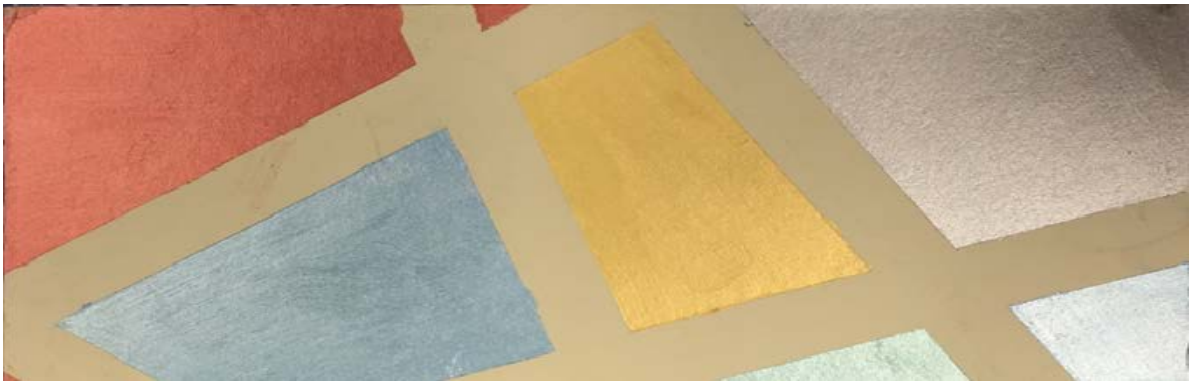
PROPERTY AND AFFAIRS
November 2024 | Issue 145



Welcome to the November 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: anticipatory declarations; systemic failure in considering PDOC patients, and the CQC and DoLS.

(2) In the Property and Affairs Report: Senior Judge Hilder reversing reverse indemnities and considering the scope of deputies' authority in the context of Personal Health Budgets;

(3) In the Practice and Procedure Report: costs and delay and capacity in cross-border cases;

(4) In the Mental Health Matters Report: the Mental Health Bill is introduced;

(5) In the Wider Context Report: Strasbourg suggests that the Supreme Court was wrong in the *Maguire* case.

(6) In the Scotland Report: Scottish Government's law reform proceeds at breakneck speed, and a symposium for Adrian.

There is one plug this month, for a free digital trial of the newly relaunched Court of Protection Law Reports (now published by Butterworths. For a walkthrough of one of the reports, see here.

His fellow editors congratulate Alex on his receipt of a Honorary Fellowship of the Royal College of Speech and Language Therapists (and he uses this opportunity to give his usual plug for their vital role as capacity supporters).

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

Contents

Reversing reverse indemnities?

Re BJB [2024] EWCOP 59 (T2) (SJ Hilder)

CoP jurisdiction and powers – interface with civil proceedings

Summary

This is the first reported judgment from Senior Judge Hilder relating to so-called *Peters* undertakings; in this case, a reverse indemnity undertaking, whereby BJB was obliged to remit 98% of public funding received to the tortfeasor.

BJB suffered a hypoxic brain injury at birth, which caused her to have dystonic cerebral palsy; she requires 24-hour care. She lived with her family until 2020, when she moved into her own home with a package of care, which since 2022 has been primarily funded with direct payments from the local authority.

She received damages from the NHS in 2009, with her father acting as her litigation friend, on a 98% liability basis. She received a lump sum payment of £1.4m and periodical payments which are adjusted annually for inflation, and are now approximately £132,000. Her father, as litigation friend on behalf of BJB, gave undertakings in the Queen's Bench Division that he would inform the NHS annually "*of the amount of 'state provision' received by BJB, 98% of which is then offset against the periodical payment due to be paid*" (paragraph 10). Specifically, the litigation friend committed to returning any local authority community care funds received to the NHS. Nothing in the orders appointing BJB's receiver (under the pre-MCA regime) and then deputy made any reference to the terms of BJB's damages award.

There was included in the QBD order a mechanism for release from these undertakings, recorded as follows at paragraph 11 of the judgment:

> *The Claimant and Defendant are agreed that the Claimant may be released from any of the undertakings given within this schedule at the discretion of the Master of the Court of Protection or his successor in the event that he is satisfied that the Claimant does not have sufficient resources to meet his (sic) reasonable needs…'*

There was no limitation on BJB applying for state funding, and the deputy would not need to be released from any such undertaking; however, BJB (and it would appear, the deputy, as the person being charged with handling her property and affairs) was to return 98% of any such funds to NHS Resolution.

In 2023, BJB's property and affairs deputy made an application to the Court of Protection for release from the reverse indemnity undertakings. That application was opposed by the Hospital Trust which was the Defendant to the damages claim, and by NHS Resolution.

It appears that the direct payments rose considerably in 2022 to a level near that of the

periodical payments, with previous payments having been lower due to BJB receiving care from her family (though it was not clear how much had historically been reverted). BJB's overall income had remained essentially static as the amount of the direct payments had been subtracted from periodical payments. The deputy estimated that BJB's outgoing expenses now exceeded her income by £5000/month, with BJB receiving approximately £3,000/week in a direct payment for her care from the local authority. Fifteen years after the lump sum payment was made, she continued to have capital in the amount of approximately £1.09m. The deputy argued that using capital to 'top up' the difference in cost between the local authority's direct payments and the actual cost of care "*does not provide a solution because it will be exhausted in around ten to twelve years, leaving BJB, then at a relatively young age, reliant exclusively on benefits. Her modest quality of life would dramatically fall*" (paragraph 29). The deputy argued that her resources were not sufficient to meet her reasonable needs, and the condition for discharging the undertaking was met.

At the time of the application, it was anticipated that "*the amount received from direct payments would exceed BJB's periodical payment, which would therefore be extinguished under the terms of the settlement order*" (paragraph 15).

The deputy's application for release from the undertakings was prospective, and there was no application for reimbursement of sums deducted from periodical payments in previous years.

NHS Resolution's opposition to the application for release varied, with the initial objection being on the basis that "*if the claimant were to be released from the reverse indemnity undertaking as she seeks then it appears that there would almost certainly be double recovery*" (paragraph 17). NHS Resolution argued that BJB would have a surplus income of £32,000 to £67,000 annually if she were no longer obliged to return local authority direct payments to the NHS. However, NHS Resolution's case on whether she had sufficient resources to meet her reasonable needs was less obvious from the judgment.

The deputy argued (filing evidence from her case manager) that BJB required 24-hour 1:1 care, and this assessment was apparently agreed by the local authority. It is not apparent how the local authority had reached the determination that BJB's needs could be met for approximately £3000/week, when her actual care package was considerably more expensive; it is not known whether the local authority had taken any view on whether BJB required a solo provision, or whether it considered that her needs could be met by continuous care in a shared setting.

NHS Resolution's case appears to have changed in the course of the application, and it appears that evidence was filed quite late, leading to it not being taken into consideration. Senior Judge Hilder was critical of the manner in which NHS Resolution had participated, stating that it had "*not challenged the reasonableness of BJB's current arrangements. They have not filed any financial evidence. Their objection to the application is in essence objection to BJB having recourse to both state provision and periodical payments to meet the costs identified by the Deputy*" (paragraph 30, emphasis in original).

NHS Resolution argued that the periodical payments were to cover care and case management, and the lump sum was to cover the other heads of loss. However, "*the presumption which underpins lump sum awards of damages is that a claimant will invest the award in such a fashion that she will be able to use the income and draw down the capital over her lifetime to fund her needs, such that by the end of her life the award will have dissipated*" and "*all the*

outgoings identified by the Deputy except contributions to direct payments 'will have been provided for in the calculation of the lump sum' approved in the settlement order" (paragraph 31). NHS Resolution argued that the periodical payments were no longer required as the local authority was now paying an amount to meet BJB's needs in excess of the periodical payments. It was argued that the periodical payments which were only required where state provision (the direct payments) was less than the amount of the indexed periodical payments.

NHS Resolution argued that BJB was thus not disadvantaged, as she was receiving a higher amount from the state than she would receive from the periodical payments. It was suggested (apparently without evidence) that BJB's funds had not been effectively managed so as to provide her with a higher income from capital; this argument found no traction with the court. It was argued that BJB's projections apparently allowed her to rely on both local authority funding and index-linked periodical payments without ever having to draw on her considerable capital, and it was not reasonable that she would be released from the undertakings without any obligation to draw on capital.

After reviewing relevant case law, Senior Judge Hilder began by considering her jurisdiction in this matter. It was asserted by the deputy that her jurisdiction arose either under s.19 Senior Courts Act 1981 read together with s.47(1) Mental Capacity Act 2005 (essentially granting the Court of Protection the right to make a High Court order) or to take this as a decision under s.16(2)(a) Mental Capacity Act 2005. NHS Resolution did not set out any basis for jurisdiction, but accepted that the Court of Protection did have the necessary jurisdiction.

Senior Judge Hilder rejected both of the routes to jurisdiction offered by the deputy, but considered that "*there is in the matter now before me some sort of obligation on the Court of Protection to 'adjudicate as between the claimant and the defendant.' That obligation comes from the High Court having made an order which incorporated the clause 5 mechanism agreed between the parties, and the Deputy's COP1 application properly made in the light of it*" (paragraph 51). She concluded that she did have jurisdiction on the following basis:

> *57. So, where does my jurisdiction lie?*
>
> *58. Capacitous disputants may agree to accept the determination of any third party if they so wish – a qualified arbitrator, an elder of their community, even the milkman. The authority of that third party comes from the agreement of the disputants to accept what they decide. In this matter, where BJB herself lacked capacity to take such an approach, the High Court has approved an agreement between her proper representatives and the defendant to her claim to accept the determination of the Senior Judge of the Court of Protection. I conclude that my jurisdiction is this matter is a jurisdiction by approved consent.*

Senior Judge Hilder goes on to describe how the matter came before the court, and how the court would exercise its jurisdiction:

> *61. The matter has come to me via usual Court of Protection procedures and therefore within the framework of the Mental Capacity Act 2005. It is a principle of that Act that an act done or a decision made under it for or on behalf of a person who lacks capacity must be done or made in their best interests.*
>
> *62. There is an obvious tension between a jurisdiction based in best interest decision making, and an adjudication between claimant and defendant.*

> *Clause 5 of BJB's settlement was approved before that tension was spelled out either by Senior Judge Lush in Reeves or by Lord Justice Longmore in Tinsley, but I proceed on the basis that the High Court must have intended, and the parties in the High Court proceedings must have agreed to, the incorporation of the best interest principle into the determination of the clause 5 release mechanism.*
>
> *63. So, I approach this matter:*
>
> > *a. first, by asking myself if I am satisfied that BJB does not have sufficient resources to meet her reasonable needs (the factual issue as spelled out in clause 5 of the settlement approval order);*
> >
> > *b. and then, in the light of that conclusion, by asking myself whether it is in the best interests of BJB that her Deputy should be released from the reverse indemnity undertaking.*
>
> *64. It should be clear from that approach that I am not determining any issue of 'double recovery.' If that is a deficiency, then in my judgment it is a deficiency to which the defendant in the damages claim consented and which the High Court approved. The place for addressing such deficiency is the court considering the damages claim, not the Court of Protection.*

In considering whether BJB had sufficient resources to meet her reasonable needs, the only evidence before the court was from the deputy, and NHS Resolution did not challenge the contention that BJB had an additional reasonable expenditure to meet her needs of approximately £7,600 per month / £91000 per year in addition to what was currently met by the direct payments, resulting in an overall deficit (after taking into account BJB's other income) of £60,000 annually while the reverse indemnity was in effect. Senior Judge Hilder did not consider that there was any bar on the deputy's using the periodical payments to meet needs other than care and case management needs, nor that the theoretical purposes of the lump sum and periodical payments assisted: the question was whether the overall level of BJB's resources met her overall needs. It was also recognised in a recital in the QBD order that 'there may be an upward shift in BJB's needs after the age of 30 (ie around now), and that the approved sums made no allowance for that.' (paragraph 70) Senior Judge Hilder considered that this recital 'very clearly point[ed] to the mechanism for release from the reverse undertaking.' (paragraph 70)

Senior Judge Hilder summarised her consideration of this issue thus:

> *72. So, even accepting that all of BJB's expenditure except contribution to direct payments was in contemplation when the lump sum was agreed, when asking myself if I am satisfied that BJB has sufficient resources to meet her reasonable needs, what I consider is:*
>
> > *a. all of her resources, including both capital awarded and other mechanisms in the settlement order; and*
> >
> > *b. her reasonable needs as I have found them to be, not as capitalised in the approved award.*

The only evidence before the court on how long BJB's funds would be able to sustain the needs which Senior Judge Hilder found to be reasonable was evidence from the deputy, which stated that BJB's funds would be extinguished in 10-12 years, with BJB having a life expectancy of over 40 more years. Senior Judge Hilder considered whether the application was

premature, but accepted the deputy's argument that "*having already reached the point where resort to capital was needed, it would not be acceptable for the Deputy to wait any longer to make the application because, if it were to be refused, she would need to make adjustments to BJB's expenditure (and therefore lifestyle) now to ensure that BJB's resources went as far as they possibly could*" (paragraph 74). In contrast, NHS Resolution had not filed any evidence that BJB would have a significant surplus, and the Senior Judge Hilder considered that "*any outcome of double recovery is not a matter for me to adjudicate*" (paragraph 75).

Senior Judge Hilder did not consider NHS Resolution's suggestion of a revised reverse indemnity was appropriate, as "[t]*he approved mechanism for release from the reverse indemnity undertaking is binary only (release or not), on the single threshold of sufficiency of resources to meet reasonable needs. For the same reasons that I have declined to take into account submissions as to effect of exercising that mechanism, I also decline to read into it any more sophistication than a binary option*" (paragraph 76). Senior Judge Hilder accepted the effectively unchallenged evidence of the deputy on "*income and expenditure and the only evidence before me in respect of how far BJB's capital will stretch, it follows that I am satisfied that BJB does not have sufficient resources to meet her reasonable needs. It is therefore open to me pursuant to clause 5 of Schedule 2 of the settlement approval order to release the Deputy from the reverse undertakings of that Schedule. To consider that, I look to the best interests of BJB*" (paragraph 77).

At paragraph 78, Senior Judge Hilder readily found it was in BJB's best interests to have:

> *access to the widest possible resources to meet her needs. If the Deputy is released from the reverse indemnity undertaking, there is no obligation to account for whatever state provision she receives and therefore no deduction from the periodical payments she will receive. I am satisfied that this outcome is in BJB's best interests, and I should release the Deputy from the undertaking.*

Senior Judge Hilder made a closing observation that

> *80. Along with Senior Judge Lush in Reeves and with Lord Justice Longmore in Tinsley, I too doubt that it is right for issues which arise in civil litigation to be transferred to the Court of Protection in the way that they were, some time ago, in this matter. When I asked counsel before me they confirmed that, to the best of their knowledge, orders with a Peters undertaking are no longer being made. I welcome that development.*

Comment

The closing observation of the judgment echoes concerns raised by other courts about the appropriateness of leaving decisions about the discharge of components of settlements in the KBD to the Court of Protection, and it is clear that in taking this decision, Senior Judge Hilder had to adjudicate on issues which would not normally be the subject of Court of Protection proceedings. From the tone of the judgment and comments made, it is clear that Senior Judge Hilder had concerns as to whether NHS Resolution had submitted appropriate evidence to the court; it also appears that it did not meaningfully challenge any of the evidence filed by the deputy, or the jurisdiction of the court to vary KBD orders.

In the absence of NHS Resolution contesting key aspect of the deputy's case, we would question the value of this judgment as precedent, and note

a number of points which may require consideration in future judgments.

Jurisdiction: We cannot see that under the Mental Capacity Act 2005, the Court of Protection has any power to discharge undertakings made in the KBD, a conclusion Senior Judge Hilder appears to have agreed with at paragraphs 54-57. It is also emphasised in this case that no party was actually raising a challenge to Senior Judge Hilder's jurisdiction, and thus it is unsurprising that this issue was addressed relatively briefly in the judgment. However, we continue to find this issue vexing. While the explanation of the court's route to jurisdiction at paragraph 59 is noted (that the parties would have been free to agree to 'accept the determination of any third party if they so wish…even the milkman' and this would grant that third party the 'authority' where the High Court had approved the agreement), it does not make clear whether this decision was considered to be delegated to the Senior Judge in his or her personal capacity, or as a judicial office within the Court of Protection. Did Senior Judge Lush's agreement to adjudicate this decision (and hold the power to discharge a QBD undertaking) apply to him specifically, or was he able to bind his successors in post and obligate them to act as an adjudicator? Could the hypothetical 'milkman's' agreement to adjudicate the dispute bind his successor as milkman on his retirement? Could the decision have been delegated to a named criminal judge who was considered appropriate at the time (for example, the Recorder of Liverpool) and bound subsequent holders of that judicial office decades into the future?

It is unfortunate that NHS Resolution did not probe this issue more fully, as we are not clear how a judge (in this case Senior Judge Lush) had the power to obligate his judicial successors to adjudicate disputes in courts in which they did not sit. We are also not clear that an agreement between parties in the QBD formalised by an undertaking (even where accepted by a QBD judge) could obligate a future judicial office holder in another superior court of record to use their time and resources on that dispute. We note that Senior Judge Hilder considered at paragraphs 50-53 that she was obligated to act in this matter, but we were less clear that the parties had any right to place this obligation upon her simply because Senior Judge Lush had agreed to act 15 years ago.

Role of the Court of Protection: The point above then leads to the question of whether in determining this dispute, Judge Hilder's authority arose as a result of her sitting as a judge of the Court of Protection at all, or whether she was essentially an arbitrator at the agreement of the parties, and the agreement of Senior Judge Lush that his successor would act as arbitrator – which would not appear to be an MCA decision. The concept of jurisdiction arising as effectively an arbitration agreement between the parties does not obviously square with the observations at paragraph 61 that "the matter has come to me via usual Court of Protection procedures and therefore within the framework of the Mental Capacity Act 2005. It is a principle of that Act that an act done or a decision made under it for or on behalf of a person who lacks capacity must be done or made in their best interests." It does not appear that the MCA 2005 had any part to play in this decision, as it did not appear within the settlement, and there was no express requirement in the order approved by the QBD for BJB's best interests to be released from the undertaking. Arguably, the sole issue that the QBD order provided for determination at any future point was whether BJB had sufficient resources to meet her reasonable needs. The application for any determination under the MCA 2005 appears to have been unnecessary here and it is not clear why this came before the court

via a 'usual' Court of Protection application, as it is not obvious that any decision was required under the MCA.

We would also express some concern as to how the MCA concept of "best interests" would come to bear on this issue: the question of release from a QBD undertaking is not a decision a person could take for him or herself, and the MCA 2005 would appear irrelevant. There would plainly be commercial implications for NHS Resolution in the discharge of the undertaking, as the undertaking would have created an ongoing revenue stream for the Respondent to offset the periodical payments. While NHS Resolution focused on 'double recovery', this would appear to have little relevance, as the key issue for the KBD Respondent was that it was losing its revenue stream by the discharge of the undertaking, which doubtless would have been a significant factor in agreeing the original settlement. The balance of rights between the parties in civil litigation in this matter appears, in reality, to have little to do with the MCA; this suggests that the issue of whether the conditions for discharge of the undertaking had been met would appear to be much better-suited to adjudication in the KBD.

Sufficiency of resources: There does not appear (on the face of the judgment) to be any criticism of the local authority's assessment of BJB's needs or its provision of direct payments to meet those needs. This would appear to imply that (a) the local authority had prepared a care and support plan which was capable of meeting BJB's Care Act-eligible needs and (b) provided direct payments in the amount required to provide this care and support plan. The deputy and case manager had chosen to arrange a care package which appeared to be considerably more expensive than the care package that the local authority considered capable of meeting her needs for care and support, and indeed, one beyond what was capable of being purchased with the additional funds from the periodical payments (which had been until recently less than the direct payments).

It is not obvious to us why NHS Resolution did not attempt to argue that, in the absence of any public law challenge or indeed any apparent criticism by the deputy, the local authority's care plan and corresponding level of direct payments were sufficient to meet her reasonable needs for care and support, and BJB had ample resources for non-care related expenses where BJB had higher-rate benefit income and capital of £1.09m to meet non-care related expenses. It appears to have been accepted by NHS Resolution that BJB's current level of expenditure (which resulted in her having an annual deficit of £60,000) was 'reasonable' and there was no obligation on the deputy to look to more sustainable arrangements even if those resulted in some changes in BJB's care arrangements or lifestyle. If NHS Resolution accepted that this expenditure was reasonable and it again appeared to accept the evidence (or at least, failed to file any credible evidence to the contrary) that she could not sustainably meet these needs in the long term, it is not entirely obvious why NHS Resolution chose to oppose this application at all. Again, it is not clear what the outcome of this decision would have been had NHS Resolution put in some focused evidence on this point and the court had had to determine a contest of what constituted a sufficient care package to meet BJB's 'reasonable' needs.

Periodical Payments: It does not appear to have been recognised by any of the parties in the case, the local authority or raised with Senior Judge Hilder, that BJB's periodical payments are not generally exempt from charging for the purposes of adult social care, and she will likely be obliged to pay most or all of these payments to the cost

of the local authority direct payments. This misapprehension appears to have been at least part of what led to NHS Resolution's understanding of the double recovery which was likely to exist if the undertaking was discharged. This issue is covered in detail in Arianna's book, 'Social Care Charging,' but briefly, unlike capital derived from personal injury awards, periodical payments are subject to a much more limited disregard under paragraphs 15 and 46 of Schedule 1 of the Care and Support (Charging and Assessment of Resources) Regulations 2014. The local authority is likely to be the primary beneficiary of BJB's being released from the undertaking, as she will likely be subject to very considerable charges from the local authority (where she now only contributes £282.36/month).

Personal health budgets and deputies

Lumb v NHS Humber and North Yorkshire ICB & Anor [2024] EWCOP 57 (T2) (SJ Hilder)

Deputies – property and affairs

Summary

This judgment considered an application by SBB's professional deputy (Daniel Lumb) to be discharged from his role. The central issue was what involvement a property and affairs deputy can/should have in the management of a Personal Health Budget under the National Health Service (Direct Payments) Regulations 2013 and specifically (as set out at paragraph 2):

a. *is management of a Personal Health Budget within the standard authorisations of a property and affairs deputyship?*

b. *can a property and affairs deputy be a 'representative'* [under the Regulations]*?*

c. *can a property and affairs deputy act as 'nominee'* [under the Regulations]*?*

d. *is the appointment of a 'representative' or a 'nominee' a best interests decision that the Court of Protection can make on behalf of SBB?*

e. *in the light of the conclusions to these questions, what steps should be taken in respect of deputyship for SBB?*

Senior Judge Hilder noted that "*Mr. Lumb has previously been involved in proceedings concerning local authority social care direct payments, a consent order from which is published at [2021] EWCOP 56. It is important to be clear from the outset that this judgment is concerned with a different direct payments scheme, in respect of health bodies rather than local authorities, to which different regulations apply*" (paragraph 3). However, the conclusions of the court as to the scope of the property and affairs deputy are broadly aligned between this judgment and the 2021 consent order.

SBB had a property and affairs deputy appointed in 2017, who was appointed, unusually, despite SBB not having any significant private assets, and having his income only from state benefits. SBB qualified for NHS Continuing Healthcare, and had a personal health budget (PHB) to purchase a package of care while he lived with his parents (a situation which has now persisted for many years). His care was provided by the ICB paying SBB's parents. The deputy was appointed to manage SBB's PHB, with the then-CCG funding his care. The original deputy was discharged as a result of safeguarding issues, and Mr Lumb was appointed in 2020 on standard deputyship terms.

The direct payments, though provided by the ICB, were paid through a system administered by the local authority, but the local authority did not have any decision-making authority. There was agreement that SBB's parents should not administer the direct payments, where they were the primary people being paid out of the direct payments.

Mr Lumb came to the view that deputyship was not required, though an application was made to call in the original deputy's security bond; the Court of Protection considered that consideration of discharge of Mr Lumb should follow resolution of the application to call in the security bond.

After the resolution of the call-in, Mr Lumb applied for discharge of the property and affairs deputyship on the basis that SBB did not require a deputy, and that acting as a 'representative' for the purposes of a PHB was not within the scope of a property and affairs deputy's general authority. This was opposed by the ICB, which submitted that "*SBB requires a property and affairs deputy to act as SBB's representative or nominee, and that acting as such falls within the general authority of a property and affairs deputy appointed under the standard order. It is prepared to commit to meeting the costs incurred by a property and affairs deputy in managing the Personal Health Budget*" (paragraph 4(b)). The ICB was prepared, in the alternative, to appoint case management companies as the 'representative' for PHB purposes.

Noting the provisions of ss.16 and 18 MCA, Senior Judge Hilder observed that at least three of the 11 sub-sections of the powers contained in s.18 MCA[1] "*do not concern management of 'assets' which 'belong' to P. From this it may be inferred that "ownership' is not the key defining feature of a person's 'property and affairs ' ...and 'affairs' has a wider meaning. On the other hand (and noting that SBB does not have a profession, trade or business), it seems to me that only (g) could be understood as possibly contemplating dealings with money belonging to a third party, such as an obligation to pay it back*" (paragraph 35). Senior Judge Hilder also noted that under s.16(5), the court may confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2), but that this provision "is to be understood as qualified by other provisions of the Act" (paragraph 38). In particular, the deputy had authority to deal with both P's property and affairs under s.16, though other parts of the MCA referenced property only. Looking to "*Re ACC & Ors [2020] EWCOP 9 at paragraph 53.7(c), that* […] *general authority of a property and affairs deputy does not encompass determination of the care needs of P but does encompass the application of P's funds to meet the costs of P's care arrangements including, if those arrangements involve direct employment of carers, preparation of employment contracts*."

Senior Judge Hilder declined "*to make a definitive conclusion on the legal basis on which direct payment monies move from the bank balance of the health body to the bank balance of the person whose care plan they are intended to facilitate. Rather, I limit myself to considering whether direct payment monies form part of SBB's "property and affairs" for the purposes of sections 16 and 18 of the Mental Capacity Act 2005*" (paragraph 47). Her conclusion, based on the relevant regulatory scheme, was that "*the patient receiving direct*

[1] (c) the acquisition of property in P's name or on P's behalf; (g) the discharge of P's debts and of any of P's obligations, whether legally enforceable or not; (k) the conduct of legal proceedings in P's name or on P's behalf.

payments does not have a right of free disposal of those monies. They must be applied for a specific purpose. The paying body exercises significant control over how funds are held, and some rights to recover payments made. None of these characteristics sits comfortably with the common understanding of 'property and affairs' as managed by a deputy" (paragraph 49).

Rejecting the submissions of the ICB that direct payments became P's property, Senior Judge Hilder found that:

> *54.* […] the *ICB's attempt to equate direct payments of a Personal Health Budget with payments of state benefits is misconceived. State benefits can be used as the payee pleases, and when the payee dies whatever remains (as long as it was not erroneously paid post-death) forms part of his estate. In contrast, it is not permissible for anyone to expend direct payments of Personal Health Budget in any way other than to give effect to an agreed care plan and, even where properly paid during the patient's lifetime, repayment obligations can arise. From this I conclude that the patient does not 'own' the direct payments in the sense considered at paragraph 36 above and the majority of the eleven particularisations at paragraph 18 of the Mental Capacity Act 2005. In that sense, we may say that direct payments are not P's "property."'*

However, Senior Judge Hilder did find that an incapacitous person who receives direct payments "*incurs obligations in respect of them; and discharge of a person's obligations, whether legally enforceable or not, is explicitly within the powers of the Court at section 18(1)(g) of the Act. So, I conclude that direct payments do fall within the meaning of '… and affairs' as envisaged in section 16(1)(b) of the Act*" (paragraph 55).

Senior Judge Hilder then turned to the question of whether the management of direct payments comes within the standard authorisations of a deputyship appointment; or, if it does not, whether such authorisation could be specifically granted. Judge Hilder concluded that 'representative' for the purposes of PHB direct payments:

> *must be able to 'plan' care arrangements - as in 'devise' them, not simply make administrative arrangements to pay for them. Such 'planning' of care arrangements is **not** within the standard authorisations of a property and affairs deputy* (paragraph 69)

Senior Judge Hilder also noted that the role was similar to the appointment of an 'authorised person' in social care, a role which had already been found to be outside of the scope of the standard deputyship order in the 2021 decision. The ICB also eventually accepted that the Regulations required some authority of a welfare type.

Senior Judge Hilder noted that the realities of deputyships did not appear to align with the role of the 'Representative' under the Regulations, as this appeared to require a person who had both authority to act for P in relation to welfare matters and P's property and affairs. Judge Hilder observed that welfare deputies were relatively uncommon. She also considered that this conclusion had implications for the potential appointment of a Trust Corporation replacement property and affairs deputy, which, like Mr Lumb, would not have welfare authority in respect of SBB.

In considering whether a property and affairs deputy could be appointed' by the health body as 'representative' pursuant to' the PHB Regulations, Senior Judge Hilder noted that the regulations permitted the health body to appoint

another person it considers appropriate to receive and manage the direct payments for the person lacking capacity. Senior Judge Hilder went on to observe that:

the Personal Health Budget representative is required to make decisions about healthcare and help develop care plans. This is an important aspect of extending the objective of 'choice' to those who, because of incapacity, need someone (other than the public body) to have determinative input into their care arrangements.' (paragraph 79)

She concluded that:

> *subject to consent, within the regulations the health body could appoint a standard terms property and affairs deputy ('D') to act as representative but that appointment would not alter the terms of the deputyship. If D agreed to act as representative, it would be outside the deputyship (leaving the oversight provisions within the Regulations themselves, without the extra supervision by the OPG.) Notably, the fees authorisation in the deputyship appointment would not extend to fees from P's funds for acting as appointed representative. Neither could the direct payments themselves be used to pay such fees. Since it is a reality of life that those who act as professional deputies would be likely to expect to be paid for their work, it seems unlikely that any such deputy would consent to such appointment unless the health body agrees to pay fees in respect of it. The health body would then presumably need to consider whether D - as opposed to, say, a case manager - represented the most appropriate appointment, in terms of best value for money and otherwise.* (paragraph 80).

The proposal of the court standing in the shoes of P to appoint a 'nominee' to manage the payments was rejected, as there is:

> *specific provision in regulation 5 as to when direct payments may be made in respect of persons who lack capacity. In circumstances where an administrative scheme itself makes provision for putting in place arrangements for management of direct payments where the recipient cannot make those arrangements themselves, it is unlikely to be appropriate for the Court to step in and make the nomination. The scheme stands self-contained….through a representative; and regulation 5(3) and (4) makes provision for where there is no representative - a health body may appoint another person it considers appropriate to receive and manage the direct payment* (paragraph 85)

However, that power rested with the health body to appoint a person, not with the Court of Protection, and "[t]*he regulatory requirements on a nominee do not fit within the standard authorisations of a property and affairs deputy*" (paragraph 91).

In considering whether the Court of Protection could specifically authorise a deputy to manage direct payments of a Personal Health Budget, Senior Judge Hilder concluded that this was possible, but cast some doubt on whether it would be desirable in this case. She noted that the ICB accepted in principle that a case manager could be appointed as the 'representative' for SBB, and stated her agreement that "*a case manager would be a suitably experienced and qualified professional to take on the role of SBB's representative for the purposes of a Personal Healthcare Budget, particularly well placed to challenge, where necessary, any decisions about the care plan so as to give meaning to the notion of 'choice' on which*

such Budgets are based" (paragraph 101). She agreed to the discharge of Mr Lumb, and concluded that "no appointment by the Court is required at all to facilitate a Personal Health Budget for SBB" (paragraph 103).

The judgment also included two significant footnotes:

Footnote 1: Judge Hilder did not reach a conclusion as to whether the deputy's administration of direct payments avoided any need for paid care staff to be CQC-registered. She noted that "*the evidence of Patrick Wright of the CQC was that he was unable to say definitely whether a property and affairs deputy acting as representative for direct payments of a Personal Health Budget would be exempt from registration requirements*."

Footnote 2: In relation to the ICB's agreement to pay for the deputyship fees, Senior Judge Hilder noted that "[a] *capacitous person receiving direct payments would not ordinarily incur fees for management of those monies. As a starting point, it is therefore difficult to see why an incapacitous person should be expected to bear such costs*."

Comment

Where precisely the line is between property and affairs and health and welfare is a matter which is not always entirely clear. As Hayden J noted in *PSG Trust Corporation Ltd v CK & Anor* [2024] EWCOP 14 (at paragraph 31):

> *Many financial issues have welfare implications, taking out mortgages, finance agreements, sustaining an extensive overdraft. This view seems to me to be entirely consistent with Judge Hilder's observations* [in *ACC*]*, indeed, she uses the term "in the realm of property and affairs" which implicitly recognises that decisions in that sphere will sometimes have welfare implications.* […] *Precisely because the Court of Protection is such a highly fact-specific jurisdiction, it is perfectly conceivable that what might appear on the surface to be a Property and Affairs issue, is on a proper construction, nothing of the kind and truly a welfare issue.*

It enacting the 2013 regulations, it might be thought that Parliament had a view that the work involved in being a representative in the personal health budget sphere was a property and affairs matter with welfare implications. Senior Judge Hilder has disabused Parliament (and the authors of the Statutory Guidance) of that notion. As she noted at paragraph 73.

> *Unfortunately, although the intention of the Regulations seems to have been to open the door to Court of Protection appointed deputies, it seems to me that the vision of deputyship held in the Regulations and Guidance is at odds with the reality of deputyship appointments as they are actually made by the Court:*
>
> *a. in accordance with the specific categories of section 16(1) the Act, the Court of Protection invariably confers property and affairs deputyship authorities separately to welfare deputyship authorities, and comparatively rarely confers the latter;*
>
> *b. decisions "about a person's healthcare" and "help[ing to] develop personalised care and support plans" fall within the remit of a welfare deputy, but "securing services" falls within the remit of a property and affairs deputy;*
>
> *c. acting as a 'representative' requires both types of authorisation.*

Taking matters back full circle, the line of analysis adopted in the judgment suggests that it would be possible for a deputy to be an 'authorised' person for purposes of the receipt of direct payments under the Care Act 2014 – albeit that the deputy would have to be appointed as both a property and affairs and a health and welfare deputy (and could not be a trust corporation, because a trust corporation can only be appointed to manage P's property and affairs).

The position of direct payments, in both social care and health care, can be a difficult and sometimes frustrating intersection between public law decision-making and personal choice. The direct payment is a means of a health body or local authority delegating its public law duties to provide care to the person. While in both health and social care (see the 2021 consent order linked to above), regulations or statutes prioritise welfare decision-makers to receive direct payments on behalf of a person lacking capacity, in reality, any choices they make are highly constrained by the terms of the care plan prepared by the health body or local authority, and the putative welfare decision-maker cannot make arrangements for care which conflict with those care plans.

We would query the extent to which there is the level of personal choice in the use of a PHB which appeared to be contemplated by the court at paragraphs 40-44, and the extent of control which is exercised by an ICB over a PHB. There is no legal right to a direct payments created by statute; the Regulations set out only that an ICB 'may' make such payments, and sets out the factors to be taken into consideration. The only legal right is to ask for a PHB, and to have reasons if it is not accepted. Akin to local authority direct payments, regulations 11 and 8 of the 2013 Regulations have the effect that the patient or their representative are bound to spend the direct payments only on services which have been set out in the care plan, which is a document 'owned' and prepared by the health body: there does not appear to be discretion for the patient or representative to deviate from this unless that has been agreed by the health body. It is thus ultimately the health body that will make the decisions about how the direct payments can lawfully be spent (in line with direct payment regulations around social care as set out in the 2021 consent order), and the person holding the direct payments appears to have a more administrative role in administering P's 'affairs' than one in which significant decisions are being taken regarding P's welfare.

Footnotes in this case indicate (similarly to the 2021 consent order) that one of the two key issue motivating this application (and indeed, the initial appointment of a deputy in 2017) was a concern as to the lawfulness of personal assistants (who were not registered with the CQC, or being employed by a CQC-registered care agency) providing personal care to P. As a general matter, providing personal care as part of one's employment requires registration with the Care Quality Commission (CQC), as providing personal care is a 'regulated activity.' However, the Health and Social Care Act 2008 (Regulated Activities) Regulations also set out that certain 'prescribed activities' are not regulated activities. The Health and Social Care Act 2008 (Regulated Activities) Regulations, Sched.1, para.1(3)(c) offers the significant caveat that the definition of personal care 'does not apply to…the services of a carer employed by an individual or related third party, without the involvement of an undertaking acting as an employment agency or employment business, and working wholly under the direction and control of that individual or related third party in order to meet the individual's own care requirements…' Paragraph 1(4) defines a 'related third party' as (inter alia) 'an individual with power

of attorney or other lawful authority to make arrangements on behalf of the person to whom personal care services are to be provided.' (emphasis added)

There are no reported cases specifically determining whether a person lawfully administering a health or social care direct payment is exercising 'lawful authority to make arrangements' on behalf of the person. However, our view (shared with Arianna in her book, 'Social Care Charging') is that a lawfully-appointed direct payment holder may employ unregistered personal assistants to provide personal care with a direct payment without breaching the Regulations above. The holder of the direct payment is chosen by the health or social care body, and relevant statutory frameworks govern their authority to act. So long as the personal assistants are 'working under the direction and control' of the 'related third party,' this does not appear to breach the CQC Regulations.

PDF accreditation

The Professional Deputies Forum has launched a voluntary, multi-tiered accreditation programme for its members following extensive collaboration with a range of specialists working in the Court of Protection area.

The programme aims to elevate standards and demonstrate that accredited professional deputies have the expertise and a foundation of knowledge in a range of areas when looking after the property and affairs of vulnerable clients.

Arianna and Alex, together with Ian Brownhill, have all contributed to the work of the accreditation scheme.

For more details, see here.

Editors and Contributors

Alex Ruck Keene KC (Hon): alex.ruckkeene@39essex.com
Alex 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 Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole KC: vb@39essex.com
Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She is Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. To view full CV click here.

Neil Allen: neil.allen@39essex.com
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 and created the website www.lpslaw.co.uk. To view full CV click here.

Arianna Kelly: Arianna.kelly@39essex.com
Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a full CV, click here.

Nicola Kohn: nicola.kohn@39essex.com
Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2022). To view full CV click here.

Katie Scott: katie.scott@39essex.com
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.

Nyasha Weinberg: Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click here

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.

Adrian Ward: adrian@adward.co.uk

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; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

Jill Stavert: j.stavert@napier.ac.uk

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

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Peter Edwards Law have announced their autumn online courses, including, Becoming a Mental Health Act Administrator – The Basics; Introduction to the Mental Health Act, Code and Tribunals; Introduction – MCA and Deprivation of Liberty; Introduction to using Court of Protection including s. 21A Appeals; Masterclass for Mental Health Act Administrators; Mental Health Act Masterclass; and Court of Protection / MCA Masterclass. 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 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 Report in the future please contact: marketing@39essex.com.

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

Chambers UK Bar
Court of Protection: Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and Community Care
Top Tier Set

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085