Mental Capacity Law Newsletter June 2014: Issue 47

Practice and Procedure

Introduction

Welcome to the June issue of the Mental Capacity Law Newsletter family. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: the Court of Appeal revisits capacity (and the role of precedent); prohibiting contact; and advance decisions to refuse treatment;

(2) In the Property and Affairs Newsletter: the sequel to the infamous *Rolex* case;

(3) In the Practice and Procedure Newsletter: a rare award of costs in welfare proceedings; the proper place of the press in CoP proceedings; revisiting decisions on appeal; judicial contact with the subject of proceedings; joint instruction of experts in publicly funded cases, and a plea for assistance with streamlining directions hearings;

(4) In the Capacity outside the COP newsletter: two important cases involving capacity and children and two book reviews;

(5) In the Scotland Newsletter: a vitally important decision of Sheriff John Baird which casts significant doubt upon the validity of very many powers of attorney entered into in Scotland and upon the standard template available on the Scots OPG website.

We are also delighted to include with this newsletter a discussion paper on the Convention on the Persons with Disability and an analysis of both the MCA 2005 and the AWIA 2000 by reference to its requirements. This discussion paper, written by Lucy Series, Anna Arstein-Kerslake, Piers Gooding and Eilionóir Flynn, is vital reading for all practitioners (of whatever hue) seeking to understand the implications of this Convention for domestic law and practice in both England and Scotland.

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

Costs in welfare proceedings

North Somerset Council v LW and others [2014] EWCOP 3 (Keehan J)

Summary

This case considers circumstances in which the court will depart from the ordinary rule that there be no order for costs in welfare cases (save that the relevant statutory body should pay 50% of the Official Solicitor's costs, in medical treatment cases).

The case concerned a young woman (LW) who was 24 years old and diagnosed with hebephrenic schizophrenia. The case first came before the court on 11 April 2014 when LW was in the late stages of pregnancy. North Somerset Council applied for permission under the inherent jurisdiction not to disclose the care plan for the unborn child to LW, namely removal into care at birth. At the hearing an issue arose as to whether an application should be made to the Court of Protection to permit the hospital at which she was due to give birth to perform a caesarean section if it were established that she lacked capacity to consent to medical treatment. Baker J therefore directed that the University Hospitals Bristol NHS Foundation Trust ("UHBT") to attend the hearing listed for 15 and 16 April 2014.

On 15 April 2014 the judge dealt with the application under the inherent jurisdiction and an application for a restricted reporting order. UHBT did not attend and was not represented. It was only when the judge threatened to telephone the Chief Executive of UHBT in open court to ask why the order of Baker J had not been complied with that counsel was instructed. The balance of the hearing on 15 April and the 16 April and 23 April dealt with the COP application.

At the hearing on 23 April 2014 all parties agreed that LW did not lack capacity to consent to medical treatment, including an elective caesarean section. No order was made on the Court of Protection application. An issue arose as to costs and the judge directed that the parties file written submissions.

On 1 May 2014 LW gave birth by elective caesarean.

The Official Solicitor and the local authority both sought an order for costs against one or more of the hospital trusts. The judge held that no substantive criticism could be made of the Third or Fourth Respondents but that the position was different in respect of the Second Respondent (UHBT).

In a judgment that was highly critical of the behaviour of UHBT, the judge held that it had fallen well short in meeting their duties to LW and her unborn child for the following principal reasons:

1. No comprehensive plan or contingency plan had been devised until after the court had been seized of the matter;

2. There was an unacceptable delay in arranging and/or undertaking a capacity assessment of LW's ability to consent to medical treatment;

3. On the evidence of the midwife the unborn child was at serious risk of death or very serious harm;

4. In the light of that evidence and evidence given by the midwife about a meeting on 7 April which concluded that an application needed to be made to the COP to seek

authority to give medical treatment to LW, the judge did not understand why:

a. An urgent capacity assessment was not undertaken on 9, 10 or 11 April; and

b. If it found LW lacked capacity to consent to medical treatment, an urgent application was not issued in the CoP.

5. Until the court was seized of the matter, no psychiatrist and in particular no psychiatrist familiar with LW, had been invited to attend the capacity assessment;

6. The response of the Trust to the order of Baker J of 11 April was wholly inappropriate and unacceptable (UHBT did not apply to discharge or vary the order but informed the local authority that it did not intend to attend or be represented); and

7. There appeared to have been little or no planning or communication between component parts of the trust responsible for LW's medical care and/or between the clinical staff and its legal department and certainly none which reflected the complexity, seriousness and urgency of the matter.

The cumulative effect of the above factors was that part of the hearing on 15 April 2014 and the whole of the hearing on 16 April 2014 were completely ineffective. It followed the court was justified in departing from the general rule that there be no order as to costs.

The judge ordered that UHBT pay the whole of the Official Solicitor's costs of 15 and 16 April which were ineffective for the purposes of the CoP application due to the failings of the trust. The hearing on 23 April was effective and the judge therefore held that the normal rule should apply and UHBT should pay half of the Official Solicitor's costs for that hearing.

UHBT was ordered to pay one half of the local authority's costs for the hearing on 15 April and the whole of its costs for 16 April.

Comment

The case is a cautionary tale for parties who consider that they do not need to attend court hearings where they have been directed to do so. UHBT's overall position that it was awaiting a capacity assessment and would make an application to the COP following that assessment if necessary was defensible but its failure to comply with the initial order to attend court and a lack of awareness of the apparent urgency of the case led to a highly critical ruling and substantial cost consequences. While there is a presumption of capacity under the MCA 2005, when an issue as to capacity is raised, the requirements of the MCA and Code of Practice must be diligently followed – whether or not the case happens to be before the Court of Protection at the time!

The press and the CoP

Re G [2014] EWCOP 1361 (Sir James Munby P)

Summary

In our report upon this case in the May Newsletter, we noted that we were awaiting with great interest the judgment of the President in the hearing we knew had occurred. That judgment was sent to us just as the Newsletter went to press.

The underlying facts relate to the applications made by the London Borough of Redbridge ('Redbridge') in relation to an elderly lady, G, considered to be a vulnerable adult, arising out of concerns regarding the behaviour of her live-in carer, C, and another carer, F, and their influence over G, her home and her financial affairs and with respect to her personal safety. In February 2014, Russell J held that G lacked the capacity to take the material decisions, such that proceedings relating to her welfare (and, in particular, as to the continued residence of G with her) were to continue in the Court of Protection.

Subsequent to that decision, Redbridge became increasingly concerned as to the fashion in which G appeared to be used by C and F in a campaign involving the press. They sought by an application issued in the Court of Protection on 18 March an order "*forbidding C and F, whether by themselves or instructing or encouraging others, from making any decision on behalf of or in relation to G, other than those in relation to day to day care without first discussing the same with G's litigation friend or litigation friend's representative*." That general form of relief was distilled down and adapted into more specific provisions, of which the most material was the order sought that: "*until further order C be forbidden, whether by herself or instructing or encouraging others, from taking G or involving G in any public protests, demonstrations or meeting with the press relating to any aspect of these proceedings*…" And further: "*requiring C and F to facilitate visits by an employee of the applicant authority to G twice weekly on Tuesdays and Fridays. For those purposes C and F would be required to provide full and unfettered access to G and ensure they do not remain in the property during the visits*."

The matter came on for a hearing before Cobb J which was attended (with his permission) by authorised accredited members of the press, subject to a Reporting Restriction Order. Much of the hearing was dedicated to consideration of what, if any, orders he should make in relation to G's (or C's) contact with the press concerning the proceedings. Cobb J concluded that he had, as a first step, to determine whether G had capacity to communicate directly with the press, and ordered a capacity assessment by an independent expert upon the point "*specifically directed to the question of whether or not G has the capacity to communicate, and engage, with members of the press, with all the implications of so doing*" (paragraph 26).

In the interim, Cobb J made an order under s.48 MCA 2005 that it was not in G's best interests for her to be able or permitted to communicate with the press at this stage; she has expressed at least ambivalent feelings, it appears, about the engagement of the media. Further directions were given leading towards a hearing to determine the question of G's capacity and, if relevant, best interests, as regards contact with the press. These included service on Associated News Limited ('ANL') a summary of the key conclusions and recommendations of the capacity assessor and (if applicable) the local authority's decision on best interests.

ANL then made an application seeking (a) to be joined as a party to the proceedings and (b) to be permitted to provide their own instructions to the capacity assessor "*to ensure that all issues relating to capacity are fully considered and covered by the letter of instructions to him*."

ANL sought orders that (1) ANL be joined as an interested party to the proceedings on the issues of (a) G's capacity to communicate with third parties including the media; (b) in the event G is assessed as lacking capacity, whether it would be in G's best interests to communicate with third parties including the media; and (c) the Reporting

Restriction Order in place dated 17th February 2014; and that ANL are served with all information in these proceedings in respect of these issues and has permission to make representations on these issues in these proceedings; (2) that the local authority serve on ANL a copy of the report of the capacity assessor; and (3) that ANL have permission to make representations to the capacity assessor within seven days of being served with his report and for the capacity assessor to take these representations into account and revise his report if appropriate.

ANL's application was opposed by the Official Solicitor on behalf of G and by the local authority. It was supported by C and, up to a point, by F, who although not advocating that ANL be joined was concerned that ANL be permitted active participation in relation to those issues in which it had an interest.

The legal framework: Article 8

The President noted the following core principles:

1. The private life protected by Article 8 includes the right of a person to define the 'inner circle' in which he chooses to live his life, including in particular the right to decide who is to be excluded from his 'inner circle'. Article 8 therefore embraces both X's right to decide to establish and develop a relationship with Y (qualified, of course, by Y's right to decide that he does not wish to establish a relationship with X) and X's right to decide not to establish or continue a relationship with Z. The State also has a positive obligation under Article 8 to ensure that X's right to respect for private life is not violated as a result of press intrusion or harassment: see, for example, Von Hannover v Germany (2003) 40 EHRR 1,[2004] EMLR 379, para 57, and Rekos v Greece [2009] EMLR 290, paras 35, 41;

2. Secondly, if for whatever reason, good or bad, reasonable or unreasonable, or if indeed for no reason at all, X does not wish to have anything to do with Y, then Y cannot impose himself on X by praying in aid his own Article 8 rights. For X can pray in aid, against Y, X's own Article 8 right to decide who is to be excluded from X's 'inner circle', and in that contest, if X is a competent adult, X's Article 8 rights must trump Y's. It necessarily follows from this that, absent any issue as to X's capacity or undue influence, X's refusal to associate with Y cannot give rise to any justiciable issue as between Y and X;

3. Thirdly, if X lacks capacity, Y's Article 8 rights can no more trump X's rights than if X had capacity. Y cannot impose himself on X by praying in aid his own Article 8 rights. Y's Article 8 rights have to be weighed and assessed in the balance against X's Article 8 rights. If Y's rights and X's rights conflict, then both domestic law and the Strasbourg jurisprudence require the conflict to be resolved by reference to X's best interests. X's best interests are determinative.

Importantly, Sir James Munby P continued,

> *"26. In the event of dispute, it is for the court – here the Court of Protection – to determine on behalf of X what X's best interests require. What is the nature of that process? As Baker J aptly put it in Cheshire West and Chester Council v P and M [2011] EWHC 1330 (COP), [2011] COPLR Con Vol 273, para 52:*
>
> > *'The processes of the Court of Protection are essentially inquisitorial rather than adversarial. In other words, the ambit of the litigation is determined, not by the parties, but by the court, because the function of the*

> *court is not to determine in a disinterested way a dispute brought to it by the parties, but rather, to engage in a process of assessing whether an adult is lacking in capacity, and if so, making decisions about his welfare that are in his best interests.'*

I agree. I add that, as Mr Millar [on behalf of G] *points out, the court, in coming to a decision on best interests must proceed in accordance with sections 1(6), 4(6) and 4(7) of the Act.*

27. Given the nature of the conflicting rights under Article 8 as I have described them, and given the nature of the Court of Protection's functions and procedures, it follows in my judgment that the identification by the Court of Protection of X's best interests does not give rise to any justiciable issue as between Y and X. Section 4(7) of the Act may in appropriate circumstances require the Court of Protection to consult Y and take into account Y's views on the question of what would be in X's best interests (and in any event Y's views may be a "relevant circumstance" within the meaning of section 4(2): see In re M (Statutory Will), Practice Note [2009] EWHC 2525 (Fam), [2011] 1 WLR 344, para 36), but that is far removed from suggesting that there is any justiciable issue as between Y and X. There is not. Nor is there any justiciable issue as between Y and X in relation to the question of X's capacity."

The legal framework: Article 10

Turning to Article 10, Sir James Munby P noted that it protected two distinct rights, the right to "receive" and the right to "impart" information and ideas. In other words, as he held at paragraph 29, when a journalist, J, publishes a story received from a source, S, Article 10 is engaged in four distinct ways: (i) S is imparting information to J; (ii) J is receiving information from S; (iii) J is imparting information to J's readers; and (iv) J's readers are receiving information from J.

This meant that, where the court is being asked to make orders designed to prevent something being published in the media, the desired objective can in principle be achieved in two quite different ways:

1. If there is some appropriate legal basis for doing so, for example, if S is threatening to disclose information in breach of a duty of confidence owed by S to T, or, when a family court makes a specific issue order against a parent forbidding the parent from disclosing information about the parent's child, the court can grant an injunction restraining S from imparting the information to J. Unless J has already received the information from S, there is no need to obtain any order against J, for the story has been cut off at source. In such a situation, the court is concerned only with S's Article 10 right to impart information; it is not concerned with J's Article 10 right to receive information, let alone with J's right to impart information which J has not in fact received. The President noted the gradual emergence in the Strasbourg jurisprudence of the idea that Article 10 may perhaps in some circumstances confer a right of access to information, but (whatever the precise scope of the right), nothing turned upon it in the case before him because on any view the right of access to information, if it exists at all, arises only in relation to information held by a public body, and the information in issue here is that held by G, C and F, that is, by private individuals.

2. Alternatively, or additionally, the circumstances may justify an order restraining J from imparting to others information received by J from S. Here, J's Article 10 rights are directly engaged: both J's right to receive information from S and, most of all, J's right to impart that information to others.

In a 'receiving' case such as this one, the starting point is that if S, as a competent adult, declines to disclose information to J – if S, as it were, shuts the door in J's face – then that is that. S is deciding not to allow J into S's 'inner circle'. S's right to be left alone by the media, if that is what S wishes, is a right which is protected by Article 8 and it trumps any rights J may have, whether under Article 8 or Article 10. J cannot demand that S talks to him and J's reliance on Article 10 will avail him nothing. From this, the President held (at paragraph 38), it must follow that S's refusal to talk to or impart information to J cannot give rise to any justiciable issue as between J and S.

What, if any difference, did it make that S (in this case G) arguably lacks capacity? It was relevant for two reasons:

1. because the Court of Protection has jurisdiction only in relation to those who lack capacity;

2. second, and more fundamental, because if S does have capacity then the decision as to whether or not to impart information to J (or, if the information has already been imparted by S to J, the decision by S as to whether or not to bring proceedings against J) is exclusively a matter for S.

If S lacks capacity the next question for the court is whether or not it is in S's best interests to impart the information to J (or, if that has already happened, whether or not S's best interests require that an injunction is granted against J). This is because best interests is the test by which the Court of Protection on behalf of S takes the decision which, lacking capacity, S is unable to take himself. As the President noted (at paragraph 43) , for essentially the same reasons as in relation to Article 8, it followed that the identification by the Court of Protection of S's best interests does not give rise to any justiciable issue as between J and S. Nor is there any justiciable issue as between J and S in relation to the question of S's capacity.

> *"the reason for this is simple: before J's right to receive information from S arises, S must, to use the language of Leander [(1987) 9 EHRR 433], "wish or be willing" to impart the information to J. Where S lacks capacity, what the court is doing when deciding whether or not it is in S's best interests for the information to be imparted to J (or, if already imparted to J, whether or not it is in S's best interests for it to be imparted by J to others), is doing what, if S had capacity, S would be doing in deciding whether or not to impart the information to J (or, as the case may be, in deciding whether or not to seek an injunction to restrain J imparting it to others). As Mr Millar points out, J would have no right or interest in relation to such a decision by S, if S had capacity. Why, he asks rhetorically, should it make any difference that, because S lacks capacity, the very same decision is being taken on behalf of S by the court. I agree." (paragraph 44)*

The President noted that the court's best interests decision in relation to S is not necessarily determinative:

> *"If the court decides that it in S's best interests for information to be imparted to J (or, if that has already happened, that S's best interests do not require the grant of an injunction) then that is the end of the matter. There is no conflict between S's best interests and J's rights. If, however, there is a conflict between S's best interests as determined by the court and J's rights as protected by Article 10, the court moves on to the third and final stage of the inquiry. But at this stage S's best interests are not determinative. There is a balancing exercise. The court is no longer exercising its protective jurisdiction in relation to S but rather its ordinary jurisdiction under the Convention*

as between claimant and defendant. Accordingly it has to balance the competing interests: S's interest under Article 8 (as ascertained by the court), and therefore her right under Article 8 to keep her private life private, and J's rights under Article 10. And at this stage, if relief is being sought against J (or against the world at large), J's Article 10 rights are directly implicated. So J will be entitled to be heard in opposition to the order being sought" (paragraph 45).

The application

Against this detailed analysis of the rights in play, and the precise way in which they arose for consideration by the court, Sir James Munby P was able to dispatch the application by ANL with some speed:

1. ANL's application to be joined as a party was misconceived, he found, because:

    a. the relief being sought by the local authority gave rise to no justiciable issue as between ANL and G, or between ANL and anyone else. So there was no reason for ANL to be joined;

    b. further, applying *Re SK* (By his Litigation Friend, the Official Solicitor)[2012] EWHC 1990 (COP), Sir James Munby P held ANL could not be said to have a 'sufficient interest' to apply to be joined as a party under COPR r75(1), nor could it be said that its joinder was desirable for purposes of COPR r73(2);

    c. finally, even if ANL's rights under Article 10 were to be engaged (as they plainly are in relation to the reporting restriction order), the President held that would not give ANL a "sufficient interest" in the proceedings, as distinct from the discrete application within the proceedings, nor would it make it "desirable" to join ANL as a party to the proceedings. As Sir James Munby held (paragraph 51), "[*o*]*n the contrary, it would be highly undesirable for ANL to be joined, because as a party it would be entitled to access to all the documents in the proceedings unless some good reason could be shown why it should not, and the grounds for restricting a party's access to the documents are very narrowly circumscribed: see RC v CC and another [2014] EWHC 131 (COP). Nor, as I have pointed out, would there be any need for ANL to be joined as a party. It would, as Mr Millar concedes, be entitled to be heard as an intervener.*" Indeed, the President noted that there appeared to be no case in either proceedings involving children or incapacitated adults where a journalist or media organisation has been joined as a party to the proceedings, as distinct from being permitted to intervene. This is surely suggestive of a well-founded assumption that joinder is as unnecessary for the protection of the media as it is undesirable from the point of view of the child or incapacitated adult whose welfare is being considered by the court.

2. ANL's other applications fell away in light of the President's decision upon their first application: if it were not to be joined as a party, he held that there was no basis upon which it could claim either to see the capacity assessor's full report or to ask him questions (paragraph 53).

3. Further:

> *"54. […] in relation to the insinuation by ANL that it should be joined as a party or allowed to intervene in relation to the issues of G's capacity and best interests because otherwise relevant arguments may not be adequately put before the court. There is no basis for this. Quite apart from the rejection by those to whom this comment appears to be directed of any factual foundation for what is being said, this cannot be a ground for being allowed to participate in the proceedings. Either ANL has some basis for being joined as a party or it does not. If it does, all well and good. If it does not, then it is a mere interloper, an officious busybody seeking to intrude in matters that are of no proper concern to it, seemingly on the basis that it can argue someone else's case better or more effectively than they can themselves. Moreover, if it is to be said that the Official Solicitor is, in some way, not acting appropriately in G's best interests, then the remedy is an application for his removal as her litigation friend, not the intrusion into the proceedings of a self-appointed spokesman for G."*

Comment

This is a characteristically robust judgment by the President; and is particularly interesting in light of the clear line it draws between:

1. increased transparency within Court of Protection proceedings (including both greater publication of judgments and the mooted access of journalists both to proceedings and – in due course – documentation); and

2. the very limited role of the press in the taking by the Court of Protection about decisions in relation to those alleged to lack capacity to determine whether they wish to have contact with journalists.

The judgment is also of interest for its very clear endorsement of the proposition that the Court of Protection is an inquisitorial jurisdiction, operating in a very different forensic sphere to the civil courts.

Circumstances in which an appeal court can re-make a decision

MB v Staffordshire County Council, KM, B (A Child) [2014] EWCA Civ 565 (Court of Appeal (The Chancellor of the High Court, Black and Ryder LJJ)

Summary

In this case the Court of Appeal restated the circumstances in which an appeal judge in public law family proceedings could re-make a first instance decision, and the circumstances in which such an exercise was inappropriate.

The local authority made applications for care and placement orders in respect of B. The Family Proceedings Court heard the case and made the care and placement orders. The parents appealed and the case came before Her Honour Judge Clarke who held that the magistrates' decision was flawed but that she could re-make the decision herself. She then held that despite errors the magistrates' decision was correct and dismissed the appeal.

Lord Justice Ryder set out some general principles in relation to appeals in such cases:

- On an appellate review the judge's first task is to identify the error of fact, value judgment or law sufficient to permit the appellate court to interfere.

- In public law family proceedings there is always a value judgment to be performed which is the comparative welfare analysis and the proportionality evaluation of the interference that the proposed order represents and accordingly there is a review to be undertaken about whether that judgment is right or wrong.

- Once the error is identified the judge has a discretionary decision to make whether to re-make the decision complained of or remit the proceedings for a re-hearing.

- The judge has power to fill the gaps in the reasoning of the first court and give additional reasons in the same way that is permitted to an appeal court when a Respondent's Notice has been filed.

- In the exercise of its discretion the court must keep firmly in mind the procedural protections provided by the Rules and Practice Directions of both the appeal court and the first court so that the process which follows is procedurally fair.

- If in its consideration of the evidence that existed before the first court, any additional evidence that the appeal court gives permission to be adduced and the reasons of the first court, the appeal court decides that the error identified is sufficiently discrete that it can be corrected or the decision re-made without procedural irregularity then the appeal court may be able to rectify the error by a procedurally fair process leading to the same determination as the first court. In such a circumstance, the order remains the same, but the reasoning leading to the order has been added to or re-formulated but based on the evidence that exists and the appeal would be properly dismissed.

- If the appeal court is faced with a lack of reasoning it is unlikely that the process above would be appropriate although it should be borne in mind that the appeal court should look for substance not form and that the essence of the reasoning may be plainly obvious or be available from reading the judgment or reasons as a whole. If the question to be decided is a key question upon which the decision ultimately rests and that question has not been answered and in particular in evidence is missing or the credibility and reliability of witnesses already heard by the first court but not the appeal court is an issue, then it is likely that the proceedings will need to be remitted to be re-heard. If that re-hearing can be before the judge who has undertaken the appeal hearing, that judge needs to acknowledge that a full re-hearing is a separate process from the appeal and that the power to embark on the same is contingent upon the appeal being allowed, the orders of the first court being set aside and a direction being made for the re-hearing.

- The two part consideration to be undertaken by a family appeal court is heavily fact dependent. What might be appropriate in one appeal on one set of facts might be inappropriate in another.

All three Lord Justices held that on the particular facts of this case (including significant evidential shortcomings) the appeal judge should have remitted the case for re-hearing.

Comment

Lord Justice Ryder's principles are a useful framework for assessing whether a decision on appeal should be remitted or re-made by the appeal judge. They apply with equal force in the context of appeals from welfare decisions made in the Court of Protection. The overwhelming message from the Court of Appeal is that every case will be different and will fall to be considered in detail on its own particular facts.

Judicial contact with the subject of proceedings

Re KP (A Child) [2014] EWCA 554 (Court of Appeal (Moore-Bick, Black and McFarlane LJJ)

Summary

This case, which concerned proceedings under the Hague Convention in relation to a child, is of interest because, although some of the principles it sets out may resonate with CoP proceedings in which it is proposed that P should meet the judge, rather than give formal evidence.

In this case, the Court of Appeal found that the judge at first instance had strayed beyond the acceptable parameters, while noting that best practice as to the right way to hear the child's voice in such cases was still developing. (At least there was some guidance to assist practitioners and the court – in the CoP, there is as yet no guidance about hearing from P, cross-examination of P, or P meeting with the judge).

The Court of Appeal set out a number of 'themes', as follows:

a) *There is a presumption that a child will be heard during Hague Convention proceedings, unless this appears inappropriate;*

b) *In this context, 'hearing' the child involves listening to the child's point of view and hearing what they have to say;*

c) *The means of conveying a child's views to the court must be independent of the abducting parent;*

d) *There are three possible channels through which a child may be heard:*

   i) Report by a CAFCASS officer or other professional;

   ii) Face to face interview with the judge;

   iii) Child being afforded full party status with legal representation;

e) *In most cases an interview with the child by a specialist CAFCASS officer will suffice, but in other cases, especially where the child has asked to see the judge, it may also be necessary for the judge to meet the child. In only a few cases will legal representation be necessary;*

f) *Where a meeting takes place it is an opportunity:*

   i) for the judge to hear what the child may wish to say; and

   ii) for the child to hear the judge explain the nature of the process and, in particular, why, despite hearing what the child may say, the court's order may direct a different outcome;

g) *a meeting between judge and child may be appropriate when the child is asking to meet the judge, but there will also be cases where the judge of his or her own motion should attempt to engage the child in the process.*

54. None of the reported cases goes further than the guidelines by suggesting that a judicial meeting might be used for the purpose of obtaining evidence from the child or going beyond the important task of simply hearing from the child that which she may wish to volunteer to the judge. As Lord Wilson SCJ describes in Re LC at para 55, where a child's evidence might prove determinative of an issue, it may be adduced by an appropriate process into the full proceedings by witness statement, report from a CAFCASS officer or, where the child is a party, by her advocate's cross-examination of the adult parties and closing submissions. Going further, where oral evidence is required, Lord Wilson indicated that an age appropriate process should be deployed.

The Court of Appeal went on to accept submissions that:

i) During that part of any meeting between a young person and a judge in which the judge is listening to the child's point of view and hearing what they have to say, the judge's role should be largely that of a passive recipient of whatever communication the young person wishes to transmit.

ii) The purpose of the meeting is not to obtain evidence and the judge should not, therefore, probe or seek to test whatever it is that the child wishes to say. The meeting is primarily for the benefit of the child, rather than for the benefit of the forensic process by providing additional evidence to the judge. As the Guidelines state, the task of gathering evidence is for the specialist CAFCASS officers who have, as Mr Gupta submits, developed an expertise in this field.

iii) A meeting, such as in the present case, taking place prior to the judge deciding upon the central issues should be for the dual purposes of allowing the judge to hear what the young person may wish to volunteer and for the young person to hear the judge explain the nature of the court process. Whilst not wishing to be prescriptive, and whilst acknowledging that the encounter will proceed at the pace of the child, which will vary from case to case, it is difficult to envisage circumstances in which such a meeting would last for more than 20 minutes or so.

iv) If the child volunteers evidence that would or might be relevant to the outcome of the proceedings, the judge should report back to the parties and determine whether, and if so how, that evidence should be adduced.

v) The process adopted by the judge in the present case, in which she sought to 'probe' K's wishes and feelings, and did so over the course of more than an hour by asking some 87 questions went well beyond the passive role that we have described and, despite the judge's careful self-direction, strayed significantly over the line and into the process of gathering evidence (upon which the judge then relied in coming to her decision).

vi) In the same manner, the judge was in error in regarding the meeting as being an opportunity for K to make representations or submissions to the judge. The purpose of any judicial meeting is not for the young person to argue their case; it is simply, but importantly, to provide an opportunity for the young person to state whatever it is that they wish to state directly to the judge who is going to decide an important issue in their lives.

Comment

The Court of Appeal specifically noted the position in the CoP where a judge may well meet with P on occasion. It appears that they considered that

there were strong analogies to be drawn between the two situations (see paragraph 35).

There is an increasing tendency for judges to meet with P – and considerable support from Strasbourg for what may even amount to a rule (or at least a presumption) that a judge considering taking a decision with significant consequences flowing from a declaration of incapacity in a material regard must meet P (see e.g. *X and Y v Croatia* ((Application No. 5193/09, decision of 3.11.11). This case shows the care that judges must exercise when they undertake this important exercise.

Joint instruction of experts – funding and the LAA

JG v the Lord Chancellor and Ors [2014] EWCA Civ 656 (Court of Appeal (Richards, Black and Fulford LJJ)

Summary

In a very important decision whose ramifications extend well into the CoP field, the Court of Appeal held that a decision by the Legal Services Commission (now the Legal Aid Agency) not to fully fund the cost of an expert report ordered in private law proceedings under the Children Act 1989, where the child had a public funding certificate but the parents did not, was unlawful (the High Court on a judicial review application had held the decision to be lawful).

A father made an application for a residence and/or contact order in respect of his daughter who was living with her mother. Neither parent was in receipt of public funding and both acted in person. The child was later joined as a party and granted a public funding certificate (which is only done in exceptional circumstances). The child was represented by a solicitor and a children's guardian. According to the judgment in the judicial review claim, shortly after the child became an assisted person, the children's guardian suggested to her solicitors that it might be appropriate to seek expert evidence. The child's solicitors identified an expert, compiled draft instructions and served them on the parents. The District Judge hearing the case subsequently gave directions about the expert report, including that "*the cost of the report to be funded by the child, the court considering it to be a reasonable and necessary disbursement to be incurred under the terms of the public funding certificate*". The expert produced a report and sent an invoice to the child's solicitors in the sum of £12,000. The LSC refused to pay the invoice in full, stating that the cost should be shared equally between the parties. It relied on section 22 (4) of the Administration of Justice Act 1999 ("section 22(4)") which held (in summary) that the fact that a person is publically funded should not affect (a) the rights or liabilities of other parties to the proceedings or (b) the principles on which the discretion of any court or tribunal is normally exercised. The LSC refusal to pay delayed the case (the expert had been asked to provide an addendum report and was refusing to do so until payment was made on her first invoice). The apparent impasse led to a judicial review claim brought by the child against the LSC for refusing to pay the invoice.

Ryder J heard the judicial review claim. He found against the child in relation to the specific issue under scrutiny, namely the refusal of the LSC to fund the whole of the costs of an expert instructed to assist the family court in its determination of the welfare issues in the case. He also addressed what was described as a question of general importance, which concerned the approach that could be taken where the family court considered that expert evidence was necessary but the only means to pay for it was through the child's public funding certificate. In relation to the general

question, Ryder J again found against the child and accepted the approach suggested by the Lord Chancellor which proceeded on the basis that normally a single joint expert should be used and the expert's costs should be apportioned equally between the parties. Only in exceptional circumstances where the court forms the view, on proper scrutiny of a party's means, that one or more of the non-legally aided parties is unable to fully pay the costs the court would otherwise expect that party to pay may the court consider that whether other parties should pay more than an equal share so as to ensure that the evidence which is necessary may be adduced in the child's best interests.

Black LJ gave the reasoned judgment of the Court of Appeal with which Richards and Fulford LLJ agreed.

The Court of Appeal's judgment addressed both the general question and the specific question posed by Ryder J in the judicial review proceedings but in respect of the general question it was noted that it did not form part of the ratio of the decision and that there was no universally applicable answer and everything depended on the facts of the case under consideration.

The general question

The judge first considered the question of whether the expert was, in fact, a single joint expert or was, more properly analysed, the child's expert. If the expert was, on a proper analysis, the child's expert then the issues in relation to funding did not arise in the same way.
In considering this aspect the judge referred to the facts of the case, noting that neither parent had raised the possibility of an expert prior to the involvement of the guardian despite litigation having been on foot for a significant period of time. The idea seemed to have come from the guardian and the child's solicitors identified the expert and drafted instructions. The guardian would only initiate such an instruction if it were for the benefit of the child. The judge held that on facts such as those, the correct starting point would be that the expert's report was genuinely sought by the child alone with the result that it would fall in the category of case in which the Lord Chancellor had accepted that it was legitimate for the legally aided party to bear the full costs.

The judge then addressed the question of whether the involvement of the other parties in the instruction of an expert would make a material difference and concluded that the answer will be fact sensitive. It was clear that the mere service of the expert's CV on parents or the service of draft instructions would not change the child's expert into a single joint expert. The expert was only a single joint expert if he provides expert evidence for use in proceedings on behalf of two or more of the parties (Rule 25.2 FPR 2010). The rules explicitly acknowledged that parties may communicate with and even take the benefit of an expert instructed by another party without that expert becoming a single joint expert. Making use of another party's expert report as evidence at a hearing did not convert the expert into a single joint expert.

The judge concluded that it may not be all that infrequent that an application by a child/guardian for permission to instruct an expert will genuinely be for an expert on behalf of the child as opposed to a single joint expert, notwithstanding that the other parties have some input into the process of approval by the court and into the format of the expert's instruction.

The judge then addressed the situation where the expert was not the child's expert but a single joint expert and the other parties were unable to contribute to the cost of the expert. The issue was

in what circumstances public funds could be required to meet the whole cost.

The judge first held that equal apportionment was not the 'normal rule' when there was no issue over resources. The court had a discretion as to what order was made as to the cost of instructing experts in family proceedings and that discretion must be exercised bearing in mind all the circumstances of the particular case. The judge held that Rule 25.12(6) FPR 2010 did not establish a 'normal rule' that the cost be apportioned equally. It followed that in order to decide whether a court order has fallen foul of section 22(4) it was not enough to say that the 'normal rule' had not been followed in order to take advantage of the fact that someone was publically funded, instead a more sophisticated exercise was required. It was necessary to ask what order the court would have made in its discretion on the particular facts of the case, leaving aside any resource problems. The answer might be equal apportionment but it might also, depending on the particular facts, be that the publically funded party should pay a greater share of the costs.

The judge then considered the question of when the court could depart from the order that it would otherwise have made, to the greater cost of a publicly funded party or parties.

Given the role of the child's guardian in family proceedings, by the time the guardian has endorsed the instruction of an expert as appropriate and the court has approved it as necessary there were the beginnings of a strong foundation for an argument that the child's Article 8/Article 6 rights would be violated if the court could not be provided with the expert assistance. Whether that argument ultimately succeeded would depend on the precise nature of the decision to be taken in relation to the child. There was no requirement for an additional hurdle or test of "exceptionality". It was also not necessary for parties to satisfy the financial criteria for legal aid in order to be treated as impecunious. However, eligibility for legal aid was a relevant factor in determining a party's means.

Given the difficulty in forecasting when financial information would be available to the court the stage at which the court can reach a final determination as to whether a departure from the order it would usually have given for Convention reasons is likely to vary. There may be cases in which the decision can be taken before the expert is even instructed. There may be others in which the absence of readily available financial information would or may import harmful delay into the proceedings and in which it would be necessary to require the guardian to instruct the expert in the first instance but with the intent of revisiting the question of cost, on proper financial information, later by means of a conventional costs order. The court would require cogent evidence that other parties would not be able to pay their way before going down that route.

The specific question

The idea of the expert was the guardian's and what was before the district judge giving directions was the guardian's proposal that the expert should be instructed. The district judge agreed that such an expert report was necessary. Had matters stopped there, there could have been no possible objection to the cost of that expert evidence being attributable to the child because it was the child who was going to put that evidence before the court. The guardian then went on long term sick leave and there was a gap before a new guardian was appointed. At a subsequent hearing the district judge made an order that the parties jointly instruct an expert with the guardian taking the lead and the cost being funded by the child. It

did not appear that the parents contributed anything on the subject of the expert and there was nothing to suggest that they were seeking to have an expert involved. It followed that the report was, in substance, ordered at the request of the guardian in order to address issues that needed to be addressed in the interests of the child. The fact that other parties may have an input into the report does not convert it into their report or necessarily render them liable for the costs of it. What mattered was the substance of the transaction. It was solely the child's expert report and should have been paid for fully by the LSC.

The appeal against Ryder J's dismissal of the child's judicial review claim was allowed and a declaration made that the LSC's decision not to meet the cost of the expert's report was unlawful.

Where judges have to deal with difficult issues such as this it would be prudent for them to explain their reasons for each decision that they take in a short judgment and for their orders to be precisely spelled out. Solicitors should be careful to avoid disputes such as this by seeking prior authority for an instruction of an expert.

Comment

Despite Black LJ stating expressly that her remarks on the general question were obiter and may not be of much assistance, there is no doubt that lawyers will draw on the judgment in future to resolve cost disputes in family proceedings (and to inform the instruction of experts in general). We also sure that her comments will also be used in other areas – most obviously the Court of Protection – where there is a similar overriding requirement that the decision be taken in someone's best interests and the failure to have access to an expert's views would infringe a person's Article 6/Article 8 rights (despite the focus on the FPR 2010).

The answer in the end in this case was that the expert report was solely the child's report (sought by the guardian in the interests of the child) and not, properly analysed, a joint report. We think there will be many instances in the COP where an expert report is sought by P's litigation friend (for example to assess capacity) where it could be said that the report is solely P's and not that of the other parties. We await the repercussions, and any examples of the case being cited in argument or in judgments before the CoP would be very much appreciated.

Reducing or streamlining directions hearings in the CoP

We are also inviting readers to contact us with ideas as to how to reduce or streamline directions hearings in the Court of Protection, following a discussion at the most recent High Court Users Group meeting. Would colleagues support the adoption of standard directions along the following lines?

> *The Applicant shall circulate to the parties a draft order not less than 10 days before the next directions hearing, and all parties shall use their best endeavours to agree the directions no later than 5 working days before the hearing. The Applicant shall inform the court promptly, and in any event not less than 48 hours before the hearing, if an order is agreed and the hearing may be vacated.*

Do others have alternative ideas or suggestions? Please let us know – the LAA and the courts will be very grateful!

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Conferences at which editors/contributors are speaking

The Deprivation of Liberty Procedures: Safeguards for Whom?

Neil is speaking at the day-long 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, to discuss the extent to which the DOL procedures comply with international human rights standards, and whether they offer adequate protection for the rights of service users and their carers. 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 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.

End of Life Care and the Law – Wirral Hospice St John's and Hill Dickinson

Tor and Parishil are speaking at this conference in the North West on 25 June 2014 which covers end of life issues including DNACPR notices, advance decisions to refuse treatment, and the MCA and CoP. Full details are available here.

Other conferences of interest

Mental Health Lawyers Association COP Conference

The MHLA is holding its first COP conference on 6 June in London. The key-note speaker is Mr Justice Charles, Vice-President of the Court of Protection, and other speakers include representatives from the LAA and the Official Solicitor's office. Full details are available here.

BABICM Summer Conference

The British Association of Brain Injury Care Managers is holding its summer conference on 25 and 26 June 2014 at the Hilton Birmingham Metropole. Entitled "Nobody Does It Better! Current Practical Issues in Brain Injury," the conference will examine issues facing brain injury case managers: (1)

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.

sex, capacity and the law; (2) what constitutes privileged documentation; and (3) the implications of the judgment in *Loughlin v Singh*. For more details and to register, please click here.

Chambers Details

Our next Newsletter will be out in early July. 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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