



PUMP COURT

CHAMBERS

**COURT OF PROTECTION AND CAPACITY:
DIVORCE AND FINANCIAL REMEDIES**

Jennifer Lee, Pump Court Chambers

Court of Protection Seminar on 12th May 2022



Court of Protection - Family Relationships

- The Court of Protection (COP) has the power to make decisions on behalf of people who lack the capacity to make those decisions themselves, applying the Mental Capacity Act 2005 (MCA 2005), underpinned by the principle that any act done or decision made on behalf of that person must be done/made in their best interests.
- However, there are a number of “excluded decisions” in relation to decisions concerning family relationships: s.27 MCA 2005

Court of Protection - Family Relationships

- Under s.27 of the MCA, the COP is **not** able to make certain decisions on family relationships on behalf of a person who lacks the necessary capacity, for example, to:
 - (a) Consent to marriage or civil partnership;
 - (b) Consent to have sexual relations;
 - (c) Consent to a decree of divorce or dissolution in respect of a civil partnership being granted on the basis of two years' separation.
- Also excluded are decisions re: the giving of consent to one's child being placed for adoption, giving consent under the HFEA 1990 and discharging PR in matters not relating to a child's property.

Court of Protection - Family Relationships

- Having said that, the COP can make declarations as to whether an individual has the capacity or not to marry, or consent to a divorce.
- ***Westminster CC v C [2008] EWCA Civ 198***. Court made declarations that P lacked capacity to marry and to consent to sexual relations. Marriage whilst valid under the law of Bangladesh, not valid under English law.
- The COP can also decide whether an individual has capacity to enter into nuptial agreements, and what financial information should be disclosed as part of that process: ***PBM v TGT & X Local Authority (2019) EWCOP 6***.

Capacity to Marry

- There are different thresholds for capacity. Capacity is also time and decision specific.
- Not uncommon to see cases where someone has capacity to marry, and/or capacity to engage in sexual relations, but not the capacity to manage their property and affairs, or capacity to litigate.
- String of cases on capacity to marry. See decision of Munby J (as he then was) in ***Sheffield City Council v E and S* [2005] 2 WLR 953**.
- Contract of marriage is a simple one which does not require a high degree of intelligence to comprehend. Focus is on whether person understands the nature of the contract of marriage, and not the implications of a particular marriage to a particular person. Nor was it necessary to show they had capacity to take care of their own person or property.

Capacity to Marry

- A more recent case is ***Mundell v Name 1* [2019] EWCOP 50**. COP had to determine whether a young man (X) had capacity to marry. X had learning disabilities and had been awarded substantial compensation following RTA.
- X lacked capacity to manage his property & affairs, with assets worth about £1.5M. A deputy for property & affairs (Mr Mundell) was appointed by the COP in 2013.
- X and his girlfriend (Y) became engaged and were due to marry on 21 September 2019. Y had been asked to sign a PNA, but had declined.
- X's deputy was very concerned that X did not understand the implications of divorce. The deputy sought a declaration that X lacked the capacity to marry.

Capacity to Marry

- The Court reiterated that the threshold for capacity to marry is low.
- It should also be looked at objectively. The wisdom of the marriage is not relevant – focus is on whether P has an understanding of the broad nature of the marriage contract, and the duties and responsibilities that normally attach to marriage.
- Mostyn J disagreed with Munby J's statement in *Sheffield* that living together and loving one another were essential features of a marriage when assessing a person's understanding of the marriage contract and capacity to marry. A sexual relationship was also not necessary for there to be a valid marriage.

Capacity to Marry

- Mostyn J expressly rejected the notion that the test for capacity to marry should include a requirement that there should be anything more than a knowledge that divorce may bring about a financial claim (para. 31):

“In my judgment, it would be inappropriate and, indeed, arguably dangerous to introduce into the test for capacity to marry a requirement that there should be anything more than a knowledge that divorce may bring about a financial claim. This (name 1) plainly understands. However, what the extent of that claim should be is a mystery to even the most sophisticated and well educated of lay, as well as legal, persons and to suggest that there is needed an appreciation of what the result of a financial remedy claim might be, would be to set the test for capacity far too high.”

Capacity to Marry

- Mostyn J returned to consider the issue of capacity to marry in ***NB v MI (Capacity to Contract Marriage) [2021] COPLR 207.***
- Application by a woman for a declaration of non-recognition of a marriage based upon lack of capacity to consent to her marriage in Pakistan in 2013. She had suffered a brain injury in an accident aged 6 and had a deputy for P&A.
- Several capacity assessments in 2013 concluded that she would not have had the capacity to enter into a marriage. Marriage was nevertheless valid according to Pakistani law.

Capacity to Marry

Mostyn J surveyed the authorities, and said they resulted in these straightforward propositions:

- (i) The contract of marriage is a very simple one, which does not take a high degree of intelligence to comprehend.
- (ii) Marriage is status-specific not spouse-specific.
- (iii) While capacity to choose to engage in sexual relations and capacity to marry normally function at an equivalent level, they do not stand and fall together; the one is not conditional on the other.
- (iv) A sexual relationship is not necessary for a valid marriage.
- (v) The procreation of children is not an end of the institution of marriage.

Capacity to Marry

- (vi) Marriage bestows on the spouses a particular status. It creates a union of mutual and reciprocal expectations of which the foremost is the enjoyment of each other's society, comfort and assistance. The general end of the institution of marriage is the solace and satisfaction of man and woman.
- (vii) There may be financial consequences to a marriage and following its dissolution. But it is not of the essence of the marriage contract for the spouses to know of, let alone understand, those consequences.
- (viii) Although most married couples live together and love one another this is not of the essence of the marriage contract
- (ix) The wisdom of a marriage is irrelevant.

Capacity to Marry

- Mostyn J found that the applicant did have the necessary capacity to consent to marry in 2013. The assessors who found that she lacked capacity to marry had deployed a test higher than that laid down by the law.
- The applicant was aware of the simple nature of the contract and that by exchange of vows, a union had been created with “mutual expectations of comfort, society and assistance”.
- That she was not aware and may not have been capable of being made aware of the potential ramifications of marriage, of her husband’s intentions as to residence and work, or of any potential claim he might have on divorce, was nothing to the point.

Deputies & attorneys – marriage/CP and divorce

- COP appointed deputies and attorneys under POAs have a duty to ensure that P's assets are safeguarded in the event of marriage, cohabitation or divorce.
- ***PBM v TGT & X Local Authority (2019) EWCOP 6***, involved a young man with brain injuries, who had significant assets awarded to him in settlement of a PI damages claim.
- Deputy for P&A very concerned about young man's capacity to marry his fiancée and the implications in the event of a divorce given his very significant resources.
- Deputy entered a caveat under the Marriage Act 1949 (s.29) to prevent the marriage from taking place. P, understandably, was very upset.

Deputies & attorneys – marriage/CP and divorce

- ***PBM v TGT & X Local Authority***: COP held that P had capacity to marry and capacity to enter into a pre-nuptial agreement (PNA). He had shown an ability to understand, retain, use and weigh the information relevant to that decision.
- Contentious issue was whether he had capacity to decide whether he should be informed about the extent of his assets.
- Deputy had concerns about P's welfare if made aware of the size of the assets. The OS (P's litigation friend) argued that he should be able to kw the extent of his assets before entering into the PNA.

Deputies & attorneys – marriage/CP and divorce

- COP ordered that the young man be informed of the extent of his assets, despite his financial vulnerability.
- Although not a pre-requisite of the PNA, the agreement would be less effective without the information. There was a risk that failure to provide it would deprive P of an opportunity to protect his assets upon divorce. Deputyship was an effective safeguard against any financial abuse.
- It was not necessary to decide if the test was whether P could decide if he should ask about the extent of his assets, or whether he could decide if he should be told.
- There was nothing inconsistent in saying that the applicant had capacity to make a decision about a PNA, but lack capacity to manage his property and affairs generally on an ongoing basis.

Deputies & attorneys – marriage/CP and divorce

- Court stressed that deputy had acted properly in entering a caveat against the proposed marriage (para. 30)

“In my judgement, PBM has the capacity to marry. I make it clear, however, that in my judgement the Deputy, having legitimate concerns, had a responsibility to take the actions that she did.”

- The emphasis is on advance planning. If in doubt, err on the side of caution. Make sure that early advice is obtained and steps are taken on behalf of clients to enter into PNA or cohabitation agreement if necessary, or that there is some other mechanism/ arrangement which protects their assets in the event of a divorce/ dissolution or relationship breakdown.



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"An absolute class act. She can grapple with complex matrimonial finance work in a heartbeat. She is a confident and calm practitioner with gravitas, technical ability and professionalism far beyond her year of call"
-Legal 500 (2022)(Tier 1)

"Jennifer is everything you would want in counsel. She has exceptional attention to detail coupled with a firm but fair approach to the opposition."
-Chambers & Partners (2022)

Jennifer Lee is a specialist family law practitioner. She is regularly instructed in financial remedy cases involving family businesses, inherited wealth, nuptial agreements, and trusts. Many of her cases also involve foreign assets, tax complications, and cross-jurisdictional issues. She has appeared in high-profile reported cases, most notably *in Velupillai [2015] EWHC 3095 (Fam) (High Court)* and in *N v N (Afghanistan: Validity of an overseas marriage)[2020] EWFC B55*.

Jennifer leads the Court of Protection Team in Chambers. She has a keen interest in COP/capacity matters, particularly where they overlap with divorce/financial remedy claims. She has appeared in cases involving property and affairs applications, including those where family proceedings are afoot. She is also instructed in difficult cases concerning personal welfare, DOLs, and urgent medical treatment. She acted for the successful applicant in DB v DW [2015] EWCOP 16, which involved competing P&A deputyship applications.

Jennifer sits as a [Fee-Paid Judge of the First-tier Tribunal \(Tax Chamber\)](#). She is ranked as ["Leading Junior \(Tier 1\)- Family and Children Law" in The Legal 500](#), and as a [specialist in "family/matrimonial law" in Chambers & Partners \(UK Bar\)](#). She appears in family arbitrations and undertakes private FDRs/ early neutral evaluations.

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