

A as delegate for B v the Representation of a as Delegate (Formerly Curator) for B

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Nicolle, Pitman
Judgment Date:	05 December 2018
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Text

[2018] JRC 225

Royal Court

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Nicolle **and** Pitman

A as delegate for B
Representor

In The Matter of the Representation of a as Delegate (Formerly Curator) for B

And In The Matter of an Application Pursuant to article 24 of the Capacity and Self-Determination (Jersey) Law 2016

Advocate C. Campbell for the Representor.**Authorities**

Mental Health (Jersey) Law 1969.

Capacity and Self-Determination (Jersey) Law 2016.

Capacity and Self-Determination (Supervision of Delegates etc.) (Jersey) Regulations 2018.

Lewin on Trusts 19th edition.

In re S Settlement [2001] JLR Note 37.

V (as administratrix of the estate of A v Minister for Health and Social Services [2014] (2) JLR 42.

Capacity —application seeking directions from the Court regarding an offer made in settlement of a personal injuries claim.

THE COMMISSIONER:

- 1 On 4th October, 2018, the Court heard an application from the Representor, as delegate for B, for directions as to whether she should accept the terms of an offer made in settlement of B's personal injuries claim.
- 2 The background to the application is that B, who is 54, was involved in a road traffic accident on 19th June 2011 while cycling in France, as a result of which he suffered life-changing physical and psychological disabilities, rendering him incapable of managing his property and affairs. As a result of his life-changing injuries, B requires, and will continue to require, full-time assistance with all aspects of daily living. This includes both active care and someone being present with him in the house.
- 3 On 9th September 2016, the Representor was appointed as his curator, to manage his affairs and property generally, but specifically to conduct a personal injury claim arising out of the accident.
- 4 4. The driver of the car involved in the accident was a French national, C.
- 5 At the time of the accident, C was insured by AXA France IARD S.A. ("AXA"), which was represented by Pierre Thomas and Partners ("PTP"), a London based law firm specialising in European and personal injury litigation.

- 6 Following the accident, B received treatment at hospitals and rehabilitation units in France, England and Jersey. B was admitted to Redford Court, a rehabilitation centre in Liverpool on 26th May, 2015, (a centre forming part of the Brain Injury Rehabilitation Trust). B remained at Redford Court on a full-time basis until 28th January, 2016, when he returned to Jersey, where he lives with the Representor and her daughter (who is over 18).
- 7 Expert medical reports have been obtained as to B's condition. These include two joint reports issued by Doctor Marc Sindres and Doctor Michel Rabinovitch, well known medical experts in France specialising in neuropsychology and rheumatology respectively. Doctor Sindres and Doctor Rabinovitch were appointed by AXA as the single experts (as is standard practice in France) to assess B from a neuropsychology and rheumatology perspective.
- 8 France operates a 'no fault' based system in respect of all road traffic accidents. The liability of AXA to provide compensation to B is therefore indisputable. The level of compensation that AXA is liable to provide, however, is not precise and is subject to various assessments. In a letter dated 16th April, 2013, AXA confirmed their liability to make an offer of compensation and certain interim payments have been made.
- 9 An open offer to settle the claim was provided by way of letter from PTP dated 5th January, 2018 ("the Offer"). Given that the claim is governed by French law, advice on the Offer was obtained on behalf of the Representor from the Paris office of law firm Holman, Fenwick, Willan LLP ("HFW"). HFW advised by way of letter dated 21st August, 2018 that the Offer was reasonable and should be accepted.
- 10 Following receipt of the advice of HFW, and for the reasons set out in the Representor's affidavit of 29th August, 2018, she was minded to accept that advice and sought the approval of the Court, initially under Article 43(17) of the *Mental Health (Jersey) Law 1969* ("the 1969 Mental Health Law"). However, the hearing took place three days after that law was repealed and replaced by the *Capacity and Self-Determination (Jersey) Law 2016* ("the 2016 Capacity Law").
- 11 11. Pursuant to the transitional provisions contained in Article 22 of the *Capacity and Self-Determination (Supervision of Delegates etc.) (Jersey) Regulations 2018* ("the Regulations"), when the 2016 Capacity Law came into force on 1st October, 2018, the Representor became the delegate of B, as if appointed under Part IV of that law "**having all powers**". She therefore has the power to accept the Offer.
- 12 The 2016 Capacity Law refers to the person lacking capacity as "P" and Article 35 provides:—

“35 Powers of delegates

Subject to paragraphs (2) to (4) and to any restriction or condition imposed by the Court on the appointment of a delegate, a delegate may do, or secure the doing of, anything which appears to the delegate to be necessary or expedient to be done in P's best interests .

... .

... .

A delegate must make all decisions on behalf of P in P's best interests and without undue delay.”

13 “ ***Best interests***” is defined under Article 6 in this way:-

“6 Best interests

(1) For the purposes of this Law, a determination as to what is in the best interests of a person lacking capacity –

(a) Must not be made merely on the basis of –

(i) The person's age or appearance, or

(ii) Any other aspect of his or her condition or behaviour;

(b) Must not be made unless, so far as reasonably practicable, the person lacking capacity has been permitted, encouraged and supported to participate as fully as possible in any act done for or any decision affecting that person; and

(c) Must consider all relevant circumstances including in particular the matters set out in paragraphs (2) to (4);

(2) Such a determination must include consideration of whether it is likely that the person lacking capacity will at some time have capacity in relation to the matter in question, and if so, when that is likely to be

(3) Such a determination must include consideration, so far as the following matters are reasonably ascertainable, of:-

(a) The past and present wishes and feelings of the person lacking capacity as to the matter in question (including in particular any advance decision to refuse treatment or other written statement made by that person at a time when that person did not lack capacity);

(b) The beliefs and values of that person which would be likely to influence that person's decision if that person did not lack capacity;

(c) Any other factors which that person would be likely to consider if that person did not lack capacity .

(4) Such a determination must take into account, if it is practicable and appropriate to consult the following persons, the views of –

(a) Anyone named by the person lacking capacity as someone to be consulted on the matter in question or matters of that kind;

(b) Anyone engaged in caring for that person or interested in that person's welfare;

(c) Any person on whom authority is conferred under a lasting power of attorney granted by that person and applicable to the matter in question; and

(d) Any delegate appointed by the Court under Part 4.”

14 Under Article 43(17) of the 1969 Mental Health Law, the Representor required the consent of the Court to settle B's personal injuries claim, which consent would only have been given after two Jurats had been appointed to examine the proposed settlement and were satisfied that it was both necessary and expedient to do so. Thus, if they were so satisfied and the Court consented to the Representor settling the personal injuries claim, she was given “safe harbour” or protection against any potential personal liability.

15 In the case of a delegate with the power to make the decision, the 2016 Capacity Law provides no such mandatory safe harbour. The delegate is accountable for the decision he or she makes, is open to investigation by the Viscount under the Regulations and exposed to the possible imposition of a liability to P or to his or her estate. It is reasonable, therefore, for delegates faced with difficult, or what may be described as “momentous” decisions (i.e. decisions of great importance or significance for P) to seek the protection of the Court in the same way, by analogy, that a trustee can.

16 Article 24(5) expressly empowers the Court to make further orders or to give directions to a delegate as to the decision he or she proposes to take:-

“24(5) Having regard to the provisions of this Part and to article 34 in particular, the Court may –

(a) make such further orders;

(b) give such directions; and

(c) confer such powers, or impose such duties,

as the Court thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment under paragraph (2), including (where the Court is satisfied that it is in P's best interests to do so) varying or discharging any previous order."

- 17 The Representor had not purported to surrender to the Court the powers delegated to her and so the decision remained hers. There is no provision under the 2016 Capacity Law for such surrender, but if there is some factor, such as a vitiating conflict of interest, which militates against the delegate making the decision, then it seems to us that Article 24(5) gives the Court ample power, on an application, to remove the power to make that decision from the delegate, so that the Court or another appointed delegate can make the decision on P's behalf, pursuant to Article 24(2)(a), which is in these terms:-

"24(2) If P lacks capacity in relation to a matter concerning P's health or welfare or P's property and affairs, the court may, on application made to it under Article 25:-

(a) by order make a decision on P's behalf as to the matter; or

(b) appoint a delegate to make a decision on P's behalf as to such matters,

(c) in accordance with this Part, and having regard in particular to Articles 3 to 6."

- 18 The next issue is to consider the role of the Court where a delegate retains the power to make the decision on P's behalf, but seeks the protection of the Court by way of a direction or authority to make the decision in the manner proposed.
- 19 As the delegate retains the power to make the decision, the role of the Court in such an application will be a limited one and, in our view, analogous to the role of the Court when a trustee seeks the blessing of the Court to a particular exercise of power without surrendering its discretion (see the often quoted passage at paragraph 27–079 of *Lewin on Trusts 19th edition*). The Court will be concerned as to whether the delegate has properly formed the view that the decision he or she proposes to make is in the best interests of P. In other words it will be concerned with the limits of rationality and honesty and will not withhold approval merely because it would not make the decision in the manner proposed. The Court will, however, act with caution, because if it approves the decision (after full and frank disclosure of everything relevant to that decision), no interested party will thereafter be able to complain that the decision was not in P's best interests.
- 20 Although not canvassed with Advocate Campbell, the Court might usefully follow its approach to an application by a trustee to have a decision blessed, suitably adapted, as set out in the case of *In re S Settlement* [2001] JLR Note 37, namely to consider firstly, whether the delegate has the power to make the decision and secondly, to be satisfied that:-

- (i) the delegate's opinion has been formed in good faith;
- (ii) the opinion is one of a reasonable delegate acting in accordance with his or her duties and obligations under the 2016 Capacity Law; and
- (iii) it has not been vitiated by any actual or potential conflict of interest.

- 21 In this case, the Representor had sought an order convening AXA and C, so that they could obtain a valid discharge from the Representor on behalf of B, as a protected party, following the principles set out in the case of *V (as administratrix of the estate of A v Minister for Health and Social Services* [2014](2) JLR 42). That case involved proceedings brought by the administratrix of an estate for the benefit of a minor who had no power to authorise her to accept the terms of the settlement; hence the court sanctioning the settlement under its inherent jurisdiction.
- 22 An order convening AXA and C was not granted in this case as it was not considered necessary for them to be convened when there is no question as to the power of the Representor, as delegate, to accept the Offer. If they have any doubt as to her power, sight of the Act of Court authoring her to accept the offer should suffice.
- 23 The Court considered the advice received by the Representor on the merits of the Offer, which it would be inappropriate to set out in this judgment, and, in the context of a personal injuries claim, considered the following factors:-
- (i) the degree of benefits the settlement would afford to B;
 - (ii) the merits of the case;
 - (iii) the level of litigation risk borne by each party; and
 - (iv) the wishes of the parties to settle.

(See paragraph 32 of *V v the Minister for Health and Social Services*).

- 24 The advice from HFW was clear and comprehensive and the application was supported by a detailed affidavit from the Representor. The Representor had been B's main carer since his return to Jersey on 28th January 2016, a full-time commitment. We quote from paragraphs 64 – 66 of her affidavit which summarises the position succinctly:-

“64 It is extremely difficult to comprehensively summarise the life-changing physical and especially psychological disabilities that B continues to endure as a result of the accident. Obtaining a fair compensation amount is part of the bigger objective of allowing B to move past the accident and begin to rebuild his life. Until B receives monies in settlement of the claim he is unable to achieve this and currently feels in limbo, which causes him increased anxiety and frustration .

65 The advice from HFW is that the offer is reasonable and acceptable. I have been advised that it might be possible to obtain a slightly higher level of compensation, but I am advised that there are inherent litigation costs and risks associated with any proceedings for formal assessment of damages in the French Courts .

66 In my role as [delegate] I am also influenced by my role as carer for and partner of B. The benefit to B of seeking Court sanction for the offer and obtaining reasonable and acceptable compensation now vastly outweighs delaying matters further by proceeding for formal assessment of damages in the French Courts.”

- 25 As his carer and sharing his accommodation, we recognised that the Representor was potentially under a conflict between her personal interests and those of B, but we were satisfied from her evidence that her decision to accept the Offer had been taken entirely in his best interests and unaffected by her personal interests.
- 26 We were also satisfied with the manner in which the Representor proposed to invest the settlement monies on B's behalf (having reviewed the advice she had obtained) and the proposal for settling the legal fees (capped by the Court) out of the settlement sums.
- 27 With specific reference to relevant parts of Article 6 of the 2016 Capacity Law which defines “ **best interests**”:-
- (i) We were satisfied from the evidence of the Representor that B had fully participated in the process to the extent that he was able (Article 6(1)(b)).
 - (ii) The decision to accept or refuse the Offer had to be made now, so there was no question of B having capacity himself to make the decision at some stage in the future (Article 6(2)).
 - (iii) B clearly wished the matter to be settled so that he could move past the accident and begin to rebuild his life. There were no other persons likely to influence his decision, and we were not aware of any factors beyond those already canvassed (Article 6(3)).
 - (iv) B had not named any person to be consulted in this matter (Article 6(4)).
- 28 In conclusion, we were satisfied that the Representor was acting in good faith, that the opinion she had formed to accept the Offer was one which a reasonable delegate could have arrived at acting in accordance with the duties and obligations of a delegate under the 2016 Capacity Law, and was not vitiated by the potential conflict she had as B's carer.

29 We therefore sanctioned her decision to accept the Offer.

Postscript

30 There was no application for this hearing to take place in private, but it seems to the Court that future applications of this kind should be heard in private because they are administrative in nature and relate to the private affairs of the person lacking capacity. It is the Court's understanding that practice directions to this effect are in the course of being drafted. In the circumstances this judgment has been anonymised.