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Re P
All Change For Statutory Wills - A New Direction

The decision of Mr Justice Lewison in Re P[1] is the first judgement of a High Court Judge (sitting as a Judge of the Court of Protection) relating to the execution of a statutory will since the Mental Capacity Act 2005 ("MCA") came into force. The decision has led to a change in the criteria to be considered when making a will for a person that lacks capacity ("the Patient") and has overturned the previous authority of Re D(J)[2].

The Court will no longer have to perform "mental gymnastics" and consider what Will the Patient himself would have executed had he the requisite capacity. Instead the Court will consider the "best interests" of the Patient. This is more in line with the aims of the MCA and may be a more realistic approach than the convoluted approach previously taken.

The difficulty going forward is considering what is in the best interests of the Patient when the impact of the decision being made (the drafting of the statutory will) is likely to have no bearing on the Patient's wellbeing in his lifetime.

Pre Mental Capacity Act 2005

Prior to the MCA, the Mental Health Acts of 1959 and 1983 governed the Court's authority to make decisions with regards to the Patient's financial affairs, including the ability to approve a statutory will.

Substituted Judgment

Section 102(1) of the 1959 Act stated: "*The judge may, with respect to the property and affairs of a patient, do or secure the doing of all such things as appear necessary or expedient- (a) for the maintenance or other benefit of the patient, (b) for the maintenance or other benefit of members of the patient's family, (c) for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered, or (d) otherwise for administering the patient's affairs.*"

Section 103 gave the Court authority to approve a settlement and the Administration of Justice Act 1969 introduced the authority to approve a will on behalf of a Patient.

[1] Re P [2009] EWHC 163 (Ch)
[2] Re D(J) [1982] Ch 237

In *Re L (WJG)*[3] Cross J was asked to make a settlement which did not benefit the Patient or his family, but benefitted persons whom the patient might be expected to provide for, ie section 102 (c). The wording of the section required the judge to assume that the Patient was not mentally disordered during the period in which the decision was to be made, and to then consider what provision the Patient would have made in this temporary state of clarity, giving regard to his personality etc. Cross J held that this was the only assumption he had to make and that having assumed that the Patient was not mentally disordered, he was to take the Patient's personality as it actually was and make the decision the Patient would have made. This is the "substituted judgment" approach.

So in the case of a will, the decision maker would have to consider what will the Patient himself would have made having regard to his specific circumstances.

In Re D(J)[4] Megarry V-c set out five guiding principles to be considered when assessing a statutory will:

1. It is assumed that the Patient has a brief lucid interval at the time the will is drafted.
2. It is assumed that during the brief lucid interval the Patient has full knowledge of the past and a realisation that he will relapse into the actual mental state with the prognosis as it actually is.
3. The actual Patient is to be considered with all his antipathies and deep affections although the Court must not give effect to a will that is beyond reason.
4. During the brief lucid interval it is assumed that the Patient is advised by competent solicitors and that relevant issues are taken into account.
5. The testator is expected to take a "broad brush" approach.

The Court therefore had to take a subjective approach and consider what the individual Patient would have done: "*seek to make the will which the actual patient, acting reasonably, would have made if notionally restored to full mental capacity, memory and foresight".* Note that the subjective judgment was tempered slightly by the fact that the Patient must have been "acting reasonably": the Court "*should not give effect to antipathies or affections…which are beyond reason".*

Section 95 of the Mental Health Act 1983 was in almost identical terms to Section 102(1) of the 1959 Act: the power: *"for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered".* Again the substituted judgement approach.

This has led to some awkward decisions having to have been made. In *Re C (A Patient)*[5] the Patient never had capacity and had lived in a hospital since she was 10 years old. She had virtually no contact with her family (they appeared to have been unaware of her existence). Apart from staff and other patients, her only visitor was a member of a voluntary organisation who would take her for drives etc. Even applying the assumption that the Patient had temporarily regained capacity and was fully aware of her situation, it was impossible to have any view on what she would have wanted to do in terms of benefitting family, the hospital or charity. Hoffmann J held that one would have to assume that the patient was a "*normal decent person, acting in accordance with contemporary standards of morality"* and ultimately the estate was divided between the Patient's family, the hospital, and charities.

[3] Re L (WJG) [1966]Ch 135
[4] Re D(J) [1982] Ch 237
[5] Re C (A Patient) [1992] FLR 51

Best Interests

These statutory powers did not enable decisions to be made about a vulnerable person's welfare but the Court had inherent jurisdiction to make these "welfare decisions" in respect of patients/vulnerable adults where it was of the view that the adult could not make the decision himself. These were typically in cases of invasive medical treatment where the Court would have to make a decision in what it considered to be the patient's best interests. In assessing best interests the Court drew up a "balance sheet": *Re A (Male Sterilisation)*[6]*:" The first entry should be of any factor or factors of actual benefit….Then on the other sheet the judge should write any counter-balancing dis-benefits to the applicant…Then the judge should enter on each sheet the potential gains and losses in each instance making some estimate of the extent of the possibility that the gain or loss might accrue. At the end of that exercise the judge should be better placed to strike a balance between the sum of the certain and possible gains against the sum of the certain and possible losses. Obviously only if the account is in relatively significant credit will the judge conclude that the applicant is likely to advance the best interests of the claimant".*

This has been known as the "balance sheet" or "best interests" approach. What the patient wants may be taken into consideration but it was for the Court to make a value judgment about what was in the patient's best interests.

So the two tests: bests interests and substituted judgment ran side by side depending on the type of decision to be made.

Mental Capacity Act 2005

The MCA seeks to govern all decisions whether financial or welfare. It also introduced the concept of time specific and task specific capacity, (eg the Patient may have capacity to decide where he wants to live, but not have the capacity to appreciate the consequences of making a will). Capacity may also vary over time so incapacity at any given time has to be proven by the person alleging it.

Section 1 of the MCA assumes that every adult over 16 has full legal capacity to make decisions for himself unless it can be shown that he lacks the capacity to make that specific decision at that specific time. All "*practicable steps"*[7] have to be taken to assist the person to make the decision and only if this is not possible can it be said that that person is unable to make the decision. Any decision taken on his behalf has to be in the person's best interests and must be taken so as to minimise restrictions on his "*rights and freedom of action"*[8]*.*

So the decision-maker should only be making an assessment of what is in the Patient's "best interests" once the decision has been made that the Patient lacks capacity to make the decision himself, despite having been given all the necessary support and information to make that decision.

Section 4 MCA: Best Interests

Section 4 of the MCA sets out in further detail exactly how the decision maker is to determine what is in the Patient's best interests. This is further clarified in chapter 5 of the Code of Practice which confirms that:

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[6] Re A (Male Sterilisation) [2000] 1FLR
[7] Section 1(3) MCA
[8] Section 1(6) MCA

1. The Patient should be encouraged to take part in the decision if possible, and given any information or tools necessary to assist in this process.
2. The decision maker should try to take account things the Patient would take into account if he were making the decision himself. He should try to establish the Patient's views, wishes and feelings (past and present), beliefs and values that would be likely to influence the decision.
3. The decision maker should not make assumptions about best interests on the basis of the Patient's age, appearance or condition.
4. There must be some consideration as to whether the Patient will regain capacity and if so, whether the decision can wait.
5. There must be consultation with others if appropriate, including: anyone previously named by the Patient as being someone to be consulted on the relevant issue, carers, friends, family who take an interest in the Patient's welfare, any attorney or deputy. This while considering the Patient's simultaneous right to confidentiality.
6. Consideration must be given to any other less restrictive way of achieving the same or similar result.

Re P

Mr Justice Lewison therefore recognised that the substituted judgement approach previously applied in relation to statutory wills was inconsistent with the approach of the MCA which was after all intended to govern all decisions, welfare and financial.

He acknowledged that the patient's wishes were still a very important part of the process and agreed with the comments made in the matter of *Re S and S (Protected Persons) (unreported 25 November 2008): "the views and wishes of P in regard to decisions made on his behalf are to carry great weight..."* although cautioning that section 1(6) of the MCA only obliges the decision-maker to have regard to the wishes of the patient and that there should be no presumption that the patient's wishes should be adhered to. They are one factor to be taken into account.

In the context of statutory wills it is often difficult to consider what is in the best interests of the Patient when of course the consequences will only have effect after death. Mr Justice Lewison concluded that what remains after death is the memory of the Patient. The fact that the Patient may be remembered as having done "the right thing" is enough to justify such a decision as being in his best interests.

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