Essex CHAMBERS

MENTAL CAPACITY REPORT:
PROPERTY AND AFFAIRS

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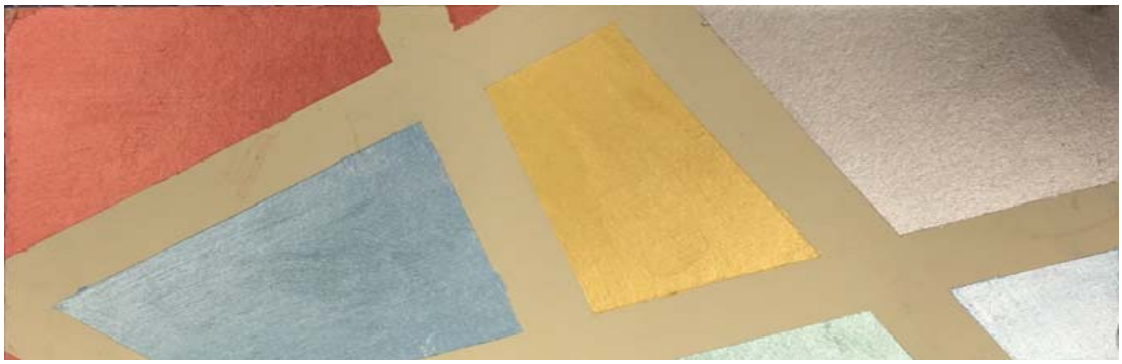

Welcome to the July 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: important decisions grappling with the meaning of best interests in the contexts of religious practices and delusional beliefs, and (finally) detailed statistics about s.21A/*Re X* cases;

(2) In the Property and Affairs Report: a new approach to severance and gifts;

(2) In the Practice and Procedure Report: changes to – and extension of the scope of – the Transparency Pilot and comments sought on a mediation pilot project;

(3) In the Wider Context Report: post-*PJ* problems, problems with care homes and capacity assessments and are moves really under way to change mental health laws?;

(4) In the Scotland Report: draft rules from Strathclyde Sheriff's Court concerning AWI applications.

We are taking a break over summer, but will be back in early September. In the interim, 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. Alex will also provide updates on truly critical matters on his own website (where you can also find the talk that he gave about the big issues facing the MCA 2005 at our recent 10th birthday party for the Act – thank you to all those who attended and made it such a success).

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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.

Contents

Important Guidance on Severance and Gifts

The Public Guardian's Severance Applications [2017] EWCOP 10 (District Judge Eldergill)

Lasting powers of attorney – revocation – severance – gifts

Summary

In a series of cases noted on Bailli as *The Public Guardian's Severance Applications* [2017] EWCOP 10, District Judge Eldergill made various rulings on applications made by the Public Guardian for severance of various provisions made in lasting powers of attorney. Although each of the persons affected by the applications were notified that there would be a final hearing in April 2017, it does not appear from the judgment that any of those persons appeared either in person or by a legal representative, and it does not appear either that any of those persons made any representations. The court, therefore, heard from in-house counsel for the Public Guardian and also in writing from the Public Guardian.

The judgment, from paragraphs 8 to 41, sets out the relevant law and background to these applications. All of the applications were for severance under paragraph 19 of Schedule 1, Mental Capacity Act 2005. That provides as follows:

> *(1) Sub-paragraph (2) applies if the court determines, under section 23(1), that a lasting power of attorney contains a provision which –*
>
> *(a) is ineffective as part of a lasting power of attorney, or*
>
> *(b) prevents the instrument from operating as a valid lasting power of attorney.*
>
> *(2) the court must –*
>
> *(a) notify the Public Guardian that it has severed the provision, or*
>
> *(b) direct him to cancel the registration of the instrument as a lasting power of attorney.*

Section 23(1) MCA 2005 gives the court a power to determine any question as to the meaning or effect of a lasting power of attorney, or an instrument purporting to create one.

These provisions give the Court of Protection power to sever a provision in a lasting power of attorney that offends s.9(2) MCA 2005. That provides as follows:

> *A lasting power of attorney is not created unless –*
>
> *(a) section 10 is complied with;*
>
> *(b) an instrument conferring authority of the kind mentioned in sub-section (1)*

> *is made and registered in accordance with Schedule 1.*

So far as Schedule 1 is concerned, paragraph 1 requires a lasting power of attorney to be in the prescribed form, comply with paragraph 2 (requirements as to content of instruments) and that the prescribed requirements in connection with its execution are satisfied. Separately from the severance provisions, paragraph 3 of Schedule 1 allows the Public Guardian to ignore immaterial differences between an instrument in respect of form or mode of expression from the prescribed form and paragraph 3(2) allows the court to declare that an instrument which is not in the prescribed form is to be treated as if it were, if it is satisfied that the persons executing the instrument intended it to create a lasting power of attorney.

The judgment, at paragraphs 30 – 37, includes a helpful summary of the scope of 3(1) and (2) of Schedule 1. All the judgments, however, were in relation to severance under paragraph 19.

Section 10(4) MCA 2005, most importantly for these purposes, states that a lasting power of attorney may appoint attorneys to act:

> *(a) jointly,*
>
> *(b) jointly and severally, or*
>
> *(c) jointly in respect of some matters and jointly and severally in respect of others.*

The prescribed form follows s.10(4) MCA 2005 in giving the donor those three choices. The sting in the tail in relation to lasting powers of attorney is that, pursuant to s.9(3) MCA 2005, an instrument which (a) purports to create a lasting power of attorney, but (b) does not comply with this section, section 10 or Schedule 1, confers no authority. In other words, it is invalid even as a power of attorney.

At paragraph 41, before turning to the individual cases, District Judge Eldergill cited what Nugee J said in Miles & Beattie v The Public Guardian [2015] EWHC 2960 (Ch) at paragraph 19:

> *… It does seem to me that it is right that the Act should be construed in a way which gives as much flexibility to donors to set out how they wish their affairs to be dealt with as possible, the Act being intended to give autonomy to those who are in a position where they can foresee that they may in the future lack capacity to specify who it is that they wish to act for their affairs.*

The Individual Cases

There is a degree of similarity between the cases determined in the judgment and, therefore, not every case is summarised. Where relevant, comments are made on a running basis in relation to each judgment, with a general comment at the end.

MC (paragraphs 43 to 53)

In this case, the donor had ticked the box that she wanted her attorneys to act jointly and severally, rather than the box to the effect that some decisions were to be made jointly and some jointly and severally. In section 7, however, (instructions) she said:

> *Any financial decisions up to the value of £150* can *be made independently by my attorneys. However, any financial decisions over this amount must be agreed upon by both my attorneys.*

The Public Guardian said that that had to be severed because it was inconsistent with the joint and several appointment. District Judge Eldergill held, however, that greater weight had to be given to the specific instruction than to the tick box exercise. He held, therefore, that the donor had simply ticked the wrong box and, therefore, it was not necessary to excise the condition or restriction in Section 7. He made a declaration to that effect.

This can be seen as the application of the general rule of interpretation that where specific words deal with a matter, then those specific words take priority over general words that might be inconsistent with the specific words.

JG (paragraphs 54 to 59)

In this case, the donor, in the preferences box of section 7 of the prescribed form, had said:

> *I would like my attorneys to consider Thomas G (my son) as my main priority when making decisions.*

The Public Guardian considered that that wording had to be severed because it was incompatible with the requirement of s.1(5) MCA 2005 that any act done or decision made must be done or made in the donor's best interests.

District Judge Eldergill held that this was a simple expression of preferences which did not in any way bind the donee when considering what decision to be made in her best interests, but which the donee would have to take into account when so doing and which the Act entitled her to make (see s.4(6)(a) MCA 2005).

District Judge Eldergill, therefore, held that there was no need to sever anything and went on to point out that, in any event, it was a misunderstanding of the Act to take the view that acting in an incapacitated person's best interests in some way precludes giving any weight to the interests of other persons dear to them, such as providing for children, spouses and other dependants (see paragraph 58).

DH (paragraphs 60 to 70)

This was a similar case to the last one, where the donor had expressed a preference that the donor would like grandchildren each to be given £1,000 and any funds left over to be shared equally by children.

Again, District Judge Eldergill held that this was a preference, not a binding condition and, therefore, did not interfere with the Act's restrictions on gift making powers of attorneys. District Judge Eldergill, however, did state that there were concerns in relation to some home-made powers that donors and donees will be unaware of the general restrictions on gifts and at paragraph 68, recommended that the Public Guardian could remind donors and donees on registration in cases similar to this that a court application is necessary to give effect to wishes expressed that would exceed statutory gifting powers.

SH (paragraphs 71 to 73) and JF (paragraphs 120 to 125)

In each of these cases, the donor had appointed a number of attorneys jointly and severally. In *SH*, the donor, in section 7 in the instructions box, stated:

> *While my attorneys are authorised to act jointly and severally, I specifically direct that all decisions must be made by at*

> *least two of my attorneys and that no attorney has the power to make decisions individually.*

District Judge Eldergill severed that provision because he agreed with the submission of the Public Guardian that the instruction was incompatible with an appointment of attorneys to act jointly and severally.

In the case of *JF*, there were three attorneys and the instruction in section 7 was:

> *My two daughters (if surviving) must always agree on any decision jointly before any actions regarding my estate can be implemented. OM may act as an attorney independently of my daughters.*

District Judge Eldergill stated, at paragraph 124, that he could not see anything objectionable in the arrangement that the donor had devised, and that it should not be necessary to create two instruments (one appointing her daughters jointly and the other her husband or partner solely) to achieve that object. He said that the aim of the statutory scheme should be to give as much flexibility to donors as possible.

The donor had consented to severance of the instruction and, at paragraph 125, therefore, District Judge Eldergill stated that he was bound by current case law to make one of two decisions: either not to sever and to direct the Public Guardian not to register or to sever and direct registration. Severance, however, created a situation that the donor did not want. He said that with considerable reluctance he had decided to order severance.

Comment

In these cases, it would appear that the objection was that that the instruction did not comply with s.10(4) MCA 2005, which does not appear on its face to permit an instrument to appoint two attorneys to act jointly and a third attorney to act jointly and severally. This, if it is the case, is, as District Judge Eldergill states, unfortunate.

District Judge Eldergill stated that he was bound by authority to take this view (he did not say what his view would have been if not so bound). It is understood that the binding case law to which he refers are decisions of Senior Judge Lush to similar effect and one of Arden J (as she then was) in relation to enduring powers of attorney (*Re E (Enduring Power of Attorney)* [2001] Ch 346).

In that case Master Lush (as he then was) had ruled that a similar provision in a EPA prevented it operating as an EPA because s.11(1) Enduring Powers of Attorneys Act 1985 provided *"An instrument which appoints more than one person to be an attorney cannot create an enduring power unless the attorneys are appointed to act jointly or jointly and severally"*. There was an appeal against other aspects of that decision but not that one. Arden J simply recorded the decision without comment.

Section 10(4) MCA 2005 is in different terms to s.11(1) EPAA 1985. Its intention is to allow more flexibility. Notwithstanding the continued practice of Senior Judge Lush, it may be that it could be argued that there is in fact no binding authority on this matter and that the wording of s.10(4) MCA 2005 can be interpreted (following *Miles and Beattie*) so as to permit this type of arrangements. This could be done by asking the question whether the power appoints the attorneys jointly, jointly and severally or jointly in respect of some matters and jointly and

severally in respect of others as one conjunctive question rather than as a series of disjunctive options. The result could be that the answer in case such as this would, therefore, be *"yes"* and severance not necessary.

SHH (paragraphs 74 to 80)

In this case, the donor had not properly executed option A in relation to life sustaining treatment, which is necessary if the attorneys are to give or refuse consent to life sustaining treatment on the donor's behalf.

In section 7, however, the donor had completed the preference box that gave instructions to her attorneys in relation to life sustaining treatment.

Because option A had not been properly completed, the Public Guardian submitted that option B (no life sustaining treatment authority) applied and, therefore, the words in section 7 had to be severed because incompatible with option B.

District Judge Eldergill, however, used his power under paragraph 3(2) of Schedule 1 to declare that the instrument should be treated as if it had been in the prescribed form and declared that although option A had not been properly completed, the meaning and effect of the instrument was that the attorneys were authorised in relation to life-sustaining treatment and, therefore, severance was not necessary.

SG (paragraphs 81 to 90)

The donor appointed her son as sole attorney with his wife as a replacement attorney and in the instructions box at section 7 wrote:

> *Whereas I have appointed VVVE to be my replacement attorney in the event of my son, TWG, being unable to continue to act as my attorney, I direct that my replacement attorney, VVVE, shall only act as my replacement attorney if she remains legally married to my son, TWG, at the point he becomes unable to act as my attorney.*

District Judge Eldergill held that this was a perfectly valid condition and stated that he could see nothing objectionable in inserting a condition that one's daughter-in-law must retain a family relationship through marriage with the donor for the replacement Order to take effect, citing Nugee J's remarks in *Miles & Beattie*.

SR (paragraphs 91 to 95)

This was another case of a preference being expressed in relation to the powers of joint and several attorneys. Again, District Judge Eldergill held that there was no need to sever as it was merely a preference.

MN (paragraphs 96 to 100)

This was another preference case in relation to gifts. Again, District Judge Eldergill held that there was no need to sever.

RH (paragraphs 102 to 108)

This was another case where District Judge Eldergill, in relation to difficulties with execution, used his powers under paragraph 3(2) of Schedule 1 and then determined that severance was not necessary.

JG2 (paragraphs 109 to 114)

This was another case where the donor had ticked the wrong box as to whether the attorneys were to act jointly and severally on all matters or jointly on some and jointly and severally on

others, and in section 7 had given instructions compatible only with the latter. Again, District Judge Eldergill interpreted the instrument so that it provided for the donors to act jointly and severally in relation to all matters, save for where specifically the donor had instructed them to act jointly (in relation to any sale of the donor's home).

JR (paragraphs 115 to 119)

This was a similar case in relation to health and welfare.

PG (paragraphs 126 to 155)

In this case, in section 7, the donor had given an instruction to this effect:

> *My attorneys must ensure that IBG* [the donor's daughter, it seems]*, who is unable to make decisions for herself because of her disabilities that her needs are met.*

The Public Guardian argued for severance because that was incompatible with the attorney's obligation to act in the donor's best interests. This case is similar to JG, except that in JG's case, the words were in the preferences box rather than the instructions box. Did that make a difference? District Judge Eldergill held that it did not. At paragraph 132, he stated:

> *I disagree that PG's condition is on its face contrary to the requirements of section 1(5)… it is not per se contrary to PG's best interests that she exercises her right to impose a condition on her attorneys that they must ensure that her incapacitated child's needs continued to be met from her estate. That her daughter is cared for appears to be her most important wish and feeling, and no doubt her core personal belief and value.*

Having decided that, District Judge Eldergill went on from paragraph 134 onwards to consider the different treatment of making gifts and providing for the needs of others. He held that there was an important distinction between the two. At paragraph 146, he said:

> *If the payment is not a gift for the purposes of section 12, but the meeting of a need, and there is no condition or restriction in the instrument which prevents such payments, then the attorney must apply the principles in section 1 and the best interest considerations in section 4. The attorney must consider matters such as the donor's past and present wishes and feelings, their beliefs and values, any written statements made by them including statements in the LPA itself and all other relevant considerations such as the donor's own needs and the nature of their relationship with the potential recipient, and decide whether such a payment is in the donor's best interests.*

At paragraph 147, District Judge Eldergill then considered whether all payments from a donor's estate, other than those for consideration, including those made to meet, for example, a child's needs are by definition "*gifts*" and, therefore, caught by section 12. He held that that was not the case. He gave, at paragraph 149, the example of a couple who had been married for, say, 60 years appointing each other as attorneys and one of them becomes incapacitated by dementia. He posed the question whether the spouse exercising the attorney role would need to apply for a court order in order to continue regular and historic

contributions from the donor's pension and assets to their partner, and the running expenses of the household. He stated that if that were the case, it would be wholly impracticable and undesirable. He said that it would be a nightmare.

At paragraph 152(g), he said:

> *Where a spouse or partner of the attorney applies part of the donor's funds to meet their own continuing needs and those of other dependents in a way which – allowing for any reduction in family income and assets caused by care home fees or loss of earnings and any increase in the donor's own needs – is consistent with the donor's historical expenditure prior to the onset of incapacity, then this is likely to be an indicator that it is a need that is being met, not a gift.*

Clearly, there will be instances where the line is not easy to draw and an application for authorisation or directions would be sensible. Equally clearly, however, these principles can be applied to many such situations so as to avoid the need for such applications.

GO (paragraphs 155 to 158)

This was a *JF* type of case and the result was the same (that is to say reluctant severance).

GB (paragraphs 159 to 165)

This was another case where there was ambiguity in the instrument between the joint and several appointment, and a preference given in section 7, which restricted powers to act in relation to sale or rental of properties and investments to joint only. Again, District Judge Eldergill declared that the specific words prevailed over the general words and, therefore, severance was not necessary.

JB (paragraphs 166 to 171)

This case was the mirror image of GB, they being spouses.

GD (paragraphs 172 to 176)

In this case, there was incompatibility between the ticked box which was for the attorneys to be able to act as soon as the power had been registered and a preference in section 7 to the effect that the power should only come into effect when the attorneys had reason to believe the donor was becoming or had become incapable of making decisions and managing her affairs.

District Judge Eldergill agreed that there was an inconsistency and one section required correction. The Public Guardian had enquired of the donor, who stated that her intention was that the instrument should take effect immediately and, therefore, he severed section 7. It would have been more difficult if, by the time the matter was investigated, the donor had lost capacity.

CW (177 to 182)

This was another case where the donor had used the preferences box in section 7 to state her wishes concerning the use of her money, namely to benefit her mother and daughter. The case was similar to that of *JG* and the result the same, in other words no severance.

General comment

Although strictly of no precedent value, being judgments of a District Judge, it is clear that these judgments, taken together, mark a

significant shift in approach to powers of attorney in favour of a more purposive and less literal approach both to severance and also to the circumstances in which payments from a donor's estate can sensibly be regarded as meeting the needs of others as opposed to gifts. We note in this regard that District Judge Eldergill made a particular point of noting at the end of the judgment (para 183) that the Public Guardian himself had had the opportunity to consider the judgment before it was handed down, and that he agreed with it.

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Conferences

Conferences at which editors/contributors are speaking

Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing and speaking at this conference in London on 14 July which looks both at the present and potential future state of the law in this area. For more details, see here.

The Legal Profession: Back to Basics

Adrian is a speaker and panellist on "The Legal Profession: Back to Basics" at the Annual Conference of the Law Society of Scotland at Edinburgh International Conference Centre on the afternoon of Tuesday 19th September 2017. For more details, and to book, see here.

JUSTICE Human Rights Law Conference

Tor is speaking on the panel providing the Equality and Human Rights Update at JUSTICE's Annual Human Rights Law Conference in London on 13 October. For more details, and to book, see here.

National IMCA Conferences

Alex is speaking on both litigation friends and a potential Vulnerable Adults Bill at the two National IMCA Conferences (North and South) organised by Empowerment Matters and sponsored by Irwin Mitchell. The northern conference is in Sheffield on 20 October; the southern is in London on 10 November.

National Advocacy Conference

Alex is speaking on advocacy as a support for legal capacity and doing a joint workshop with Jess Flanagan on advocacy and available options at the National Advocacy Conference in Birmingham on 19 October. For more details, and to book tickets 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 early September. 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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