Mental Capacity Law Newsletter April 2014: Issue 45

Capacity outside the Court of Protection

ThirtyNine ESSEX STREET

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Introduction

Welcome to the April issue of the Mental Capacity Law Newsletter. The Newsletter has a new look this month, and, in a step upon which we would welcome feedback, we have decided to split the newsletter into five members of a family: (1) CoP: Health, Welfare and Deprivation of Liberty; (2) CoP Property and Affairs; (3) Practice and Procedure; (4) Capacity outside the CoP; and (5) Scotland. Each will be available separately, but it is always possible to read the entirety as one newsletter. The introduction will also always be the same across each of the members of the family.

The division comes at a vital time for the MCA 2005 – in one week in March we had first the report of the House of Lords Select Committee on the MCA 2005 (covered in more detail in the Capacity outside the CoP newsletter), and then the landmark decision of the Supreme Court in *Cheshire West* and *P and Q* (to which we devote almost the entirety of the Health, Welfare and Deprivation of Liberty newsletter). The Supreme Court also handed down an important decision in relation to litigation capacity and the settlement of civil proceedings, covered in detail in the Capacity outside the CoP newsletter, as are two important decisions on testamentary capacity. In the Property and Affairs newsletter, we cover important cases on gifts and the notification requirements in relation to statutory wills. In our Practice and Procedure newsletter we cover, amongst other things, the evidence given by the President and Vice-President of the Court of Protection to the Justice Select Committee. Last, by very much no means least, we cover in the Scottish newsletter the implications of the decision in *Cheshire West* for Scotland and also the consultation on draft proposals for a Mental Health (Scotland) Bill.

As if this were not enough, we also this month offer guidance notes: (1) on the implications of *Cheshire West*; and (2) on capacity assessments; the second part of Adrian's note on Scottish adult incapacity law; and an article by Simon Edwards on testamentary capacity and the MCA 2005.

Table of Contents

Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

The House of Lords Select Committee

Undoubtedly the most important development in the capacity field outside the Court of Protection is the report of the House of Lords Select Committee convened to conduct post-legislative scrutiny of the MCA 2005.

The House of Lords Committee appointed to consider the MCA 2005 has now reported. After a mammoth evidence gathering exercise (the transcripts of the oral evidence received and the written evidence submitted ran to almost 2,000 pages[1]), the Committee has provided a damning report upon almost all aspects of the implementation of the MCA 2005.

In its 143 page report, the Committee was unanimous that the MCA 2005 is important – indeed visionary - legislation, with the potential to transform lives. However, they were equally clear that the Act is not working well, because people do not know about the Act and, where they do know about it, they do not understand it. As the Committee notes in the summary at the outset: "[f]*or many who are expected to comply with the Act it appears to be an optional add-on, far from being central to their working lives. The evidence presented to us concerns the health and social care sectors principally. In those sectors the prevailing cultures of paternalism (in health) and risk-aversion (in social care) have prevented the Act from becoming widely known or embedded. The empowering ethos has not been delivered. The rights conferred by the Act have not been widely realised. The duties imposed by the Act are not widely followed*."

The Committee reserved some of its most damning criticisms for the DOLS regime, noting that the evidence that it had heard suggests that"[t]*he provisions are poorly drafted, overly complex and bear no relationship to the language and ethos of the Mental Capacity Act. The safeguards are not well understood and are poorly implemented. Evidence suggested that thousands, if not tens of thousands, of individuals are being deprived of their liberty without the protection of the law, and therefore without the safeguards which Parliament intended. Worse still, far from being used to protect individuals and their rights, they are sometimes used to oppress individuals, and to force upon them decisions made by others without reference to the wishes and feelings of the person concerned. Even if implementation could be improved, the legislation itself is flawed*."

The Committee has made a number of important recommendations to bring about the effective implementation of the Act, chief amongst them being that:

(1) overall responsibility for the Act be given to an independent body whose task will be to oversee, monitor and drive forward implementation;

(2) The DOLS regime be ripped up and the Government goes back to the drawing board to draft replacement provisions that are easy to understand and implement, and in keeping with the style and ethos of the Mental Capacity Act;

(3) The Government works with regulators and the medical Royal Colleges to ensure the Act is given a higher profile in training, standard setting and inspections;

[1] Alex gave oral evidence to the Committee; Tor coordinated a written submission with contributions from Counsel and solicitors with a health and welfare specialism, to which Alex and Neil contributed.

(4) The Government increases the staff resources at the Court of Protection to speed up handling of non-controversial cases;

(5) The Government reconsiders the provision of non-means tested legal aid to those who lack capacity, especially in cases of deprivation of liberty;

(6) Local authorities use their discretionary powers to appoint Independent Mental Capacity Advocates more widely than is currently the case;

(7) The Government addresses the poor levels of awareness and understanding of Lasting Powers of Attorney and advance decisions to refuse treatment among professionals in the health and social care sectors;

(8) The Government review the criminal law provision for ill-treatment or neglect of a person lacking capacity to ensure that it is fit for purpose.

The Committee also recommended that the House of Lords seek an update from the Government twelve months from now to find out what they have done in response to their key recommendations.

For a much longer discussion and commentary upon the report, see this post by Alex here. For an example of why we would suggest that the Government would be well-advised to look north of the Border to take the Mental Welfare Commission as a template for a 'Mental Capacity Act Commission,' we would recommend reading the report of the investigation into *Ms E* discussed in the Scotland newsletter.

The effect of incapacity upon settlements

Dunhill v Burgin (Nos 1 and 2) [2014] UKSC 18 (Supreme Court (Lady Hale, Lords Kerr, Dyson, Wilson Reed SCJJ)

Mental Capacity – Litigation

Summary

Ms Dunhill sought to have a compromise agreement into which she had entered declared void due to her having lacked litigation capacity at the time it was agreed. She had suffered a brain injury in a car accident with Mr Burgin and had instructed solicitors to bring a claim for personal injury. The claim was settled for £12,500 on the first day of trial, but it had subsequently transpired that if properly pleaded, the claim would have been worth at least £790,000, and possibly as much as several million pounds.

At first instance ([2011] EWHC 464 (QB)), the Court held that Ms Dunhill had not lacked capacity at the time the consent order was agreed, and had been given a sufficiently clear explanation of the terms of the order, which she had understood. Silber J made it clear that he reached his decision by asking himself whether the Claimant had had capacity to enter into the consent agreement, rather than whether she had the capacity to conduct the proceedings as a whole.

Ms Dunhill appealed. The Court of Appeal allowed her appeal ([2012] EWCA Civ 397). Giving the sole reasoned judgment (with which Lewison LJ and Sir Mark Potter agreed), Ward LJ noted (paragraph 22) that the case raised the same broad issue as in the pre-MCA cases of *Masterman-Lister v Brutton & Co* [2003] 1 WLR 1511, and *Bailey v Warren* [2006] EWCA Civ 51, namely whether a previous compromise/order could be set aside for want of

capacity. Those cases had established that the proper question is whether the individual in question "*ha*[s] *the necessary capacity to conduct the proceedings or, to put it another way, to litigate*" (paragraph 24). In the circumstances, Ward LJ considered that Silber J. had fallen into error because he had approached matters too narrowly by treating the relevant transaction as the actual compromise negotiated outside court which led to the consent order in question because: "[s]*ince the compromise* [was] *not a self-contained transaction but inseparably part and parcel of the proceedings as a whole, the question is not the narrow one of whether [the Claimant] had capacity to enter into that compromise but the broad one whether she had the capacity to conduct the proceedings*." (paragraph 24). Framing the test this way, Ward LJ had no hesitation in finding that she lacked the requisite capacity.

Mr Burgin appealed to the Supreme Court. In the interim, the claim was remitted to the High Court for case management, and a further issue arose as to the effect of Ms Dunhill's incapacity upon the settlement agreement because it had not been approved by the Court as was required under CPR r.21.10, Ms Dunhill being a protected party. Bean J held ([2012] EWHC 3163 (QB)) that her incapacity rendered the settlement void, but granted Mr Burgin permission to appeal directly to the Supreme Court.

The two appeals were heard together, so the Supreme Court had the opportunity to consider: (1) the test for deciding whether a person lacks capacity to conduct legal proceedings; and (2) the consequences if legal proceedings are compromised without it being recognised that one of the parties lacked that capacity.

The Supreme Court unanimously dismissed Mr Burgin's appeals. Lady Hale gave the judgment on behalf of the court. In the material parts of her judgment, she held:

1. The general approach of the common law, now confirmed in the Mental Capacity Act 2005, is that capacity is to be judged in relation to the decision or activity in question and not globally. Hence it was concluded in *Masterman-Lister* that capacity for this purpose meant capacity to conduct the proceedings (which might be different from capacity to administer a large award resulting from the proceedings). This was also the test adopted by the majority of the Court of Appeal in *Bailey v Warren* [2006] EWCA Civ 51, [2006] CP Rep 26, where Arden LJ specifically related it to the capacity to commence the proceedings (para 112). Lady Hale noted that "*it would have been open to the parties in this court to challenge that test, based as it was mainly upon first instance decisions in relation to litigation and the general principle that capacity is issue specific, but neither has done so. In my view, the Court of Appeal reached the correct conclusion on this point in Masterman-Lister and there is no need for us to repeat the reasoning which is fully set out in the judgment of Chadwick LJ*" (paragraph 13);

2. Construed properly, CPR r 21 (in requiring that a protected party must have a litigation friend) "posits a person with a cause of action who must have the capacity to bring and conduct proceedings in respect of that cause of action. The proceedings themselves may take many twists and turns, they may develop and change as the evidence is gathered and the arguments refined. There are, of course, litigants whose capacity fluctuates over time, so that there may be times in any proceedings where they need a litigation friend and other times when they do not. CPR 21.9(2) provides that when a party ceases to be a patient (now, a protected

person) the litigation friend's appointment continues until it is ended by a court order. But a party whose capacity does not fluctuate either should or should not require a litigation friend throughout the proceedings. It would make no sense to apply a capacity test to each individual decision required in the course of the proceedings, nor, to be fair, did the defendant argue for that" (paragraph 15);

3. Further, apparent suggestions in earlier cases which could be read as to the effect that, "having identified a problem and gone to a lawyer, all that is needed is the capacity to understand and make decisions based upon the actual advice given by that lawyer" could not be correct as this would mean that whether a person had or lacked litigation capacity would depend upon whether they received good advice, bad advice or no advice at all. Rather

> "*the test of capacity to conduct proceedings for the purpose of CPR Part 21 is the capacity to conduct the claim or cause of action which the claimant in fact has, rather than to conduct the claim as formulated by her lawyers*" (paragraph 18)

4. Judged by that test, it was common ground that Ms Dunhill did not have capacity to conduct the claim (paragraph 18). She should therefore have had a litigation friend from the outset of the proceedings;

5. As Kennedy LJ had noted in *Masterman-Lister*, CPR r 21.3(4) does suggest a solution to the fact that litigation conducted in the absence of a litigation friend is ineffective. This provides: "[a]*ny step taken before a child or patient has a litigation friend, shall be of no effect, unless the court otherwise orders*." Lady Hale endorsed the comments of Kennedy LJ to the effect that "[p]*rovided everyone has acted in good faith and there has been no manifest disadvantage to the party subsequently found to have been a patient at the relevant time I cannot envisage any court refusing to regularise the position*," but noted that "[b]*ut of course, everything must depend upon the particular facts. It might be appropriate retrospectively to validate some steps but not others. In this case, we have not been asked to validate anything, but no doubt we could do so of our own motion if we thought it just*" (paragraph 19);

6. In the instant case, it would not be just retrospectively to validate the settlement (and the Supreme Court had not been asked to do so). As Lady Hale noted, "[w]*hile every other step in the proceedings might be capable of cure, the settlement finally disposing of the claim is not*" (paragraph 20). The purpose of requiring approval by the court of a settlement involving a protected party "*is to impose an external check on the propriety of the settlement and the accompanying practice direction sets out the evidence which must be placed before the court when approval is sought*" (paragraph 20);

7. As CPR r.21.10 was intra vires, and did not require that Mr Burgin be on notice of Ms Dunhill's incapacity (the rule being a substantial, but specific exception to the common law principle set down in *Imperial Loan Co Ltd v Stone*), the combined effect of Ms Dunhill's incapacity and the absence of court approval of the settlement order meant that that order was of no effect (paragraphs 20, 22 and 30);

8. Policy arguments could not answer the legal questions before the court, but to the extent

> to in any event that "*the policy underlying the Civil Procedure Rules is clear: that children and protected parties require and deserve protection, not only from themselves but also from their legal advisers. The notes to Order 80 in the last (1999) edition of the Supreme Court Practice stated that among the objects of the compromise rule was 'to protect minors and patients from any lack of skill or experience of their legal advisers which might lead to a settlement of a money claim for far less than it is worth', a sentiment which has been carried forward into the current edition of Civil Procedure*." (paragraph 33).

The consent order was therefore set aside, and the matter remitted to be set down for trial.

Comment

The Supreme Court's decision as to litigation capacity does not perhaps come as a substantial surprise given the careful and comprehensive judgment of the Court of Appeal on this aspect. It is interesting, though, to note that Lady Hale left open the possibility that the parties could have challenged the long-established test for litigation capacity (albeit that she then shut down such a challenge by affirming the reasoning of the Court of Appeal in *Masterman-Lister*).

The decision in relation to CPR r.21.10, likewise, is perhaps not altogether surprising. The decision is also useful confirmation of the limits of the power under CPR r 21.3(4) to remedy steps taken in the absence of a litigation friend. It is perhaps also worth noting in this regard that there is no equivalent to this power in the COPR. However:

The silence in the COPR may, in and of itself, mean that the court retains a discretion retrospectively to approve any steps to be taken prior to the appointment of a litigation friend (whether or P or another party to the proceedings) – see in this regard the commentary in *Jordans' Court of Protection Practice 2014* (Jordans, 2014) at p. 762, in the commentary to COPR r141;

It would also be open to a Court of Protection judge to apply CPR r.21.10 through the (often overlooked) provisions of COPR r.9, which provide that "*In any case not expressly provided for by these Rules or the practice directions made under them, the Civil Procedure Rules 1998 (including any practice directions made under them) may be applied with any necessary modifications, insofar as is necessary to further the overriding objective.*"

No matter how the discretionary power arises, we would suggest that the comments of Lady Hale would be applicable so as to suggest that the court should proceed with caution before endorsing any steps that went beyond the merely procedural.

Is Banks v Goodfellow history?

Fischer v Diffley [2013] EWHC 4567 (Ch) (HHJ Dight sitting as a Deputy High Court Judge)

Testamentary capacity

Summary

This Chancery Division case is of some interest because it is the first one of which the editors aware in which the MCA 2005 has been expressly prayed in aid in determining whether an individual had testamentary capacity.

The claimants were the representatives of the family in Germany of Louise Beck, who died on 17 January 2011. They sought a declaration that she died intestate and that the two wills executed by her and dated 1 March 2009 ('the first will') and 2 May 2010 ('the second will') were invalid.

The deceased had substantial assets in both England and Germany and on the literal construction of the wills they purported to deal with her assets in both jurisdictions. If the wills are invalid, then the deceased's estate in England and Wales are passed on intestacy to the family whom the claimants represent and her estate in Germany would pass according to the laws of that country.

The claimants contended that at the date of execution of each of the wills, the deceased suffered from such severe dementia brought on by Alzheimer's disease that (a) she lacked testamentary capacity and (b) there was a want of knowledge and approval and that in those circumstances they ask the court to pronounce against both wills. The only active defendants to the claim were the former tenants and neighbours of the deceased and by their counterclaim they ask the court to pronounce in solemn form for both wills notwithstanding the apparent discrepancy between the terms of each will. By the wills, the defendants stood to benefit from a life interest in either the whole or part of the deceased's estate in both jurisdictions. If the first will was upheld, the remainder would be to the Battersea Dogs and Cats Home absolutely. If the second will was upheld, the remainder is to the family in Germany.

For our purposes, the key passages from the judgment are those relating to the law, which HHJ Dight referred to as not being in dispute (paragraph 24).
At paragraph 25, HHJ Dight held:

> *"As far as capacity is concerned, there are many reported decisions setting out the common law, the principal case being Banks v. Goodfellow, which has recently been supplemented by statute, to which, it seems to me, that I am entitled to have regard as a starting point in connection with the question of capacity."*

HHJ Dight then set out the key provisions of the MCA 2005. He noted that the general principles to be applied were now contained in s.1, holding (at paragraph 28) that:

> *"28. Notwithstanding the wording of sub-section 1 [i.e. '[t]he following principles apply for purposes of this Act.'] it seems to me, having regard to the terms of the Act and the context in which it was enacted, that the principles go further and are applicable in situations such as the present and must be looked at alongside the classic test contained within the common law as set out in the case of Banks v. Goodfellow."*

Having set out and commented upon the provisions of ss.2-3 MCA 2005, he held at paragraph 34 that it was apparent to him from the terms of the expert evidence that he heard that "*each of the experts had in mind this modern statement of the principles relating to the assessment of capacity in a court of law and have addressed their evidence so as to deal with the factors that have been identified in the provisions that I have just referred to*."

HHJ Dight recited the classic authorities on want of knowledge and approval, placing particular reliance upon the decision of the Court of Appeal in *Hawes v Burgess* [2013] EWCA Civ 74 and that of Newey J in *Greaves v Stolkin* [2013] EWHC 1140 (Ch).

On the basis of the tests set down above, and after an exhaustive review of the evidence, lay and expert, HHJ Dight held that the deceased had not had the requisite capacity to make either of the two wills, nor had the defendants discharged the burden of establishing that she knew and

approved the contents of the first will (for 12 reasons) or the second will (for 16 reasons). He therefore found against both wills and declared that the deceased died intestate.

Comment

As noted at the outset, this is, as far as the editors know, the first time in which a Chancery judge has expressly prayed in aid the MCA 2005 in determining the test to apply (retrospectively) to decide whether the deceased had had testamentary capacity. Alex's commentary upon the case can be found here, whilst Simon Edward's article upon testamentary capacity in light both of this case and that of *Simon v Byford* discussed also in this issue can be found here.

Keeping it concrete

Simon v Byford [2014] EWCA Civ 280 (Court of Appeal (Sullivan, McFarlane and Lewison LJJ)

Testamentary capacity

Summary

This is the appeal from the decision of Nicholas Strauss QC that we covered last year in the newsletter. In summary, one of the sons ('R') of a Mrs Simons ('S') brought proceedings in the Chancery Division challenging a will made by his mother, at her 88th birthday party in 2005. Mrs Simo's previous will, made in 1996, was more generous to R than his other three siblings in that, although the majority of her estate was split equally between them, R also received a flat owned by C and shares in the family company. R was not present at the birthday party but other members of the family were there, including his brother J and sister H. The will made by C at the birthday party provided for her assets (with the exception of a relatively small sum) to be divided between her children in equal parts. There was evidence that S was suffering from mild to moderate dementia at the time she made that will and R argued that she lacked testamentary capacity. This was rejected by J and H. S died in 2009.

Nicholas Strauss QC held at first instance that S had had the requisite testamentary capacity, that she knew of and approved of the provisions of the will made in 2005 and that it was her last and valid will. Importantly, he considered that although S would not have been able to remember the terms of her previous will, she would have been able to ask to see that will if she wished to do so, when she was told at the time of making the 2005 will that it did not (as she believed) leave her property to her children equally.

R appealed to the Court of Appeal on the grounds that (1) the judge was wrong in his analysis of the requirement (deriving ultimately from *Banks v Goodfellow*) that the testator is able to comprehend and appreciate the claims to which he ought to give effect; (2) the judge was wrong to infer that S was capable of understanding the extent of her estate; and (3) the judge set the requirements of establishing knowledge and approval too low.

The appeal was dismissed, with Lewison LJ giving judgment on behalf of the Court of Appeal. As a preliminary point, he reminded himself (as he said in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]) that a first instance's judges findings about testamentary capacity and knowledge and approval are findings of fact, based on his appreciation of the evidence as a whole, such that an appeal court should be wary of interfering with them.

In relation to grounds (1) and (2), Lewison LJ considered the principles relating to testamentary

capacity. He held that *Banks v Goodfellow* was the applicable test, although – interestingly – on the basis that the will was made before the MCA 2005 came into force (paragraph 39). Importantly, however, citing dicta of Peter Gibson LJ in *Hoff v Atherton* [2004] EWCA Civ 1554; [2005] WTLR 89, he (re)emphasised (at paragraph 39) that what one is dealing with is "*capacity*, in other words with potential" (paragraph 39, emphasis in original). In other words, "*capacity depends on the potential to understand. It is not to be equated with a test of memory*" (paragraph 40). As he noted, this was not a new point:

> *"40… [i[]n Harwood v Baker (1840) 3 Moo PC 282 Erskine J giving the judgment of the Privy Council said:*
>
> > *'… in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his will he is excluding from all participation in that property.' (Emphasis added)*
>
> *He did not say that the testator must actually remember the extent of his property. Mrs Simon did in fact remember the extent of her estate, partly as a result of executing the deed of gift, and partly as a result of the discussions that followed. In my judgment, when the judge said that Mrs Simon was not "capable" of remembering why her earlier will had benefited Robert, he meant no more than that she had forgotten. Once I knew the dates of all the Kings and Queens of England, and the formula for Hooke's law; and was "capable" of remembering them. Now I would have to look them up. The judge's important finding was not that Mrs Simon had forgotten the terms of and reasons for her earlier will. It was that she was capable of accessing and understanding the information; but chose not to…"*

The appellant's more substantial point, Lewison LJ found, was the contention that, by dividing her shareholding equally between her children S must have overlooked the reason why in her earlier wills she had left them all to R. It was contended on R's behalf, although S might, with the help of an explanation, have been able to understand why she had done that, in the absence of an explanation she could not. Thus while she might have understood that she owned the shares (as was apparent from the deed of gift) she did not understand their significance. Their significance was that if they all went to R then deadlock in the company would be prevented; whereas if divided equally among the children deadlock was possible. It was said, that, while it would have been open to S to change her mind about the desirability of leaving all the shares to R, she did not have capacity to do so without first understanding the consequences of doing that. This was not simply a failure of recollection. It was an inability to replicate the thought processes that had led her to her earlier disposition.

As Lewison LJ noted, "*it seems to me that the question that divides the parties is whether a testator or testatrix must not only be capable of understanding what assets are at his or her disposal and the persons who have claims on those assets, but must also understand not simply the direct consequences but also the collateral consequences of disposing of them in one way rather than another*" (paragraph 43).

Significantly, Lewison LJ held (at paragraph 45) that:

> *"I do not believe that previous authority goes to the length of requiring an understanding of the collateral consequences of a disposition as*

opposed to its immediate consequences. Nor do I think it desirable that the law should go that far. As Mummery LJ put it in Hawes v Burgess [2013] EWCA Civ 74; [2013] WLR 453 at [14]:

> *'The basic legal requirement for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estate on their death."*

46. The significance of the shares on their own was slight. What gave them significance (at least to Robert) was the fact that, combined with his existing shareholding in the company, acquisition of Mrs Simon's shares would give him the power to avoid deadlock. But that would have required Mrs Simon to have understood (and remembered) not only what her own estate was, but also what Robert's assets were. I do not think that any of the authorities requires as a condition of testamentary capacity that the testator should understand or remember the extent of anyone else's property. Again, what Ms Reed's submission really amounts to is a memory test. In fact the classic formulations of testamentary capacity … limit themselves to requiring the testator to understand no more than the extent of his property. They do not require him to understand the significance of his assets to other people" (emphasis in original).

In relation to knowledge and approval, Lewison LJ held that:

"what we are looking for is actual knowledge and approval of the contents of the will. But it is important to bear in mind that it is knowledge and approval of the actual will that count: not knowledge and approval of other potential dispositions. Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made. That is why knowledge and approval can be found even in a case in which the testator lacks testamentary capacity at the date when the will is executed. The reason for this requirement is the need for evidence to rebut suspicious circumstances: Perrins v Holland [2010] EWCA Civ 840; [2011] Ch 270 at [25]. Normally proof of instructions and reading over the will will suffice: ibid at [25]. The correct approach for the trial judge is clearly set out in Gill v Woodall [2010] EWCA Civ 1430; [2011] Ch 380. It is a holistic exercise based on the evaluation of all the evidence both factual and expert. The judge's starting point in our case was one of 'initial suspicion', given that the disputed will was prepared and executed without a solicitor and without Mrs Simon having been medically examined: see [11]. But having heard the evidence he held that his initial suspicion had been dispelled. He found it clear that Mrs Simon knew that she was making a will, took a conscious decision to make it and approved its terms. This conclusion was, in my judgment, fully supported by the evidence that the judge accepted. In particular he accepted the evidence of Ms Schachter that she read the draft will to Mrs Simon twice; and having typed the will, she read it again to Mrs Simon who appeared to understand it. She did that because, as a former legal secretary, she understood that the will had to be read and understood by its maker. Mrs Simon also read it to herself. Given that the will was relatively simple, and that the judge had found that Mrs Simon had testamentary capacity, his finding of knowledge and approval is in my judgment unassailable."

The appeal was therefore dismissed.

Comment

Lewison LJ's restatements of the principles governing the test for testamentary capacity for pre MCA 2005 wills and those governing the test for knowledge and approval are helpful in their focus upon: (1) the realities of the situations in which wills are drawn up; and (2) the concrete requirements of a person choosing to make a will. His message – even if it relates to cases which formally do not engage the MCA 2005 – is very much in line with the spirit of the Act in terms of securing against the risk of (retrospectively) finding incapacity by asking too much of the testator.

For further commentary upon this case by Simon Edwards, see here, and by Alex see here.

The burden of proof in testamentary capacity revisited?

Bateman v Overy and Overy [2014] EWHC 432 (Ch) (John Male QC sitting as a Deputy High Court Judge)

Testamentary capacity

Summary and comment

We do not formally provide a case note upon this case relating to (inter alia) testamentary capacity, which is highly fact-specific, but note the decision of the Deputy High Court Judge upon the approach to be adopted to the determination of testamentary capacity. Counsel for the Claimant contended that the agreed medical expert evidence raises a real doubt about capacity and that this shifts the evidential burden on to the Defendants as propounders of the will. In so doing, he relied upon the well-known summary of the relevant principles by Briggs J in *Key v Key* [2010] EWHC 405 (Ch) at paragraph 97:

> *"97. The burden of proof in relation to testamentary capacity is subject to the following rules:*
>
> *i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity.*
>
> *ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.*
>
> *iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless.*
>
> *See Generally Ledger v. Wootton [2007] EWHC 2599 (Ch) per HHJ Norris QC at paragraph 5."*

Counsel for the Defendants sought to rely upon what he said was the rather approach of the different approach of the Court of Appeal in *Hawes v Burgess* [2010] EWCA Civ 74. He relied upon the following passages from the judgment of Mummery LJ:

> *"13…. [t]he court has to consider and evaluate the totality of the relevant evidence, from which it may make inferences on the balance of probabilities. Although talk of presumptions and their rebuttal is not regarded as specially helpful nowadays, the courts realistically recognise that, for example, if a properly executed will has been professionally prepared on instructions and then explained by an independent and experienced solicitor to the maker of the will, it will be markedly more difficult to challenge its validity on the grounds of either lack of mental capacity or want of knowledge and approval than in a case where those prudent procedures have not been followed.*

> *14. I should add a statement of the obvious in order to dispel any notion that some mysterious wisdom is at work in this area of the law; the freedom of testation allowed by English Law means that people can make a valid will, even if they are old or infirm or in receipt of help from those whom they wish to benefit, and even if the terms of the will are hurtful, ungrateful or unfair to those whose legitimate expectations of testamentary benefit are disappointed. The basic legal requirements for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estate on their death."*

The Deputy High Court Judge rejected the suggestion advanced by Counsel for the Defendants, and proceeded in accordance with the approach set out in *Key v Key*. At paragraph 138, he held that, as he "*read the earlier paragraphs 11 and 12 in Mummery LJ's judgment in Hawes, the passages cited by Mr Lonsdale deal with more general matters rather than with the specific issue of testamentary capacity. So, I will apply the approach set out by Briggs J in Key v. Key. However, I will step back at the very end of what I say on the issues about the 2011 will and test my conclusions against Mummery LJ's more general remarks*."

Alex has addressed the question of the burden of proof further in his paper here; for further discussion of this case, see also Simon Edwards' paper here.

107 Days of Action

Readers may already be familiar with LB, who was the star of his mother's blog until his tragic and unnecessary death last year in an assessment and treatment unit. LB's mother has started a campaign called 107 Days of Action which aims to bring people together to achieve justice for LB, and for other learning disabled young adults. Of particular resonance to readers may be her goal to "*prevent the misuse/appropriation of the mental capacity act as a tool to distance families and isolate young dudes.*"

Please visit www.107daysofaction.wordpress.com to support the campaign.

Research Project: Welfare Cases in the Court of Protection

The Centre for Health and Social Care Law at Cardiff University is undertaking research on welfare cases in the Court of Protection. The project is funded by the Nuffield Foundation. The project is led by Professor Phil Fennell. Dr Lucy Series is the researcher working on the project, and Professor Luke Clements and Dr Julie Doughty are project consultants.

The project aims to gather information about the *process* of using the Court of Protection, and the views of those who work within the court or use it as litigants. The researchers will use a range of research methods, including: a *statistical* analysis of court files to look at patterns of use, demographic issues and procedural questions; focus groups and interviews with a range of stakeholders involved in the Court of Protection; observations of proceedings and roundtable discussions on key policy themes with invited stakeholders.

Research findings and information about the project for both specialists and the general public will be published on a dedicated website.

The researchers are very grateful to the judges and staff at the Court of Protection and the Ministry of

Justice for their considerable assistance and support in helping to set up this project. Questions, comments or suggestions for the research team from practitioners and others are welcomed; please direct them to Professor Phil Fennell (Fennell@cardiff.ac.uk).

NAO Report upon Adult Social Care in England

The National Audit Office has recently published the first in a series of report upon the (not entirely happy) picture of Adult Social Care in England. It details increasing pressures on the system: adults with long-term and multiple health conditions and disabilities are living longer; demand for services is rising while public spending falls; and there is unmet need for care. As the NAO notes, whilst the need for care continues to rise, local authorities' spending on adult social care fell by 8 per cent in real terms between 2010-11 and 2012-13. As the NAO notes:

> *"The adult care system is changing significantly and rapidly. The Department for Communities and Local Government is expecting local efficiency initiatives, service transformation and the Better Care Fund to help local government manage financial pressures. However, there is weak evidence for which ways of commissioning and providing services are the most cost-effective. The Care Bill will introduce significant changes for local authorities which will be challenging to plan for because of a lack of information, lack of evidence on what works and short timescales."*

It warns that:

> *"while the Department of Health and the Department for Communities and Local Government are working together to understand the cumulative implications of changes to, and reduced spending on, health and social care, welfare and related local services, other departments are not. For example, changes to benefits for adults with disabilities and their carers will put further strain on care users' ability to pay for their own care and for informal carers to provide support."*

Torture in Healthcare Settings

We reported last year upon the Special Rapporteur on Torture's 2013 Thematic Report on torture in healthcare settings. A series of important – and difficult – essays responding to this report can be found here, in a volume produced by the Center for Human Rights & Humanitarian Law at American University Washington College of Law. It is particularly important, and challenging, as regards the interaction between the UN Convention on the Rights of Persons with Disabilities (CRPD) and UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in the healthcare setting.

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Conferences at which editors/contributors are speaking

5th anniversary conference for the National Preventive Mechanism (Optional Protocol to the Convention against Torture)

Jill is chairing the session on de facto detention at this conference to mark this important anniversary, being held in Bristol on 8 April. Details are available here.

The Assisted Suicide Bill: Does Scotland Need to Legislate?

Adrian is speaking at a medico-legal seminar at the Mason Institute of the University of Edinburgh Law School on the subject of assisted dying on 24 April 2014 at the Royal College of Physicians in Edinburgh. Details can be found here and initial details can be found here.

A Deprivation of Liberty: Post Cheshire West and P and Q

Neil is speaking with Jenni Richards QC at the conference arranged by Langleys on 1 May on the *Cheshire West* judgment. Full details are available here.

Annual private law conference convened by the Royal Faculty of Procurators

Adrian will be speaking at the annual private law conference convened by the Royal Faculty of Procurators in Glasgow on 29 May 2014. Full details are available here.

Hot topics in adult incapacity law

Adrian will be speaking on hot topics in the incapacity field at the Solicitors' Group Wills, Trust & Tax conference in Edinburgh on 7 May 2014. Full details are available here.

The Deprivation of Liberty Procedures: Safeguards for Whom?

Neil is speaking at the conference arranged on 13 June by Cardiff University Centre for Health and Social Care Law and the Law Society's Mental Health and Disability Committee. The conference will focus on the implications of the ruling of the Supreme Court *Cheshire West* as well as the likely impact of the Report of the House of Lords Committee on the

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 Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Mental Capacity Act. Other speakers include Richard Jones, Phil Fennell, Lucy Series, Professor Peter Bartlett, Sophy Miles and Mark Neary. Full details are available here.

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Chambers Details

Our next Newsletter will be out in early May. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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Alex is frequently instructed before the Court of Protection by individuals (including on behalf of the Official Solicitor), NHS bodies and local authorities, in matters across the spectrum of the Court's jurisdiction. His extensive writing commitments include co-editing the Court of Protection Law Reports, and contributing to the 'Court of Protection Practice' (Jordans). He also contributed chapters to the second edition of 'Mental Capacity: Law and Practice' (Jordans 2012) and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). To view full CV click here.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

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Adrian is a practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law*," he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV click here.

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Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. To view full CV click here.