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AN INTRODUCTION TO THE ENGLISH COURT OF PROTECTION AND THE MENTAL CAPACITY ACT 2005

DAVID REES QC

5 Stone Buildings, Lincoln's Inn, London

drees@5sblaw.com; +4420 7242 6201

Introduction

In this talk I consider recent developments in the law relating to mental capacity in England and Wales and look at the extent to which there has been a divergence from the common principles upon which the English and Manx approaches are founded. I will also consider the developing law in England and Wales on the recognition of foreign powers of attorney and foreign orders relating to the property and affairs and welfare of persons lacking capacity.

Common Roots

The relevant Manx law relating to persons who lack capacity to manage and administer their property and affairs is to be found in Part 7 of the Mental Health Act 1998 ("MHA 1998"). The language of this Act draws on English law and in particular on the provisions of Part VIII of the Mental Health Act 1959, and its successor Part VII of the Mental Health Act 1983; apart from a couple of minor differences in phrasing the statutory language is essentially identical. These statutes have their origins in the Lunacy Act 1890 and in the *parens patriae* jurisdiction that the Crown exercised over the estates of what were once termed "lunatics and idiots". One of the joys of preparing this talk has been the chance to revisit some statutory provisions and case law that were once extremely familiar to practitioners working in this area, but which have now been lost to English law.

Manx law, like the former English statutes, adopts for these purposes a test of capacity that is focussed on the person's ability to manage their property and affairs as a whole[1].

A fundamental change in the approach in England and Wales to dealing with persons who lack capacity occurred on 1st October 2007 with the coming into force of the Mental Capacity Act 2005 ("MCA 2005"). This introduced a new unified approach for dealing with both the property and affairs and the personal welfare of persons lacking capacity within a single specialist court, the Court of Protection[2]. It also introduced into English law a set of fundamental principles relating to issues of capacity and placed a statutory footing a general test of capacity that is both time, and issue, specific. The extent to which this general test replicates or supersedes some of the other well known tests of capacity (for example that for testamentary capacity set out in *Banks v Goodfellow*[3]) is one of the issues that is still being worked out in a number of English cases[4].

The five core principles are set out in section1 MCA 2005. These are:

- A person must be assumed to have capacity unless it is established that he lacks capacity.
- A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- An act done, or decision made, under the MCA 2005 for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

The test of capacity is set out in sections 2 and 3 MCA 2005. These provide as follows:

> **2 People who lack capacity**
> (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material

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1 For the purposes of Part 7 MHA 1998 "patient" means "a person who is incapable, by reason of mental disorder, of managing and administering his property and affairs". – MHA 1998 s 98(1).

2 Previously issues of property and affairs had been dealt with by the Court of Protection under Part VII MHA 1983, whilst personal welfare matters had been dealt with by the Family Division of the High Court under its inherent jurisdiction.

3 (1870) LR 5 QB 549.

4 See *Walker v Badmin* [2014] EWHC 71 (Ch).

time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to—

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

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3 Inability to make decisions

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—

(a) deciding one way or another, or

(b) failing to make the decision.

A key point to note about the MCA 2005 test of capacity is that it has two elements. There is a diagnostic test (the person must have an impairment of, or a disturbance in the functioning of, the mind or brain) and a functional test (as a result of that impairment etc the person must be unable to make a decision). Section 3 expands upon what is meant by an inability to make a decision and lists a number of factors which are relevant in this regard. These elements are missing from a number of the common law tests of capacity.

Differences in approach - "Substituted Judgment" vs "Best Interests"

Another key difference between the MCA 2005 and the previous approach under the MHA 1983 is the test that is applied by the Court when making decisions on behalf of an incapacitated person.

The previous English legislation (and the approach that is still embodied in the Manx MHA 1998[5]) applied a "substituted judgment" approach when making decisions on behalf of a person lacking

5 And other common law jurisdictions – for example, Hong Kong.

capacity; that is to say the Court attempted to make the decision that the incapacitated person would themselves have made if they had had capacity.

By contrast the MCA 2005 currently adopts an objective "best interests" test. "Best interests" are not defined as such by the Act. Rather, s 4 MCA 2005 sets out a number of issues which must be taken into account when assessing best interests. "All relevant circumstances" must be considered, and in particular the court must consider (so far as they are reasonably ascertainable):

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

If it is practicable and appropriate to consult them, the views of:

(a) anyone named by the person in question as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy[6] appointed for the person by the court,

as to what would be in the person's best interests are also taken into account.

The MCA 2005 does not lay down any hierarchy as between the factors set out in section 4.

The difference between the between the two approaches can be seen through the case law applicable to the making of statutory wills for persons who lack testamentary capacity.

The substituted judgment approach requires the court to make an elaborate set of counter-factual assumptions. These were identified by Sir Robert Megarry V-C in *Re D(J)* [1981] Ch 237 thus:

(1) It is assumed that the person is having a brief lucid interval at the time that the will is made;

(2) It is assumed that he has a full knowledge of the past and a full realisation that once the will is executed he will relapse into his actual mental state;

(3) It is the actual person in question who is considered - not a hypothetical reasonable

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[6] A "deputy" is (broadly speaking) the MCA 2005 equivalent of a receiver under section 103 MHA 1998.

person. The court should seek to make the will which the person himself, acting reasonably, would have made if notionally restored to full mental capacity, memory and foresight;

(4) The person should be assumed to be advised by competent solicitors; and

(5) The person should be envisaged as taking a broad brush to his bounty rather than an accountant's pen.

Ultimately though the Court's goal is to determine what the person in question would have done if capacitous in that situation.

By contrast the MCA 2005 "best interests" approach requires the Court to take an objective view as to the person's best interests having regard to all relevant circumstances. The question of how to determine best interests in the context of dispositions such as gifts and wills has vexed various English judges since the introduction of the MCA 2005.

The following points can be derived from the key English authorities[7]:

- The principles applied in relation to cases under the MHA 1983 are no longer directly relevant to cases under the MCA 2005.
- The weight to be attached to the various factors set out in section 4 MCA 2005 will, inevitably, differ depending upon the individual circumstances of the particular case, and in any given case there may be one or more features or factors which are of "magnetic importance" in influencing or even determining the outcome.
- The wishes and feelings of the person in question (which are *ex hypothesi* the wishes and feelings of a person who lacks capacity to take the decision in question) form an important part of the picture, although the weight to be attached to them will be case and fact specific.
- Although the goal of the Court's inquiry is no longer to reconstruct what the person himself would have done were he to have capacity, this remains a factor which it is entitled to have regard to as part of the overall balance sheet when determining the person's best interests.

Certain judges have also suggested that it is important for the person in question to be remembered for having "done the right thing" by their will[8]. However this formulation rather begs

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7 See in particular *Re P* [2010] Ch 33; *Re M* [2011] 1 WLR 344; *Re D* [2012] Ch 57; *Re G(TJ)* [2011] WTLR 231

8 *Re P* [2010] Ch 33; *Re D* [2012] Ch 57.

the question, as experience has shown that different parties tend to have different views as to what is the right thing. This factor therefore tends to play a role mainly in cases where there is an objectively reasonable approach to take (for example authorising a statutory will to avoid a contentious probate dispute from occurring after the person's death).

Reform?

Both the diagnostic element of the test of capacity and the introduction of the bests interests test into English law have proved controversial as there has been some dispute as to whether they are compatible with the UN Convention on the Rights of Persons with Disabilities[9]. In March 2017 the Law Commission proposed to change the best interests test and to elevate the status of the relevant person's wishes and feelings above other factors. They propose amending s 4 MCA 2005 to impose a positive duty on the decision maker to ascertain, so far as is reasonably practicable, (a) the person's past and present wishes and feelings, (b) the beliefs and values which would be likely to influence his decision if he had capacity and (c) any other factors that he would be likely to consider if her were able to do so. It would also require the decision maker, when weighing up best interests to give particular weight to any wishes or feelings ascertained. If enacted this will mark an important shift in the way that best interests are to be determined, although this change is not currently in the Mental Capacity (Amendment) Bill which is before Parliament at the moment. Whilst the proposed amendment would not prevent the decision maker from making a best interests decision contrary to the person's wishes and feelings, it clearly places wishes and feelings centre stage and will require the decision maker to justify any best interests decision to depart therefrom. It would perhaps mean that English law will come closer to achieving the same results as are achieved under the substituted judgment regime. Nonetheless the proposed emphasis on the incapacitated person's current (and thus non-capacitous) wishes and feelings may not always lead to the same result as seeking to establish what they would have done had they not been incapacitated.

Recognising Foreign Orders in England and Wales

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9 The concern is that the diagnostic test is discriminatory and contrary to Art 5 CRPD as it imposes a regime on those who are unable to make a decision *because of* an impairment of or disturbance in the functioning of their mind or brain which is not imposed on those unable to make a decision for other reasons. The complaint against the "best interests" test is that it fails to satisfy the requirements of Art 12(4) CRPD which requires safeguards to ensure respect for the rights, will and preferences of disabled persons in matters pertaining to the exercise of legal capacity.

One change made to English law which may be of particular relevance to Manx practitioners is the inclusion in the MCA 2005 of a mechanism which places the English Court of Protection under a positive obligation to recognise and enforce certain types of foreign measures made in relation to adults who lack capacity. The UK is a signatory to the 2000 Hague Convention on the International Protection of Adults, although it has only ratified it in relation to Scotland. The Convention (like other private international law conventions) contains a set of rules providing for the mutual recognition of types of order between signatory states. However, Sch 3 MCA 2005 unilaterally extends these obligations and introduces into English law a mechanism which requires the English Courts to recognise and enforce certain orders relating to incapacitated adults *from any foreign jurisdiction*, whether or not that foreign state is a party to the Convention.

The way that the Schedule operates is as follows:

(1) The Court of Protection can exercise its primary jurisdiction (ie the jurisdiction to make best interests decisions) in relation to:
   (a) an adult habitually resident[10] in England and Wales
   (b) an adult's property in England and Wales
   (c) an adult present in England and Wales or who has property there, if the matter is urgent, or
   (d) an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him.

(2) There may be situations where the Court of Protection's primary jurisdiction is concurrent with the jurisdiction of a foreign court (for example were a person habitually resident in the Isle of Man also has property situated in England and Wales).

(3) There is no statutory definition of "habitual residence". However it is a concept applied in a number of Hague Conventions and other international agreements and the Court of Protection has given it the same meaning that is applied in many international child cases. Ultimately it is a question of fact to be determined by reference to the conditions and reasons for the stay, its duration, and other factors which make clear that the person's presence is not in any way temporary or intermittent. These are factors which, address

[10] The focus of Schedule 3 MCA 2005 on the concept of habitual residence can be contrasted with the provisions that govern the effect of statutory wills which are focussed on the place of the testator's domicile (MCA 2005 Sch 2 para 4; Section 101 MHA 1998)

whether the residence has acquired the necessary degree of stability[11].

(4) The Schedule applies to "adults". Broadly these are defined as persons over 16 who as a result of his personal faculties cannot protect their interests.

(5) It applies to "protective measures" which are defined as measures directed to the protection of the person or property of an adult. These are not confined to court orders.

(6) The Court of Protection is obliged to recognise and enforce foreign protective measures if the measure was taken by the foreign tribunal on the basis that the adult in question was habitually resident in that jurisdiction unless:

  (a) if the case in which the measure was taken was not urgent, the adult was not given an opportunity to be heard such that this amounted to a breach of natural justice;

  (b) recognition of the measure would be manifestly contrary to public policy;

  (c) the measure would be inconsistent with a mandatory provision of the law of England and Wales; or

  (d) the measure is inconsistent with one subsequently taken or recognised in England and Wales in relation to the adult.

(7) The procedure for recognition is intended to be summary in nature. The Court of Protection does not review the facts as found by the foreign tribunal or consider whether the measure is in the adult's best interests. However the Court is required to conduct a limited review to satisfy itself that the content and form of the foreign measure do not infringe rights safeguarded by the European Convention of Human Rights[12].

It is also possible under the MCA 2005 for an attorney under a foreign power of attorney "of like effect" to an English Enduring Power of Attorney ("EPA") or Lasting Power of Attorney ("LPA")[13] to apply to the Court of Protection for a declaration that they are acting lawfully when exercising

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11 *Re LC (Children)* [2014] UK SC 1 per Lady Hale DPSC at [59] and *An English Local Authority v SW* [2014] EWCOP 43.

12 For example the right to liberty under Art 5 ECHR and the right to a fair trial under Art 6. These are mandatory provisions of English law. See *Health Service Executive of Ireland v PA* [2015] EWCOP 38.

13 EPAs were created under the Enduring Powers of Attorney Act 1985. It has not been possible to create one since 30 September 2007. Since that date English law has provided for LPAs made under the MCA 2005.

authority under that power. Such applications are made under Part 23 of the Court of Protection Rules 2017 (specifically r.23.6). An enduring power of attorney granted under the Isle of Man Powers of Attorney Act 1987 would be accepted by the Court of Protection as being "in like form" to an English law EPA.

The law applicable to the existence, extent, modification or extinction of a foreign power of attorney will in general be the proper law of the donor's place of habitual residence, whilst the law applicable to its exercise in England and Wales will be English law.

David Rees QC
5 Stone Buildings, Lincoln's Inn
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David Rees was called to the Bar of England and Wales in 1994. He was appointed as a as Queen's Counsel in 2017, as a Recorder in 2012 and as a Deputy High Court Judge in 2018.

David is well known for his experience in wills, trusts, estates and mental capacity matters. He is ranked in Chambers UK Bar Guide 2018 for Court of Protection and Traditional Chancery in and in Chambers High Net Worth 2018. He is regularly instructed by the Official Solicitor in England and Wales and appears before all levels of judge in the Court of Protection. He has appeared in many leading cases under the Mental Capacity Act 2005 and has particular expertise in cross-border mental capacity disputes. David is the General Editor of Heywood & Massey's Court of Protection Practice and is a member of the Court of Protection Rules Committee. He writes and lectures regularly on all areas of his practice.