ROOK IRWIN SWEENEY

Essex CHAMBERS

14th June 2022

Changes to the Mental Capacity Act 2005 Code of Practice – the appointment of personal welfare deputies

The Government's consultation on the proposed changes to the Mental Capacity Act 2005 ('MCA') Code of Practice will close on 7 July this year, with the main focus of the consultation being on the new Liberty Protection Safeguards scheme (LPS). However, the new draft Code of Practice contains wider updates to the existing Code, reflecting developments in case law and practice across the board.

One notable update relates to the guidance on the appointment of personal welfare deputies. The existing Code provides at paragraph 8.38 that deputies for personal welfare "*will only be required in the most difficult cases*", guidance that was challenged by the applicants in Re Lawson, Mottram and Hopton (appointment of personal welfare deputies) [2019] EWCOP 22, represented by Alex Rook, now of Rook Irwin Sweeney LLP, and Victoria Butler-Cole QC of 39 Essex Chambers.

In his judgment in that case, Hayden J outlined the principles which should govern the appointment of personal welfare deputies, confirming that there is no statutory bias or presumption against the appointment of a deputy, each case needing to be decided on its merits by reference to whether the appointment is in the best interests of the incapacitated adult (known as 'P'). This was the outcome that the 3 families had sought when they brought the case. Hayden J considered that constructing an '*artificial impediment*' to the appointment of a personal welfare deputy, such as a statement that it would only be appropriate in the 'most difficult cases' would *"fail to have proper regard to the 'unvarnished words' of the MCA"*, and that paragraph 8.38 of the Code therefore required to be revisited.

The judgment was also clear that the most likely conclusion in the majority of cases will be that it is not in P's best interests for the Court to appoint a welfare deputy. The judge's reasoning was that the informal and collaborative decision-making process envisaged by the MCA, whereby the relevant parties are able to come together to reach a consensus on P's best interests, should usually be sufficient. One implication of the judgment was that applicants seeking to be appointed as welfare deputies would need to demonstrate why divergence from that consensual process was justified.

What does the proposed amended Code now say?

Hayden J's judgment is reflected, and explicitly referenced, in the new draft Code, which provides guidance on the appointment of personal welfare deputies at paragraphs 9.12 – 9.14. The relevant section begins with a statement which mirrors Hayden J's assessment of the likely outcome of welfare deputyship applications:

> *"9.12 There are fewer personal welfare deputies than property and financial affairs deputies. Many decisions regarding care and treatment can be made applying the process set out in section 5 of the Act […]"*

At 9.13 the draft Code then confirms that the question for the Court is whether the appointment of a personal welfare deputy is in the best interests of the person, aiming, it seems, to have proper regard to the "unvarnished" words of the MCA, as opposed to any test that requires a consideration of whether this is a 'difficult case'.

It goes on to remind readers that P's wishes and feelings will form an important aspect of that decision, for instance where P wishes a family member to be appointed to advocate on their behalf. This will provide comfort to family members hoping to be appointed as welfare deputies where they believe that this also reflects what P wants.

Paragraph 9.14 also reflects Hayden J's judgment in *Re Lawson,* confirming the need for applicants to provide evidence that the collaborative decision-making process in s.5 MCA has not been working in P's best interests. It serves as practical guidance to applicants, giving the following (non-exhaustive) examples of situations that might demonstrate the point:

> *"• Disputes within the person's family that are having a detrimental effect on their care and will continue to do so unless one specific person is appointed to make necessary decisions*
>
> *• A person with a particular medical condition requiring repeated assessment and/or treatment, where there is clear evidence that a family member who is well-placed to advocate their wishes and feelings and make decisions on their behalf has not been appropriately consulted*
>
> *• Ongoing decisions on behalf of the person relating to the planning and implementation of a publicly-funded care package, where there is clear evidence that a family member who is well-placed to advocate their wishes and feelings and make decisions on their behalf has not been appropriately consulted"*

Conclusion

We do think that the proposed amendments are a helpful clarification of the law following Re Lawson. In our experience, the 3rd of the bullet point examples quoted above will particularly resonate with families who feel that they are the 'expert' in relation to P's views and wishes, but are overlooked once P's reaches adulthood, often in favour of a social worker or other paid professionals who, inevitably, won't have anything like the same depth of knowledge about P.

The 2nd bullet point however appears to us to be too restrictive. There is good evidence that people with learning disabilities often fail to get adequate routine medical care such as dentistry, not just specialist treatment for a particular condition. We are also aware that sometimes, it is not the lack of consultation that is the problem, but the delay caused by there not being an identified person who can act as decision-maker and whose authority is recognised.

We also consider that, although the examples are a non-exhaustive list, it would be helpful to include a further example confirming that a welfare deputy may be needed in anticipation of future decision-making, rather than as a result of historical problems. In our experience, the desire to address matters before a problem arises is a very common explanation why an applicant considers that it is in P's best interest that they are appointed as a welfare deputy.

Finally, we would stress, for the avoidance of doubt, that there will be scenarios where it is not in P's best interests for a family member to be appointed as a welfare deputy. We support the conclusion of *Re Lawson*, now reflected in the proposed new Code, that rather than considering whether this is a 'difficult case,' the proper consideration is whether the appointment of a personal welfare deputy is in the best interests of P, based upon their individual circumstances.

Rosie Campbell, Rook Irwin Sweeney

Alex Rook, Rook Irwin Sweeney

Victoria Butler-Cole QC, 39 Essex Chambers