IN THE COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTER OF ALLEN

Before Senior Judge Denzil Lush

21st July 2009

An objection was made by the donor's son to the registration of her EPA on the ground that the attorney was unsuitable to be the donor's attorney. The objector argued that the attorney had a duty under the Mental Capacity Act to consult him before making decisions and had failed to do so.

Decision

There were two main themes to D's objections. First, that the attorney had failed to consult with him, but was under a duty to consult him, by virtue of section 4(7)(b) of the Mental Capacity Act 2005, as someone who is interested in his mother's welfare. And secondly, that the attorney had somehow made or got hold of the wrong diagnosis, as a result of which the donor had either been inappropriately treated, or had failed to receive the appropriate treatment at the material time.

In support of his argument relating to his right to be consulted under section 4(7)(b), D quoted the following passages from the Mental Capacity Act 2005 Code of Practice: paragraphs 5.13, 5.32, 5.37, 5.49, 5.51, 5.54, 5.61, 5.64, and 5.67. In paragraph 5.54, for example, the code states "everybody's views are equally important – even if they do not agree with each other." And paragraph 5.61 says that decision-makers cannot simply impose their own views, "They must have objective reasons for their decisions – and must be able to demonstrate them. They must be able to show they have considered all relevant circumstances and applied all elements of the best interests checklist." D claims that the attorney fails to engage in any proper debate, and merely expresses an opinion, without justifying it or explaining the reasons for it.

As I suggested to D at the hearing, whereas attorneys acting under a Lasting Power of Attorney have a duty "to have regard to" the Code of Practice (Mental Capacity Act 2005, section 42(4)(a)), attorneys acting under an Enduring Power of Attorney do not, largely because it was considered inappropriate to impose the requirements of the new legislation retrospectively on them. Nevertheless, his arguments raise interesting issues regarding the extent to which any attorney should reasonably be expected to consult with someone who, in all reality, will treat every single issue upon which he is likely to be consulted as a bone of contention or stumbling-block. In such circumstances, the process of consultation would become both burdensome and futile.

The first line of section 4(7) provides that any best interests decision-maker "must take into account, if it is practicable and appropriate to consult them, the views of" various categories of individuals. In my judgment, where any attempt at consultation will inevitably be unduly onerous, futile, or serve no useful purpose, it cannot be in P's best interests, and it would be neither practicable nor appropriate to embark on that process in the first place.

[The court then directed registration of the EPA.]