ThirtyNine
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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: October 2012

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Editors

Introduction

Welcome to the October 2012 newsletter. Whilst we only cover one COP case, *KK*, it is of particular interest for the approach taken to the question of capacity, and also for being the first detailed post-*Cheshire West* consideration of deprivation of liberty. We also cover an important case upon the approach to non-disclosure in Children Act proceedings, which sheds useful light upon the approach to be taken in the Court of Protection, as well as highlighting an amendment to the MCA 2005 which will be coming into effect on 1 November.

As an innovation, and as part of our continuing attempts to make the newsletter more useful, we include hyperlinks to publicly accessible transcripts of the judgments where they are available at the time of publication (as a general rule, those which are not so accessible will be in short order upon the www.mentalhealthlaw.co.uk site; our previous case comments can be found at www.copcasesonline.com).

We also wish to use this newsletter to pay our respects to Sir Nicholas Wall, who we have learned will be stepping down as President of the Family Division (and hence of the Court of Protection) with effect from 1 December 2012, due to ill health. Sir Nicholas has played an important role in developing the jurisprudence of the Court of Protection in its new guise, and, in particular, in emphasising the need for transparency in decision-making and the reporting of judgments. He was also a strong supporter of the Rules Review Committee established to seek to build upon the experiences of the first years of the Court's work. That we have yet to see the majority of those recommendations bear fruit is something that we must lay at others' door. We wish him very well.

CC v KK and STCC [2012] EWHC 2136 (COP)

Mental capacity – assessing capacity – residence – Article 5 ECHR – Deprivation of liberty

Summary

KK was an 82-year old woman with Parkinson's Disease, vascular dementia, and paralysis down her left side. Following the death of her husband, she moved and settled in a rented bungalow. However, incapacity and best interests determinations had resulted in her being placed in a nursing home between July and October 2010 and from July 2011. Her deprivation of liberty was authorised under Schedule A1 of the MCA from 12 August 2011 which she challenged under MCA s.21A on 2 September 2011.

Trial home visits commenced in November 2011 and subsequent requests for a DOL authorisation under Schedule A1 were refused on the basis that there was no deprivation of liberty. The s.21A challenge was dismissed and interim declarations granted as to her incapacity

and best interests. By the time of the final hearing in May 2012, she was having daily home visits.

Mr Justice Baker was called upon to determine: (1) whether KK had capacity to make decisions about her residence and care, and (2) whether she had been, and or was being, deprived of her liberty. His Lordship concluded that she had residential capacity and had not been, and was not being, deprived of her liberty.

(1) Capacity?

In the face of the unanimous views of both the independent expert psychiatrist and all of the professionals, KK asserted that she had capacity to make decisions concerning her residence. The court received evidence from her, not only in a written statement but also orally in court. Before weighing the competing evidence, his Lordship helpfully set out the approach to be taken by the Court when addressing questions of capacity (paras 17-25). The following summarises some of the key points arising from the judgment (including the citations thereto):

(a) Para 24: The roles of the court and the expert are distinct and it is the court that makes the final decision as to the person's functional ability after considering all of the evidence, and not merely the views of the independent expert (*A County Council v KD and L* [2005] EWHC 144 (Fam) paras 39, 44).

(b) Para 25: Professionals and the court must not be unduly influenced by the "protection imperative"; that is, the perceived need to protect the vulnerable adult (*Oldham MBC v GW and PW* [2007] EWHC 136 (Fam); *PH v A Local Authority, Z Ltd and R* [2011] EWHC 1704 (Fam)).

> "25…[T]h*ere 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. On the other hand, the court must be equally careful not to be influenced by sympathy for a person's wholly understandable wish to return home*."

(c) Para 22: The person need only comprehend and weigh the salient details relevant to the decision and not all the peripheral detail. Moreover, different individuals may give different weight to different factors (*LBL v RYJ* [2010] EWHC 2664 (Fam) paras 24, 58). At para 65 Baker J held:

> "*…There is, I perceive, a danger that professionals, including judges, may objectively conflate a capacity assessment with a best interests analysis and conclude that the person under review should attach greater weight to the physical security and comfort of a residential home and less importance to the emotional security and comfort that the person derives from being in their own home. I remind myself again of the danger of the "protection imperative" identified by Ryder J in Oldham MBC v GW and PW (supra). These considerations underpin the cardinal rule, enshrined in statute, that a person is not to be treated as unable to make a decision merely because she makes what is perceived as being an unwise one*."

(d) Para 68: Capacity assessors should not start with a blank canvas: "*The person under evaluation must be presented with detailed options so that their capacity to weigh up those options can be fairly assessed*" (para 68).

KK was found to be clear, articulate, and betrayed relatively few signs of the dementia which afflicted her. She understood that she needed total support and carers visiting four times a day. Whilst she may have underestimated or minimised some of her needs, she did not do so to an extent that

suggests that she lacked capacity to weigh up information (para 64). After citing passages from Munby LJ's lecture, '*Safeguarding and Dignity: Protecting Liberties – When is Safeguarding Abuse?*' (including "[w]*hat good is it making someone safer if it merely makes them miserable?*" – Baker J held (in passages sufficiently important to merit reproduction almost in full):

> "67*. In this case, I perceive a real danger that in assessing KK's capacity professionals and the court may consciously or subconsciously attach excessive weight to their own views of how her physical safety may be best protected and insufficient weight to her own views of how her emotional needs may best be met.*
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> *68. This danger is linked, in my view, to a further problem with the local authority's approach in this case…. I find that the local authority has not identified a complete package of support that would or might be available should KK return home, and that this has undermined the experts' assessment of her capacity. The statute requires that, before a person can be treated as lacking capacity to make a decision, it must be shown that all practicable steps have been taken to help her to do so. As the Code of Practice makes clear, each person whose capacity is under scrutiny must be given 'relevant information' including 'what the likely consequences of a decision would be (the possible effects of deciding one way or another)'. That requires a detailed analysis of the effects of the decision either way, which in turn necessitates identifying the best ways in which option would be supported. In order to understand the likely consequences of deciding to return home, KK should be given full details of the care package that would or might be available. The choice which KK should be asked to weigh up is not between the nursing home and a return to the bungalow with no or limited support, but rather between staying in the nursing home and a return home with all practicable support. I am not satisfied that KK was given full details of all practicable support that would or might be available should she return home to her bungalow.*
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> *69. When considering KK's capacity to weigh up the options for her future residence, I adopt the approach of Macur J in LBJ v RYJ (supra), namely that it is not necessary for a person to demonstrate a capacity to understand and weigh up every detail of the respective options, but merely the salient factors. In this case, KK may lack the capacity to understand and weigh up every nuance or detail. In my judgment, however, she does understand the salient features, and I do not agree that her understanding is 'superficial.' She understands that she needs carers four times a day and that is dependent on them for supporting all activities in daily living. She understands that she needs to eat and drink, although she has views about what she likes and dislikes, and sometimes needs to be prompted. She understands that she may be lonely at home and that it would not be appropriate to use the lifeline merely to have a chat with someone. She understands that if she is on her own at night there may be a greater risk to her physical safety.*
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> *70. In weighing up the options, she is taking account of her needs and her vulnerabilities. On the other side of the scales, however, there is the immeasurable benefit of being in her own home. There is, truly, no place like home, and the emotional strength and succour which an elderly person derives from being at home, surrounded by familiar reminders of past life, must not be underestimated. When KK speaks disparagingly of the food in the nursing home, she is expressing a reasonable preference for the personalised care that she receives at home. When she talks of being disturbed by the noise from a distressed resident in an adjoining room, she is reasonably contrasting it with the peace and quiet of her own home."*

The fact that KK had used the lifeline emergency call service no fewer than 1097 times between

January and July 2011 had been an important factor in the decision to move her back into the nursing home and remained a significant factor in the professionals' assessment of her capacity:

> *"71. … To my mind, however, the local authority has not demonstrated that it has fully considered ways in which this issue could be addressed, for example by written notes or reminders, or even by employing night sitters in the initial stage of a return home. I also note that during KK's daily home visits it has not been reported that she has used the telephone in ways similar to her previous use of the lifeline, although in the latter stages of her period at home prior to admission to care in July 2011 she was apparently using the lifeline excessively during the day as well as at night. Ultimately, however, I am not persuaded that calling an emergency service because one feels the need to speak to someone in the middle of the night, without fully understanding that one has that need or the full implications of making the call, is indicative of a lack of capacity to decide where one lives.*
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> *72. Another factor which features strongly in the local authority's thinking is KK's failure to eat and drink. Here again, however, I conclude that more could be done to address this issue by written notes and reminders, and by paying greater attention to KK's likes and dislikes. KK is not the only older person who is fussy about what she eats and drinks.*
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> *73. I do not consider the fact that KK needs to be helped about overusing the lifeline, or reminded to eat and drink regularly, carry much weight in the assessment of her capacity. Overall, I found in her oral testimony clear evidence that she has a degree of discernment and that she is not simply saying that she wants to go home without thinking about the consequences. I note in particular that for a period earlier this year she elected not to go on her daily visits to the bungalow because of the inclement weather. This is, to my mind, clear evidence that she has the capacity to understand and weigh up information and make a decision. Likewise, I consider her frank observation that 'if I fall over and die on the floor, then I die on the floor' demonstrates to me that she is aware of, and has weighed up, the greater risk of physical harm if she goes home. I venture to think that many and probably most people in her position would take a similar view. It is not an unreasonable view to hold. It does not show that a lack of capacity to weigh up information. Rather it is an example of how different individuals may give different weight to different factors.*
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> *74. This case illustrates the importance of the fundamental principle enshrined in s. 1(2) of the 2005 Act – that a person must be assumed to have capacity unless it is demonstrated that she lacks it. The burden lies on the local authority to prove that KK lacks capacity to make decisions as to where she lives. A disabled person, and a person with a degenerative condition, is as entitled as anyone else to the protection of this presumption of capacity. The assessment is issue-specific and time specific. In due course, her capacity may deteriorate. Indeed that is likely to happen given her diagnosis. At this hearing, however, the local authority has failed to prove that KK lacks capacity to make decisions as to where she should live*."

(2) Deprivation of liberty?

His Lordship noted that, pending the determination by the Supreme Court of the Official Solicitor's appeals in *P and Q v Surrey County Council* [2011] EWCA Civ 190 and *Cheshire West and Chester Council* v P [2011] EWCA Civ 1257, there was "*some uncertainty on the future interpretation of the deprivation of liberty provisions under the 2005 Act. It is obviously of great importance to all professionals practising in this field that this uncertainty is resolved promptly*" (para 81). A summary of the present law is then provided at paras 83-96. In relation to the comparator approach adopted by the Court of Appeal in *Cheshire West*, his Lordship noted:

"*95. I anticipate that this aspect of the decision in Cheshire West will receive particular scrutiny in the Supreme Court. It has been the subject of academic criticism on the grounds that, insofar as it may permit some people to be denied a declaration of deprivation of liberty in circumstances where others would be entitled to such a declaration, it may be discriminatory. The decision of the Court of Appeal is, of course, binding on this court."*

Insofar as the relevance of purpose is concerned, Baker J cited the European Court of Human Rights' decision in *Austin and others v United Kingdom* [2012] ECHR 459 and the following passage from Munby LJ's lecture (supra):

"*Where does this leave us? And where in particular does it leave the decisions in P and Q and Cheshire West? It is early days and you will understand that I must be careful what I say. A provisional and very tentative view might be that questions of reason, purpose, aim, motive and intention are wholly irrelevant to the question of whether there is a deprivation of liberty; that anything in the domestic authorities (and particular in Cheshire West) which suggests otherwise needs to be reconsidered; that in all other respects P and Q and Cheshire West stand as good law; that none of this affects the correctness of the actual decisions in the two cases; and that none of this is likely to have any decisive effect on the outcome in the general run of cases of the kind with which we are concerned.*"

Pending the appeals to the Supreme Court, Baker J. held (at para 96) that "*the right course is to have regard to the purpose for a decision as part of the overall circumstances and context, but to focus on the concrete situation in determining whether the objective element is satisfied*". In deciding that KK had not been and was not deprived of her liberty, his Lordship's reasoning merits full citation:

"*98. On any view, staff at STCC exercise a large measure of control over KK's care and movements. The fact that she is disabled means that she is completely dependent on others for her care and treatment. When one considers the "relevant comparator", it is clear that anybody with KK's disability would experience a significant physical restriction on the life that they are able to lead. In this case, however, there is no suggestion that the manner in which KK is looked after at STCC is significantly more restrictive than it would be were she to live at home in her bungalow. As in all nursing homes, KK's needs have to be accommodated alongside the needs of other residents. No doubt she sometimes has to wait before her care needs are attended to. But the evidence suggests that staff are appropriately attentive to her as far as possible given the other demands on their time. KK has a number of grumbles about the food, and the level of noise in the nursing home. Overall, however, I do not detect any significant level of complaint by KK about the way in which she is treated at STCC.*

99. There is, of course, no doubt that KK does object strongly to her residence at STCC. As Wilson LJ observed in P and Q (supra) her objections are a factor pointing towards deprivation of liberty. KK has a strong wish to live at home and the fact that this wish is frustrated undoubtedly causes her a degree of stress and distress. On at least one occasion, when she said that she did not wish to return home after a visit, her wishes were ignored. Clearly that was an example of her objections being overridden. Earlier difficult behaviour has subsided and there is now little evidence that her overruled objections lead to a significant degree of conflict. I have not been told of a pattern of regular or significant arguments between KK and the staff at the care home. On the contrary, the evidence suggests that KK does not repeatedly raise the topic of returning home in everyday conversations with staff. In my judgment, staff at STCC are dealing with KK's wish to go home with tact and

sensitivity.

100. On the other side of the scale, there are a number of factors pointing away from a finding of deprivation of liberty. There is no suggestion that restraint is ever used. Equally, there is no suggestion that sedation is used. KK's door is not locked. With the assistance of members of staff, she is able to go elsewhere in the nursing home, in particular to the lounge, if she so chooses. She is consulted about her day to day care and treatment. There are no restrictions placed on her contacts with other people. Overall, the arrangements for her care could not, in my view, be described as one of "continuous control". I do not, therefore, consider that KK has lost a significant level of personal autonomy as a result of her residence at the nursing home.

101. I turn finally to the question of the 'relative normality' of KK's life. She is in what some might describe as 'an institution' rather than her own home, but on the spectrum identified by Wilson LJ [in] P and Q, it seems to me to be far removed from type of institution associated with a deprivation of liberty. It is, in the words of McFarlane J (as he then was) in LLBC v TG, JG and KR [2007] EWHC 2640 [2009] 1 FLR 414 'an ordinary care home where only ordinary restrictions of liberty apply'. By all accounts, it is a well run nursing home which puts the needs of its residents first. I bear in mind that KK's disability itself imposes a degree of restriction on her life. I do not consider that the circumstances of her placement at STCC significantly add to that restriction.

102. KK is now spending part of everyday at home at her bungalow. In my experience, this is unusual compared to most other residents of nursing homes. Considerable time and effort is devoted to enabling KK to experience a greater degree of freedom by returning home. Just as Wilson LJ in P and Q considered the fact that a child or young adult attends school or college or a day centre or other form of occupation to be a sign of normality which would indicate that the circumstances do not amount to a deprivation of liberty, so I find the fact that KK, with a degree of planning and notice, goes home on most days is a sign of normality indicating that her circumstances do not amount to a deprivation of liberty. In addition, she is also able to leave the nursing home on other occasions accompanied by her friend EB and her IMCA, JM.

103. I therefore conclude that KK's circumstances do not amount to a breach of her rights under Article 5. In my judgment, she was not being deprived of her liberty before the introduction of the home visits in November 2011. Now that KK is able to go home on a daily basis, I find that the circumstances in this case fall well short of a deprivation of liberty."

Comment

Capacity

This judgment provides a very useful and detailed analysis of the approach to be taken to determining the functional limb of the capacity test. It is no doubt one of the relatively few cases in which the Court has disagreed with the consensus of expert and professional opinion. Had KK not been enabled to provide written and oral testimony, matters might have been very different. Indeed, we would suggest that taking all practicable steps to involve the subject of the proceedings conforms with the philosophy of the MCA and their right to a fair trial under Article 6. The particular steps will of course differ in each case. Examples we have come across include attendance notes, videos of P, IMCA reports, supporting the person to attend court, and judicial visits to the person's place of residence.

Identifying both the relevant decision and the information relevant to it can be a somewhat subjective exercise, with a real danger of capacity assessments being conflated with the assessor's views on best interests. Detachment and objectivity is key. Approaching matters on the basis that the closer the person's views are

to those of the assessor the more likely they are to have capacity has always been a forbidden line of reasoning which this judgment has reinforced. The wisdom and practicable steps principles in MCA s.1 are designed to guard against this danger. And Baker J's emphasis on the need to take such steps – in this case, identifying the full details of the domiciliary care package that would or might be available to KK – is extremely important. For nobody can make an informed decision without being made aware of the salient details.

Deprivation of liberty

As noted by Baker J, the situation is at present deeply unsatisfactory. The indication that we have at present is that the (joined) appeals in *Cheshire West* and *P and Q* will not be heard by the Supreme Court until well into next year, such that we are unlikely to have a judgment for (at least) a year's time. Subsequent to the decision in *Cheshire West*, the ECHR has had cause to consider the questions of deprivation of liberty not just in *Austin* but also in *Stanev v Bulgaria* (Application No. 3760/06, decision of the Grand Chamber of 17.1.12); and *DD v Lithuania* (Application No. 13469/06, decision of 14.2.12).

As indicated by Baker J – and apparently accepted by Munby LJ – there is a mismatch in at least one fundamental respect between the approach taken in *Cheshire West* and the approach now taken by Strasbourg. As Alex is exploring in work being done on his sabbatical, the decisions in both *Stanev* and *DD* would also appear to cast further doubt upon the approach taken in *Cheshire West*, and might – indeed – to suggest that (at least as regards the objective element) we have entangled ourselves in unnecessary Gordian knots by moving away from what may have been a very simple question posed in *Bournewood*: namely whether Mr L was free to leave.[1]

Especially given the terms of s.64(5) MCA 2005 (linking the definition of a deprivation of liberty for purposes of the Act to Article 5(1) ECHR, suggesting that linkage is to the Article as interpreted by Strasbourg, rather than our courts), any mismatch between the approach taken in the two jurisdictions makes it extremely difficult for those advising upon what is or is not a deprivation of liberty, as well as for those seeking to implement the provisions of Schedule A1 upon the ground.

Whilst it arguably would be possible for a first instance judge to use s.64(5) to proceed on the basis that: (a) the Strasbourg court has now further pronounced upon the definition of a deprivation of liberty; (b) that definition (binding for purposes of s.64(5) MCA 2005) is materially different to that given in *Cheshire West*; and hence (c) *Cheshire West* is on that basis not good law and does not need to be followed, it is fair to say that this would represent an extremely bold break with conventional principles. The approach adopted by Baker J in *KK* is therefore undoubtedly the one that is more likely to be adopted in the interim pending the determination by the Supreme Court of the appeals.

Against this backdrop, it is therefore particularly interesting that that the Scottish Law Commission has recently published a discussion paper upon Adults with Incapacity (available at http://www.scotlawcom.gov.uk/news/discussion-paper-on-adults-with-incapacity/). This paper presents a number of provisional views upon possible options for the Scottish Government to create a statutory regime to close the *Bournewood* gap north of the border (the consultation period upon the discussion paper closing on 31st October 2012). The paper makes required reading for anyone interested in deprivation of liberty matters, not least because it contains a clear-eyed and detached dissection of the jurisprudence in England, Scotland and Strasbourg, as well as a tour d'horizon of the approach taken in other jurisdictions.

One of the most interesting – provisional – conclusions of the paper is that Scotland should not seek to follow the route adopted by Parliament in Westminster by enacting s.64(5) MCA 2005, but should rather seek to enact a statutory definition of what constitutes (and does not constitute) a deprivation of liberty. This

[1] Alex would emphasise that this view is not necessarily shared by other members of the editorial team, or indeed other members of the 39 Essex Street Court of Protection team.

would avoid what the Scottish Law Commission provisionally identify as two of the main problems with the DOLS regime arising out of s.64(5):

> "*First, the result is a lack of guidance to those working in the area and, secondly, individual case-by-case assessment appears necessary, with lengthy hearings of evidence and consequent demands on resources.*" (paragraph 6.41)

Quite what that statutory definition should include is the subject of some detailed consideration, outside the scope of this newsletter. It is, perhaps, worth noting that it would appear clear the Commission harbours some – polite – doubts about the approach that has been taken recently in England. As it drily notes:

> "*6.60 Were Scots law to develop provisions concerning deprivation of liberty which relied directly on concepts such as the purpose of a measure and the effect of a comparison with another person with similar disabilities in distinguishing deprivation of liberty from the provision of care, there would be a risk that such measures might not accord with Strasbourg case-law on Article 5.*"

The paper is also of interest for suggesting that the ECtHR may have recognised in *Stanev* the principle that "valid replacement" of the wishes of the person with incapacity would prevent the regime under which he or she is living from being a deprivation of liberty at all (see the discussion at paragraph 6.73). If correct (and we – or least Alex – would respectfully suggest that it is doubtful that this is correct), this would undoubtedly put a very substantial cat amongst the DOLS pigeons and potentially would require a complete reworking of the statutory regime of Schedule A1 to identify when, how and by whom such "valid replacement" could take place. It would also give rise to questions as to how the 'non-DOL' could be reviewed to ensure that a once-for-all replacement of wishes could not lead to the incapacitated adult being deprived of any regular statutory oversight of their position going forward (and hence the *Bournewood* gap yawning open again in different form). Yet another reason why we entirely echo Baker J's plea that the questions arising upon the appeals to the Supreme Court in *Cheshire West* and *P and Q* are resolved speedily…

Jurisdiction

As a final point, the judgment is also worth noting for the pragmatic (and we would suggest entirely correct) approach taken to s.21A in this case. Baker J noted that, *prima facie*, the Court's powers under s.21A extend to determining the questions arising under that section and, if appropriate depending on its determination, making an order varying or terminating a standard authorisation. However,

> "*16…. But once an application is made to the Court under s. 21A, the Court's powers are not confined simply to determining that question. Once its jurisdiction is invoked, the court has a discretionary power under s. 15 to make declarations as to (a) whether a person has or lacks capacity to make a decision specified in the declaration; (b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration, and (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person. Where P lacks capacity, the court has wide powers under s. 16 to make decisions on P's behalf in relation to matters concerning his personal welfare or property or affairs.*"

Whilst it is clear (on this approach) that the Court will not consider itself narrowly bound by the confines of s.21A upon an application under its provisions, it is necessary to recall that the Legal Services Commission continues to take a very narrow view of the scope of s.21A for purposes of the non means-tested public funding available for such applications.

Re J (A Child: Disclosure) [2012] EWCA Civ 1204

Practice and procedure – other

Summary

Whilst not a COP case, this case merits mention because of the approach adopted by the Court of Appeal to the difficult question of the management of disclosure of sensitive information and, in particular, to the question of when a judge who has had sight of key material which has not been disclosed to all the parties should then go on to make substantive determinations.

In 2009, a father obtained an order providing for contact with his daughter. In 2010, social workers employed by the local authority with statutory responsibility for the daughter contacted the mother and informed her that a young person had made series allegations of sexual abuse against the father. The mother was not told any details of the allegations and was also told that the young person did not wish her identity to be revealed to any person. The social workers did, however, tell the mother that the local authority considered that the allegations were 'credible' and advised the mother that she should not allow the daughter to have unsupervised contact with her father. The mother therefore applied to vary the contact order, the sole basis for her application being the limited information given to her by the social workers. In that application, the local authority sought to establish Public Interest Immunity attached in respect of certain documents, in particular (it appears) the identity of the young person, X, who had made the allegations, and the detail of those allegations.

In advance of the first substantive hearing, Peter Jackson J had received the documents in respect of which the local authority wished to establish PII. The father's position was that he denied sexually abusing anyone, had not been informed of X's identity and knew nothing about the substance of the allegations. He asserted that the mother had colluded with X to generate the allegations for purposes of obstructing contact with his daughter. He sought further information about X and her allegations. The daughter's guardian asserted that she was unable to represent the daughter's interests in the proceedings without knowing the detail of the allegations and forming an assessment of them. X strongly resisted disclosure of her identity and of the substance of her allegations; she as acutely distressed by the effect of the proceedings on her already fragile state of health. All parties save for the father knew X's identity (in the case of both the mother and the guardian thanks to accidental disclosure by the local authority); the mother knew nothing about the allegations save that they were serious and that the local authority considered them credible.

Peter Jackson dismissed the application for disclosure of further information about X and her allegations. In so doing, he proceeded on the basis that it was unrealistic to decide the application without considering the consequences were the application to succeed. In particular, he considered that it was inevitable that, once her identity was disclosed, a witness summons would be issued and the Court would promptly be considering whether or not X should be compelled to give evidence. He therefore considered himself justified in looking beyond the immediate issue and asking the question "where is this going?"

The guardian appealed. On appeal, McFarlane LJ (giving the lead judgment) considered as a first question the decision taken by Peter Jackson J to proceed as the trial judge on the issue of contact. In so doing, he observed that the nature and extent of X's allegations mean that they could not readily be proved or disproved by reference to third parties or independent sources. They were said to be unlikely to provide a solid foundation for future arrangements for the daughter, A. Although these allegations are the only new material in the case that might justify a departure from the regime of unsupervised contact, the judge went on to say that nondisclosure of the material 'will not automatically lead to the court making an order for unsupervised contact.'

McFarlane LJ declared himself fully satisfied that Peter Jackson J in the passages set out above had no intention of relying directly upon the

undisclosed material to support some finding of the issue of sexual abuse, and that his comment about the outcome not automatically leading to unsupervised contact being no more than a proper judicial indication that all substantive welfare options remained open as he had done no more than decide the disclosure application. However, McFarlane LJ continued,

> "*there is a need to step back to consider how a fair final hearing can be seen to take place if it is conducted by a judge who has read the detail of X's undisclosed allegations. This is not a topic that is addressed expressly in the judgment, yet to my mind it justifies careful consideration. From the perspective of an insider within the family justice system, I have no difficulty in accepting that any judge of the High Court Family Division would have the necessary intellectual and professional rigour to conduct the final hearing by putting the undisclosed material out of his or her contemplation when considering A's welfare. That, however, is not the test, or, at least, not the complete test. Justice not only has to be done, but it must be manifestly and undoubtedly seen to be done. How is the final hearing to be viewed by the father if his contact to A is reduced from its pre-2010 level or terminated, when he knows that the judge who has determined the case has read details of serious, but untried and untested allegations against him? The father has already referred to 'a kangaroo court' and such a characterisation could only gain prominence in his mind were the case to proceed in the manner contemplated by the current orders.*
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> *38. Often when Public Interest Immunity ('PII') is raised the matter to which the PII relates may not be directly relevant to the primary issue in the case and there can be a fair trial of the central issue notwithstanding the fact that material known to the judge remains undisclosed to some or all of the parties. Here the undisclosed information is at the core of the case and represents the entirety of the material relating to the only issue that has generated the mother's application to vary the contact regime. The father, or an impartial bystander, is entitled to question how there could be a fair trial of the contact issue when the judge is privy to this core material yet the father and those representing A are not. I stress again that I readily accept that if Peter Jackson J were the trial judge he would have approached the matters before him with intellectual and judicial rigour; my concern relates to how matters are, or may be, perceived by the parties and others.*
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> *39. Drawing these observations together, in my view an outcome on the facts of this case whereby the key material has been read in full by the judge but is not to be disclosed to the parties, yet the same judge is going on to preside over the welfare determination is an untenable one in terms of justice being seen to be done. In failing both to consider this aspect of the case and in arriving at that outcome the judge was plainly wrong.*
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> *40. In the light of the conclusion that I have just described, the option of non-disclosure but the case remaining with the judge was not one that was properly open to the court in this case. I repeat and stress that this conclusion is specific to the facts of this case where the PII material relates entirely to the core issue in the case. It is not my intention to lay down a blanket approach to all cases, which will fall to be determined by the application of general principles to the individual facts that are in play.*"

McFarlane LJ therefore indicated that the two options going forward were that the sensitive material (or a significant part of it) be disclosed to the parties and the case continuing in front of the judge who had heard the disclosure application or the sensitive material was not disclosed and the welfare determination not be disclosed and the welfare determination be conducted by a judge in a similar state of ignorance to that of the father.

McFarlane LJ then went on to conduct a review of the authorities relating to PII before turning to

the decision taken by Peter Jackson J upon the disclosure application itself. He held that the approach adopted by the judge in linking the question of whether or not X could ever give oral evidence with the issue of disclosure was not only unsupported by previous authority but appeared to be contrary to previous case law (paragraph 73). He also found that Peter Jackson J's characterisation of the probative value of the allegations as being unlikely to lead to resolution of the issue that they raise might be correct, that characterisation was based solely upon what X was reported to have said. No investigation having been conducted, McFarlane LJ could not therefore accept "*Peter Jackson J's assertion that 'the nature and extent of X's allegations mean that they could not readily be proved or disproved by reference to third parties or independent sources'; the position is that, unless or until the relevant adults are told of the allegations, it is simply too early to come to a conclusion on that issue. There is merit in the disclosure of this core material, so that it may properly be evaluated by A's mother, A's father and A's professional representatives, that merit is freestanding and has value irrespective of whether or not in due course X could be called to give oral evidence*" (paragraph 74).

Having found that Peter Jackson J fell into error, McFarlane LJ found that the Court of Appeal had to undertake the disclosure application itself. He found that the impact of disclosure upon X was the only substantial factor against disclosure, but that it was a very significant factor, both in terms of its importance in principle but also because of the serious consequences that might follow disclosure for X's well-being. In terms of characterisation of the impact upon X in terms of the ECHR, McFarlane J agreed with "t*hat the act of disclosure falls short of engaging Art 3 and does not amount to inhuman or degrading treatment. X's right to a private life, which includes not only confidentiality of information relating to her life but also her ability to live that life as she would wish, is, however, plainly engaged. The state, in this context that is the court, may only act in breach of those rights in a manner which is compatible with Art 8(2), that is because it is necessary to do so and that what is proposed is proportionate to the identified need*" (paragraph 80).

McFarlane LJ then went through and examined each of reasons given by Peter Jackson J for non-disclosure, before at paragraphs 91 ff concluding thus:

> "*91. Drawing matters together, the balance that has to be struck must accord due respect to X's Art 8 rights on the one hand and the Art 6 and 8 rights of A and her parents, and the marginal impact of A's Art 3 rights, on the other. In conducting the balance no one right attracts automatic precedence over another, however Art 8 rights are qualified whereas those under Art 6 are not qualified. The presence of A's Art 3 rights is to be highlighted; they are of marginal impact on this issue, but their presence flags up the importance of the issue (serious sexual abuse) to which the disclosure relates. The evaluation of necessity and proportionality is to be conducted on the basis of the current situation, taking account of the fact that the state has already seen fit to breach X's Art 8 rights by making the disclosure that has taken place to the mother and the state has effectively required the mother to commence these proceedings with a view to achieving orders that protect A from a risk that the local authority has described as credible. In terms of A's interests and those of her parents, the undisclosed material is absolutely central to the issue of contact that has been brought before the court.*
>
> *92. For the purposes of this evaluation it must be assumed that the local authority was justified in acting as it did in relation to A's mother. Where the state has decided to breach X's Art 8 rights to that degree, and where the fallout from that disclosure leaves the mother in the difficult position that she so clearly describes, only very exceptional circumstances are likely to justify the court, also acting as an arm of the state, in refusing full disclosure of the material to the mother and in turn to the father and A's representatives.*
>
> *93. Adopting the words of Munby J in Re B (Disclosure to Other Parties)* [[2001] 2 FLR

1017], *which were endorsed by this court in Re B, R and C* [[2002] EWCA Civ 1825], *the case for non-disclosure must be 'convincingly and compellingly demonstrated' and will only be sanctioned where 'the situation imperatively demands it'.*

94. This is a hard and difficult decision. It is made so by the fact that the stakes are high on both sides of the equation. The description of X's mental and physical health difficulties are towards the top end of the spectrum. The issues for A and her family arising from what X has said are similarly of great magnitude.

95. In answer to the questions posed within structure established by Lord Mustill in Re D [[1996] AC 593]*:*

a) there is a real possibility that disclosure will cause significant harm to X's mental and physical health;

b) the interests of X would benefit from non-disclosure, but the interests of A favour disclosure. It is in A's interests that the material is known to her parents and is properly tested. There is a balance to be struck between the adverse impact on X's interest and the benefit to be gained by A;

c) If that balance favoured non-disclosure, I would in any event evaluate the importance of the undisclosed material as being central to the whole issue of contact and the life-long structure of the relationships within A's family. In fact, X's allegations represent the entirety of the 'issue' in the family proceedings. There is therefore a high priority to be put upon both parents having the opportunity to see and respond to this material.

96. For the reasons that I have given, and approaching the matter in way that I have described, I am clear that the balance of rights comes down in favour of the disclosure of X's identity and of the records of the substance of her sexual abuse allegations to the mother, the father and A's children's guardian."

Hallett and Thorpe LJJ agreed.

Comment

It is – sadly – not uncommon that very serious allegations are made in the context of (in particular) welfare applications in the COP. It is also not uncommon that contentions are advanced by a party holding information that disclosure of that information be withheld from another party on the basis of its adverse impact upon another (most frequently P). We would suggest that the guidance given in this case applies with equal force in the COP as it does in the Family Division (there being no material differences in the regimes that apply – cf the provisions of the First Tier Tribunal (Mental Health) Rules allowing for disclosure to legal representatives alone). In particular, we would echo the clear steer of the Court of Appeal that the dicta that justice must not just be done but be seen to be done applies with particular force where (for proper reasons) much of what happens can seem to happen behind closed doors.

Amendment of Schedule 3 to the MCA 2005

On 27 July 2012, the United Kingdom ratified (finally) the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. The Convention will enter into force for the United Kingdom on 1 November 2012. By virtue of the operation of Paragraph 10 of Schedule to the Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations (SI 2010/1898), the definition of 'adult' for purposes of Schedule 3 to the MCA 2005 will be amended, so that paragraph 4 will read:

"*(1) Adult" means (subject to sub-paragraph (2)) a person who –*

(a) as a result of an impairment or insufficiency of his personal faculties,

cannot protect his interests, and

(b) has reached 16.

(2) But "adult" does not include a child to whom either of the following applies—

(a) the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children that was signed at The Hague on 19 October 1996;

(b) *Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility*."

The effect of this amendment is – in essence – to ensure that (at least for purposes of the Court considering cross-border matters) a person without capacity to take decisions regarding their health and welfare/property and affairs who is aged 16 or 17 will now fall to be considered in one of three ways:

(a) Under the 1996 Hague Convention (the counterpart to the 2000 Hague Convention as regards international cooperation and resolution of conflicts of laws issues);

(b) Under Council Regulation (EC) No. 2201/2003 ('Brussels IIR'), covering EU countries (and discussed in our July newsletter in relation to the case of *HSE Ireland v SF (A Minor)* [2012] EWHC 1640 (Fam));

(c) As an adult without capacity.

Serious Case Review into the murder of Martin Hyde

With thanks to Helen Clift at the Official Solicitor's office for bringing this to attention, we note the conclusions of the serious case review commissioned by Stockport Safeguarding Adults Board into the murder of Martin Hyde, who was killed in November 2009, aged 22, following months of violence at the hands of his eventual murderers and others. For present purposes, we note the criticisms levelled of the approach taken by Stockport's Children services to the MCA 2005 (as reported at http://www.communitycare.co.uk/Articles/14/09/2012/118526/scr-murdered-care-leaver-wrongly-denied-adult-care-assessment.htm). In particular, we note that Mr Hyde's capacity to take decisions (it would appear regarding both health and welfare and property and affairs) had never been assessed under the Act, despite the fact that he used alcohol and cannabis, and made a number of objectively unwise decisions which placed him at risk of harm. Whilst the Serious Case Review noted the presumption of capacity in the MCA 2005, it concluded on the facts of Mr Hyde's case that it was "*questionable*" whether agencies' assumption of capacity was reasonable, adding: "[t]*he presumption of capacity does not exempt authorities and services from undertaking robust assessments where a person's apparent decision is manifestly contrary to his wellbeing*."

Draft Indian Rights of Persons with Disabilities Bill

And now for something completely different: with thanks to Lucy Series, we wanted to draw to your attention the recent publication of a Rights of Persons with Disabilities Bill in India (http://socialjustice.nic.in/pwd2011.php). It (and the 2011 report prepared by the Committee charged with drafting the legislation) makes interesting reading, especially alongside the debates taking place in the Republic of Ireland surrounding the introduction of a bill to address the position of those without capacity to take decisions for themselves. For those seeking to bring comparative perspectives to their understanding of the MCA 2005, valuable insights can be found from the experiences in both countries in seeking to implement the provisions of Article 12 of the UN Convention on the Rights of Persons with Disabilities and the emphasis there upon the support to be offered to those with disabilities to exercise an equal legal capacity to those without disabilities.

Correction

A glitch crept into last month's issue. The case of **LB Hammersmith v MW** was erroneously given a neutral citation number. In fact, the decision (of HHJ Horowitz QC, handed down on 29th July 2012) has no neutral citation number. Many thanks to Zoe Ciereszko for pointing this out.

Medical treatment seminar 25 October 2012

As a reminder, Fenella Morris QC, Vikram Sachdeva, Tor and Alex will be presenting a seminar on medical treatment cases (both in respect of those lacking capacity and children) at 39 Essex Street on 25 October from 17:00-19:00. Places are still available, but limited. Full details can be obtained by emailing marketing@39essex.com.

Our next update should be out at the start of November 2012, 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: credit is always given.

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