MENTAL CAPACITY REPORT: PROPERTY AND AFFAIRS

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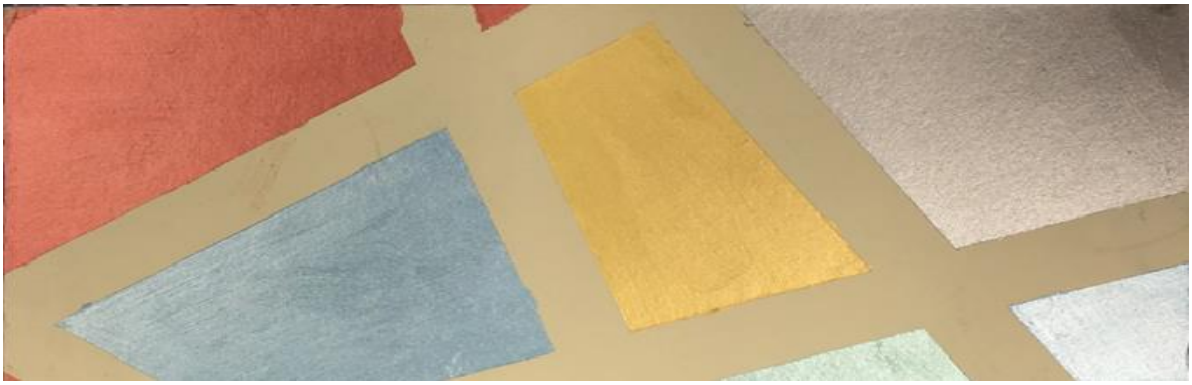

Welcome to the January 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: *Re Y* update, a further round in the *Re X* saga, a briefing note on PJ/MM, the Chief Coroner's annual report and Manuela Sykes' obituary;

(2) In the Property and Affairs Report: case-law and OPG guidance on gifts, and whether its effect on a will is information relevant to the test of whether a person has capacity to marry;

(2) In the Practice and Procedure Report: fluctuating capacity in the face of the court, Court of Protection statistics and a useful case for human rights claims arising out of the misuse of the MCA;

(3) In the Wider Context Report: interim guidance on CANH withdrawal, the NICE consultation on decision-making and capacity, an important study on everyday decision-making under the MCA and a book corner with recent books of interest;

(4) In the Scotland Report: Court of Protection orders before the Scottish courts and an update on the Scottish Government consultation on adults with incapacity;

You can find all our past issues, our case summaries, and more on our dedicated sub-site here, and our one-pagers of key cases on the SCIE website.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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Gifts, LPAs and costs

Re MB [2017] EWCOP B27 (HHJ Parry)

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Summary

In three decisions, published together on Baillii at the end of 2017, District Judge Batten made rulings in relation to LPAs concerning PP.

In the first of the decisions, the judge had to consider the application made by one of two joint and several attorneys for ratification of gifts.

The Applicant, BB, was PP's son-in-law and held a joint and several LPA with a solicitor, CD, for PP's property and affairs. They also held an LPA for health and welfare.

BB's application was made after the Public Guardian had investigated various gifts BB had made out of PP's estate. At the end of the Public Guardian's investigation, he required BB to make an application for retrospective ratification of gifts, failing which the Public Guardian would seek the removal of the attorneys. PP, at the date of the first judgment in 2015, was 78 years old, living in a care home and lacked the capacity to make decisions for herself as to her property and affairs. Her income was above her annual outgoings by just short of £7,000 per annum. She had assets that totalled approximately £1million, after deduction of the challenged gifts.

The main gift that was in issue was a gift of £324,000 to BB's wife, PP's daughter (JB). It was said that this was some form of IHT planning. There were other, less significant gifts that the court considered, totalling just over £10,000. The largest of these was £6,000, again to JB.

The Official Solicitor was appointed PP's litigation friend and opposed the application for ratification. The judgment refers, of course, to s.12 MCA 2005 that sets out the limited powers of attorneys under LPAs to make gifts on behalf of a donee who lacks capacity to make gifts. Broadly, this is the "*customary occasions*" power, where the value of each gift on such an occasion is not unreasonable, having regard to all the circumstances and, in particular, the size of the donor's estate.

The court also referred to the well-known guidance of Senior Judge Lush in *Re Meek* [2013] EWCOP 2966.

The judge had little difficulty in coming to the view that the gift of £324,000 was outside BB's powers given by s.12 MCA. The reasoning is set out at paragraphs 109 to 125.

The court in the same passage then went on to consider whether to ratify the gift. Again, with no hesitation, the court refused so to do. There were various reasons: one was the fact that although PP's estate was sufficient, at the moment, to cover her outgoings, that might not persist because she might need nursing care. She was only 78 and her mother was still alive at 100. Furthermore, when she learnt of the gift, she had expressed "*shock and surprise*". Yet further, when she made a will in 2011, having capacity so to do, she had given half of her residuary estate to JB and the other to her grandchildren. There was no evidence that PP wanted to privilege JB to any greater extent than set out in her will. There had been no history of giving to JB or, indeed, any other family member.

Having come to the decision to refuse to ratify the gift of £324,000, the court had to consider what to do. BB and JB had used £160,000 of the gift to purchase their current home. They were also very much involved in looking after PP from 2011 when she had moved to be near them. The court, therefore, ordered BB to restore £164,000 of the gift and directed a statutory will or codicil so that the remaining £160,000 would be brought into hotchpot.

As regards the smaller gifts, the court did not require repayment of the £6,000 or the other smaller gifts, but directed that equivalent payments should be made to those grandchildren who had not been beneficiaries and that no further gifts would be permitted, save gifts of the annual small gift allowance, currently £250, to be made to all PP's grandchildren in each tax year.

The court then adjourned the question of what to do about the LPAs. This led to the second judgment on the application of the Official Solicitor as litigation friend for PP for the revocation of both LPAs.

In that second judgment, DJ Batten first drew attention to s.22 MCA, that gives only limited powers to the court to revoke a LPA. It is not wholly a "*best interests*" decision and the court only has jurisdiction (so far as is relevant here) where the donee of the LPA has behaved or is behaving in a way that contravenes his authority or is not in P's best interests, or proposes to behave in a way that would contravene his authority or would not be in P's best interests. Once that jurisdictional hurdle is overcome, then the court has the power (although not the duty) to revoke the LPA, a decision which is taken in P's best interests.

So far as BB was concerned, the court had little difficulty in holding that he had exceeded his authority. So far as CD was concerned, the judge concluded that she had not contravened her authority, but had not acted in PP's best interests because she had not taken decisive action when she learnt of the gift to JP of £324,000 and had failed to provide in her role as professional attorney sufficient oversight of BB and ensure that he was acting in PP's best interests.

The judge then went on to consider whether or not, the jurisdictional hurdle having been overcome, it was in PP's best interests that BB and CD should remain as attorneys of the

property and affairs LPA. Again, with no hesitation, the court held that it was not and ordered the appointment of a deputy for property and affairs from the Public Guardian's panel of deputies.

So far as the health and welfare LPA was concerned, a different decision was reached. There was recognition of the fact that it had been PP's choice to appoint BB and CD as her health and welfare attorneys and did not find that they had acted in contravention of their authority or not in PP's best interests. In those circumstances, the court did not revoke the LPA for health and welfare.

The court then turned to the costs of the ratification application. The court held that BB's conduct took the case outside the general rule in relation to costs of property and affairs applications set out in the then Rule 156, namely that such costs are charged on the estate and applied Rule 159, which allowed the court to depart from that general rule, having regard to all the circumstances, especially including conduct. The court found that BB's conduct justified an order that BB pay his own costs and the costs of the Official Solicitor, apart from £4,000 plus VAT which should come from PP's estate in recognition that a prospective application for approval of gifts may have been appropriate.

So far as the costs of the revocation application were concerned, those were adjourned for written submissions and the final judgment of the three gives the decision in relation thereto. In relation to the application for revocation of the property and affairs LPA, the court applied Rules 156 and 159, and decided that the conduct of both BB and CD had justified a departure from the general rule. In the result, they were ordered to pay their own costs and the costs of the Official Solicitor as litigation friend of PP.

Finally, in relation to the application for the revocation of the LPA for health and welfare, the court applied the ruling of Senior Judge Lush that such an application falls to be decided under Rule 156. As the LPA for health and welfare had not been revoked, the court ordered that the costs of that application should come out of PP's estate and allowed 10% of BB's and CD's costs to come out of PP's estate.

Comment

These decisions are useful illustrations of the problems that can arise where attorneys do not understand the limits of their authority in relation to gifts (as to which see also the OPG's updated guidance note, discussed further below). The case is somewhat surprising in that one of the attorneys was a solicitor and it seems that she had failed to acquaint the non-professional attorney with his responsibilities. There had also, it seems, been a failure of oversight.

The refusal to ratify the large gift and the revocation of the property and affairs LPA would appear, on the face of it, to have been almost inevitable and underline the fact that the court is often reluctant, even on a prospective application, to approve gifts of substantial parts of P's estate simply for the purpose of IHT planning, especially where that might leave P vulnerable to running out of money for nursing and care costs.

The order made on the gift application is interesting in that it shows flexibility in the

court's response to its refusal to ratify the gift, allowing the donee to keep part of the gift, but bringing it into hotchpot instead. Whilst this course of action was plainly eminently sensible, it does – for the more technically-minded – raise a question as to the precise jurisdictional basis upon which the court could make it. The Court of Protection was not, here, making decisions on behalf of P, but purporting to direct what others should do with P's property. On one view, the court should have authorised PP's litigation friend to begin restitution proceedings in the Chancery Division. However, this would have an absurdly complex and expensive exercise, and it is hardly surprising that the court wished to take pragmatic steps to resolve the situation. We have no doubt that, had the question been asked (as it appears not to have been) thought would have been given as to precisely how it could have been done: perhaps the answer is that it was exercising its imported High Court powers under s.45(1) MCA 2005 "in connection with its jurisdiction" in effect to grant injunctive relief against the defaulters.

Capacity to marry – the effect on a will

Re DMM [2017] EWCOP 32 and [2017] EWCOP 33 (HHJ Marston QC)

Mental capacity – marriage

Summary

HHJ Marston QC has answered a question as to the salient information relevant to the capacity to marry that, somewhat surprisingly, had not previously been answered. The case concerned a retired insurance broker, DMM with Alzheimer's disease. He had once been married, ending in divorce, and had then cohabited with a woman, SD, for 20 years. He had made a will in 2013 and previously executed an EPA appointing EJ, one of his adult daughters from his marriage, as attorney; in 2013, he executed a health and welfare LPA in EJ's favour. It is implicit from the judgment that plans must have been afoot for DMM and SD to marry, because EJ brought an application under Part 4A Family Law Act 1996; these were transferred to the Court of Protection, with an interim injunction made to prevent the proposed marriage. The case was listed for a preliminary hearing before HHJ Marston QC to decide the preliminary issue as to whether the:

> *legal test for whether a person has capacity to marry includes a requirement that the person should be able to understand, retain, use and weigh information as to the reasonably foreseeable financial consequences of a marriage, including that the marriage would automatically revoke the person's will.*

It was agreed that the effect of the marriage of DMM to SD would automatically revoke the will that he previously made. If SD lacked the capacity to make a new will (or a statutory will was not made on his behalf), the effect of revocation combined with the effect of the statutory intestacy provisions would mean his children would receive less and SD more.

The evidence was that DMM (who was not at that stage a party or represented in any way before the court) might not have the capacity to understand the effect of the remarriage upon his will. The question was therefore whether, as a matter of law, such understanding was required as a component part of the test.

HHJ Marston QC reviewed the authorities and held, at paragraph 7, that:

> *It is clear to me that DMM has to be able to understand the information relevant to a decision (to marry) and that information includes information about the reasonably foreseeable consequences of deciding one way or the other. The effect of the marriage making the will invalid is not just a reasonably foreseeable consequence of marriage, it's a certain consequence of marriage which will have financial consequences to the parties. Is a financial effect on the parties relevant to capacity to marry? In London Borough of Southwark v KA [2016] EWCOP 20 Parker J said "P must understand the duties and responsibilities that normally attached to marriage, including that there may be financial consequences and that spouses have a particular status and connection with each other." She also made it quite clear that this did not mean for example that you had to understand financial remedy law before you got married. She said "the test for capacity to marry is not high or complex. The degree of understanding of the relevant information is not sophisticated and has been described as rudimentary. I must not set the test too high." One does not need a refined analysis as the President said [in Sheffield CC v E and another [2004] EWHC 2808 (Fam)]. There is also quite clearly a policy issue involved here, the test must not be set too high because that would be an unfair, unnecessary and discriminatory bar against those with capacity issues potentially denying them that which all the rest of us enjoy if we choose, a married life.*

HHJ Marston QC noted that there had been discussion in the reported cases as to whether it was necessary to understand that a reasonable foreseeable consequence of marriage is that your financial position might be affected by marriage, particularly if it failed and there were financial remedy proceedings. He noted *"importing that into capacity to marry is setting too high a standard, too refined an analysis, asking to take too many hypothetical situations into consideration."* However, he continued (at paragraph 10):

> *that seems to me to be very different from the fact that your will is going to be set aside if you marry. That is a statement of fact not a hypothetical situation, you don't have to know what the situation will be if you die intestate, all you need to know is "What you wanted to happen on 11 December 2013 cannot happen because your will is invalid because of the marriage". If you cannot understand that how are you said to be able to understand, retain, use and weigh information as to the reasonably foreseeable consequences of the marriage? It is said in Miss Bond's argument that this is focussing on the testamentary consequences of the marriage, in my view it's not, it's focussing on the factual consequences of marriage. I therefore find that the fact that a second marriage revokes the will is information that a person should be able to understand, retain, use and weigh to have capacity to marry.*

Matters then proceeded, recorded in a second judgment. DMM was then joined as a party, represented by the Official Solicitor. Dr Hugh Series was instructed to report upon DMM's capacity in light of the determination set out above as to the information relevant to the test. He was clear that DMM did have this capacity,

clearly retained and understanding the fact that the will would be revoked, he might not be able to make a new one, and that, in consequence, his children might receive less and SD more. HHJ Marston QC therefore made a declaration to the effect that DMM had the capacity to marry, stayed for a short period to enable an application for permission to appeal to the Court of Appeal to be made – an application which did not come to pass.

Comment

On one view, it would have been helpful had the Court of Appeal been asked to consider the question before HHJ Marston QC, as it would have been useful to have an appellate level decision on the information relevant to the marriage test (a previous opportunity in *A, B and C v X & Z*, also on the relevance of financial consequences. not having come to pass on the death of P).

However, it is perhaps not surprising that the case did not progress further. Although it is a little odd that P was not joined to the determination of such important a preliminary issue (and could, in principle, have argued that HHJ Marston QC was wrong even when he was joined), the conclusion reached on the legal issue would seem to be unimpeachable because of the inexorable consequences of marriage upon a will. Further, HHJ Marston QC was astute to formulate the necessary information at as low a level as sensibly possible to outline those consequences. Although the report of the evidence of Dr Series was of short compass, it would appear clear that it would have been all but unassailable on appeal.

OPG Guidance on Gifting

On 10th January 2018, the OPG updated its legal guidance for professional deputies and attorneys on the rules about giving gifts. The Practice Note can be found here.

The note deals with the principles of gifting (that is to say what powers attorneys and deputies have to make gifts), the meaning of a gift, capacity to make a gift, involving the person in the decision, the attorney or deputy accepting a gift, general rules about gifts, what is reasonable as a gift, gifts of property, who gifts are for, the relevance of any will, applying to the Court of Protection, providing for others' needs, unauthorised gifts, deprivation of assets, bonds and the criminal law.

Of particular interest is a section entitled "*Providing for Others' Needs*", which mentions the decisions of District Judge Elldergill in *The Public Guardian's Severance Applications* [2017] EWCOP 10, where the judge highlighted the difference between a gift and a payment to meet a person's needs. In that case, the court held that an attorney could make payments from the LPA donor's estate to meet the donor's disabled daughter's needs without seeking authority from the court, as this was meeting a need rather than making a gift.

The guidance, however, cautions seeking authority from the court where there is doubt, that it would be prudent to include in any LPA specific provision for these payments and that such payments should ordinarily only be made where in the past the donor had provided for the needs and it was reasonable to conclude that that would have continued into the future.

OPG's business plan for 2017-2018

On 7th December 2017, the OPG published its Business Plan for 2017 to 2018. Notwithstanding the debate provoked by former Senior Judge Lush as to the relative merits of LPAs and deputyship, there are clear aims to increase the number of people making LPAs, aiming to reduce the average donor age from 73 to 65 and to ensure that usage represents a more diverse spectrum of society. There is, further, an aim to increase online usage so that the percentage of LPAs made using the online tool should increase with a target of 30% of new LPAs being created using that tool, and 80% of deputies submitting their reports online.

Finally, there is an aim to have a published strategy for safeguarding as well as proposals for a new life-long LPA, creating a new area of OPG business to meet the needs of missing persons and improve digital tools and online access to make it easier for users to access services and provide information.

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

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Conferences

Conferences at which editors/contributors are speaking

5th UCLH Mental Capacity Conference

Alex is speaking at the 5th University College London Hospital mental capacity conference on 20 February, alongside Sir James Munby P and Baroness Ilora Finlay. For more details, see here.

Edge DoLS Conference

The annual Edge DoLS conference is being held on 16 March in London, Alex being one of the speakers. For more details, and to book, see here.

Other conferences of interest

SALLY seminar

The next seminar in the ESRC-funded seminar series on Safeguarding Adults and Legal Literacy will be held on 16 February at the University of Bedfordshire's Luton campus, the topic being "Safeguarding Adults Boards and Reviews." See here for more details.

COPPA seminars

The Court of Protection Practitioners Association have a packed programme of seminars coming up, including (in the North West) a seminar on differing perspectives on proceedings on 31 January and (in London) a seminar on financial abuse on 7 February. For more details, and to book, see here.

Finder's Deputy day

The Third Finder's International Deputyship Development Day is taking place on 1 March in York. It is a free event open to all local authorities carrying out deputyship and appointeeship work, and includes a specific focus on hoarding. For more details, see here.

Advertising conferences and training events

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

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

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