Capacity in the rearview mirror – squaring the common law and the MCA

In *Re Clitheroe* [2021] EWHC 1102 (Ch), Falk J maintained the largely staunch resistance of the judiciary to adopting the test for capacity contained in the MCA 2005 to determining, after the event, whether a person had capacity to make a will. Strictly, her comments are obiter – in other words, they do not form part of her decision on the appeal – but they are amongst the most detailed that have been made and have provoked considerable discussion.

I agree with Falk J that the MCA 2005 does not, as a matter of statutory construction, apply to the determination of testamentary capacity after the event, at least when the question is being considered by a judge of the Chancery Division in the probate setting.[1] Rather, the test remains the common law test. However, that is not the end of the story, because, as the common law "is capable of moving with the times,"[2] the courts can, in principle, align the common law test to that contained in ss.2-3 MCA 2005. I am amongst those who think that they should (for more on my views, see this article here).

Although Falk J recognised that there was a tension between the two tests, and that this tension could potentially cause problems (see paragraph 75), she proceeded on the basis any difficulties with the law were a matter for the Law Commission and Parliament. The Law Commission has provisionally proposed a statutory alignment of the two tests, but any such statutory alignment may be some way off.

In the interim, it seems to me that important to identify that Falk J's approach to the issue was, in one respect, based upon a misunderstanding of the position under the MCA 2005, and hence, therefore, indicates that a possible development of the common law was stymied by an illusory obstacle.

At paragraph 62 of her judgment, Falk J noted that:

> *Nothing indicates that determining such a matter is one of the "purposes" of the Act. I also note that it does not straightforwardly fit with all the principles in s 1. Obviously capacity could be presumed in favour of the testator, but s 1(3) in particular presents a potential problem. As Mr Dumont* [Counsel for Respondent] *points out, it could encourage an approach that is the opposite of the "golden rule" (see [19] above), because if there was no or limited evidence of steps taken to assist the testator in (for example) understanding, retaining, or using or weighing information then capacity would be presumed.*

[1] A judge of the Court of Protection has to apply the MCA test for purposes of deciding whether to make a statutory will on behalf of the person. If the question of capacity is being asked in retrospect by a judge of the Court of Protection (for instance to determine whether it is necessary to make a statutory will to avoid a probate dispute), then there is an interesting and as yet unresolved question as to whether they are bound to apply the MCA 2005 or whether they would be applying the common law test. This question arose but not was not determined in *VAC v JAD & Ors* [2010] EWHC 2159 (Ch)

[2] *In re D Birmingham City Council v D (Equality and Human Rights Commission and others intervening)* [2019] UKSC 42, para 22.

I should perhaps note that, to the extent that it is being suggested that the support principle does not apply at all in the context of wills, this cannot be right: after all, the Court of Protection could not be asked to make a will for a person unless it was satisfied that all practicable steps had been taken to support them to do so without success. There are undoubtedly some – as yet perhaps imperfectly explored – questions about what this means in terms of solicitors' duties to their clients where they appear to have difficulties with (e.g.) understanding relevant information.

For present purposes, however, I want to focus in on the suggestion that particular complexities arise from applying the principles of the MCA 2005 in retrospect.

On one view, if (as I suggest is the case) the test for determining testamentary capacity remains a common law test, it would be quite possible for the courts to align the test to the 'functional' test contained in ss.2-3 MCA 2005 without importing the statutory principles within the MCA 2005.

However, it is important to understand how those statutory principles apply where a court has to apply the MCA 2005 in retrospect. The clearest example of this is in the context of advance decisions to refuse treatment, where the Court of Protection has the power (by s.26(4) MCA 2005) to determine whether an advance decision 'exists,' one of the preconditions for existence being that the adult in question "has capacity to" make the decision to refuse treatment at a later point (s.24(1)).

How should the court approach this question if doubts are raised? Should it proceed on the basis that capacity is presumed, even in the face of doubts? Should it proceed on the basis that capacity could not be presumed unless all practicable steps had been taken? What should it do if there are questions about whether the person was provided with support?

In other words, exactly the same dilemmas arise as are faced by a court considering the question of whether a testator had capacity (and exactly the same policy imperatives might be thought to arise as led to the development of the so-called 'golden rule' in relation to testamentary capacity, precisely to stave off these problems).

Answering this question, it seems to me, might help clear at least part of the air in relation to retrospective questions of testamentary capacity.

Doing so requires, as often in this context, a careful reading of the MCA 2005 itself. This shows that the presumption of capacity in s.1(2) MCA applies only to the current assessment of capacity, as it is clearly framed in the present tense: "[a] person must be assumed to have capacity unless it is established that he lacks capacity" (emphasis added). Similarly, the support principle is equally framed in the present tense: "[a] person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success."

On proper analysis, therefore the MCA 2005 is, in fact, silent as to the approach that is required to take in respect of the past assessment of capacity, even in those sections where it specifically empowers the Court of Protection to consider questions of the past capacity of the person ('P'), including s.26(4)(a).

There are undoubtedly sound reasons, not least so as to secure proper respect for P's rights under Article 8 ECHR, for the court to proceed in any retrospective assessment of P's capacity *as if* it were bound by the presumption in s.2(1). However, that still leaves room in an appropriate case for the court to proceed differently so as to secure P's interests. Advance decisions provide exactly such a case. This was identified, although without detailed analysis, by Peter Jackson J (as he then was) in *A Local Authority v E* [2012] EWCOP 1639 The case concerned two documents signed by E (a 32-year-old woman who suffering from extremely severe anorexia nervosa, and other chronic health conditions) saying that she did not want to be resuscitated or to be given any medical intervention to prolong her life. One of the documents was an advance decision which, if it existed, would undoubtedly have been valid and applicable to the situation in which E found herself, and would have meant that she could not have been force-fed. Peter Jackson J held at paragraph 55 that:

> *for an advance decision relating to life-sustaining treatment to be valid and applicable, there should be clear evidence establishing on the balance of probability that the maker had capacity at the relevant time.* ***Where the evidence of capacity is doubtful or equivocal it is not appropriate to uphold the decision*** (emphasis added)

Whilst Peter Jackson J's observations related to life-sustaining treatment, I would suggest that they apply to all forms of advance decisions to refuse treatment, and appropriately reflect the fact that the mechanical operation of the presumption in such a case could mean that medical practitioners would be required to abide by the advance decision notwithstanding the presence of such doubt. That would be a problematic outcome, not least in terms of the state's obligations to secure life under Article 2 ECHR.

Importantly, however, these considerations only arise if proper doubts have been raised as to the person's capacity at the point they purportedly made the advance decision. They are not a licence to unpick an advance decision which makes professionals (or family members) uncomfortable on the basis of spurious doubts.

Looked at through this prism, therefore, the position under the MCA 2005 in relation to advance decisions is, in fact, exactly the same as under the common law in relation to testamentary capacity or lifetime gifts. In such a case, if proper doubts have been raised that the person lacked the relevant capacity, then the evidential burden shifts to those person(s) seeking to establish that the relevant capacity was present. See e.g., *Gorjat v Gorjat* [2010] EWHC 1537(Ch) at paragraph 139 per Sarah Asplin QC (sitting as a Deputy

High Court Judge):

> [f]*inally, at common law, the burden of proving lack of mental capacity lies on the person alleging it. To put the matter another way, every adult is presumed to have mental capacity to make the full range of lifetime decisions until the reverse is proved. Section 1(2) Mental Capacity Act 2005 which came into force after the decision which is under consideration in this case, put the presumption of mental capacity on a statutory footing. This evidential burden may shift from a claimant to the defendant if a prima facie case of lack of capacity is established: Williams v Williams [2003] WTLR 1371 at 1383.*

Further, the "support principle problem" applies equally in relation to the retrospective consideration of advance decisions as it appears to do in relation to wills or lifetime gifts. It would also apply to situations where the court is considering whether a person had capacity to create a Lasting Power of Attorney (which has very strong functional resemblances in terms of its intended legal consequences to a will). And it could lead to equally peculiar outcomes if followed to its logical conclusions.

It seems to me, that, in fact, there is no such problem that has to be confronted by the Court of Protection. Rather, it seems to me that the answer for statutory MCA purposes is that the support principle does not apply in relation to the situation where either the person themselves or someone is else seeking to rely after the event upon a document created by the person. In other words, even where a court is on its face bound by statute to apply the MCA 2005, the present-focused support principle simply does not enter into the equation when the time for giving such support has passed, and the issue is whether, in fact, the person had capacity to make the decision at the time. [3]

In the circumstances, therefore, it seems to me that, when the judiciary next come to consider the question of whether to align the common law and the MCA tests, they can do so confident that the operative principles (whether statutory or common law) in fact are in alignment.

Alex Ruck Keene
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[3] The situation is different if someone else is seeking to justify actions that they have taken on the basis that they considered that the person lacked capacity. At that point, unless they can show that, at the time, they had a reasonable belief that this was the case, they would not be able to rely (for instance) upon the defence under s.5 MCA to any liability that they might have for actions taken in the absence of the person's consent. Their belief could not, by definition, be reasonable if they had not taken appropriate steps to support the person to make their own decision before proceeding. The support principle is therefore – in this context – reintroduced through the back door. Although not expressed in exactly these terms, this is the logical underpinning of the decision in *Re CH* [2017] EWCOP 12: because the local authority in question had not taken identified and practicable steps to support CH to have capacity to be able to give consent to sexual relations (as the test was framed at the time), it could not then assert that the interference in the private and family life of CH and his wife by (as Hedley J put it) "enforc[ing] abstention from conjugal relations" was justified for purposes of Article 8 ECHR.