Mental Capacity Law Newsletter October 2016: Issue 70

Court of Protection: Property and Affairs

Welcome to the November 2016 Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: the new COPDOL 10 form comes into force on 1 December, an *MN*-style case management decision, Baker J on life and death and Strasbourg's latest on deprivation of liberty;

(2) In the Property and Affairs Newsletter: trusts versus deputies, undue influence and wills, and useful STEP guidance for attorneys and deputies

(3) In the Practice and Procedure Newsletter: important practice guidance on participation of P and vulnerable witnesses, naming experts and child competence to instruct solicitors;

(4) In the Capacity outside the COP Newsletter: new guidance from the Royal College of Surgeons and the College of Policing, and an important decision of the German Federal Constitutional Court on forced treatment and the CRPD;

(5) In the Scotland Newsletter: new guidance on supported decision-making (of relevance also in England and Wales) and problems with MHOs.

We have also updated our guidance note on judicial deprivation of liberty and are very pleased to announce a new guidance note (written by Peter Mant) on mental capacity and ordinary residence.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here. 'One-pagers' of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE website.

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When to Trust

Watt v ABC [2016] EWCOP 2532 (Charles J)

Best interests – Property and affairs

Summary

In this case Charles J was considering the issue of whether P's funds from a personal injury award of £1.5 million should be administered through a deputyship or a trust. Charles J had approved the settlement sitting as a QB judge. There was an issue as to P's capacity to manage his property and affairs and Charles J held that P lacked such capacity but that there was a small chance that P might regain capacity and the issue should be kept under review (paragraph 7).

At paragraph 8, however, Charles J stated that the given the unusual and difficult nature of the case, the deputyship order should not have been made by an authorised officer.

The evidence suggested that with support P would have capacity to make decisions about how to spend the income from his award (paragraph 11). It also suggested that in the event that P regained capacity to manage the capital element of his award, he would be very vulnerable to exploitation (paragraph 16). There was also a serious risk of a breakdown in the relations between P and his professional advisers (paragraph 15).

This lead Charles J to suggest that it would be in P's best interests for the award to be settled on irrevocable trusts which allowed P autonomy over income but would not allow P access to capital even if he regained capacity (paragraphs 17 and 18). He thus, at paragraph 65, directed the parties to produce an analysis of the rival options (including but not only their costs).

He then turned to considering *SM v HM* [2012] COPLR 187 (a decision of HHJ Marshall).

That case is often cited as authority for the proposition that there is a strong presumption in favour of a deputyship over a trust. Charles J held that it was not or if it was, then it was wrong (paragraph 69).

At paragraphs 76-79 he said this:

> *76. Rather, it introduces a reasoning process that can, for example, start with all of the factors that favour the appointment of a deputy over other results and so points that deputies are appointed and regulated under a statutory scheme (a) which is directed to persons who lack capacity and so need someone to make decisions for them, and (b) which has statutory tests for decision making, access to the COP, checks and balances and provisions that provide security (and so the points made in paragraphs 32 to 34 of SM v HM and paragraph 53 hereof).*
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> *77. I fully accept and acknowledge that the weight of those factors in many cases (and perhaps the great majority of cases) will outweigh factors in favour of the COP making an order that empowers persons other than a deputy (and so trustees) to make decisions about P's property and affairs, and so the appointment of a deputy can be said to be the norm.*
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> *78. But I repeat that in my view the normality of the appointment of a deputy does not create a presumption, starting point or bias that needs to be displaced.*

79. I accept that in many circumstances only fine or pedantic differences can be said to exist between a rebuttable presumption and a starting point that recognises the existence of a normal arrangement. However, in my view, an approach based on a strong presumption that has to be displaced has been at the heart of the result in this case that factors against the appointment of a deputy, and so the Breakdown Risks and the Vulnerability Risk, were effectively ignored until it was too late to assess whether they founded the result that the weight of competing factors favoured the creation of an irrevocable trust.

Lastly, at paragraph 92, Charles J summarised points that should be considered in analogous cases:

"I make the following points:

(1) The management regime for a substantial award of damages should be considered as soon as is practicable.

(2) This will involve a careful consideration of what the claimant (P) has and does not have the capacity to do and of his or her likely capacity and/or vulnerability in the future. This is relevant to both jurisdictional and best interests issues.

(3) It will also involve the identification of all relevant competing factors and should not proceed on the basis that there is a strong presumption that the COP would appoint a deputy and would not make an order that a trust be created of the award. Rather, it would balance the factors that favour the use of the statutory scheme relating to deputies (that often found the appointment of a deputy in P's best interests) against the relevant competing factors in that case.

(4) It will also involve the identification of the terms and effects (including taxation) and the costs of those rival possibilities.

(5) Care should be taken to ensure that applications that are not straightforward are not decided by case officers in the COP but are put before judges of the COP.

(6) The possibility of listing case management hearings or the final hearing of QB proceedings before a judge who is also nominated as a COP judge should be considered. However, the potential for conflict between the respective roles of the judge in the two courts (e.g. one arising from a consideration of without prejudice communication in respect of the QB proceedings concerning its settlement that is not agreed or not approved by the COP judge) and the respective jurisdictions of the two courts need to be carefully considered.

The CoP, personal injury and deputies

Tinsley v Manchester City Council and others [2016] EWCOP 2532 [2016] EWHC 2855 (Admin) (Administrative Court (HHJ Stephen Davies sitting as a judge of the High Court))

Best interests – Property and affairs – CoP jurisdiction and powers – interface with civil proceedings

Summary

In this case P had received a large personal injury award in 2005 as a result of a serious brain injury. He had been compulsorily detained under the Mental Health Act 1983 so under s. 117 of the Act he was entitled to aftercare services on his discharge which the relevant authorities were not

entitled to charge him for. (*R v Manchester City Council ex parte Stennett* [2002] 2 AC 1227).

At the trial of his claim, the defendant had argued that in the light of that, P could not claim damages for the sums that he needed for such after care. The judge at that trial (Leveson J as he then was) at paragraph 126 of his judgment held that it was not unreasonable for the claimant to refuse to accept local authority provision and so he was able to claim the full cost of private care (*Tinsley v Sarkar* [2005] EWHC 192 QB).

At paragraph 122 of his judgment, however, Leveson J had appeared to suggest that the local authority could take into account a person's resources when assessing their need for care under section 117.

After the award, P went into private care funded from his damages. Unfortunately, because of possible mismanagement of the award, P's resources were not going to be adequate in the long term and so a new deputy applied to the relevant local authority and CCG for the provision of aftercare under section 117. They refused citing the fact that P had an award for that purpose. P brought proceedings for judicial review.

HHJ Stephen Davies upheld P's claim, holding that the defendants could not use the fact of P's award to refuse to provide for his admitted needs (see paragraph 26). It seems that he differed from Leveson J's view that a local authority (or CCG) could take account of a person's resources in the light of the Court of Appeal's decision in *Crofton v NHSLA* [2007] 1 WLR 923. That was a decision on s.2 Chronically Sick and Disabled Persons Act 1970 and by reference to its functions under s.29 National Assistance Act 1948 but the judge held that the same principles applied, namely that the providing authority cannot take into account the personal injury award.

The defendants also argued that it was an abuse or against public policy to allow what in effect would be a double recovery. The judge rejected these arguments (paragraphs 36 and 39), interpreting *Peters v E Midlands Strategic Health Authority* [2010] QB 48 as simply holding that it was no part of a deputy's duty to make all applications for state funding and not authority for the proposition that a deputy should refrain from making such applications (see paragraph 35).

Comment

In *Peters* the Court of Appeal endorsed a method of avoiding double recovery by seeking an undertaking from a deputy not to seek state funding. Later Senior Judge Lush in *Re Reeves* [2010] WTLR 509 held that in a case where there had been no *Peters* undertaking, there was no question of the Court of Protection restricting a deputy's right to apply for all statutory benefits even where P had an award of damages to cover the care.

The practice in the Queen's Bench Division now is that on a settlement that includes periodical payments, the defendant asks for and the court will approve what is known as a reverse indemnity. The deputy undertakes to inform the defendant's insurer if he gets benefits that cover an aspect of the award (for example the funding of care) and in those circumstances, the insurer is entitled to reduce the periodical payments by the amount or value of the funding. In cases where there has not been a full award (because, say, of

contributory negligence) the reduction is pro rata.

This only works where there are periodical payments and would not cover the problem that arose in this case (a shortfall because of mismanagement). Mismanagement of funds, however, is less of a danger where there are periodical payments.

Short Note: Contesting influence

A recent case (*Edkins v Hopkins* [2016] EWHC 2542 (Ch), a decision of HHJ Jarman QC sitting as a judge of the High Court) illustrates just how hard it is to get a will overturned on the basis of undue influence. The deceased was a vulnerable, ill alcoholic who had just discharged himself from hospital against medical advice. He made a will, crucially as it turns out, via an independent, experienced solicitor that left the bulk of his estate to a friend who, as the judge found, was in a position to exercise control and influence.

The judge was not, however, prepared to take the final step to holding that there had been undue influence even though it was not a far jump from his findings that the friend had a significant degree of control over the deceased and that the friend had suggested that the deceased make a new will and arranged for the solicitor to attend.

STEP guidelines for attorneys and deputies

STEP has published a very useful set of guidelines for attorneys and deputies when dealing with P's property and affairs.

They cover the scope of the order or power; the main principles of the MCA; proper administration (separate bank accounts etc); property purchase; property occupation; property improvements; making gifts; meeting needs; unauthorised gifts; expenses, accounts and investments; standards; using IFAs; discretionary fund management and other guidance.

Autumn Edition of *In Touch: the OPG's newsletter for Deputies*

This edition of the OPG's newsletter contains material that may be of interest to property and affairs deputies. It includes reminders about the OPG's guidance about family care payments and gifts as well as the new security bond provider and the requirement for annual reports from all deputies.

It also gives a nudge to anyone still holding a pre MCA short order authority or receivership order to get them up dated with a full deputyship order. You can find it here.

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Conferences at which editors/contributors are speaking

Scottish Young Lawyers Association

Adrian will be speaking on adults with incapacity at the SSC Library, Parliament House, Edinburgh on 21 November. For more details, and to book, see here.

Royal Faculty of Procurators in Glasgow

Adrian will be speaking on adults with incapacity at the RFPG Spring Private Law Conference on 1 March 2017. For more details, and to book, see here.

Scottish Paralegal Association Conference

Adrian will be speaking on adults with incapacity this conference in Glasgow on 20 April 2017. For more details, and to book, 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 Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

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

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Trust Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment to the Law Commission working on the replacement for DOLS. To view full CV click here.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click here.

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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click here.

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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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