ThirtyNine
ESSEX STREET

ISSUE 8 APRIL 2011

Thirty Nine Essex Street Court of Protection Newsletter: April 2011

Alex Ruck Keene and Victoria Butler - Cole
Editors

Introduction

Welcome to this edition of the Court of Protection newsletter from 39 Essex St. There is not too much in the way of case law to distract you from the good weather and the flurry of bank holidays, but do take note of the draft practice direction on preparing bundles. We are grateful to James Batey at the Court of Protection for providing the draft practice direction on the preparation of bundles to us for circulation; he welcomes comments, which are to be directed to him at james.batey@hmcts.gsi.gov.uk, and to arrive before 13th May.

We are also grateful to Byran McGuire who has informed us that the Court of Appeal will be hearing an appeal in the long-running case of **G v E** on the issue of costs. Readers will recall that Manchester City Council was made the subject of an adverse costs order by Baker J, and we understand that the Court of Appeal will be looking at the issue of costs orders in CoP and social welfare cases from first principles.

LBB v JM, BK and CM (unreported, 5 February 2010)

Summary

This case, a transcript of which has only recently been made available, is a judgment of Mr Justice Hedley in a case concerning allegations of sexual abuse against the step-father of an incapacitated young adult. It is of interest because of general comments made about cases in which a public authority seeks to interfere with the Article 8 rights of family members by preventing or imposing restrictions on contact, on the basis of safeguarding concerns.

The judge said this:

The local authority took the view that since the intervention of the court would engage a potential breach of the Article 8 rights of the parties, that it may be incumbent upon them to establish on a factual basis why it was that the court's jurisdiction should be exercised. Broadly speaking, I would endorse that approach and recognise that where an Article 8.2 justification is required then the case should not be dealt with purely as a welfare case if there are significant factual issues between the parties which might bear on the outcome of the consideration under Article 8.2 as to whether state intervention was justified.

The Mental Capacity Act does not contain provisions equivalent to the threshold provisions under s.31.2 of the Children Act. Nor should any such provisions be imported in it as clearly Parliament intended that they should not be, but an intervention with parties' rights under Article 8 is a serious intervention by the state which requires to be justified under Article 8.2. If there is a contested factual basis it may often be right, as undoubtedly it was in this case, that that should investigated and determined by the court.

The judge also confirmed that the burden of proof in establishing factual allegations lies on the public authority, and that the standard of proof is the balance of probabilities.

On the facts of the case, the judge found that there was unacceptable physical contact, though not sexual abuse. It did not follow from this that there should be no contact with P. Indeed, the judge considered in some detail methods of indirect contact and arrangements that might be made to enable P to

have supervised contact with her step-father in the future, even though P was presently saying that she did not want to see him.

Comment

The judgment will be of particular interest to local authorities, as it demonstrates the gap between safeguarding concerns being raised, and obtaining findings of fact within the court that provide a sufficient basis for substantial restrictions on contact. In the authors' experience, it can be easy for a local authority to assume that a history of suspicious incidents and safeguarding alerts will translate easily into declarations restricting or banning contact, when in reality the process is much more complicated. Common difficulties include a lack of direct witness evidence due to the circumstances of the suspected abuse or simply the lapse of time and the movement of staff, and by the absence of consistent or sometimes of any evidence from P him or herself.

The decision also ties in with the recent exhortation of Mr Justice Charles in the case of ***A Local Authority v PB and P*** [2011] EWHC 502 (COP), the parties should work to ensure that fundamental disputes of fact are resolved at an appropriate (and often early) stage in proceedings.

A Local Authority v DL [2011] EWHC 1022 (Fam)

This is the second decision in the case of DL, which readers may recall concerned an ex parte application by a local authority under the inherent jurisdiction seeking orders preventing the son of an elderly couple from committing an unlawful acts against them. The orders were granted by the President of the Family Division in October 2010. This hearing, before Mrs Justice Theis, considered whether there was any proper lawful basis for the use of the inherent jurisdiction on the basis of certain assumed facts (many of which were disputed by the son and his mother (who remained the only other parties to the proceedings, as the father had subsequently been found to lack capacity and was therefore subject to the MCA 2005).

In short, the judge found that the inherent jurisdiction had survived the introduction of the MCA 2005 and could be used in certain limited circumstances:

22. Having considered the detailed written and oral submissions, I have come to the conclusion that the inherent jurisdiction can still be invoked in cases such as this and that what has been termed the SA jurisdiction does survive the MCA and the Code. I have reached this conclusion for the following reasons:

(1) *It is accepted prior to the implementation of the MCA that the inherent jurisdiction extended to cases that went beyond issues relating to mental capacity. In appropriate cases, having balanced the competing considerations, the jurisdiction was invoked and exercised with the court making declarations and protective orders (SA supra).*

(2) *It is accepted that the essence of this jurisdiction is to be flexible and to be able to respond to social needs.*

(3) *The Parliamentary consideration, prior to the passing of the MCA, did not expressly seek to exclude the court's inherent jurisdiction that had developed at the time. The consideration it did give to adults found to have capacity (sometimes after investigation) did not expressly exclude the court exercising its inherent jurisdiction in relation to adults as described in SA. The SA inherent jurisdiction is a protective jurisdiction that extends beyond dealing with issues on mental incapacity.*

(4) *Each case will, of course, have to be carefully considered on its own facts, but if there is evidence to suggest that an adult who does not suffer from any kind of mental incapacity that comes within the MCA but who is, or reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors they may be entitled to the protection of the inherent jurisdiction (see: SA (supra) para [79]). This may, or may not, include a vulnerable adult. I respectfully agree with Munby J in SA at para [83] "The inherent jurisdiction is not confined to those who are vulnerable adults, however that expression is understood, nor is a vulnerable adult amenable as such to the jurisdiction. The significance in this context of the concept of a vulnerable adult is pragmatic and evidential: it is simply that an adult who is vulnerable is more likely to fall into the category of the incapacitated in relation to whom the inherent jurisdiction is exercisable than an adult who is not vulnerable. So it is likely to be easier to persuade the court that there is a case calling for investigation where the adult is apparently vulnerable than where the adult is not on the face of it vulnerable." In the cases I have been referred to the term 'vulnerable adult' appears to have been used to include the SA definition, whether the adult in question is vulnerable or not. Obviously the facts in SA were very different to the case I am concerned with. For example, in this case ML and DL have capacity to litigate but that does not, in my judgment,*

mean that the inherent jurisdiction should not be available to protect ML, once the court has undertaken the correct balancing exercise.

(5) *The continued existence of the SA jurisdiction, following implementation of the MCA, has been re-stated in a number of decisions. Whilst some of the observations may be regarded as obiter (in particular A Local Authority v A (supra) at para [68]) they have consistently re-affirmed the existence of the jurisdiction. In particular the observations made by Bodey J in A Local Authority v Mrs A (supra) at para [79], Macur J in LBL v RYJ (supra) para [62] and Wood J in LB of Ealing v KS (supra) para [148] […]*

(6) *I agree with the submissions of Mr Bowen, that the obligations on the State under the Convention and the HRA require the court to retain the inherent jurisdiction, as by refusing to exercise it in principle the court is, in effect, creating a new "Bournewood gap". Whilst it is correct that the cases to date regarding any positive obligation on the State (including the LA) arising under Article 8 have concerned cases involving children or adults who lack mental capacity that does not mean, in principle, such positive duties cannot arise in other circumstances. There may be a heightened positive duty in cases concerning children and adults who have mental incapacity. Much will depend on the circumstances of each case and what the proportionate response is considered to be by the LA.*

(7) *I agree with the submissions of Miss Lieven Q.C. (as supported by the observations of Bodey J in A Local Authority v Mrs A supra para 79 and Macur J in LBL v RYJ supra para 62) that in the event that I found that the jurisdiction does exist that its primary purpose is to create a situation where the person concerned can receive outside help free of coercion, to enable him or her to weigh things up and decide freely what he or she wishes to do. That is precisely what Munby J ordered in SA. There obviously needs to be flexibility as to how that is achieved, dependent on the facts of each case. That does not mean it can be covered by s 48 MCA, as Miss Lieven Q.C. sought to suggest at one stage in her oral submissions as, in my judgment, s 48 by its express terms is only intended to cover the interim position pending determination of an application. As Munby J observed in SA (para [137]) in some circumstances it will be necessary to make orders without limit of time.*

(8) *The mere existence of the jurisdiction does not mean it will always be exercised. Each case will have to be considered on its own facts and a careful balance undertaken by the court of the competing (often powerful) considerations as to whether declarations or other orders should be made. As Miss Lieven Q.C. points out the assumed facts in this case are not accepted by DL and even if they are one of the important considerations for the court to consider are the views of adults concerned; they do not support the orders being sought by the LA. In addition, the terms of the orders being sought in this case are likely to require very careful scrutiny.*

Comment

This decision was not, in the view of the authors, a surprising one, in light of the various recent cases cited by Mrs Justice Theis in which a similar conclusion has been reached. It does however provide a useful and thorough summary of the relevant authorities and some insight into the way applications under the inherent jurisdiction are likely to be approached by the courts:

Practice direction on the preparation of bundles

The draft practice direction is heavily based on a similar practice direction used in the Family Division, and it is likely that the various Court of Protection judges will be very keen to ensure it is followed, as the problems of unwieldy, incomplete or non-existent bundles are very common.

The full text of the draft practice direction is reproduced below, and we have highlighted in bold text the parts that are likely to be of particular interest. When the final version has been approved, it will be issued by the President of the Family Division, but it would be prudent to start following its requirements immediately.

1 The President of the Court of Protection has issued this practice direction to achieve consistency across the country in the preparation of court bundles and in respect of other related matters in the Court of Protection.

Application of the practice direction

2.1 Except as specified in paragraph 2.4, and subject to a direction under paragraph 2.5 or specific directions given in any particular case, the following practice applies to:

(a) all hearings in the Court of Protection before the President of the Family Division, the Chancellor or a High Court judge sitting as a judge of the Court of Protection wherever the court may be sitting;

(b) all hearings in the Court of Protection relating in whole or in part to personal welfare, health or deprivation of liberty that are listed for a hearing of one hour or more before another judge of that court

(c) all hearings in the Court of Protection relating solely to property and affairs that are listed for a hearing of three hours or more before another judge of that court

2.2 "Hearings" includes all appearances before a judge whether with or without notice to other parties and whether for directions or for substantive relief.

2.3 This practice direction applies whether a bundle is being lodged for the first time or is being re-lodged for a further hearing.

2.4 This practice direction does not apply to the hearing of any urgent application if and to the extent that it is impossible to comply with it.

2.5 ***The President of the Court of Protection may, after such consultation as is appropriate direct that this practice direction shall apply to such hearings as he may specify that are not before a judge of the High Court irrespective of the length of hearing.***

Responsibility for the preparation of the bundle

3.1 ***A bundle for the use of the court at the hearing shall be provided by the party in the position of applicant at the hearing (or, if there are cross-applications, by the party whose application was first in time) or, if that person is a litigant in person, by the first listed respondent who is not a litigant in person***

3.2 ***The party preparing the bundle shall paginate it****. If possible the contents of the bundle shall be agreed by all parties.*

Contents of the bundle

4.1 ***The bundle shall contain copies of all documents relevant to the hearing, in chronological order from the front of the bundle, paginated and indexed, and divided into separate sections (each section being separately paginated) as follows:***

(a) preliminary documents (see paragraph 4.2) and any other case management documents required by any other practice direction;

(b) applications and orders including all CoP forms;

(c) statements and affidavits (which must be dated in the top right corner of the front page);

(d) care plans (where appropriate);

(e) experts' reports and other reports; and

(f) other documents, divided into further sections as may be appropriate.

4.2 ***At the commencement of the bundle there shall be inserted the following documents ("the preliminary documents"):***

(i) an up to date summary of the background to the hearing confined to those matters which are relevant to the hearing and the management of the case and limited, if practicable, to one A4 page;

(ii) a statement of the issue or issues to be determined (1) at that hearing and (2) at the final hearing;

(iii) a position statement by each party including a summary of the order or directions sought by that party (1) at that hearing and (2) at the final hearing;

(iv) an up to date chronology, if it is a final hearing or if the summary under (i) is insufficient;

(v) skeleton arguments, if appropriate, with copies of all authorities relied on; and

(vi) a list of essential reading for that hearing.

4.3 Each of the preliminary documents shall state on the front page immediately below the heading the date when it was prepared and the date of the hearing for which it was prepared.

4.4 The summary of the background, statement of issues, chronology, position statement and any skeleton arguments shall be cross-referenced to the relevant pages of the bundle.

4.5 Where the nature of the hearing is such that a complete bundle of all documents is unnecessary, the bundle (which need not be repaginated) may

comprise only those documents necessary for the hearing, but

(i) the summary (paragraph 4.2(i)) must commence with a statement that the bundle is limited or incomplete; and

(ii) the bundle shall if reasonably practicable be in a form agreed by all parties.

4.6 Where the bundle is re-lodged in accordance with paragraph 9.2, before it is re-lodged:

(a) the bundle shall be updated as appropriate; and

(b) all superseded documents (and in particular all outdated summaries, statements of issues, chronologies, skeleton arguments and similar documents) shall be removed from the bundle.

Format of the bundle

5.1 The bundle shall be contained in one or more A4 size ring binders or lever arch files (each lever arch file being limited to 350 pages).

5.2 ***All ring binders and lever arch files shall have clearly marked on the front and the spine:***

(a) the title and number of the case;

(b) the court where the case has been listed;

(c) the hearing date and time;

(d) if known, the name of the judge hearing the case; and

(e) where there is more than one ring binder or lever arch file, a distinguishing letter (A, B, C etc).

Timetable for preparing and lodging the bundle

6.1 ***The party preparing the bundle shall, whether or not the bundle has been agreed, provide a paginated index to all other parties not less than 4 working days before the hearing.***

6.2 ***Where counsel is to be instructed at any hearing, a paginated bundle shall (if not already in counsel's possession) be delivered to counsel by the person instructing that counsel not less than 3 working days before the hearing.***

6.3 ***The bundle (with the exception of the preliminary documents, if and insofar as they are not then available) shall be lodged with the court not less than 2 working days before the hearing, or at such other time as may be specified by the judge.***

6.4 ***The preliminary documents shall be lodged with the court no later than 11 am on the day before the hearing and, where the hearing is before a judge of the High Court and the name of the judge is known, shall at the same time be sent by e-mail to the judge's clerk.***

Lodging the bundle

7.1 The bundle shall be lodged at the appropriate office. If the bundle is lodged in the wrong place the judge may:

(a) treat the bundle as having not been lodged; and

(b) take the steps referred to in paragraph 12.

7.2 Unless the judge has given some other direction as to where the bundle in any particular case is to be lodged (for example a direction that the bundle is to be lodged with the judge's clerk) the bundle shall be lodged:

(a) for hearings in the RCJ, in the office of the Clerk of the Rules, 1st Mezzanine, Queen's Building, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44450 Strand) or, as appropriate, in the office of the Chancery Judges' Listing Officer, Room WG 4, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44450 Strand);
(b) for hearings at the Court of Protection in Archway, North London, with the Listing & Appeals team, Level 9, Archway Tower, 2 Junction Road, London, N19 5SZ (DX 141150 Archway 2)
(c) for hearings in the PRFD at First Avenue House, at the List Office counter, 3rd floor, First Avenue House, 42/49 High Holborn, London, WC1V 6NP (DX 396 Chancery Lane); and

(d) for hearings at any other court, including regional courts where a Court of Protection judge is sitting, at such place as may be designated and in default of any such designation, at the court office or Court of Protection section of the court where the hearing is to take place.

7.3 Any bundle sent to the court by post, DX or courier shall be clearly addressed to the appropriate office and shall show the date and place of the

hearing on the outside of any packaging as well as on the bundle itself. It must in particular expressly and prominently state that it relates to Court of Protection business.

Lodging the bundle – additional requirements for cases being heard at First Avenue House or at the RCJ

8.1 In the case of hearings at the RCJ or PRFD, parties shall:

(a) if the bundle or preliminary documents are delivered personally, ensure that they obtain a receipt from the clerk accepting it or them; and

(b) if the bundle or preliminary documents are sent by post or DX, ensure that they obtain proof of posting or despatch.

The receipt (or proof of posting or despatch, as the case may be) shall be brought to court on the day of the hearing and must be produced to the court if requested. If the receipt (or proof of posting or despatch) cannot be produced to the court the judge may (i) treat the bundle as having not been lodged and (ii) take the steps referred to in paragraph 12.

8.2 For hearings at the RCJ:

(a) bundles or preliminary documents delivered after11 am on the day before the hearing will not be accepted by the Clerk of the Rules or Chancery Judges' Listing Officer and shall be delivered, in a case where the hearing is before a judge of the High Court, directly to the clerk of the judge hearing the case;

(b) ***upon learning before which judge a hearing is to take place, the clerk to counsel, or other advocate, representing the party in the position of applicant shall no later than 3pm the day before the hearing, in a case where the hearing is before a judge of the High Court, telephone the clerk of the judge hearing the case to ascertain whether the judge has received the bundle (including the preliminary documents) and, if not, shall organise prompt delivery by the applicant's solicitor.***

Removing and re-lodging the bundle

9.1 Following completion of the hearing the party responsible for the bundle shall retrieve it from the court immediately or, if that is not practicable, shall collect it from the court within five working days. Bundles which are not collected in due time may be destroyed.

9.2 The bundle shall be re-lodged for the next and any further hearings in accordance with the provisions of this practice direction and in a form which complies with paragraph 4.6.

Time estimates

10.1 ***In every case a time estimate (which shall be inserted at the front of the bundle) shall be prepared which shall so far as practicable be agreed by all parties and shall:***

(a) specify separately (i) the time estimated to be required for judicial pre-reading (ii) the time required for hearing all evidence and submissions and (iii) the time estimated to be required for preparing and delivering judgment; and

(b) be prepared on the basis that before they give evidence all witnesses will have read all relevant filed statements and reports.

10.2 Once a case has been listed, any change in time estimates shall be notified immediately by telephone (and then immediately confirmed in writing):

(a) in the case of hearings in the RCJ, to the Clerk of the Rules or the Chancery Judges' Listing Officer as appropriate;
(b) in the case of hearings in the Court of Protection at Archway Tower, North London, to the Diary Manager in the Listing & Appeals team

(c) in the case of hearings in the PRFD at First Avenue House, to the List Officer at First Avenue House; and

(d) in the case of hearings elsewhere, to the relevant listing officer.

Taking cases out of the list

11 As soon as it becomes known that a hearing will no longer be effective, whether as a result of the parties reaching agreement or for any other reason, the parties and their representatives shall immediately notify the court by telephone and by letter. The letter, which shall wherever possible be a joint letter sent on behalf of all parties with their signatures applied or appended, shall include:

(a) a short background summary of the case;

(b) the written consent of each party who consents and, where a party does not consent, details of the steps which have been taken to obtain that party's consent and, where known, an explanation of why that consent has not been given;

(c) a draft of the order being sought; and

(d) enough information to enable the court to decide (i) whether to take the case out of the list and (ii) whether to make the proposed order.

Penalties for failure to comply with this practice direction

12 ***Failure to comply with any part of this practice direction may result in the judge removing the case from the list or putting the case further back in the list and may also result in a "wasted costs" order in accordance with CPR Part 48.7 or some other adverse costs order.***

Commencement of this practice direction and application of other practice directions

13 This practice direction shall have effect from the date of this practice direction

14 This practice direction is issued by the President of the Court of Protection, as the nominee of the Lord Chief Justice, with the agreement of the Lord Chancellor.

Forthcoming seminars

Finally, there are two conferences coming up which may be of interest. The first is the 39 Essex St seminar on 10 May 2011 at the Law Society. Almost all the places have already been reserved, but we will make available the papers afterwards for anyone who cannot make it and would like to have them – just send us an email. The second is a Butterworths conference on Safeguarding Adults on 23 June 2011 in London, at which members of 39 Essex St are speaking. Further details of the conference will be circulated with this edition of the newsletter.

Law Reports

Very, very finally, and by way of a trail only, we are excited to announce that we will be co-editors, together with a number of other practitioners (and judges), of a new Court of Protection Law Reports series to be brought out by Jordans, starting later this year. We will bring you further news later, but we very much hope that this initiative will help to plug the perennial information gap.

Our next issue should be out at the end of May, unless any judgments 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.

Alex Ruck Keene
alex.ruckkeene@39essex.com

Victoria Butler-Cole
vb@39essex.com

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. 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. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. 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).

David Barnes 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