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Thirty Nine Essex Street Court of Protection Newsletter: January 2011

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Editors

Introduction

Happy New Year and welcome to the first Court of Protection newsletter from 39 Essex Street in 2011.

As usual, the newsletter contains summaries of recent cases that have come to our attention; where transcripts are available, they will be found on www.mentalhealthlaw.co.uk. We are grateful to Helen Clift and Debbie Keyes at the Official Solicitor, the Editor of mentalhealthlaw.co.uk and Julie Cornes of Maxwell Gillott for alerting us to items for this edition.

Re KS (unreported, 17 May 2010)

Summary

This case concerned welfare proceedings issued by a private carer who made allegations of abuse against P's family. The carer brought the matter to court and applied to be made welfare deputy. The Official Solicitor was instructed for P and the local authority became involved, having previously had little to do with P whose care was privately funded.

The carer subsequently withdrew from the case, before any findings of fact had been made about the allegations he made against the family. The Official Solicitor and the local authority were apparently satisfied with the care plan in place for P, and the proceedings ended with little change in the position on the ground, save that the carer was no longer employed to provide care for P.

The carer sought his costs of bringing proceedings but his application was refused at first instance. On appeal to HHJ Cardinal, he argued that as a whistleblower, he ought to have his costs paid from P's estate, as he had acted in P's interests by bringing the matter to the court's attention. The judge refused to interfere with the decision not to aware the carer his costs. In circumstances where no findings of fact were made, it was impossible for the carer to say that the proceedings had been required or that he was entitled to his costs. The carer had withdrawn from the case at a stage at which it could not be certain that his allegations were made out, or that P's care was likely to be altered, which made it very difficult for him to say that he should have his costs.

Comment

The case is important for any carer, relative or IMCA considering bringing proceedings in the Court of Protection. The general rule is that no order for costs will be made in welfare applications, but one can sympathise with the view of a whistleblower that unless costs orders are made, individuals may not feel in a position to bring important matters before the court. The lesson from this case is that third parties will have to be very sure of their ground and must see the case through to its conclusion if they are

to have any realistic chance of recovering their costs. It may be that the better course of action for such individuals is to inform the Official Solicitor of the case and request that the Official Solicitor initiate proceedings.

An NHS Foundation Trust v D [2010] EWHC 2535 (COP)

Summary

This case concerned the medical best interests of a woman D, with longstanding schizophrenia, who was suffering from a prolapsed uterus, but believed 'that there is a conspiracy on the part of medical personnel to subjugate and experiment upon her, if not kill her' and that her physical condition was a normal part of the aging process. The court was told that left untreated, it would severely restrict D's everyday life and could prove fatal due to complications including kidney disease. However, the treatment required sedation, surgery and a period of recovery in hospital, and it was necessary for D to be sedated before, during and after the surgical intervention for there to be a realistic prospect of treatment being successfully delivered. Mrs Justice Macur accepted the unanimous expert evidence and concluded that it was in D's best interests for the court to '*sanction the deprivation of her liberty in so far as it is required to remove her to and retain her in hospital to conduct necessary medical investigations into and thereafter administer the appropriate treatment of her procidentia with all such necessary restraint, physical or chemical, to achieve the same -consistent so far as possible with maintaining D's dignity throughout*.'

Comment

The case was heard in public and there is an unsurprising contrast between the sensitivity of the judgment and the manner in which the 'story' was reported: the Daily Mail headline shrieked '*Judge rules mentally ill woman can be sedated for SIX days so doctors can perform life-saving surgery she doesn't want'*.

G v E [2010] EWHC 3385 (Fam)

Summary

The long-running case of G v E continues, this time with a decision by Baker J concerning costs. After the naming and shaming of Manchester City Council in a previous hearing, it will come as no surprise that the Council was made the subject of a costs order in favour of the Official Solicitor, G, and E's carer, F. The hearing concerned the costs of the initial phases of the proceedings, up until the point at which G was returned to F's care by order of the court. In deciding to depart from the general rule in welfare applications that there should be no order as to *costs, Baker J observed that 'local authorities and others who carry out their work professionally have no reason to fear that a costs order will be made...The Court is not going to impose a costs burden on a local authority simply because hindsight demonstrates that it got* [difficult] *judgments wrong*'. However, in the present case, there had been a 'blatant disregard of the processes of the MCA and their obligation to respect E's rights under the ECHR' which amounted to misconduct sufficient to justify imposing a costs order.

Baker J rejected the Council's reliance on the ignorance of its staff, stating that notwithstanding the complexity of the MCA and DOLS, '*Given the enormous responsibilities put upon local authorities under the MCA, it was surely incumbent on the management team to ensure that their staff were fully trained and properly informed about the new provisions*.' Importantly, Baker J confirmed that '*If a local authority is uncertain whether its proposed actions amount to a deprivation of liberty, it must apply to the Court*.' The same applies, as is evident from cases discussed in previous editions of this newsletter, where not only staff but also assessors under the DOLS regime conclude that there is no deprivation of liberty but where doubt or disagreement remains.

The Council was duly ordered to pay the costs of G, F and the Official Solicitor, and for part of the time period in question on an indemnity basis.

Comment

Perhaps the only mildly surprising element of the judgment was the imposition of costs on an indemnity basis for a period of time; in light of his previous findings as to the conduct of the Council, though, such an approach was, perhaps, all but inevitable. The judgment does provide a salutary lesson in the importance both of adherence to the statutory provisions of the Act and also of adequate training.

Passing reference is made to the problem which the authors know has arisen in numerous other cases, caused by the operation of the statutory charge in respect of publicly funded litigants. Baker J expressed the view that it could not be a proper reading of the relevant legislation that a litigant might have to use his damages to pay the statutory charge in a case where not all of his costs were recovered from the other side, but he heard no argument on the issue and the issue remains.

Re RK [2010] EWHC 3355(COP) (Fam)

Summary

This case concerned RK, a 17½ year old woman who suffered from autism, ADHD, severe learning disability and epilepsy, and displayed aggressive and self-harming behaviours. RK was moved to care home placements by the local authority under s.20 Children Act 1989 after her family became unable to care for her at home. The issue for the court was whether RK was deprived of her liberty in the care home placements. If she was, then being under 18, the DOLS regime would not apply, and the local authority would have to apply to the court for declarations authorising the placement, with the consequent reviews.

Mostyn J held that there was no deprivation of liberty, either on the facts, or as a matter of law. He held that where a child is placed under s.20 CA 1989 and the parents have a right under s.20(8) CA 1989 to refuse consent to the placement, there can be no deprivation of liberty. Any restriction on RK's freedom was the result of RK's parents exercising parental responsibility by consenting to the placement, and thus the 'subjective' limb of the test for a deprivation of liberty could not be met. Nor was the objective test met, according to the judge, because RK's care came nowhere near involving depriving her of her liberty. RK lived at the residential placement from Monday to Friday but attended school each day. She returned to her parents' home every weekend. While at the placement, she was allowed unrestricted contact with her parents, and was subject to close supervision at all times, but was apparently not restrained or subject to a particularly strict behavioural management regime. The door to the placement was not locked, although if RK had tried to leave, she would have been brought back. In response to a submission that these arrangements amounted to confinement because they restricted PRKs autonomy, the judge said '*I am not sure that the notion of autonomy is meaningful for a person in RK's position.*' He concluded:

'*I find it impossible to say, quite apart from s20(8) Children Act 1989, that these factual circumstances amount to a "deprivation of liberty". Indeed it is an abuse of language to suggest it. To suggest that taking steps to prevent RK attacking others amounts to "restraint" signifying confinement is untenable. Equally, to suggest that the petty sanctions I have identified signifies confinement is untenable. The supervision that is supplied is understandably necessary to keep RK safe and to discharge the duty of care. The same is true of the need to ensure that RK takes her medicine. None of these things whether taken individually or collectively comes remotely close to crossing the line marked "deprivation of liberty*".'

Further, the local authority was not detaining RK under any 'formal powers', as would be the case if, for example, a care order was in place. RKs parents could remove her from the placement if they chose to withdraw their consent to it (even though on the facts of the case, there was no practical possibility of RK's parents doing any such thing without the local authority's assistance and provision of an alternative care package). If RK's parents have decided not to remove her from the placement, the judge found

it difficult to see how the State could be said to be responsible for her detention.

Comment

This decision is interesting and potentially problematic. It seems to represent part of a growing unwillingness on the part of the High Court to recognise deprivations of liberty on the objective test. One is reminded of the submission on behalf of the government in the Bournewood case when it reached the ECtHR that HL could not be deprived of his liberty, because if he was, then so were most residents of care homes and hospitals in England. The courts seem keen to ensure that that prediction is not fulfilled, even though HL was indeed found to have been deprived of his liberty.

On the subjective limb, it seems surprising that parents can consent to a placement that entails a deprivation of liberty for any child under 18 who is incapacitated by reason of a mental health problem, with no recognition of the obvious differences between infants and a young adult. The trick is to find a distinction which though artificial is not arbitrary: in this case, the authors fear that adhering to a 'bright line' categorisation sits uneasily with the more nuanced treatment of young adults in other areas of law, not least the MCA itself.

The judge's analysis of the question of State responsibility is also questionable. It does not appear that relevant caselaw was cited which shows that the State does not have to be directly responsible for a deprivation of liberty to be liable under Article 5. The authors find it difficult to understand how the concept of 'formal powers' for detention being necessary to engage Article 5 fits with HL v UK - the very reason the deprivation of liberty safeguards were introduced was that there was a breach of Article 5 where detention occurred without any formal basis or power.

The authors also note that the judge's comment about autonomy not being a meaningful concept for someone in RK's position is likely to raise hackles amongst those who work towards achieving greater independence for mentally disabled adults and young people. Clearly, RK will never achieve the sort of autonomy someone without her disabilities might enjoy. But there are no doubt many ways in which her autonomy can be promoted, and she can be helped to direct the course of her life, even if only in relation to expressing preferences and making choices about simple or immediate matters.

PM v KH and HM [2010] EWHC 3279 (Fam)

Summary

This case represents a further iteration in a sequence of judgments that rivals, if not exceeds, those in G v E for the breadth of issues covered. We have already covered judgments in this case in previous editions of this newsletter; this judgment is of particular significance for reiterating the Court's powers to imprison and fine for contempt of Court. On the particular facts of the case, the incapacitated adult (HM)'s father was sentenced to a total of four month's imprisonment for (1) failing to make arrangements to return her to the country as soon as possible after service of a Court order requiring him to do so; (2) failing to inform the Official Solicitor's solicitor of the address at which he was living with HM; and (3) failing to inform the Official Solicitor's solicitor of his assets.

Comment

Whilst these powers were exercised by the Court under its inherent jurisdiction, there is no reason to suggest that they could not be exercised by the Court of Protection, because s.47(1)MCA 2005, imbues it in connection with its jurisdiction "the same powers, rights, privileges and authority as the High Court." The case also serves as a salutary reminder of the Court's ability to take steps to enforce its injunctions, something that (especially) litigants in person either do not or cannot always fully appreciate.

Re J (unreported decision of HHJ Marshall QC on 6.12.10)

Summary

This case merits highlighting for a short but important exercise of statutory construction carried out by HHJ Marshall QC. In factual circumstances that were not relevant to the point of principle, the Court had to determine the proper interpretation of s.22(3)(b) MCA 2005, which provides that a Court has the power to revoke an LPA where the donee "(i) has behaved in a way which contravenes his authority or is not in P's best interests, or (ii) proposes to behave in a way which contravenes his authority or would not be in P's best interests." In essence, the proposition advanced by the applicant was that s.22, taken as a whole, embodied a broad concept of "unsuitability." The judge did not accept this proposition, taking the view that s.22 was more narrowly focussed by reference to s.22(3)(b). The Respondent donee contended that the only conduct that the Court could take into account for purposes of s.22(3)(b) was that of the donee in his capacity as donee. The judge rejected this submission, too, taking the view (at paragraph 11) that:

In my judgment, the key to giving proper effect to the distinction between an attorney's behaviour as attorney and his behaviour in any other capacity lies in considering the matter in stages. First, one must identify the allegedly offending behaviour or prospective behaviour. Second, one looks at all the circumstances and context and decides whether, taking everything into account, it really does amount to behaviour which is not in P's best interests, or can fairly be characterised as such. Finally, one must decide whether, taking everything into account including the fact that it is behaviour in some other capacity, it also gives good reason to take the very serious step of revoking the LPA.

At paragraph 13, she concluded that "noting the court's powers with regard to directing an attorney under s 23 of the Act... on a proper construction of s 22(3), the Court can consider any past behaviour or apparent prospective behaviour by the attorney, but that, depending on the circumstances and apparent gravity of any offending behaviour found, it can then take whatever steps it regards as appropriate in P's best interests (this only arises if P lacks capacity), to deal with the situation, whether by revoking the power or by taking some other course."

Comment

This decision provides helpful, if not entirely surprisingly, clarification of the approach that the Court is likely to take in cases of alleged unsuitability on the part of the donee of an LPA, and, in particular, where allegations are made of unsuitability on the basis of behaviour by the donee which is unconnected with the discharge of their obligations under the LPA.

AVS v NHS Trust [2010] EWHC 2746 (COP)

Summary

The Court of Appeal has very recently upheld the robust case management decision of the President in AVS v NHS Trust [2010] EWHC 2746 (COP), reported in our November newsletter. In short, the President had given an 'unless' order that medical treatment proceedings concerning a patient with vCJD should come to an end within 14 days unless AVS's brother was able to produce a report from a doctor identifying a proper issue for the Court's determination.

The Court of Appeal had little hesitation disposing of the brother's appeal. Ward LJ, giving the sole reasoned judgment, identified the essential futility of proceedings continuing where no medical practitioner was ready and willing and able to provide the medical treatment AVS' brother considered should be given to him. He made clear the Court's reluctance to decide hypothetical questions, citing R v Home Secretary ex parte Wynne [1993] 1 WLR 115, R v Secretary of State for the Home Department, ex parte Salem [1999] 1 AC 450, R (Burke) v General Medical Council [2006] QB 273 and Gawler v Raettig [2007] EWCA Civ 1560, before noting (at paragraph 35) that the case in question raised exactly the sort of academic or hypothetical appeal the Court should decline to

entertain. He continued at paragraph 35:

"...*The relief being sought is that the court grant declarations:*
'(ii) that it is in the best interests of [the patient] *for the infusion pump necessary for the administration of intraventricular PPS to be replaced,*
(iii) that it is in the best interests of [the patient's] *for the administration of intraventricular PPS to continue.'*
One has to ask, therefore, what purpose will be served by such declarations. A finding, not necessarily a declaration, that a course of treatment is, or is not, in a patient's best interest is usually the essential gateway to a declaration that such treatment would, or would not, be lawful. It is trite that the court will not order medical treatment to be carried out if the treating physician/surgeon is unwilling to offer that treatment for clinical reasons conscientiously held by that medical practitioner. The court's intervention is sought and is necessary to overcome a reluctance or reticence to undertake the treatment for fear that doing so would be unlawful and render him or her open to criminal or tortious sanction. It is significant that the court's power to make declarations under the Mental Capacity Act 2005 is conferred by section 15 of the Act in these terms:

"(1) The court may make declarations as to –
…
(c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.
(2) "Act" includes an omission and a course of conduct."

35. Section 1(5) of the Act sets out the principles underpinning the Act and provides:
"1(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interest."

36. Even if, as the applicant contends, there is a sufficient dispute about whether or not the continued infusion of PPS is in the best interests of the patient and whether, therefore, the pump should or should not be replaced, there is no question of the respondent hospital hindering or preventing the transfer of the patient to the care of any physician or surgeon who, contrary to their own views, sincerely believes that the procedure is in the interests of this patient and is willing to provide it. If Mr NT is prepared to operate and can find a hospital where the operation can take place, the respondent hospital will co-operate in the transfer of the patient. If Dr P can provide the treatment, the hospital will discharge the patient from their care to his. The fact that the respondent hospital does not believe that the placement of the pump and the continuation of infusion are in the patient's best interest simply does not matter if a medical practitioner who takes the other view will accept responsibility for the patient. The transfer of the patient to another's care would take place co-operatively and no approval from the court is required to enable that transfer to take place.

37. The harsh fact is that, although Mr NT and Professor R are willing to replace the pump, there is no evidence of their present ability to do so. No hospital has been identified where that surgery can be undertaken. Without a new pump being inserted, there is nothing Dr P can do. This litigation is going nowhere. What the court is being invited to do is no more nor less than to declare that if a medical practitioner is ready, willing and able to operate and if a medical practitioner is willing, ready and able to replenish the supply of PPS, then it would be in the best interests of the patient to do so. The President was correct to identify the need for evidence from Dr P to plug this gap in the claimant's case. Without that evidence that someone is "able and willing to take over the care of [the patient] and treat him with PPS", we are dealing with a purely hypothetical matter. A declaration of the kind sought will not force the respondent hospital to provide treatment against their clinicians' clinical judgment. To use a declaration of the court to twist the arm of some other clinician, as yet unidentified, to carry out these procedures or to put pressure upon the Secretary of State to provide a hospital where these procedures may be undertaken is an abuse of the process of the court and should not be tolerated."

Ward LJ concluded at paragraph 39 that, "[i]*f there are clinicians out there prepared to treat*

the patient then the patient will be discharged into their care and there would be no need for court intervention. If there is no-one available to undertake the necessary operation the question of whether or not it would be in the patient's best interests for that to happen is wholly academic and the process should be called to a halt here and now."

Comment

The passages above have been cited at some length because, despite the fact-specific nature of the judgment, it is clear that the Court of Appeal intended that this judgment (upon a permission application) should be cited in the future, and that they intended to make a statement of principle as to the boundaries of the Court's willingness to become involved in clinical decision-making. We await a decision of equal robustness and clarity as to the Court's willingness to become involved in public law decision-making following the implementation of the MCA.

Challenge to a DOLS standard authorisation

Victoria Butler-Cole appeared for P's daughter in a challenge to a standard authorisation under s.21A MCA 2005. The case concerned P, an elderly gentleman with moderate dementia, who had been kept against his wishes in a care home since early November 2010. The local authority had prevented him returning home after a stay in hospital due to concerns raised by P's general practitioner.

At an interim hearing before Mostyn J on 23 December 2010, it was held that P should return home notwithstanding that it was accepted that better care would be provided in the care home, that there were risks to P of returning home, and in the face of opposition from the local authority and the Official Solicitor. The Official Solicitor did not express a view as to the merits of the original grounds of challenge to the SA but argued that P ought to remain in the care home until, at the very least, better evidence was available to satisfy him and the Court that it was in P 's best interests to return home. The judge accepted evidence from P's family that P was 'desperately unhappy' and wanted to leave the care home. He held that there was effectively a presumption against deprivation of liberty (pursuant to s.1(6) MCA 2005), and on the facts, the balance tilted in favour of P returning home pending a final hearing at which full evidence could be considered.

TTM v LB Hackney & Ors [2011] EWCA Civ 4

By way of brief reference only, as it is a case concerning obligations under the MHA 1983, the recently decided case of TTM in which Alex Ruck Keene was involved contains important clarification as to liabilities for compensation for breaches of Article 5 ECHR. The reasoning of the Court of Appeal is, we suggest, equally applicable to cater for circumstances where a deprivation of liberty occurs in the MCA field where the relevant authority is not, in fact, itself the detainer, but where it has a causative role in the deprivation of liberty. It is also certainly consistent with approach adopted by Munby LJ in *Re A and Re C* regarding the positive obligations imposed by Article 5(1) ECHR upon public authorities to act where they are aware of a deprivation of liberty occurring.

In other news

In December 2010, the High Court issued 'Guidance in cases involving protected parties in which the Official Solicitor is being invited to act as guardian ad litem or litigation friend' which contains the following text relevant to COP welfare cases (including medical cases):

"6*. The number of welfare cases brought under the provisions of the Mental Capacity Act 2005 is rising exponentially with concomitant resource implications for the Official Solicitor.*
7. Judges should be alert to the problems the Official Solicitor may have in attending at each and every preliminary hearing. Consideration should be given, in appropriate cases, to dispensing with the requirement that he should be present at a time when he is unable to contribute meaningfully to the process. In circumstances where his position has been / will be communicated in writing it may be particularly

appropriate for the judge to indicate that the Official Solicitor's attendance at the next directions' hearing is unnecessary.
8. The Court of Protection Rules make clear that the judge is under a duty to restrict expert evidence to that which is reasonably required to resolve the proceedings. The explanatory note to r.121 states that the court will consider what 'added value' expert evidence will give to the case. Unnecessary expert assessments must be avoided. It will be rare indeed for the court to sanction the instruction of more than one expert to advise in relation to the same issue.
9. The Practice Direction – Experts (PD15A) specifies that the expert should assist by "providing objective, unbiased opinion on matters within his expertise, and should not assume the role of advocate". The form and content of the expert's report are prescribed, in detail, by paragraph 9 of the Practice Direction. It is no part of the expert's function to analyse or summarise the evidence. Focussed brevity in report writing is to be preferred over discussion".

The authors are interested to note the final comment about the content of expert reports, having seen many in which the evidence is summarised, often in considerable detail. Such summaries can often prove very useful, particularly where evidence from statutory agencies is not comprehensive or is not laid out in an accessible manner, but they can also lead experts into difficulties when their reporting of the evidence creates an impression that they have formed a view as to whether allegations or criticisms are made out, thereby usurping the court's function and undermining their objectivity and independence.

Report from Department of Health

Finally, the following report published by the Department of Health in November 2010, 'Nothing Ventured, Nothing Gained: Risk management for people with dementia' (http://tinyurl.com/232r66v) may be of interest to practitioners dealing with cases involving people with dementia, particularly where there are disputes as to the degree of risk-taking that should be tolerated.

Our next update should be out in February 2011, unless any major decisions are handed down before then which merit urgent dissemination. Please email us with any judgments and/or other items which you would like to be included: full credit is always given.

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