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Thirty Nine Essex Street Court of Protection Newsletter: July 2011

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Editors

Introduction

Welcome to the July 2011 edition of the 39 Essex Street Court of Protection Newsletter. It has been a very much quieter month this month in terms of reported decisions. Indeed, we are only aware of one reported CoP decision, from Baker J, who is as we go to press hearing the case of *W v M & Ors*: watch this space for what will be a landmark decision on the lawfulness of the withdrawal of artificial nutrition and hydration from a person in a Minimally Conscious State.

Cases

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

PH v A Local Authority and Z Limited and R

[2011] EWHC 1704 (Fam)

Summary

The Court was asked to decide whether a man suffering from Huntingdon's Disease ('HD') had the capacity to make decisions about his residence, care and treatment. The matter came before the Court by way of an application under s.21A MCA 2005 seeking a termination of a standard authorisation made by the local authority permitting Z Limited to keep PH at a care home. The application challenged the conclusion of the local authority (as supervising body) that PH met two of the qualifying requirements for a standard authorisation, namely the capacity requirement and the best interests requirement. PH (acting by his litigation friend, the Official Solicitor) further challenged the purposes and conditions of the standard authorisation. It was agreed that the question of capacity would be determined as a preliminary issue. A jointly-instructed consultant neuro-psychiatrist (with a particular expertise in well respected as an expert in HD) concluded that PH had the capacity to decide the question of residence. This view was accepted by the Official Solicitor and shared by P's former partner, R, with whom he had continued to live until he was placed at the care home, and to whom PH wished to return. However, the view was contrary to the conclusions of the medical professionals treating PH, and both the local authority and Z Limited sought to challenge the conclusions of the expert.

Following a two-day hearing in which he heard evidence from the treating professionals, PH's social worker and R, Baker J concluded that PH lacked the relevant capacity. Before assessing the evidence, Baker J set out in his judgment (at paragraph 16) a summary of the principles to be adopted by a Court assessing capacity which are of sufficiently general application to all those required to assess capacity that they merit setting out in full:

"*16. When addressing questions of capacity, the Court must apply the following principles.*

i) *A person must be assumed to have capacity unless it is established that he lacks capacity: section 1(2). The burden of proof therefore lies on the party asserting that P does not have capacity.*

ii) *The standard of proof is the balance of probabilities: section 2(4).*

iii) *A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success: section 1(3). As paragraph 4.46 of the Mental Capacity Act 2005 Code of Practice makes clear, "it is important to assess people when they are in the best state to make the decision, if possible".*

iv) *A person is not to be treated as unable to make a decision merely because he makes an unwise decision: section 1(4).*

v) *A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or disturbance in the functioning of, the mind or brain: section 2(1). This first question is sometimes called the "diagnostic test".*

vi) *For the purposes of section 2, a person is unable to make a decision for himself if he is unable to (a) to understand the information relevant to the decision; (b) to retain that information; (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision whether by talking, using sign language or any other means: section 3(1). These four factors comprise the second question which is sometimes called the "functional test".*

vii) *The Code of Practice gives guidance as to the meaning of the four factors in the functional test. Thus, so far as the first factor is concerned - understanding information about the decision to be made – paragraph 4.16 provides: "It is important not to assess someone's understanding before they have been given relevant information about a decision. Every effort must be made to provide information in a way that is most appropriate to help the person understand".*

viii) *The Code also gives guidance concerning the third of the four factors – using or weighing information as part of the decision-making process. Paragraph 4.21 provides "for someone to have capacity, they must have the ability to weigh up information and use it to arrive at a decision. Sometimes people can understand information, but an impairment or a disturbance stops them using it. In other cases, the impairment or disturbance leads to a person making a specific decision without understanding or using the information they have been given."*

ix) *Further helpful guidance as to the interpretation of the functional test is given by Macur J in LBL v RYJ [2010] EWHC 2664 (Fam). At paragraph 24 of the judgment, the learned judge said:*

> *"I read section 3 to convey, amongst other detail, that it is envisaged that it may be necessary to use a variety of means to communicate relevant information, that it is not always necessary for a person to comprehend all peripheral detail and that it is recognised that different individuals may give different weight to different factors."*

x) *Later, at paragraph 58 of the judgment, the learned judge indicated that she agreed with the interpretation of the section 3 test advanced by the expert in that case (which, coincidentally, was Dr Rickards) namely that it is "to the effect that the person under review must comprehend and weigh the salient details relevant to the decision to be made".*

xi) *In Sheffield City Council v E [2004] EWHC 2808 (Fam) (a case concerning the capacity to marry decided before the implementation of the 2005 Act) Munby J (as he then was) said (at paragraph 144):*

> *"We must be careful not to set the test of capacity to marry too high, lest it operate as an unfair, unnecessary and indeed discriminatory bar against the mentally disabled".*

Although that observation concerned the capacity to marry, I agree with the submission made by Miss Morris on behalf of the Official Solicitor in this case that it should be applied to other questions of capacity. In other words, courts must guard against imposing too high a test of capacity to decide issues such as residence because to do so would run the risk of discriminating against persons suffering from a mental disability. In my judgement, the carefully-drafted detailed provisions of the 2005 Act and the Code of Practice are consistent with this approach.

xii) The 2005 Act generally, and the DOLS in particular, are compliant with Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms – see my earlier decision in G v E [2010] EWHC 621 upheld by the Court of Appeal at [2010] EWCA Civ 822 and in particular paragraphs 24-25 and 57 of the judgment of Sir Nicholas Wall P in the Court of Appeal. Just as there is no justification for imposing any threshold conditions before a best interests assessment under the DOLS can be carried out (the point taken up unsuccessfully by the appellants in G v E) so in my judgment there is no reason for adopting the approach advocated by Miss Morris on behalf of the Official Solicitor in this case, namely that a finding of a lack of capacity should only be made where the quality of the evidence in support of such a finding is "compelling". Equally, it is unnecessary for the court to adopt an approach, also advanced by Miss Morris on behalf of the Official Solicitor, that the statutory test should be construed "narrowly". The statutory scheme is, as I have already observed, carefully crafted. I agree with the submission made on behalf of Z Limited (in written submissions by Mr Vikram Sachdeva who did not appear at the hearing) that the question of incapacity must be construed in accordance with the statutory test – "no more and no less".

xiii) In assessing the question of capacity, the court must consider all the relevant evidence. Clearly, the opinion of an independently-instructed expert will be likely to be of very considerable importance, but in many cases the evidence of other clinicians and professionals who have experience of treating and working with P will be just as important and in some cases more important. In assessing that evidence, the court must be aware of the difficulties which may arise as a result of the close professional relationship between the clinicians treating, and the key professionals working with, P. In Oldham MBC v GW and PW [2007] EWHC136 (Fam) [2007] 2 FLR 597, a case brought under Part IV of the Children Act 1989, Ryder J referred to a "child protection imperative", meaning "the need to protect a vulnerable child" that for perfectly understandable reasons may lead to a lack of objectivity on the part of a treating clinician or other professional involved in caring for the child. Equally, in cases of vulnerable adults, there is a risk that all professionals involved with treating and helping that person – including, of course, a judge in the Court of Protection – may feel drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to carry out an assessment of capacity that is detached and objective. Having identified that hypothetical risk, however, I add that I have seen no evidence of any lack of objectivity on the part of the treating clinicians and social worker who gave evidence in this case.

In concluding that he preferred the evidence of the treating medical professionals and the social worker, Baker J was "*struck by the fact that* [the] *report* [of the jointly instructed expert], *and the answers to the supplementary questions posed by the other parties, seemed somewhat superficial. This may have been a reflection of the fact that he was basing his opinion on a single interview of ninety minutes. It would be*

an over-simplification to describe it as a snapshot but it is, to my mind, a disadvantage that the assessment was based on a single visit" (paragraph 56).

Comment

This judgment is of some considerable importance for the following reasons:

(1) endorsing the conclusion of Macur J in *LBL v RYJ* [2010] EWHC 2664 (Fam) that attention must be given to whether the person must comprehend the salient details relevant to the decision to be taken (i.e. not every detail);

(2) emphasising that courts must guard against imposing too high a test of capacity to decide issues such as residence because to do so would run the risk of discriminating against persons suffering from a mental disability;

(3) for its careful analysis of the relevant weight to be placed upon the evidence of a jointly instructed expert versus treating professionals (including the dangers of a lack of objectivity on the part of the latter);

(4) as an example of the practical difficulties that can be caused by the fact that it is likely in many cases that the jointly instructed expert will only have the opportunity to make one visit and undertake one interview with P, and will, inevitably, only be able to give a snapshot.

McDonald v RB Kensington and Chelsea [2011] UKSC 33

We draw your attention to this important community care case because, in it, their Lordships (with a powerful dissent from Baroness Hale) make it clear that the scope for challenges to funding decisions based upon Article 8 ECHR is likely to be very limited. Lord Brown JSC made a particular point of noting that a local authority can choose between appropriate care packages upon the basis of cost – see paragraph 22:

"*I add only that, even if such an interference* [with the Claimant's Article 8(1) ECHR rights] *were established, it would be clearly justified under article 8(2)… on the grounds that it is necessary for the economic well-being of the respondents and the interests of their other service-users and is a proportionate response to the appellant's needs because it affords her the maximum protection from injury, greater privacy and independence, and results in a substantial costs saving*."

We anticipate that it may well be the case that the approach adopted by the Supreme Court in this would feed through into any 'collateral' judicial review challenge that may be brought to a decision by a public authority not to put before the Court of Protection a particular option for consideration. It is one that has already been picked up by the Court of Appeal in rejecting an Article 8 ECHR challenge to a PCT's funding decision (**R(Conliff v North Staffordshire PCT** [2011] EWCA Civ 910).

In other words, we anticipate that, so long as it remains the case that such a decision by a local authority is only challengeable by way of judicial review, it is likely that, so long as a local authority can demonstrate that the option(s) that is/are before the Court of Protection from its end can meet the needs of P, it is likely that the Administrative Court will be very slow to find its decision flawed on the basis that a more "Rolls-Royce" package would be better.

Deprivation of Liberty: Statistics and a Map

With many thanks to Caroline Hurst of Langleys for drawing this to our attention, you may find the following link of interest: http://carlplant.me/mental-capacity-act-2005-deprivation-of-liber. It is a map putting into graphical form the information on DOLS applications contained in the Second Report on Annual Data for 2010/11, which is itself important reading and is to be found at http://www.ic.nhs.uk/pubs/mentalcapacity1011annual.

The key findings of this Report (covering the period April 2010-March 2011) are as follows:

"*The total number of applications made was still much lower than expected for the second year (8,982 in England compared with the number predicted for in England and Wales1 which was around 18,600). This compares to the 7,157 applications made in 2009/10; just over 34 per cent of the predicted number for that year.*

• *The number of successful applications resulting in an authorisation to deprive a person of their liberty was about the expected number (4,951 in England compared to the 5,000 predicted for in England and Wales1), though a much higher percentage of applications than expected were successful (55% compared with the predicted 25%1). In the previous year 3,297 applications were approved – a 46% approval rate compared to the 25% expected.*

• *About 2% of applications that were not authorised involved situations where the person was nevertheless judged as being in a situation that amounted to a deprivation of liberty. In these cases the hospitals and care homes could be acting illegally, if that person was not swiftly cared for or treated in less restrictive circumstances. This is half the percentage in 2009/10 (4%).*

• *Of those authorisations that were granted, more then half (55%) were for a person who lacked capacity because of dementia.*

• *57% of those applications made to a Local Authority were granted when applying for a deprivation of liberty compared to 50% in Primary Care Trusts.*

• *Authorisations granted for people in care homes were generally for longer periods than for people in hospitals (62% of authorisations granted by Local Authorities were for more than 90 days compared with 23% of Primary Care Trust authorisations).*

• *There is a big difference in the number and rate of applications in different parts of England, with the highest number and rate of applications being made in the East Midlands (1,644 applications and 46 applications per 100,000 population) compared to the England rate (22 applications per 100,000 population) and the lowest number of applications made in the North East (579) with the lowest rate being in the East of England with just 13 applications per 100,000 population.*"

Appointment of QB judges to hear CoP cases in an emergency

With immediate effect from 28.7.11, all Queen's Bench Division Judges have been nominated for purposes of s.46 MCA 2005 to exercise the jurisdiction of the Court of Protection.

It is envisaged that they will only be required to hear Court of Protection applications on an emergency basis in the unlikely event that it has not been possible to identify a High Court Judge of the Family Division to hear the matter.

However, a nomination is a nomination, and it will be of interest to see whether any enterprising souls seek to contend – say – that an Admin Court Judge hearing a judicial review relating to an incapacitated adult should don the cap of a CoP judge to make best interests declarations regarding that person…

Court of Protection User Survey

Finally, we attach to this newsletter a letter (and accompanying questionnaire) from the new Court Manager at the Court of Protection. Please do take the time to read it and respond to the questionnaire, especially those regular users to whom it is specifically aimed.

Our next update should be out in August 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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