Mental Capacity Law Newsletter May 2015: Issue 56

Court of Protection: Health, Welfare and Deprivation of Liberty

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Introduction

Welcome to the May 2015 Newsletters, which are a little late, but delayed so as to be able to bring you the crucial Court of Appeal decision in *Re MN*, handed down on Thursday. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: a difficult decision on DOLS and Guardianship and best interests in the real world

(2) In the Property and Affairs Newsletter: when (and what) deputies can pay themselves for care and clarification as to when an LPA can be revoked on the basis of animosity between the attorneys;

(3) In the Practice and Procedure Newsletter: *Re MN*, setting out the boundary between the Court of Protection and the Administrative Court; revisiting litigation capacity; and transparency and the Court of Protection ;

(4) In the Capacity outside the COP Newsletter: the new POST note on Vegetative and Minimally Conscious States;

(5) In the Scotland Newsletter: the importance of careful drafting when it comes to powers of attorney and an appreciation of two recently retired members of staff of the MWC.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here.

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For all our mental capacity resources, click here. Transcripts not available at time of writing are likely to be soon at www.mentalhealthlaw.co.uk.

Guardianship and DOLS (again)

NM v Kent County Council [2015] UKUT 125 (AAC) (Upper Tribunal (Administrative Appeals Chamber (Upper Tribunal Judge Jacobs))

Article 5 ECHR – DOLS ineligibility – Mental Health Act 1983 – conditional discharge – interface with MCA

Summary

This judgment considers the relationship between DoLS and guardianship. Mr M was in his early forties and was described as having mild learning disability and paedophilic sexual interests. He had previously set fires alight, been verbally and physically aggressive, hoarded materials relating to children, and sought to contact them by dropping notes in the street inviting them to contact him.

Mr M's local authority guardian required him to reside in a residential home and meet with clinicians and therapists for treatment. He was also subject to DoLS which had been endorsed by the Court of Protection. Mr M contended that guardianship was no longer necessary because of the DoLS authorisation. He was said to have capacity to decide where to live but lacked capacity with regard to the level of supervision required to keep him and children safe. The professional view was that if discharged from guardianship he would try to leave and not return.

The First-Tier Tribunal rejected Mr M's contention, deciding that guardianship was necessary in the interests of his welfare and that of the children with whom he sought contact. His appeal was dismissed by the Upper Tribunal where it was said that "there is a fine line" between guardianship and DoLS. Judge Jacobs accepted the following important differences between them, albeit that this list was not comprehensive:

- DoLS assumes that the person lacks capacity to make the relevant decisions in their best interests. Guardianship is not based on an assessment of the person's best interests.

- DoLS cannot impose a requirement that the person reside at a particular address, whereas a guardian can, enforced by taking the person into custody and returning them to their required residence.

- DoLS cannot authorise anyone to give, or consent to, treatment for someone with a mental disorder.

It was noted that it may in some cases be possible for DoLS to provide sufficiently for a person's welfare and the protection of others so that guardianship was not necessary (para 19). Tribunals, Judge Jacobs held, must be alert to the potential relevance and practical effect of DoLS. And "*guardianship may not be necessary for a person who is physically unable to leave a care home, whereas this is not necessarily the case for a person who has the will and ability to abscond*" (para 20). It is necessary to take account of the practical effect of DoLS. Judge Jacobs held that "*There is no rule that a DOLS always trumps guardianship, any more than there is a rule that guardianship inevitably trumps a DOLS*" (para 22). He went on to decide:

> "*26. I do not accept the argument put by Mr M's solicitors that a DOLS is sufficient protection as it allows the home to prevent Mr M leaving. That argument does not deal with the possibility that he may abscond, especially given his wish to live elsewhere and the*

> *tribunal's findings that he is devious in the pursuit of his own objectives. This is a limitation inherent in the nature of a DOLS; nothing in the Court of Protection's declaration could have affected this reasoning."*

Accordingly, Mr M was to remain under DoLS and guardianship.

Comment

This decision confirms – if ever there was any doubt – that guardianship can be used alongside DoLS. With regard to the apparent differences between the regimes identified by Judge Jacobs, we would make the following observations. First, both DoLS and guardianship can have the effect of requiring someone to reside somewhere. The guardian's power is exclusive, even to the Court of Protection; DoLS provides authority to deprive those lacking residential capacity of their liberty. Second, neither DoLS nor guardianship can authorise treatment, whether for physical or psychiatric ill health. Such treatment is governed by the MCA if the person lacks the relevant capacity: a guardian can require the person to attend a place for treatment but guardianship provides no power to treat. Finally, guardianship can clearly trump DoLS as the residence requirement is exclusive: so if DoLS is inconsistent with a MHA requirement the person is not eligible for it.

The list provided by the Upper Tribunal is of course not exhaustive. Other differences are that, for those with learning disability, guardianship (but not DoLS) requires the condition to be associated with abnormally aggressive or seriously irresponsible conduct. DoLS is only available for hospitals and care homes, whereas guardianship is not so limited and can be used elsewhere. The individual's family has more powers under guardianship. For the nearest relative can veto it (subject to being displaced in the County Court), unlike DoLS (unless they have been appointed under a health and welfare LPA). Moreover, the nearest relative can order the person's discharge from guardianship (with a responsible clinician having no power to bar it); whereas only the supervisory body or the Court of Protection can terminate DoLS.

The Upper Tribunal's rejection of the argument that DoLS allows the home to prevent Mr M leaving does not – in our view – properly address the legal complexities that are in play here. A supervisory body has of course authorised the managing authority to deprive the person of their liberty so the person can be prevented from leaving. However, if they abscond, Parliament deliberately decided not to include a conveyance power within the DoLS authorisation (although some case law suggests that it is implied). MCA ss.5-6 can, of course, be used to exercise proportionate restraint to convey the person back if the statutory requirements are met, provided the conveyance itself does not constitute a deprivation.

The professional view on Mr M's mental capacity is a somewhat bizarre finding which may have stemmed from the error of using a blank canvass (see *CC v KK*). Clearly, by virtue of the DoLS authorisation, he had been found to lack capacity to decide whether to be accommodated in the care home for the purpose of receiving the necessary care or treatment.

Finally, we should highlight the 2015 Code of Practice to the Mental Health Act 1983, which states that:

> *"30.12 Where an patient aged 16 or over is assessed as requiring residential care but lacks the capacity to make a decision about whether*

they wish to be placed there, guardianship is unlikely to be necessary where the move can properly, quickly and efficiently be carried out on the basis of:

- *section 5 of the MCA or the decision of an attorney or deputy, and*
- *(where relevant) a deprivation of liberty authorisation (a DoL authorisation) (in relation to a patient aged 18 or over) or deprivation of liberty order (Court of Protection order) under the MCA.*

30.13 But guardianship may still be appropriate in such cases if:

- *there are other reasons – unconnected to the move to residential care – to think that the patient might benefit from the attention and authority of a guardian*
- *there is a particular need to have explicit statutory authority for the patient to be returned to the place where the patient is to live should they go absent, or*
- *it is thought to be important that decisions about where the patient is to live are placed in the hands of a single person or authority – eg where there have been long-running or particularly difficult disputes about where the person should live.*

30.14 It will not always be best to use guardianship as the way of deciding where patients who lack capacity to decide for themselves must live. In cases which raise unusual issues, or where guardianship is being considered in the interests of the patient's welfare and there are finely balanced arguments about where the patient should live, it may be preferable instead to seek a best interests decision from the Court of Protection under the MCA.

The question of the interaction between the MCA and the MHA is one that continues to vex – and to no obviously sensible aim as regards the delivery of proper clinical care. We will cover in the next issue the decision in *A Local Health Board v AB* [2015] EWCOP 31 which arrived too late for us to consider fully for this issue, but illustrates this point in spades.

Best interests in the real world

Bedford Borough Council v (1) Mrs LC (2) Mr C [2015] EWCOP 20 (Bodey J)

Best interests – residence

Summary

This case concerned LC's (Mrs C's) best interests in relation to residence, contact with her husband and a deprivation of her liberty.

Mrs C was a 74 year old woman with a diagnosis of dementia, diabetes and strike-related illness. Mrs C had been married to Mr C for over fifty years. Until June 2010, they had lived together in their matrimonial home. In June 2010, there was an incident in which a carer reported that Mr C had pushed Mrs C in the face. Mr C pleaded guilty to assault and was given a community sentence. Following this incident, she was taken to a care home as a place of safety and has remained there ever since.

Mrs C did not wish to see her husband for some time after the assault. After 8.5 months, Mrs C wished to see her husband. Gradually, Mr and Mrs C rebuilt their relationship. The current arrangements were that Mrs C goes to the matrimonial home twice a week for up to four hours and her husband is able to visit the care home whenever he likes. The couple have "supported rather than supervised" telephone contact at Mr C's instigation. Mrs C did not have

the capacity to initiate a telephone call.

Mr C contended that it was in his wife's best interests to return to the family home. However, the local authority disagreed and contended that it was Mrs C's best interests to remain in the care home and for all contact with her husband to be supervised.

One factor for the judge's consideration was that the local authority could not afford or would not agree to fund a package of care at home which costs more than £700 per week. In particular, the local authority would not fund 24 hour care for Mrs C in the matrimonial home. Having regard to the level of funding, the judge had to decide which one of three options was in Mrs C's best interests:

1. To return to the matrimonial home with a personal budget of £700 per week, sufficient to buy approximately 50 hours of care per week, or 25 hours of double-handed care;
2. To continue residing at the care home; or
3. To reside in a different care home.

After making detailed findings of fact and weighing up the various competing opinions, District Judge Eldergill decided that it was in Mrs C's best interests to remain in the care home. Of particular concern was the evidence that Mrs C's needs had increased since 2010 but the local authority would not or could not fund more than £700 of care per week which was the same level of care that Mrs C received in 2010. The judge concluded that Mrs C would not receive the care at home that she required.

Comment

In reaching a best interests decision, District Judge Eldergill carefully considered the various factors set out in section 4 MCA 2005. In particular, he was satisfied that Mrs C's present wishes and feelings were to live at home with her husband. However, he was constrained by the local authority's position regarding funding. He stated at paragraphs 26-27:

> *"26. This court does not have the power to review the lawfulness of this financial needs assessment and it has not been challenged by any of the parties by way of judicial review.*
>
> *27. I must proceed on the basis that the local authority's financial needs assessment in this respect is lawful and binding on me unless and until it is set aside by the appropriate court or modified by the local authority, if ever."*

Therefore, despite finding that it was Mrs C's wish to return home to her husband, the judge held that it was not in her best interests because she would not receive the care she required on the level of funding that the local authority was prepared to provide. No viable alternative care package, whether from friends, family or volunteers, had been put forward by Mr C.

In addition to the factual issues, District Judge Eldergill made a number of general remarks about Court of Protection procedure and hearings. First, he criticised the local authority's "unacceptable delay" in bringing the matter to court. Mrs C was admitted to the care home in June 2010 but it was not until December 2012 that the local authority applied for declarations in relation to residence, deprivation of liberty and other issues. After further delay, the matter reached the judge on 7 March 2014, by which time Mr and Mrs C had been separated for almost four years without a hearing of the issues. The judge said:

> *"Bearing in mind the length of her marriage, any objective view of her best interests should have led a local authority to facilitate an early determination of the issues. That was the overriding procedural consideration."*

The judge was also critical of the documentation that he received:

> *"The Court received a 1500-page bundle of documents which included applications and application notices, orders, directions, position statements, capacity assessments, witness statements, exhibits, correspondence, a jointly instructed independent social work report… a jointly instructed independent SALT report, Scott Schedules/Particulars of Allegations and preserved Deprivation of Liberty forms. In my view, it is fair to say that the bundles were confusing and the court worked from two different bundles."*

He also expressed several concerns about the way in which the local authority had prepared its care and about the quality of some of its evidence, for example:

- Allegations were made which could not be substantiated and which ought not to have been part of the case;
- There was a tendency to look to hold Mr C responsible for all care difficulties;
- Mr C was described as 'lacking insight' when sometimes he simply took a different view to that of the professionals; and
- The local authority's witnesses were unable to provide basic care planning information.

This is a reminder of the burden on local authorities thoroughly to investigate the issues and to bring the matter to court in a timely manner. The case – more broadly – may also be thought to stand as an illustration of the issues that have led to the trenchant comments of Sir James Munby P in *ACCG* as to the conduct of welfare proceedings discussed in the Practice and Procedure Newsletter.

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Conferences at which editors/contributors are speaking

Mentally Disordered Offenders – disposals, risk and remedies

Jill is speaking at this Legal Services Agency seminar "Mentally Disordered Offenders - disposals, risk and remedies" on 18 May in Glasgow, addressing "The Mental health Bill and Mentally Disordered Offenders."

'In Whose Best Interests?' Determining best interests in health and social care

Alex will be giving the keynote speech at this inaugural conference on 2 July, arranged by the University of Worcester in association with the Worcester Medico-Legal Society. For full details, including as to how to submit papers, see here.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

Our next Newsletter will be out in early June. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (2015, Oxford University Press) and Jordan's 'Court of Protection Practice.' He is the general editor of the fourth edition of 'Assessment of Mental Capacity' (Law Society/BMA, forthcoming). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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Adrian is a practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law*," he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV click here.

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