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Thirty Nine Essex Street Court of Protection Newsletter: August 2011

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Editors

Introduction

Welcome to the August 2011 edition of the 39 Essex Street Court of Protection Newsletter. This edition marks something of a milestone, it now being a year since we started to circulate newsletters in this format. In that time, we have gained a new editor, been pointed to numerous interesting developments by our readers and have been consistently surprised (and pleased) at the extent to which newsletters have reached the outer corners of the MCA world. By this time next year, we hope that one part of its function will be superseded by the formal reporting of cases in the Court of Protection Law Reports, but we will continue to ensure that we highlight and comment upon cases that come to our attention, along with other developments of note for those working in this fast evolving field. These developments will, we anticipate, include at the very minimum, the following:

- clarification of the approach to be adopted to applications for the withdrawal of Artificial Nutrition and Hydration for those in minimally conscious states, once judgment is handed down by Baker J in *W v M*;

- clarification of the application of Article 5(1) ECHR to those in care homes who are subject to restraint for their own protection, the Court of Appeal having granted permission to the applicant local authority to appeal the decision of Baker J in *Chester West and Cheshire Cheshire West and Chester Council v P & Anor* [2011] EWHC 1330 (Fam), the hearing taking place in late September;

- clarification of the application of Article 5(1) ECHR to those between 16 and 18, the Court of Appeal hearing the Official Solicitor's appeal against the decision of Mostyn J in *YB v (1) BCC (2) AK (3) RK (by her Litigation Friend the Official Solicitor)* [2010] EWHC 3355 (COP) (Fam);

- possible further consideration of *MIG and MEG* by the Supreme Court;

- clarification from the President of the circumstances under which bodily samples (including DNA) may be taken from P for purposes of determining the parentage of any person, judgment on an application raising this point being expected in late September/early October;

- clarification by the Divisional Court of the circumstances in which (and the powers under which) hospitals may detain those without the relevant capacity pending the making of applications for their admission under the Mental Health Act 1983, judgment on this point being expected in early October.

Cases

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

Manchester City Council v E, G and F [2011] EWCA Civ 939

Summary

The Court of Appeal considered an appeal from a judgment of Baker J ([2010] EWHC 3385 (Fam)) making an award of costs against Manchester City Council. We have discussed this judgment previously, but summarise it again here for ease of reference.

E, who suffers from tuberous sclerosis and learning difficulties, had been accommodated with F pursuant to s.20 of Children Act 1989 in 1999. F then looked after E throughout his childhood. In April 2009 the Appellant removed E from F's care and placed him in a residential unit. No DOLS authorisation was in place and no Order was sought from the Court of Protection. Following E's removal from her care, F was not involved in the decision making process and was not allowed to see E until 5 months later. In November 2009, E's sister, G, made an application to the Court of Protection with the assistance of legal aid. It was not until the first day of the final hearing that the Appellant formally conceded that the circumstances of E's removal from F's care had been unlawful and that E had been deprived of his liberty.

In relation to the costs of this aspect of the proceedings, Baker J departed from Rule 157 of the Court of Protection Rules which provides that where the proceedings concern P's personal welfare, the general rule is that there will be no order as to the costs of the proceedings or of that part of the proceedings that concerns P's personal welfare. Baker J held that whilst the Court should follow the general rule where appropriate, the Local Authority's blatant disregard of the MCA on the facts of this case justified a departure from it. The Order was made in the following terms:

> *"(1) That the local authority [the appellant, Manchester City Council] should pay the costs of G, F and E, including pre-litigation costs, up to and including the first day of the hearing before me on 14th January 2010 on an indemnity basis.*
>
> *(2) The local authority shall pay one third of the costs of G, F and E from that date up to and including the hearing on 6 May 2010 on a standard basis.*
>
> *(3) All costs will be subject to a detailed assessment, if not agreed."*

Manchester City Council brought the appeal on the ground that the Judge had erred in departing from Rule 157 and should not have apportioned the costs or alternatively, that the only order that should have been made was a limited order against the Appellant in respect of the costs incurred by the Respondents up to and including the first day of the hearing on 14 January.

In upholding the Order of Baker J, the Court of Appeal [1]reiterated that the appeal could only succeed in the event that Baker J made an error of law or if his conclusions are conclusions which no reasonable judge could reach. In so far as costs decisions are concerned, it is well established that: "[t]*he judge has the feel of a case after a trial which the Court of Appeal cannot hope to replicate and the judge must have gone seriously wrong if this court is to interfere*." (*Straker v Tudor Rose* [2007] EWCA Civ 368, [2007] C.P. Rep. 32, para 2)

On the facts, Hooper LJ held that Baker J had rightly concluded that this was not a paradigm best interests case such that the general rule should be applied. Baker J had been driven to find that the conduct of the Appellant had increased the complexity of the case. Ignorance of the legislation or its complexity did not afford the Local Authority a defence. Even though the Respondents had not sought costs on an indemnity basis, Hooper LJ held that Baker J had been entitled to order that they paid on this basis. Equally, whilst Hooper LJ noted that it

[1] Mummery and Hooper LLJ and McFarlane J (as he then was). Hooper LJ gave the only reasoned judgment.

was correct that the Appellant had technically succeeded on one part of the case in that no Order to return E to F had been made at the conclusion of the interim hearing (although this order was then made on 6 May 2010), that did not prevent Baker J from ordering that the Appellants pay one third of G, F and E's costs from 14 January until 6 May 2010 on a standard basis.

Comment

This case is a useful reminder that although generally a Local Authority will not face an adverse costs award in welfare proceedings the Court of Protection has a discretion to disapply Rule 157 if the circumstances of the case justify it. Such circumstances include a failure to adhere to the basic principles of the MCA regime.

One point of regret is that the Court of Appeal did not take the opportunity (as we understood had at one point been envisaged) to give general guidance as to the circumstances under which departure from the general rule under Rule 157 will be likely. Senior Judge Lush has given some guidance to this effect (*Re RC (deceased)* [2010] EWHC B29 (COP)[2]), and it is perhaps unfortunate that the guidance given in that case was not referred to by the Court of Appeal, whether with approval or otherwise. All we are left with is the somewhat terse reference by Hooper LJ to his agreement with Baker that this was not a "typical" CoP case.

That having been said, it would seem clear that, as Baker J had emphasised at first instance, it is likely that it is only those Local Authorities who act unlawfully who need fear any order as to costs. It further seems likely that the threshold of misconduct justifying such an award (on any basis, let alone an indemnity costs basis) will be relatively high.

P v Independent Print Ltd and Ors [2011] EWCA Civ 756

Summary

The Official Solicitor appealed on behalf of P against an order made by Hedley J permitting the *Independent* newspaper to attend hearings in a welfare case in the Court of Protection. The application by the *Independent* was sprung on the parties on the day of a directions hearing, as a result of the newspaper's erroneous belief that simply emailing an application to Archway would result in that application being issued and copies served on all parties. The Official Solicitor and the statutory bodies responsible for P were therefore disadvantaged by not having been able to obtain evidence about the effect on P of his case being reported by the press. By the time of the Court of Appeal hearing, an expert report had been obtained which said – materially – that P would be unlikely to recognise himself if he read the anonymised account of the hearing that had already been published by the Independent, but that the more press coverage that was given, the greater chance of P becoming aware that details of his personal life were being shared with the media, which would in turn contribute to a sense of distrust and seriously undermine his care plan and the developing of therapeutic relationships.

The Court of Appeal upheld the ex tempore judgment of Hedley J, saying that the judge had correctly applied the two stage test (whether there is good reason for the media's application, and if so, whether the public interest in freedom of expression outweighed P's interest in maintaining the privacy of his personal affairs) and had reached the right conclusion.

The Court of Appeal expressly declined to give any general guidance about media applications to attend and report on Court of Protection hearings, but did say that in P's case:

- since there had been a previous anonymised judgment published,[3] there

[2] A case concerning whether a private individual, rather than a local authority, should be required to pay the costs of any ofthe other parties.

[3] In fact, there have been two, *sub nom A Primary Care Trust v AH and P* [2008] EWHC 1403 (Fam) and *A Primary Care Trust v P* [2009] EW Misc 10 (EWCOP) (the latter being the Bailii classification)

was already material in the public domain and therefore continuing public interest in the eventual outcome.

- even though the issues raised in P's case were said not to be particularly unusual, there was no risk that the decision would lead to media access in many or all cases: each case had to be decided on its own merits.

- the judge's decision was not caught by s.1(5) MCA 2005 because it was not a decision made on P's behalf. P's best interests were therefore not determinative, although of course any negative effect on P of media involvement would be relevant to the balancing process that had to be carried out.

- the judge had used his powers under Rule 91(3) to impose restrictions on the publication of any information which would identify P and had accepted that the local authority would instruct members of staff providing care for P that P must not be made aware of the fact or content of any reporting of his case. An injunction had been made against P's mother preventing her from alerting P to the involvement of the press. There was therefore a limited risk of there being an adverse effect on P.

Comment

This decision is important because, notwithstanding the Court of Appeal's statement that they had not opened the floodgates to media involvement in welfare cases, it is difficult to see how (given this approach) the Article 8 rights of P in any case could outweigh the Article 10 considerations provided that reporting restrictions and injunctions can be drafted which, if complied with, greatly reduce the risk of any adverse effect on P. If it is right to allow press attendance and anonymised press coverage in a case where the expert evidence is that P's care will be seriously undermined should he become aware of the media's involvement, what would have to be shown to tip the balance in the other direction? Perhaps in any case where there is a chance of media interest (for example because of the strong views of a family member, the questionable conduct of a statutory body, or the circumstances of the case itself) those concerned for P's welfare should come to every hearing armed with expert evidence about not only the impact on P of media coverage of the case, but also the prospects of restrictive reporting requirements and injunctions being implemented and adhered to. Certainly, it appears from this judgment that the Court of Appeal is keen to leave the decisions to the High Court judges. Acquiring expert evidence after the event, as occurred here due to the lack of advance warning of the press application, is far from ideal, and as soon as any press coverage is given, it becomes harder to argue that future hearings should be in private.

While it is obviously a good thing for perceptions of the Court of Protection as a secretive court to be addressed through increased media involvement, and while Hedley J was surely right that well-informed press reporting is better than ill-informed coverage, the authors cannot shake off a faint feeling that something may have gone wrong when the price of press involvement in this particular case is the imposition of extensive and serious measures (including an injunction against his mother) to make sure that P is kept completely in the dark.

Furthermore, the authors also note that this case is another in the line suggesting a shift in approach from those cases decided regarding media reporting prior to the enactment of the MCA, when the Courts appeared to be more concerned about P's *inherent* interest (whether under Article 8 ECHR or otherwise) about securing the privacy of sensitive material regarding him (e.g. medical records). On one view, it would appear somewhat odd that journalists would have access to (or knowledge of the contents of) these very sensitive documents simply because P is before the Court of Protection. Put another way, in 'conventional' litigation, P will have a degree of choice as to whether (1) to bring or defend such litigation; and (2) whether to disclose such sensitive documents. This would inevitably then act as a further filter upon reporting of such material. In proceedings relating to P's best interests, P almost invariably will not have had the capacity

to exercise any choice as to the bringing/defending of the litigating or the disclosure of the documents; the further filter/safeguard for P regarding reporting of sensitive material relating to him is therefore removed.

WCC v GS, RS and J [2011] EWHC 2244 (COP)

Summary

This is a decision of District Judge Marin upon an application by a local authority for declaratory relief regarding an elderly lady's residence and contact with one of her children. It merits note not for the substance of the decision, but rather for the approach taken by the District Judge to the question of whether it was necessary to hold a fact-finding hearing before making declarations as to contact between the elderly lady, GS, and her son, RS.

The relevant paragraphs of the judgment are as follows:

"*30. There are many cases in the Court of Protection where large numbers of allegations are made by a care home, a local authority or a family member against another family member (usually a child as in this case) which relate to the family member's conduct during visits to a care home or at home. The difficulty that is often faced by the court in these cases is whether or not a fact finding hearing is necessary in order to establish the veracity of the allegations first before the court proceeds to impose a final order in a case.*

31. The obvious problem with fact finding hearings is that they can be lengthy, they eat up the court's pressed resources and they are expensive not only because of legal costs but in terms of the cost of social workers and other professionals involved who need to attend court to give evidence. In this case, both judges who managed this case prior to the final hearing clearly took the view that no fact finding hearing was necessary presumably because they believed that the court would be able to make its own decision after hearing the evidence at the final hearing.

32. It should be said in RS's favour that he has accepted some of the allegations such that I have taken the view in agreement with all the parties that there is no need for me to embark on a long fact finding exercise in respect of every event that is found in the papers. I believe this is a proportionate way of dealing with matters.

[the Judge then recorded what RS had accepted]

35. Given these admissions I do not need to make any further investigation into the various allegations made against RS because the admissions on their own in my view demonstrate that the concerns raised by WCC about RS' behavior are genuine."

Comment

The necessity for and scope of fact-finding hearings is a perennial difficulty for practitioners before the Court of Protection. There are decisions which suggest which one is always required before the Court makes a decision which involves a serious intervention in P's family life where the factual basis for that intervention is contested – see, for instance, *LBB v JM, BK and CM*.[4] However, the authors have collective experience of numerous cases, including this one, in which what might be said to be a more pragmatic approach is taken. This case represents a useful, and rare, example of the reasoning process being recorded in a judgment approved for publication (even if, strictly, it can have no precedent value given that it was determined by a District Judge).

Court of Protection annual report

With thanks to James Batey, and apologies for failing to include it last month, we should draw your attention to the Court of Protection's report for 2010, available at

[4] http://www.mentalhealthlaw.co.uk/images/Re_CM%3B_LBB_v_JM_%282010%29_COP_5-2-10.pdf

http://www.judiciary.gov.uk/NR/rdonlyres/2EE702F5-5C39-4311-8B32-E7BCB31EDBDC/0/courtofprotectionreport2010.pdf

Amongst other things, it includes a very helpful summary of some of the major cases decided in 2010.

Court of Protection Conference

Apologies for the shameless self-publicity, but Alex will be speaking at a conference hosted by Jordans Publishing on Court of Protection Practice and Procedure 2011 on 26 September at the Holiday Inn in Regents Park in London. The other speakers represent an extremely high-powered array in the form of Charles J, District Judges Marin and Ashton OBE and Penny Letts OBE. There will also be a keynote address by the President of the Court of Protection, Sir Nicholas Wall. Further details can be found at:

http://www.jordanpublishing.co.uk/training-and-development/private-client/court-of-protection-practice-and-procedure-2011

Our next update should be out in September 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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