ThirtyNine
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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: May 2011

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Editors

Introduction

Welcome to the May 2011 edition of our Newsletter. A particular highlight discussed this month is *W v M, S, an NHS Trust and Times Newspapers Limited* [2011] EWHC 1197 (COP), in which Baker J addressed for the first time the power of the Court of Protection to make restricted reporting orders. We are very grateful to Vikram Sachdeva, also of 39 Essex Street, who appeared for the Applicant W, for his contribution by way of guest commentary upon the decision. Coupled with the decision in *Neary*[1] reported in our March edition, very welcome clarity has now been given as to publicity and reporting of health and welfare cases proceeding before the CoP.

We are also very happy to welcome Josephine Norris of 39 Essex Street as a co-editor of the Newsletter for this and forthcoming editions.

Thank you to those of you who were able to attend our seminar on 10.5.11, which covered a number of (complicated) issues concerning both deprivation of liberty and capacity to consent to sexual relations. For those of you who were unable to make it, copies of the papers are available on application to our marketing team at marketing@39essex.com.

By way of forward planning, we are hoping to have another birthday party for the Act later this year (date TBC but likely to be in late September). As part of our general policy of inclusion, we very much welcome suggestions of topics that you would like to see covered (either by way of talk or in smaller groups). We cannot promise to act upon such suggestions, but we promise to reflect upon them!

As ever, contributions or comments are very much appreciated, our email addresses being at the end of this Newsletter.

Practice – DOLS cases

The President has recently confirmed (by way of communication with the judiciary, rather than by way of formal Practice Direction) that "*Deprivation of Liberty Safeguarding cases in the Court of Protection should continue for the time being and until further notice to be heard in the High Court*." This is useful clarification, because it had been unclear whether the previous President's initial diktat in April 2009 (on the coming into force of Schedule A1) that such cases should be listed before a High Court Judge had expired. This does not mean, for the avoidance of doubt, the DOLS cases should be issued in the High Court, only that they should then be listed before a puisne judge of the High Court sitting as a judge in the Court of Protection.

[1] *Hillingdon LBC v Neary* [2011] EWHC 413 (COP).

Cases

All cases discussed below can be found on www.mentalhealthlaw.co.uk if not otherwise available.

R v Dunn [2010] EWCA Crim 2935

Summary

This case, which we should perhaps have noted previously, was decided by the Court of Appeal (Criminal Division) last year, and sheds some useful light on the provisions of s.44 MCA 2005, provides that

> "(*1*) *Subsection (2) applies if a person ('D') –*
>
> *(a) has the care of a person ('P') who lacks, or whom D reasonably believes to lack capacity,*
>
> *(b) is the donee of a lasting power of attorney, or an enduring power of attorney (within the meaning of Schedule 4), created by P, or*
>
> *(c) is a deputy appointed by the court for P.*
>
> *(2) D is guilty of an offence if he ill-treats or wilfully neglects P*."

Ms Dunn was charged with three counts of ill-treatment of persons falling within the scope of s.44(1) whilst the manageress of a residential care home. She was convicted, and appealed on the basis that the directions given by the Recorder to the jury about the constituent elements of the offence created by section 44 and in particular the concept of the absence of capacity for the purposes of this offence.

The 'preliminary question' the subject of appeal was formulated by the Recorder (with the assistance of Counsel) as follows:

> *"What is 'a person without capacity'?*
>
> *A person 'lacks capacity' within the meaning of the Act of Parliament if he is unable to make decisions for himself because of some impairment or disturbance of the function of the mind or brain. The key phrase is, 'unable to make decisions for himself'. A diagnosis of dementia on its own is not enough. The impairment or disturbance may be permanent or temporary."*

The Recorder continued in his summing up that:

> *"You always assume to start with that a person has capacity and then you look at the evidence as a whole including the medical evidence and you ask yourselves this question: 'Did he probably lack capacity?' To put it another way, 'Is it more probable than not that he lacked capacity?'"*

The central criticism of the Recorder's summing up was that it did not make express reference to the issue and time-specific nature of questions of capacity, as required by the provisions of ss.2 and 3 MCA 2005.

The Court of Appeal (in a single judgment delivered by the Lord Chief Justice) noted (at paragraph 19), that:

> *"… At first blush, and indeed on more mature reflection,* [ss.2 and 3] *do not appear to be entirely appropriate to defining the constituent elements of the criminal offence of ill-treatment of a person without capacity. By the time sections 2 and 3 are analysed and related to an individual case, they become convoluted and complex when, certainly in relation to a criminal offence, they should be simple."*

They continued, though, that they would:

> *"… pause to remember the purpose of section 44 and the creation of the offence; and bear in mind that everyone, who for whatever reason but in particular the natural consequences of age, has ceased to be able to live an independent life and is a vulnerable individual living in a residential home, is entitled to be*

protected from ill-treatment if he or she lacks "capacity" as defined in the Act.

At paragraph 22, therefore, they took the view that, notwithstanding the fact that there was something of a "*disconnection*" between the simple criminal offence created by s.44 and the elaborate provisions contained in ss.2-3:

> "*nevertheless the stark reality is that it was open to the jury to conclude that the decisions about the care of each of these residents at the time when they were subjected to ill-treatment were being made for them by others, including the appellant, just because they lacked the capacity to make these decisions for themselves. For the purposes of section 2, this was "the matter" envisaged in the legislation. On this basis the Recorder's direction properly expressed the issues which the jury was required to address and resolve by putting the direction clearly within the ambit of the language used in section 2.*
>
> *23. In the context of long-term residential care, and on the facts of this particular case, it was unnecessary for the Recorder further to amplify his directions and complicate the position for the jury by referring in this part of his summing-up to any of the provisions of section 3, or for them to be incorporated into his directions…*"

The Court of Appeal therefore dismissed the appeal.

Comment

Section 44 MCA 2005 provides an important tool by which the wider protections afforded by the Act could be enforced. The Court of Appeal's criticisms of its drafting are on view well-founded, and, indeed, it is slightly ironic that s.44 requires consideration of a question which the balance of the Act and of the Code makes clear is analytically meaningless, i.e. "does/did X lack capacity?"

However, as the Court of Appeal noted, the underlying principle of s.44 is clear, and the approach adopted at paragraph 22 of their judgment represents an appropriate reading in of words into its provisions. Had it acceded to the thrust of the appeal, it would have made it even more difficult than it is at present to bring a successful prosecution.

V Hackett v CPS and D Hackett [2011] EWHC 1170 (Admin)

Summary

This case is included not because it is a decision of the Court of Protection, but rather because it represents a very useful summary of the law of undue influence in the context of the very vulnerable.

The facts are somewhat complex, but the issue for determination arose, ultimately, out of a confiscation order made in 2007 against the second defendant, who had been illegally importing goods without paying the prescribed duties. His mother, the claimant, had, in 2004, transferred to him for no consideration a house. In the application before Silber J, the claimant contended that the transfer to the second defendant should be set aside on the grounds of presumed undue influence of the second defendant and/or *non est factum* on the basis that when the claimant signed the transfer of the house, she did not know what the document was. The second defendant supported the application, but it was vigorously resisted by the CPS on the basis that (1) that the house was purchased with the proceeds of the second defendant's criminal activities and second, that the claims of presumed undue influence and/or *non est factum* could not succeed.

The claimant (aged 83 at the date of judgment) was profoundly deaf from birth, did not learn to speak, and was unable to read or write, understanding only some basic signs of sign language, able to do some lip-reading, and able to communicate with her hands. In 2003, her husband having died some years previously, she appointed her son as her attorney with general authority to act on her behalf in respect of her property and affairs.

In 1998 she purchased a house, she contended with her late husband's savings (the CPS contending that it was with the proceeds of her son's crimes). She transferred the house to her son in 2004 by way of a transfer deed prepared by a solicitor (arranged by her son) and purportedly signed by her.

Silber J admitted the evidence of the claimant under the provisions of the Civil Evidence Act, but noted that she had not been subject to cross-examination and was clearly somebody of very limited memory, and therefore declined to attach any weight to it unless corroborated by other evidence. For reasons given in some detail in his judgment, he was prepared, however, to accept that (despite his conviction for dishonesty) the son's evidence was reliable. He was also prepared to accept a somewhat Dickensian story as to how it was that the claimant's late husband had come to accumulate sufficient sums to allow her to purchase the house.

He therefore proceeded to consider whether the transaction by which it was transferred to her son should nonetheless be set aside upon the basis of presumed undue influence.

Summarising the case-law,[2] Silber J held (at paragraph 53) that three questions had to be asked:

> *(i) Was there a relationship between the claimant and the second defendant such that a potential claim of presumed undue influence arises? The burden is on the claimant to establish this relationship;*
>
> *ii) If there is such a relationship, is there a transaction arising out of the relationship that calls for evidence of the free exercise of the will of the claimant as a result of full, free and informed thought? The burden is on the claimant to prove the existence of such a transaction; and*
>
> *iii) If there is such a transaction that requires evidence of the full exercise of the will of the claimant as a result of full, free and informed thought, then can the CPS (as the party seeking to counter the inference of undue influence) discharge the evidential burden and provide a satisfactory explanation?*

In relation to the first question, the CPS accepted (and Silber J indicated he would have found) that the fact of the signing of the Power of Attorney gave rise to a relationship of presumed influence. He also noted (at paragraph 54) that "*the claimant was deaf, dumb, barely educated and illiterate and …, since the death of her husband, she had become reliant on the second defendant to manage her affairs and to physically care for her. There was clear evidence from, for example, the claimant's sister Mrs Savage that the claimant went "downhill" after her husband's death in 1997 so that in consequence she was reliant on the second defendant to deal with these matters on her behalf*."

In relation to the second question, Silber J declined to accept the contention of the CPS that the transfer of the house could be reasonably accounted for (essentially because it alleviated the risk that inheritance tax would fall to be paid upon it upon her death). Amongst the reasons he gave for concluding that it was a transaction requiring explanation was (perhaps unsurprisingly) that "*any transaction by which the donee of a Power of Attorney obtains a gift of a substantial asset from the donor of the Power of Attorney calls for some form of justification, especially if, as in this case, the donor is old, infirm, deaf and dumb and the donee himself organises the transaction*."

In relation to the third question and, unusually, the CPS found itself in the position of seeking to establish (as against the contentions of the claimant and her son) that, nonetheless, the transaction had been entered into as a result of full, free and informed thought on the part of the claimant. The CPS sought to draw assistance from the fact that the claimant's own evidence

[2] *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773; *Smith v Cooper* [2010] EWCA Civ 722.

was to the effect that her son would not cheat her and was a good man, but Silber J noted that "*it is not determinative of the issue that the person presumed to exert undue influence did not act wrongfully as it is not an ingredient of undue influence that the wrongdoer cheated the victim*."[3] Silber J was also unimpressed by the submission that, notwithstanding the claimant's severe communication problems, it did not follow she was unable to make up her own mind as to matters. None of points advanced by the CPS, in his view, assisted with establishing that the claimant had entered into the transaction as a result of 'full, free and informed thought.' Having reviewed the case-law, and in particular those cases involving consideration of whether it could properly be said that the individual had received independent advice, he concluded (at paragraph 74) that

> *"In my view, in cases where a donor is suffering from a mental impairment or a learning difficulty, the court is obliged to look with special care to see if the decision taken by a donor is really based on full, free and informed thought. Snell on Equity (32nd Edition page 272) quotes the case of Williams v Williams [2003] WTLR 1371, where the presumption was not rebutted in the case of a claimant suffering from severe mental impairment and who was dependent on the defendant even though it was accepted that the claimant had been "independently advised and that advice would have brought to an ordinary person the implications of what he was doing". The claimant in the present case was not suffering from a medical impairment but she was deaf, dumb and barely educated and this required especially careful advice before the CPS would have discharged the burden of showing that the claimant disposed of the house as a result of full, free and informed thought."*

Although the solicitor in question who was said to have given the claimant the necessary independent advice did not give evidence, an attendance note recording a conference and a letter from the solicitor were both before the Court, and Silber J had no hesitation (at paragraph 80) of making a number of relatively severe criticisms of the steps taken by the solicitor, and hence of the independence of the advice he could give; not the least of these was that he did not see her in the absence of her son, and that the letter in which advice was given was sent to someone who could not read, and it appeared that the solicitor took no steps to ensure that she had the letter read to her in terms she could understand.

Silber J therefore declared himself satisfied that the transaction was to be set aside because the presumption of undue influence could not be disproved by the CPS. Although he did not then need to go on to consider the claim of *non est factum*, he noted that the plea enabled a party to avoid an agreement if that party was permanently or temporarily unable, through no fault of its own, to have any real understanding of the purport of the document, irrespective of whether this inability arises from defective education or any incapacity.[4] The judge noted the reluctance of the Courts to allow people to avoid transactions under this head, and, on the basis of the evidence before him concluded (at paragraph 90) that

> *"In this case there is no evidence as to what the claimant thought she was signing. She might well have realised that she was transferring the house to the second defendant. In other words, she has failed to discharge the burden on her and for that reason, this claim must fail."*

Comment

As noted at the outset, this is not strictly a case involving lack of capacity (and, indeed, the judge was careful not to make a finding that the claimant, notwithstanding her evident disabilities, did not have capacity to take the relevant decision at the relevant time). However, it serves both as a useful summary (albeit on rather odd facts) of the case-law on presumed

[3] Citing Mummery LJ in *Niersmans v Pesticcio* [2004] EWCA Civ 37.

[4] *Saunders v Anglia Building Society* [1971] AC 1004, 1015-1016.

influence, and also an object lesson in the steps that are necessary for those advising the vulnerable to take when they are engaged in a transaction involving anyone potentially capable of overbearing their will.

W v M and Ors [2011] EWHC 1197 (COP)

Summary

In this case, Baker J had to consider the power of the Court of Protection to impose reporting restrictions and the factors that it should take in to account when doing so.

M has been in a minimally conscious state for several years. Members of her family, including her mother, W, reached the conclusion that she would not wish to continue living in her current state. They started proceedings in the Court of Protection seeking a declaration that she lacks capacity to make decisions as to her future medical treatment and for the Court's approval of the withdrawal of artificial nutrition and hydration. The final hearing is listed for 18 July 2011.

When the case first came before Baker J in November 2010, he ordered that all further proceedings should be heard in open court but indicated that it was open to any party to apply for an injunction preventing publication of the identity of the parties and other information concerning the proceedings. In April 2011, the applicant sought an Order imposing reporting restrictions which would restrain publication of information likely to lead to the identification of M, family members, and care staff and further restrain the media from contacting or communicating with any person. The scope of the order sought was contested. By the time the application was heard before Baker J, the parties had narrowed the issues considerably and a draft order was agreed save for one point of dispute.

In granting the orders, Baker J gave guidance as to the considerations that apply when the Court of Protection imposes reporting restrictions on the media and in particular, the balancing exercise that must be undertaken between competing Convention Rights:

- The general rule is that Court of Protection proceedings should usually be held in private. When granting an order containing reporting restrictions, careful consideration must always be given to the precise terms to be included in the order which will always be determined by the specific facts of the individual case.

- Orders for the restriction of publication of information must be founded on rights arising under the ECHR. Practice Direction 13A, following the House of Lords authorities, makes it clear that in the Court of Protection neither article 8 nor article 10 has automatic precedence over the other: *Re S (A Child) (Identification: Restriction on Publication)* [2004] UKHL 47, [2005] 1 AC 593 as emerging from the opinions of the House of Lords in the earlier case of \i[2004] UKHL 22, [2004] 2 AC 457:

- A number of further points arise about the balancing of Convention rights in these applications in the Court of Protection.

    1. Whilst the rights engaged will normally be confined to articles 8 and 10, there may be cases where article 6 is engaged, where for example it is asserted that the publication of information relating to proceedings, or attempts by the media to contact litigants, would affect the capacity or willingness of a party to participate in the litigation.

    2. A decision whether or not to allow publication of information in such cases may well engage the article 8 rights of not only the incapacitated adult but also other members of her family. Under s.6(3) of the Human Rights Act 1998, the Court of Protection is a public authority and must not act in any way that is incompatible with Convention rights. Accordingly, the balancing exercise that has to be undertaken may, in appropriate circumstances, include consideration of the article 8 rights of other family members.

    3. When focusing on the article 8 rights of

P and any other relevant person, the court should consider the nature and strength of the evidence of the risk of harm. There must, as Peter Jackson J observed in *Hillingdon LBC v Neary* [2011] EWHC 413 (COP) at paragraph 15(3), be a proper, factual basis for such concerns.

4. Whilst there may be cases in which the Court of Protection allows details and even the name of the adult who is the subject of the proceedings to be reported, the public interest in freedom of expression arising in serious medical cases will usually lie in the general issues arising on an application for an order that might have the effect of leading, directly or indirectly, to the shortening of the life of an incapacitated adult, as opposed to the identity and personal circumstances of the incapacitated adult.

5. When conducting the balancing exercise, the Court must bear in mind that it is in the public interest for the practices and procedures of the Court of Protection to be more widely understood.

6. Judges and practitioners in the Court of Protection – as in the Family Division – must be on their guard to ensure that their naturally protective instincts, developed through years of giving paramount consideration to the welfare of children and the best interests of vulnerable adults, do not lead them to underestimate the importance of article 10 when carrying out the balancing exercise.

7. It is of course the case that the Court of Protection hearing an application for a reporting restriction order under rule 92 is considering the same human rights as usually arise in the so-called 'superinjunction' cases in the Queen's Bench Division, in which celebrities and others seek to restrain publication concerning their private lives. Both jurisdictions are applying the same statute, namely the Human Rights Act, and will continue to do so unless and until Parliament passes a new privacy law. Both jurisdictions involve the balancing exercise, usually of articles 8 and 10. But the conduct of that balancing exercise will invariably be very different in the Court of Protection because of the circumstances of those whom the court is seeking to protect. As Maurice Kay LJ observed in *Ntuli v Donald* [2010] EWCA 1276 at paragraph 54, "*this is an essentially case-sensitive subject*". Decisions on the conduct of the balancing exercise between competing Convention rights in celebrity cases are unlikely to be of any relevance to decisions in the Court of Protection or vice versa.

When applying this approach to the facts of this case, Baker J emphasised that the Court has determined that issues in this case are sufficiently important to justify public hearing, and the press must be allowed to report the proceedings as far as possible. Nevertheless, the balance fell manifestly in favour of granting the orders sought by the applicant and the Official Solicitor. The Article 8 rights of both M and her family members are engaged. The terms of the order will ensure that the article 8 rights of family members are properly protected. The freedom of expression enjoyed by the press will be restricted, but the extent of that restriction will not prevent the press from reporting the issues, evidence (including expert evidence) and arguments at the hearing in July.

Guest Comment – Vikram Sachdeva

This impressive judgment from Mr. Justice Baker is important for four reasons.

First, it clarifies the procedure which must be followed in serious medical treatment cases where reporting restrictions orders (and possibly further injunctions, such as non communication orders) are sought. This will happen in virtually every serious medical treatment case, for (per Practice Direction 9E) such cases are, unlike other CoP cases, presumptively heard in public.

Second, it rejected an attempt by *The Times* to apply a dictum in a case about a well-known sportsman's sexual indiscretions to this sensitive field, which would have given primacy to the media's article 10 rights over the article 8 rights of the protected party and his or her family.

Third, it suggests that the balancing process can take into account both the parties' Article 6 rights, and the Article 8 rights of parties and (if appropriate) of non-parties such as family members.

Fourth, it provides a very useful standard order which can be modified to the facts of individual cases, which is currently lacking in the CoP Rules and Practice Directions.

Wychavon District Council v EM (HB) [2011] UKUT 144 (AAC)

Summary

This was a decision of the Upper Tribunal in respect of a claim for housing benefit. The claimant lived and was cared for in a home that had been specially constructed for her. She was (apparently) party to a tenancy agreement with her father as landlord. The tenancy agreement was for an indefinite term. In the space for the claimant's signature the agreement simply said that she was '*profoundly disabled and cannot communicate at all'.*

The Upper Tribunal found that there was no agreement as the claimant had not agreed to the arrangements (regardless of whether or not she had capacity to do so). There could not be a voidable agreement as the claimant's father must have known that she was of unsound mind and could not have entered into a contract. It could not be said that she had taken the benefit of the contract and should therefore pay the rent as she had no understanding of the basis on which she was staying at her home. She had no liability to pay rent and until such time as a lawful agreement was entered into on her behalf, there was no entitlement to apply for housing benefit.

Comment

This case is of interest because it addresses, from outside the Court of Protection, the question of the validity of tenancy agreements entered into with people who lack capacity. This is a subject which it is anticipated the Court of Protection is likely to have to grapple with in the near future.

Our next update should be out in June 2011, unless any major decisions are handed down before then which merit urgent dissemination. Please email us with any judgments and/or other items which you would like to be included: full credit is always given.

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