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Thirty Nine Essex Street Court of Protection Newsletter: September 2011

Alex Ruck Keene, Victoria Butler-Cole and Josephine Norris
Editors

Introduction

Welcome to the September 2011 edition of the 39 Essex Street Court of Protection newsletter. It has been a relatively quiet month for case law from the Court of Protection, although the decision in ***W v M*** [2011] EWHC 2443 (Fam) has been in the headlines this week. Other important decisions, although less likely to attract the interest of the media, are also on the horizon. The hearing of the appeal in ***Cheshire West and Chester Council v P & Anor*** [2011] EWHC 1330 (Fam) has taken place and the decision is awaited. As the Editors have previously indicated, this decision, which will consider the application of Article 5 ECHR to those in care homes who are subject to restraint for their own protection, will have potentially far reaching consequences.

The recently published Upper Tribunal decision in ***DN v Northumberland Tyne and Wear NHS Foundation Trust*** [2011] UKUT 327 (AAC) which can be found on www.mentalhealthlaw.co.uk is essential reading for all AMHPs and local authorities. It concerns the interrelationship between the MCA and the MHA, and whether DOLS authorisations in the community under the MCA can be used in place of detention under the MHA. Unfortunately, no opposing submissions were made in the case, and there are a number of issues raised by the decision which we feel require further consideration. We will provide our commentary on the case in the next newsletter.

Cases

R (on the application of O) v London Borough of Hammersmith and Fulham [2011] EWCA Civ 925

Summary

O was a child with complex care needs due in part to his severe autism. O's parents considered that O needed to reside and be educated in one location due to the difficulties he experiences with transitions from one environment to another. They identified an appropriate establishment, namely Purbeck View School in Dorset, but were prepared to consider similar alternatives. The Local Authority decided that O should attend a school near his home, Queensmill, and reside in a separate location. The residential placement initially proposed would be available for 38 weeks a year.

Proceedings for Judicial Review of the Local Authority's decision as to O's placement were issued on 11 February 2011. The decision was challenged on various grounds, including the ground that the only rational option was to accommodate O at Purbeck View School. A mandatory Order requiring the Local Authority to accommodate O at Purbeck View was sought.
At first instance, the matter came before Blair J ([2011] EWHC 679 Admin). Mr Justice Blair accepted the submission put by Counsel for O

that the standard of Wednesbury review was variable and that the case warranted an intense degree of review. On this basis, Blair J concluded that the decision was irrational as the Local Authority had placed too much weight on a decision relating to O's education taken by the First Tier Tribunal two years previously and had placed insufficient weight on the conclusion of its own core assessment that there was a need to minimise transitions. However, Blair J declined to grant the mandatory order on the basis that there were other options lawfully open to the authority. Blair J rejected an argument that local authority's decision was a disproportionate and unlawful interference with O's Article 8 ECHR rights or that in the alternative, the local authority was in breach of its positive obligations to promote the fulfilment of his Article 8 rights.

Both parties appealed this decision. In May 2011, prior to the appeal being heard, the Local Authority took a fresh decision and proposed a placement at Queensmill School with a residential placement at a children's home in Croydon 9 miles away which would be available 52 weeks per year. This was rejected by the parents. Rather than issuing proceedings for judicial review of the fresh decision, O's legal representatives indicated that they would leave it to the Court of Appeal to resolve the issues, a procedural course which the Defendant opposed.

The matter came before the Court of Appeal for consideration of both permission and the substantive hearing if appropriate.

O's appeal

Black LJ held that in essence O's case was that the only way O's needs could lawfully be met was through a placement at Purbeck View. If that were not accepted, all the grounds of challenge would fail. O had presented a powerful case supported by expert evidence. The Local Authority did not challenge the suitability of Purbeck View School but did not consider that it was the best way to meet O's needs at present.

Black LJ concluded that "*the difference of opinion between the local authority on the one hand and O's parents and their advisors on the other as to what is required to meet O's needs results from a different weighting of the various factors that must be considered. O's parents give priority to avoiding anything other than the inevitable moves each day between living accommodation and educational provision and to the complete integration of care that can occur when a single establishment is responsible for a child. The local authority gives priority to maintaining O's links with his locality and reducing the obstacles (non-existent in the family's view) that geography might present to contact with his family*." Accordingly she was not persuaded that Purbeck View was the only placement currently available that would meet O's needs. The local authority's proposal was another way of meeting his needs. Neither proposal could be rejected as misguided, impractical or inappropriate. The choice between the two proposals depended on how one weighed the various factors.

Further, where a local authority simply chose one way of meeting a child's needs rather than another, it could not be said to have interfered with the exercise by the child or the parents of their right to respect for their private or family life. There was no breach of Article 8.

The Local Authority's Appeal

The Local Authority had sought permission to challenge the decision of Blair J on the ground that he had erred in holding that the decision under challenge was subject to a greater intensity of review (*The Queen on the Application of L v Leeds City Council* [2010] EWHC 3324 (Admin)). Black LJ refused permission to appeal. Whilst this was a difficult issue, it had not been fully explored and should be left until another day. The remaining issues were purely of academic interest.

Comment

Although this is not a Court of Protection case, it is a useful reminder of the breadth of a Local Authority's discretion when proposing a placement pursuant to its duties to accommodate a child in need under the Children Act – a principle which is of wider relevance in the exercise of a Local Authority's discretionary

powers. It further highlights the difficulties parties will encounter when arguing that there is only one rational option open to a Local Authority, even where there is substantial expert evidence in support of the preferred option, in cases where the Local Authority refuses to fund the preferred option, thereby circumventing the ability of the Court of Protection to influence its decision. Local Authorities will no doubt be comforted by Blake LJ's explicit recognition that in-house social services teams have important expertise in assessing the needs of children with disabilities.

W v M [2011] EWHC 2443 (Fam)

Summary

M had suffered a non-traumatic brain injury some eight years ago, following which she was diagnosed as being in a vegetative state. On further examination, it transpired that M did not meet the criteria for vegetative state and was in a 'minimally conscious state' ('MCS'). M was severely disabled and dependent on others for all aspects of her care. She had no functional communication and only intermittent awareness of herself and her environment. So far as it was possible to tell, M was capable of experiencing pain, and did experience pain though not constantly. She was apparently able to have pleasurable experiences for example hearing music and being massaged. She was kept alive through artificial nutrition and hydration.

M's sister and partner were adamant that M would not have wanted to be kept alive in this condition. She had been very independent and had expressed views about not wanting to end up in a care home or dependent on others. There was no realistic prospect of M recovering, and it was estimated that her life expectancy was a further 10 years. The family sought a declaration under the MCA 2005 that it was in M's best interests for ANH to be withdrawn.

The application was opposed by the PCT responsible for commissioning M's care and by the Official Solicitor on behalf of M, who argued that M's quality of life was not so burdensome to her she should be allowed to die, and that her previously expressed wishes and likely views were too uncertain to be given significant weight.

The Official Solicitor further submitted that the court could not carry out a balancing exercise at all in the case of patient in MCS who was clinically stable, because to do so would be to make impermissible value judgments about another person's quality of life.

Mr Justice Baker found against the Official Solicitor on the question of what approach the court should take to the application, holding that a best interests decision had to be made, and that there was no rationale for extending the approach set out in Bland (whereby there was no balancing exercise to perform in respect of someone who was permanently insensate) to patients in MCS.

In M's particular case, the judge found that M's life was not overly burdensome, saying in his summary that '*M does experience pain and discomfort, and her disability severely restricts what she can do. Having considered all the evidence, however, I find that she does have some positive experiences and importantly that there is a reasonable prospect that those experiences can be extended by a planned programme of increased stimulation.'* The preservation of life was a fundamental principle, and the views of M's family about her likely wishes were not to be given significant weight.

Comment

It is unsurprising that a court will be extremely reluctant to sanction steps which result in the death of an incapacitated person, and is likely to err on the side of choosing life over death, given the gravity and irreversibility of the decision to withdraw ANH.

However, it is interesting to note that in any other case, the previously expressed views of a now-incapacitated person, and their likely view of their present circumstances, would be paid considerably more attention.

Perhaps the most important lesson to draw from the judgment is that given the inherent cautiousness about refusing medical treatment on the part of an incapacitated person, there

should be much greater use of advance decisions about medical treatment, for those people who are uneasy about the prospect of a court making decisions on their behalf if they should lose capacity.

Other news

We have just discovered that we have been described in the new edition of the Legal 500 as '*Undoubtedly the leading set in Court of Protection work'* – thank you to our many instructing solicitors who read this newsletter, some of whom were no doubt interrogated by the Legal 500 publishers as part of their research and thus helped us to receive this accolade!

Contributors:

Alex Ruck Keene: alex.ruckkeene@39essex.com
Alex has a very busy practice before the Court of Protection. He is regularly instructed by individuals (including on behalf of the Official Solicitor), NHS bodies and local authorities. Together with Victoria, he co-edits the Court of Protection Law Reports for Jordans. He is a co-author of Jordan's Court of Protection Practice 2011, and a contributor to the third edition of the Assessment of Mental Capacity (Law Society/BMA 2009)

Victoria Butler Cole: vb@39essex.com
Victoria regularly appears in the Court of Protection instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights' and a contributor to the Assessment of Mental Capacity (Law Society/BMA 2009).

Josephine Norris:josephine.norris@39essex.com
Josephine is regularly instructed before the Court of Protection. She also practises in the related areas of Community Care, Regulatory law and Personal Injury.

David Barnes Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle Practice Manager
sheraton.doyle@39essex.com

Peter Campbell Assistant Practice Manager
peter.campbell@39essex.com

For further details on Chambers please visit our website www.39essex.com

London
39 Essex Street London WC2R 3AT
Tel: +44 (020) 7832 1111 Fax: +44 (020) 7353 3978

Manchester
82 King Street Manchester M2 4WQ
Tel: +44 (0) 161 870 0333 Fax: +44 (020) 7353 3978

Email: clerks@39essex.com