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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: January 2012

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Introduction

Welcome to the first issue of our Court of Protection Newsletter for 2012. We revisit two judgments discussed in the last issue, and look at the decision of Mostyn J about the role of RPRs in DOLS challenges. Two cases in which the relationship between the MHA and MCA and/or deprivation of liberty are examined, including the recent decision of Mr Justice Peter Jackson which considers the particular issues raised by guardianship. We also take the opportunity to discuss a number of cases determined some time ago which have only recently become available.

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

RK v (1) BCC (2) YB (3) AK) [2011] EWCA Civ 1305

Summary and comment

The keen-eyed will have noted an oddity about the decision of the Court of Appeal in this case (discussed in our previous edition), namely that it only appeared to contain one judgment, that of Thorpe LJ. That was, it appears, an error, and a further iteration has now been handed down which contains two concurring judgments, from Gross LJ and Baron J. The latter merely relates the concurrence; during the course of the former, Gross LJ commented that he was:

> "*particularly and respectfully struck by the force of Lord Hope of Craighead's observation in Austin v Metropolitan Police [2009] UKHL 5; [2009] 1 AC 564, at [34]:*
>
> > *'I would hold therefore that there is room, even in the case of fundamental rights as to whose application no restriction or limitation is permitted by the Convention, for a pragmatic approach to be taken which takes full account of all the circumstances.'*
>
> *35. Once such a "pragmatic approach" taking "full account of all the circumstances" is adopted, the conclusion follows, as explained by Thorpe LJ... [t]he restrictions in question did not amount to a deprivation of liberty*."

Given the repeated references to *Austin* in Court of Protection cases, it would now seem

increasingly difficult to argue that it is to be limited to its own specific facts (far removed from Article 5(1)(e) and the care of those without capacity).

Secretary of State for Justice v RB [2011] EWCA Civ 1608

Summary

This case concerned a life-long 75-year-old paedophile who was attracted to boys, typically aged between 9 and 13 years old, which led to his conviction for indecent assault in 1999. An indefinite restricted hospital order followed, with a diagnosis of 'persistent delusional disorder', pursuant to sections 37 and 41 of the Mental Health Act 1983. For a number of years both RB and his care team, but not the Secretary of State, agreed that he could be cared for in a registered care home, provided he was escorted in the community.

At first instance the tribunal decided to discharge RB, subject to the following conditions:

1. That he resides at the care home
2. That he abides by the rules of that institution
3. That he does not leave the grounds of the care home except when supervised
4. That he accepts his prescribed medication
5. That he engages with social supervision
6. That he engages with medical supervision.

On appeal, the Upper Tribunal concluded that 'discharge' simply meant 'release from the state there mentioned, that is from "detention in a hospital for treatment"'. It held that the conditions amounted to a deprivation of liberty to which RB had not given valid and unfettered consent but, because the proposed detention related to a care home, it was lawful and in his best interests. The Secretary of State challenged this decision.

The Court of Appeal was therefore asked to consider whether there was any statutory authority to deprive him of his liberty once an order for his conditional discharge had been made. Focusing solely on the 1983 Act, the answer was an emphatic 'no'. After emphasising the fundamental nature of the right to liberty, by reference to clause 39 of the Magna Carta, Article 9 of the Universal Declaration of Human Rights, and Article 5 of the ECHR, the Court concluded that Parliament had not intended to create a new species of detention post-discharge. Section 73 of the 1983 Act did not prescribe any continuing detention criteria; the rights of conditionally discharged patients were inferior to those of detained patients and threatened Article 14 ECHR; and the decision under challenge would have authorised detention for the purposes of containment rather than treatment which contradicted the policy of the MHA. As a result, RB could not be conditionally discharged to a care home in circumstances where he would be deprived of his liberty.

Comment

This decision illustrates how the deprivation of liberty concept can impact negatively upon MHA patients. The Court acknowledged the irony that, by embracing human rights arguments intended to safeguard patients from arbitrary detention, the ultimate result was less liberal towards the patient. If forensic patients cannot be conditionally discharged into care home detention (MHA s.73), civil patients may experience similar problems in seeking discharge from hospital detention into guardianship (MHA s.7) or supervised community treatment (MHA s.17A) if their circumstances engage Article 5.

It appears that RB had the mental capacity to consent to the conditions and so his detention could not have been authorised under Schedule A1 of the Mental Capacity Act 2005 ('DOLS'). However, his consent was invalid because, in effect, he had no choice. The second irony, therefore, is that had he lacked capacity, he could presumably have been conditionally discharged from MHA-detention into MCA-detention as this provides distinct statutory authority to deprive liberty. In ***DN v Northumberland Tyne & Wear NHS Foundation Trust [2011] UKUT 327 (AAC***), for

example, the Upper Tribunal envisaged that a patient detained for treatment under MHA s.3 would be discharged and detained in a care home under a DOLS authorisation (see our October/November 2011 newsletter for further details).

Another potentially significant aspect of the judgment relates to Article 14 ECHR. The Court held that the words "other status" would 'cover a patient's status when detained in an institution which is not a hospital following their conditional discharge' (para [64]). It may well be, therefore, that in addition to 'disability' (see *Glor v Switzerland* (Application no. 13444/04, 30 April 2009)), being subject to a DOLS authorisation might similarly amount to a status protected against discrimination. The Secretary of State may then shoulder the burden of showing why, for example, there are differences between the substantive and procedural rights given to those detained under DOLS as compared with the MHA and vice versa.

AB v LCC [2011] EWHC 3151 (COP)

Summary

In this decision, Mostyn J gave general guidance on the circumstances in which P's Relevant Person's Representative ("RPR") may be appointed as a litigation friend in the context of a challenge to the deprivation of his liberty pursuant to section 21A Mental Capacity Act 2005.

The substantive dispute concerned AB, an 81 year old man who was said to suffer from dementia and cognitive impairment and who sought to challenge his deprivation of liberty in a Care Home under s.21A MCA 2005. On 12 October 2011, the Court ordered that the Official Solicitor be appointed to act as his litigation friend subject to his consent. No consent was initially forthcoming and on 4 November 2011, AB's solicitors applied to the Court for his RPR to be appointed as his litigation friend. The Official Solicitor's position was that he was a litigation friend of last resort and if another individual (namely the RPR) was willing to act, he would decline the invitation to do so. Mostyn J duly appointed AB's RPR as AB's litigation friend.

In his judgment, Mostyn J considered the relevant statutory provisions, rules and regulations. The Judge held that P is required to have a litigation friend and that there is only one process by which a litigation friend may be appointed (as defined in Part 17 of the Court of Protection Rules). The Judge noted that an RPR is a creation of Schedule A1 MCA 2005 and accepted the applicant's submissions that a crucial role of an RPR in the DOLS process is to provide the relevant person with representation and support that is independent of the commissioners and providers of the services they receive.

At paragraph 34 of his judgment Mostyn J further held that it is plain that Parliament has intended that the RPR should play a central role in challenges pursuant to s21A MCA 2005. The Judge noted that RPRs do not require the permission of the court to bring a challenge under s.21A. The RPR may be a party to an application under s21A in his own right and, properly understood, the Court should not automatically appoint the detained person as the Applicant.

Accordingly, as to whether an RPR can act as a litigation friend, Mostyn J held:

37. *The role of the RPR is to meet with the relevant person and to represent him in matters relating to his deprivation of liberty. As I have shown, the 2005 Act lays down certain specific examples of obligations on supervisory bodies to inform the RPR and the Act permits the RPR to seek reviews of standard authorisations. The Code of Practice (which must be taken into account by the Court if a provision of the Code is relevant to the question arising in the proceedings: see s42(5) MCA 2005) states that the RPR should represent and support the relevant person in 'making an application to the Court of Protection'.*

38. *I conclude therefore that there is no impediment to a RPR acting as a litigation friend to P in a s21A application provided that:*

i) *the RPR is not already a party to the proceedings;*

ii) *the RPR fulfils the COP rule 140 conditions;*

iii) *the RPR can and is willing to act as litigation friend in P's best interests; and*

iv) *the procedure as set out in COP rule 143 is complied with."*

Mostyn J then went on to consider whether the normal or usual litigation friend should be the Official Solicitor. The Judge concluded:

There is no good reason why the Court cannot of its own motion appoint the RPR as a litigation friend in accordance with its powers under rule 143;

At the initial directions hearing, the Court should try to determine whether there is a suitable litigation friend, and in many cases (like this one) the RPR can well fulfil that role.

There appear in practice to be few cases where the RPR acts as the applicant in s21A applications. Should the applicant be a paid RPR appointed by the supervisory body it may be the Court would want to encourage such RPRs remaining as such, as envisaged by the statutory scheme. If, however, the RPR is a family member, the Court will need to consider whether P's interests are properly represented before the Court. In circumstances where a family member RPR is the applicant, the Court may feel it necessary to make P a respondent and to appoint the Official Solicitor (or another person) as the litigation friend.

Comment

This judgment was handed down to give general guidance on the potential role of an RPR as a litigation friend in the specific context of challenges under s21A MCA 2005. It is a useful reminder that whilst in practice, the Official Solicitor is often appointed as P's litigation friend, the applicant should consider whether there is another individual who is willing and capable of fulfilling this role.[1] It also emphasises the scope of the functions which an RPR may properly perform.

The authors have experience of RPRs acting as litigation friends in s21A challenges, and have found this approach to be a more satisfactory way of implementing the court review than by expecting local authorities to issue proceedings to challenge their own decisions, as suggested in ***Neary*****,** not least because it ensures that the s.21A procedure is used and P's entitlement to non-means-tested legal aid is triggered.

C v Blackburn with Darwen Borough Council [2011] EWHC 3321 (COP)

Summary

This case concerned a 45 year old man with an acquired brain injury who suffered from mental health problems as well as lacking capacity to make decisions about his residence. He was the subject of a guardianship order under s.7 MHA 1983, and was also the subject of a standard authorisation.

Mr C was required by the local authority (as guardian) to reside at a care home, which had locked doors. He was subject to 1:1 supervision inside and outside the home, including when on trips to his family (this at their request). If Mr C tried to leave the home unescorted, he would be distracted, but restraint was apparently not used. Mr C gave oral evidence at the hearing and said that he was stressed by the guardianship and DOLS regimes and wanted both the order and the authorisation lifted. He did not like the care home or his fellow residents and wanted to live somewhere else.

The judge found that Mr C was not ineligible to be deprived of his liberty under Schedule A1, notwithstanding the guardianship order.

[1] The authors are aware that the Official Solicitor's office, which is considerably over-stretched, is of its own motion taking the point increasingly often that he is the Litigation Friend of last resort and other avenues need to be exhausted first.

However, he found on the facts that Mr C was not deprived of his liberty, saying:

'I accept that Mr C is acutely anxious about the restraints upon him, being more aware of his predicament than the subjects of previous reported cases. On the other hand, the restraints upon him within and outside the care home are relatively lighter. The existence of locked doors and a requirement of supervision are not in themselves a deprivation of liberty, where their purpose is to protect a resident from the consequence of an epileptic fit, or harm caused by a lack of awareness of risk, or from self-harm. The limit on the number of outings as a consequence of staffing levels does not tip the balance, when Mr C in fact has quite regular access to the community and to his family.'

The judge relied on the decision of the Court of Appeal in the **Chester West** case, noting that '*in the present case Mr C undoubtedly wants to live somewhere else, but this is a reflection of his unhappiness with the care home. He would like to be able to live an unconfined life in the community, but this is not realistically possible due to the extent of his difficulties. I distinguish his situation from those where a person has been removed from a home that is still realistically available.'* The judge did not accept that a proposed rehabilitation placement, identified by the independent social worker who had been instructed in the proceedings, counted as an option that was actually available. The independent social worker had concluded that the present arrangement was not in Mr C's best interests and that his care plan and place of residence should change.

The judge also considered whether the guardianship order would have been sufficient to authorise a deprivation of liberty, if the same had existed. He found that it did not, relying on paragraph 13.16 of the MCA Code of Practice,[2] and saying that guardianship does not include the power to prevent a person from leaving their place of residence.

The judge also interpreted the decision of Charles J in GJ v The Foundation Trust and others [2009] EWHC (Fam) 2972 as meaning that the MHA has primacy over the MCA as a general principle, not just in the specific circumstances with which GJ was concerned. He said '*there are good reasons why the provisions of the MHA should prevail where they apply. It is a self-contained system with inbuilt checks and balances and it is well understood by professionals working in the field. It is cheaper than the Court of Protection*.' However, where a guardianship order is not working, because the subject of the order disagrees with the requirements imposed by the guardian, it would be appropriate for that dispute to be determined by the Court of Protection (assuming the person lacks capacity). But, the Court of Protection could not do so while the guardianship order was in place because it would have no jurisdiction, by virtue of s.8 MHA 1983. The judge envisaged that in such cases, the guardianship order should be discharged, so that the Court of Protection could determine the fundamental 'best interests' dispute.

Comment

This case is of interest from a number of angles. First, it appears to the authors, that as feared, the Court of Appeal's decision in **Chester West** has led to the wrong approach being taken to the question of whether there is a deprivation of liberty. It is somewhat surprising to the authors that a person who objects to living in a care home, but who is required to live there against his wishes, is not being deprived of his liberty. The fact that Mr C could go on frequent outings, and the possibility that 1:1 supervision may have been required in any setting due to his care

[2] 13.16 *Guardianship gives someone (usually a local authority social services department) the exclusive right to decide where a person should live – but in doing this they cannot deprive the person of their liberty. The guardian can also require the person to attend for treatment, work, training or education at specific times and places, and they can demand that a doctor, approved social worker or another relevant person have access to the person wherever they live. Guardianship can apply whether or not the person has the capacity to make decisions about care and treatment. It does not give anyone the right to treat the person without their permission or to consent to treatment on their behalf.*

needs,[3] do not seem to alter the fundamental reality of Mr C's position. The judge's decision appears to have turned on the fact that there was no 'actual' alternative placement available to Mr C. The danger of this approach is that where, as here, the local authority has not investigated or put forward any alternative placement (because they believe that the present placement is best), someone in Mr C's position has no meaningful way of presenting an alternative option to the court.[4] Mr C's lack of capacity and lack of ability to control and manage his own affairs effectively works against him by preventing him from accessing the safeguards of the DOLS regime.

It seems to the authors that Mr C was deprived of his liberty, albeit that the deprivation of liberty may have been proportionate and in his best interests given the (possible) lack of a better alternative – and that Mr C may have been deprived of his liberty in any placement, because resistance to care was said to be an intrinsic part of his condition.

Although Mr C was stressed by the DOLS authorisation, without its protection, how is he to require the local authority to continue to monitor his placement, and to consider alternatives? The guardianship order had been renewed despite his opposition to the placement, and there was thus no incentive for the local authority to think creatively about alternative placements such as the one recommended by the independent social worker. Although the MHA may well have the advantages identified by the judge, it appears that in Mr C's case, it had not worked to promote a comprehensive review of his situation or the identification of alternative arrangements for his care and residence which may have been more acceptable to him.[5]

The judgment is also of interest for its conclusion that a guardianship order cannot also authorise a deprivation of liberty. Although the Code of Practice asserts this to be the case, there are a number of commentators (and other judges) who take a different view. The issue does not appear to have been argued fully, and no detailed reasons for the judge's conclusion are given. No doubt it will be raised again in the future, as this part of the judgment was obiter.

Finally, we note that there appears to be a difference of opinion between the court and the Department of Health as to whether the analysis of Charles J in the GJ case should be read as laying down a general principle of the primacy of the MHA over the MCA, or whether that principle was tied to the 'Case E' scenario under Schedule 1A. In the case of **DN v Northumberland Tyne and Wear NHS Foundation Trust** [2011] UKUT 327 (AAC), a letter from the DH to the court was reproduced, which stated that '*it was specifically in the context of the interpretation of Case E that Mr Justice Charles talked in J about the MHA having "primacy". Outside that context, the Department does not understand him to have been making a more general statement about the relationship* between *the two Acts. Indeed, as set out above, the Department does not think it would actually be possible to say, in general, which has primacy over the other.'* Yet further complication in what Mr Justice Peter Jackson observed in this case to be a complex and inaccessible area of law.

Cardiff Council v Peggy Ross (2011) COP 28/10/11

Summary

This case concerned an 82 year old woman with a diagnosis of dementia, who had decided with her partner of 20 years to go on a cruise ship holiday, something they had both done together on many previous occasions. Mrs Ross had moved to a care home a few months before the

[3] Which was said in ***Chester West*** to be a 'relevant' factor, not a determinative one (paragraph 102 per Munby LJ).

[4] It is also interesting to ask why the absence of an actual alternative is relevant in the first place – imagine a homeless person who is detained under s.3 MHA 1983, or a person whose home is repossessed while they are serving a prison sentence.

[5] See the latest posts by Lucy Series on http://thesmallplaces.blogspot.com/ for a comprehensive comparison of guardianship and DOLS and their respective advantages and disadvantages.

planned cruise following medical problems, but spent weekends with her partner Mr Davies at his home.

The local authority formed the view that Mrs Ross lacked capacity to decide to go on the cruise, and that it was not in her best interests. The critical issue from the local authority's perspective was that Mrs Ross was not able to appreciate the potential risks to her wellbeing of going on the cruise.

The court was required to make a decision at short notice and without oral evidence from expert witnesses on capacity. However, the judge felt that the decision in question was fairly straightforward – '*It is a choice of whether to go on holiday or not, in familiar circumstances, with one's companion of the past two decades'* – and that despite the views of the social worker and a psychiatrist who had assessed Mrs Ross that she lacked capacity, there was insufficient evidence to rebut the presumption in favour of capacity.

The judge went on to hold that even if Mrs Ross lacked capacity, it was not contrary to her best interests to go on the holiday. The judge felt that the Council's approach to the best interests decision was too risk averse and failed to take proper account of the potential benefits to Mrs Ross: it '*smacked of saying that her best interests were best served by taking every precaution to avoid any possible danger without carrying out the balancing exercise of considering the benefit to Mrs Ross of what, sadly, may be her last opportunity to enjoy such a holiday with Mr Davies. This led, in my view, to trying to find reasons why Mrs Ross should not go on this holiday rather than finding reasons why she should.'* The judge was satisfied that Mr Davies would be able to care for Mrs Ross, as he did when she stayed with him at weekends, and was strongly influenced by the fact that this was likely to be her last cruise ship holiday.

The Council had put in place a DOLS authorisation to prevent Mrs Ross going on the holiday, and had then made an application to the court very shortly before the cruise was due to start. Although the issue was not fully argued or decided, the judge indicated that this was not the correct procedural route, and that an application should have been made to the court rather than the use of the DOLS regime.

Comment

This case provides another example of a tendency among local authorities to focus on risk prevention at the expense of emotional wellbeing. The opposite approach is often taken by the court, particularly in cases involving elderly people, who, even though they may have impaired capacity, would rather take the riskier option for care, residence or holidaying, rather than losing their remaining autonomy. It may be that judgments of this sort will persuade statutory bodies to take a broader view of best interests and to give proper weight to the wishes and feelings of the individual concerned, and to the need to promote emotional wellbeing as well as physical safety.

Re HM (SM v HM) Case No 11875043/01

Summary and comment

Last month's issue contained an illuminating summary and commentary by Martin Terrell on this important case. By way of our own comment, we would perhaps add that the judgment of HHJ Marshall QC also emphasised the extent to which that the degree of benefit to HM ('P') in that case which could be achieved by only a modest saving in costs was significant, because she had under-recovered in her damages claim. In other words, although the saving was a slight one in monetary terms, it was (in context) a very valuable one; the case is therefore not authority for the proposition (which may previously had held sway) that any little saving can justify the endorsement of a trust.

NK v VW (Case No. 11744555; 27 October 2010)

Summary

This case was determined well over a year ago, but anonymisation has taken a considerable

period of time. It merits attention, though, because it is a very rare example of a reported case in which reasons have been given for refusal to bring welfare proceedings.

NK sought permission to bring proceedings in relation to the welfare of his elderly mother, VW. He expressed concern as to her welfare and that his relationship with her had been alienated by the method and nature of the care which she received. The purpose of his application was said primarily to be to remove her from the care home where was resident (situated a long distance from where he lived) to one located in another part of the country. He was in a position to fund such care, and wished by removing his mother to another care home to exercise more frequent contact with her than were currently imposed within a standard authorisation granted by LCC, the relevant local authority, upon the recommendations of the care home at which VW was resident. The son also wished to be appointed his mother's deputy in respect both of property and affairs and health and welfare. There was before the Court an unchallenged psychiatric report from a Dr A, who had concluded unequivocally that it was in the mother's best interests to remain resident where she was. Dr A also concluded that it was in the mother's best interests that there be no restrictions to visits taking place outside the home with independent monitors.

In determining the application, Macur J reminded herself (at paragraph 3) that, in deciding whether to grant permission where such is required by s.50 MCA 2005 and Rule 50 of the Court of Protection Rules 2007, the Court must in particular have regard to (a) the Applicant's connection with the person to whom the application relates; (b) the reasons for the application; (c) the benefit to the person to whom the application relates or the proposed order or directions, and (d) whether the benefit can be achieved in any other way.

Having directed herself thus and outlined the evidence, Macur J concluded that, considering the overall objective of the MCA and unchallenged opinion of Dr A, the proposed order and directions sought by NK if permission were to be granted were not capable of being perceived to be to the benefit of VW. The disadvantages to her in removing her from the care home in which she was residing home outweighed every benefit suggested that the move would bring. She continued:

> "*In those circumstances, I refuse NK permission to make application pursuant to the MCA 2005 in relation to his mother. In doing so I obviously consider that section 50 (3) and the associated Rules require the Court to prevent not only the frivolous and abusive applications but those which have no realistic prospect of success or bear any sense of proportional response to the problem that is envisaged by NK in this case.*" (paragraph 16)

Comment

Whilst many applicants are refused permission to bring welfare applications (see the discussion in the last issue of the valuable statistical work done in this regard by Lucy Series), reasons for the refusal of permission are rare, largely because the decisions are usually made at (what was) Archway and are not reported. This judgment is therefore of assistance in reminding practitioners as to the tests to be applied; that of proportionality between problem and response set out by Macur J may not find its express place in the MCA but – it is respectfully suggested – is clearly correct.

A London Borough v (1) BB (by her Litigation Friend the Official Solicitor) (2) AM (3) SB and (4) EL Trust [2011] EWHC 2853 (Fam)

Summary

This judgment, determined by Ryder J in the summer, but not available until recently, is a further judgment in the proceedings concerning BB, a woman suffering a number of disabilities, including deafness and a learning disability, who was initially removed from her home following an allegation of assault upon by her mother. An earlier judgment, relating to deprivation of liberty and the interaction with the MHA 1983 was

discussed in our August 2010 edition.[6]

At this juncture, the Court was asked to make decisions as to (1) BB's marriage to her husband, MM; and (2) as to her residence (and, related, whether the care arrangements at the placement at which she was living amounted to a deprivation of liberty).

As regards marriage, Ryder J endorsed the agreement of all the parties that it was in BB's best interests for her marriage with MA to be annulled pursuant to s 12(c) of the Matrimonial Causes Act 1973 on the ground that she did not validly consent to the marriage as she lacked capacity to consent at the relevant time. Ryder J noted that MA had agreed through solicitors to an annulment and accordingly, Ryder J dismissed the prayer in his petition for divorce and allowed the petition to proceed on the basis that the marriage was to be annulled. BB was given leave to issue an application for an annulment pursuant to section 13(4) of the 1973 Act and in exercise of its powers under Part 18 Family Procedure Rules 2010 dispensed with the procedural steps to be taken before the grant of such leave by agreement and in furtherance of the over-riding objective as set out in the Rules. Having regard to requirements of Part 7 of the 2010 Rules, Ryder J directed that the application be listed before a District Judge of the Principal Registry for pronouncement of a decree nisi and that the hearing should be in private pursuant to rule 7.16(3)(d) of the Rules. With the agreement of the parties, Ryder J further gave leave for the proceedings to be treated as an application for a forced marriage protection order and made such an order as being in BB's best interests.

As regards residence, Ryder J noted, with some asperity, that the allegation of assault could not be proved on the balance of probabilities, and that the material necessary to come to this conclusion had been available almost immediately. He noted (at paragraph 18) that the fact that steps had not been taken to address this situation meant that the allegation had been hanging over the family like a cloud, and that they had in consequence been placed in an adversarial position as regards the more important welfare issues which related to BB.

Ryder J noted that the full evidence was not before the Court (in particular as to whether residence back with BB's family was an option);[7] however, holding that the arrangements at her placement amounted to a deprivation of liberty, he held that they were justified and residence at the placement was in her best interests on an interim basis pending a further review in 6 months' time. He set out a detailed exegesis of the further investigations that he required to be carried out in the interim.

Comment

Whilst not the subject of controversy, as it was agreed as between the parties, the approach adopted to the annulling of the marriage between BB and MA was a pragmatic one which it is useful to have set out in full as a template for similar cases in future.

One further point of interest is the short shrift given to the evidence of a cultural expert jointly instructed by the parties. Ryder J expressed no difficulty with the expert's evidence as to the cultural implications of BB's marriage and the ways in which that ought to be brought to an end; or BB's cultural and religious background and the importance of the same to her identity. However, Ryder J expressed difficulty as to the hypotheses proffered by the expert about BB's family and the community in which they lived. He noted that the evidence given in this regard was well within the knowledge of the court (and that this "*might of course have suggested to the parties that the evidence was neither necessary nor admissible*";[8] it was not cross referenced to the attitudes and practices of this particular family or the community in which they lived because the expert was not instructed to perform that task. In the absence of any instruction to the expert to undertake that work,

[6] *BB v AM* (2010) EWHC 1916 (Fam), a judgment of Baker J.

[7] He noted in this regard (paragraph 47) that it was the role of the local authority where welfare proceedings are necessary to bring all of the relevant materials to the Court so that a best interests decision can be made.

[8] Paragraph 23.

Ryder J found that that evidence remained purely hypothetical.

AH v Hertfordshire Partnership NHS Foundation Trust & Anor (including costs) [2011] EWHC 276 (COP)

Summary

The costs decision in this previously reported case which concerned plans to move a number of residents from an NHS campus facility has been handed down. The court ordered the statutory bodies involved to contribute to the costs incurred by the litigation friends of the residents involved, including in cases where the statutory bodies had agreed to consent orders that it was in the best interests of the residents not to be moved, and thus no substantive hearing had occurred.

Peter Jackson J reiterated the familiar principle that decisions to depart from the general rule that there should be no order for costs in welfare proceedings are fact-specific. In these cases, he found that 50% of the residents' costs should be paid by the statutory bodies to reflect the following features of the litigation:

- There had been difficulties in getting information from the statutory bodies about their planning and about the financial circumstances of the residents.
- The costs of the residents were increased by virtue of their having to act as Applicants in each set of proceedings.
- The best interests assessments that had been carried out were inadequate.
- There had been a lack of clarity about whether the campus facility was being closed, and a lack of effective communication and consultation about the proposal to move the residents.
- The residents had succeeded in obtaining the outcome sought by their litigation friends, and the jointly instructed experts had said in the clearest terms that the moves were not in the best interests of the residents. The failure to accept the views of the experts was unreasonable.
- No warning of a costs application is necessary when the party against whom costs are sought is a public body.

Comment

It would be dangerous to attempt to read across from this judgment to other cases, but the judgment is worth noting as an example of costs being ordered even where there is no bad faith or flagrant misconduct. The judgment should give pause for thought to litigants, whether individuals or public bodies, who seek to dispute the recommendations of jointly-instructed experts where the bulk of the evidence points in one direction.

The London Borough of Hillingdon v Steven Neary (by his Official Solicitor) and Mark Neary [2011] EWHC 3522 (COP)

Summary and comment

Peter Jackson J has been busy recently. In addition to the costs judgment in the *AH* case discussed above, he has also handed down his costs judgment in the *Neary* case. In sum, he departed from the general rule contained in rule 157, and ordered Hillingdon to pay the costs of the Official Solicitor costs from the date of issue to the conclusion of the main hearing. He declined to order that it pay the OS's costs thereafter, because Hillingdon had sought to cooperate in the securing of successful future care arrangements. He also declined to order costs in relation to the question of whether the press should be entitled to attend the hearing, primarily because it raised issues of general public importance.

This judgment is perhaps unsurprising, but is valuable for two dicta. Having reviewed five Court of Protection decisions on costs,[9] he

[9] *SC v London Borough of Hackney* [2010] EWHC B29 (COP), a decision of Senior Judge Lush; *G v E & Ors* [2010] EWHC 3385 (Fam), a decision of Baker J, upheld

commented (at paragraphs 7-8) as follows:

> "*I find that these decisions do not purport to give guidance over and above the words of the Rules themselves – had such guidance been needed the Court of Appeal would no doubt have given it in Manchester City Council v G. Where there is a general rule from which one can depart where the circumstances justify, it adds nothing definitional to describe a case as exceptional or atypical. Instead, the decisions represent useful examples of the manner in which the court has exercised its powers.*
>
> *8. Each application for costs must therefore be considered on its own merit or lack of merit with the clear appreciation that there must be a good reason before the court will contemplate departure from the general rule. Beyond that, as MCA s. 55(3) – cited above – makes plain, the court has "full power" to make the appropriate order.*"

Finally, at the very end of his judgment (paragraph 18(9), he noted that:

> "...*there is nothing in this decision to deter public authorities or others from issuing proceedings in a timely way in appropriate cases. Far from increasing the risk of costs orders being made, or their being made with effect from an earlier date, the greater likelihood is that matters would not reach the stage where such orders were in prospect at all.*"

Schedule 3

on appeal in *Manchester City Council v G & Ors* [2011] EWCA Civ 939; *D v R (the Deputy of S) and S* [2010] EWHC 3748, a decision of Henderson J in a property and affairs case; and (discussed above) *AH v Hertfordshire Partnership NHS Foundation Trust & Anor (including costs)* [2011] EWHC 276 (COP) and 2011 [EWHC] 3524 (COP). The judgments were usefully summarised in an appendix.

By way of a 'watch this space,' a judgment will be forthcoming in short order as to the circumstances under which a foreign 'protective measure' requiring the detention and treatment of an incapacitated adult in an English psychiatric institution will be recognised and enforced.

Training DVD

The Court of Protection team are in the process of producing a training DVD on the MCA, which will cover capacity assessments, best interests decision-making, the role of the Court of Protection, and deprivation of liberty. The target audience is social workers, best interests assessors and other employees of statutory agencies who work in this area. If you would like to find out more, please email Beth Williams – beth.williams@39essex.com.

Our next update should be out at the start of February 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: full credit is always given.

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