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Thirty Nine Essex Street Court of Protection Newsletter: May 2012

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Editors

Introduction

Welcome to the May issue of the 39 Essex Street Court of Protection Newsletter. We are very pleased to welcome to the CoP team within Chambers Simon Edwards, who brings with him a wealth of experience in common law and Chancery matters. By way of an introduction, he has written an extremely useful guide to the interaction between the MCA and housing law which we include with this newsletter.

There have been a number of interesting judgments handed down this month, including formal confirmation that that pre-MCA practice by which the Official Solicitor was entitled to half his costs in serious medical treatment cases continues, as well as a Court of Appeal decision upon litigation capacity which is essential reading. We also include a case which has some trenchant comments upon the citation of authorities in health and welfare application; we trust, though, that our readers will continue to take the view that it is helpful to know what judges are currently deciding even if they may choose to deploy the fruits of that knowledge with caution!

As of 1.5.12, the long-awaited Practice Direction on bundles in the Court of Protection came into force. We set out a draft of core parts of this PD several months ago; its gestation has been long, but we attach it to this Newsletter as part of our ongoing campaign to disseminate important information. The obligations that it imposes upon practitioners appear (and, frankly, are) onerous, but its emphasis upon enabling efficient judicial decision-making is very much in keeping with the tenor of the times and the pressure upon Court time.

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

B v B [2010] EWHC 543 (Fam)

Summary

Costs; Litigation friend; Official Solicitor

We are grateful to Simon Edwards for bringing this case to our attention; whilst it was decided some time ago, the point that it establishes remains of significance.

Mrs B divorced her husband. There then followed ancillary relief proceedings, in relation to their assets and liabilities, and contact proceedings with regard to their six children. Mr B lacked litigation capacity due to a delusional thought disorder and the Official Solicitor agreed to act for him as his guardian ad litem (now litigation friend). The legal bill incurred by the Official Solicitor was around £100,000. After regaining capacity, Mr B contested his liability to pay these costs on various grounds. These included the Official Solicitor's apparent failure to seek public funding.

Bennett J held that an application for public funding could not have sensibly been made because of Mr B's hostility and lack of cooperation with the Official Solicitor. The second avenue of funding, namely obtaining from Mr B's assets, would also have been inappropriate because he was still a patient. As a result, all of the litigation costs had to be funded by the Official Solicitor out of public revenue. In the absence of unreasonable conduct, Bennett J. held that the Official Solicitor was entitled to be reimbursed for his costs on an indemnity basis from the person in whose best interests he had acted as guardian ad litem.

Comment

Although these were family proceedings involving the Official Solicitor as guardian ad litem, the principles are equally applicable to litigation friends acting in Court of Protection proceedings. The Court endorsed the view expressed in *Re E (mental health patient)* [1984] 1 All ER 309 at 312, that the main function of litigation friends is to carry on the litigation on behalf of the incapacitated person in their best interests. They must make all the decisions that the person would have made had he been able to. Importantly, litigation friends are not litigants: their functions were described as "essentially vicarious" and they are responsible to the Court for the propriety and the progress of the proceedings.

Insofar as costs are concerned, the Court noted that by acting, litigation friends render themselves personally liable to the other parties for the costs of unsuccessful proceedings. However, they are entitled to be indemnified out of the incapacitated person's estate "if it was proper to institute the proceedings, and they have been conducted with propriety".

The Court of Protection Rules 2007 contain wide-ranging powers to fund the Official Solicitor's costs. Rule 163 provides, inter alia, that they "shall be paid by such persons or out of such funds as the court may direct". Funding the litigation friend of last resort is becoming increasingly important. Given the incapacity of the litigant, it raises access to justice issues which bear upon Article 6 ECHR. This case shows that where the Court requests the Official Solicitor to act as litigation friend for a person lacking litigation capacity and the Official Solicitor accepts the appointment, that person will be liable for the Official Solicitor's costs even if he objects to the appointment so long as the Official Solicitor acts properly.

LB Haringey v FG & Ors (No.1) [2011] EWHC 3932 (COP)[1]

Mental capacity – Contact – Education – Litigation – Residence – Tenancy Agreements – Practice and Procedure

Summary

Proceedings were brought by the LB Haringey regarding the welfare of a young woman, HG. As a preliminary issue, Hedley J had to decide whether HG had the capacity to litigate, and also whether she had the capacity to decide where she should live; where she should be educated,; decide on the extent of the contact and relationship she should have with her natural family; to deal with her financial affairs, and to enter into what was described as a tenancy agreement.[2] Hedley J conducted a detailed analysis of the evidence as it related to HG's capacity in each of these domains, and concluded that she lacked capacity in each regard. For present purposes, perhaps of most significance is what he then said by way of conclusion at paragraph 21, where he noted by of a final comment:

> "*I have been referred to the decision of Mr Justice Baker in PH v A Local Authority [2011] EWHC 1704 (Family). This is a considered decision on capacity, and one that is undoubtedly helpful, particularly in relation to its analysis of the law between*

1 We are very grateful to Bryan McGuire QC, of Cornerstone Chambers, for bringing these two cases to our attention.

2 It would appear that Hedley J had some considerable doubts as to whether the agreement in question was in fact a tenancy agreement, but it made no difference as he concluded that HG lacked the capacity to enter into any form of legal relationship (paragraph 20).

paragraphs 13 and 16. I have deliberately not referred to it in this judgment, not because it is unhelpful or because I disagree with it, but because it seems to me that unless and until there is any binding authority available, courts may be safest in an approach to this case by ascertaining the facts, applying the statutory principles and reasoning a conclusion from that, and treating each case as one to be decided on its own facts. I say that so as to avoid a multiplicity of first instance judgments being cited as a matter of course in these cases. It may be that parties and advisors and those who have to operate this system will find the individual expressions of judges helpful, but debates in proceedings about saying the same thing in many different ways does not seem to me helpful, particularly, where, as here, no doubt increasingly so in the future, the question of capacity will be determined summarily as a preliminary issue prior to the determination of welfare which is probably, in most of these cases, what is going to be upper most in the minds of all those who engage in them."

Comment

Whilst we do not set out here the detail of Hedley J's assessment of HG's capacity to take the decisions in question, they stand (a little ironically, given his comments in paragraph 21) as a model of the exercise which we would commend to our readers.

His comments at paragraph 21 chime with those that he has subsequently made in *A Local Authority v H* [2012] EWHC 49 (COP),[3] in which he expressly decided to return to first principles in considering the question of whether H had the capacity to consent to sexual relations, only turning to previous first-instance authorities in essence by way of a cross-check. They also stand as a salutary reminder against over-burdening already groaning Court bundles with authorities in circumstances, where, as the President reminded us in *RT v LT and Anor* [2010] EWHC 1910; [2010] COPLR Con Vol 1061, "*what we now have is the Act (as amended) and the essential judicial task is to apply the plain words of the statute to the facts of the case before the court.*"[4]

LB Haringey v FG & Ors (No.2) [2011] EWHC 3933 (COP)

Best interests – residence – contact

Summary and comment

Having determined that the relevant individual, HG, lacked the capacity to litigate and take relevant decisions as a preliminary issue in *LB Haringey v FG & Ors (No.1)*,[5] Hedley J went on to make a series of decisions as to what lay in her best interests, in particular whether she should continue to be accommodated by the local authority or to return home to live with her mother. With no disrespect to Hedley J or, indeed, to HG, there are no features in his judgment which call for specific comment save perhaps, two, namely:

(a) as with *B v M* [2010] EWHC 3802 (Fam) [2010] COPLR Con Vol 247, this was a case which had started out as proceedings under the Children Act 1989 but were then transferred to continue under the MCA 2005 given HG's age;

(b) Hedley J met HG before evidence was given, meeting with her in the company of the solicitor instructed by the Official Solicitor and the Official Solicitor's representative, and reporting in open court the conversation he had had with her. Hedley J did not given any specific reason for having taken this step, but it is one that in our respectful submission is one that could fruitfully be adopted in many more cases where the nature of P's particular disability allows.

[3] Covered in our February 2012 newsletter.

[4] Paragraph 49, although the President rejected the submission in that case that all the pre-Act jurisprudence was irrelevant. The case was discussed in our very first newsletter in August 2010.

[5] [2011] EWHC 3932 (COP).

Dunhill v Burgin [2012] EWCA Civ 397

Litigation capacity; Compromise agreement

Summary

We covered the first instance decision[6] in this case in our March 2011 newsletter. The Claimant sought to have a compromise agreement into which she had entered declared void due to her having lacked litigation capacity at the time it was agreed. The Claimant had suffered a brain injury in a car accident and had instructed solicitors to bring a claim for personal injury. The claim was settled for £12,500 on the first day of trial, but it had subsequently transpired that if properly pleaded, the claim would have been worth at least £790,000, and possibly as much as several million pounds.

At first instance, the Court held that the Claimant had not lacked capacity at the time the consent order was agreed, and had been given a sufficiently clear explanation of the terms of the order, which she had understood. Silber J made it clear that he reached his decision by asking himself whether the Claimant had had capacity to enter into the consent agreement, rather than whether she had the capacity to conduct the proceedings as a whole.

The Claimant appealed. The Court of Appeal allowed her appeal. Giving the sole reasoned judgment (with which Lewison LJ and Sir Mark Potter agreed), Ward LJ noted[7] that the case raised the same broad issue as in the pre-MCA cases of *Masterman-Lister*[8], and *Bailey*,[9] namely whether a previous compromise/order could be set aside for want of capacity. Those cases had established that the proper question is whether the individual in question "*ha*[s] *the necessary capacity to conduct the proceedings or, to put it another way, to litigate*."[10] In the circumstances, Ward LJ considered that Silber J had fallen into error because he had approached matters too narrowly by treating the relevant transaction as the actual compromise negotiated outside court which led to the consent order in question because:

> "[s]*ince the compromise* [was] *not a self-contained transaction but inseparably part and parcel of the proceedings as a whole, the question is not the narrow one of whether* [the Claimant] *had capacity to enter into that compromise but the broad one whether she had the capacity to conduct the proceedings*."[11]

In the circumstances, Ward LJ had no hesitation in concluding (at paragraph 29) that:

> *"*[w]*ith proper advice (proper explanation being a part of Chadwick LJ's test in [75] of his judgment [in Masterman-Lister] this claim would never have been advanced for the limited sums pleaded. Since capacity to conduct proceedings includes, per Arden LJ at [126] [of Bailey], the capacity to give proper instructions for and to approve the particulars of claim, the claimant lacked that capacity. For her to have capacity to approve a compromise she needed to know, again per Arden LJ at [126], what she was giving up and, as is conceded, she did not have the faintest idea that she was giving up a minor fortune without which her mental disabilities were likely to increase. If the litigation had been conducted properly, it would have been conducted differently. Given that scale of award and the claimant's limited understanding of the implications arising from a claim of that size, a litigation friend should and would have been appointed for her if not when the proceedings commenced, as I believe should have been the case, then at least certainly when the compromise was under discussion. Had she been recognised to be a patient, the compromise she in fact entered into would never have been approved by the court."*

[6] [2011] EWHC 464 (QB).
[7] Paragraph 22.
[8] *Masterman-Lister v Brutton & Co* [2003] 1 WLR 1511.
[9] *Bailey v Warren* [2006] EWCA Civ 51.
[10] Paragraph 24.
[11] Ibid.

Comment

Whilst (as Silber J noted) the injustice that the Claimant undoubtedly suffered as a result of the entry into the compromise agreement could have been remedied, at least in part, by the bringing of an action for professional negligence against the Claimant's former advisers, the robust approach adopted by the Court of Appeal provided a very much more direct route to setting matters aright.

More broadly, this case is a useful – if unsurprising – ringing endorsement of the continuing relevance of the principles established in *Masterman-Lister* and *Bailey* regarding the determination of litigation capacity. The case also stands as an interesting example of how it is possible to fall into error when assessing capacity not just by defining the relevant issue too broadly, but also by defining it too narrowly.

D v JC & Others Case No. 11757467 (Senior Judge Lush, 26 March 2012)

Summary

This case concerned an application for an Order authorising the execution of a new statutory will for JC.

JC was born in 1922 and has an estate worth approximately £3.5 million. He has mixed dementia. In 2010, JG was appointed as JC's deputy following an application by Reading Borough Council. JC did not have testamentary capacity.

JC has four biological children, A, B, C and D. Two of the children, B and C were born in wedlock but had limited contact with JC. JC disputed his paternity of A (and always has done) but tests authorised by the Court in 2011 confirmed JC is A's biological father. D, the sister of B and C was put up for adoption at birth and has never met or had contact with JC.

In August 2010, the Court authorised JC's deputy to execute a statutory will on JC's behalf leaving £50,000 to the Jehovah's Witnesses and the remainder to be divided in three equal parts between A, B and C. Following the execution of the statutory will, B produced an earlier will dated December 2008 which named B, C and B's daughter Q as beneficiaries. JC subsequently indicated that this did not represent his wishes (although the expert evidence reiterated that he did not have testamentary capacity at the time this was asserted).

In January 2011, the Court authorised a further statutory will in favour of A, B and C in the event that paternity tests concluded A was JC's son. D subsequently challenged this on the grounds that the will should make provision for her, notwithstanding that she had been adopted. D acknowledged that she had no right as a matter of law to a share of JC's estate in the event he died intestate, but asserted what was essentially a moral claim to be recognised in his will on the basis that her birth was the result of the violent rape of her mother and that JC had not had a relationship with his other children either. A contested D's application. The Official Solicitor and the Deputy contended that D did not have a valid claim in law (whereas the other biological children did).

Senior Judge Lush considered the law concerning the authority of a judge to authorise a statutory will and at paragraph 48 noted that it had been easier for a judge prior to the entry in to force of the MCA 2005. He held that the decisions in *Re P*[12] and *Re M*[13] indicated that it is no longer good law for a judge to simply substitute his judgment; rather, the judge must act in P's best interests. Senior Judge Lush went on to state (at paragraph 51) that when adjudicating on a statutory will application the judge must have regard to:

a. the check list of factors for best interests' decisions;

b. the possible application of the "balance sheet" approach as set out by Lewison J in *Re P*; and

[12] *Re P* [2009] EWHC 163 (Ch) [2009] COPLR Con Vol 906.

[13] *Re M* [2009] EWHC 2525 (Fam) [2009] COPLR Con Vol 828.

c. the jurisprudence on applications of this nature.

At paragraph 53, Senior Judge Lush expressed doubts as to the efficacy of the balance sheet approach in the context of these proceedings because of the difficulty of identifying factors of actual benefit, counterbalancing dis-benefits, risks of possibility of loss or possibilities of gain, all of which were expressions used in the *Re A* case in which the balance sheet was first advocated. He did, though, note that there will usually be at least one factor of magnetic importance to assist the judge in reaching in this decision.

At paragraph 54, Senior Judge Lush expressed doubt as to whether the idea of being remembered for doing the right thing (a factor identified as of importance in *Re P* and *Re M*) was of any assistance in the case before him, because of JC's "appalling track record," of spending a lifetime doing entirely the wrong thing in his relationships with others. At paragraph 55, he expressed his conclusion that, if JC had had testamentary capacity, he would have chosen to die intestate which was the effect that the existing statutory will sought to achieve.

At paragraph 58, having examined (insofar as he was able) JC's past and present wishes and feelings, Senior Judge Lush noted that the case presented a combination of best interests and substituted judgment: JC would have chosen to die intestate but it was in his best interests that the will was made in order to appoint independent executors familiar with the background who could provide continuity in the administration of his estate before and after his death.

Given that by operation of law, in the event that JC were to have died intestate, there would have been no provision for D and further, and given that there had been no interaction at all between JC and D (a factor of "magnetic importance"), he dismissed D's application. He allowed A's application to determine what should happen to his share of the estate in the event that he predeceases JC and extended that to B and C.

Comment

This is an extreme case on the facts. It is, however, of some interest for Senior Judge Lush's scepticism of the value of the balance sheet exercise in statutory will cases, and also a case in which there would have been a clearly different outcome based upon substituted judgment to that which prevailed under the best interests test enshrined in s.1 and 4 MCA 2005.

An NHS Trust v D [2012] EWHC 885 (COP) and [2012] EWHC 886 (COP)

Summary

This case concerned an application for a declaration that it was in D's best interests to have life-sustaining medical treatment, in the form of artificial nutrition and hydration, withdrawn. D had fallen into a vegetative state following surgery during which he suffered a cardiac arrest and associated hypoxia. Prior to the surgery, he had given his sister-in-law G a signed letter which said:

> *"To whom it may concern: I authorise* [and then G's name and address] *to act on my behalf in the event of me being unable to make decisions for whatever reason. In particular, I authorise the above to liaise with the medical profession in making decisions regarding any further medical treatment. More specifically, I refuse any medical treatment of an invasive nature (including but not restrictive to placing a feeding tube in my stomach) if said procedure is only for the purpose of extending a reduced quality of life. By reduced quality of life, I mean one where my life would be one of a significantly reduced quality, with little or no hope of any meaningful recovery, where I would be in a nursing home/care home with little or no independence. Similarly, I would not want to be resuscitated if only to lead to a significantly reduced quality of life."*

Unfortunately, D had not been aware of the provisions in the Mental Capacity Act 2005 relating to advance decisions to refuse

treatment, and in particular the requirement that an advance decision to refuse life-sustaining treatment must be witnessed (s.25 MCA 2005). The letter was therefore not binding, and the court's assessment of D's best interests was required.

As the diagnosis of permanent vegetative state had been confirmed, the court's conclusion that it was in D's best interests for artificial nutrition and hydration was inevitable, following the House of Lords' decision in Airedale NHS Trust v Bland [1993] 1 AC 789 which held that continued futile medical treatment for a patient in a vegetative state was not in the patient's best interests. However, the judge commented that "*had there been anything to put in the balance against the other evidence, D's wishes would have carried very great weight with me. He was a very private man before his incapacity, who would have been horrified at the prospect of being kept alive in this condition, with the total loss of privacy that his dependency entails*."

The court was also asked to determine whether the pre-MA 2005 convention under which NHS bodies bringing applications for withdrawal of treatment were required, as a starting point, to pay 50% of the costs of the Official Solicitor. In the second judgment, the judge held at paragraph 15 that the MCA 2005 and the Court of Protection Rules had not changed the earlier position, continuing:

> "*I accept that to exercise discretion in this way in effect displaces the 'general rule' in cases in which the Official Solicitor acts, but the pragmatic basis for this compromise is as strong now as it ever was. To disturb long-standing practice would introduce uncertainty into every case, and foster costs arguments between public bodies. It would make it very difficult for public bodies to budget in individual cases and for the Official Solicitor to budget generally.*"

However, the judge commented[14] that "*there is much to be said for a rationalisation of the underlying arrangements, with the Official Solicitor's budget being set in such a way that he does not depend upon the recovery of costs from other public bodies. That, however, requires a change by Government to the financial rules of the game. It is not a change that can be brought about by decisions of individual referees*."[15]

Comment

The pain and distress caused to D's family by the failure of his advance decision to comply with the requirements of the MCA 2005, and the subsequent court proceedings, cannot be underestimated. D's clear wishes were known, but the treating clinicians were unable to act on them for some 9 months while the court process took place. The case is a reminder of the importance of increasing public awareness about the statutory requirements for advance decisions, as well as for its related decision on costs which clarifies that the existing practice of sharing the Official Solicitor's costs across the public bodies involved in medical treatment cases will continue, unless and until the Government provides full funding to the Official Solicitor to carry out his duties.

Verlander v Rahman [2012] EWHC 1026 (QB)

Mental capacity – finance

Summary

We make brief note of this quantum-only personal injury judgment for the approach adopted by Sir Robert Nelson (sitting as a High Court Judge) to the question of whether the Claimant (who had been moderately brain injured when struck by a car) had the capacity to manage her property and affairs.[16]

The main factor pointing towards the Claimant's incapacity in this regard was her impulsivity, which had led her to spend substantial sums (including a significant portion of a sum paid to her by way of interim payment) upon gambling

[14] Paragraph 17.

[15] Paragraph 15 of the judgment.

[16] Her application for a litigation friend had previously been dismissed by the High Court in February 2011 (see paragraph 24 of the judgment).

and online gaming before her mother took control of her daughter's finances and provided her with limited sums of pocket money.

The experts instructed on behalf of the two parties agreed that the Claimant's impulsivity was the potential cause of her inability to weigh properly the necessary information in order to make a decision. However, whilst the Defendant's consultant neuropsychiatric expert accepted in evidence that if the Claimant were to be given access to her bank account into which her pension money was paid, and then provided with her cash card there was a substantial risk that she would spend the money inappropriately, he nevertheless expressed the view[17] that the Claimant did have financial capacity and that a Trust should be put in place in order to protect her from herself.

Sir Robert Nelson concluded, however, that it could not properly be said that the Claimant was at the date of the hearing managing her own money. She was only doing that, and making decisions in relation to it, with the substantial assistance of her mother. He noted that, even if it were to be the case that she participated in the decision to pay individual bills and then carried that out and obtained the receipts,[18] the guiding person in making the decision was her mother. Sir Robert Nelson accepted the Defendant's submission that it would be possible for the Claimant's mother to exercise yet further control over the situation by advising the Claimant to make payments by direct debit, by obtaining copies of the bank statements herself, and by becoming a co-signatory. However, the judge noted that the difficulty remained that the Claimant had demonstrated an inability to take appropriate care of her money, and along with noting the evidence of the experts found it to be "telling"[19] that she had given evidence that she would probably "blow" the cash were she to have access to it by herself without the constraints of the system set in place by her mother for collecting and delivering her pension, are telling. At paragraph 95, Sir Robert Nelson therefore concluded that the Claimant, as at the time of delivering judgment, did not have financial capacity because she was unable to weigh the necessary information as part of the process of making a decision and, were she to have access to substantial funds through an award of the court there was a serious risk that she would spend large amounts of it inappropriately without others necessarily knowing what she had in fact done. Sir Robert Nelson did not consider that a trust would provide adequate protection for the Claimant in such circumstances and, accepted the point made by the Claimant's counsel that if the trust' only purpose was to stop inappropriate spending then it suggested financial incapacity.

At paragraph 96, Sir Robert Nelson concluded on this point that:

> "*96. I emphasise however that whilst I have firmly in mind that impulsivity may remain, it is not inconceivable that the Claimant's condition in the years to come may demonstrate that she has in fact gained financial capacity. I am not prepared to make any ruling, even if I were able to do so at this stage, which finds that the Claimant is permanently incapable of managing her own property or affairs. It would be perfectly reasonable for the Court of Protection itself to reconsider her situation some time after two years following the conclusion of the litigation. If the decision then was that at that time she had financial capacity, consideration could be given as to whether a Trust ought to be set up to provide guidance and assistance in the management of her money.*"

Comment

Whilst elements of the deliberation summarised above would on one view seem to conflate the wisdom of the decisions taken by the Claimant regarding her finances and the question of whether they were made with capacity, the end result (on the evidence as summarised in the judgment) would seem to be unimpeachable. The judgment is also of note for the ringing endorsement of the possibility of recovery from incapacity; whilst we have some reservations as

17 Paragraph 93.
18 Which appeared to be the case: paragraph 89.
19 Paragraph 94.

to whether a judge sitting in the Queen's Bench Division has the power to direct the Court of Protection to review the Claimant's capacity,[20] one would anticipate that Sir Robert's exhortation would be incorporated into the consequential order that one would anticipate seeing in that latter Court for the management of the Claimant's property and affairs.

COP Cases Online

Unfortunately, the sheer volume of cases which will be included in our online database of COP cases has temporarily defeated us; but we are confident that it will be live as of the start of June 2012, so watch this space for a further announcement.

Our next update should be out at the start of June 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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[20] As it seems that he sought to do at paragraph 97 of the judgment.

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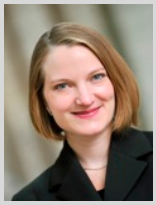

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