



LexisNexis®

This article was first published on Lexis®PSL Famil on 4 July 2014. Click for a free trial of [Lexis®PSL](#).

The shrinking scope for anonymity in the Court of Protection

04/07/2014

Family analysis: Discussing the judgment in Re DP, Felicity McMahon, a media law barrister at 5RB, predicts that the increasing transparency and importance given to open justice in the Court of Protection and family courts will continue.

Original news

Re DP [2014] EWCOP 7, [2014] All ER (D) 200 (Jun)

The court revoked a lasting power of attorney executed by DP appointing JM. It found that JM had acted in breach of his fiduciary duties. The Daily Mail ran a story demanding to know why JM's anonymity had been preserved and its owner, the intervening party, made an application, in which it sought to have his full name made public. The Court of Protection, in allowing the application, held that the balance came down heavily and decisively in favour of the public being told who JM was.

What key issues did this case raise?

The key issue was whether the Court of Protection should permit a person who has been restrained from acting as an attorney for an individual who lacks capacity because the court found he had acted improperly to be named by the press. The issues in play were:

- o the right to freedom of expression, including to receive and impart information, of the press and the public under the European Convention on Human Rights, art 10 (ECHR)
- o the right to privacy of the person lacking capacity (in this case referred to as 'DP') under ECHR, art 8
- o the right to privacy of the person who formerly acted as an attorney (in this case referred to as 'JM') under ECHR, art 8

What did the court decide?

The court decided that JM could be named.

The impact on DP of JM being named--an issue of great importance--was found to be minimal. Few if any additional people would be able to link JM and DP, most of whom would be able to make the link would already have done so.

There was no reason why JM should be protected from the normal consequence of a finding of misconduct by a court--the identification of the wrongdoer in a judgment. If the finding about the same conduct had been made in another court (eg the Crown Court or Chancery Division) he would have been named, and there is no reason why it should be any different simply because the finding was made by the Court of Protection.

To what extent does the judgment clarify the law in this area?

The judgment makes clear the application to this matter of the Practice Guidance by Sir James Munby as President of the Court of Protection in January 2014 (see *Practice Guidance: Transparency in the Court of Protection: Publication of Judgments* [2014] COPLR 78). That guidance (together with similar guidance issued for the Family Division) was intended to bring about a change in practice so that more judgments are published to increase transparency. That guidance states that where a person has been restrained from acting as an attorney, permission should be given for the judgment to be published unless there are 'compelling reasons' not to do so. In this case there were no compelling reasons not to publish the judgment or to name JM.

How far does anonymity extend?

Anonymity does still exist in the Court of Protection however. The person lacking capacity will be protected both by being anonymised themselves, and by others being anonymised and/or other restrictions imposed (eg on approaching particular persons) if it may lead to the person lacking capacity being identified or cause harm to their carers' ability to care for them.

Are there any grey areas or unresolved issues remaining that practitioners should be aware of?

The circumstances in which it will be necessary to grant anonymity to someone other than the person lacking capacity will continue to be decided on a case-by-case basis. Anonymity may be required to protect the interests of the person lacking capacity, or because another individual's ECHR, art 8 rights require such protection. The court will need to have regard to all the circumstances of the case, subjecting the competing rights and interests in play to 'intense focus' in order to come to an appropriate decision in the particular case.

How does the judgment further the debate on freedom of the press versus an individual's ECHR, art 8 rights?

Sir James Munby sets out and applies case law that is familiar in other areas where ECHR, arts 8 and 10 rights come to be balanced against one another--such as *Re S (a child) (identification: restrictions on publication)* [2004] UKHL 47, [2004] 4 All ER 683 and *Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 All ER 799--including key passages on the importance of naming individuals to the media and reporting cases in a way that is interesting to the public and therefore may spark informed public debate. Thus the same principles apply.

The judgment also makes clear that the court is not an editor and the nature of the reporting which may take place if an individual is named is not a relevant matter. If the reporting is problematic--for example defamatory--this is a matter for other legal proceedings (eg a defamation action).

What should lawyers take from this case?

Lawyers should be aware of the changing landscape in Court of Protection and family cases towards increased transparency of the process, including the naming of individuals involved (other than children and those lacking capacity). If representing an individual who wishes to preserve their anonymity, be aware that the burden of proof is on them to show that anonymity is necessary--clear and cogent evidence will need to be put before the court to show this. If the reporting proves problematic, consider other potential remedies. If acting for those seeking to report on matters in the Court of Protection or family courts, this case is a useful precedent.

What are your predictions for future developments in this area of law?

I anticipate that the increasing transparency and importance given to open justice in the Court of Protection and family courts will continue. As demonstrated in cases such as *Re P (a child)* [2013] EWHC 4048 (Fam), [2013] All ER (D) 188 (Dec), openness is key if the public are to be accurately informed, able to assess

whether any criticisms made are justified, and if so, to understand where any problem may lie (Is it a problem of interpretation? Is there an argument that the law should be changed?). Similarly, as in this case, where a court has found wrongdoing, there is no reason why the usual position--that said wrongdoing is made public--should not apply.

Felicity McMahon has experience of all aspects of 5RB's practice, including defamation, privacy and confidence, copyright, data protection, access to journalistic material, contempt, harassment, injunctive relief and sports law. Her work often includes consideration of the balance between ECHR, arts 8 and 10. She also has particular experience of advising on data protection issues.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.