



www.doughtystreet.co.uk

Court of Protection Caselaw Update September 2024



Sophy Miles
Elizabeth Cleaver
Nancy Williams



WELCOME!

- Thank you for joining us!
- The seminar will last about an hour
- We will try to answer questions – please put them in the chat
- Please also share your own thoughts on the cases we cover
- If you have a question we can't answer- we'll provide email addresses
- Our caselaw update also appears in Legal Action



CAPACITY AND BELIEF

- Thirulamesh Chellamal Hemachndran and another v Sudiksha Thirulamesh and another [2024] EWCA Civ 896
- Successful appeal against declarations of incapacity
- Sudiksha Thirulamesh was 19, with rare mitochondrial disease. Medical consensus was that it was in a terminal phase
- Sudiksha was an A level student with no brain damage or mental illness.
- Application for declarations and orders in her best interests to move to palliative care

THE FIRST INSTANCE HEARING

- Sudiksha and her family wanted her to be considered for experimental treatment abroad and did not accept prognosis
- Trust psychiatrist – she was ‘delusional’
- Dr Mynors-Wallis – on paper thought she did not understand the relevant information and was suffering from trauma (=impairment)
- Then saw her and thought she had capacity
- Another psychiatrist thought she had capacity
- OS- her beliefs were in a reasonable range.

THE FIRST INSTANCE JUDGMENT

- Roberts J did not accept Sudiksha was delusional
- But held she had to believe the relevant information to understand/use or weigh.
- She did not believe info about her prognosis, and the 'trauma' of admission was the causative impairment
- Did not explain why she differed from views of other experts

THE APPEAL

- Belief is relevant but NOT determinative
- Judgment of Munby in A Local Authority v MM [2007] EWHC 20003 (Fam) is WRONG when it states belief is subsumed into requirement to understand/use or weigh (misquotes an earlier judgment in MB [1997] 2 FLR 426)
- “All that is required is an application of the statutory words without any gloss”

THE MCA DOES WHAT IT SAYS ON THE TIN

- Do NOT import additional requirements
- Belief MAY be relevant but it won't always be
- If P has a delusional belief about (eg) prognosis, because P is (eg) floridly psychotic clearly this could give rise to a finding of incapacity
- Don't rely on the reasoning in Leicester City Council v MPZ [2019] EWCOP 64 or Re BNK (Dental Treatment) [2023] EWCOP 56

A SENSIBLE DECISION, NOT THE PURSUIT OF PERFECTION

- Re A (Covert Medication: Residence [2024] EWCA Civ 572
- Long running case where Poole J made final orders that P should return to her mother's care when everyone else said she should stay where she was.
- Court had run out of time and asked for written submissions.
- Judge did not alert the parties that he was considering permanent return home, which is what he ordered- see first instance judgment- A, Re (Covert Medication: Residence) [2024] EWCOP 19
- Everyone appealed except P's mother

RE A- THE APPEAL

- Judgment given by Peter Jackson J
- Good practice to alert parties if judge is considering making an order they do not seek
- Would have been well-advised to do so in this case
- Did not make the proceedings unfair and no other criticism
- Points of principle
- Reminder of role of the COP- not a supervisory court

RE A-2

“The Court of Protection is not, therefore, A's guardian, and nor are any of the professional parties, whatever duties they may owe her. This should not be forgottenThe Court of Protection has become a fixture in A and B's lives. If that is necessary because the court is for good reason unable to bring its involvement to an end, so be it, but it should not be mistaken for normality....

Section 1(5)calls for a sensible decision, not the pursuit of perfection..

Here, the court's task was to select the best practical outcome that was realistically available, even though all options were, to say the least, imperfect”

WELFARE DEPUTIES-1

Appointment:

- AB v CD (by the Official Solicitor) and Sheffield City Council [2024] EWCOP 32
- Recurrent proceedings since 2016- residence, care, contact and DOL
- ISW expressed concern about impact of conflict between providers and AB (CD's mother), and recommended welfare deputy
- Local authority agreed to fund professional welfare deputy who would liaise with commissioners/providers, make contact arrangements and deal with complaints

WELFARE DEPUTIES -2

- CL v Swansea Bay University Health Board, LL and Others [2024] EWCOP 22
- Unsuccessful appeal against decision to discharge a welfare deputy
- Section 16....
- *(7) An order of the court may be varied or discharged by a subsequent order.*
- *(8) The court may, in particular, revoke the appointment of a deputy or vary the powers conferred on him if it is satisfied that the deputy– (a) has behaved, or is behaving, in a way that contravenes the authority conferred on him by the court or is not in P's best interests, or (b) proposes to behave in a way that would contravene that authority or would not be in P's best interests.*
- BOTH gave power to remove deputy – section 16(7) gives “broad discretion”- as long as follow s1 and s4 principles.
- Route to ‘no fault’ discharge of deputy, in P’s best interests

REPRESENTATION AND DOLS...AGAIN

- Re PQ (Court Authorised DOL: Representation during Review Period) [2024] EWCOP 41
- Lengthy welfare case came to an end- section 16 orders gave rise to DOL, review in 12 months
- LA would not fund representative under rule 1.2, and argued it wasn't necessary to comply with Article 5.
- Court disagreed in this case (though didn't rule it out in other cases)
- Refused to discharge OS and would not fix a hearing in 12 months as a device to maintain legal aid
- Directions for hearing IF legal aid was withdrawn including joinder of MoJ and written explanation by local authority/LAA for funding decisions.

A SENSE OF DÉJÀ VU?

- Re NRA [2015] EWCOP 59
- Re JM [2016] EWCOP 15
- Re KT [2018] EWCOP 1
- Secretaries of State for Health and Justice parties in Re JM.
- “Minimum procedural requirements” of Article 5 required “some assistance from someone on the ground who considers the care package through P's eyes and so provides the independent evidence to the COP that a family member or friend can provide”
- Watch this space.....

IMPULSIVITY & DECISION MAKING UNDER THE MCA

A Local Authority v ZZ [2024] EWCOP 21

A Local Authority v ZX [2024] EWCOP 30

ZZ- appeal of decision HHJ Burrows heard by Theis J

ZX- Judgement HHJ Burrows post ZZ

Both decisions relate to impact of impulsivity on P's capacity to engage in sexual relations.

Re PS (severe short-term memory loss- capacity to engage in sexual relations) [2024]
EWCOP 42 (T2)

A LOCAL AUTHORITY V ZZ

Facts

- ZZ 20-year-old man with diagnoses mild learning disability, ADHD, possible OCD
- Victim and perpetrator of child sexual abuse
- Sexual Harm Prevention Order in place (up to October 2024)
- Looked after child in 2019 and placed in residential setting for children presenting with harmful sexual behaviours
- In July 2021, assessed by neuropsychiatrist as presenting with: *“a very high risk of committing harmful sexual acts towards others’ by virtue of his ‘intrusive [sexual] thoughts”* which were deemed obsessional in nature.
- In October 2021- moved to supported- living placement, but ZZ wants to live with girlfriend and her mother.
- Application by LA to authorise deprivation of liberty at the placement

A LOCAL AUTHORITY V ZZ (2)

Expert evidence

- Dr Rippon instructed- ZZ lacks capacity to conduct proceedings, make decisions about his care and support, internet and social media use and contact with others.
- ZZ has capacity to engage in sexual relations, to marry, to make decisions about contraception and to enter into a tenancy agreement
- March 2023- Dr Rippon asked to review her conclusions on sexual relations in light of how ZZ's impulsivity interacts with his appreciation of another's consent to engage in sexual relations- changed her view:

1. *ZZ lacks insight into his ability to control his behaviour and stop himself from engaging in behaviour he knows is wrong, and lacks insight re his vulnerability*
2. *This prevents ZZ from using and weighing information with regards to engaging in sexual activity*
3. *As he lacks capacity to engage in sexual relations he also lacks capacity to marry*

A LOCAL AUTHORITY V ZZ (3)

First instance

- HHJ Burrows rejected Dr Rippon's evidence- ZZ has capacity to make decisions about residence, engage in sexual relations, marry, make decisions about contraception
- Cannot add an additional limb to the test under *JB* i.e. "*having insight into and controlling one's urges*" [47]
- LA attempted to draw up *TZ* care plan (for those lacking capacity to make decisions about contact, but having capacity re sexual relations)- placement said they would give notice if required to implement these due to the risks.- LA appealed

A LOCAL AUTHORITY V ZZ- APPEAL

Theis J

- (1) Judge did not properly analyse whether ZZ's wish to live with TD was "a pipedream" in light of his care needs;
- (2) In this case care needs were relevant information for the purposes of the decision on residence- ZZ did not consider he needed care and support- this was relevant to the decision about where he should live;
- (3) Issue of residence was therefore considered in a silo- LA would have been unable to coherently manage a care plan in light of these declarations
- (4) Re sexual relations- Theis J found this difficult. Agreed that the bar must not be set too high, but HHJ Burrows wrong to conclude that he was being asked to add a limb to the *JB* test (issue impulsivity fell under second limb- understanding consent)
- (5) HHJ Burrows did not properly deal with ability use/weigh information about consent in context of sexual impulsivity and the causes included mental impairment, beyond usual risk taking

A LOCAL AUTHORITY V ZZ- APPEAL (2)

- (6) Under *JB* Judge should have first asked himself whether person unable to decide the matter by reference to the relevant information, then considered causal nexus- this would have directed him to the relevant parts of Dr Rippon's evidence;
- (7) ZZ also lacks capacity to marry as consistent feature of the evidence is that ZZ wishes to marry TD for them to have children

A LOCAL AUTHORITY V ZX

Facts

- ZX and brother removed from parents with mental health/substance abuse issues in 2007 when ZX was 3 weeks old.
- Adopted together- came to attention social services again as brothers were displaying sexually harmful behaviours
- ZX placed in specialist residential accommodation under s20 CA 1989, in therapy he made graphic disclosures about harmful sexual activity that he and his brother had engaged in, and sexual abuse they suffered in adoptive parents' care. ZX disclosed that he had sexual thoughts of a violent, controlling and coercive nature.
- Further care proceedings- final care orders
- No charges brought against anyone at time of proceedings (hearings in private), no alternative legal frameworks to protect ZX/others- proceedings brought in the COP as ZX had turned 18 and needed plans going forwards (restrictions previously authorised under IJ)

A LOCAL AUTHORITY V ZX (2)

- No option for ZX to be involved with forensic CAMHS or Youth Justice as about to turn 18, despite posing considerable risk of serious sexual harm
- LA concern that ZX was reporting that he had a 15-year-old girlfriend, absconding from placement, inappropriate contact with an ex-employee from his placement at her home

Expert evidence

- Dr Ince- ZX diagnoses of ADHD, conduct disorder, background of trauma (not enough evidence for autism diagnosis)
- Initial report- ZX “passed” structured series of questions re sexual capacity under *JB*- has capacity engage in sexual relations
- Lacks capacity re contact with others as does not recognise risks related to contact with younger males and need for staff support to minimise risk to others
- Dr Ince was sent further questions on ZX’s impulsivity in light of judgement in *ZZ*- changed his views

A LOCAL AUTHORITY V ZX (3)

Expert evidence

- ZX's impulsivity (caused by conduct disorder and ADHD) and underlying social scripts re relationships, not addressed in therapy, impact on his understanding of consent before and throughout sexual activity
- In XX Dr Ince questioned about ZX's ability "in the moment" to understand and weigh up issues around consent- lack of evidence base as has not had a normal legal relationship

Held

- HHJ Burrows highlighted ZZ did not change the law- Theis J found he had not given adequate reasons for decision or taken an approach that was *"too- siloed (if that is a word)"*
- Impulsivity such that "in the moment" P cannot weigh up partner's right to withdraw consent- and this is due to mental impairment- P lacks capacity engage in sexual relations.
- In ZX's case mental impairment does not just affect ability to use/weigh information "in the moment" but any situation where he has the urge to engage in sexual activity
- Avoid "protection imperative" but serious consequences for ZX as well as victims.
- ZX therefore found to lack capacity to engage in sexual relations

RE PS

Facts

- PS 79-year-old lady with alcohol related amnesia (permanent but not progressive)
- In residential care
- In a relationship with her partner WP for twenty years- both wish to continue sexual relationship. Safeguarding alert when found locked in her room together.
- Parties agreed PS lacks capacity to make decisions about residence, care, alcohol use.

Held- HHJ Burrows

- Expert Dr McIntosh should have considered functional test before diagnostic (but no impact here)
- PS lacks capacity to make decisions about contact with others (no ability to initiate or refuse contact with WP other than following basic feeling that she knows him)
- PS has capacity to engage in sexual relations. Limb 4 (risk of pregnancy) and limb 5 (risk of STDs) not relevant information in this case
- PS able to understand and weigh up relevant information in limb 2 (other person's consent)
- Difficulty with limb 3- (understanding of her own ability to give or withhold consent) as may forget she had consented

RE PS (2)

- HHJ Burrows: relevant that sexual activity here is between established and loving partners. WP can be trusted to ensure he behaves appropriately
- Conscious of silos again- not making a decision that is too complex to care-plan
- Presumption capacity has not been displaced here, threshold low
- TZ care plan required- how care planning can be managed remains to be seen.

INHERENT JURISDICTION VS. MCA 2005 – I

LB Hackney v A, B and C [2024] EWCOP 33

- Urgent hearing before a Tier 3 judge in the context of ongoing welfare proceedings before a Tier 1 judge of the Court of Protection
- A had been removed from his placement by B without authority for 16 days
- B and C (mother and her partner respectively) had failed to comply with injunctive orders made by a Tier 1 judge to secure A's return to the placement
- Hearing in the High Court took place without notice to B and C
- LA sought a collection order and an order against two telephone companies to provide disclosure to assist in identifying the whereabouts of B

INHERENT JURISDICTION VS MCA 2005 – II

INHERENT JURISDICTION

- Statutory gap; or
- Vulnerable adults – indicators of vulnerability in capacitous adults were identified by Munby J in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2006] 1 FLR 867 at paragraph 77 as persons:
 - 1) Under constraint;
 - 2) Subject to coercion or undue influence;
 - 3) For some other reason deprived of the capacity to make the relevant decisions, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.

See paragraphs 52 - 58 JK v A Local Health Board [2019] EWHC 67 (Fam)

- HM and PM and KH [2010] EWHC 870 Fam

Court powers under the inherent jurisdiction can be used to locate a missing or abducted adult lacking capacity

INHERENT JURISDICTION V MCA 2005 – III

Section 16(5) MCA 2005

Re G (Court of Protection: Injunction) [2022] EWCA Civ 1312

- Injunctive orders can be made under s16(5) MCA 2005 to:
 - Give effect to a decision made under s16(2)(a) MCA 2005; and
 - Just and convenient (s47(1) of the MCA 2005 and s37 Senior Court Act)

EG and DG against AP and others [2023] EWCOP 15

- Scope of the powers under s16(5) to give effect to a decision under s16(2)(a) are broad

INHERENT JURISDICTION V MCA 2005 – IV

- Judge made the collection order and third party disclosure order under both jurisdictions
- Practical implications of the decision

SUMMARY DISPOSAL OF PROCEEDINGS

Re VT v NHS Cambridgeshire and Peterborough Integrated Care Board v Cambridge County Council [2024] EWHC 294 (Fam)

- Issue - whether it was in the best interests of VT to return home in accordance with her wishes and feelings
- At a case management hearing, the ICB informed the other parties during PHD that it was intending to invite the court to make final orders at the hearing
- Position of the ICB was opposed by the Official Solicitor and the local authority
- Circuit Judge concluded the proceedings at the hearing
- Appeal of the decision brought by the Official Solicitor

SUMMARY DISPOSAL OF PROCEEDINGS

Arbuthnot J provides guidance in respect of summary dismissal:

- CoP has the power to determine a case summarily
- Summary dismissal of a case is fact specific and is a power that should be used “appropriately and with a modicum of restraint” as per *KD & Anor v London Borough of Havering* [2009] EW Misc 7 (EWCOP)
- Test for summary disposal :
 - a. Whether the court has sufficient information to make the determination (where this involves deprivation of liberty, the evidence should be cogent and a proper enquiry has been undertaken); and*
 - b. Whether the determination can be reached in a procedurally fair manner [Paragraph 35]*

APPROACH TO FACT-FINDING HEARINGS - I

An ICB v G LF, GR and CJ [2024] EWCOP 13

- Fact-finding hearing that took place over 19 days between July and November 2023
- Protracted proceedings that commenced in December 2021
- ICB had prepared a detailed Scott schedule of allegations against the family
- LF had prepared a counter Scott schedule alleging that the professionals were negligent
- Serious findings were made against the family. Hayden J found that the family's actions were motivated by a desire to precipitate a breakdown in the placement

APPROACH TO FACT FINDING HEARINGS - II

- Purpose – establish a factual basis on which future care planning and best interests decisions relating to P can be made.
- Need for the ICB to prepare their witness statements with ‘tight forensic care’ – refer to contemporaneous documents or notes
- Endorsement of the approach of the Court of Appeal in Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings) (Rev 2) [2021] EWCA Civ 448,

NB

- Hayden J indicated that the clinical professionals had given undue deference to the views of the parents
- Hayden J also observed that the hospital staff had not been ‘sufficiently proactive’ in stopping LF exerting his control over the medical regime

QUESTIONS?

s.miles@doughtystreet.co.uk

e.cleaver@doughtystreet.co.uk

n.williams@doughtystreet.co.uk

