



briefing

Health, Risk and Regulatory - January 2010

KD and LD v Havering Borough Council

Court of Protection, 19 October 2009

This judgement provides a useful review of the principles applicable to proceedings under the Mental Capacity Act 2005. It confirms that, although the Court of Protection has the power to summarily dispose of proceedings, the exercise of this power should be used with caution. In this case, the exercise of such powers had been inappropriate and procedurally unfair, inter alia, because there were potential issues engaging Article 5 (right to liberty) and Article 6 (right to a fair trial) under the European Convention on Human Rights (ECHR).

LD was severely disabled and until 2009 had been in the care of KD, who herself had previously been detained under the Mental Health Act 1983. LD was placed on the Local Authority Child Protection register and received a high degree of support for himself and his mother. However, KD was resistant to the support that was considered necessary by the professionals responsible for providing care and support. LD was then placed in the Local Authority facility for respite care with his mother's consent.

Concerns were raised over the ability of KD to co-operate with the arrangements. In consequence, the Local Authority sought orders to retain LD's placement in respite accommodation, to allow an assessment at another unit and to replace his mother as his deputy.

At the initial hearing a holding order was made declaring that LD lacked the capacity to make decisions for himself, and that he was to remain in his current placement until a further review by the court. Expert evidence in the form of a 'best interests' report was directed.

At the review hearing, the judge wished to rely upon summary powers of disposal, rather than progress to a full hearing with examination of the expert evidence. Counsel for KD contested this on the basis that:

- KD was absent from the proceedings;
- KD was not on notice that proceedings might be brought to an end; and
- there were concerns about KD's litigation capacity.

This argument was rejected, and the following order was made:

- LD lacked capacity to make relevant decisions and deprivation of his liberty was necessary, proportionate and in his best interests;
- LD was to remain resident at his present nursing home or such other establishment as recommended by the applicant Local Authority in conjunction with medical evidence and consultation (if possible) with KD;
- contact between LD and KD to be as arranged with the Local Authority; and
- permission to KD to apply on 48 hours notice to vary.

KD appealed and submitted that the court lacked the jurisdiction to determine the case summarily, or alternatively; if such power existed, it was unfairly exercised in the circumstances.

On appeal, the HHJ Horowitz QC held that the power to determine cases summarily existed in accordance with the overriding objective (Rule 3); and case management powers (Rules 25 and 27) of the Court Protection Rules 2007. Indeed, HHJ Horowitz QC noted that it did not appear to be the intended policy of the Mental Capacity Act 2005 that every case should proceed to an extended hearing with expert evidence.

However, he further noted that such summary power was to be exercised appropriately and with a modicum of restraint. It was a power to be used as an alternative to a hearing, or in an emergency where there was little

or no apparent contest anticipated. It was held that it was not likely to be appropriate where the outcome of such an exercise could result in Article 5 and 6 ECHR being engaged. In this case, LD faced a potential deprivation of liberty (Article 5); whilst KD faced a potential denial of a right to a fair hearing in circumstances where she had potentially been denied the opportunity to make her wishes known (Article 6). In the circumstances it was considered inappropriate to dispose of proceedings summarily rather than progress to a hearing with full examination of the expert evidence.

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