ThirtyNine
ESSEX STREET

ISSUE 25 SEPTEMBER 2012

Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: September 2012

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Editors

Introduction

Welcome to the September 2012 newsletter. This is a small issue, but we wanted to ensure that you had something to read upon your return to work (or to take on holiday for those who were working the summer shift).

We also include with it, as a special bonus for those interested in deprivation of liberty matters, a table of cases drawn up by Neil addressing the key cases (in both Strasbourg and England & Wales) in which the Courts have had cause to consider whether P is deprived of his/her liberty. We hope that it will provide a handy reference guide to set out, in particular, what the facts of those individual cases were (something which frequently gets rather lost in discussion). It can usefully be read alongside Lucy Series' diagrammatic classification of cases to be found at http://thesmallplaces.blogspot.co.uk/2012/08/dol-or-no-dol.html.

As a reminder, our COP Cases Online database can be reached on:

www.39essex.com/court_of_protection.

or even more simply at

www.copcasesonline.com.

As ever, transcripts are to be found on www.mentalhealthlaw.co.uk if not otherwise available.

LB Hammersmith v MW [2012] EWHC 1390 (Fam)

Best interests – contact

Summary and comment

This decision (of HHJ Horowitz QC) is a relatively straightforward welfare decision, concerning an application by a local authority for relief preventing an individual, JC, having contact with MW and, in particular, visiting, staying or residing at MW's house. JC was a childhood friend of MW who in the difficult and complicated circumstances of MW's life was considered to have a baleful impact upon MW's wellbeing. It bears brief notice for the following reasons:

(1) as a – relatively – rare example of a decision relating purely to contact, and therefore as an example of a court considering issues relating to contact in isolation. We note in this regard that HHJ Horowitz QC proceeded on the basis that MW lacked the capacity "to make his own decision as to the boundaries of contact with an important person in his life […] that is JC" (paragraph 63). This suggests that the Court proceeded on the basis that capacity to decide upon contact is person specific, rather than issue specific and, as such, might be thought to feed into what we know is an ongoing debate upon this thorny

question;

(2) as an example of a case in which P did not attend the final hearing on the basis that it would be adverse to his interests. It is not clear from the judgment whether MW in fact wished to attend the hearing, so it is unclear whether the direction to this end (at paragraph 29) was made in the face of MW's wishes; it was, though, supported by the experts and the Official Solicitor;

(3) as an example of a case in which the Court (and – it would appear – the local authority and the Official Solicitor) had access to more material than was disclosed to the other parties and, specifically, JC. HHJ Horowitz QC expressed some – understandable – relief (at paragraph 30) that he was not required in fact to stray beyond material to which all before the Court had access; this may explain the fact that he gave no specific ground upon which the redaction of the material in question was permissible and compatible with JC's Article 6 rights.

Coventry City Council v C, B, CA and CH [2012] EWHC 2190 (Fam)

Assessing mental capacity – Article 8 duty to consult – Article 6 duty to inform and act fairly

Summary

A 27-year-old woman with significant learning disabilities was pregnant with her fourth child. Her previous children had been placed for adoption and the local authority planned to similarly accommodate the newborn under a voluntary agreement with the mother pursuant to section 20 of the Children Act 1989. For such an agreement to be lawful, the parent must have the requisite capacity to decide whether to consent in the light of the Mental Capacity Act 2005.

On the day of her emergency hospital admission, the mother was confronted with three key decisions: (1) whether to consent to life sustaining surgery; (2) whether to accept pain relief (including morphine to which she thought she was allergic); and (3) whether to consent to the accommodation of her child in local authority care. She consented to the first, belatedly agreed to the second, but initially refused to consent to the third. But when the social worker returned later that same day, the mother – by then on morphine – consented and the child was removed. Mr Justice Hedley agreed that the child's welfare required her to be taken into care and approved the local authority's concessions that the Article 8 rights of both mother and child had been breached because consent should not have been sought that day in the aftermath of birth, and the removal was a disproportionate response to the risks that then existed.

So far as the section 20 agreement was concerned, if the mother lacked capacity when she consented it would have been invalid and the removal unlawful. His Lordship reiterated that capacity was issue and situation specific, so being able to decide about surgery and pain relief did not indicate that she could decide about the removal of her child. The fact that she might be able to make that decision before the birth or sometime after did not mean she could do so on the day of birth. Moreover:

> *"39. Capacity is not always an easy judgment to make, and it is usually to be made by the person seeking to rely on the decision so obtained. Sometimes it will be necessary to seek advice from carers and family; occasionally a formal medical assessment may be required; always it will be necessary to have regard to Chapter 4 of the Code of Practice under the 2005 Act…"*

Even where there was capacity, "*it is essential that any consent so obtained is properly informed and, at least where it results in detriment to the giver's personal interest, is fairly obtained. That is implicit in a due regard for the giver's rights under Articles 6 and 8 of the European Convention on Human Rights*" (paragraph 28). In this case, the mother's consent may not have been properly informed because (a) she was never told that a continued refusal of consent would result in the child staying in hospital with her for another day or two and (b) she was told that the removal was only a temporary arrangement, despite everyone else knowing that this was highly unlikely

(paragraph 43). In relation to fairness, his Lordship added:

> *"44. I am not sure that the court can say much about fairness on the facts of this case in the light of the local authority's concessions. Clearly a social worker must have regard to the vulnerability of the parent, her previously expressed willingness or otherwise to consent, the magnitude of the decision and its consequences for the mother and the actual circumstances of the mother as and when consent is sought. In this case the failure to encourage the mother to speak to her solicitor may also have affected fairness. It is important to emphasise that whilst the mother should know the plan of the local authority, willingness to consent cannot be inferred from silence, submission or even acquiescence. It is a positive stance."*

At paragraph 46, his Lordship then gave guidance, approved by the President of the Family Division, to social workers in respect of obtaining consent for section 20 agreements.

Comment

Although this was not a Court of Protection case, his Lordship's comments on assessing mental capacity are of more general application and therefore transferable. That a person's capacity is both decision and time specific and the need to identify who should assess capacity serve as important reminders. Moreover, amongst the guidance given, it was stated that "[e]*very social worker obtaining* [consent under a section 20 agreement] *is under a personal duty (the outcome of which may not be dictated to them by others) to be satisfied that the person giving the consent does not lack the capacity to do so*." Again, such a duty may be equally applicable to all those responsible for assessing others' capacity.

The Article 6 requirement for fairness in the seeking of a person's consent is also of interest and would seem relevant to, for example, best interests decisions taken to remove someone lacking capacity from the care of others. It is also likely to be further explored in Court of Protection proceedings.

Davis & Davis v West Sussex County Council
[2012] EWHC 2152 (QB)

Practice and procedure – other

Comment

This judicial review decision does not specifically relate to the MCA. However, it arose out of a case conference convened by a local authority in December 2010 concerning allegations of abuse at a care home, and therefore provides some important guidance upon a matter that that is – sadly – very much in the news at the moment.

The Claimants owned two care homes, and applied to quash decisions of WSCC taken at a safeguarding vulnerable adults care conference that (inter alia) allegations of abuse against members of the staff at one of the homes were substantiated, individual actions should be taken by the care home, and that three members of staff should be referred to the appropriate professional body for possible disciplinary action.

For present purposes, the main thrust of the Claimants' challenge to the process adopted by WSCC was (as set out at paragraph 3):

(1) they were not given adequate notice of the allegations made against them so as to allow them a fair opportunity to present their case at the Case Conference. They were only provided with a copy of the very substantial Investigation Report – which set out the allegations for the first time, albeit in unclear form – one working day before the Case Conference;

(2) they were not shown the evidence against them;

(3) the Case Conference was not shown relevant evidence generated by the investigation, both for and against them.

(4) they were not permitted, or given an adequate opportunity, to produce relevant evidence to the Case Conference, whether through witnesses or otherwise.

HHJ Mackie QC (sitting as a High Court Judge) noted a number of significant failures in the process:

> "*45. The* [case conference] *meeting lasted more than 8 hours. It is unclear what documents were available to the panel. Mr McGuire emphasises the extent of the discussion at Mrs Hillary-Warnett's interview with the police, at which all matters complained of were apparently covered. However there is nothing to suggest that the record of the interview was disclosed or discussed with the panel despite the fact that it must have been one of the factors leading the police to decide to take no action. It does not appear from the record that notes of other interviews were available to the panel either. West Sussex, surprisingly, relies on the fact that Mrs Davis did not herself at the conference ask to have the matter adjourned. But it was or should have been obvious that she wanted it adjourned because her solicitors had written to say so and Mrs Davis had reminded the meeting of the letter. Ms Attwood points to the fact that Mrs Davis started by making it clear that she was going to follow her solicitors' advice to make no comment but then chose to go on and comment on a number of occasions. There was no indication that West Sussex saw anything amiss in relying on what this elderly lady went on to say, despite knowing of her solicitors' advice. During the lunch break which according to Ms Attwood was 'relaxed' Mrs Davis made a remark to her informally. Ms Attwood 'suggested … that she share these comments with other attendees when the meeting reconvened and she agreed and … repeated this statement towards the end of the meeting.' This was unfair.*
>
> *46. West Sussex was aware of Mrs Davis's limited role as owner not manager of Nyton House. The chair refused an adjournment, gave Mrs Davis no proper opportunity to prepare for the meeting, refused even to consider her solicitors' letter, continued for eight hours knowing that she was an elderly lady, where the meeting was ten on one side and one on the other and where even the informality of a brief lunch break was abused. Nevertheless conclusions were drawn about Mrs Davis's credibility and her fitness to own a care home. These were in part based on detailed matters relating to individual carers and patients (see paragraph 18 of Ms Attwood's statement) which West Sussex knew or should have known were outside Mrs Davis's knowledge given the impossibility of looking into all these allegations in such an absurdly short time and its decision (for reasons which were of themselves legitimate) to exclude from the meeting those who would have had the answers. West Sussex, as Mr McGuire put it, considered that Mrs Davis had 'made a long series of admissions'.*
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> *47. I again remind myself that the prime object of the investigation was to protect vulnerable adults and to prevent abuse not to give particular consideration to Mrs Davis. But her treatment at and around the meeting was deplorable."*

Reminding himself that WSCC had stated in an earlier letter sent in June 2010 that the relevant investigation report would be shared with Mrs Davis prior to the case conference "and time given for Mrs Davis to provide a detailed response" (paragraph 32), HHJ Mackie QC concluded at paragraphs 70-1 that:

> *"70. The conference was not a trial of Mr and Mrs Davis but the process of investigation and the taking of decisions had potentially serious consequences for their business, for their residents and for their staff. The Claimants were given an assurance in June on which they were entitled to rely. Nothing relevant occurred between the giving of that assurance and the Case Conference. The length, importance and content of the report was such that Mrs Davis*

could not reasonably have absorbed it so as to respond in the short time that she was given, the circumstances of the conference itself and the consequences were unfair and unjust to Mrs Davis in the ways I have explained.

71. The procedure adopted and carried out was unfair. It did not follow fully the guidance in the Multi-Agency Policy. The policy did not comply with the legitimate expectations of the Claimants created by the letter of 14 June. There was no good reason for the commitment made in that letter not to be carried out. It follows that subject to the two further arguments which West Sussex were given permission to bring when this case was first listed for trial before Mrs Justice Nicola Davies on 27 March 2012, and to questions of remedy, the application would be granted."

The first of these arguments advanced was that the Claimants could not derive any public law assistance from either the "No Secrets Guidance" or the local protocol under which WSCC argued. In this, it relied upon the analysis of the former in Part 9 of the Law Commission Report on Adult Social Care. At paragraph 75, HHJ Mackie QC noted:

"As Mr McGuire and the Law Commission point out there is a lack of precision because "No Secrets" contains guidance for local authorities in the exercise of existing statutory functions but no freestanding justification for an investigation. Quite rightly this has not deterred West Sussex, like other authorities, from carrying out investigations and Mr McGuire does not go as far as suggesting that that is a defence to judicial review where the public body did not have statutory power to do what it did. It seems to me that this defence is closely linked to the whole question of natural justice. While there may well be situations where the obligation to protect vulnerable adults justifiably permits a local authority to infringe what might otherwise be the rights to natural justice of third parties no question of this arises here. There was, by December 2010, no respect in which the duty to protect vulnerable adults conflicted with the less pressing obligation to treat other parties affected in a just manner."

The second of the arguments was as to whether the decisions were amenable to judicial review at all, or whether they represented allegations of breach of contract entered into by WSCC in a private capacity. This argument was rejected, in essence on the basis that the investigation would have taken place whether or not there was a contract in place, because WSCC "was rightly and primarily concerned with investigating allegations of abuse under its legal powers." (paragraph 87). The process of investigation and decision was therefore a public function distinct from the contractual relationship (paragraph 89).

HHJ Mackie QC quashed the adverse determinations made at the case conference in December 2010 (and a further conference convened in July 2011), and declared that the determinations and the recommendations made pursuant to the review were unlawful.

It is perhaps only fair to conclude this summary by highlighting HHJ Mackie QC's comments at paragraph 101:

"*As I have been critical of West Sussex I repeat my view that the professionals in this case acted throughout in good faith and having in mind the best interests of those whom they are engaged to protect. There are obviously great pressures on local authority employees carrying out this important and stressful work. The consequences of a failure to intervene can be grave. Those working in this area face criticism for allegedly interfering when they intervene and for alleged neglect or worse when they do not. These factors need to be borne in mind by anyone making a further issue of the matters I have identified.*"

Comment

What happened in this case was undoubtedly extremely unfortunate; whilst in retrospect it would appear easy to identify the basic failings in procedural fairness that took place, the judgment also stands as a salutary reminder of the difficulty of balancing the interests of the protection of the vulnerable with the rights of those involved in delivering care to them. Whilst there may well be occasions on which the interests of the former prevail over the latter, especially in urgent situations, it must always be good practice to ensure that the trampling is as delicate and as documented as possible.

Funding

Funding continues to be a vexed issue in CoP proceedings. We have heard anecdotally that in cases where interim welfare orders have been made and no order for costs have been made, the LSC has then declined to make payments on account. This would therefore suggest that orders should provide that costs are reserved (even if this is a fiction in almost all welfare cases given the provisions of the COP Rules).

MCA literature review

With thanks to Lucy Series to bringing this to our attention, we note that the Mental Health Foundation have recently produced an extensive review of the literature upon the implementation of the MCA (although not DOLS), available at http://www.mentalhealth.org.uk/publications/mca-lit-review/.

Consultation on new safeguarding power

As you are no doubt aware, the DoH has published a draft Care and Support Bill (http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_134740.pdf). That Bill (responding to a proposal in the Law Commission's Report on Adult Social Care) includes a proposed duty upon local authorities to make enquiries whenever there is a safeguarding concern. It also includes a proposal to repeal s.47 National Assistance Act 1948 (the power to remove a person from his/her home in specific circumstances).

The DoH is therefore consulting as to whether local authorities have sufficient power to gain access to a person who may be at risk of abuse where this is appropriate and not already provided for in existing legislation (in the case of an adult without capacity, this would be within the MCA 2005). The consultation can be found at

http://www.dh.gov.uk/health/files/2012/07/Consultation-on-New-Safeguarding-Power.pdf

The proposal on which the DoH is consulting applies where a local authority has reasonable cause for concern that a person with capacity is experiencing abuse or neglect, and someone else in the property is preventing the local authority from speaking with that person. The DoH is seeking views as to whether the local authority should be able to apply for a warrant to enter the premises and speak with that person alone. In its consultation document, the DoH noted the approval of the Court of Appeal of the survival of the inherent jurisdiction *in DL v Local Authority* [2012] EWCA Civ 253, but commented that leaving matters to be resolved on a case-by-case basis is not satisfactory.

The DoH is not proposing that there be any new statutory power granted to local authorities to remove or detain the vulnerable adult.

The suggestion is that the application be made to a Circuit Judge (e.g. a nominated judge of the Court of Protection), with evidence. It is not clear whether such applications would be made on notice, but the suggestion is that there be a process by which a complaint can be made about the way in which the power granted by the warrant has been exercised.

The consultation runs until 12 October 2012 (the wider consultation upon the Care and Support Bill runs until 19 October).

Medical treatment seminar 25 October 2012

By way of a plug, 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. Full details can be obtained by emailing marketing@39essex.com.

Our next update should be out at the start of October 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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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell).

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