

IN THE COURT OF PROTECTION

CASE No. 10034253

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

Neutral Citation Number: [2021] EWCOP 56

BETWEEN:

CALDERDALE MBC

Applicant

-and-

(1) AB (by his litigation friend, the Official Solicitor);

(2) DANIEL LUMB (as property and affairs deputy for AB);

(3) AnB

Respondents

ORDER

BEFORE Senior Judge Hilder (sitting remotely via Microsoft Teams)
AT First Avenue House, 42 – 49 High Holborn, London WC1V 6NP
ON 20 July 2021
ISSUED ON 6 August 2021

UPON reading the bundle and the position statements of the parties, and hearing from counsel for each party

AND UPON the Court making separate orders to progress other issues in this matter

AND WHEREAS

1. By order made on 9th August 2019 Daniel Lumb of Stonegate Law was appointed as property and affairs deputy for AB.
2. AB's brother-in-law, DB, receives a direct payment from the applicant local authority for AB's care and support needs. DB uses this direct payment to fund a package of care provided by AB's siblings.
3. In 2020, Mr Lumb raised concerns as to the lawfulness of arrangements in respect of AB's care, specifically:



- a. who may receive AB's direct payments under the Care Act 2014 and manage them on his behalf; and
 - b. whether the carers funded by AB's personal budget are obliged to be registered with the CQC to provide his personal care?
4. The applicant local authority made this application to seek:
- a. authorisation for deprivation of liberty in AB's living arrangements; and
 - b. determination of the scope of the deputy's authority in respect of direct payments.
5. The applicant local authority's position was that:
- a. the power to determine who should receive AB's direct payment rests with the local authority:
 - i. The Care Act provides for direct payments as a means of discharging a local authority's s.18 Care Act duties to the person;
 - ii. direct payment monies cannot be spent in a discretionary fashion but must be used to fund a person's care as set out in the local authority's care plan. (per s.33(3) Care Act 2014: '*A direct payment is made on condition that it be used only to pay for arrangements under which the needs specified under section 25(2)(a) in the care and support plan or (as the case may be) the support plan are met.*')
 - iii. if conditions attached to a direct payment are breached or if the funds are spent otherwise than on meeting the person's needs as set out in the care plan, a local authority may require repayment of the relevant funds. (per s33(5) Care Act 2014)
 - iv. the person managing a direct payment is acting in the place of the local authority in arranging care and meeting needs for care and support – it is an act of managing the local authority's budget for the person's care, rather than the person's own funds.
 - b. Where an adult lacks capacity to request that their needs be met through direct payments, s32 Care Act 2014 applies. The relevant question whether the adult has capacity to make the request, and not whether the adult has capacity to manage their financial affairs or to make decisions about their needs for care and support. The statutory guidance does not specify the relevant information for having capacity to make the request. It is suggested that it is a hybrid of issues relating to health and welfare (making decisions about how to meet care needs) and property and affairs (becoming an employer, managing a budget, signing contracts with carers).
 - c. If the person does not have capacity to 'request the direct payment' himself, an 'authorised person' may do so. Section 32(4) of the Care Act 2014 sets out who is an 'authorised person'(emphasis added):



(4) *A person is authorised for the purposes of this section if—*

(a) the person is authorised under the Mental Capacity Act 2005 to make decisions about the adult’s needs for care and support,

(b) where the person is not authorised as mentioned in paragraph (a), a person who is so authorised agrees with the local authority that the person is a suitable person to whom to make direct payments, or

(c) where the person is not authorised as mentioned in paragraph (a) and there is no person who is so authorised, the local authority considers that the person is a suitable person to whom to make direct payments.

- d. In relation to AB, the appointment of Daniel Lumb as property and affairs deputy is in standard terms relating to property and affairs. His decisions about how AB’s funds are to be spent may include decisions about applying AB’s own funds to provide for his care.
- e. However, per *ACC & Ors (property and affairs deputy; recovering assets costs for legal proceedings)* [2020] EWCOP 9 at paragraph 53.7(c), while a property and affairs deputy’s general authority would allow him to undertake carers’ employment contracts on behalf of AB, it *‘does not encompass determination of [AB]’s care needs’*:

“c. Employment contracts for directly employed carers: Similarly, the authority of a property and affairs deputy does not encompass determination of P’s care needs but it does encompass the application of P’s funds to meet the costs of care arrangements. If those arrangements involve direct employment of carers, preparation of employment contracts will be encompassed within the “general” authority to manage P’s funds.”

- f. Making arrangements for the employment of carers would be a key task that an ‘authorised person’ for the purposes of a direct payment would be responsible for. However, to be an ‘authorised person’ for the purposes of s.32 Care Act, the authority required is not authority to *‘apply P’s funds to meet the costs of care arrangements,’* (as the decisions would not be in relation to P’s funds at all, and the money would not become P’s own assets); but rather authority to *‘make decisions about the adult’s needs for care and support’*, which would appear to contain within it an inherent *‘determination of P’s care needs.’*
- g. The question of whether Mr. Lumb is an ‘authorised person’ in respect of AB within the meaning of s32 of the Care Act is of practical significance because



of s.32(5), which provides that if there is a person authorised under the Mental Capacity Act, no other authorised person may seek direct payments without that person's support:

“(5) Condition 1 is that, where the authorised person is not authorised as mentioned in subsection (4)(a) but there is at least one person who is so authorised, a person who is so authorised supports the authorised person's request.”

- h. So, if Mr Lumb is the 'authorised person' for the purposes of s.32(4)(a), AB's brother-in-law would not be able to request and manage direct payments for AB without Mr. Lumb's support. It would be entirely Mr. Lumb's decision as to whether AB's brother-in-law continued to receive AB's direct payment, and he could terminate the arrangement if he saw fit. On the other hand, if Mr Lumb is not authorised 'to make decisions about the adult's needs for care and support,' then decision about direct payment arrangements rests with the local authority to determine whether the person seeking direct payments was a 'suitable person' who would act in the adult's best interests in arranging care and support and is capable of doing so, per s32(4)(c) and s32(7).
- i. Where the precedence given in s.32(4)(a) is specifically directed at a person who has authority under the MCA to make decisions about a person's care needs, in the context of spending public funds to purchase care in order to discharge the local authority's s.18 Care Act duties, it is the position of the local authority that Mr Lumb does not have the authority required to be an authorised person under s.32(4)(a).
- j. The local authority does not suggest that Mr Lumb would not potentially be an appropriate recipient of the direct payment if he sought to have it. Rather, the local authority's position is that the authority granted to him by the property and affairs deputyship order does not make him an 'authorised person' for the purposes of s.32(4)(a).

6. The positions of the other parties were as follows:

- a. AnB and Mr. Lumb expressed agreement with the analysis of the local authority;
- b. the Official Solicitor took no position and did not request an opportunity to put in further submissions on this issue;

AND UPON the court inviting attention to paragraphs 52-54 of the judgment in *Re ACC & Ors* [2020] EWCOP 9 on this point and concurring with the uncontested position of the applicant local authority



IT IS ORDERED THAT:-

7. For the avoidance of doubt, the authority granted to Daniel Lumb in the deputyship order made on 9th August 2019 does not include authority to make decisions about AB's needs for care and support within the meaning of section 32(4)(a) of The Care Act 2014.
8. This order may be made published in this (anonymised) format.

OTHER

9. Costs reserved.

