MENTAL CAPACITY REPORT: PROPERTY AND AFFAIRS

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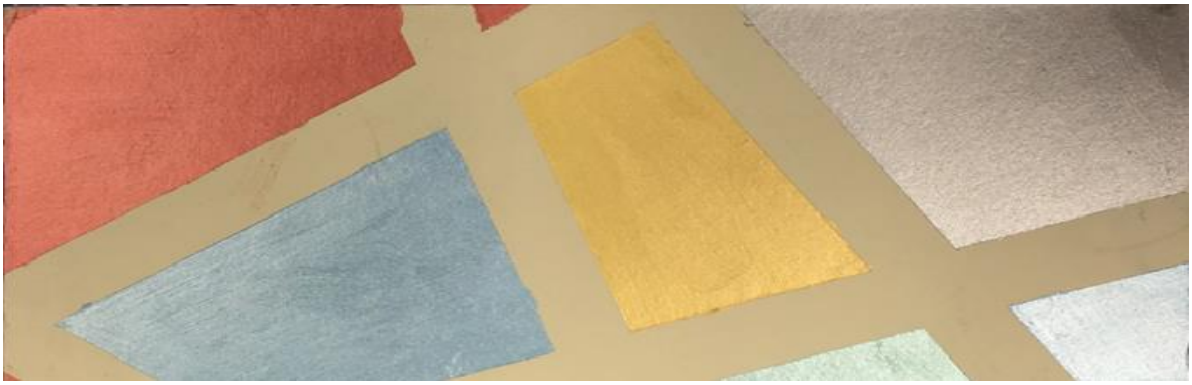

Welcome to the February 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a personal view on the Mental Capacity (Amendment) Bill from Tor, damages where the MCA has gone awry and the Supreme Court on the MHA in the community;

(2) In the Property and Affairs Report: neglect and attorneys, a speedy (and sensitive) statutory will and attorneys as personal representatives;

(3) In the Practice and Procedure Report: a challenging decision on the inherent jurisdiction, CoP statistics and guidance on anonymisation;

(4) In the Wider Context Report: the Code of Practice is being revised, guidance on CANH and the Mental Capacity Action Day looms;

(5) In the Scotland Report: a welcome change to guidance in relation to voter registration, and the death of the former Director of the Mental Welfare Commission.

Last, but very much not least, her fellow editors invite you to join in congratulating Tor on her appointment as Queen's Counsel.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here.

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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

Neglect and attorneys – (yet another) problem with the criminal law

Kurtz v R [2018] EWCA Crim 2743 Court of Appeal (Criminal Division) (Macur LJ, Knowles J and HHJ Wall QC)

Criminal offences – ill-treatment/willful neglect

Summary

A solicitor specialising in mental capacity was charged with the offence of wilfully neglecting her mother in respect of whom she was the donee of an enduring power of attorney ('EPA'), contrary to s 44(1)(b) MCA 2005. Her mother, with whom the solicitor lived, had a history of mental illness including bipolar disorder, depression and obsessive-compulsive disorder. She also had a history of failing to co-operate with medical professionals when they tried to help her. The mother had refused to see her GP or to have a Mental Health Act 1983 assessment in 2004, and thereafter had had nothing to do with doctors. There was evidence that in the past when her mother had availed herself of medical assistance it had temporarily alleviated her mental health conditions. There was also evidence that the mother could be difficult with anyone within the family who tried to persuade her to seek medical attention. When paramedics, called by the solicitor, attended the home, her mother was pronounced dead at the scene. She was 79 at the time of her death. Her body was in a seated position on a sofa in the living room which had an indent in it suggestive of her having sat there in the same position for some considerable time. She was sitting in her own urine and faeces, and had urine burns and sores on her buttocks and legs. She was malnourished (weighing only about six stone) and was covered in dirt. Her hair was matted and her nails were unkempt, suggesting that they had received no attention for over a year. When the paramedics tried to lift her body from her seat, her clothes fell apart. She had not changed her clothing for many, many months.

The prosecution originally charged the solicitor with the offence under s.44(1)(a) MCA 2005, on the basis that she had care of her mother. However, the prosecution then changed the indictment to the offence of s.44(1)(b), on the basis that she was the donee of an EPA. This was on the basis that the prosecution considered that this obviated the need for the prosecution to prove either that her mother

lacked capacity, or that the solicitor had care of her; and, hence that this made the prosecution's task simpler.

At the trial, the judge had agreed with the prosecution and ruled that the prosecution did not need to prove that the woman's mother lacked capacity. The judge therefore did not direct the jury in relation to capacity. The solicitor was convicted and sentenced to 30 months' imprisonment. She appealed to the Court of Appeal on the basis that the existence of the EPA was not sufficient of itself to render the Appellant guilty of the offence contrary to s 44(1)(b) of the MCA 2005, even if she had wilfully neglected her mother. Two points were advanced in support of this ground:

1. The offence created by s.44(1)(b) only applied where the EPA had been registered.
2. Section 44(1)(b) had to be read as requiring the prosecution to prove that the victim lacked capacity at the time of the offence; as the judge had directed to the contrary, the solicitor's conviction was unsafe.

Prefacing their consideration of the grounds, the Court of Appeal expressed their sympathy for the judge, faced with the task of interpreting s.44(1)(b) in the absence of Court of Appeal authority and against the background of criticism by the Court of Appeal of the drafting of s.44 in connection with appeals against conviction for the offence contrary to s.44(1)(a) of the MCA 2005 (see here and here).

The Court of Appeal had no hesitation in rejecting the first limb of the solicitor's appeal,[1] not least because:

> [u]*nder paras 4 and 13 of Sch 4, only the donee of an EPA can register it. If the s 44(1)(b) offence required the EPA to be registered, then the donee could avoid liability for the offence, no matter much they ill-treated a non-capacitous donor, by not registering the EPA. This would hardly further the principal aim of the MCA 2005 to provide protection for those who are vulnerable through a lack of capacity.*

As to ground 2, the Court of Appeal identified the essential question as being as whether:

> *on a prosecution for the offence contrary to s 44(2) read with s 44(1)(b), the prosecution must prove that the person said to have been wilfully neglected or ill-treated lacked capacity, or that the defendant reasonably believed that s/he lacked capacity. We shall refer to this as 'the lack of capacity requirement'.*

Having conducted an extensive examination of the pre-history to s.44, statements made during its legislative passage, and the Code of Practice, the Court of Appeal concluded that the answer must be 'yes,' rejecting the broader construction that the judge had adopted, which could give rise to criminal liability merely because the victim had granted the EPA (and hence even if they, in fact, had capacity at the time). The court recognised that:

> *possibly there might be circumstances when a donee of an EPA with authority for*

[1] Note, there is what must be a typographical error at paragraph 36, where the Court of Appeal refer to the donee of an LPA; they clearly mean EPA.

> *property and affairs could wilfully neglect a donor who has the relevant mental capacity regarding his/her property and affairs, but with physically restricted access to funds, for whatever reason. However, we find it difficult to contemplate how a capacitous donor of an EPA could be wilfully neglected in terms of their personal welfare, if that donor refuses medical treatment and why the donee of an EPA, restricted as it is to property and financial affairs, should be made criminally liable in those circumstances. We do not believe that this result, which would be a consequence of the broader interpretation, could represent the will of Parliament, which was careful to preserve the autonomy of the individual by the principles expressed in s 1 of the MCA 2005.*

As the judge had failed to direct the jury that it had been for the prosecution to prove that the victim lacked capacity, the solicitor's appeal was allowed.

Comment

It is clear that the Court of Appeal had some considerable reservations about the outcome of the appeal on its facts. It observed that:

> *The state of* [the victim] *in the months leading up to her death, and the conditions in which she spent the last weeks and months of her life, might well have been sufficient, without more, for the jury to have been satisfied that she lacked capacity. Also, given that the Appellant was a solicitor specializing in mental capacity matters, and given that she lived with her elderly and infirm parents, the prosecution would have had little difficulty in showing that she had the care of her mother for the purposes of s 44(1)(a). We consider that had the prosecution proceeded on the indictment as originally drafted then the complications of this case might never have arisen.*

As to the law, the case only reinforces how poor is the drafting of s.44, as the Court of Appeal had to undertake what amounted to a wholesale rewriting of s.44(1)(b). After all, on its face, there is nothing to suggest that s.44(1)(b) is limited by the capacity requirement, and it would have been equally plausible (absent the legislative archaeology exercise undertaken) to have construed s.44(1)(b) as applying where a person is abused or wilfully neglected by someone they trusted sufficiently to make their attorney. This is particularly so given that an LPA (unlike an EPA) is not registered upon incapacity, but rather from the outset. On one view, therefore, the registration of an LPA (and hence its creation for purposes of the MCA[2]) automatically puts the donor in a potentially vulnerable position, as the donee could manipulate or otherwise misrepresent the donor's capacity to take relevant decisions.

Given that the capacity requirement has been held to be the person's capacity to make decisions concerning his/her care (under s.44(1)(a) but now, apparently, also to be read across to s.44(1)(b)) it seems that the offence under s.44(1)(b) is very much narrower, and more difficult to establish, than we might have thought.

[2] See s.9(2)(b).

When not telling is in a person's best interests

EXB v FDZ [2018] EWHC 3456 (QB) High Court (Queen's Bench Division) (Foskett J)

CoP jurisdiction and powers – interface with civil proceedings – deputies – financial and property affairs

Summary[3]

In this personal injury case, Foskett J had to grapple with a question that has apparently never been considered (or, more likely, never been the subject of a reported case). Should the deputy appointed to manage the substantial personal injury payment made to the brain-injured claimant be permitted not to tell the claimant the precise sum awarded him?

The matter arose because the claimant's mother (his litigation friend) and his solicitor considered that it was in his best interests for him not to be told the settlement sum. Rightly, they, and the court, recognised that this represented a substantial interference with his rights, and Foskett J adjourned, including for pro bono assistance from Tor Butler-Cole as amicus curiae.

The evidence reviewed in detail by the judge included the following from his treating neuropsychologist (who did not know the settlement sum):

> *The first issue, to my mind, would be his vulnerability. If he were to have knowledge of a specified sum he would have a significantly compromised and basic appreciation of its intended purpose. Such knowledge would translate and impact upon his behaviour. In plain terms I know that if EXB knows that he has a specific sum of money he (a) perseverates over it and cannot move beyond thinking about what he's going to spend it on, and (b) he will seek to spend money that he has in his head – even if he doesn't physically have it. It would, in my view, escalate his existing vulnerabilities to himself and his own actions. It would also escalate his vulnerability to others.*
>
> *In my clinical opinion knowledge of a crystallised figure from his perspective would cause him to be more vulnerable to his own impulses, and increase his vulnerability to other people who might, for example, propose to borrow money from him …*
>
> *He, in my experience, constantly lives beyond his means. This situation is not mediated by the amount he receives. It results in him borrowing money, and him being in a seemingly unbreakable cycle of what he refers to as "owing money out". There is a culture within EXB's peer group of lending money to one another and helping each other out financially. Clearly there is nothing wrong with this per se, but there is clearly a risk of exploitation if there is a perceived imbalance within that group of their respective means.*
>
> *In my opinion EXB is likely to conceptualise a crystallised figure as a pot of gold or lottery win. Upon the assumption that it is a substantial sum, it is likely to distort his perception of his own means, and exacerbate his preoccupation over money. It is likely to*

[3] Tor having been involved in this case, she has not contributed to this note.

> *encourage "Well it's my money - I've got this amount - Why can't I have £x for whatever?". In my view it is likely to exacerbate EXB's existing difficulty with money and his finances, and consequently also significantly exacerbate his frustration. It would further limit his insight into situations that he already finds himself in, such as misallocating and spending money on items that he had not planned. The coherent sense that his support team are trying to employ with EXB by, for example saying if you ask for £100 for x, you need to spend it on x, would largely become missing on EXB as he would simply be preoccupied by the conceptualised pot of gold. EXB does not have an overall coherent sense and appreciation of his finances, his preoccupation with money, his behaviour, and how all of these are linked together. In my view it is therefore important to appreciate that a specified figure is not just likely to affect his actions and decision making, but also his frustration and behaviour to the detriment of himself and those around him.*

Interestingly, but not entirely surprisingly given that many with brain injuries are frequently able to grasp at least part of their deficits, EXB himself seems to have had some appreciation of his position and expressed views both to his own solicitor and to the court that it was better that he did not know the sum, although (after having said this to the court) apparently expressed the view that he had been conned into doing so.

In approaching the question of what was in EXB's best interests, Foskett J noted the difficulty posed by the fact that, logically, this could only be asked having assessed EXB's own capacity in this domain – when this would be entirely to defeat the exercise. He found he was able to conclude, however, that he lacked the relevant decision-making capacity. He further found that it was in EXB's best interests not to be told the sum, relying in part upon the fact that:

> *the conclusion to be drawn from all the evidence is that when the Claimant is capable of sitting down and weighing up the competing considerations calmly, possibly with the assistance of others, he considers that it would be in his best interests not to know the amount of the award.*

Foskett J left for another day the question of whether a decision not to tell a person in the Claimant's position a sum that they had been awarded lay within the scope of the normal deputyship order made by the Court of Protection. He was, in this, particularly persuaded by the fact that it would make the deputy's life much more difficult if it perceived to be the deputy's decision not to tell the person; conversely, it would be significantly easier for the deputy if they could tell the person that the court prevented them from doing so.

Foskett J endorsed an order which is likely to be assistance in any future case in which this issue arises, and held that the costs of the exercise that he had undertaken had to be borne by the relevant defendants, as the need to make the application arose directly out of their actions.

Finally, Foskett J noted that:

> *53. If it is the case that it is an issue that might arise for consideration more frequently than hitherto, I think there is at least the makings of a case that the inter-relation of the normal rules of civil practice and the rules of the CoP is*

considered with a view to trying to streamline a way of dealing with the issue, if it arises, in a convenient and fair way. As I have already said, I have been greatly assisted by both Counsel in this case and, in particular, by Ms Butler-Cole who kindly agreed to act on a pro bono basis. However, that cannot be expected in every case, but it is possible that the issue (or some other welfare issue) will arise at the time when the case is still proceeding in the High Court. Whilst some QB Judges will have experience of the CoP jurisdiction, many will not. (There is also the question of what happens where an action in the County Court raises a similar question.)

54. All I can do is to flag up the issue and invite the appropriate bodies to consider it. I will send a copy of this judgment to the Deputy Head of Civil Justice and to the Vice-President of the Court of Protection so that they can consider whether any consultation on this issue is required and whether any action needs to be taken as a result.

Comment

Foskett J was undoubtedly right to conclude that the principles both of the MCA and of the CRPD suggest that, ordinarily, a person in the Claimant's position should be informed of the details of a settlement award because this would be to treat him in the same way as a person without a disability. In some ways, this was a relatively easy case for him to determine, because there was at least some evidence upon which he could rely in order to conclude that the person did not wish to be told the settlement sum (in CRPD language, to withhold it from them was to respect their rights, will and preferences). It would have been significantly more difficult for him to have taken the course that he did if EXB had been demanding consistently to know the sum; now that this issue is squarely on the radar of practitioners, it will no doubt only be a matter of time before such a case does arise.

Attorneys and personal representatives

Whittaker v Hancock [2018] EWHC 3478 (QB)
High Court (Chancery Division) (Master Shuman)

Other proceedings - Chancery – lasting powers of attorney

The case provides clarification of the application of s.50 of the Administration of Justice Act 1985 ("the 1985 Act") – the power of the High Court to substitute or remove a personal representative. In doing so guidance was given on the interaction between powers of attorney and those of a personal representative.

The deceased had made a will which appointed his wife and niece as joint executrices, with his wife as the sole beneficiary. No provision was made for the deceased's daughter (the Third Defendant) who subsequently questioned the will's validity.

Before his death the deceased's wife executed a lasting power of attorney in favour of her daughter (the wife's daughter as opposed to the deceased's daughter and Third Defendant), who was the Claimant. The wife was subsequently moved into full time residential care as a result of her dementia.

In these proceedings the Claimant applied under s.50 of the 1985 Act to be substituted as personal representative for the deceased's estate in place of the deceased's wife. The wife lacked capacity to consent to this. The claim

was resisted by the deceased's daughter who argued that the LPA did not give the Claimant power to represent the wife in this way – it was said that the LPA only permitted the Claimant to deal with the wife's property and financial affairs, not the deceased's financial affairs.

Master Shuman rejected that argument, observing that the LPA was not subject to any limitations. As a result, the Claimant's authority was subject only to the provisions of the Mental Capacity Act 2005, notably the requirement to act in the wife's best interests. This means that the Claimant was empowered to make decisions about the wife's "property and financial affairs", which included the deceased's estate given that the wife was the sole beneficiary. The Claimant could also have brought the application as attorney for the wife who was a joint executrix. Importantly, the Claimant was not seeking to act in her own right but in a representative capacity as attorney.

In the event that the above approach was found to be incorrect, Master Shuman held that the wife could be added as the Claimant and the current Claimant appointed as her litigation friend.

Comment

This case is a useful reminder of the breadth of authority contained in most property and affairs LPAs. It is now clear that this covers the administration of an estate where P is a sole beneficiary.

A statutory will at speed

LCN v CJF [2019] EWCOP 1 (District Judge Beckley)

Summary

In this case P (CIF) was seriously injured at birth. By a litigation friend, he brought a claim for damages against the hospital trust responsible for his care at birth. That resulted in an award of damages consisting of a lump sum of over £800,000 plus substantial periodical payments.

He was born on 2 October 2005 and by November 2018 it was clear that he was critically ill. At that time, he was living in a home bought with his award, being cared for by a couple (AH and EH) who were his special guardians.

P was too young to make a will and the MCA mirrors that restriction in relation to statutory wills (section 18(2)). On intestacy, P's estate would be divided between KF (his mother) and his biological father who had denied paternity, played no part in P's life and whose whereabouts were unknown.

P's deputy (LCN) thus applied as a matter of urgency on 20 November 2018 for the court to authorise the execution of a settlement by P of his estate, on P for life and thereafter the property where he lived to pass free of inheritance tax to EH and AH, the residue to KF.

The application was heard and determined on 26 November and P died on 4 December.

All parties agreed that a settlement was in P's best interests and that the appropriate guidance was to be found in cases on statutory wills. So far as service on the biological father was concerned, that had not been attempted as his

whereabouts were unknown and he was not a party. By reason of the urgency, the application continued without any attempt to notify him. The final order required an attempt to serve him with the order and gave him permission to apply within 21 days of service.

The only issue between the parties that the court had to decide was the incidence of inheritance tax. KF, AH and EH were unable to agree that partly because of the emotional trauma caused by P's condition and prognosis. In the end the court decided that P would have wanted EH and AH (and their children) to have the security of the home without the worry of having to raise the tax so the gift to them was tax free.

Comment

This shows how the Court of Protection can move swiftly in cases where P's life expectancy is short and a statutory will is needed (or in this case a settlement). It also illustrates the rare type of case where the court will proceed even though a person who would benefit under an intestacy (as here) or a previous will has not been given the chance to be heard.

Updated guidance on searching the OPG register

The OPG for England and Wales has published a new practice note on searching the register of lasting powers of attorney (LPAs), enduring powers of attorney (EPAs) and deputyship orders which the OPG has a duty to maintain under the Mental Capacity Act 2005.

While it has been possible to request a search of the register since 2013, the new form OPG100 now allows applicants to request any additional information to that held on the register. The OPG will consider such requests on a case by case basis, only disclosing additional information when the request is reasonable and justified, or when legally required to do so. The OPG will prioritise requests made by public authorities, in particular sharing information where there may be a safeguarding concern.

Alan Eccles to retire

The Public Guardian for England and Wales and Chief Executive of the Office of the Public Guardian, Alan Eccles, has announced his intention to retire in June 2019, after 7 years in post.

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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 Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. 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), 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 has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. To view full CV click here.

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Simon Edwards: simon.edwards@39essex.com

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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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

Conferences at which editors/contributors are speaking

Edge DoLS assessor conference

Alex is speaking at the Edge DoLS assessor conference on 8 March, alongside other speakers including Lord Justice Baker and Graham Enderby. For more details, and to book, see here.

Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." 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 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 edition will be out in March. 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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