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PSG Trust Corporation Limited v CK [2024] EWCOP 14

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Background

- PSG TC appointed as deputy for P&A of (i) CK and (ii) NJ
- CK – passenger in RTA causing serious orthopaedic injuries and a brain injury. PI claim brought on her behalf, which was settled.
- NJ – victim of serious shaking assault aged 3 months. Diagnosis of cerebral palsy. Claim brought on her behalf, which was compromised.

The Problem

- There were various risks in CK/NJ knowing the value of the settlements.
- Concealing the value of the settlement was in conflict with the deputy's duty to promote CK/NJ's autonomy and could affect their ability to make a will.
- Conflict in way in which experts in civil claim had approached the issue.

- Unsatisfactory approach by the Courts in previous decisions:
 - EXB v FDZ [2018] EWHC 3456 (QB)
 - PBM v TGT [2019] EWCOP 6
 - DXW v PXL [2019] EWHC 2579.

- EXB:

- Approval of PI claim under CPR rule 21.10.
- EXB's mother and solicitor did not consider it was in his best interests to be told about the value of the settlement.
- EXB told the judge he did not want to know the value as he would *'probably end up spending it'* and knowing about it would cause him stress.
- Foskett J held that *'the primary question...is whether I can conclude...that the Claimant cannot make for himself the decision about whether to be told the value of the award'*.
- Court did not demarcate the test of capacity sufficiently from the best interest analysis.

- PBM:
 - Court was asked to consider whether P retained capacity to enter into a prenuptial agreement and whether he should be informed about the extent of his assets.
 - Francis J was invited to hold by David Rees KC that the approach in EXB was wrong. It was said that *'a capacitous person... does not ask themselves whether they should be made aware of the extent of their assets. If they do not have the relevant knowledge to hand, they have a right to obtain that information should they wish to obtain it'*.
 - Argued that P had an automatic right to the information.

- Court held that PBM retained capacity *‘to be informed about the extent of his assets’* but went on to say that it was unnecessary to decide if the test was whether *‘PBM can decide whether he should ask about the extent of his assets or whether he should be told’* as this was *‘boarding on semantic absurdity’*
- This approach ignored the proper approach to capacity emphasised by the Supreme Court in Local Authority v JB [2022] AC 1322

- Local Authority v JB [2022] AC 1322:

- First, identify the correct formulation of '*the matter*' in respect of which it is required to evaluate whether P is unable to make a decision;
- Then, identify the '*information relevant to the decision*'.
- Finally, ask oneself whether P is unable to make a decision in relation to the matter and, if so, whether that inability is because of an impairment of or a disturbance in the functioning of the mind or brain.

- DXW:

- Claim settled at 6.6M. Saini J was asked to make an ‘*EXB order*’. Court was not referred to PBM and did not highlight the conflict in the previous cases.
- DXW’s deputy, parents and several experts considered that he lacked capacity to decide whether he should know the value of his settlement.
- The Court found that DXW lacked ‘*capacity to decide whether or not he should know of the amount of the settlement*’.

- DXW did not have insight into:
 - The need to keep the settlement confidential.
 - That the settlement was in respect of past and future losses principally care, case management and long term assistance.
 - The money could and should be used wisely and properly only for his reasonable needs and requirements as part of his ongoing care regime.
- Here, the court did not identify correctly the relevant information. For instance, insight into how the settlement should be spent and the costs which it was intended to meet are not relevant to P's decision about whether to request information about its value.

The Application

- PSG brought an application seeking declarations on whether:
 - CK/NJ lack capacity to request information about their settlements?
 - If they did, was it in their best interests to be provided with this information?

The Issues for Consideration

How should the capacity test be framed '*where the focus of the concern is on P's vulnerability*'?

Should disclosure to P be regarded as automatic and as of right?

Is disclosure a facet of management of P's P&A?

The Court's Decision

- (1) The capacity decision is not determined by the Court's existing declaration that P lacks capacity to manage their P&A.
- (2) There is a free standing capacity decision – does P lack capacity to decide whether to request information about the value of their civil settlement.

(3) The relevant information for the purposes of this decision is:

- (i) the nature of the information in question
- (ii) the risks of obtaining it;
- (iii) the risks of not obtaining it;
- (iv) the benefits of obtaining it;
- (v) the benefits of not obtaining it.

(4) 'But the role of this court is to protect and promote human autonomy not to repress it with misconceived paternalism. A life wrapped in cotton wool is a restricted and diminished one' [§29]

(5) If a best interests decision needs to be made, it is within the Deputy's authority to make it.

(6) **BUT**, *'Precisely because the Court of Protection is such a highly fact-specific jurisdiction, it is perfectly conceivable that what might appear on the surface to be a Property and Affairs issue, is on a proper construction, nothing of the kind and truly a welfare issue. In these cases, an application can be made and a deputy's authority extended where appropriate'* [§31].

(7) Should obtain P's wishes/feelings but not if it would undermine the protections sought for P.

(8) An attorney under a finance LPA **does** require authority not to tell P.

CK

- Lacks capacity to make the decision.
- Good with numbers, grasp of budgeting and could understand extent of settlement.
- Lacks insight into actions of others and need to minimise circumstances putting her at risk of financial abuse.
- Primary area of deficiency is her inability to recognise her own vulnerability.

- In CK's best interests to provide the information because:
 - Family are strong protective factor.
 - Estimated the value already.
 - Considered able to make a simple will.
 - Involvement of deputy provides significant but not guaranteed protection.
 - Knowledge of the settlement unlikely to escalate her vulnerability.
 - Affords respect to her in the execution of her own autonomy.

NJ

- Lacks capacity to make the decision
- Profound difficulties with understanding numbers.
- Detained twice.
- Understood that she did not want her brother to find out but could not identify why.

Not in NJ's best interests to provide her with information at this stage:

- History of financial abuse by brother (heroin addict).
- Strikingly vulnerable to exploitation.
- Would not be able to understand the settlement
- Deputy considered that it would be difficult to manage her expectations if she knew
- Unlikely to have capacity to make a will.

Summary

- In the civil claim, the expert report on deputy costs will need to treat this issue as a separate capacity decision. A cost allowance for an application might need to be made in the expert report where it is likely to be a tricky BI decision.
- A deputy will need to think about a discrete capacity assessment on this decision where relevant.
- A deputy can make the best interest decision themselves. Consider reports from neuropsychologists, case manager etc.

- There might be a need to make an application if BI is not clear cut (disagreement amongst the family, P threatening to harm themselves, real risk of harm to P if they know but persistent wishes and feelings).
- Consider whether this can be made at the approval hearing or once the settlement is approved and you make your Re ACC requests.
- Need to advise attorneys and donors of this decision when drafting LPAs.
- Will need to make an application for authority to not tell the donor.

The End
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