisdiction by a Trust for a declaration that it was lawful for its doctors to treat a 17 year old girl (P) following a drug overdose, notwithstanding her refusal to consent to the treatment.

P had a history of self-harming and had been known to the Child and Adolescent Mental Health Service for some time. The week before the hearing she had been discharged from detention under section 2 of the Mental Health Act 1983.

P had taken an overdose of paracetamol and was admitted to hospital shortly afterwards. For several hours she resisted all treatment to counter the effects of the paracetamol. Her mother consented to the treatment on P's behalf, but the Trust was reluctant to administer treatment without a court order.

The Trust sought the opinion of a child and adolescent psychiatrist who considered that P had a personality disorder but did not lack capacity to make decisions about her medical treatment.

By late evening the situation was critical because unless a paracetamol overdose is treated within approximately 8 hours, there may be serious liver damage which may lead to the patient dying. That point had been reached at 10pm. At 11pm a solicitor acting for the Trust contacted the out of hours' duty officer who telephoned the judge. When the judge spoke to the solicitor he was informed that P had agreed to take the first dose of medication but the treating clinicians were concerned that she might refuse to continue the treatment which needed to be administered over a continuous period of about 21 hours. A duty solicitor employed by CAFCASS Legal agreed to assist the judge as an advocate to the court.

The Trust solicitor asked for an order including a declaration that it was lawful and in P's best interests for the medical practitioners having responsibility for her care and treatment to treat her for the overdose, and to carry out such sedation or restraint as might be required, even if they would amount to a deprivation of liberty.

As P was over 16, the judge applied the provisions of the MCA 2005 to the question of whether she had capacity. The judge noted that the information available to the court was limited but given the opinion of the psychiatrist, would grant a declaration that '*on the basis of the information available at present, I am not satisfied that she lacks capacity to make decisions concerning her medical treatment*.'

The judge reiterated the legal position. All medical treatment requires consent. Treatment administered to a competent adult without consent will amount to a tortious act and may render the medical practitioner liable to criminal proceedings. A person with capacity of 18 or over may refuse treatment even if that decision in unwise (and may lead to death).

However, in respect of a child with capacity who is under 18, the court may exercise its inherent jurisdiction to override the child's wishes in her best interests and give its consent to her treatment. The child's welfare is the court's paramount consideration. Whilst the wishes and feelings of a 17 year old is an important component of the analysis of welfare, they are not

decisive. The court must also consider other factors and in particular any harm the child has suffered or is at risk of suffering.

The judge held that the balance came down firmly in favour of overriding P's wishes. Her Article 8 rights were outweighed by her rights under Article 2. The judge therefore made the declarations sought by the Trust.

Having made those declarations, the judge again emphasised that he had taken account of P's wishes and feelings. He referred to the fact that due to the urgency of the situation he had made the order without speaking directly to P. He noted that it was possible that P might wish to apply to the court to vary or discharge the order later in the morning. He made directions to facilitate a hearing before the applications judge in the event that P did wish to make such an application. If P did not make an application then the treatment should continue for the 21 hours. Both parties could then apply to vary or discharge the order. The order should not remain in force long term and the judge ordered that it would expire within 28 days unless an application was made to extend it before that date.

Comment

The unusual wording of the declaration of incapacity in this case appears to be a function of the urgency of the case which caused difficulties in obtaining detailed evidence – as Peter Jackson J pointed out recently in *Re JB*, language such as 'not being satisfied that P has capacity' sits uneasily with the presumption of capacity and the burden of proof under the MCA 2005. Given the urgency of the situation and the seriousness of the risks to P however, it is easy to see why the court took the approach it did, and attempted to put in place measures for P to challenge the declarations swiftly – although one wonders how likely it is in reality that a 17 year old receiving treatment in hospital, whose mother and doctors supported that treatment, would have been able to get before the applications judge the next day.

P was on the cusp of being an adult and acquiring the ability to take unwise decisions if she had capacity. In such cases (as the judge acknowledged) her wishes and feelings should be given significant weight. The seriousness of the potential harm in this case (possible death) outweighed her strongly voiced wishes (although we note that she had in fact agreed to the first dose of the antidote). Given the factual matrix in this case, the evidence of a mental disorder and the fact that she had recently been discharged from section 2, the interesting question arises whether P's Article 2 rights might have led the judge to the same conclusion even if she had turned 18 and the case had been heard under the MCA 2005 (*Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2).

Capacity in relation to children: termination of pregnancy

An NHS Trust v A, B, C and a Local Authority [2014] EWHC 1445 (Fam) (Mostyn J)

Summary

This case in the Family Division concerned a 13 year old girl (A) who was assessed to be over 21 weeks pregnant. The NHS Trust concerned sought urgent declaratory relief that if A lacked capacity to consent to the continuation or termination of the pregnancy then it would be in her best interests to terminate the pregnancy; and that if A had capacity then the court should make a declaration to that effect so that the position was "*put beyond doubt and that any later criticisms of the Trust, in taking the steps that they did, [could] be deflected*".

Initial meetings between the specialists and A had revealed her to be uncommunicative and a doubt was raised about her capacity to decide to continue with or to terminate the pregnancy.

The test for capacity in a child under 16 was set out in *Gillick v West Norfolk and Wisbech Area Health Authority & Anr* [1986] 1 FLR 224: "[…] *there is no statutory provision which compels me to hold that a girl under the age of 16 lacks the legal capacity to consent to contraceptive advice, examination and treatment provided that she has sufficient understanding and intelligence to know what they involve*".

The judge relied on the evidence of a consultant psychiatrist, Dr Ganguly (whose oral evidence he ordered to be annexed to the judgment) in concluding that A did have "*sufficient understanding and intelligence*" (capacity) to decide that she wanted a termination and that her decision was not the product of influence by adults in her family. As Dr Ganguly put it, "*she understood the gist of [what was involved in a termination] to the extent that it would be necessary for her to reach a decision*."

Comment

Mr Justice Mostyn expressly stated that he was giving judgment in open court "*so that anyone who later reads the transcript of this judgment understands that proceedings of this nature are not done in secret by some mysterious court determined to prevent the public from knowing what is being done in its name*". He emphasised the need for transparency in such cases whilst making clear that a reporting restrictions order was appropriate.

Whilst the MCA 2005 does not apply to children aged 16 and under,[1] the evidence of the consultant psychiatrist made clear that there was overlap between the *Gillick* test and with the functional test in the MCA 2005.

Article 8 and inadequate care packages

McDonald v UK (Application no. 4241/12, 20 May 2014) (European Court of Human Rights)

A brief mention of the decision by the ECtHR to dismiss the appeal by Ms McDonald arising from her failed attempts to persuade the domestic courts that making her wear incontinence pads at night when she was not incontinent but required assistance to access the toilet was a violation of her rights under Article 8 ECHR. Sadly for Ms McDonald, although the ECtHR found that the decision by the local authority to reduce her care package and remove the provision of a night-waking carer did engage Article 8(1), it was justified as proportionate under Article 8(2) having regard to the scarcity of resources. This decision hammers home the comments made by Mrs Justice Eleanor King in *ACCG & Anor v MN & Ors* [2013] EWHC 3859 (COP) that arguable Article 8 claims within CoP proceedings are likely to be extremely rare.

[1] Although for a characteristically thoughtful argument as to why it should, see the article by McFarlane J (as he then was): *Mental Capacity: One Standard for all Ages* [2011] Fam Law 479.

Book review: Cretney and Lush on Lasting and Enduring Powers of Attorney

Book review: Cretney and Lush on Lasting and Enduring Powers of Attorney (7th Edition): Senior Judge Denzil Lush (Jordans, 2014, £67.50)

This work is now in its seventh edition. It is rightly regarded as the bible in this area, so this review therefore will be relatively short. Suffice it to say that, written by Senior Judge Denzil Lush, it comes with the stamp of authority of a judge who knows more about LPAs and EPAs than any other judge sitting today. The book is also particularly useful because SJ Lush has a very strong sense of the history underlying the current regime. Notwithstanding the fact that the Court of Appeal has recently (in a slightly different context) sought to emphasise again that the starting point in relation in mental capacity issues is the plain text of the Act itself, a sense of the history underpinning some of the provisions in the Act and Rules is necessary in order to understand how powers of attorney are supposed to work. Therefore, whilst some might say that the sections of the work dealing with the past should themselves be consigned to history, I would urge them to be retained.

A very useful addition to this edition is an analysis and discussion of the position in relation to private international law questions. The exact status of foreign powers of attorney under the law of England and Wales (set out in Schedule 3 to the MCA 2005) is a matter of no little complexity. In his chapter on this, SJ Lush details the precise position as clearly as it can be. In particular, he makes the important point that the foreign power of attorney is not a measure of protection (to use the language of Schedule 3, reflecting in turn that of the 2000 Hague Convention on the International Protection of Adults). This means that the attorney cannot, for instance, invoke the summary procedure provided for in respect of such measures of protection to obtain recognition and enforcement of the power. The chapter stands as a powerful reminder of why the United Kingdom should ratify the 2000 Convention in respect of England and Wales (in addition to Scotland, already a 'Convention country') so that use can be made of the procedure envisaged under Article 38 of the Convention (and paragraph 30 of Schedule 3, not yet in force) for certificates to be issued confirming the powers under which an attorney acts.

Many of those reading this review will already have this edition parked neatly on their bookshelves; I would recommend that those who do not and who practice or advise in this area remedy that situation forthwith.

Alex Ruck Keene

Book review: Dementia and the Law

Book review: Dementia and the Law: Tony Harrop-Griffiths, Jonathan Cowen, Christine Cooper, Rhys Hadden, Angela Hodes, Victoria Flowers, Steven Fuller (Jordans, 2014, £55)

This new work deals with many of the very specific problems faced by those caring for, treating, or seeking to advise and assist those with dementia. In some ways, it is quite a similar book in its approach to that reviewed last month, the second edition of Elderly People and the Law. Both books seek to set out a tour d'horizon of the various legal issues that arise in relation to a particular category or class of person. In this case, it is those with dementia.

There are many advantages to this sort of approach. For a start, it reflects reality. After all, a lawyer asked to give advice in relation to a person with dementia will need to have at least a broad overview of the main issues that are likely to arise. For instance, they will need to know something, at least, about the sort of assessments that the individual clients might have to undergo for the purposes of receiving social care. They will also they will also need to know at least the outlines of how it is that the Mental Capacity Act 2005 will be of relevance both before and after the point at which the client loses capacity to take their own decisions in relation to their property and affairs and in relation to their health and welfare.

This book seeks to provide such a guide. Its chapters cover a broad range of topics, for instance the right to assessments; NHS care and treatment; local authority care; funding care services; challenging decisions and making complaints; as well as a particularly helpful set of chapters on the Administrative Court and the Court of Protection.

Although for the most part this is an excellent book, judiciously balancing the need for width of coverage with adequate detail to highlight specific points, there are a few oddities that I must point out.

In particular, starting to work with a chapter on accessing rights of personal information (whilst a decision explained in the preface) is perhaps not the most obvious jumping-off point. Further, and whilst I accept that I may have at the moment become slightly obsessed by the Convention on the Rights of Persons with Disabilities, I was perhaps a little surprised I could not find a mention of the Convention in the work. It poses dramatic challenges to the way in which we approach those with dementia. Whilst it is not yet is implemented in domestic legislation, it has been used by both by our courts and by Strasbourg as an aid to construction. It is also clear that there are very real issues as regards the compatibility of the MCA 2005 and the CRPD. I hope that in the second edition of this book it would be possible to include discussion of this important Convention.

A second edition of this book well, I hope, be forthcoming in relatively short order. This is because much of the law relating to social care in England (and indeed in Wales) is shortly to undergo radical changes. In England, we have just seen Royal Assent given to the Care Act 2014. As its provisions come into force, the landscape will look very different. The authors have done a heroic job of trying to anticipate some of these changes by reference to the Care Bill as it stood at the point when the text was being prepared. But they were, inevitably, unable to include coverage of the full detail of what became of the Act.

In the next edition of the book, I also hope that it may prove possible to include a chapter from a psychiatrist to give a clinical perspective on the issues posed by dementia. This would be the icing on the cake, because the book does not purport to be a clinical textbook, but rather a legal guide. But 'dementia' is a short-hand, and lawyers in my experience could often usefully do with having some of its nuances teased out from a clinical perspective.

Overall, however, and despite these minor quibbles, this book is immensely helpful. The authors, all practicing barristers, are to be congratulated on pulling together so much useful information in so clear an overview of these critical areas of the law through the prism of the needs of so vulnerable a group of individuals.

Alex Ruck Keene

A majority of all Scottish powers of attorney invalid?

Application for guardianship in respect of NW: Opinion of Sheriff John A Baird (decision 29th April 2014)

Introduction

"Bombshell" is not an extravagant description for the opinion of Sheriff Baird that all continuing powers of attorney (CPA's) following the wording of the "sample" up till now published on the website of the Office of the Public Guardian ("OPG") are invalid. That opinion appears in the Judgment, available here on the Scotcourts website, now issued by Sheriff Baird in this case, which featured in a case update provided by Alison Hempsey of TC Young (who acted for the successful applicants) in last month's Newsletter.

The application began unremarkably. A niece and a cousin of an elderly widow suffering from Alzheimer's Disease sought appointment as her welfare and financial guardians under the Adults with Incapacity (Scotland) Act ("the Act", for all statutory references in this article). Only upon intimation of the application to OPG did they discover that a CPA in favour of a bank had been granted and registered in 2008. The applicants sought leave to amend to include a crave under s20(2)(e)(ii) for revocation of the appointment of the bank as attorney, and sought warrant to intimate to the bank. The bank opposed revocation. The proposal to appoint the applicants as welfare guardians was not opposed. As reported last month, Sh. Baird held that the CPA was not validly constituted. He appointed the applicants as both financial and welfare guardians. For reasons specific to the facts of the case, he held that even if the purported CPA had been validly constituted, he would nevertheless have so appointed the applicants, which – as he pointed out – would have *ipso facto* terminated the CPA by virtue of s24(2). Of general concern are Sh. Baird's two reasons for holding that the purported CPA was invalid. As noted last month, the document was in the bank's standard form, and the decision raised questions as to whether a large number of powers of attorney ("POA's") prepared in the bank's standard form are invalid. What is new in the Judgment now issued is that one of Sh. Baird's reasons for invalidity applies also to the "sample" CPA appearing on the OPG website.

The Judgment addresses many other issues of importance and should be read in full by any practitioner engaged in private client or adult incapacity work.

The statutory background

Sh. Baird quotes s18: "[A] *power of attorney granted after the commencement of this Act which is not granted in accordance with section 15 [or 16] shall have no effect during any period when the granter is incapable in relation to decisions about the matter to which the power relates*". He then quotes the prerequisites in s15 for validity of a CPA. Critically they include requirements that the POA document "*incorporates a statement which clearly expresses the granter's intention that the power be a continuing power*" (s15(3)(b)) and "*where the continuing power of attorney is exercisable only if the granter is determined to be incapable in relation to decisions about the matter to which the power relates, states that the granter has considered how such a determination may be made*" (s15(3)(ba)). Also relevant to discussion of this case is the provision of s15(2) that: "*In this Act a power of attorney granted under subsection (1) is referred to as a 'continuing power of attorney' and a person on whom such power is conferred is referred to as a 'continuing attorney'*". Of further relevance are the provisions in relation to welfare powers of attorney ("WPA's") that for validity they

require "*a statement which clearly expresses the granter's intention that the power be a welfare power to which section applies*" (s16(3)(b)); and that a WPA is not exerciseable unless either the granter is incapable (s16(5)(b)(i)) or the welfare attorney reasonably believes that the granter is incapable (s16(5)(b)(ii)).

The POA document and the two grounds of invalidity

Sh. Baird narrates that the only references, anywhere in the document, to the issue of subsequent incapacity or to the Act are in the initial clause which he quotes (in short) as saying: "*I appoint* [the Bank] *to be my continuing Attorney ("my Attorney") in terms of section 15 of the Adults with Incapacity (Scotland) Act 2000 and as it may be amended*". Sh. Baird held that the document was not a valid CPA because this wording did not meet the requirements of s15(3)(b) and because nowhere in the document were the requirements of s15(3)(ba) met. Regarding s15(3)(b) he narrates that he has seen very many POA's created since the passing of the Act, and that he: "*can therefore state with certainty that it is routine to find a specific clause in the document which contains words along the lines of 'The granter hereby declares that she intends that this document and the powers contained therein shall subsist and continue to have effect, notwithstanding that I shall have lost capacity in relation to the matters contained herein'*", or other fuller clauses including *inter alia* "*it being my intention that the powers shall subsist and remain in full force and effect notwithstanding incapacity, as defined by the Act, on my part*". He comments that: "*Any clause along the lines of those just quoted clearly represents the incorporation into the document of a statement which clearly expresses the granter's intention that the power be a continuing power. There is no such clause in the document in question here*"; and that the document in the present case: "*manifestly, does not incorporate a statement which clearly expresses the granter's intention that the power be a continuing power*" (emphasis in original). As regards s15(3)(ba) he refers – as many have done before – to the absurdity of a provision which requires granters to state that they have considered how incapacity should be determined, without explicitly requiring them to state the outcome of such consideration.

Regarding s15(3)(b), he concludes his Judgment by pointing out that the "sample" POA's on the OPG website are in the same terms – in that regard – as the bank's standard form; that "*As a matter of inexorable logic, all of such purported attempts to create continuing Powers of Attorney and which are in the same form as the one in this case will be contained in documents which will have no effect during the period of incapacity of the granters thereof*"; and that in consequence any document following the OPG sample "*has not validly created, in my opinion, a continuing Power of Attorney*".

Appeal

The bank has intimated an appeal, but has not appealed against the appointment of the applicants as guardians. The applicants accordingly have no reason to oppose the appeal, so there is likely to be no contradictor. Also, as the new sheriff court appeals structure proposed under civil courts reforms is not yet in place, the appeal decision will only be binding upon Sheriffs in the Sheriffdom of Glasgow and Strathkelvin.

Context and consequences

This decision comes at a time of increasing realisation that the major consequences of authorising someone to act and make decisions following impairment of capacity, coupled with the infinite variety of personal circumstances and associated needs and risks, necessitate a high

degree of skill and care of any professional taking instructions and preparing a CPA or WPA. Last year the Law Society of Scotland published guidance which remains the subject of ongoing review. There has already been disquiet at the concept of offering "one size fits all" samples on the OPG website, and at other aspects of those samples. An example is that their unfortunate failure to regulate adequately management by joint attorneys can and has resulted in attorneys at loggerheads simultaneously making contradictory decisions. More broadly on officially promulgated samples and styles under the Act, the Law Society of Scotland's Mental Health and Disability Sub-Committee has recently criticised the significant shortcomings of the style of guardianship application appearing in the Scottish Government publication "A Guide for Carers - Guardianship and Intervention Orders - Making an Application".

Because of the similarities between requirements in s15(3)(b) and s16(3)(b), Sh. Baird's "inexorable logic" potentially affects many WPA's. OPG reports that more than 500,000 POA's have now been registered under the Act and that a majority of them suffer from the defect identified by Sh. Baird, if defect it be. Regardless of the outcome of the appeal, and given that this will not provide a definitive ruling applicable throughout Scotland, solicitors and others preparing POA's using a limited range of styles as standard, and particularly those using styles similar to the OPG "samples", will no doubt wish to review their styles and procedures, and perhaps POA's already granted, just as it is understood that OPG is removing the "samples" from its website. There are widespread potential cost and liability consequences if significant numbers of POA's already granted do not achieve intended validity as CPA's and/or WPA's, whether replacement be fresh documents by competent granters or guardianship applications for granters who have already lost capacity. It may be that by the test in *Hunter v Hanley*, 1955 SC 200, and other relevant authorities, a "defect" apparently to be found in so very many documents prepared prior to judicial identification of the "defect" would not give rise to a finding of professional negligence; but provision of proper professional services may nevertheless require rectification now, particularly if Sh. Baird's decision were to be upheld. There are likely to be consequences for OPG, especially where members of the public have relied upon OPG's "samples" without engaging professionals.

Comment

Because of the immediate impact of Sh. Baird's decision, it would appear – unusually – not inappropriate to make some further comment in advance of the appeal hearing. On the s15(3)(b) point, it seems that the issue can simply be stated as to whether the words which did appear in the POA document, as quoted above, in fact met that requirement. The bank was appointed "*continuing attorney*" under the Act. Under s15(2) that can only mean a person to whom a CPA has been granted. Does "*clearly expresses*" mean "*conclusively demonstrates*" or does it mean "*states in explicit terms*"? If the latter applies, how explicit must the statement be? The examples quoted by Sh. Baird do not follow the wording of s15(3)(b) (or of s16(3)(b)) as explicitly as the style in Appendix 5 of Ward *Adult Incapacity* (Greens, 2003): "*I expressly declare that it is my intention that the powers conferred in terms of this provision* […] *be continuing powers in terms of section 15 of said Act* [or welfare powers in terms of section 16 of said Act]".

As regards s15(3)(ba), there is a question as to whether that provision was engaged at all, or whether in that regard the POA fails to clear an even earlier hurdle. CPA's may come into force at any time, including immediately upon granting,

upon subsequent request by the granter, upon the reasonable belief of the attorney that the granter has lost capacity, or upon actual incapacity. Only in the last event is s15(3)(ba) relevant. Combinations of these factors are not uncommon. A granter may provide that powers come into force either upon written request or upon the reasonable belief of a spouse as first attorney, but medical certification of incapacity in the case of substitute attorneys. A startling defect of the POA in this case, not identified by Sh. Baird, is that it apparently does not state when it is intended to come into force. The fallback position, in construing documents generally, that in absence of explicit statement to the contrary they come into force upon execution (in the case of a POA, which establishes a contract of mandate, that would mean the acceptance of appointment by the attorney, which in this case will have been by execution of the registration application form) cannot apply because, as narrated in the Judgment: "It was explicitly accepted in argument on behalf of the Bank that it was never intended that they should act as the granter's attorney and operate the powers conveyed while she retained capacity". So the POA document may have required further competent action by the granter if it were ever to enter into force at all, something of which the granter is apparently no longer capable. One has to note that the unacceptably poor drafting of the 2007 amendments to the Act extends to s16(3)(ba) which assumes that all WPA's require a determination of incapacity, ignoring the alternative quoted above in s16(5)(b)(ii).

Developments will be reported in this Newsletter as they occur. A statement narrating the position has now appeared on the Law Society of Scotland website, with link to a statement by the Scottish OPG.

Adrian D Ward

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Conferences at which editors/contributors are speaking

The Deprivation of Liberty Procedures: Safeguards for Whom?

Neil is speaking at the day-long conference arranged on 13 June by Cardiff University Centre for Health and Social Care Law and the Law Society's Mental Health and Disability Committee, to discuss the extent to which the DOL procedures comply with international human rights standards, and whether they offer adequate protection for the rights of service users and their carers. The Conference will focus on the implications of the ruling of the Supreme Court *Cheshire West* as well as the likely impact of the Report of the House of Lords Committee on the Mental Capacity Act. Other speakers include Richard Jones, Phil Fennell, Lucy Series, Professor Peter Bartlett, Sophy Miles and Mark Neary. Full details are available here.

End of Life Care and the Law – Wirral Hospice St John's and Hill Dickinson

Tor and Parishil are speaking at this conference in the North West on 25 June 2014 which covers end of life issues including DNACPR notices, advance decisions to refuse treatment, and the MCA and CoP. Full details are available here.

Other conferences of interest

Mental Health Lawyers Association COP Conference

The MHLA is holding its first COP conference on 6 June in London. The key-note speaker is Mr Justice Charles, Vice-President of the Court of Protection, and other speakers include representatives from the LAA and the Official Solicitor's office. Full details are available here.

BABICM Summer Conference

The British Association of Brain Injury Care Managers is holding its summer conference on 25 and 26 June 2014 at the Hilton Birmingham Metropole. Entitled "Nobody Does It Better! Current Practical Issues in Brain Injury," the conference will examine issues facing brain injury case managers: (1) sex, capacity and the law; (2) what constitutes privileged documentation;

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Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

and (3) the implications of the judgment in *Loughlin v Singh*. For more details and to register, please click here.

Chambers Details

Our next Newsletter will be out in early July. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (forthcoming, 2014, LAG); 'The International Protection of Adults' (forthcoming, 2014, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicylaw.org.uk. To view full CV click here.

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