Mental Capacity Law Newsletter April 2014: Issue 45

Court of Protection: Property and Affairs

ThirtyNine
ESSEX STREET

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Introduction

Welcome to the April issue of the Mental Capacity Law Newsletter. The Newsletter has a new look this month, and, in a step upon which we would welcome feedback, we have decided to split the newsletter into five members of a family: (1) CoP: Health, Welfare and Deprivation of Liberty; (2) CoP Property and Affairs; (3) Practice and Procedure; (4) Capacity outside the CoP; and (5) Scotland. Each will be available separately, but it is always possible to read the entirety as one newsletter. The introduction will also always be the same across each of the members of the family.

The division comes at a vital time for the MCA 2005 – in one week in March we had first the report of the House of Lords Select Committee on the MCA 2005 (covered in more detail in the Capacity outside the CoP newsletter), and then the landmark decision of the Supreme Court in *Cheshire West* and *P and Q* (to which we devote almost the entirety of the Health, Welfare and Deprivation of Liberty newsletter). The Supreme Court also handed down an important decision in relation to litigation capacity and the settlement of civil proceedings, covered in detail in the Capacity outside the CoP newsletter, as are two important decisions on testamentary capacity. In the Property and Affairs newsletter, we cover important cases on gifts and the notification requirements in relation to statutory wills. In our Practice and Procedure newsletter we cover, amongst other things, the evidence given by the President and Vice-President of the Court of Protection to the Justice Select Committee. Last, by very much no means least, we cover in the Scottish newsletter the implications of the decision in *Cheshire West* for Scotland and also the consultation on draft proposals for a Mental Health (Scotland) Bill.

As if this were not enough, we also this month offer guidance notes: (1) on the implications of *Cheshire West*; and (2) on capacity assessments; the second part of Adrian's note on Scottish adult incapacity law; and an article by Simon Edwards on testamentary capacity and the MCA 2005.

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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

Gift-giving to parents

Re AK (Gift Application) [2014] EWHC B11 (COP)
(Senior Judge Lush)

Gifts

Summary

This case considered whether a substantial gift (£150,000) should be made from the damages award of an eleven-year-old boy to his parents.

Senior Judge Lush began by noting that, although the MCA 2005 applies only to persons aged 16 and over (section 2(5)), the effect of section 18(3) is to enable the Court of Protection to appoint a deputy who can take a long term view where a child has been awarded substantial compensation for personal injury or clinical negligence and it is unlikely that the child will have the capacity to manage the award when they attain adulthood.

AK was born in October 2002 and due to a prolonged period of hypoxia at the time of birth he has cerebral palsy. Acting by his mother as litigation friend, he sued the local NHS Trust for clinical negligence. In 2009 a High Court judge approved a substantial settlement which included a lump sum payment of £1,050,000 plus a series of index linked periodical payments which were calculated on the basis that it was unlikely that AK would live beyond the age of 15. The assessment of life expectancy was made in 2006 by a consultant paediatric neurologist who strongly recommended that a further assessment was made in 4 or 5 years' time. At the date of the hearing such an assessment had not been carried out which Senior Judge Lush described as regrettable.

AK's estate was worth £1,311,156 and he had a surplus income of £95,363.71 a year due to the fact that his mother provided his care gratuitously or at a much lower cost than was envisaged when his claim was settled. His care costs were therefore subject to possible change in the future.

Julia Lomas of Irwin Mitchell Solicitors was appointed as AK's deputy for property and affairs in 2009. Senior Judge Lush commented that she had considerable experience of managing the estates of people with cerebral palsy and acquired brain injury. In November 2013 she applied to the court for an order "*gifting AK's parents £150,000 towards the building of a property in Pakistan suitably adapted to AK's complex needs".* In a witness statement that accompanied the application Ms Lomas set out the following facts:

- AK and his family are Pakistani. Most of their family live in Pakistan and they recently visited for 4 months;
- AK's mother and father have purchased land with the intention of building a family home near their extended family;
- They have requested £150,000 as a contribution to the property being built so it is suitably adapted;
- A gift is the more practical approach given the difficulty of obtaining receipts for all works to be carried out in Pakistan. Further, receipts would have to be translated which would cause additional expense;
- There were health benefits to AK from being in Pakistan, associated with the climate;
- There would be long term financial benefits for AK as it was anticipated that the family would spend 6 months of the year in Pakistan

which meant that expenditure on agency care would decrease dramatically as there were more family members in Pakistan to help with care and even professional care was far cheaper than in the UK;

- AK would inherit the property if his parents should die;

- AK's life expectancy 'does not greatly exceed 20' and the property would allow him to experience a better quality of life.

Given that the application sought a substantial lifetime gift, Senior Judge Lush joined AK as a party and invited the Official Solicitor to act as his litigation friend.

The Official Solicitor took the view that the deputy had not properly considered all the ways in which AK might contribute to the purchase or adaptation of a home for himself and his family in Pakistan by way of an investment rather than simply as a gift to his parents. The suggestion made was that AK might be able to purchase either the relevant land or interest in that land which would mean that he was left with a valuable asset. The OS acknowledged that if that was not possible or reasonably practicable then a gift should be authorised but only on the basis that the deputy was satisfied that it was to be used within a certain period for the construction of an adapted home for AK.

Senior Judge Lush noted that where P is profoundly disabled and has lacked capacity from birth the application of the best interests' checklist in s.4 MCA 2005 is not always conclusive because of its strong emphasis on supported decision making and substituted judgment. Given the limitations of the s. 4 checklist, Senior Judge Lush applied a 'balance-sheet' approach, setting out the advantages and disadvantages of the proposal.

The advantages were essentially those set out above in the witness statement of Ms Lomas. The disadvantages were those highlighted by counsel for AK instructed by the Official Solicitor, namely that he would have £150,000 less in capital, there were no architect's plans and no costings for the construction of the house or its adaptations and no guarantee that the £150,000 would actually be used by AK's parents to build and adapt a property for his use.

Senior Judge Lush also held that it was important to exercise "caution and prudence" when applying AK's funds because of a series of uncertainties: (i) care costs increasing significantly if his parents predeceased him or became incapable of looking after him; (ii) his parents separating or divorcing in which case a second property may have to be purchased and adapted; (iii) political circumstances in Pakistan deterring the family from travelling there; (iv) AK's condition deteriorating so that he could not travel; (v) AK's condition deteriorating so that he required a more intensive and expensive care regime; (vi) AK's life expectancy exceeding the original prediction so that he needed 'every penny he can get'.

However, Senior Judge Lush acknowledged that if his life expectancy were only 15, as originally predicted, then time was of the essence and it was essential that the works be carried out without further delay (AK was 11.5 years old at the time of the hearing).

Senior Judge Lush noted that the purpose of the application was to provide suitably adapted accommodation for AK's use and enjoyment (a proper use of his funds) and not to reduce the amount of inheritance tax payable which was not a purpose for which the award was intended (see *Re JDS: KGS v JDS* [2012] EWHC 302 COP).

Senior Judge Lush held that it was in AK's best interests to allow the transaction to proceed by way of an interest free loan of £150,000 to his parents rather than as an outright gift. A loan was preferable to a gift because (i) AK retained the capital as part of his estate and (ii) it was more likely to ensure that his parents complied with the purpose for which the loan is intended.

The details of the loan were that it was repayable over 10 years at a rate of £15,000 a year. The judge further authorised the deputy to make annual gifts of £15,000 to AK's parents, if there is sufficient income surplus to his requirements in each accounting period, to assist them in repaying this loan.

Whilst not material to his decision, Senior Judge Lush noted that the annual gifts of £15,000 would fall within the normal expenditure out of income exemption contained in section 21 of the Inheritance Tax Act 1984.

Comment

With apologies for apparent (or actual) judicial toadying, Senior Judge Lush's solution in this case strikes us (with one partial exception) as neat and approaching ingenious. He mitigated the disadvantages he set out in his judgment by the making of a loan rather than a gift whilst also making a gift in all but name as long as AK has sufficient surplus funds (this loan/gift could be christened a ''lift'). The solution is therefore elegantly straightforward but takes account of the following complexities: (i) concern that the parents will actually use the money for the intended purpose (a loan gives the incentive to fulfil the purpose); (ii) uncertainties about AK's life expectancy – a pragmatic solution if life expectancy is short (let's get on with it so AK can get some enjoyment from it) and also if his life expectancy is greater than predicted (the £15,000 annual gifts are only made if there are sufficient surplus funds); uncertainties about care costs in the future (again, the £15,000 annual gifts are dependent on sufficient surplus funds).

The judgment also exposes (not for the first time) the deficiencies of the s.4 MCA 2005 checklist when P is profoundly disabled and has lacked capacity since birth. The judge's careful application of a 'balance sheet' approach is a useful tool in such cases.

The one caveat that we would enter is that it does not appear that thought was given by either the Official Solicitor or to the court as to the fact that the payment out from AK's funds was being authorised out in respect of the purchase and modification of property outside England and Wales. What – if any – jurisdiction the Court of Protection would have over the way that those monies were actually spent in Pakistan is an interesting question that – we rather hope – does not fall for further consideration in this case in due course.

When can you dispense with service in a statutory will case?

Re AB [2013] EWHC B39 (COP) (District Judge Batten)

Practice and Procedure – Statutory Wills

Summary

This judgment, delivered some time ago, but only very recently made publicly available, deals with a short but important point as to whether (and upon what basis) the CoP can dispense with service upon the father of the adult upon whose behalf an application was made to authorise a statutory will.

AB, a young adult, suffered a brain injury whilst a teenager, as a result of which she suffered a severe brain injury and ultimately recovered substantial damages. Her property and affairs were managed by two solicitors, appointed jointly and severally as property and affairs deputies, one of whom applied for execution of a statutory will be authorised by the CoP on AB's behalf under s.18(1)(i) MCA 2005.

AB lived with her mother, stepfather and step brother. The whereabouts of her father, PQ, was unknown. On the basis of the (at that point unchallenged) evidence before the Court there was a substantial history of violence by PQ towards CD prior to CD leaving the family home, and PQ had at one stage thereafter abducted AB. CD and AB had not seen PQ for many years. PQ has not paid maintenance for AB and CD has not claimed maintenance from him. CD had not sought contact with AB and did not know where PQ was living now or indeed whether he was alive. It was known that PQ had two other daughters, RS and TS, by a different mother.

AB told the Official Solicitor's representative that her mother had left her birth father and that her father stopped turning up for contact at a contact centre. She said that she did not want to see him or have anything to do with him; he had the opportunity to make contact with her and chose not to do so. She further said that she not want her father to get anything from her estate and he did not deserve anything.

The effect of the proposed will advanced for endorsement by the CoP was to remove PQ's entitlement to half of AB's estate under the rules on intestacy, his share being worth about £750,000 at the present time. If PQ should predecease AB, then his biological children who are AB's half-siblings would suffer a loss of entitlement under the intestacy.

The evidence before the CoP was not conclusive as to whether AB had testamentary capacity, and District Judge Batten directed that a further assessment of AB's testamentary capacity be filed. She was, however, satisfied that she had power to make interim orders and give directions because the evidence was sufficient to pass the s.48 MCA 2005 threshold.

District Judge Batten had to decide whether to grant the Applicant's application to dispense with service of the application on PQ and on RS and TS (and any others who are the biological children of PQ). In summary, the Applicant submitted that the decision was one falling within the scope of s.1(5) MCA 2005, such that it was a decision to be taken in AB's best interests; the Official Solicitor submitted that it was not, but that it should be taken with regard to the overriding objective contained in COPR r3, and the engagement of the rights of PQ (and the half-siblings) under Articles 6 and 8 ECHR as well as Article 1 Protocol 1 to the ECHR.

District Judge Batten held that she was not making a best interests decision when directing that a party not be served with an application. Rather:

> *"63. …This decision is one made by a judge in the exercise of powers given by the Court of Protection Rules. It is not an act done or a decision made on behalf of P. The principles of the Mental Capacity Act 2005 cannot be strictly applied to such a decision. For example the principle that a person is not to be regarded as lacking capacity because he does something unwise is clearly not a principle which can be applied to a decision by a judge made pursuant to the Court of Protection Rules. The principles set the context in which the case before the Court of Protection proceeds but do not strictly govern its case management or other decisions under the Court of Protection Rules 2007. In any event the overriding objective refers*

explicitly to the way in which the court must have regard to P; dealing with a case justly includes so far as practicable ensuring that P's interests and position are properly considered (Rule 3(3)(b)). The case of MN while not strictly analogous, supports this conclusion.

64. Article 6 of the European Convention on Human Rights entitles PQ to a fair hearing. This is not a qualified right. To direct that the application not be served on PQ is to interfere with his rights under Article 6. PQ will be excluded from the knowledge that his statutory entitlement to benefit from AB's estate has been removed and he will be prevented from putting forward his own evidence in response to the allegations made on behalf of the applicant and his submissions as to why he should benefit from AB's estate and to what extent.

65. Article 8 gives AB the right to respect for her privacy and family life. Article 8 is a qualified right and allows interference with the right to respect for privacy and family life in circumstances where it is necessary for the protection of the rights and freedoms of others, which includes the right of PQ to a fair trial.

66. If PQ is served with the application and as a result acts as CD fears in a threatening and harassing manner, AB's privacy and that of CD, DD and ED will be invaded and their right to family life interfered with. The court must be satisfied on the balance of probabilities that this is likely to happen and that the outcome for AB and CD, DD and ED as her family is likely to be so serious that it justifies an interference with PQ's rights under Article 6. I must make that judgment without seeing the evidence that PQ may seek to adduce to challenge the factual evidence and submissions of the Applicant.

67. Article 8 also applies to the right of PQ to a family life with AB. His decision to cease contact with AB when she was still an infant and failure to maintain any kind of parental relationship with her since that time are relevant matters to be taken into account by the court in considering how far to give effect to PQ's rights in this regard.

68. Article 1 of the First Protocol to the Human Rights Act protects the right of persons to the peaceful enjoyment of their possessions. It is beyond my remit to provide a definitive answer to the issue of whether an expectation of inheritance under the laws applying to intestacy constitutes a possession for the purpose of Article 1.

69. The cases of Re HMF and Re B were decided before the Mental Capacity Act 2005 came into effect and are thus not binding on this court. They dealt with a comparable issue, that of notification of applications under the Rules which then applied to proceedings in the old Court of Protection, and thus are of some assistance. To the best of my knowledge there is no reported case on this issue since the inception of the Mental Capacity Act 2005. According to those cases, there needs to be a compelling argument and exceptional circumstances to justify not serving an application on a person who will be materially affected by it. Both judgments were given before the Human Rights Act 1998 was implemented. Article 6 serves to reinforce the principle that parties to be materially affected by an order of the court should be notified of or served with proceedings and given an opportunity to be heard unless there are exceptional circumstances."

Having outlined the relevant elements of the overriding objective, and then the factors for and against the order sought by the Applicant, District Judge Batten concluded that, on a fine balance, the factors in favour of notifying PQ outweighed those against notifying him. As she held (at paragraph 78): "*The allegations against him are significant and serious; they are partly but far from fully supported by corroborative evidence.*

However I have not been able to hear PQ's side of the story which may shine a different light on the events described. Weighing all the factors in the balance I have come to the conclusion that I am not satisfied that the circumstances of this case are so exceptional or that there are sufficiently compelling reasons that I must direct that service of the application on PQ and his children should be dispensed with and I will not grant the Applicant's application."

District Judge Batten did not direct that PQ and his children be served with the application papers, but rather that they be notified of the application and, if necessary, was prepared to direct that any documents sent to the Respondents must be redacted to remove any reference to AB's address or which may assist PQ in tracing AB (for example the name and address of her general practitioner). She noted that, even without a fact-finding exercise, there were some salient factors which were effective incontrovertible, and which are likely to be given very significant weight when the court makes its final decision. She considered these factors should be brought to PQ's attention when he is notified of the application. They were that (i) PQ had not seen AB since the contact proceedings were in progress; AB suffered a severe head injury over ten years after she last had contact with PQ; AB's estate was a very substantial one solely because of the personal injury damages she has received as a result of the injury; AB's mother had devoted herself to AB's care; AB's funds were required for her care throughout her life and were likely to be exhausted by the date of her death.

District Judge Batten then concluded with some important general observations:

> *"82. It may be thought that the circumstances of AB's case are very rare. In fact that is not the case. The Court of Protection deals several times a year with applications for permission to dispense with service of an application for approval of a statutory will, declaration of trust or the making of gifts on a person who is a respondent to be served according to practice direction 9F. Typically such a respondent is a family member (often an absent father) who is no longer in contact with P and those caring for P, and/or who has a poor relationship with them. Frequently such applications involve large sums of money. I have been asked to give a written judgment in this application to provide some guidance as to how the court is likely to deal with such an application.*
>
> *83. Each case must be dealt with in the light of its own particular facts and the judge will apply the overriding objective in the light of those facts. I am well aware that other judges may take a different view from the view I have expressed in this judgment.*
>
> *84. In my judgment permission to dispense with service or notification of an application altogether should only be made in exceptional circumstances, where there are compelling reasons for doing so. Otherwise the interests of justice will not be served and the court will not be seen to be acting fairly towards all parties.*
>
> *85. The conduct of the Respondent may justify such an order: for example if he has been convicted of an offence of physical or sexual abuse of P, or if P's funds derive from a Criminal Injuries Compensation award where the Respondent was the assailant.*
>
> *86. In matters concerning the Respondent's conduct, the court has to take a decision to dispense with service of the application while only having available evidence from the party seeking the order to dispense. The application is more likely to be successful if supported by objective evidence than unsupported allegations. The court is more likely to be persuaded of the strength of the case if there is independent and reliable corroborative*

evidence as to the past behaviour of the Respondent, whether in the form of criminal convictions, court orders, CAFCASS, or other reports by professionals, or other similar evidence.

87. The court may be willing to make an order to dispense with service of the application where the value of the financial benefit lost to the Respondent by the making of the order is not significant. Value should be considered both in absolute terms and relative to the Respondent's means. (A legacy of £10,000 may be of considerable significance to an elderly person on a low income but less important to a person of substantial wealth).

88. The court may also reach the conclusion, usually after enquiries have been made, that the cost to P's estate or to the parties, and the delay caused in concluding the application, of proceeding with service of an individual or class of Respondents (usually where tracing of potential Respondents will be necessary) is disproportionate relative to the value to the Respondents of the benefit they will lose by the proposed final order.

89. These examples are not intended to be exhaustive or to limit the circumstances in which judges may make an order to dispense with service of an application on a Respondent.

90. This judgment should also not be taken to apply to service of an application for a holding will, where there is acute urgency in the face of P's likely imminent death. The cases of In re Davey [1981] WLR p164 and In the matter of R [2003] WTLR 1051, although decided before the Mental Capacity Act 2005 came into force are of assistance as to service/notification of such applications."

Comment

Whilst strictly not of precedent value, this is nonetheless an important judgment setting out a number of principles that we would suggest are incontrovertible as to the principles that the Court will apply when considering the (rightly) exceptional step of granting permission to dispense with service upon a Respondent to a statutory will application. We would also respectfully suggest that District Judge Batten was clearly correct to hold that her decision was not one falling within the scope of s.1(5) MCA 2005 - to this end, the judgment also stands as a useful further confirmation of the fact that not all steps taken by the Court of Protection can be said to be 'taken for or on behalf of P.'

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Conferences at which editors/contributors are speaking

5th anniversary conference for the National Preventive Mechanism (Optional Protocol to the Convention against Torture)

Jill is chairing the session on de facto detention at this conference to mark this important anniversary, being held in Bristol on 8 April. Details are available here.

The Assisted Suicide Bill: Does Scotland Need to Legislate?

Adrian is speaking at a medico-legal seminar at the Mason Institute of the University of Edinburgh Law School on the subject of assisted dying on 24 April 2014 at the Royal College of Physicians in Edinburgh. Details can be found here and initial details can be found here.

A Deprivation of Liberty: Post Cheshire West and P and Q

Neil is speaking with Jenni Richards QC at the conference arranged by Langleys on 1 May on the *Cheshire West* judgment. Full details are available here.

Annual private law conference convened by the Royal Faculty of Procurators

Adrian will be speaking at the annual private law conference convened by the Royal Faculty of Procurators in Glasgow on 29 May 2014. Full details are available here.

Hot topics in adult incapacity law

Adrian will be speaking on hot topics in the incapacity field at the Solicitors' Group Wills, Trust & Tax conference in Edinburgh on 7 May 2014. Full details are available here.

The Deprivation of Liberty Procedures: Safeguards for Whom?

Neil is speaking at the conference arranged on 13 June by Cardiff University Centre for Health and Social Care Law and the Law Society's Mental Health and Disability Committee. The conference will focus on the implications of the ruling of the Supreme Court *Cheshire West* as well as the likely impact of the Report of the House of Lords Committee on the

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.

Mental Capacity Act. Other speakers include Richard Jones, Phil Fennell, Lucy Series, Professor Peter Bartlett, Sophy Miles and Mark Neary. Full details are available here.

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Our next Newsletter will be out in early May. 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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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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Alex is frequently instructed before the Court of Protection by individuals (including on behalf of the Official Solicitor), NHS bodies and local authorities, in matters across the spectrum of the Court's jurisdiction. His extensive writing commitments include co-editing the Court of Protection Law Reports, and contributing to the 'Court of Protection Practice' (Jordans). He also contributed chapters to the second edition of 'Mental Capacity: Law and Practice' (Jordans 2012) and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). To view full CV click here.

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