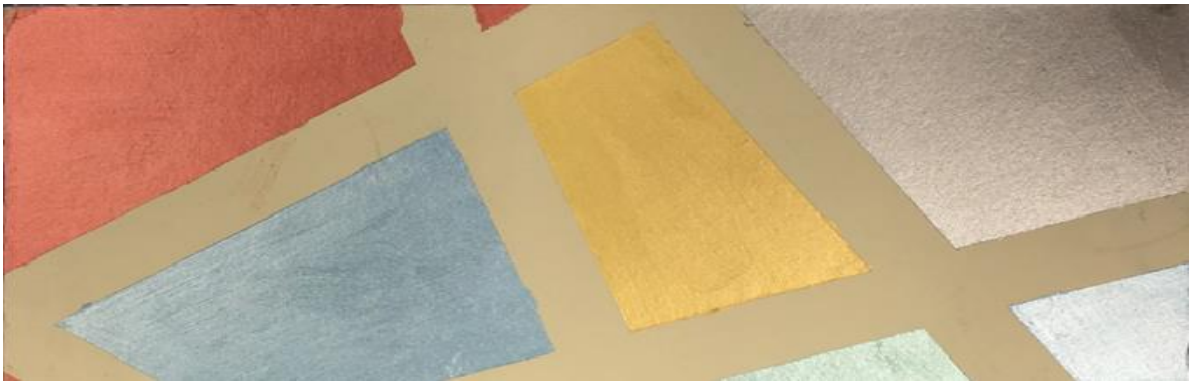
Essex CHAMBERS

MENTAL CAPACITY REPORT: PROPERTY AND AFFAIRS

October 2019 | Issue 98



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

(1) In the Health, Welfare and Deprivation of Liberty Report: the Supreme Court pronounces on confinement and 16/17 year olds and two important – and difficult – cases about sex;

(2) In the Property and Affairs Report: attorneys and gifts, and withholding knowledge of an application from P or another person;

(3) In the Practice and Procedure Report: the Court of Protection mediation scheme, and the inherent jurisdiction, necessity and proportionality;

(4) In the Wider Context Report: learning from a complex case about medical treatment for a child, the Irish Bournewood and an important shift from the CRPD Committee in the context of legal capacity;

(5) In the Scotland Report: developments in the context of the MHTS and sentencing in the presence of disability.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find our new guidance note on the inherent jurisdiction.

If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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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

Attorneys and gifts

Re Various Lasting Powers of Attorney [2019] EWCOP 40 (Senior Judge Hilder)

Lasting power of attorneys – gifts

Summary

In this case the Public Guardian brought to the court various LPAs that had been submitted for registration but in respect of which there were concerns as to the effectiveness and lawfulness of some of the provisions.

In essence, the concerns related to provisions in the LPAs that either mandated or stated a desire that the donee should benefit people other than the donor including in one case the donee himself. The question was, could such provisions be included in a valid LPA or should they be severed?

Mostly, the provisions had been inserted in the "instructions" section on the form but some had been in the "preferences" section.

This is one example.

> *At section 7 of the instrument under the heading 'Preferences' the donor entered the words "The needs of [LS] before anyone else.' Under the heading 'Instructions', she entered the words "The attorney [SS] must ensure that the needs of my daughter [LS] are taken care of…"*

At paragraph 69, the court expressed general conclusions. They can be summarised as follows.

1. A donor cannot authorise a gift within the meaning of s.12 MCA 2005 so as to extend the attorney's powers to make gifts in circumstances covered by that section.
2. Provisions that authorise the benefitting of another are not rendered valid simply by reason of the fact that the donor owes a legal obligation towards that other for that other's maintenance.
3. A provision that provides for the donee to use the donor's funds to benefit another person may be valid so long as it is a precatory provision. If it is mandatory, it is ineffective.
4. A provision that authorises the benefitting of the donee is not invalid simply because the donee is in a fiduciary position viz a viz the donor.
5. Such a provision is also not invalid simply because of a conflict of interests as such has been authorised by the donor and in any event the donee is obliged to act in the donor's best interests.

On the way to these conclusions, there was substantial discussion of what constituted a gift within the meaning of section 12. Section 12 provides.

> *12 Scope of lasting powers of attorney: gifts*
>
> *(1) Where a lasting power of attorney confers authority to make decisions about P's property and affairs, it does not authorise a donee (or, if more than one, any of them) to dispose of the donor's property by making gifts except to the extent permitted by subsection (2).*
>
> *(2) The donee may make gifts –*
>
> *a. on customary occasion to persons (including himself) who are related to or connected with the donor, or*
>
> *b. to any charity to whom the donor made or might have been expected to make gifts,*
>
> *if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.*
>
> *(3) 'Customary occasion' means –*
>
> *a. the occasion or anniversary of a birth, a marriage or the formation of a civil partnership, or*
>
> *b. any other occasion on which presents are customarily given within families or among friends or associates.*
>
> *(4) Subsection (2) is subject to any conditions or restrictions in the instrument.*

The court held that the only voluntary dispositions of the donor's estate that come within this section are those made on a "customary occasion" or where the donor is not under a degree of obligation in respect of the disposition (see paragraph 54). This departs from the previously held view, including by former Senior Judge Lush, that there had to be some element of need in the disponee that is satisfied by the disposition.

As regards the actual provisions, the court reminded itself that the fact that the term was in the "instructions" or "preferences" section was not determinative. The court then went on to construe each provision. Most were held mandatory and therefore invalid because they would inhibit the attorney from making decisions in the donor's best interests so, in the example given above the decision was:

> *At section 7 of the instrument under the heading 'Preferences' the donor entered the words "The needs of [LS] before anyone else.' Under the heading 'Instructions', she entered the words "The attorney [SS] must ensure that the needs of my daughter [LS] are taken care of…*
>
> *The first of these provisions is an expression of wishes. It does not contravene the Act. It is not ineffective as part of the lasting power of attorney, and it would not prevent the instrument from operating as a valid lasting power of attorney. Its inclusion in the instrument is not a problem.*
>
> *The second of these provisions is in mandatory terms. As a condition of authority, it would prevent the attorney from properly making a best interests*

> *decision. It is therefore ineffective as part of a lasting power of attorney. If severed, the instrument can operate as a valid lasting power of attorney.*
>
> *I sever the second provision and direct the Public Guardian to register the instrument with a note to that effect attached.*

At paragraph 68, the court gave guidance as to the circumstances where an attorney should seek the court's consent to a proposed disposition:

> *A proportionate approach has to be taken to considerations of conflict of interest, balancing the risk of abuse against the objective of facilitating autonomous decision making. In my judgment, where the donor whilst he had capacity used his own funds to benefit another (including the attorney) in the way contemplated, or where there is an express statement in the instrument of the donor's wish that his funds be used in the way contemplated, there should be no requirement for the attorney to seek prior authority from the court to use the donor's funds to benefit another, even if the attorney is in a position of conflict of interest. However, in the absence of either capacitous demonstration of such beliefs and values, or express statement of wishes in the instrument, where the use of funds under contemplation gives rise to a conflict of interest on the part of the attorney, the attorney should make an application to the court for prior authority pursuant to section 23(2) of the Act.*

Comment

The guidance given in the paragraph immediately above only applies to dispositions that are not gifts covered by s.12 MCA 2005 (as explained above). In respect of such gifts, if they are not authorised by section 12, then the attorney must seek permission from the court.

This decision extends somewhat the class of voluntary dispositions that are not gifts within s. 12 MCA 2005 beyond those dispositions that cater for a person's needs to those where there is some sense of obligation on the part of the donor of the LPA towards the person being benefitted (provided that the disposition is not on a "customary occasion").

The decision also makes it clear that where a disposition is mandated by the LPA, the provision will be ineffective and severed whereas, in general, precatory words will be allowed.

Unusually, but helpfully, Senior Judge Hilder, noting that her conclusions will be "applied in the day to day context of lay people making arrangements for management of their funds and acting as attorney," summarised them in the form of a 'decision tree' attached to this judgment.

Withholding knowledge of an application (1) from P

DXW v PXL [2019] EWHC 2579 (QB) (High Court (Pushpainder Saini J)

CoP jurisdiction and powers – interface with civil proceedings

Summary

In this case P suffered serious brain injuries whilst at work. These left him with severe cognitive and executive impairments. Apart from lacking litigation capacity, the evidence was

clear that he lacked the capacity to manage his property and affairs. His claim for damages was settled for £6.6million and the court approved that settlement making the usual anonymity orders.

Those responsible for P's care and his property and affairs deputy considered that P would be at risk of significant harm if he knew the size of the award. There was evidence that P's rehabilitation would be prejudiced, that he would become upset and confused and would be rendered more vulnerable.

The court in *EXB v FDZ* [2018] EWHC 3456 (QB) (2019) PIQR P7 had considered this issue and granted an order that it was in P's best interest not to be told the size of the award and this case is an illustration of when such orders are justified and considers a factor that was not present in *EXB*.

In *EXB*, P had been informed that P's views had been sought bearing in mind the requirement in s.4(6) MCA 2005 when applying the best interest test to consider so far as reasonably practicable P's wishes and feelings and the principles of non-discrimination and autonomy enshrined in the CRPD.

In this case P had not been told of the application. The judge was concerned about this, see paragraph's 9-11, stating that in the ordinary case P's views should be sought and that strict justification based on evidence of real necessity would be required to displace that starting point.

Ultimately, the court was so persuaded principally on the grounds that P's rehabilitation would be impeded if he knew even that the application was being made (paragraph 16).

Comment

Applications to this effect will be unusual as they represent a serious invasion of P's right to know and the principles of autonomy and non-discrimination. Even rarer will the case here that P is not told of the application itself. The effect of the decision in this regard is that the court has made a decision for P that P should not be told of an application being made in respect of P's property and affairs in circumstances where he could express a view so that ascertainment of his wishes and feelings is reasonably practicable. This is directly contrary to s.4(6) MCA 2005 which **requires** (through the use of the word "must") consideration of such wishes and feelings.

Withholding knowledge of an application (2): from another person

M and H v P [2019] EWCOP 42 (Senior Judge Hilder)

Practice and procedure (Court of Protection) – without notice applications

Summary

In this case the court was considering an application that the court should authorise the making of a statutory will on P's behalf and the issue arose of whether P's son, a beneficiary in an earlier will should be joined or notified.

P was a successful businessman and had suffered a stroke. He had a will but the change of circumstances following his stroke, involving the need for substantial care, together with evidence that before his stroke, he was considering a change, prompted those interested in his care to consider that a new will was in P's best interests.

The initial proposed will adversely affected P's son's interests so pursuant to PD9, he was a mandatory respondent. By the time of the hearing, though, the proposed will had been modified so that the requirement was for notification of the proceedings only.

The applicants and the OS, who was appointed as litigation friend on P's behalf in the usual way, considered that P's son should not be joined or notified because he had behaved in a threatening and demanding way towards P in the past and had been sent to prison for breach of a restraining order and they feared that if he was notified, similar behaviour would ensue such that if he was to be notified, the applicants would withdraw the application.

The judge refereed to the guidance given by former Senior Judge Lush in *I v D* [2016] EWCOP 35 concerning dispensation with service. She held that where dispensation was in relation to notification only as the person's interests were not materially adversely affected, the balancing exercise was differently weighted to the situation where the person should ordinarily be made a respondent. At paragraph 38, she said this:

> *Where a person is not likely to be materially or adversely affected by an application, the balancing exercise of procedural fairness in excluding him from the proceedings is differently weighted:*
>
> *a. Against such exclusion there is still the disadvantage that the court may have to determine the substantive application without all relevant material – X's account will not be available. There is too the ultimate risk that, after P's death when the fact of the statutory will inevitably becomes known to X, his exclusion from proceedings will foster a sense of resentment which actually aggravates the risk of the Applicants' fears being realised.*
>
> *b. However in favour of such an approach, it is more likely that an application which those with responsibility for managing P's financial affairs consider to be appropriate will be heard at all; and P's own representatives in the substantive application support this approach. In so far as X may feel aggrieved at having been deprived of opportunity to contribute to proceedings, the opportunity will have been lost because of his own (unlawful) actions.*

In the circumstances, the court acceded to the application that P's son be not notified of the application.

Comment

The balancing exercise carried out in this case is of particular interest in showing how the factors will differ depend upon whether the relevant individual's interests will be directly affected by the substantive order under contemplation.

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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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Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals. 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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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. 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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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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Conferences

Conferences at which editors/contributors are speaking

AWI, guardianship and elder law conference

Adrian is giving the keynote address for the Law Society of Scotland's conference on this subject in Glasgow on 30 October. For more details, and to book, see here.

Adult incapacity law

Adrian is delivering a lecture at Edinburgh Napier University on 13 November on "Adult incapacity law: visions for the future drawn from the unfinished story of a new subject with a long history." For more details, see the website of the Centre for Mental Health and Capacity Law.

Taking Stock

Neil is giving the keynote speech at the annual national conference on 15 November jointly promoted by the Approved Mental Health Professionals Association (North West England and North Wales) and the University of Manchester. For more information, and to book, see here.

Mental Capacity Law Update

Neil is speaking along with Adam Fullwood at a joint seminar with Weightmans in Manchester on 18 November covering topics such as the Liberty Protection Safeguards, the inherent jurisdiction, and sexual relations. For more details, and to book, see here.

Other conferences of interest

The Court of Protection Bar Association will be holding a seminar, open to members of the Association, on 28 October at 39 Essex Chambers in London addressing recent developments in mental capacity law. 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 edition will be out in November. 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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