Mental Capacity Law Newsletter October 2014: Issue 50

Compendium

Introduction

Welcome to the October issue of the Mental Capacity Law Newsletter family. We hit our half-century this month in terms of numbers of issues in the newsletter format, although Tor and Alex can remember even earlier days! We remain very grateful to all of our readers for their continued support which allows us to continue with our mission of trying to spread the capacity law love.

Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: news of the process for judicial authorisations of deprivations of liberty, capacity and deprivation of liberty, and a new and depressing '*Neary*'-type saga;

(2) In the Property and Affairs Newsletter: cases on the duties of attorneys vis-à-vis care expenditure, testamentary capacity and the MCA 2005 and new guidance on assessing capacity to manage property and affairs;

(3) In the Practice and Procedure Newsletter: two extremely important cases on when (and how) to go to court in medical treatment cases;

(4) In the Capacity outside the COP newsletter: an update on the compatibility of the MCA 2005 and the CRPD, developments with LPAs, and two important Strasbourg cases;

(5) In the Scotland Newsletter: breaking news as regards plugging the Bournewood 'gap' in Scotland and further news in the developing saga relating to validity of powers of attorney.

As ever, we welcome your contributions and comments – and promise to publish those which pass our test of being useful to the wider community!

ThirtyNine ESSEX STREET

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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

Contents

Stop Press: Scottish Law Commission's report on the deprivation of liberty of adults with incapacity published

As we went to press, the SLC's long-awaited report on reform of the law in Scotland to cater for the lawful deprivation of liberty of adults with incapacity was published. We S have a full report upon this in the Scottish section of the next newsletter, but its importance goes far beyond Scotland as a contribution to the debate as to what should replace the DOLS regime (a model which is notably not endorsed by the SLC).

Short Note: judicial authorisation of deprivation of liberty

In *Re X and others (Deprivation of Liberty)* [2014] EWCOP 25, responding to the fact that there will be very many more applications for authorisations of deprivations of liberty outside the scope of Schedule A1 to the MCA 2005, the President of the Court of Protection sought to set out a streamlined process to seek to enable the court to deal with deprivation of liberty cases in a timely, just, fair and ECHR-compatible way. In this first of two judgments, Sir James Munby P sets out the broad framework; the second will elaborate on the reasons and address three remaining matters of the 25 identified by the court.

The practical implications of the judgment are very significant; it is anticipated that new forms and a Practice Direction will be forthcoming short order; in the interim, for discussion of the key points of the judgment and, in particular, the evidential requirements imposed upon applicants for such authorisations, we refer our readers to this guide.

It should finally be noted that, as at the time of going to press, permission had been sought to appeal by two of the protected parties in the proceedings before the President to appeal his conclusions that: (1) (subject to certain conditions) it is not necessary for P to be a party to proceedings for applications for judicial authorisations for deprivation of liberty; and (2) that a litigation friend is not required to act via a solicitor for purposes both of conducting litigation and acting as advocate before the court. The Law Society has also sought permission to appeal on the first of the points above, and also on the President's decision that an oral hearing is not required in all cases.

We will keep you posted as to developments both in relation to the case specifically and in relation to the application procedure more generally.

Capacity and deprivation of liberty

X v A Local Authority and an NHS Trust [2014] EWCOP 29 (HHJ Cardinal)

Mental capacity – assessing capacity

Summary

A very intelligent retired lawyer suffered from Korsakoff's syndrome as a result of excessive alcohol consumption. Having previously been detained in hospital under the Mental Health Act 1983, Mr X now found himself detained in a care home. The issue for HHJ Cardinal was whether he lacked capacity to make decisions as to residence, treatment and care. His social worker and treating psychiatrist, who had known him throughout his illness, believed he lacked capacity. Whereas the DoLS assessors considered that Mr X had capacity. In determining the issue, the judge also heard unsworn evidence from Mr X.

His social worker felt that he had difficulty retaining information and was able to mask his cognitive difficulties that only manifested themselves after spending around two hours with him. She felt he had unrealistic expectations as to the future, constantly saying he hoped to remarry his first wife and to live with her. Having sought drink and been found standing dangerously near a busy trunk road during a previous period of leave, she was concerned that he had no real idea as to where he was going to live upon discharge. His psychiatrist, who was absent abroad at the date of the hearing, was also sure that he lacked the appropriate executive functioning capacity.

The psychiatrist appointed for the purposes of the DoLS authorisation spent between 60 and 90 minutes assessing his capacity. He also coincidentally knew of Mr X whilst he was previously detained in hospital. The psychiatrist considered his understanding and retention but not Mr X's ability to use and weigh the relevant information. He conceded that his capacity could fluctuate but observed that he needed to look at him at his best. He did not accept that a risk that he would resume drinking implied a lack of capacity. He was satisfied that he could give an account of where he was residing, what his role there was, and what the benefits of residing there were. Mr X told him he was willing to stay voluntarily for a while. The best interests assessor concluded that Mr X continued to have poor short-term memory, required prompting for washing and dressing, and that his capacity may fluctuate with variable presentation.

In giving evidence, Mr X showed a tendency to repeat himself: he told the judge the information about his ex-first wife four times. He wished to stay in the care home until he could obtain either a home with her or rented property and said he would make contact with agents to try and find a place to live. Separated from his second wife, he described how his excessive drinking and sectioning had been a bitter experience. He was unable to explain why he was found standing by a main road, why he bought alcohol on leave and why he had sought alcohol on another occasion. Whilst his plans for a reconciliation with his first wife were vague and perhaps overly optimistic, there was a degree of realism because he said he could not leave the home yet and would stay there until he found a place to go. The judge went on to conclude:

> "[T]*his is a man who now can take decisions as to where he should live, what care he should have and as to his medical treatment. He is able to identify the factors relevant to making the decisions. He has identified the decision he needs to make, finding a rented property with the help of an agent or living with his ex-wife, even though that may be unrealistic. He understands what he has to do, even if his plans are not yet concrete. He was not able to identify the precise details of what he needs to do but that is not a legal requirement that he would do so. He understands the salient details, which is the L.B.C. test. I conclude, too, that, although he suffers from short term memory problems, he retains sufficient information to be able to deal with planning. I do note that at times in speaking he is hesitant and he plainly forgets some information but he keeps notes and keeps them carefully which will assist him. His thought process before me was reasonably logical. He has no problem in communicating a decision. He understands, in my judgment, the reasonably foreseeable consequences of his decisions and, above all else, he plainly fears the consequences of another mental breakdown and a visit to hospital.*
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> *He may drink to excess again, but that, in my view, is an unwise decision rather than a sign of continuing incapacity. I accept, as I have said, his short term memory problems are still there but, if one applies the Re: F decision and the S.M.B.C. v. W.M.P. decisions to which I have referred then I cannot find sufficient evidence to*

justify a reasonable belief that he lacks capacity in the relevant regard. True enough, Dr. Loosemore saw him for only a short time but, in my judgment, that was sufficient."

It followed that his compulsory detention under DoLS would come to an end as he had capacity to consent, and was consenting, to remaining in the care home. HHJ Cardinal accepted that High Court judges retain power under the inherent jurisdiction to deal with those who were vulnerable but otherwise capacitous but this would require a separate application to be made.

Comment

The issue of fluctuating capacity has received relatively little judicial attention since the MCA 2005 emphasised the time-specific nature of capacity. Fluctuating cases seem to be addressed either through the use of interim declarations, using the lower incapacity threshold of "reason to believe that P lacks capacity", or the court focuses on capacity at the time the decision has to be made. Neither way brings comfort to practitioners grappling with the situation where the person's inability to decide varies on perhaps a daily, or even hourly, basis.

Whilst it is concerning that Mr X's ability to use and weigh the relevant information did not form part of the DoLS capacity assessment, it is reassuring that he was assessed when at his best. Empowering people to decide by taking practicable steps to help them is key. Where capacity fluctuates, such steps may include delaying the assessment and/or going back to reassess capacity if this is practicable. Documenting the capacitous decision, along with the person's wishes and feelings were they to lose capacity, also serves a useful purpose. In this case, a suggested way forward was for the care providers to draw up a voluntary contract with Mr X about his length of stay including any support that they assess he needs accessing the community and how it can be provided with his consent.

Safeguarding and the CoP – a(nother) salutary tale

Somerset v MK (Court of Protection Deprivation of Liberty: Best Interests Decisions: Conduct of a Local Authority) [2014] EWCOP 25 (HHJ Marston)

Article 8 – Safeguarding – Deprivation of Liberty

Summary

HHJ Nicholas Marston has made findings of extensive breaches of the Convention rights of P, a young woman with severe learning disabilities and autism, and her family, by Somerset County Council, in a highly critical judgment.[1]

P was 19 and had lived with her family all her life. In May 2013 P became distressed and disruptive (possibly due to her menstrual cycle) at school and was returned home early from a school trip. That

[1] Note, this case note draws in part on a case note prepared for the Court of Protection Handbook website by Sophy Miles.

evening her mother M noticed bruising to P's chest and reported it to the GP and to staff at the respite placement where P was due to stay during a family holiday M was due to take.

During M's holiday further bruising on P was noticed and a safeguarding procedure was put in hand. Those investigating the injuries were criticised by the judge for failing to obtain the "easily discoverable" but key information that P had been seen to hit herself heavily on the chest during the school trip. Instead a decision was taken that P should not return home and M was informed of this on her return from holiday. It was plain that P's whole family sought her return but P remained at the placement where her distress resulted in the prescription of aripiprazole, an anti-psychotic medication with a sedative side effect. In November 2013 she was moved to a second placement and in December 2013 a standard authorisation was granted and the local authority applied to the Court of Protection.

A nine day fact-finding hearing took place in May and June 2014. Shortly before the hearing the local authority decided not to rely on any allegation regarding the bruising which had led to the safeguarding investigation. The findings are set out in the judgment. In giving his findings in relation to M's parenting style and relationship with professionals the judge said:

> *"35. Finding 22, inability to accept advice on M's part, and finding 23 M's rigid style both of parenting and of dealing with professionals, are important issues when considering if returning home is an appropriate option because they directly relate to issues about the care P would be getting at home. Three points need to be made first. As I have already said, given the longevity of the relationship between M and the social workers and the number of social workers involved, there are bound to be some people who don't get on and some who do. In her evidence M told me of social workers she had had good relationships with and others (the majority it has to be said) she did not. Second, M has a strong personality, otherwise she would have sunk under the weight of cares and problems in the last 20 years and she perceives herself as having to fight for a good deal for in particular P and A. Third, as will become clear in the later parts of this judgment when I examine the conduct of the LA over the last 13 months, she and her family have had a lot to put up with. In his evidence the senior manager for social services conceded LA failures across the board and the damage that has done to the family and its relationship with the LA. Having said all of that there have in the past, prior to May 2013, been real clashes of personality and failures in communication but I cannot find that it has been proved on the balance of probabilities there has been an irrational refusal to co-operate from the family with the statutory authorities. The best evidence for that is that there was never, in the whole of Ps minority, an application in public law proceedings and no doubt if the LA had had evidence at the time of failure to co-operate on a scale which was causing P or any of the children significant harm such an application would have been made.*
>
> *36. Two final points before leaving the Schedule, first the relevance to a best interests decision now of historical concerns which have never led to legal action prior to May 2013 has always been, in my view, difficult to demonstrate, so I agree with the comment in the Closing Submissions of the OS for P at paragraph 28 page 7: '…the reliance on this long and historical schedule to paint a damaging picture of this family is unnecessary and disproportionate. It does not build bridges.' Second, the adversarial nature of the argument and cross-examination needed to advance the schedule robbed the LA's apology for its conduct of at least some of it credibility, no matter how carefully and dextrously leading counsel for the LA put the case."*

The independent social worker instructed recommended a return home by P and this was supported by the Official Solicitor. The judge found that the balance fell decisively in favour of a return home.

On the conduct of the local authority the judge said:

> *"75. In its position statement of 22/4/14 the LA concede that P was deprived of liberty and that there was a period where that deprivation was unlawful. It's case is that was from the end of the respite care in early June to the urgent authorisation on 28/11/13. It further concedes that the deprivation of liberty and loss of her society to the family amounted to an interference with respect to their right to a private and family life contrary to Article 8 ECHR and that interference was not in accordance with the law. It argues that if a lawful process had been followed it is likely that P would have remained away from home while the LA pursued its concerns over safeguarding (the bruising issue) and in due course of time P would have moved to a residential home as they now suggest. It is conceded that if I do not think the residential home is in P's best interests P should have been returned home at a significantly earlier date.*
>
> *76. There is no question here that P was removed unlawfully from her family, she went into Selwyn for respite care and it is from the date of her mother's return from holiday that the breach flows. I further accept that the LA had a duty to investigate the bruising but I find that a competently conducted investigation would have swiftly come to the conclusion that no or no sufficient evidence existed to be able to conclude P's safety was at risk by returning her home. This conclusion should have been reached within a week or so after the family asked for her back. If the LA came to a different conclusion, as they did, they should have applied to the CoP by early June for a hearing. Not doing so is a further breach. Having not done so they should have told the family they could make an application, not doing that is a further breach. After the Police investigation ended in September P should again have been returned but was not nor was an application made to CoP as it should have been. The limitations and conditions placed on contact between the family and P constitute another breach.*
>
> *77. The LA seeks to rely on the DOL urgent authorisation it obtained on 28/11/13 to close off the period of unlawful deprivation of liberty. In the case of* London Borough of Hillingdon v Neary*(2011) EWHC 1377,* *a case that has many depressing similarities to this one, Mr Justice Peter Jackson said at paragraph 33:*
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> > *'The DOL scheme is an important safeguard against arbitrary detention. Where stringent conditions are met it allows a managing authority to deprive a person of liberty at a particular place. It is not to be used by a local authority as a means of getting its own way on the question of whether it is in the person's best interests to be in that place at all. Using the DOL regime in that way turns the whole spirit of the MCA on its head, with a code designed to protect the liberty of vulnerable people being used instead as an instrument of confinement. In this case far from being a safeguard the way in which the DOL process was used to mask the real deprivation of liberty which was the refusal to allow Stephen to go home.'*
>
> *78. I find that is also precisely what has happened here and the breach of Article 8 rights continues up to now.*
>
> *79. These findings illustrate a blatant disregard of the process of the MCA and a failure to respect the rights of both P and her family under the ECHR. In fact it seems to me that it is worse than that, because here the workers on the ground did not just disregard the process of the MCA they did not know what the process was and no one higher up the structure seems to have advised them correctly about it."*

The judge noted that the Official Solicitor had indicated the intention to pursue a claim for damages for breach of P's rights under Articles 5, 6 and 8 ECHR and to make that application within the COP proceedings. We will report upon any determination made in that application if it is publically available.

Comment

We have on several previous occasions in the Newsletter – most recently in relation to the *Milton Keynes v RR* – had cause to note the disastrous consequences that can ensue where (entirely legitimate) safeguarding concerns give rise both to actions taken without proper lawful authority and then applications to the Court of Protection which are founded on an entirely inadequate forensic basis. This further addition to the canon makes singularly depressing reading, especially given that the events that transpired took place so recently. We have every sympathy with local authorities who are under enormous pressure to act on safeguarding concerns, but – as with cases involving children – there can be no substitute for the convening of the relevant expertise to determine the forensic basis of those concerns prior to taking matters to court. Further, and almost more importantly, it is almost impossible to emphasise too strongly the message that acting on the basis of safeguarding concerns gives no additional powers to local authorities to intervene in the lives of vulnerable adults – those powers have to be found either in statute or in the common law.

Short Note: Advance Decisions to Refuse Treatment and Lasting Powers of Attorney

In *Re E (N and S v E v M and ors)* [2014] EWCOP 27, a case primarily concerned with the incidence of costs in a 'mixed' property and affairs and health and welfare case, Senior Judge Lush also had cause to consider the status of P's advance decision to refuse treatment ("ADRT," which she had also identified – colloquially – as a "Living Will") in circumstances where she subsequently made an LPA for personal welfare in which she repeated her treatment preferences.

Section 25(2)(b) of the MCA 2005 provides that an ADRT is not valid if P has created an LPA after the advance decision was made conferring authority on the done to give or refuse consent to the treatment to which the advance decision relates.

The judge held that although the ADRT and the LPA were signed on the same day and it was unclear which was signed first, the effect of section 9(2)(b) of the MCA 2005 was that the LPA was not created unless it was registered and the LPA was registered after the ADRT was signed. Section 25(2)(b) therefore applied and the ARDT was not valid.

The unfortunate consequence of the invalidity of the ADRT on the facts of this case (where the attorneys had disclaimed their appointment under the LPA) was that there was a danger that "*the treatment preferences that E had expressed in both her Living Will* [ADRT] *and LPA would be lost and consigned to oblivion*." The court therefore made a declaration under section 26(4) of the MCA 2005 that the advance decisions made by P in the Living Will and set out in the Schedule continued to exist and to be valid and to be applicable to her treatment.

Whilst we acknowledge the good sense and pragmatism of the decision (allowing as it does, P's clear wishes to be known and acted upon) it is somewhat problematic that the judgment declares the ADRT invalid in one paragraph and then declares it to be valid (based on the section 26(4) declaration) in the following paragraph.

Deprivations of liberty – what's coming down the line

With thanks to Niall Fry of the Department of Health for permission to publish this, we note here a letter from him to local authority and NHS DoLS leads setting out some of the key initiatives that will be coming down the line to address the impact of the Supreme Court decision in *Cheshire West*. Of particular interest to many will no doubt be the fact that the ambit of the Law Commission's review has been expanded to include the DoLS regime generally (as opposed to supported living in the first instance).

Deprivations of liberty applications – statistics for 2013-4

The number of completed DoL applications have risen for the fourth year running, according to new figures from the Health and Social Care Information Centre (HSCIC). During 2013-14 there were 13,000 DoL applications completed by Councils with Adult Social Services Responsibilities (CASSRs or councils) in England. Headline figures from the report are as follows:

- The 13,000 completed applications relate to 9,400 individuals. 73% had only one application made for them during the reporting period. 18% had two applications made and the remaining 9% had three or more applications;

- Of the 13,000 DoL applications completed in 2013-14, 59% (7,600 applications) were granted which is the highest percentage since Schedule A1 came into force;
- 5,400 applications were not granted in 2013-14 as they failed one or more of the six assessment criteria;

- Older people are more likely to have a DoL application made for them: within the 85 and above age group the rate stood at 212 individuals per 100,000 population, whereas the rate per 100,000 population for the 18-64 age group stood at seven individuals.

- During 2013/14 a total of 8,500 authorisations were active and 5,800 ended during the period, of which:

    - 70% (4,100 authorisations) were in place for three months or less.

    - 22% (1,300 authorisations) were in place for three to six months

    - 8% (500 authorisations) were in place for more than six months.

Short Note: Ashya King

For those who wish to see the judgment in this case (rather than the frequently hysterical coverage) see here.

Short Note: Local authority deputies – pros (and a con)

In *EU (Appointment of Deputy)* [2014] EWCOP 21, Senior Judge Lush commented further upon the considerations going to the appointment of a family member as deputy (in this case for property and financial affairs).

At paragraphs 34 ff, he commented thus:

> *"34. In continental countries where the legal systems are based partly on Roman law, family members traditionally had a public duty to act as a curator (their equivalent of a 'deputy') for someone who lacked the capacity to manage their property and financial affairs. No one could refuse to act as a curator, though not everyone had the time or the inclination, or the ability or the energy to take on a responsibility of this kind, and numerous grounds for exemption, known as 'excuses', developed whereby a family member could avoid being appointed as a curator.*
>
> *35. In England and Wales there has never been a public duty for family members to act as a deputy or its antecedents but, equally, family members have never had an automatic right to be appointed.*
>
> *36. The Court of Protection has a discretion as to whom it appoints and has generally preferred to appoint a relative or friend as deputy (as long as it is satisfied that it is in P's best interests to do so), rather than a complete stranger.*
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> *37. The main reason for preferring family members to strangers, as a starting point, has been respect for their relationship, which is now reflected in Article 8 of the European Convention on Human Rights, but there are other, practical reasons for choosing a family member.*
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> *38. A relative will usually be familiar with P's affairs, and aware of their wishes and feelings. Someone with a close personal knowledge of P is also likely to be in a better position to meet the obligation of a deputy to consult with P, and to permit and encourage them to participate, or to improve their ability to participate, as fully as possible in any act or decision affecting them. And, because professionals charge for their services, the appointment of a relative or friend is preferred for reasons of economy.*
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> *39. There are, of course, circumstances in which the court would never contemplate appointing a family member as deputy. I gave some examples in Re GW, London Borough of Haringey v CM [2014] EWCOP B23, at paragraphs 28 and 29.*

Senior Judge Lush also endorsed the submission made on behalf of the local authority applying to be appointed EU's deputy:

> *"43. I also accept Carol Richards' submission that there can be distinct advantages in having a local authority act as deputy. These include:*
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> *(a) considerable hands-on experience in dealing with the property and financial affairs of adults who lack capacity to manage their own affairs;*

(b) more rigorous checks and balances against financial misconduct and other forms of abuse than are possible in cases where a lay deputy is appointed;

(c) membership of a professional association, the Association of Public Authority Deputies ('APAD'), which provides guidance on professional ethics and best practice; and

(d) a greater awareness of:

(i) the provisions of the Mental Capacity Act 2005;

(ii) the application of the principles in section 1 of the Act;

(iii) the requirement, where necessary, to assess the person's capacity to make a particular decision at a particular time;

(iv) the criteria and procedure for making a best interests decision;

(v) the contents of the Mental Capacity Act Code of Practice, particularly relating to the duties of a deputy; and

(vi) the ongoing case law emanating from judgments such as this."

Whilst not disagreeing that the propositions set out above are accurate as a general rule, we would also note one potential disadvantage – unlike other deputies, a local authority deputy is not, as a general rule, required to provide security by way of a bond. If, contrary to all expectations, a local authority behaves in a fashion that is contrary to the Act and the Code and causes P financial loss, that loss cannot be made immediately good by calling in a bond and recovery of any loss will therefore be a more complex and (therefore) inevitably more costly process.

Short Note: Attorneys and care expenditure

In *EU (Appointment of Deputy) The Public Guardian v AW and DH* [2014] EWCOP 28, Senior Judge Lush revoked an LPA as the donee had used a substantial part of P's estate on improvements to the donee's house (where P lived) and payments for the donee's care of P without having sought the court's authority, without obtaining the agreement of the co-donee and without recording or protecting P's interest in the property. She had also severely restricted contact between P and the co-donee and her family. (The donees were sisters and P their mother).

Senior Judge Lush at paragraphs 30-32 held that the proper course would have been an application for authorisation under section 23(2)(b) MCA 2005. At paragraph 32, he referred to the pre Act practice of approving care expenditure and capital expenditure on accommodation in personal injury cases, stating that significant expenditure on improvements to a house where P was living should be protected by a declaration of trust and an entry on the Land Register.

Testamentary capacity and the MCA 2005 (again)

Bray v Pearce and Smith (unreported, 6 March 2014) (Chancery Division) (Mr M H Rosen QC, sitting as a Deputy High Court Judge)

Mental capacity – finance

Summary

With thanks to Martyn Frost for bringing this to our attention (and Constance McDonnell for confirming certain points), we note this further case relating (inter alia) to the question of whether the MCA 2005 applies to the determination of testamentary capacity outside the Court of Protection.

In this case the deceased died on 1 September 2008 when 98 years old. She had made wills on 14 November 2005, 23 November 2007 and 7 December 2007. Each of those wills made Mr Pearce, the deceased's window cleaner, the principal beneficiary and the last will her only beneficiary. Previous wills, the last dated 7 August 2003, made the deceased's nephew her main beneficiary with gifts to various Jewish and animal charities.

The last will was proved in common form by the named (solicitor) executor on 18 November 2008. The nephew brought a claim for the revocation of that grant, declarations against the validity of the 2005 and November 2007 wills and proof in solemn form of the August 2003 will.

The nephew claimed the 2005 and 2007 wills were invalid on various grounds, but the one that concerns us is that of capacity. He also made a claim that he was entitled to a constructive trust interest in the deceased's main asset.

Mr Pearce appeared at the trial but was not represented. He (because of a failure to serve any witness statements or give disclosure) did not give evidence or call witnesses. He was allowed to cross examine the claimant's witnesses and make submissions. The executor appeared by counsel and took a neutral position.

As to the deceased's capacity, there was the written evidence of Professor Jacoby, an eminent old age psychiatrist, together with witnesses of fact as to her condition.

The result of the trial was that the judge (M Rosen QC sitting as a deputy judge of the Chancery Division) declared against the 2005 and 2007 wills and in favour of the 2003 will on the ground that the deceased lacked capacity to make those wills. He would also have found in favour of the claimant's constructive trust claim, had that been necessary.

As to the test for capacity, he set out the *Banks v Goodfellow* common law test. He then considered whether, in relation to the 2007 wills, the capacity test in the MCA 2005 applied (this issue being dealt with, after the trial, by email correspondence with the judge).

At paragraph 90 Murray Rosen QC stated his view that *"if left to his own devices"* he would hold the Act applied to testamentary capacity at least by analogy. He then, however, at paragraph 91 (and 74) stated that incapacity may be established under section 1(2) of the Act if a real doubt is raised by the evidence from which it is possible to infer incapacity and the defendant does not rebut that inference in evidence.

In this case, the defendant had not been able to call any evidence and at paragraphs 82-84, the judge followed the pre Act cases that held that where a real doubt as to capacity of a testator is raised, the evidential burden to prove capacity shifts to the proponent of the will in question.

The question of the burden of proof was in the end academic as at paragraph 92 the judge held that that the evidence (essentially that the deceased had become delusional) would have satisfied him that the deceased lacked testamentary capacity even if the burden of proof had remained on the claimant throughout.

Comment

The precise effect of the MCA 2005 on the issue of testamentary capacity has yet authoritatively to be determined. There are two questions, one whether the Act's test applies and the other whether the presumption of capacity in the Act means that the burden of proving incapacity remains on the person asserting it throughout. These questions were recently discussed in an article by Simon Edwards available here.

Assessment of capacity to manage property and affairs

The excellent Empowerment Matters has just published (free) guidance on assessing, supporting and empowering specific decision-making in the context of financial matters. It is available for free from their website, and contains a wealth of practical tips to assist in the practical application of the MCA 2005 in this vital area.

Out of hours medical treatment applications – the key principles

Sandwell and West Birmingham Hospitals NHS Trust v CD & Ors [2014] EWCOP 23 (Theis J)

Practice and procedure – without notice applications

Summary

In this judgment Theis J has set out clear guidance that must be followed in out of hours medical treatment cases.

By way of context AB was a 20 year old woman with a multiple disabilities including a severe learning disability and cerebral palsy. She was admitted to hospital on 12 June 2014; her condition was such that her treating medical team wished to make an application for declarations that, in the event of her condition deteriorating, it would not be in her best interests to receive certain forms of life-sustaining treatment. Legal advice had been sought by the Trust after a discussion with her father on 17 June; the parents met with Trust representatives on 19 June, and the application application was initially made to Theis J as the out of hours judge at about 5.15 pm on Friday 20 June 2014. The only information she had was the application, some medical notes and a two page document from Dr Y, the joint speciality lead in critical care medicine at the hospital. The Official Solicitor was not represented – differing reasons for this being given in the judgment; the mother joined the hearing by telephone, but it transpired that she was taking that call in the public area of the hospital. Theis J took steps to contact the Official Solicitor who was able to arrange for Counsel; the hearing re-commenced at about 7.30 pm that date with counsel for the Trust and the OS in court and the parents and Dr Y on the end of a telephone. It had not been possible to secure representation for the parents in the short time available. Matters then ultimately progressed to an agreed order at a hearing on 30 July 2014 that it was not in AB's best interests to be given certain life sustaining treatment.

Theis J was, however, sufficiently concerned about the timing and practical arrangements for the out of hours hearing on Friday 20 June that, having endorsed the order, she gave guidance which merits reproduction in full.

> *"35. I, of course, accept that in cases involving medical treatment, or the withholding of such treatment, it can be a difficult judgment as to when to make an application. This has to be looked at in the context of the realities of the situation in a critical care unit in a Trust such as this one. The person who is the subject of the application is not the only patient being cared for by the clinical team, and the situation can evolve on the ground quite quickly. I recognise also that I am considering these aspects with the benefit of hindsight, and after hearing submissions from counsel who are specialist in this field.*
>
> *36. However, those considering making such applications should err on the side of making applications earlier rather than later. By doing so the necessary safeguards will be put in place in advance to support an effective hearing taking place, rather than risk what happened here, where those important safeguards had to be put in place as the hearing unfolded (such as involvement of the OS, ensuring the parents had the documents the*

court had and somewhere private from where they could participate in the hearing). This was particularly difficult in this case due to the time when the application was made, namely late on a Friday afternoon into the evening.

37. It must have been clear from the 17 June that there was an issue relating to this between the Trust and the parents; the medical records record the Trust sought legal advice then. The issuing of an application would not prevent efforts continuing to seek to resolve matters; they can, and should, run in parallel. But importantly, issuing the application earlier would have meant it was more likely there would have been an effective on notice hearing, with all parties being represented and their Article 6 rights being fully protected.

38. It is essential there is compliance with the relevant Court of Protection Practice Directions, in this context in particular PD9E Applications relating to the serious medical treatment and PD10B Urgent and interim applications.

39. In the situation I was presented with on 20 June some basic steps had not been taken and, with the benefit of hindsight, they should have been. These included:

(1) Making suitable and sensitive arrangements for the parents to be able to participate in the hearing. Clearly joining a hearing such as this from a public waiting room in the hospital was not suitable. There did not appear to be anyone on the ground at the hospital to assist the parents in relation to participating with this hearing, there should have been. The parents had solicitors advising them and every effort should have been made for them to be able to represent the parents at a hearing as important as this one. If the application had been issued earlier in the week it is likely the parents' solicitor would have been able to secure public funding for them. As their solicitor states in his statement 'If I had been given 2 days notice of this application I could have obtained legal aid for the [parents]. In my view this would have made a great deal of difference to them. The experience of going to court over the issue of whether life-sustaining treatment should be withheld from one's child is extremely stressful even if one has proper legal representation, and I do not believe that families should be put in this position other than in the most urgent of cases, which this was not. The desirability of there being equality of arms between parties in cases involving life and death should be made clear to Trusts in my view.' I agree wholeheartedly with those sentiments.

(2) Not alerting the OS to the application with sufficient time to get a direction from the court for him to be invited to represent AB. Paragraph 8 of PD9E makes it clear the OS is prepared to discuss applications in relation to serious medical treatment before an application is made. The medical notes could have been sent over in the morning of 20 June to the OS. There was no issue in this case AB lacked capacity. Ms Paterson has informed me that in serious medical treatment cases, where the applicant is a Trust or other public body, the OS will expect the applicant to agree to pay one half of his costs acting as a solicitor for P. Where agreement to do so is readily given, matters can then proceed without costs' questions distracting his case manager. He will, of course, act as P's litigation friend and solicitor without such agreement, seeking an order from the court if the agreement is not forthcoming.

(3) The court is there to assist in applications such as this one; the Urgent Applications Judge and the Clerk of the Rules should be alerted at the earliest opportunity that an application is likely and, in suitable cases, application promptly made for a direction for the OS to be invited to act where an application is realistically anticipated, as it clearly was in this case. This should have been done (at the very latest) by 2pm on 20 June. This would have enabled the OS to see the papers and start making enquiries at the

earliest opportunity. Proper and effective contingency plans for a hearing that is likely must be put in place at the earliest opportunity, not, as happened in this case, left to the last minute.

(4) It is essential when making this type of application, particularly one that is made out of hours, that a word version of the draft order is available so any amendments can be made promptly.

(5) The statement in support of the out of hours application gave no information regarding the history or AB's quality of life. Such information is essential material for the court when considering the context in which such an application is being made. There was nothing to prevent that information being obtained in tandem with the clinical and medical evidence justifying the application. The evidence was clear that there were a number of clinicians involved in treating AB. If the application had been made earlier this information would have been readily available.

40. These observations, although made in the context of an application concerning an adult within proceedings in the Court of Protection, apply equally in similar proceedings under the inherent jurisdiction concerning medical treatment or the withholding of medical treatment for a child (in which CAFCASS Legal as opposed to the Official Solicitor would act on behalf of the child), where the relevant provisions in Part 12 FPR 2010 and PD12E Urgent Business apply.

41. As I hope I have made clear these comments are made with the benefit of hindsight. It is recognised that on the ground difficult professional judgments have to be made, and there will remain truly urgent cases that require applications to be made out of hours. However, I hope the message is clear that in this type of case; where significant medical treatment or withholding of treatment is at issue, or likely to be at issue, applications should be made sooner rather than later. As Mr Sachdeva and Ms Paterson submitted, this will ensure all the necessary safeguards are in place in terms of legal representation and notification to the Press. In addition, the advantages of a hearing taking place in normal court hours includes the court being able to hear parties and evidence in person, and proper recording facilities being in place."

Comment

This case, read together with the decision in *NHS Trust v FG* covered in this issue, make essential reading for all those concerned with medical treatment cases. Together, they provide a very substantial amplification of the (now rather skimpy looking) PD9E, and a failure to comply with the material matters set down in both judgments is likely to lead (rightly) to substantial judicial knuckle-rapping, especially where the situation is one that has been developing for some time and steps are not taken with sufficient alacrity to bring them to the attention of the Court.

Intervening in child-birth – when to go to Court

NHS Trust & Ors v FG [2014] EWCOP 30 (Keehan J)

Practice and procedure – Other

Summary

In this judgment, Keehan J has given important and detailed guidance as to when and how applications should made where a treating Trust is concerned that pregnant woman lacks, or may lack, the capacity to take decisions about her antenatal, perinatal and post natal care as a result of an impairment of, or a disturbance in, the functioning of her mind or brain resulting from a diagnosed psychiatric illness. The guidance is reproduced here; the summary and comment here addresses some of the details of the judgment itself.

The actual application itself came about in a roundabout fashion, the case originally arising in the context of an application by a local authority not to disclose a care plan providing for the removal of a child from a woman detained under the provisions of the MHA 1983, during the course of which it became clear that applications from the treating NHS Trusts (both that providing obstetric care and psychiatric care) for relief from the Court of Protection would be required.

The first part of Keehan J's judgment therefore concerned a careful analysis where the woman's best interests of lay, a distinguishing feature being that – very unusually – Keehan J granted a 'very exceptional' order 'at the extremity of what is permissible under the European Convention' that FG not be notified of the proceedings, such an order only being justified and required if the interests of the patient and/or the child demand the same: see *Re D (Unborn Baby)* [2009] 2 FLR 313. (FG having safely been delivered of her baby, Keehan J then held that she should be informed of the proceedings).
Keehan J then moved to accept an invitation by the Official Solicitor to give guidance on the steps to be taken when a local authority and/or medical professionals are concerned about and dealing with a pregnant woman who has mental health problems and, potentially lacks capacity to litigate and to make decisions about her welfare or medical treatment. This invitation was extended out of concern that:

> *"73. [….] in a number of recent cases there has not been a full appreciation or understanding of:*
>
> *a) the planning to be undertaken in such cases;*
>
> *b) the procedures to be followed;*
>
> *c) the timing of an application to the Court of Protection and/or the Family Division of the High Court; and*
>
> *d) the evidence required to support an application to the court."*

The guidance, which formed an annex to the judgment, is reproduced here, but should be read with paragraphs 81-130 of the judgment in which Keehan J gave a number of observations underpinning it.

Importantly, Keehan J noted that it should not be read as applying to every pregnant woman with a diagnosed mental health illness as "[n]*o doubt in the vast majority of such cases it will not be necessary to make an application to the Court of Protection or to the Family Division of the High Court. I should emphasis*[e] *that P is assumed to have capacity in accordance with the provisions of s1(2) MCA, unless it is established to the contrary, even if she is detained under the provisions of the Mental Health Act 1983 ('MHA')*" (paragraph 82).

At paragraph 83, Keehan J noted that the purpose of the Guidance was to i) to prevent the need for urgent applications to be made to the out of hours judge; and ii) to ensure trusts do not rely inappropriately on the provisions of s5 of the MCA. Perhaps unsurprisingly, he noted at paragraph 84 that he did not "*consider a failure to plan appropriately and/or a failure to identify a case where an application to the court may be required constitutes a genuine medical emergency*."

Having outlined the circumstances under which obstetric care may be provided to a psychiatric patient under s.63 MHA 1983, Keehan J noted that, in the majority of cases, such care will in fact be given in reliance upon s.5 MCA 2005. As he drily noted, however, "[t]*he potential use of restraint complicates matters*" (paragraph 92)… and "[t]*he distinction between actions which amount to restraint only, and those which become a deprivation of liberty might be difficult, but is of critical legal significance because s.4A(1) prevents clinicians performing acts which amount to a deprivation of liberty as part of the care and treatment under s.5*" (paragraph 93).

In this context, and almost in passing (but perhaps unsurprisingly), Keehan J gave the first judicial confirmation that the 'acid test' set down by Lady Hale in ***P v Cheshire West and othrs*** [2014] UKSC 19 applies in the acute setting. It appears that by 'acute' here, Keehan J intended not just to mean the acute psychiatric setting because his observations were expressly directed to circumstances outside such a setting. Applying the acid test, Keehan J observed at paragraph 96 that:

> *"It will commonly be the case that when at the acute hospital P:*
>
> *i) will have obstetric and midwifery staff constantly present throughout her labour and delivery;*
>
> *ii) will be under the continuous control of obstetric and midwifery staff who, because she lacks capacity to make decisions about her medical case, will take decisions on her behalf in her best interests;*
>
> *iii) will often not be permitted to leave the delivery suite.*
>
> *Those factors may, when applying the acid test, lead to a conclusion that P is or will suffer a deprivation of her liberty when at the acute hospital. If the Trusts are to deprive P of her liberty, they have a duty not to do so unlawfully: s6 HRA 1998.*

Keehan J continued:

> *"97. The Trusts must, therefore, plan how P is to receive obstetric care in sufficient detail to identify whether there is potential for a deprivation of liberty to arise. When trusts identify there is a real risk that P will suffer an additional deprivation of her residual liberty during transfer to and from the acute hospital and/or when present at the acute hospital, the Trusts must take steps to ensure the deprivation of liberty is authorised in accordance with the law. I use the term 'real risk' to mean that "judged objectively there is a risk that cannot sensibly be ignored that the relevant circumstances amount to a deprivation of liberty": AM v South London v Maudsley NHS Foundation and Anthr [2013] UKUT 365 (AAC) per Charles J at para 59.*
>
> *98. Where the Trusts identify there is a real risk that P will suffer a deprivation of liberty in these circumstances it is for them to decide whether the same is achieved by a standard authorisation under schedule A1 of the MCA, by an application to the court or under another lawful jurisdiction.*
>
> *99. I do not propose to analyse further what measures or restraint used or proposed to be used to facilitate P's obstetric care would amount to a deprivation of liberty. I limit myself to four observations:*
>
> *i) a mental health patient enjoys all of the fundamental rights and freedoms guaranteed under the ECHR save to the extent that her liberty is restricted pursuant to the MHA;*
>
> *ii) restraint or measures to facilitate P's obstetric care which amount to a deprivation of liberty would interfere with her rights under Articles 3, 5 and 8 of the ECHR unless authorised in accordance with the law;*
>
> *iii) total restraint for very short periods may amount to a deprivation of liberty; ZH v Commissioner of the Police for the Metropolis [2013] 1 WLR 3021; and*
>
> *iv) P's lack of objection to obstetric care or any restraint used to facilitate it is irrelevant in determining whether the actions amount to a deprivation of liberty: P v Cheshire West and Othrs (above), para 50."*

In his analysis of how a deprivation of liberty in such circumstances can be authorised, Keehan J noted – importantly – that

> *"101.*
> […]
> *ii) if the need for the deprivation of liberty in relation to the proposed obstetric care was foreseeable but the Trusts omit to seek a standard authorisation, the use of an urgent authorisation may be unlawful: see paragraphs 6.2 and 6.3 of Deprivation of Liberty Safeguards Code of Practice which provides that urgent authorisations should normally only be used in response to sudden unforeseen events and they should not be used where there is no expectation that a standard authorisation will be required; and*
>
> *iii) the mere fact that a deprivation of liberty could be authorised under Schedule A1 does not absolve the Trusts from making an application to the court where the facts of the individual case would otherwise merit the same.*

The guidance identified four categories of case where an application needed to be made to the Court; in the judgment, Keehan J explained why this was so; for ease of reference, we therefore insert the relevant category at each point before discussing the rationale given.

Category 1 – the interventions proposed by the Trust(s) probably amount to serious medical treatment within the meaning of COP Practice Direction 9E, irrespective of whether it is contemplated that the obstetric treatment would otherwise be provided under the MCA or MHA

Keehan J confirmed that neither delivery of a baby per se (paragraph 107) or an uncomplicated planned caesarean section (paragraph 110) would amount to serious medical treatment ('SMT') within the meaning of PD9E. However,

> *"111. A proposed caesarean section may, however, become a case of SMT where:*
> *a) they are factors in P's medical or obstetric history which means she faces a higher risk of complications (PD9E paras 3 and 4); or*
> *b) because of P's psychiatric condition, the intervention proposed may cause a deterioration in her psychiatric condition which causes her not to be compliant and a degree of force to restrain P is required to carry out the intervention (PD9E para 6 … c)).*
>
> *112. Whether the proposed intervention amounts to SMT is a decision to be made in each case following consideration of the provisions of PD9E, an assessment of the risks involved and the potential consequences for the individual patient."*

Further, and importantly:

> *"113. A decision to compel a mother, who would otherwise wish to have as natural a birth as possible, to undergo treatment which amounts to SMT is a very serious interference with her human rights as protected by the ECHR. In my judgment such decisions in the case of a P should be brought before the court for permission to undertake the same. Accordingly in this category of case an application should be made to the court irrespective of whether the treatment proposed could be provided pursuant to the provisions of s5 MCA or as medical treatment under s63 MHA." (emphasis added)*

Category 2 – there is a real risk that P will be subject to more than transient forcible restraint

Keehan J confirmed that where it is not possible to predict whether active restraint will be required, the case will not fall within paragraph 6 (c) of PD9E: "*to come within that provision it is necessary for there to be a greater degree of confidence that restraint will be required*" (paragraph 115).

However,

> *"117. The use of more than transient forcible restraint of a mother during labour is a grave interference with her rights under Articles 3,5 and 8 of the ECHR. In my judgment it is so grave that such categories of cases should be the subject of an application to the court.*
>
> *118. The assessment of the extent of the potential interference requires a consideration of:*

i) quantifying the risk of the interference being required at all; and

ii) assessing the extent and gravity of the potential interference if it were to be undertaken.

119. The assessment of a 'real risk' requires an intense focus on P's present and individual circumstances and on her previous behaviour in the context of the nature of her illness. Thus in cases where there is no evidence of P having been non compliant with her care or having been aggressive to medical staff or others, either in the past or currently, it is unlikely such a case would fall within this category."

Keehan J made clear that he "*included this category in the Guidance with the intention of alerting Trusts of the need to make these assessments prior to labour and in a timely fashion to allow for appropriate planning and, if necessary, to make an application to the court*." However, he indicated that "[i]*t is not intended that applications to the court should become routine or the usual course taken in the majority of cases*" (paragraph 120).

Category 3 – there is a serious dispute as to what obstetric care is in P's best interests whether as between the clinicians caring for P, or between the clinicians and P and/or those whose views must be taken into account under s.4(7) of the MCA

Keehan J founded his rationale for including this category of case upon the observation of Peter Jackson J in *London Borough of Hillingdon v Neary* [2011] 4 All ER 584 that "*significant welfare issues that cannot be resolved by discussion should be placed before the Court of Protection, where decisions can be taken as a matter of urgency where necessary*." He confirmed, however that "*not very dispute over P's obstetric care will fall within category 3. There must be a serious dispute which must have real substance, for instance, based on P's religious beliefs*" (paragraph 123).

Category 4 – there is a real risk that P will suffer a deprivation of her liberty which, absent a Court order which has the effect of authorising it, would otherwise be unlawful (i.e. not authorised under s4B of or Schedule A1 to the MCA).

Explaining the basis for including this category of case, Keehan J observed that:

"126. A deprivation of P's liberty which is not authorised in accordance with the law will amount to a breach of her rights under Article 5 of the ECHR. As public authorities, Acute and Mental Health Trusts have a duty under s.6 of the Human Rights Act 1998 not to act in a way that is incompatible with P's Convention rights. When planning P's care in cases of this nature, Trusts therefore have a duty to consider whether the interventions they propose or the steps necessary to facilitate them will, or could, amount to a deprivation of P's liberty and, if so, how that should be authorised.

127. Logically, it must follow that if Trusts consider that P's liberty may be deprived to facilitate her obstetric care, but the Trust is unable to deprive her of her liberty under Schedule A1, and no other legal justification for that deprivation of liberty is available, they have a duty to seek the authorisation of P's deprivation of liberty from the Court.

128. Although the Court will not be able to make a welfare order depriving P of her liberty under s 16(2)(a) of the MCA, it will be able to exercise the inherent jurisdiction of the High Court to make such an order provided that it complies with Article 5: see A NHS Trust v A [2014] 2 WLR 607, per Baker J, para 89-96."

Comment

Unlike the guidance given by Baker J in *W v M* upon when applications relating to those in Minimally Conscious States, the guidance given by Keehan J does not – on its face – carry the imprimatur of the President. However, the guidance undoubtedly carries very significant weight given its clarity and detail. On its face, it suggests that more applications are likely to be made than previously, although Keehan J was at pains to identify the limits to the four categories that he identified as requiring such applications.

It may well also be the case that the guidance feeds through into a revision of Practice Direction 9E in due course, both in terms of the circumstances under which applications should be brought and in terms of the procedure that should be adopted (we note, for instance, that the guidance appears to be predicated upon the Official Solicitor being notified after the application has been issued rather than, as per PD9E, before the application is issued (see paragraph 8 of PD9E cf paragraph 20(ii) of the Guidance)).

Keehan J's observations as to the application of the 'acid test' are also of note as they confirm what – on their face – appeared clearly to be the case, namely that they apply with equal force in the hospital setting. The level of continuous involvement of the clinical staff in the delivery suite is likely to be similar to be the level of such involvement of (different) staff in – for instance – the intensive care setting. It is also of note that he picked up on the observation of the Court of Appeal in *ZH* that a deprivation of liberty can arise in a very short space of time where the restraint is total.

Short Note: Courts Service may have to meet costs of legal representation and of securing the attendance of expert where no other funding is available

In *Q v Q* [2014] EWFC 31, Sir James Munby P has held in the context of particularly serious private law cases in the Family Court and as a last resort to prevent a court being unable to deal with a matter justly and fairly and of a litigant's rights under Articles 6 and 8 being breached, if a litigant is unable to afford representation, pro bono representation is not available and public funding from the LAA is not available, the cost of legal representation would have to be borne by HMCTS. He also held that the same would also potentially apply to covering the costs of bringing an expert to court whose evidence is necessary for the resolution of the proceedings.

There is no reason in principle why the decisions reached by the President in these conjoined cases should not also apply to the Court of Protection in circumstances where it is otherwise impossible for a matter to be dealt with fairly and properly. One may at that point also then get into extremely complex territory in light of the President's observation that he could see a possible argument that in a public law case brought

by a local authority, the local authority would have to pay. Would an argument be run(able) in a case brought by a public authority (especially a case where the authority is seeking authority for a serious intervention in an individual's life such as removal from the family home).

Short Note: when and who should be an expert is the court's decision

In *Re AB (A Child: Temporary Leave to Remove from Jurisdiction: Expert Evidence)* [2014] EWFC 2758, HHJ Clifford Bellamy noted that it was for the courts, not the Legal Aid Agency, to determine whether expert evidence was necessary and whether a witness was an appropriate expert. He further held that it was not open to the LAA to ignore a judicial decision on those issues when considering an application for prior authority to incur expert fees. Finally, he held that the expression "non-legal work" in the Standard Civil Contract 2013 included expert advice on the law of any country outside the UK. Whilst the test for the grant of permission for expert evidence in the COPR is (for the time being) different to that in the FPR, the principles set down in this judgment are equally applicable in the CoP.

The MCA and the CRPD

We have covered the project being undertaken by the Essex Autonomy Project (EAP) to assess the compatibility of the MCA and the CRPD in previous issues of this Newsletter. The final report has now been published, and is available here. The conclusions of the EAP position paper are that:

1. The Mental Capacity Act of England and Wales is not fully compliant with the United Nations Convention on the Rights of Persons with Disabilities, to which the UK is a signatory.

2. The definition of "mental incapacity" in s.2(1) of the MCA violates the antidiscrimination provisions of CRPD Art. 5, specifically in its restriction of mental incapacity to those who suffer from "an impairment of, or a disturbance in the functioning of, the mind or brain."

3. The best-interests decision-making framework of Section 4 of the MCA fails to satisfy the requirements of CRPD Art. 12(4), which requires safeguards to ensure respect for the rights, will and preferences of disabled persons in matters pertaining to the exercise of legal capacity.

4. MCA s.2(1) should be amended to remove the following words: "because of an impairment of, or a disturbance in the functioning of, the mind or brain."

5. The best-interests decision-making framework on which the MCA relies should be amended to establish a rebuttable presumption that, when a decision must be made on behalf of a person lacking in mental capacity, and the wishes of that person can be reasonably ascertained, the best-interests decision-maker shall make the decision that accords with those wishes.

6. The United Nations Committee on the Rights of Persons with Disabilities is not correct in its claim that compliance with the CRPD requires the abolition of substitute decision making and the best-interests decision-making framework.

We will await with very considerable interest how the Government takes this forward as part of its engagement (nb on behalf of the whole of the UK – with three very different regimes, or potential regimes in the case of Northern Ireland) with the Committee on the Rights of Persons with Disabilities.

PVS/MCS resource

A new resource has been launched for families of those in a PVS and MCS and also for professionals caring for such patients. It is available here (warning/endorsement – it makes extremely powerful viewing).

LPA changes to be less dramatic than envisaged

In its response to the consultation undertaken as to potential changes to LPAs, the Ministry of Justice has put on hold proposals to create a fully online process for creating LPAs. It has also slowed down the potential introduction of a combined form for health and welfare and property affairs LPAs.

The MoJ has, however, committed the OPG by April 2015 to:

- Launch redesigned, separate Health & Welfare and Property & Finance LPA forms which will:
    - Encourage donors to state when they wish their LPA to come into effect.
    - Include new language aimed at making the LPA easier to complete for lay donors.
    - Remove the requirement for a second certificate provider.
    - Amalgamate the revised 'application to register' form (LPA002) with the main LPA form.
- Expand the range of cases for which a reduced application fee is applicable to include those cases where the LPA can only be made capable of registration by an application being made to the Court of Protection.

During 2014/15 the OPG will start to take forward work to:

- Launch a digital tool for second tier searches of the OPG's register.
- Provide intermediate access to the register for accredited parties.

Capacity and the participation of P – Strasbourg pronounces (again)

Ivinovic v Croatia [2014] ECHR 964 (European Court of Human Rights)

Mental capacity – assessing capacity

Summary
These proceedings concerned the removal of legal capacity from an adult who suffered from cerebral palsy and who, it was thought, had begun to make irrational decisions about her financial affairs following an operation on her head, by refusing to pay bills, putting herself at risk of eviction.

A 'social welfare centre' applied to appoint its employee as the applicant's guardian, and the employee consented to the application. The applicant was legally represented at the hearing concerning the removal of her legal capacity, and explained that the reason for her failure to pay her bills was that she had asked her son to deal with them in the aftermath of her operation, but he had failed to pay them.

A psychiatrist produced a report for the hearing which contained the infamous phrase '*Lacks insight into her condition'* and concluded that she was not able to look after her personal needs, rights and interests, and might jeopardize the rights and interests of others.

The various domestic courts who heard the applicant's case relied on the psychiatric evidence and concluded that a guardian should be appointed.

The applicant claimed that the process for depriving her of legal capacity had violated her rights under Article 8 ECHR. The court noted that its task was to consider whether, in light of the case as a whole, the reasons for measures taken were relevant and sufficient, and whether the decision-making process afforded due respect to the applicant's Article 8 rights. The court noted that there was a margin of appreciation in such matters, but stated that *"the Court would like to stress that strict scrutiny is called for where measures that have such adverse effect on an individual's personal autonomy, as deprivation of legal capacity has, are at stake.*" The court further noted that *"depriving a person of his or her legal capacity, even in part, is a very serious measure which should be reserved for exceptional circumstances*."

Considering the facts of the Applicant's case, the court found there had been a violation of Article 8. Although medical evidence as to capacity was relevant, it was the judge who was "*required to assess all relevant facts concerning the person in question and his or her personal circumstances*" and to consider "*whether such an extreme measure is necessary or whether a less stringent measure might suffice.*" The court also had to consider issues of proportionality: "*When such an important interest for an individual's private life is at stake a judge has to carefully balance all relevant factors in order to assess the proportionality of the measure to be taken. The necessary procedural safeguards require that any risk of arbitrariness in that respect is reduced to a minimum*."

The domestic courts had failed to hear evidence from a doctor who regularly saw the applicant and could comment on her state of health, which the psychiatrists had said was poor. Nor had the domestic courts established all the relevant facts about the applicant's debts and the reason they had arisen. The ECtHR stated that "[e]*ven when the national authorities establish with the required degree of certainty that a person has been experiencing difficulties in paying his or her bills, deprivation, even partial, of legal capacity should be a measure of last resort, applied only where the national authorities, after carrying out a careful consideration of possible alternatives, have concluded that no other, less restrictive, measure would serve the purpose or where other, less restrictive measure, have been unsuccessfully attempted.*"

In respect of the legal proceedings themselves, the court found that there had been a conflict of interest in that the Centre responsible for the applicant had nominated one of its employees as guardian. That employee had consented to the application and made no submissions on the evidence. Although the applicant had in fact paid for her own legal representation, the court noted that the domestic law "*does not provide for obligatory representation of the person concerned by an independent lawyer, despite the very serious nature of the issues concerned and the possible consequences of such proceedings...Furthermore, the Court reiterates that in cases of mentally disabled persons the States have an obligation to ensure that they are afforded independent representation, enabling them to have their Convention complaints examined before a court or other independent body.*"

The court awarded the applicant 7,500 Euros in damages.

Comment

This case is of particular interest as the latest in a series of decisions by the ECtHR looking at the process of depriving individuals of legal capacity to make their own decisions. The court helpfully emphasises the importance of not relying on expert opinion, and of ascertaining all relevant facts before determining whether an individual lacks capacity – an issue that arises not just in respect of decisions about property and financial affairs, but also welfare matters. This decision also raises the question whether it is lawful for the court to rely on the written evidence of a psychiatrist in a case where 'P' asserts capacity, or whether a full hearing must be held, even if P's litigation friend considers that the psychiatric evidence is probably correct.

The ECtHR's insistence that the proportionality of a decision to deprive a person of legal capacity must be considered is of great interest, as the MCA and Code of Practice do not expressly require proportionality to be considered, nor do they require consideration of other mechanisms for achieving the same ends. While there is a presumption of capacity and an obligation to help 'P' demonstrate that she has capacity, there is no requirement to consider other forms of supported decision-making, rather than a court decision or the appointment of a deputy, and to try them out to see if they are successful.

Finally, the case will no doubt be cited in any future attempts to require public funding for representation for 'P' in a greater variety of Court of Protection proceedings – if there is an "*obligation to ensure that they are afforded independent representation, enabling them to have their Convention complaints examined before a court or other independent body,*" can the limiting of non-means tested legal aid to DOLS cases and/or the failure to fund the office of the Official Solicitor so that he truly can act as litigation friend of last resort in all cases (even where legal aid is not available) be compliant with Article 8?

Deprivation of liberty – further news from Strasbourg

Atudorei v Romania [2014] ECHR 947 (European Court of Human Rights)

Article 5 – Deprivation of Liberty

Summary

The applicant in this case had attended yoga classes arranged by the Movement for Spiritual Integration into the Absolute (MISA). Apparently as a result of her involvement with MISA, her family considered that she was mentally ill and took her to hospital where she was deprived of her liberty for a short period. Some 18 months later, the applicant's family facilitated her admission to a psychiatric hospital where she was medicated against her wishes. The applicant's attempts to achieve redress in the domestic courts through civil and criminal actions were largely unsuccessful.

In respect of the applicant's claim for breach of Article 5, the court held that she had been objectively deprived of her liberty for 8 weeks (the duration of the second hospital admission), applying the familiar

test of 'complete and effective control', and relying on the fact that if she had wanted to leave the psychiatric hospital, she would have to have asked the permission of the staff, and that the hospital dictated with whom she could have contact. Of some note given the current debate as to meaning of freedom to leave, the court reiterated that a person can be considered to be detained for purposes of Article 5(1) even during a period when they are allowed to make certain journeys or are in an open ward with regular unescorted access to unsecured hospital grounds and the possibility of unescorted leave outside the hospital. Accordingly, "*in view of the specific situation in the present case*" the Court considered "*that the applicant was under continuous supervision and control and was not free to leave*."

The required element of state control was made out, since although it was the applicant's mother who had requested her admission to hospital, it was implemented by a state-run institution. The court was satisfied the applicant had not consented to her admission.

In considering the lawfulness of the applicant's deprivation of liberty, the court noted that "*while it is true that Article 5 § 1 (e) authorises the confinement of a person suffering from a mental disorder, such a measure must be properly justified by the seriousness of the person's condition in the interest of ensuring his or her own protection or that of others. Moreover, it may be acceptable, in urgent cases or where a person is arrested because of violent behaviour, for such an opinion to be obtained immediately after the confinement, but in all other cases prior consultation is necessary. Where no other possibility exists, for instance owing to the refusal of the person concerned to appear for an examination, at least an assessment by a medical expert on the basis of the file must be sought, failing which it cannot be maintained that the person has reliably been shown to be of unsound mind.*" The evidence about the applicant's mental disorder was inadequate, and there was no convincing explanation for why she could not have been treated and monitored without being deprived of her liberty. There was therefore a breach of Article 5(1).

The applicant's Article 8 rights had also been violated, since she had been given treatment without her consent, and the relevant domestic law about the administration of treatment without consent had not been followed.

However, the applicant's complaint under Article 3 in respect of her forced medication was deemed inadmissible, as there was insufficient evidence that the effect on her of receiving the medication reached the threshold required. She did not suffer from the most serious side-effects of the medication, and there was no long-lasting psychological or physical effect on her after discharge from hospital.

The findings of violations of Article 5(1) and Article 8 in respect of the 8 week period of unlawful deprivation of liberty and forced medication resulted in an award of damages of 15,600 Euros (just over £12,000).

Comment

This case is of interest both as a further illustration of the circumstances in which Article 5 is engaged, and the level of damages the ECtHR considered appropriate for the violations of Articles 5 and 8 which it found had occurred.

Validity of Powers of Attorney (1) – The saga of *NW* continues

The fall-out from the "bombshell" decision of Sheriff John Baird in *W* (2014) SLT (Sh Ct) 83 continues. For simplicity and clarity we still describe it as "*NW*". The bank appointed under the document held by Sheriff Baird to be invalid in *NW* has withdrawn its appeal. A related application (not by the bank) in that process was not warranted, and the period for appealing against the refusal to warrant has expired without any such appeal being lodged. There are accordingly now no "live" proceedings concerning *NW*. We report below on *B and F v B*, a decision of Sheriff Gregor Murray at Forfar reaching a conclusion opposite to that of Sheriff Baird in *NW*, with reference to the document and facts before Sheriff Murray in that case. Sheriff Murray narrated some of the fall-out as follows:

> "*The decision in W has been the subject of discussion and comment, some of which concerned its effect on professional practice and drafting (Law Society of Scotland Professional Practice Update, July 2014; Ward – A majority of all Scottish Powers of Attorney Invalid?, Mental Health Newsletter, June 2014; Office of the Public Guardian website). However, those issues are not part of the ratio decidendi.*"

These have since been followed by an article by Roddy MacLeod (also referring to the case as *NW*) in the September 2014 Journal of the Law Society of Scotland entitled "Power and Authority". His article "*offers an alternative view to the requirements of s15*" which is unlikely to be accepted as uncontroversial or to quieten the debate. In common with other commentators he points out that his article "has been written without the benefit of having seen the document in *NW*. It would not be appropriate to reproduce an anonymised version of the entire document in this Newsletter, but the following excerpts (in the layout of the document, rather than isolated quotations) may assist the debate:

> *CONTINUING POWER OF ATTORNEY*
>
> *By* [NW]
>
> *1 Appointment*
>
> *I,* [NW]*, appoint* [the Bank] *to be my continuing Attorney ("my Attorney") in terms of section 15 of the Adults with Incapacity (Scotland) Act 2000 (which Act and any subsequent amendment of that is referred to as the "Act"),declaring that the Bank may act as such Attorney on the Bank's Terms and Conditions* [specified by reference to a Deed of Declaration] *(including what is therein provided in regard to the right of the Bank to remuneration) as if such Terms and Conditions were herein expressed.*
>
> *2 General powers*
>
> *2.1 My Attorney may manage my whole affairs as my Attorney thinks expedient and shall have full power for me and in my name or in my Attorney's name to do everything regarding my estate which I could do myself and that without limitation by reason of anything contained in this Power of Attorney or otherwise.*
>
> *2.2 Without prejudice to these general powers my Attorney shall have the powers set out in the following clauses.*

3 *Particular powers*

[Specific powers listed]

3.17 *The said* [Bank] *shall also be entitled to act as Bankers for me and to make the usual charge for so acting and to charge their usual remuneration for acting as my Attorney.*

4 *Validity of documents*

All documents which may be granted by my Attorney to whatever person or persons shall be equally valid and binding as if granted by me.

5 *Recall*

This Power of Attorney shall subsist until it is recalled by a writing signed by me or until my death.

6 *Testing clause*

This document is executed as follows:-

[Execution follows]

[Certificate under s15(3)(c) incorporated]

At least until any relevant points are, for a sheriffdom, decided upon appeal to a Sheriff Principal or, for all of Scotland, decided by an appeal binding upon sheriffs throughout the country, practitioners are likely to take the view that they have a responsibility to raise the question of validity in any case founding upon a power of attorney document where its validity could be relevant. The point was thus taken by the defender's advocate in *B and F v B*. We are informed that it has been taken in criminal proceedings where an accused faces certain charges relating to his role as an attorney, and pleads that he was not an attorney because the document purporting to appoint him was invalid. It is a potential issue for any third party asked to act in reliance upon a power of attorney document of doubtful validity. This is known to be of particular concern to local authorities, and to be a point which has been raised in proceedings in England and Wales referring to a Scottish power of attorney.

Adrian D Ward

Validity of Powers of Attorney (2) – *B and F v B*

Sheriff Gregor Murray at Forfar issued his judgment in *B and F v B* on 7th August 2014. At time of writing the judgment has not been placed on scotcourts website and is not available in anonymised form. The background is that in 2009 Mr and Mrs B executed documents entitled continuing and welfare powers of attorney in favour of their three children. Both documents were registered with the Public Guardian in February 2010. The attorneys have been in dispute since August 2011. Two of them raised summary

applications with reference to both powers of attorney craving revocation or restriction of the appointment of the third attorney, under s20 of the Adults with Incapacity (Scotland) Act 2000 (all references in this article being to that Act). Orders were pronounced revoking the defender's powers *ad interim*. The action relating to Mr B's power of attorney has been in abeyance since his death in April 2014. In the case concerning Mrs B's document, the pursuers aver that she became incapacitated in August 2013. The defender maintains that she retains some capacity to decide certain welfare issues. After a proof had been fixed, the defender introduced an argument that her power of attorney was invalid. The proof was discharged and that issue was debated on 29th July 2014. The sheriff made *avizandum* and issued his decision nine days later.

As in *NW*, it is significant that the sheriff took account of extraneous facts as well as the terms of the document. Insofar as quoted in the judgment, and for comparison with *NW*'s document as quoted above, the terms were as follows:

1 APPOINTMENT

1.1 [Mrs B appointed the defenders "*to be my continuing attorneys … in terms of section 15 of the Adults with Incapacity (Scotland) Act 2000* …"]

1.2 [Mrs B appointed the defenders *"to be my welfare attorneys in terms of section 16"*]

…..

3 GENERAL POWERS

3.1 *My Attorneys may manage my whole affairs as my Attorneys think fit and shall have full power for me and in my name or their own names as my Attorneys to do everything regarding my estate which I could do myself and that without limitation by reason of anything contained in this power of attorney or otherwise.*

3.2 *In the event of my being incapable in terms of the Act in relation to decisions about my personal welfare, or in the event that my Attorneys reasonably believe that is the case, then my Attorneys may make decisions on my behalf in relation to my personal welfare. I have considered how my incapacity will be determined.*

[terms of 3.3 and 3.4 not disclosed]

4 [No title, 19 detailed financial powers]

5 PARTICULAR WELFARE POWERS

[8 paragraphs "*conferring almost unfettered welfare powers … in relation to all aspects of Mrs B's life*"]

The defender submitted that the document did not comply with sections 15(3)(b), 15(3)(ba), 16(3)(b) or 16(3)(ba) and accordingly was invalid. The pursuers contended that it fulfilled all relevant statutory criteria.

The sheriff noted that Part 2 of the 2000 Act followed recommendations in the 1995 Scottish Law Commission Report on Vulnerable Adults, sections 15(3)(ba) and 16(3)(ba) having been later introduced in 2007. He noted the Commission's recommendations that financial powers of attorney should continue in effect after incapacity only if the deed creating them clearly showed that this was the granter's intention; that welfare powers should be permitted, but only after incapacity of the granter, or an attorney's reasonable belief to that effect; that the Public Guardian should be required to register powers of attorney unless the document prohibited registration until occurrence of a trigger; and that such powers of attorney should only be valid if they contained certificates such as those now required. The sheriff had obviously sought to trace the genesis of the 2007 amendments with some difficulty. He referred to an explanation provided to the Health Committee at Stage 1 on behalf of the Parliament's Directorate of Access and Information as follows:

> *"Essentially, welfare powers of attorney, and financial powers where specified, become operational at the point the granter becomes incapacitated. Continuing powers can continue or start on incapacity. However, unless it is specifically stated in the authorisation document, there is no requirement for the attorney to obtain evidence that the adult has lost the ability to have control over their own affairs, for example through obtaining a medical certificate…..The Executive….believed that it was a matter for the person who is granting the power of attorney to dictate at what point the powers should come into effect….the Bill poroposes a check in the system so that all continuing and welfare powers of attorney becoming operational on incapacity must contain a statement to the effect that the granter had considered how incapacity should be determined."*

The sheriff noted that "*slightly confusingly*" a continuing financial power might either take effect immediately and continue after incapacity, or may take effect only upon incapacity. Section 15(3)(ba) is only engaged by the latter type, and was not engaged by Mrs B's document. The sheriff described the purpose of s16(3)(ba) as similar. He commented:

> "*A granter may, if he wishes, define the means by which his incapacity is to be judged before welfare powers spring into effect. In that way, he retains control of his welfare until his incapacity is proved in a way he considers reasonable. This option both restricts unethical attorneys exercising power early and from being able to rely on s.16(5) 'reasonable belief'."*

It was undisputed that s16(3)(ba) was engaged by Mrs B's document. However:

> "*The wording and location of the final sentence of Clause 3.2 creates an obvious concern – if* [Mrs B] *considered how incapacity was to be determined, what was the result?*"

However, to determine a means of incapacity diagnosis is optional. A granter who wishes to do so may prescribe a means by which incapacity is to be judged. There was no suggestion in this deed that Mrs B intended to state a means. The deed was not illustrative of a person who was concerned about welfare powers being exercised. The welfare powers were "very wide indeed". The sheriff held that the final sentence of clause 3.2 had sufficient meaning for the purposes of s16(3)(ba).

The sheriff considered that the submissions on s15(3)(b) and s16(3)(b) could be addressed concurrently. Although compliance was a prerequisite "*they cannot be regarded in isolation*". He noted that the 1995 report rejected prescribed wording in favour of a recommendation that any words showing clear intention should suffice. The legislation adopted that wording.

> "'*Intention' connotes the existence of an aim or plan, something is to be achieved.*"

Mrs B's deed, and the certificate incorporated in it, showed that the pre-execution checks – among the requirements for validity – were completed the same day as the deed was subscribed, Mrs B's GP having been consulted. The Public Guardian accepted the certificate and registered the deed. Accordingly, determination of intention should take additional factors into account. Doing so, the sheriff held that:

> *"*[Mrs B] *took legal advice. She must have instructed preparation of a power of attorney which was to confer continuing and welfare powers. Her solicitor, after consulting her GP, concluded she was aware of its nature and effect. Her intention in the deed, therefore, was to achieve the immediate appointment of financial Attorneys whose powers, under the 2000 Act, were to continue in the event of her incapacity, to provide for the same Attorneys to be able to exercise welfare powers in the same event and to specify appropriate powers.*
>
> "*In the deed itself, the Attorneys are appointed within an appropriate Clause, preceded by an appropriate heading in upper case. The continuing and welfare appointments are made in separate paragraphs, suggesting independent thought and intent. The individual Attorneys are fully designed. The relevant sections of the 2000 Act are specified. Full financial and welfare powers are specified. Where appropriate, the Act is mentioned throughout the deed.*
>
> "*I do not dispute that the deed could have been better drafted. However, any errors are, it appears to me, stylistic and not substantial.* [Mrs B's] *intentions to create continuing and welfare powers are, in context, clearly expressed. S.18 is not, therefore, engaged. I respectfully decline to agree with the Sheriff in W that for the purposes of ss.15(3)(b) and 16(3)(b) it is necessary to include a 'specific statement' in every deed, for the reasons given above. Every case must turn on its facts. In some, such a statement may be necessary, in others not. If I am wrong in that, W can be distinguished in this case as it deals only with s.15 and the full wording of the deed is not disclosed.*"

The sheriff repelled the relevant pleas-in-law for the defender; continued the case on the procedural roll "presumably to fix a new diet of proof", and reserved all question of expenses.

The following comments may be added:

1. Council of Europe Recommendation (2009)11 on Continuing Powers of Attorney and Advance Directives has the same "confusing" terminology, including as "continuing" powers which only take effect upon incapacity. In the Recommendation "continuing" refers to both financial and welfare powers, another potential source of confusion in Scotland.
2. As quoted above, the sheriff accepted that the deed could have been better drafted. Pertinently, he added that if part of the deed derived from a style "those who have used it appear to have

overlooked the meaning and purpose of a style." It is sincerely to be hoped that the issues originally raised in *NW* will only be relevant to historic documents, that in future they will be eliminated by careful drafting, and that likewise the difficulties which so often arise in relation to other aspects of powers of attorney – and also appointments of guardians and under intervention orders – will be avoided by careful drafting. Preparation of a power of attorney is never a simple task. It always requires expertise in adult incapacity matters. Granters seek to anticipate their own incapacity, and need to be advised on the basis of expertise in all the issues – foreseeable and unforeseeable – that can arise in that situation.

3. In *RC v CC and X Local Authority* [2014] EWHC 131 (COP) Sir James Munby, President of the Court of Protection, referred to "a *characteristically thoughtful discussion*" in the June 2013 issue of this Newsletter. While not suggesting that this new Scottish section would yet earn such acclaim, it is believed that the reference to it by Sheriff Murray quoted in the preceding item is the first time that the Newsletter has been thus referred to in a Scottish judgment.

Adrian D Ward

Powers of attorney – delays in registration

On 29th July 2014 Michael McMahon, MSP for Uddingston and Bellshill and chair of the Cross-Party Disability Group of the Scottish Parliament, asked:

> "*To ask the Scottish Government whether it is aware of delays in the registration of powers of attorney (a) generally and (b) with regard to the Adults with Incapacity (Scotland) Act 2000*"

Ms Roseanne Cunningham MSP has provided the following written answer:

> "*Registration of powers of attorney under the Adults with Incapacity (Scotland) Act 2000 is a matter for the Office of the Public Guardian, part of the Scottish Court Service. There is no requirement to register a general power of attorney with the Office of the Public Guardian. The Scottish Government is aware that there are delays in registering manually submitted powers of attorney under the Adults with Incapacity (Scotland) Act 2000. The Office of the Public Guardian is taking action to address this and details are available from their website: http://www.publicguardian-scotland.gov.uk/news/index.asp. Submissions made on the electronic registration system can be dealt with promptly.*

The latest update of 23rd September 2014 on the Public Guardian's website reports a 20-day waiting period for electronic registrations and a 24-week period for manual submissions. As previously, the Public Guardian's Office will expedite registration "on cause shown" but ask that this service be respected and used only in cases of true urgency, to avoid defeating its purpose. Against a continuing substantial year-on-year increase in registrations, now running at about 50,000 per annum, the Public Guardian is endeavouring to cope with staff reduced by 12% as a result of the public sector response to fiscal deficit. On Tuesdays 16th, 23rd and 30th September all available staff have been deployed to try to reduce the

backlog in registrations, and on those dates the OPG has not offered a telephone service, prompting complaints to this Newsletter where there have been urgent needs to communicate. However, urgent communications by email are dealt with on these days.

Adrian D Ward

Damaging illegality of Scottish social work authorities

Our items under this heading in July and August have been followed by a question in the Scottish Parliament by Michael McMahon, MSP for Uddingston and Bellshill, and chair of the Parliament's Cross-Party Disability Group:

> *"To ask the Scottish Government what proportion of mental health officer reports under the Adults with Incapacity (Scotland) Act 2000 are provided within the required timescale"*

The following written answer has been provided by Ms Roseanna Cunningham MSP:

> *"This information is not collected centrally"*

Adrian D Ward

16- and 17- year olds victims of discrimination by Scottish Legal Aid Board?

Scottish 16- and 17-year olds were able to vote in the referendum on Scottish independence but are not eligible to do so in elections to the European, Westminster or Scottish Parliaments. There are suggestions that this might change. For the purposes of adult incapacity jurisdiction, they are adults, including in Schedule 3 to the Adults with Incapacity (Scotland) Act 2000 which substantially replicates relevant provisions of the Hague Convention of 13th January 2000 on the International Protection of Adults, except that adults for the purposes of the Convention are persons who have attained the age of 18, so that in cross-border situations to which Hague Conventions apply they are still children. This added vulnerability of young people in this age range is now being exploited by Scottish Legal Aid Board in relation to those who, through learning disabilities or other reasons, require adult guardianship as soon as parental guardianship ceases at age 16. This is accommodated in the 2000 Act by section 79(a) which allows applications for adult guardianship to be made up to three months before the person's 16th birthday, with any orders granted before that date coming into force upon it. This provision is of increased importance in that financial guardianship powers are in many such cases required to enable self-directed support payments to be accessed.

Scottish Legal Aid Board is now attempting to assess the resources of parents of such young adults when applications are made for legal aid for proceedings under the 2000 Act in relation to them. The text of the relevant statement from Scottish Legal Aid Board is as follows:

"The following addresses why we need to assess the resources of the parents in conjunction with those of the incapax adult.

"*Regulation 7(4) of the Advice and Assistance (Scotland) Regulations 1996 provides that when advice and assistance is being granted to a person with an interest in the affairs of an incapable adult, then for the purposes of assessing financial eligibility regard is to be had to the resources of that person and not those of the applicant. It is accepted that a person can be deemed to be an incapable adult under the Adults with incapacity (Scotland) Act 2000 and therefore become the subject of orders under that legislation from attaining 16 years of age.*

For the purposes of carrying out an assessment of the incapable adult's disposable income and capital regard must had to Schedule 2 to the 1996 Regs. Paragraph 4A(1) therein states that if the person concerned (the person whose finances are to be assessed) is a child, the resources of any person who owes an obligation of ailment to that child under section 1(1)(c) or (d) of the Family Law (Scotland) Act 1985 are to be treated as part of the child's own resources. Paragraph 4A(2) clarifies that in sub-paragraph (1), "child" has the meaning given in section 1(5) of the Family Law (Scotland) Act 1985, and therefore applies to persons aged under 18 years; or over that age and under the age of 25 years in circumstances prescribed by the 1985 Act. In many cases an applicant will be seeking advice and assistance in relation to an incapable adult aged over 25 years of age, and Paragraph 4A(1) will not be engaged. The fact that a person can be defined as an adult under one piece of legislation does not preclude that person being assessed under reference to being a child when an application for advice and assistance is to be submitted, as the Board requires to apply its own regulations, which for the present purposes will ultimately require consideration of the applicant's resources.

Notwithstanding, the need to have regard to the finances of a person owing an obligation to aliment to a child can be disregarded if it would be unjust or inequitable in the circumstances of that case to take these into account."

With reference to the last sentence of the statement, it is difficult to envisage situations under the 2000 Act in which such means-testing of parents would not only be unjust and inequitable, but potentially discriminatory. There is a question whether liability to meet the costs of such applications falls within the parental responsibilities on which SLAB founds. Such applications might be made by any party claiming an interest, and the parents might wish to oppose.

In any event, it could be argued that this is discrimination within the definition in s. 15 Equality Act 2010. People with intellectual disabilities are among those likely to benefit from SDS arrangements. To impose a financial penalty which obstructs their access to SDS in this way would seem to discriminates against them compared with anyone else not suffering from that intellectual disability and accordingly not requiring to follow that route in order to access SDS – the essential route to access SDS, for people with an intellectual disability in Scotland, being to have a guardian appointed. This of course applies where the intellectual disability is such that a guardian is required. On that basis it would appear to be disability discrimination for the state to impose (in the form of legal aid means-testing) any financial charge upon anyone with an intellectual disability to enable them to access services or anything else covered by the 2010 Act where someone without such intellectual disability can access the same without incurring such charge. This argument would appear to apply even without taking account of the combined effect of age

and disability discrimination, which will become relevant once section 14 of the 2010 Act is brought into force.

The above line of argument has much wider implications. If it is correct, it would imply that most means-testing for most if not all guardianship and intervention order applications is contrary to the 2010 Act and should be abolished, regardless of age of the "adult" and regardless of whether welfare or financial powers (or both) are sought. This follows a long history of what could be interpreted as hostility on the part of SLAB and its predecessors towards people with intellectual disabilities in Scotland. The Mental Health and Disability Sub-Committee of the Law Society of Scotland had to battle to achieve non-means-tested legal aid in relation to former Mental Health Act guardianships, even though such legal aid was at the time available in England for English guardianship procedures with identical powers. It took much further persuasion to retain this position through the changes introduced by the 2000 Act. It could be said that any financial barrier to participation in proceedings under the 2000 Act has the potential to contravene Article 6 of the European Convention on Human Rights, with some also potentially contravening Article 5.

Adrian D Ward

Scottish Government Consultation on proposals to reform Fatal Accident Inquiries legislation[2]

Introduction

In July 2014, the Scottish Government launched a consultation on proposals to reform Fatal Accident Inquiries legislation in Scotland which closed on 9 September 2014. This comes some not inconsiderable time after the 2009 Cullen Review of the legislation[3]. One of the issues that arose in connection with this review was the treatment of deaths of psychiatric patients in Scotland, as well as the compatibility of the current system in Scotland for investigation into these with Article 2 ECHR (the right to life)[4]. The current consultation deals with this amongst other issues.

Incidences of deaths by persons with mental health issues in Scotland

Statistics showing the reported incidence of deaths of persons who have been in contact with mental health services in Scotland provide a harrowing picture and, of course, irrespective of actual numbers, each death will have very sad and upsetting consequences for relatives, friends and those who knew the person concerned.

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[2] Scottish Government *Consultation on proposals to reform Fatal Accident Inquiries legislation*, July 2014.

[3] Cullen Report, *Report of findings of Review of Fatal Accident Inquiry Legislation, an independent review*, November 2009, See also Scottish Government, *Response to the Recommendations from the Review of Fatal Accident Inquiry Legislation*, March 2011.

[4] The Equality and Human Rights Commission also raised the question of whether the current for investigating deaths of patients in England. See Equality and Human Rights Commission, *Human Rights Review 2012*, pp64-65

The 2014 Annual Report of the National Confidential Inquiry into Suicide and Homicide by People with Mental Illness illustrates something of the scale of the issue. According to this report during the period 2002 to 2012 30% (2,725) of suicides in Scotland were identified as persons who had been in contact with mental health services in the 12 months prior to their death, an average, therefore, of 248 patient suicides per year[5]. During this period of 2002 to 2012 there were 195 in-patient suicides 27% of which were detained patients and 27% of which had died after absconding from the ward[6]. Further, 189 (7% of the total sample) suicides were of people who were under crisis resolution or home treatment teams[7] and 491 of the suicides took places within 3 months of discharge from in-patient care[8].

In 2014, the Mental Welfare Commission for Scotland published a report "*Death in detention monitoring*"[9] reviewing deaths of detained psychiatric patients during the period 2012 to 2013. During this period 6721 individuals were subject to compulsory treatment and of this number 78 deaths were of patients who were subject to compulsion under the Mental Health (Care and Treatment) (Scotland) Act 2003, 32 being subject to Compulsory Treatments Orders or temporary suspension of detention and 46 of which were detained in hospital. The Commission had information on 73 of the deaths and 39 of these were from natural causes where death was expected, 14 died of natural causes but more suddenly, 11 died through suicide, 6 were unexplained (and may have been connected with the person's mental disorder or learning disability or their treatment) and 3 had delirium.

Article 2 ECHR (the right to life) and the procedural obligation to investigate deaths

Article 2 encompasses not only a negative obligation not to take life but also a positive obligation to protect life and to establish an appropriate framework with a view to achieving this. A procedural obligation to establish legal systems that provide for the proper investigation into deaths of citizens has also been identified by the European Court of Human Rights.

Whilst ECHR and UK case law[10] is still developing direction in terms of the Article 2 procedural duty and accepts the flexibility of individual systems, it is clear that states must ensure the existence of a legal framework to provide for full, effective and independent investigations into deaths of those who are under the care and/or control of the state. This includes psychiatric patients detained under mental health legislation and also extends to voluntary patients where a real and immediate risk of suicide exists[11]. Who

[5] National Confidential Inquiry into Suicide and Homicide by People with Mental Illness, *Annual Report 2014*, July 2014, p94.
[6] *Ibid*, p101.
[7] *Ibid*, p102.
[8] *Ibid*, p103.
[9] Mental Welfare Commission for Scotland, *Death in detention monitoring*, 2014

[10] See H Patrick, J Stavert and J Malcolm, "The right to life, and to proper inquiries on death: A Human Rights Perspective on the Investigation of Deaths of Psychiatric Patients in Scotland, (2012) 1 *Juridical Review* 51 and J Stavert, "Deaths of Psychiatric Patients, Article 2 ECHR and Proper Investigation: a case for reform in Scotland? (2012) *Scolag Legal Journal* (2012) (September) 206 for reference to and analysis of relevant cases.
[11] *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2.

actually initiates such an inquiry depends on the circumstances of the case and the extent to which state bodies are responsible for the death concerned.

System of investigations into deaths of patients in mental health settings in Scotland

The current position

Currently, all Scottish health boards operate a form of review process to consider the circumstances of a suicide by a person who has been in contact with their mental health services. Commonly, these are internal reviews involving senior clinical and managerial staff and, occasionally, clinicians from outside their service but there is no standardised procedure. Moreover, since April 2008, Healthcare Improvement Scotland (HIS) (formerly NHS Quality Improvement Scotland) has received notifications from NHS Boards of suicides or suspected suicides of people who have been in contact with mental health services within the last 12 months and from procurators fiscal. Where lessons are to be learned from such reviews these are collected and disseminated although it is not possible to ascertain how many of these deaths relate to patients subject to compulsory measures as HIS does not hold such data. HIS established a suicide review network to create a community of practice in this area. HIS must also report to the Mental Welfare Commission for Scotland any case that may require inquiry under the Mental Health (Care and Treatment) (Scotland) Act 2003 which has not already been reported by the relevant NHS board[12].

Sheriff-led fatal accident inquiries (FAIs) are mandatory under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 in the event of a death of a prisoner but not when a psychiatric patient dies in hospital, even if they are detained there[13]. Whether a FAI actually takes place in such circumstances is left to the discretion of the Lord Advocate[14] and, short of judicial review, it is not possible to challenge this decision.

Article 2 compatibility

As things currently stand in Scotland it is questionable whether the system of investigations into deaths of psychiatric patients is entirely Article 2 compatible. Moreover, one might ask whether not affording this category of persons the same type of review as prisoners is discriminatory.[15]

The health boards and even the HIS do not have the necessary distance to meet the independence requirements of Article 2. Admittedly, the HIS is independent from health boards but it remains part of NHS Scotland and acts under the direction of Scottish Ministers[16]. In addition, its role is not to consider fault or negligence but rather to highlight areas of good practice.

[12]The Commission has statutory duties under the 2003 Act that include carrying out a investigations where a patient may have been subject to ill treatment, neglect or some other deficiency in care or treatment (s.11, 2003 Act).
[13] s.1(1)(a)(ii).
[14] s.1(1)(b).
[15] Article 14 ECHR in conjunctions with Article 2 ECHR.
[16] s.10A(3) National Health Service (Scotland) Act 1978.

Mental Welfare Commission investigations are more promising given the Commission's practical, hierarchical and institutional independence from the NHS and health boards and the fact that it can publish the results of its inquiries[17]. It also has powers to carry out formal inquiries and compel witnesses[18] (although it has not yet used these latter powers) and can involve relatives and carers in its investigation. That being said, it has not exercised its powers in this respect and generally takes the view that the facts can be more effectively established by investigations carried out in cooperation with relevant services and their staff. The fact that the Public Services Reform (Scotland) Act 2010[19] allows the Scottish Government to introduce delegated legislation to abolish or significantly modify the Commission's functions (for instance, compelling it to conduct joint inspections or involve Scottish Government representatives in Commission meetings) should not be overlooked. However, the Commission has traditionally, and regularly, demonstrated its independence and there are no indications that this is likely to change in practice.

In terms of their independence, ability to compel witnesses and evidence and public scrutiny FAIs do appear to meet the state's duties under Article 2. However, as already noted, such inquiries are not mandatory for psychiatric patients and are in fact rarely held.

Scottish Government proposals for change

Amongst the 36 recommendations contained within the Cullen Report one was the extension of mandatory FAIs to deaths of any persons who are subject at the time of their death to compulsory detention by a public authority within the meaning of s.6 Human Rights Act 1998. This would include persons detained under the Mental Health (Care and Treatment) (Scotland) Act 2003, the Criminal Procedure (Scotland) Act 1995 and children and young people held in secure accommodation.

The report considered it to not be in the public interest that FAIs be automatically held for all those who are living in care on the basis that in many cases they are voluntarily there. However, the *Cheshire West*[20] ruling has, of course, now reinforced the fact that individuals who lack capacity and who have not been formally detained may nevertheless have their liberty sufficiently restricted so as effectively to be subject to detention. Persons subject to compulsory measures under mental health legislation but living in the community and those subject to welfare guardianship or other measures under the Adults with Incapacity (Scotland) Act 2000 also potentially fall within this category.

Notwithstanding the Cullen Report recommendation regarding the extension of mandatory FAIs the Scottish Government considers that some discretion should remain to determine the appropriateness of an FAI in certain cases. Referring to the "crucial distinction" between an independent investigation and the full sheriff-led hearing offered by an FAI, it offers as options for comment:

[17] s.10 Mental Health (Care and Treatment) (Scotland) Act 2003.
[18] s.12 Mental Health (Care and Treatment) (Scotland) Act 2003.

[19] ss.14 and 115, and Schedules 5, 18para 7E(3), 19 and 20.
[20] *P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents); P and Q (by their litigation friend, the Official Solicitor)(Appellants) v Surrey County Council (Respondent)* [2014] UKSC 19.

- An investigation by the procurator fiscal and exercise of discretion by the Lord Advocate on completion of that investigation to instruct a FAI; or

- A case review investigation by a public authority (not the health board in whose area the death occurred), such as the Mental Welfare Commission or a different health board, combined with the continuation of the Lord Advocate's duty to investigate the death and a discretionary power to initiate an FAI[21].

The latter option is largely in line with the approach preferred by the Mental Welfare Commission at the time of the Cullen Review. It considered that as many patients die of natural causes formal inquiries, such as FAIs, are unnecessary and could cause further distress to relatives. This does appear to be supported at least by the previously mentioned "*Death in detention monitoring*" report which indicates that during 2012-2013 over 50% of the 73 deaths of patients the Commission had information on had died of natural causes and that such deaths were expected.

The second proposed approach, insofar as the Commission is involved, would appear to be Article 2 compatible in that it reflects the independence requirement stipulated by the European Court of Human Rights. However, there should also be a requirement that the Commission and Lord Advocate publish reports of their inquiries and that relatives and carers of the deceased person are kept fully informed. The assistance of the Commission after any FAI would also be highly beneficial in ensuring that mistakes are not made in the future and that good practice is followed[22].

It should be mentioned that the consultation also asks[23] whether the death of a child in 'secure care' be subject to a mandatory FAI and any other categories of residential childcare, which are not defined as 'secure care', should not result in a mandatory FAI. This was prompted by the Cullen Report recommendation that mandatory FAIs be extended to deaths of children in residential child care including in private boarding schools, residential special schools and placements in residential child care as a result of a compulsory supervision order made at a children's hearing or voluntarily accommodated by the local authority under s.25 of the Children (Scotland) Act 1995. However, the Scottish Government takes the view that FAIs are extremely stressful for all those involved and whilst they can be useful in terms of the lessons to be learned and independent accountability they are not required in every case. Crucially, it also comments that none of the mentioned residential child care establishments can detain children against their will. However, again recalling the *Cheshire West* ruling, it is entirely possible that children with mental health issues and/or learning disabilities in such situations may be subjected to continuous supervision and control and not free to leave and thus be deprived of their liberty. Some independent review is thus required if Article 2 requirements are to be met.

[21] *Consultation on proposals to reform Fatal Accident Inquiries legislation*, *op cit*, chapter 5.
[22] Indeed, the Cullen Report expressed concern that there appeared to be a lack of action taken on recommendations made by sheriffs in fatal accident inquiries (para 8.25).
[23] In Questions 3 and 4.

Conclusion

Article 2 ECHR and the standards and principles concerning compatible investigations into deaths identified in European Court of Human Rights jurisprudence must be followed in Scotland. Admittedly it is not always possible to obtain anything than a rather general steer from Strasbourg on Article 2 investigation requirements but it is hoped that the resultant Bill amending the current Fatal Accident Inquiries legislation will take the above into account. It is also worth noting that investigations into deaths of psychiatric patients have additional value in terms of identifying potential or actual areas of mistreatment that amount to inhuman and degrading treatment and thus violations of Article 3 ECHR.

Jill Stavert

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Conferences at which editors/contributors are speaking

Implementing the Mental Capacity Act and the Deprivation of Liberty Safeguards

Alex and Tor are speaking at this conference arranged by Community Care in London on 8 October 2014, a re-run (with variations) of the sold-out and high octane conference held in March – on the day of the Supreme Court decision in Cheshire West. Full details are available here.

The Mental Capacity Act 2005: Annual Review 16 October 2014

Neil and Tor are speaking at Switalski's multi-disciplinary conference looking at the workings of the Mental Capacity Act 2005 in York on 16 October, alongside speakers including Mr Justice Baker and Fenella Morris QC. Full details are available here.

'Taking Stock'

Neil is speaking at the annual 'Taking Stock' Conference on 17 October, jointly promoted by the Approved Mental Health Professionals Association (North West and North Wales) and Cardiff Law School with sponsorship from Irwin Mitchell Solicitors and Thirty Nine Essex Street Barristers Chambers – and with support from Manchester University. Full details are available here.

Court of Protection Practice and Procedure 2014

Alex and Tor are speaking at Jordan's annual Court of Protection Practice in London on 21 October, alongside Mr Justice Charles, Vice-President of the Court of Protection, the Public Guardian, Alan Eccles, District Judge Marin and David Rees. For further details, see here.

Talks to local faculties of solicitors

Adrian will be addressing local faculties of solicitors on matters relating (inter alia) to adult incapacity law in Perth on 9 October, Aberdeen on 20 November and Wigtown on 10 December.

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Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

Our next Newsletter will be out in early November. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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