ThirtyNine
ESSEX STREET

ISSUE 4 DECEMBER 2010

Thirty Nine Essex Street Court of Protection Newsletter: December 2010

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Editors

Introduction

First of all, many thanks to those of you were able to attend our birthday party for the MCA on 6 December. We enjoyed it sufficiently, and would like to think that those who attended found it sufficiently useful, that it is very likely that we will be holding a similar event to celebrate the Act's fourth birthday: watch this space.

Tenancy agreements

In this issue, in addition to our usual case-law update, we thought it might be helpful to share our experiences relating to tenancy agreements, because we are aware (not least from the frequency with which we asked to advise on the subject) that more and more cases are coming before the Court of Protection concerning the signing of tenancy agreements on behalf of people who lack capacity. The experience of the Court of Protection team at 39 Essex Street is that the following procedure should be adopted, where there is no dispute that requires the court's intervention. An application should be issued, not for a financial deputy to be appointed, but simply for a declaration that it is in P's best interests that a named person sign a tenancy agreement for X property on P's behalf. The tenancy agreement needs to be filed, along with evidence that all relevant parties including the local authority and family members or carers agree that the proposed arrangement is in P's best interests. A capacity assessment that specifically deals with the tenancy agreement is also essential. Our experience is that it may then be possible to have the relevant order and declaration made by consent without the need for a hearing, if no other issues (such as deprivation of liberty) arise.

Cases

All cases discussed below can be found on www.mentalhealthlaw.co.uk if not otherwise available. They are set out in chronological order.

Decision of Mostyn J on the scope of Schedule A1

Summary

Robert Eckford of the Official Solicitor's office has recently kindly brought to our attention an important decision of Mostyn J of June 2010 regarding the scope of the powers that are granted by a standard authorisation under Schedule A1 to the MCA 2005. The authors understand that there is no transcript of the judgment, but that no problems will be caused by the dissemination of the gist of the judgment in an entirely anonymised form.

Mostyn J was considering the extent of the powers granted to a local authority and a care home under existing (and any renewed) standard authorisations. He noted that it was common cause that these powers extended to a power to restrain P if he tried to leave the care home. The question for him was whether within

those powers there was a power to coerce P to return if he refused to return to the care home from a period of leave. Mostyn J noted that it was understandably in P's interests that he should have access to society in the community and 'escape' the confines of the care home, and that the relevant PCT had agreed to fund 'befrienders' to encourage access to the community.

Mostyn J therefore asked himself whether the powers under the existing standard authorisation extend to coercing P back to the nursing home if P refused to return. He noted that it would be little short of absurd if the local authority and care home had powers to restrain P from leaving but not to compel him to return, and that the greater power must include the lesser. Mostyn J therefore declared that the power was implicit in the current and any future standard authorisation.

Comment

This decision is of some importance as a companion piece to and/or re-affirmation of the decision of *DCC v KH* (2009) COP 11729380, in which DJ O'Regan held that a DOLS standard authorisation was sufficient to return P on the long journey from contact sessions to his residential placement. Notwithstanding the conclusions expressed in these two cases, however, the authors' clear view (and one accepted in at least one case in which they have appeared in Archway) remains that standard authorisations are not apt to cover any deprivation of liberty arising whilst P is being taken to the placement covered by the standard authorisation.

City of Sunderland v MM & Ors [COP 1155573T-01]

Summary

This judgment is of some importance because, on the very specific facts of the case, HHJ Moir declared that the Article 8 rights of a person other than P had been breached by the denial of contact between P and a person with whom they enjoyed family life for a period between August 2006 until a period of observed contact directed by the Court took place in July 2008. RS and MM were both 80 and had cohabited for roughly 4 years, having rekindled a childhood acquaintance following the deaths of their respective partners. HHJ Moir found (at paragraph 7) enjoyed an intimate personal relationship giving rise to an obligation upon and on behalf of the local authority to respect their private and family life. The local authority justified the interference with that right on the basis that it was necessary to protect MM.

HHJ Moir set out in some detail the chronology following the decision to terminate contact between the two (which appears to have been taken, in the first instance, by the care home at which MM was then residing following an admission to hospital and a subsequent transfer to that facility). In very brief terms, that decision was taken in large part because of concerns raised by MM's daughters and that, to a very large extent, the dispute as to contact was one between private individuals.

HHJ Moir noted that, without apportioning blame, the history made sorry reading and that the reality of the situation was that for 10 months the whole issue of contact between the two was put on hold (paragraph 18). She accepted the proposition advanced by the OS that administrative difficulties such as had occurred in the case before her did not render the continued and extended infringement of ECHR rights necessary and proportionate (reliant on a ECtHR case of Olsson v Sweden [1998] 11 EHRR 259. She therefore found (paragraph 18) that there was a necessity that "any issue in relation to the upholding of rights must be determined expeditiously as delay in the decision-making process may itself amount to an infringement of rights." On the facts, she found that there was unacceptable delay, and she also found (paragraph 22) that it was not an adequate answer to the question of whether there was a breach of Article 8 ECHR that the local authority was attempting to monitor a dispute between private individuals. Whilst she held (paragraph 23) that there could be no argument that the local authority had acted with anything other than good faith and a proper motive, this, again, was not relevant to the question of proportionality and necessity. In the

circumstances, she held (paragraph 31) that the local authority could and should have made an application to the Court of Protection (which resulted in the period of court-directed contact) much sooner. As damages were not sought, HHJ Moir did not have to rule upon whether she had the jurisdiction to award them.

Comment

This case is of some importance in three respects: (1) the recognition given to the rights of those other than P; (2) the recognition that administrative difficulties alone cannot justify extended interference with Article 8 rights; and (3) the recognition of the positive obligation imposed upon the local authority to secure the private and family life of P and those with whom they enjoy such private and family life (i.e. an obligation going beyond the more frequently found negative obligation imposed on public authorities not to interfere with those rights).

v RYJ and VJ [2010] EWHC 2665 (COP)

Summary

This case represents something of a cautionary tale regarding the requirement to ensure that evidence as to capacity is cogent, and also further clarification upon the scope of the inherent jurisdiction. Although it was decided before the case of *A v DL, RL and ML* [2010] EWHC 2675 (Fam) reported in our last issue, it only came to our attention subsequent to that issue, and, more pertinently, does not seem to have been before the President in that latter case.

Applications were before Macur J by the local authority, LBL, seeking declarations that RYJ lacked capacity to make day-to-day decisions concerning her daily life and to appoint an appropriate officer of the local authority to be made Health and Welfare and Finance Deputy. In the alternative, if RYJ was determined to have capacity, LBL sought to invoke the inherent jurisdiction of the court, initially seeking those orders commonly following decisions as to "best interests" of an incapacitated person and amounting to empowering the local authority to direct where she should reside, be educated and with whom she had contact and appointing the local authority to receive benefits payable to her.

LBL's position changed in the course of the hearing; by the end, they conceded that they were unable to disprove the presumption of capacity to the relevant standard. Macur J recorded (paragraph 5) that they sought to preserve RYJ's position by way of recitals and preambles to an order ensuring that her decisions were facilitated and articulated with appropriate support. Macur J noted that no argument had been advanced by LBL asserting her jurisdiction to dismiss the mother as "appointee" for the purpose of receipt and management of benefits and appoint the local authority in her place in the face of the written arguments made by the OS and on behalf of VJ (RYJ's mother) denying the same. She accepted the latter arguments and noted (at paragraph 5) that the appointment of an "appointee" in this regard was in the discretion of the Secretary of State for Works and Pensions.

VJ denied that her daughter had capacity to make decisions as to care, residence and education but, it appears Macur J, she acknowledged that RYJ has capacity in decisions as to contact. It was common ground that she lacked litigation capacity.

The OS took issue on RYJ's behalf with the assertion that she lacks capacity in other than financial matters. He argued against the use of the inherent jurisdiction to make orders which subvert the intention of the MCA 2005 to preserve the autonomy of the individual subject to lack of capacity.

Macur J noted that the diagnostic test provided for in s.2 MCA 2005 was met, but that the second was in dispute. At paragraph 25, she held that: "[s]*ignificantly, as I indicate below, I read the phrase 'to a matter if at the material time he is unable to make a decision for himself in relation to the matter' in section 2 to mean that capacity is to be assessed in relation to the particular type of decision at the time the decision needs to be made and not the person's ability to make decisions generally or in abstract. This, it appears to me, is an important distinction lost in the case of VJ and, to some extent, LBL*."

Macur J went through the evidence before her in considerable detail and, perhaps significantly, indicated that she was prepared to place significant weight upon the evidence as to capacity given by Stewart Sinclair, an experienced independent social worker. The sections of the judgment setting out the evidence and her comments thereupon bear close attention because of the nuanced approach that she indicated was necessary to adopt in the case of a teenager, commenting (at paragraph 33) that she considered that there had been "*inadequate regard paid by LBL and VJ to RYJ's potential tendency to teenage ennui, manipulation and fickleness which are traits not confined to those lacking capacity*."

88. Macur J then turned to consideration of the Court under the inherent jurisdiction, holding as follows at paragraphs 61 ff:

"61.*I turn to consider LBL's application to invoke the inherent jurisdiction. As I have indicated, by the conclusion of the proceedings LBL seemed to suggest that their concerns could be met by appropriate recitals. But it is necessary that I deal, at least in brief, with the application that they within the inherent jurisdiction of the court.*

62. I do not doubt the availability of the inherent jurisdiction to supplement the protection afforded by the Mental Capacity Act 2005 for those who, whilst 'capacitous' for the purposes of the Act, are 'incapacitated' by external forces –whatever they may be- outside their control from reaching a decision. (See SA (A Vulnerable Adult) [2005] EWHC 2942 @ para 79; A Local Authority and Mrs A 2010 EWHC 1549 @ para 79). However, I reject what appears to have been the initial contention of this local authority that the inherent jurisdiction of the court may be used in the case of a capacitous adult to impose a decision upon him/her whether as to welfare or finance. I adopt the arguments made on behalf of RYJ and VJ that the relevant case law establishes the ability of the court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-making by those who they have determined have capacity free of external pressure or physical restraint in making those decisions.

63. RYJ's vulnerability is assessed by Mr. Sinclair as that which is associated with her age and limited intellectual functioning. I am not satisfied that it has been established before me that she is unable to recognise and withstand external pressure to appropriate degree nor that she is or is likely to be subject to physical constraint or behaviour that will impact upon her free will and ability and capacity to reach decisions concerning residence, care and contact. All the evidence in the papers before me suggests that even during her minority she was able to withstand the external desires of others by her physical resistance to the same; that she has been able to withstand decisions enforced upon her and that she has been able to verbalise her wishes. The difficulty, as I apprehend it to be, arising from the approach of others to the expression of those wishes.

64. If I were to have found that her vulnerability was exceptional/greater by reason of her limited intellectual functioning and age, these factors would need to have been considered in reaching my decision concerning capacity. If she is unable to withstand external pressure of 'normal/everyday' degree, whether emotional or physical, it seems to me that it would necessarily inform the answer to the question posed at section 3(1)(c) of the Act.

65. In that I have not found that she is so exceptionally vulnerable for the purpose of my consideration under the Mental Capacity Act 2005, it seems to me that there is little that LBL can rely upon in hoping to invoke the inherent jurisdiction of the court. What is necessary in this case, quite clearly, is that the established network already available to RYJ is consolidated with co-operation of LBL, VJ and other family members."

Comment

Macur J's comments at paragraph 64 of her judgment are of particular significance, and no little difficulty. In the authors' view, they come close to denying any real space for the inherent jurisdiction at all, because they imply that the factors that would point towards a person falling within the inherent jurisdiction are, on a proper analysis, factors that fall for consideration in

answering the question as to whether they lack the relevant capacity for purposes.

Macur J's comments also make it clear that – at least from her perspective – the inherent jurisdiction of the Court is considerably more limited than some have advocated and that it can only properly be exercised so as to secure unencumbered decision-making (rather than, for instance, allowing decisions to be taken on behalf of the vulnerable adult). As noted above, however, Macur J's judgment was not before the President in the *A v DL, RL and ML* case, and it is perhaps not immediately obvious how to square her restrictive view of the inherent jurisdiction with the rather more expansive view taken by the President.

Re G (TJ) [2010] EWHC 3005 (COP)

Summary

In this case, Morgan J had cause to consider whether a Deputy could be required to make payments from the funds administered on behalf of a Mrs G to her adult daughter, C, by way of maintenance of C. It was common ground between the parties that he could only make an order in those terms if I was satisfied in accordance with the 2005 Act that such an order was in the best interests of Mrs G. Although the parties were agreed between themselves that he had power to make the order, and no one proposed to make submissions to the effect that he should not make the order, Morgan J recorded (at paragraph 9), that he felt that he would benefit from a detailed investigation of the matter and that he had invited counsel to assist him with their submissions as to why this part of the proposed order was in the best interests of Mrs G, within the meaning of the 2005 Act. Having considered those submissions, he reached his conclusion that it was in Mrs G's best interests so to do, although he acknowledged that he had not had the benefit of adversarial argument on the point.

For present purposes, the decision is of particular importance for Morgan J's consideration of what "best interests" means in the context of a lifetime gift. At paragraphs 34 ff, he held as follows:

"34.*The phrase "best interests" is not defined. That might suggest that it was intended that the application of the phrase would be responsive to the particular issue which arises and the facts of the individual case.*

35.The context in which issues as to "best interests" arise in the present case concerns the property and affairs of Mrs G, rather than her welfare and healthcare. As I have explained, the court is given power to make a lifetime gift of P's property and to make a lifetime settlement of P's property for the benefit of others: see section 18(1)(b) and (h). The court can also make a will for P: see section 18(1)(i). Further, I note that under section 12, the donee of a lasting power of attorney may make certain gifts and by section 9(4), the authority conferred by a lasting power of attorney is subject to the requirement that the donee acts in the best interests of the donor of the power. These various references to gifts, lifetime and testamentary, and settlements for the benefit of others, suggest to me that the word "interests" in the phrase "best interests" is not confined to matters of self interest or, putting it another way, a court could conclude in an appropriate case that it is in the interests of P for P to act altruistically. It seems unlikely that the legislature thought that the power to make gifts should be confined to gifts which were not altruistic or where the gift would confer a benefit on P (or the donor of the lasting power of attorney) by reason of that person's emotional response to knowing of the gift.

36. Further help as to what is meant by "best interests" can be derived from section 4(6). Section 4(6)(a) refers to the past and present wishes and feelings of P. That suggests that giving effect to P's actual wishes can be relevant to assessing P's best interests. Section 4(6)(b) refers to the beliefs and values which would be likely to influence P's decision if he had capacity. I regard section 4(6)(b) as considerably widening the matters which fall to be considered. The width of the relevant matters is further extended by section 4(6)(c) which refers to the other factors which P would be likely to consider if he were able to do so.

37. The provisions of section 4(6)(b) and (c)

extend beyond the actual wishes of P. They refer to the matters which P would be likely to consider if he were able to make the relevant decision. P would be likely to consider any relevant beliefs and values and all other relevant factors. Therefore, the matters which the court must consider under these paragraphs of section 4(6) involve the court in drawing up the balance sheet of factors which P would be likely to draw up if he were able to do so. Of course, the ultimate question for the court is: what is in the best interests of P? The court will necessarily draw up its own balance sheet of factors and that may differ from P's notional balance sheet. The court is not obliged to give effect to the decision which P would have arrived at, if he had capacity to make the decision for himself. Indeed, section 4(6) does not expressly require the court to reconstruct the decision which P, acting reasonably or otherwise, would have reached. Nonetheless, if the court considers the balance sheet of factors which would be likely to influence P, if P had capacity, the court is likely to be able to say what decision P would be likely to have reached. The court is not obliged to give effect to the decision which P, acting reasonably, would have made (the test of "substituted judgment") but section 4(6) appears to require the court to consider what P would have decided (or, at least, the balance sheet of factors which P would be likely to have considered). My provisional view is that, in an appropriate case, a court could conclude that it is in the best interests of P for the court to give effect to the wishes which P would have formed on the relevant point, if he had capacity."

Morgan J then considered the law as it stood prior to the enactment of the MCA 2005, and also the decisions in are *In re S (Protected Persons)* [2009] WTLR 315, *In re P (Statutory Will)* [2010] Ch 33 and *In re M* [2010] 3 All ER 682 (aka *ITW v Z*). He held (at paragraph 52) that "*the discussion in these three cases is of great help to me in identifying the general approach which I should adopt in the present case. However, those cases did not need to focus upon a matter which is of importance in the present case, namely, whether in the absence of any other competing consideration, a court could decide that it is in the best interests of P to give effect to the wishes which P would have formed (but had not in fact formed) on the relevant topic*."

He then concluded:

"55. *The best interests test involves identifying a number of relevant factors. The actual wishes of P can be a relevant factor: section 4(6)(a) says so. The beliefs and values which would be likely to influence P's decision, if he had capacity to make the relevant decision, are a relevant factor: section 4(6)(b) says so. The other factors which P would be likely to consider, if he had the capacity to consider them, are a relevant factor: section 4(6)(c) says so. Accordingly, the balance sheet of factors which P would draw up, if he had capacity to make the decision, is a relevant factor for the court's decision. Further, in most cases the court will be able to determine what decision it is likely that P would have made, if he had capacity. In such a case, in my judgment, P's balance sheet of factors and P's likely decision can be taken into account by the court. This involves an element of substituted judgment being taken into account, together with anything else which is relevant. However, it is absolutely clear that the ultimate test for the court is the test of best interests and not the test of substituted judgment. Nonetheless, the substituted judgment can be relevant and is not excluded from consideration. As Hoffmann LJ said in the Bland case, the substituted judgment can be subsumed within the concept of best interests. That appeared to be the view of the Law Commission also.*

56. Further, the word "interest" in the best interests test does not confine the court to considering the self interest of P. The actual wishes of P, which are altruistic and not in any way, directly or indirectly self-interested, can be a relevant factor. Further, the wishes which P would have formed, if P had capacity, which may be altruistic wishes, can be a relevant factor. It is not necessary to establish that P would have been aware of the fact that P's wishes were carried into effect. Respect for P's wishes, actual or putative, can be a relevant factor even where P has no awareness of, and no reaction to, the fact that such wishes are being respected."

Having gone through the various items set down

in the checklist at s.4 MCA 2005, Morgan J concluded on the facts of this case (at paragraph 65) that:

"*Having identified the factors as best I can, it emerges that the principal justification, so far as Mrs G is concerned, for making the order for maintenance payments in favour of C, is that those payments would be what Mrs G would have wanted if she had capacity to make the decision for herself. I recognise that this consideration is essentially a 'substituted judgment' for Mrs G. I am also very aware that the test laid down by the 2005 Act is the test of best interests and not of substituted judgment. However, for the reasons which I have tried to set out earlier, the test of best interests does not exclude respect for what would have been the wishes of Mrs G. A substituted judgment can be subsumed into the consideration of best interests. Accordingly, in this case, respect for what would have been Mrs G's wishes will define what is in her best interests, in the absence of any countervailing factors. There are no such countervailing factors here. I therefore conclude that an order which provides for the continuation of maintenance payments to C is in the best interests of Mrs G*."

Comment

In the views of the authors, this decision is one that must be read with very considerable care and, in particular, is not authority for a return to the substituted judgment test (albeit that, on one view, it could be seen as a significant rowing back from the very clear statement in *Re P* that – at least in the context of statutory wills – this test is now entirely inappropriate). Rather, on a proper analysis, it is authority for the fact an element of substituted judgment can be subsumed into the consideration of best interests, and that, absent any countervailing factors, respect for what the Court can identify to have been P's wishes can define what would be in her best interests.

Our next update should be out in January 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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