Private Client ~ February 2023

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Adults Lacking Decision-Making Capacity Should Not Be Equated to Children

Can Faith and Medicine Ever Be Reconciled in 'Right to Life' Cases?

Considering Surrogacy? There May Be Legal and Emotional Pitfalls

Judge Emphasises that a Care Order Does Not Imply Parental Blame

Making a Will? Thought About Appointing a Professional Executor?

Pre-Nuptial Agreement Given Only Partial Effect in Big Money Divorce Case

Protecting the Vulnerable from the Internet's Dark Side – High Court Ruling

Restrictive Covenants – Objectors Succeed in Blocking Flats Development

**Adults Lacking Decision-Making Capacity Should Not Be Equated to Children**

Adults who lack the capacity to make important decisions for themselves are entitled to their autonomy and should never be equated to children. The Court of Appeal trenchantly made that point in directing that a man with a severe learning disability should be vaccinated against COVID-19.

The man, aged in his 20s, also suffered from congenital heart defects and his mother and primary carer was deeply anxious that vaccination against the virus would place him at particular risk. A judge nevertheless found that vaccination would be in his best interests and authorised an NHS body to perform the procedure.

Ruling on the mother's challenge to that ruling, the Court did not doubt the sincerity and strength of her beliefs, which were worthy of respect. She had provided her son with the best possible care throughout his life and it was thanks to her that delightful and engaging aspects of his personality had blossomed and grown.

In dismissing her appeal, however, the Court found that her principled opposition to his vaccination could not be reconciled with national medical guidance or the expert opinion of a consultant cardiologist that it was the virus itself, rather than vaccination against it, that would place him at heightened risk.

The Court noted that an adult who lacks capacity is not and never should be treated as a child. Such a paternalistic approach had long since been consigned to history and recognised for what it is – a subversion of adult autonomy. The Court was concerned to protect the man's freedom, not that of his mother.

The views of parents, friends and others close to a person who lacks capacity are, the Court acknowledged, invariably helpful when considering non-medical issues in such cases. However, their relevance is to illuminate the broader canvas of such a person's circumstances, not to provide a platform for their own opposition to a course of action which is, objectively, in the person's best interests.

The Court noted that, whilst the man's ability to exercise his autonomy may be circumscribed, it was not extinguished. He had a quality of life which was both dignified and meaningful and his lack of capacity did not render his own wishes and feelings irrelevant. Although unable to express himself verbally, he was able to express enjoyment or displeasure, acquiescence or resistance.

The preponderance of evidence indicated that he was not anxious about receiving injections or having blood taken. The only force likely to be required in vaccinating him was to hold his arm to keep it still. Although he could not absorb the medical issues involved in the case, he was perfectly able to decide for himself whether to cooperate or reject vaccination.

We have experience of dealing with matters such as these. Contact our expert team for advice.

**Partner Note**

*TN v An NHS ICB and Another [2022] EWCOP 53*

**Can Faith and Medicine Ever Be Reconciled in 'Right to Life' Cases?**

When deciding whether life-preserving treatment should be withdrawn from severely brain-damaged patients, family judges often have to strike a difficult, if not impossible, balance between religious beliefs and medical science. As one case showed, however, the patient's welfare is always their guiding light.

The case concerned a baby boy who suffered a cardiac arrest in his cot and endured about half an hour of oxygen deprivation before his arrival at hospital. A diagnosis of brain-stem death was made. However, that was later rescinded after he showed signs of respiratory effort indicative of some brain-stem function. The NHS trust that bore responsibility for his care nevertheless sought judicial authorisation for his withdrawal from mechanical ventilation.

His parents were united in their religious conviction that life should be promoted at all costs. They agreed that it would be the will of God if his heart were to stop, and that he should not in that event receive CPR. Removing him from ventilation, however, would be an active step contrary to their beliefs.

Ruling on the matter, the High Court recognised that the culture and faith into which he was born was an important factor. The central tension in the case, which had taken a great toll on the parents and treating clinicians, was between faith and medicine. The matter involved balancing concepts which were at the very least difficult – some might say impossible – to reconcile.

The unique value of human life, the Court acknowledged, does not dissipate where awareness diminishes, or where the capacity of the brain become so corroded that all autonomy is lost. It was perhaps in such circumstances that the sanctity of life required the most vigilant protection.

In granting the trust the declaration sought, however, the Court noted that it was required to focus unwaveringly on the boy's best interests. The evidence was clear that he was dying and that continuing ventilation would merely protract that inevitable process. The possibility that he felt pain could not be excluded and persisting with ventilation would confer harm without conveying benefit. The Court directed that he should continue to receive palliative care.

Empathy and sensitivity are as important as legal expertise in cases such as this. Our experienced team can provide guidance in the most sensitive manner possible.

**Partner Note**

*Guy's and St Thomas' NHS Foundation Trust v A and Others [2022] EWCA Civ 1221*

**Considering Surrogacy? There May Be Legal and Emotional Pitfalls**

Surrogacy arrangements may proceed without a hitch, but they can also be fraught with legal – and emotional – difficulty. A case in which a surrogate mother became so attached to the child she was bearing that she was unwilling to kiss him goodbye provided a distressing illustration of what can go wrong.

The surrogate mother agreed to undergo artificial insemination and to bear a child for a couple to whom she had been introduced by a friend. She acknowledged that it was always anticipated that, post-delivery, she would consent to a parental order by which the couple would be formally recognised as the child's legal parents.

During her pregnancy, however, she became emotionally attached to the child. She felt increasingly undervalued by the couple and, on giving the child up soon after his birth, she was assailed by a sense of loss. She accepted that the child should live with the couple but was anxious to have regular contact with him. After a judge granted the couple a parental order, she appealed.

In upholding her challenge, the High Court noted that she had an absolute legal right to withhold her consent to the making of a parental order. Such consent as she had given was provided neither freely nor unconditionally. She had unwittingly expressed consent under palpable pressure in reliance on a promise that a further order would also be made, enabling her to have contact with the child.

The Court noted the increasingly bitter relations between her and the couple. It was, however, intended by all that the child should have contact with her whilst being brought up by the couple. A legal mechanism by which that could be achieved had yet to be decided upon. In the absence of her free and unconditional consent, however, the Court was driven to overturn the parental order.

Surrogacy arrangements can involve many legal complexities. Our expert family law team can assist.

**Partner Note**

*Re C (Surrogacy: Consent) [2023] EWCA Civ 16*

**Judge Emphasises that a Care Order Does Not Imply Parental Blame**

You might think that the making of a care order implies blame on the part of a child's parents. However, as a family judge's ruling in the case of a tragedy-struck 14-year-old girl made plain, you would certainly be wrong about that.

The girl was brought up by her mother alone after her father died when she was very young. Her mother subsequently suffered a catastrophic brain haemorrhage and was thereafter herself in need of round-the-clock care. She could not look after her daughter or exercise her parental responsibility for her.

The girl was placed in foster care, where all agreed she should remain until reaching adulthood. However, an issue arose as to whether she could lawfully be made the subject of a formal care order in circumstances where there was no criticism of the care her mother gave her prior to losing her parenting capacity.

Ruling on the point, the judge found that the making of a care order does not require evidence of a history of past risk or parenting failure. He noted that parents may be unable to provide adequate care for their children for a variety of reasons that reflect no blame on their part. Proof of blameworthiness was not necessary before a care order, which all agreed would best serve the girl's welfare, could be made.

The judge was satisfied that his decision would not open the floodgates so as to render any parent who loses capacity vulnerable to state intervention. The girl had suffered a torrid, difficult and traumatic time and the judge emphasised that his paramount concern was to ensure her future welfare.

The threshold for the making of a care order was crossed in that, were no such order made, the girl would be at risk of significant future harm. The order would enable a local authority to share parental responsibility for her so as to ensure that she was appropriately looked after.

We can advise you on all aspects of family law. Contact **<<CONTACT DETAILS>>** for guidance.

**Partner Note**

*West Sussex County Council v K [2022] EWFC 170*

**Making a Will? Thought About Appointing a Professional Executor?**

When you die, it is the executor or executors of your will who will bear the burden of distributing your estate to your chosen beneficiaries. You are perfectly free to appoint a family member or friend to that important role but, as a High Court ruling made plain, there can be advantages in engaging an independent professional.

The case concerned a man who died at the age of 85, a few days after making a will by which he appointed his brother as one of his executors. Issues concerning the will and the distribution of his estate had since become the focus of disagreement within the family. In that context, four of his beneficiaries launched proceedings with a view to removing, or passing over, the brother in his role as executor.

Ruling on the matter, the Court noted that the deceased was fully entitled to choose his brother to serve as his executor and that his brother was keen to fulfil the task laid upon him. Having declared an intention to pursue significant personal claims against the estate, the brother's position was heavily conflicted. On the face of it, however, such conflict arose from the deliberate acts of the deceased himself and did not, by itself, justify passing over or removing his brother.

In nevertheless upholding the claim, the Court was quite satisfied on the available evidence that the brother was unfortunately incapable of acting as a disinterested, objective administrator of the estate. The welfare of the beneficiaries as a whole would be best served if he were not involved in the administration process.

The effect of the ruling was that the estate would be administered by a professional trust corporation. The Court, however, emphasised that it was making no findings of wrongdoing on the brother's part. He was undoubtedly well meaning and firmly believed that he knew what the deceased would have wanted and that he was capable of implementing his wishes.

We can help you to ensure that your estate is dealt with efficiently and in accordance with your wishes. Contact **<<CONTACT DETAILS>>** for advice.

**Partner Note**

*Pegler and Others v McDonald and Others [2022] EWHC 2405 (Ch)*

**Pre-Nuptial Agreement Given Only Partial Effect in Big Money Divorce Case**

Couples who enter into a pre-nuptial agreement (PNA) with their eyes wide open can expect to be bound by its terms. However, as the outcome of a 'big money' divorce case made plain, judges have the power to effectively rewrite them if they fail to make fair provision for the reasonable needs of either husband or wife.

The case concerned a middle-aged couple whose realisable assets, worth more than £43 million, were almost entirely held in the wife's name. On their wedding day they signed a PNA by which the separation between their assets was maintained. Under its terms, the husband's financial entitlements on divorce were restricted to about £190,000 in cash and repayment of a £250,000 loan.

Following a hearing, a judge rejected his arguments that the PNA should be entirely disregarded on the basis that he entered into it in haste and without legal advice. He was found to have signed it freely and with a full appreciation of its meaning and consequences. The judge suspected that he had come to regret signing the document in the belief that it would never come into effect.

In ruling that the PNA failed to provide fairly for his reasonable needs, however, the judge noted that he had made a full contribution to the marriage and the upbringing of the couple's three children. The wife having received a huge sum on the sale of her family's business, the whole landscape of the couple's finances had changed dramatically since the PNA was signed.

The judge directed the wife to provide the husband with a £2.5 million house that would revert to her on his death. She was further ordered, amongst other things, to pay him £1.2 million in capitalised maintenance and to cover his substantial debts. His total financial award came to around £1.9 million.

Had the couple married without signing a PNA, the judge suspected that, given the scale of the wife's fortune, the husband's award would have been significantly higher. The outcome, however, properly recognised the limiting consequences of the PNA, balanced against his reasonable needs.

If you are divorcing, a number of issues may arise on which sound legal advice is essential. We can talk you through alternative dispute resolution options, to help mitigate the need for expensive and drawn-out court proceedings.

**Partner Note**

*HD v WB [2023] EWFC 2*

**Protecting the Vulnerable from the Internet's Dark Side – High Court Ruling**

The ability to use the internet and social media is viewed by many as akin to a human right – but how should the law respond to risks posed to vulnerable individuals by the dark side of the web? The High Court addressed that issue in the case of an autistic young man who formed a deeply disturbing relationship online.

The man, who lived in sheltered accommodation, had borderline cognitive deficits and an attachment disorder that gave him a powerful urge to form relationships. During an online relationship with a man, which lasted some months, he was persuaded to send the latter a naked photograph of himself.

In those circumstances, the local authority that bore responsibility for his care sought a judicial finding that he lacked capacity to make unsupervised use of the internet and social media. With a view to protecting him from harm, the council further sought authority to carry out daily checks on his internet usage.

Ruling on the matter, the Court acknowledged that he had difficulty in assessing risks. He had in the past engaged in autoerotic asphyxiation which put his life in danger. It noted, however, that the mere fact that an individual makes unwise decisions does not mean that he or she lacks capacity to make such decisions.

He had himself terminated the inappropriate online relationship when he was asked to provide more explicit material. He had since made very considerable progress and various restrictions upon him had been stepped down to the point where he was afforded the opportunity of unsupervised time in the community.

Rejecting the council's application, the Court noted that he enjoyed positive contact with his family and within the wider community. For some months after he ended the relationship, there was no evidence that he had put himself at further risk of harm on the internet. The Court directed that, save with his consent, checks on his internet usage, which at least made him uneasy, should cease.

Contact us for expert advice on any matters relating to local authority care.

**Partner Note**

*A Local Authority v AA [2021] EWCOP 70*

**Restrictive Covenants – Objectors Succeed in Blocking Flats Development**

If a neighbour has been granted planning permission for a development to which you object, you may feel that there is little or nothing you can do about it. As a tribunal ruling showed, however, you may well be wrong about that.

The case concerned a proposal to demolish four suburban houses and replace them with a block of 33 flats, standing up to five storeys high. Given the acute need for more new homes, planning permission was granted for the project.

Standing in the developer's way, however, were restrictive covenants enshrined in the title deeds of three of the houses. One of them, dated 1963, forbade construction of more than one detached house on one of the plots. Another, dated 1993, required that two of the properties only be occupied by single households.

The developer applied to the Upper Tribunal (UT) under the Law of Property Act 1925 to modify the covenants so as to permit implementation of the planning permission. However, fierce objections were raised by neighbouring property owners who it was accepted enjoyed the benefit of the covenants.

The company argued that any diminution in the value of the objectors' properties arising from the development would be modest and offered them a total of about £33,000 in compensation. The objectors, however, argued that the construction of the block would devalue their homes by 10-15 per cent, or a total of more than £380,000.

Ruling on the matter, the UT noted that, planning permission having been granted, it was difficult not to regard the development as a reasonable use of the relevant land. It was not in dispute that the covenants impeded that use. The crucial question was whether the covenants continued to secure practical benefits of substantial value or advantage to the objectors.

In ruling that it had no discretion to modify the covenants, the UT found that one objector's property would be significantly overlooked by the proposed block. The very large and overbearing building would transform the outlook from that property, dominating views of the western sky. It would also be visible from the second-floor office and garden of another objector's home.

If you are concerned that a neighbour's development plans could have a detrimental impact on your property and your enjoyment of it, contact us for advice.

**Partner Note**

*Quantum (Barrowsfield) Ltd v Bell and Others [2023] UKUT 2 (LC)*

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