Best Interests Applications to the Court of Protection

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Historical Background

Law Commission Proposals

1. The Law Commission, in a number of consultation documents and reports prior to the introduction of the Mental Capacity Act 2005 ('the 2005 Act'), sought the establishment of a clear legal framework for making decisions with, or on behalf of people who lack capacity and to that end it proposed a single criterion to govern all decision-making – 'best interests'.

> *"We recommend that anything done for, and any decision made on behalf of, a person without capacity should be done or made in the best interests of that person[1]."*

2. It is noteworthy that the Scottish Law Commission took the view that' best interests' was too vague and that that it would have to be supplemented by further factors. Furthermore, their view was that it did not give sufficient weight to the view or feelings of the adult as expressed while capable of doing so. It took this view largely because the 'best interests' concept was developed in the context of child law and was less appropriate where adults may have possessed full mental capacity and subsequently do not.

3. The Joint Committee on the Draft Bill compared the two approaches and decided that as the courts had usefully developed the concept of best interests its inclusion

[1] Law Com No 231, n 1, paras 3.24-3.25

in statute would promote awareness and good practice as well as consistency of approach.

s1 Mental Capacity Act 2005

4. The legal principles by which best interest applications to the Court of Protection fall to be determined are therefore those found in the relevant sections of the 2005 Act

5. The first section of the 2005 Act is entitled 'principles' and s1(5) establishes in statute the common law principle that:

> *"An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests."*

6. s1(6) further provides that:

> *"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 first question that the court or decision-maker needs to ask, prior to the assessment of best interests, is whether there is an alternative to the act or decision proposed that, in the words of the section, is less restrictive of P's rights and freedom of action. It is only when regard has been had as to whether there are other ways of achieving the purpose of the proposed act or decision that s1(5) becomes operative. It has been observed that there is some tension between the principles in s 1(6) and s 1(5) in that the decision or act taken under s 1(5) may not be the decision or act that P would himself have taken[2]. It seems right that for instance the freedom to dispose of one's property may be restricted where a

[2] See Heywood & Massey: Court of Protection Practice, 2012, 20-023 in the context of statutory wills

statutory will is made under the 2005 Act. However, it is only after regard is had as to whether there is an alternative to a statutory will that the 2005 Act decision making process is undertaken.

s4 Mental Capacity Act 2005

7. s4 of the 2005 Act sets out in some detail what acting in a person's best interests means in practice and the steps that must be taken in determining what is in P's best interests. However, what it doesn't do is provide a comprehensive definition. The Law Commission acknowledged that:

> *"...no statutory guidance could offer an exhaustive account of what is in a person's best interests, the intention being that the individual person and his or her individual circumstances should always determine the result.[3]"*

8. s4 states:

> *"(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—*
>
> *(a) the 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 what might be in his best interests.*
>
> *(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.*
>
> *(3) He must consider—*
>
> *(c) whether it is likely that the person will at some time have capacity in relation to the matter in question, and*

[3] Law Com No. 231, n1, at para 3.26

(d) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is 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.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

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

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

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

(h) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—

(i) are exercisable under a lasting power of attorney, or

(j) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

(10) "Life-sustaining treatment" means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.

(11) "Relevant circumstances" are those—

(k) of which the person making the determination is aware, and

(l) which it would be reasonable to regard as relevant."

9. s4 of the 2005 Act is not a prescriptive checklist to be applied rote-like in every circumstance. The Law Commission made this clear when it stated that it should not unduly burden any decision-maker or encourage unnecessary intervention, it must not be applied too rigidly and should leave room for all considerations relevant to the particular case. The commission stated that it should be confined to major points, so that it can adapt to changing views and attitudes[4]. It is also clear that there is no hierarchy to the checklist – the weight that should be attached to the various factors will depend on the circumstances[5].

10. s4(2) of the 2005 Act makes it clear that the decision maker must consider all the relevant circumstances. The relevant circumstances are then defined in s4(11). This applies an objective test which will vary according to the proposed decision and circumstances. Not all factors in the checklist will be relevant, but they must be considered if only to be disregarded as irrelevant.

11. Before assessing how the courts have interpreted the 2005 Act and s 4 of that Act, it is worthwhile considering some pre-2005 Act case law. The Law Commission itself noted that the courts had usefully developed the concept of best interests prior to

[4] Ibid at para 3.28
[5] See *Re M* [2009] EWHC 2525 (Fam) at para [32]

the Act. There are two cases in particular that came before the courts in which the best interests concept was analysed in some detail and which were influential in developing the concept. The application of a best interests test in one of them was critical to the decision in the case.

Pre-MCA 2005 Case Law

Airedale NHS Trust v Bland [1993] AC 789

12. The case involved one of the victims of the Hillsborough disaster who was left in a persistent vegetative state. Medical opinion was unanimous in the view that he would never recover and his family applied to the court for permission for life-support to be removed.

13. The overall conclusion of the House of Lords was that the court should decide what was to happen by reference to what was in the best interests of the individual concerned. Clearly, this involved the court making its decision based on what it considered was in the individual's best interests. This process differs from substituted judgment in that the court is in no way obliged to give effect to the decision which P, acting reasonably, would have made rather it requires the court to consider what P would be likely to have considered as part of the best interests decision making process.

14. Hoffman LJ, as he then was, in a judgment involving a close examination of the dilemma before the court as well as the principles on which it should make its decision said that the patient's best interests would normally also include having respect paid to what seems most likely to have been his own views on the subject. To that extent he said that "substituted judgment" may be subsumed within the English concept of best interests.

Re A. (Male Sterilisation) [2000] 1 FLR 549

15. In *Re A. (Male Sterilisation)* P had Down's syndrome. He lived with his 63-year-old mother who provided him with a high degree of care and supervision. However, the mother's health was not good and her major concern was that, when P moved into local authority care, he might have a sexual relationship resulting in the birth of a child. The mother applied to the court for a declaration that a vasectomy operation was in P's best interests.

16. Thorpe LJ made a series of obiter comments in relation to best interests. He said that the evaluation of best interests is akin to a welfare appraisal (in the same case Butler-Sloss LJ also observed that 'best interests encompasses medical, emotional and all other welfare issues') and that pending the enactment of a checklist or other statutory direction the first instance judge with the responsibility to make an evaluation of the best interests of a claimant lacking capacity should draw up a balance sheet.

17. In setting out what the structure of such a balance sheet should be Thorpe LJ continued that the first entry should be of any factor or factors of actual benefit and on the other side of the balance 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.

18. The result of the balance sheet exercise should be that 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 P.

Decisions on the 2005 Act

Re S and S (Protected Persons), C v V [2009] WTLR 315

19. In *Re S*, a husband and wife had each executed an Enduring Power of Attorney (EPA) appointing C and V, jointly, to continue their affairs in the event of their losing capacity. C and V's relationship subsequently deteriorated, as did S's health. V wished to register the EPAs but C did not, and V therefore applied to the Court of Protection to be appointed deputy for S. S did not want either C or V to act as sole deputy. On the facts it was clear that the husband and wife were still capable of expressing coherent views and the medicals reports had not been unanimous in declaring incapacity.

20. The broad thrust of HHJ Marshall QC's judgment in the case has been approved on a number of occasions. In *Re S* it was held that pursuant to s4(6)(a) the views and wishes of P in regard to decisions made on his behalf are to carry great weight. HHJ Marshall asked the rhetorical question in her judgment - what, after all, is the point of taking great trouble to ascertain or deduce P's views, and to encourage P to be involved in the decision making process, unless the objective is to try to achieve the outcome which P wants or prefers, even if he does not have the capacity to achieve it for himself.

21. However, HHJ Marshall recognised that the Act does not say that P's wishes are to be paramount, nor does it lay down any express presumption in favour of implementing them if they can be ascertained. It was further held that by giving such prominence to the wishes and views of P, the Act does recognise that having his views and wishes taken into account and respected is a very significant aspect of P's best interests. Due regard should therefore be paid when doing the weighing exercise of determining what is in P's best interests in all the circumstances.

22. HHJ Marshall then went on to set out how this would work in practice. She held that:

> *"where P can and does express a wish or view which is not irrational (in the sense of being a wish which a person of full capacity might reasonably have), is not impractical as far as its physical implementation is concerned, and is not irresponsible having regard to the extent of P's resources (i.e. whether a responsible person of full capacity who had such resources might reasonably consider it worth using the necessary resources to implement his wish) then that situation carries great weight, and* ***effectively gives rise to a presumption*** *in favour of implementing those wishes, unless there is some potential sufficiently detrimental effect for P of doing so which outweighs this."* (emphasis added)

It seems that while HHJ Marshall recognised that the Act itself does not provide for a presumption of what is in the best of interests of P where P's wishes and views have been expressed on the subject, practically the result is a presumption. This element of the judgment has been questioned in subsequent judgments. However, it seems that the conclusions that HHJ Marshall came to were quite fact-specific, dealing as she was with two elderly individuals who had been declared incapable of granting an EPA. However, both were still capable of expressing coherent views and they had expressed themselves vigorously on the issues.

Re P [2009] EWHC 163 (Ch)

23. *Re P* involved an entailed estate. The current tenant in tail in possession lacked mental capacity and the court had been asked to make a will on his behalf as well as to appoint a deputy. Lewison J's judgment in *Re P*, later described as one of compelling force by Munby J[6], stated at para [37]:

[6] *Re M, ITW v Z* [2009] EWHC 2525 (Fam)

> *"The overarching principle is that any decision made on behalf of P must be made in P's best interests. This is not (necessarily the same as inquiring what P would have decided if he or she had had capacity). As the explanatory notes to the Mental Capacity Bill explained:*
>
> *"Best interests is not a test of substituted judgment (what the person would have wanted), but rather it requires a determination to be made by applying an objective test as to what would be in the person's interests."*
>
> *38. I agree...."*

24. Lewison J in *Re P* further agreed with the broad thrust of HHJ Marshall QC's judgment in *Re S and S (Protected Persons)* although with caveats. In particular, he held that although P's wishes must be given weight, if Parliament had endorsed the balance sheet approach, they are only part of the balance. The wishes must be given great weight, but they probably do not give rise to a presumption. The Code of Practice seems to bear out this conclusion where it states at §5.38:

> *"In setting out the requirements for working out a person's 'best interests', section 4 of the Act puts the person who lacks capacity at the centre of the decision to be made. Even if they cannot make the decision, their wishes and feelings, beliefs and values should be taken fully into account – whether expressed in the past or now. But their wishes and feelings, beliefs and values will not necessarily be the deciding factor in working out their best interests. Any such assessment must consider past and current wishes and feelings, beliefs and values alongside all other factors, but the final decision must be based entirely on what is in the person's best interests."*

25. In relation to the guidance given by the cases under the Mental Heath Acts 1959 and 1983 (on the making of wills) Lewison J held that they were no longer 'directly applicable' to decisions made under the 2005 Act for the following reasons:

"(i) The 2005 Act does not require the counterfactual assumption that P is not mentally disordered. The facts must be taken as they are. It is not therefore necessary to go through the mental gymnastics of imagining that P has a brief lucid interval and then relapses into his former state.

(ii) The goal of the inquiry is not what P 'might be expected' to have done; but what is in P's best interests. This is more akin to the 'balance sheet' approach than to the 'substituted judgment' approach. The code of practice makes this clear in that it points out that the test of best interests was one that was worked out by the courts mainly in decisions relating to the provision of medical care: para 5.1

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(iii) The previous guidance was concerned with deciding what P would have wanted if he were not mentally disordered. But the 2005 Act requires the decision-maker to consider P's present wishes and feelings, which ex hypothesi are wishes and feelings entertained by a person who lacks mental capacity in relation to the decision being made on his behalf.

(iv) The same structured decision-making process applies to all decisions to be made on P's behalf, whether great or small, whereas the previous guidance was specific to the making of a will, gift or settlement. Moreover, it is a decision-making process which must be followed, not only by the court, but by anyone who takes decisions on P's behalf.

(v) In making his decision the decision-maker must consider 'all relevant circumstances'.

(vi) The Act expressly directs the decision-maker to take a number of steps before reaching a decision. These include encouraging P to participate in the

decision. He must also 'consider' P's past and present wishes, and his beliefs and values and must 'take into account' the views of third parties as to what would be in P's best interests.

39 Having gone through these steps, the decision-maker must then form a value judgment of his own giving effect to the paramount statutory instruction that any decision must be made in P's best interests. In my judgment this process is quite different to that which applied under the former Mental Health Acts."

26. Later judgments have held these remarks and the approach suggested by Lewison J to be helpful in identifying the general approach that should be taken to best interest cases[7]. The 'structured decision making process' as described by Lewison J is a process that requires the decision maker to take a number of steps before reaching its decision. Those steps include, but are not restricted to encouraging P to participate in the decision, 'considering' P's views and wishes, values and beliefs and the taking into account of third parties as to what would be in P's best interests.

27. Finally, Lewison J in *Re P* added a further consideration that was to prove problematic in a case to come before the Court of Protection soon after *Re P*. What Lewison said at para [44] was that the best interest should be considered in the light of the effect of the decision or act taken on P's behalf after P's death. He held that it can be a factor in the best interests balance sheet to consider how P will be remembered after his death as a result of the decision or act taken on his behalf. Although the comment didn't reference it, the comment at least alludes to Hoffman LJ's judgment in *Airedale NHS Trust* at page 829. Hoffman LJ held there that part of the reason why we honour the wishes of the dead about the distribution of their property is that we think it would wrong them not to do so. Best interests it seems can be considered in terms of what P would wish for his property or himself after death.

[7] *Re G (TJ)* [2010] EWHC 3005 (COP)

In re M [2009] EWHC 2525 (Fam)

28. In *re M,* a childless widow had been removed from the care of a neighbour, who had cared for her for a number of years. The court had previously held that the neighbour should account for large sums of money that had been removed from P's bank account. The application before the court was for a statutory will to be made on behalf of P.

29. In his judgment Munby J was more dismissive of authority relating to the previous Mental Health Acts than had been the case. He held that the 2005 Act signalled such a radical shift in the law that in terms of the treatment of persons lacking capacity that previous authority was not useful in determining best interests applications. At para [28] he stated that where Lewison J had said that such authority was not directly applicable, in fact, it should be 'consigned to history'.

30. In *Re M*, Munby J applied the two judgments in *Re P* and *Re S* and set out the factors to consider when evaluating the weight to be attached to P's views. He also recognised the structurally somewhat similar schemes exercised by the courts in relation to the statutory schemes under section 1 of the Children Act 1989 and section 1 of the Adoption and Children Act 2002 and, in a financial context, under section 25 of the Matrimonial Causes Act 1973. He held at para [32]:

> *"Deriving from that experience it may be useful to make three points, very familiar in the context of those other jurisdictions, which, allowing for the somewhat different context with which I am here concerned, seem to me to be of equal application to the statutory scheme under sections 1 and 4 of the 2005 Act:*

> *i) The first is that the statute lays down no hierarchy as between the various factors which have to be borne in mind, beyond the overarching principle that what is determinative is the judicial evaluation of what is in P's "best interests".*
>
> *ii) The second is that the weight to be attached to the various factors will, inevitably, differ depending upon the individual circumstances of the particular case. A feature or factor which in one case may carry great, possibly even preponderant, weight may in another, superficially similar, case carry much less, or even very little, weight."*

31. Munby J also makes the point that that material that falls outside the defined provisions of sections 4(6) and 4(7) does not on that ground alone fall out of account altogether. The point being that notwithstanding that it does not fit precisely within the language of sections 4(6) and 4(7) it can still be a 'relevant circumstance' within the meaning of section 4(2). He gives the example of an oral statement which would not fall with section 4(6)(a) as a relevant *written* statement made by P when he had capacity, but may fall within the meaning of s4(2) as a relevant circumstance and, if it goes to wishes and feelings may fall within s4(6)(a). Similarly the views of past carers of P may also be relevant although not expressly provided for in the statute.

32. Having assessed the checklist there may be what Thorpe LJ has referred to as factors that are of 'magnetic importance'. Munby J, states at para [32]:

> *".... there may, in the particular case, be one or more features or factors which, as Thorpe LJ has frequently put it, are of "magnetic importance" in influencing or even determining the outcome: see, for example, Crossley v Crossley [2007] EWCA Civ 1491, [2008] 1 FLR 1467, at para [15] (contrasting "the peripheral factors in the case" with the "factor of magnetic importance") and White v White [1999] Fam 304 (affirmed, [2001] 1 AC*

596) where at page 314 he said "Although there is no ranking of the criteria to be found in the statute, there is as it were a magnetism that draws the individual case to attach to one, two, or several factors as having decisive influence on its determination." Now that was said in the context of section 25 of the Matrimonial Causes Act 1973 but the principle, as it seems to me, is of more general application."

Re G (TJ) [2010] EWHC 3005 (COP)

33. The case was concerned with the making of maintenance payments in favour of the daughter of a mentally incapacitated woman. Morgan J in his initial examination of the concept of best interests states that:

> *"...the word "interests" in the phrase "best interests" is not confined to matters of self interest or, putting it another way, a court could conclude in an appropriate case that it is in the interests of P for P to act altruistically. "*

What is plain from the judgment is that best interests may involve, on consideration of all the relevant factors, a decision or act taken on behalf of P that would not be immediately in the self interest of P. Rather the judgment recognises that acts or decisions may be altruistic. Of course, there is the view that even superficially altruistic acts may have some self-interest to them in that that there may be an expectation of a longer-term benefit such as filial affection or further contact where a gift or payments have been made to a daughter. However, the judgment recognises the complexity of motives that may go to the making of a decision and that the court may consider in its checklist or balance sheet.

34. Having assessed what the balance sheet of factors are and the fact that those factors may involve an element of substituted judgment being taken into account, Morgan J held that:

> *"It is absolutely clear that the ultimate test for the court is the test of best interests and not the test of substituted judgment. Nonetheless, the substituted judgment can be relevant and is not excluded from consideration. As Hoffman J said in the Bland case, the substituted judgment can be subsumed within the concept of best interests. That appeared to be the view of the Law Commission also."*

35. In his concluding remarks Morgan J held that the principal justification for making the decision he did (that maintenance payments should be paid to the daughter of P) was that the payments would have been what Mrs G would have wanted if she had capacity to make the decision for herself. Clearly, this is in all but name a 'substituted judgment'; indeed Morgan J recognised it as such. What the judgment emphasises therefore is that test of best interests does not exclude respect for what would have been the wishes of P. A substituted judgment can be subsumed into the consideration of best interests. In that case what would have been Mrs G's wishes defined what was in her best interest, in the absence of countervailing factors.

K v LBX and Others [2012] EWCA Civ 79

36. A young man suffering from mild mental retardation was living with his father and brother. His father acknowledged that there was a need for long-term care plan but objected to the local authority's plan to move the young man to supported loving accommodation on a trial basis. The point that came before the Court of Appeal was whether or not Art 8 of the European Convention as incorporated by the Human Rights Act 1998 (respect for family life) requires the court in determining issues under the 2005 Act to afford a priority to placement of an incapacitated adult in their family or whether family life is simply one of 'all the relevant circumstances' which under s4 of the 2005 Act the court must consider.

37. Thorpe LJ concluded on the point of law the case raised that the safe approach of the trial judge in Mental Capacity Act cases is to ascertain the best interests of the incapacitated adult on the application of the s 4 checklist. The judge should then ask whether the resulting conclusion amounts to a violation of Art 8 rights and whether that violation is nonetheless necessary and proportionate.

38. Black LJ added in his judgment that the general approach under the Act is laid down in s 4, with the principles set out in s 1 applying. To add to that a further starting point viz. Art 8, is not called for by the Act, in fact to do so would give rise to a further unnecessary complicating factor.

Conclusions

39. The four leading authorities on the meaning of best interests and how the checklist should be applied are:

    a) *Re S and S (Protected Persons), C v V* [2009] WTLR 315;
    b) *Re P* [2009] EWHC 163 (Ch);
    c) Re M [2009] EWHC 2525 (Fam);
    d) *Re G (TJ)* [2010] EWHC 3005 (COP; and

    The recent case of *K v LBX and Others* [2012] EWCA Civ 79 provides guidance on the tensions between Art 8 – the right to family life - and the 2005 Act.

40. The conclusions that may be drawn from those cases are, in my view:

    a) The views and wishes of P may have great weight in reaching a decision as to what is in P's best interests, but they are unlikely to create a presumption.

b) Substituted judgment may be subsumed into the best interests decision making process, but the goal of the inquiry under s 4 is not to determine what P would have done.

c) It may be a factor in the checklist to consider how P will be remembered after his death in light of the decision taken.

d) Having assessed the checklist or balance sheet, it may be that there are factors of magnetic importance to which preponderant weight is attached in the decision making process.

e) The starting point in a consideration of best interests is the s 4 checklist. Having made that assessment the decision maker should then consider Art 8 (where Art 8 rights are engaged).

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