Best interests decision-makers limited to options on the table agrees Supreme Court

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Summary

The Supreme Court has today published its judgment in the important 'available options' case of *N (Appellant) v. ACCG* (often referred to as the 'MN' case).

The case was about whether the Court of Protection is limited to choosing between the options actually on the table or whether it can decide that something else would be in the person's best interests, regardless of what the care provider/funder is willing or able to provide.

The Supreme Court agreed with what the courts had decided in this case previously - i.e. the Court of Protection can only choose between options which are actually available.

This underlines what all best interests decisions are - a choice between the options which would have been open to the person if they had been able to make the decision themselves.

What was the case about?

The case was about the care of MN - an adult in his 20s with severe learning and physical disabilities, as well as autism and frequent epileptic seizures. He had the cognitive ability of a child aged less than a year. It was agreed by everyone that MN lacked capacity to make any decisions about his care.

MN was living in a residential placement fully funded by the CCG. He needed trained carers with him at all times, including 2:1 care to access the community.

In light of MN's parents disagreeing with the care arrangements, an application was made to the Court of Protection (initially by the Local Authority, but taken over by the CCG when MN turned 18) for declarations on where MN should live and be cared for. The care package on offer by the CCG involved MN continuing to live and be cared for at his current residential placement, with his parents being able to visit him at the care home whenever they liked.

His parents, however, wanted MN to be able to visit them in the family home. The care home was unable to provide the staff needed for this to happen safely, so it would have involved the CCG employing and training carers from third party providers. The CCG was not prepared to fund this, meaning this option was not on the table. In addition, MN's mother wanted arrangements to be made for her to assist staff at the care home with MN's intimate care. For various reasons, the care home was not prepared to facilitate this.

MN's parents nevertheless asked the Court of Protection to assess whether contact visits to their home and the mother assisting with intimate care would be in MN's best interests.

What did the Supreme Court decide?

The Supreme Court agreed with the previous court decisions in this case in deciding that best interests decision-makers (including the Court of Protection) have no greater power to oblige others to provide/fund a particular care arrangement than the person lacking capacity would have done if they had full capacity.

The Court of Protection did not have power to order the CCG to fund what the parents wanted or to order the actual care providers to do that which they were unwilling or unable to do. In line with this, Court of Protection proceedings should not be used as a way of putting pressure on public bodies to make a decision they would not otherwise have made.

Accordingly, just like a person who is able to make their own decisions, the Court of Protection can only choose between available options.

In MN, the parents essentially wanted a 3 day hearing to investigate care options which were purely hypothetical in the sense that the CCG/care home were not going to provide them. On this point, the Supreme Court emphasised that the Court of Protection does not have to hold a hearing to resolve every dispute where this will serve no useful purpose. Whilst the Court's case management powers can be used to require a public authority to account for their decisions, including what

options they have considered and why they have ruled out other options, it is up to the Court to decide to what extent it investigates disputes, depending on the particular issue at stake. In MN, for example, the CCG had good reasons for rejecting the parents' wishes for home contact and the Supreme Court thought it unlikely that further investigation of this issue would have brought about a consensus or modifications to the care plan. The Court of Protection had therefore been entitled to conclude, in the exercise of its case management powers, that there was no useful purpose in a hearing on that issue.

As the Court made clear, the only proper way to challenge unreasonable or irrational decisions made by care providers or other public authorities is via judicial review.

Impact

This is a very significant decision in terms of clarifying the nature of best interests decisions and the role of the Court of Protection where there are disagreements about the care arrangements that should be on offer.

If the Supreme Court had decided the case differently, the risk was that public bodies could have found themselves tied up in Court of Protection proceedings looking at hypothetical options, going beyond the offer of care they were prepared to put on the table. The Supreme Court has now made clear that this is not what should happen.

In practice, nothing will therefore change as a result of the Supreme Court judgment because it maintains the position as established by the Court of Appeal in 2015 - i.e. the Court of Protection can only choose between options which those providing/funding the care are prepared to offer.

The route for challenging public body decisions about which options to provide/fund has to be via a judicial review, looking at the lawfulness and reasonableness of the public authority's decision on what to provide/fund.

However, it is worth remembering that the impact of this is wider than just cases in the Court Protection because the principle of only being able to choose between available options applies to all best interests decision-makers - including health professionals, carers, donees of a power of attorney and court-appointed deputies.

This case helps clarify the principles underpinning best interests decisions, which are frequently misunderstood, including what is - and is not - a best interests decision. A best interests decision is needed where there is a choice to be made between different available options for care, treatment or accommodation in respect of an adult who lacks the capacity to make that choice for themselves. While the issue in this case was resource, some decisions are a matter of clinical judgment (e.g. whether a particular drug should be provided) and do not become best interests decisions simply because they are disputed by family members.

It will still be important, however, for organisations to ensure they have given proper consideration to all possible options and can provide evidence that they have completed this exercise properly to avoid the risk of challenge.

How we can help

Our national team of Mental Capacity Act and Court of Protection specialists have extensive experience of advising commissioners and providers across the health and social care sector.

We are able to provide responsive, practical advice on all aspects of the law in this area, including:

- Court of Protection welfare applications relating to care and/or accommodation
- Serious medical treatment cases
- Section 21A challenges to DoLS authorisations
- Responding to Orders for Section 49 reports, including advice on effective report preparation
- Interface between the Mental Capacity Act and Mental Health Act

We can also provide bespoke training in relation to all aspects of Court of Protection proceedings.

If you need advice in relation to the impact of this case in the context of a patient's care or an inquest, please contact Gillian Weatherill on: +44 (0)191 4044045 or gweatherill@dacbeachcroft.com.

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