Welcome to the February 2020 Mental Capacity Report, which is, even by our standards, a bumper one. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a tribute to Mr E; fluctuating capacity; improperly resisting a deputy appointment; DoLS, BIAs and RPRs, and finding the right balance with constrained resources;

(2) In the Property and Affairs Report: the OPG, investigations and costs; e-filing for professional deputies, and a guest article about the National Will Register;

(3) In the Practice and Procedure Report: the Vice-President issues guidance on serious medical treatment; an important judgment on contingent declarations; the permission threshold; and disclosure to a non-party;

(4) In the Wider Context Report: brain death and the courts; deprivation of liberty and young people;

(5) In the Scotland Report: supplemental reports from the Independent Review of Learning Disability and Autism; the Scott review consults; and relevant cases and guidance.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Mr E

We were really saddened to hear of the death in January of Mr E. Mr E was, with his wife, both the foster carer of HL, and HL's unstinting champion in the fight to bring him home from Bournewood hospital, and thereafter. Mr E was also an unstinting champion of the rights of others with impaired capacity, as well as a splendid gadfly, provoking bureaucracy where it might be found.

We hope that, in due course, it will be possible to give Mr E his real name (many, of course, know it, and knew him). In the meantime we send our very best wishes to Mrs E and to HL.

Refusing food, (in)capacity and coming to court

QJ v A Local Authority [2020] EWCOP 3 and [2020] EWCOP 7 (Hayden J)

Article 5 ECHR – DoLS authorisations – mental capacity – medical treatment

Summary[1]

In *QJ v A Local Authority* Hayden J was considering the situation of an 87 year old man with vascular dementia challenging a DoLS authorisation under s.21A. The man was, in the run up to the first hearing (reported at [2020] EWCOP 3), on hunger strike, but things changed on the morning of the hearing so that it appeared that he might have changed his mind (whether capacitously or not). Hayden J therefore directed a further assessment of P's capacity.

By the time of the second hearing (reported at [2020] EWCOP 7), the plan was (1) administering of Fortisip three times per day, with 750 to 1,000 calories per day, which would still be sub-optimal but not immediately life-threatening; (2) weighing of QJ twice a week; (3) discussing again with QJ, within a week, his present situation and a plan to discharge him back to the nursing home; (4) no readmission of QJ to hospital, once discharged back to the care home, if there he refuses to accept food or water.

There was also further evidence as to QJ's capacity from his treating physician, Dr B, whose conclusion was that:

> *He did not seem to understand the gravity of what might happen to him if he did not eat and would barely talk although he was capable of speaking. It may be that he simply did not want to talk to me but my judgment was that he did not really understand the consequences of his action and could not communicate any view other than by occasionally shaking his head. I did not feel that he had any real depth of understanding of his situation. I could not get him to describe why he was in hospital, nor could I get him to even repeat minimally what the concerns about him were. I did not sense any evidence of him being able to weigh up or retain the information given to him.*

Hayden J noted that:

> *20. Dr B was entirely aware that others had regarded QJ's response and resistance to eating and drinking as a form of "silent protest", but he commented that a refusal to accept food and drink is "a common feature of the sort of illness that QJ suffers from" and is one that he had encountered many times in the course of his work.*
>
> *21. I have struggled to understand those conclusions, not only in the light of the totality of the available evidence, but also in the context of Dr B's own observations. It is undoubtedly a difficult situation when an individual suffering from dementia chooses not to respond to certain questions. However, we do know that QJ has chosen not to eat for many weeks. We know that prior to that there had been a significant decline in his food consumption and we know that presently, at hospital, he is taking miniscule amounts of food and Fortisips as well as water.*

Hayden J recognised:

> *23.* […] *Dr B's experience and expertise, and entirely accept his view that a refusal to accept food and drink might well be a common feature of the sort of illness that QJ suffers from, I am required to*

[1] Tor having been involved in the case, she has not contributed to this case report.

> *evaluate QJ's capacity in relation to these specific issues, and I do so. I am highly conscious that the presumption of capacity is a fundamental safeguard of human autonomy. It requires cogent, clear and carefully analysed information before it can be rebutted.*
>
> *24. It is important to emphasise that lack of capacity cannot be established merely by reference to a person's condition or an aspect of his behaviour which might lead others to make unjustified assumptions about capacity (s.2(3) MCA). An aspect of QJ's behaviour included his reluctance to answer certain questions. It should not be construed from this that he is unable to. There is a good deal of evidence which suggests that this is a choice.*
>
> *25. All parties in this case agree that evaluating capacity on this specific issue is finely and delicately balanced. But ultimately, I have to be satisfied, on the balance of probabilities (s. 2(4) MCA), that the presumption has been rebutted. I am unable to reach that conclusion.*

Hayden J observed that "[i]*t is potentially significant, and certainly interesting, that the agreed medical consensus as to the way forward accords exactly with what QJ himself expresses*." Whilst it was unnecessary for him to evaluate QJ's best interests because QJ should be regarded as capacitous, he considered it was right that he acknowledged that "*QJ, in conjunction with the doctors, has been able to put together a plan which both respects his autonomy and has regard to his dignity.*"

Comment

Such cases as QJ's are very fact specific, but Hayden J's observations about the need to distinguish between a reluctance to answer questions and an inability to do so are of wider importance. Similarly, of wider import are Hayden J's observations in the first judgment that:

> *16.* [...] *If it were determined that QJ had capacity to decide whether to receive nutrition, irrespective of which decision he made (i.e. either to take nutrition or to refuse it), does the case, in those circumstances, need to come back before the Court? Ms Butler-Cole took me to the Guidance of this Court: 'Applications relating to medical treatment' issued 20th January 2020 and in particular to paragraph 8 which is headed 'Situations where consideration should be given to bringing an application to court'. In that paragraph, the following is stated:*
>
> > *"If, at the conclusion of the medical decision-making process, there remain concerns that the way forward in any case is:*
> >
> > ***finely balanced***, [...]
> >
> > *Then it is highly probable that an application to the Court of Protection is appropriate. In such an event consideration* ***must*** *always be given as to whether an application to the Court of Protection is required."*
>
> *17. Ms Butler-Cole considers that this may very well be a "finely balanced decision" which in and of itself might well have required an application to the court. But she submits, and I agree, that where there is already an extant application in relation to the central issue, then the matter should only be*

> *concluded within the proceedings of the Court and not subsequently left to clinical decisions. As I have said, I agree with that submission.* (emphasis in original)

In other words,[2] if a case about medical treatment is **already** before the court, then decisions relating to that treatment should be taken by the court, rather than by the clinicians.

Fluctuating capacity – another judicial take

Cheshire West And Chester Council v PWK [2019] EWCOP 57 (Sir Mark Hedley)

Mental capacity – fluctuating capacity

Summary

In this case, Sir Mark Hedley had to consider (in the context of a s.21A challenge) whether a young man, PWK, had capacity to make decisions in relation to residence; care and support needs; contact with others; social media and the internet; financial and property affairs; and lastly, use or possession of his car provided by the Motability scheme. Until the involvement of Dr Lisa Rippon, a consultant psychiatrist, it had always been the common view of those involved that PWK lacked capacity in each relevant area. Dr Rippon then challenged this view. However, having had the opportunity to consider all the information in the case, in her third report, she revised her views and found that he lacked the relevant capacities. Inevitably, her views had to be explored with some care and, given the inherent complexity of the case, it was listed before a tier-three judge (i.e. a Judge of the High Court). As Sir Mark noted:

> *9. As Dr Rippon's evidence proceeded, the true difficulty became clear. When PWK was relaxed and in a good place he might well be regarded as having capacity. However, when he became anxious his position could be very different. Moreover, there were many things that could trigger anxiety and quite often his carers would be confronted with irrational behaviour that could be difficult to manage.*

The question therefore arose as to how the legal position should be addressed. Sir Mark identified that

> *15. in this case there is likely to be a particular focus on understanding relevant information, retaining it and using or weighing it. There will be many occasions when PWK is hampered by anxiety when those grounds are clearly made out. However, that will not always be the case. It may fluctuate. The question is how the law deals with that.*
>
> *16. In Royal Borough of Greenwich v CDM [2018] EWCOP 15, Cohen J made a declaration of fluctuating capacity. There are, as it seems to me, two potential difficulties with that approach. The*

[2] And as presaged in the BMA/RCP guidance as to CANH decision-making, which had noted (page 11, para. 46 that "[i]*f an immediate decision is needed about whether or not to re-start CANH, if the feeding tube becomes blocked or dislodged, whilst a case is under consideration by the court, an urgent application should be made to the court, out of hours if necessary*."

first is the question of whether the statute actually permits the making of a declaration in those terms. The second is that there is the practical problem of how those responsible for PWK's care could in fact operate such a declaration on the ground. It is not, of course, my place to say that this decision was wrong in the circumstances of that case, but I do believe that PWK's case requires a rather different perspective.

17. I take the liberty, if I may, of adopting the position that I sought to set out in my judgment in A,B & C v X, Y & Z [2012] EWHC 2400 (COP). There I was dealing with a person with some fluctuating capacity. I sought to draw a distinction between isolated decisions, for example, making a will or power of attorney, and cases where decisions may regularly have to be taken sometimes at short notice, as for example, in managing one's own affairs.

18. In paragraph 41 of the judgment I expressed myself as follows:

> *'In the light of Dr Posser's evidence, I am satisfied on balance that he lacks capacity to manage his own affairs. In so finding I acknowledge, as I have done in relation to the other matters, that there would be times when a snapshot of his condition would reveal an ability to manage his affairs. But the general concept of managing affairs is an ongoing act and, therefore, quite unlike the specific act of making a will or making an enduring power of attorney. The management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent. In the context of the evidence that I have, I am not satisfied that he has capacity to manage his affairs.'*

19. Some have referred to this as taking a longitudinal view. In my view, this approach has the value of clarity. It establishes that the starting point is incapacity. The protection for the protected person lies in the mandatory requirements of Section 4, in particular subsections (3) and (6) which provide as follows:

> *'(3) He must consider –*
>
> *(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and*
> *(b) if it appears likely that he will, when that is likely to be.*
>
> *(6) He must consider, so far as is reasonably ascertainable –*
>
> *(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),*
> *(b) the beliefs and values that would be likely to influence his decision if he had capacity, and*
> *(c) the other factors that he would be likely to consider if he were able to do so.'*

20. It seems to me that the closer the protected person is at the moment of actual decision to capacity, the greater the weight that his views must carry and of course, any decision made must take in to account that he may acquire capacity and, therefore, it must not be beyond change.

On the facts of the case, Sir Mark found that:

> *21* […] *all the relevant decision-making with which I am concerned lies in the field of repeat rather than isolated decisions. Dr Rippon's view, which was not really the subject of challenge, was that where a longitudinal perspective was adopted then PWK lacked capacity in all relevant areas.*

Sir Mark declined then to give detailed directions under s.4 MCA 2005, it being:

> *26.* […] *enough to say that the detailed care package provided under Section 117 of the Mental Health Act 1983 is, as it seems to me, entirely in his best interests and that it is further both proportionate and in his best interests to deprive him of his liberty to the extent implicit in that package. The details are matters to be worked out on the ground on the basis of decisions made in accordance with Section 4 by those responsible for his care.*

In terms of the car, Sir Mark Hedley noted that it was a:

> *28.* […] *controversial matter. However, three things are clear: first, that PWK cannot drive it himself; secondly, no one can compel an unwilling carer to drive it for him; and thirdly, no one has attempted to assert a right to drive in the face opposition from the care providers. However, possession of the car and access to it and use of it, even whilst stationary, have proved to be controversial. As I say, matters relating to this wholly dominated PWK's written observations and in particular his second address to me.*
>
> *29. Having reflected with care on this, I have concluded that PWK lacks capacity to make decisions about the use of his car. I am not convinced that he is always able to retain all the necessary information. However, I am amply satisfied that, because of the acute anxiety that this subject generates in him, he is unable to use and weigh that information as part of the decision-making process.*
>
> *30. It is not for me, again, to make best interest determinations about this for it is necessarily part of the care package. I am satisfied that both the social worker and the care providers understand the importance of this matter to PWK and will take account of that. It may be wise that, if the decision is to remove the vehicle, to ensure that it is done at the behest of Motability rather than the Local Authority or the care providers as I think PWK might find that an easier decision to accept.*

Comment

Sir Mark expressed himself with characteristic tact in relation to the rather problematic first decision in *CDM*'s case. The judgment in the present case was given in July 2019 (but not published on Bailii until much later in the year); it therefore predated the second decision in *CDM*'s case in which Newton J took a rather different approach, much closer to that adopted by Sir Mark (in that case, framed as distinguishing between macro- and micro- decisions). It is respectfully suggested that the approach of Sir Mark and Newton J provide the right way forward for the Court of Protection to grapple with the difficult issue of fluctuating capacity. Outside the court setting, professionals are sometimes in an easier position of 'only' having to explain why at any given point they had a reasonable belief that the

person had or lacked capacity. But fluctuating capacity can at other times be incredibly difficult for professionals so the longitudinal approach to repeated or macro decisions may help in that regard. Hopefully the next iteration of the Code of Practice will also provide further guidance to them in this regard.

Will, preferences and estrangement

A Local Authority v PS & HS [2019] EWCOP 60 (Judd J)

Mental capacity – best interests – contact

Summary[3]

In this case, the court had to decide upon an 80 year-old woman's capacity and best interests in relation to contact with her former husband, whom she had divorced some 25 years previously. The woman, PS, had had some limited contact with her former husband, HS, over the subsequent years until the autumn of 2016, when she developed what became clear was dementia. Thereafter, HS spent more and more time with PS; her daughter became more anxious about the amount of time that HS was spending with PS, especially as a consequence of comments that PS was making about him getting into bed with her. DB stated that PS was telling her that she did not want "that man" to be there at her home.

In February 2019, the local authority received a safeguarding referral with concerns that PS was being sexually abused by HS, and also that he had a key to her home and had opened a joint bank account with her. In order to assess PS's care and support needs she was moved from her home to a care home, where she stayed for three weeks before moving to a Care Home where she remained at the time that the matter was heard in November 2019. HS had not seen PS since February, although the police closed their investigation into whether or not he sexually assaulted her in March 2019. The local authority's plan was for PS to remain at the Care Home permanently, and she saw her daughter, DB, approximately three times a week.

The medical evidence adduced by the local authority was that PS did not have insight into her dementia and the impact it had on her memory, orientation and visual perception. She was said to be very disorientated with respect to time and intermittently with respect to space. She had comparatively well-preserved social skills and language but she had significant cognitive impairment, which markedly fluctuated during the day and from day to day. The local authority's case was that PS did not know who HS was, did not realise that he was her ex-husband, and that when she was seeing him in 2018 and early 2019 she exhibited anxiety about this 'man' being in her house. The Official Solicitor, as PS's litigation friend, supported the local authority application on very much the same grounds; the Official Solicitor noted that PS had been pleased at times to see HS, but this was without cognisance of who

[3] Katie having been involved in the case, she has not contributed to this case report.

he was, and was not consistent.

Judd J noted that HS appeared to accept PS's diagnosis, but because he had not been able to see her since February he found it difficult to appreciate her current state and did not readily accept the evidence of others who had seen her. He stated that when he was still seeing her in February and before, she was capable of conversing lucidly for extended periods of time. He said that she was pleased to see him when he went around to her house, and when he saw her by chance in Waitrose in March 2019. He found it very difficult to accept evidence that contact with him either did, or would distress her. He believed that she certainly did recognise him and know who he was. He wished to see her again, and felt that he would know then whether or not she wished to see him. He therefore opposed the making of any declaration as to capacity.

Judd J found that PS lacked capacity to make the decision as to contact with HS:

> *16. I am clear after hearing the social worker and DB that PS does not have capacity to make the decision as to contact with HS. She does not know who he is, and she is not able to appreciate the negative and positive effects that contact with him has upon her. She is not able to weigh up and retain information about what type of contact she could have and in what circumstances. There is no prospect that her capacity to make this decision will improve, and nor is there any way in which she could be assisted with this.*

This therefore meant that Judd J had:

> *24.* […] *to make the decision as to whether it is in PS's best interests to have contact with HS. I have come to the clear conclusion that it is not and that I should make an order to that effect. When she had capacity she did not want to see him other than very occasionally, and it seems impossible to believe that the values she held then would have changed now. I suspect that HS feels that the death of DS would have drawn them closer together, but that is very speculative. The fact that PS can demonstrate some superficial pleasure upon seeing HS is not achieved because of who he is but because she does not realise who he is. Also, the contact can cause her anxiety, as was demonstrated during 2018, 2019 and also after the chance encounter in Waitrose. PS's important relationships for the last 25 years have been with DB and DS when she was alive, and also with her son in law and her grandchildren. DB has been very close to PS for years, and her views about her mother's wishes, feelings and best interests deserve the greatest of respect.*

Comment

This is a clear example of a court seeking to work through systematically and carefully questions of capacity and best interests in the context of what could either have been a very significant interference with PS's rights under Article 8 ECHR, or a significant step towards upholding those rights. Another way of framing this in the language of the Convention on the Rights of Persons with Disabilities would be as a way of seeking to balance PS's will and preferences.

It is not quite clear from the judgment when the application was brought, in particular, whether it was

before or after PS was moved to the care home. As to whether and when such a move absent a court order would be lawful, see further here.

Finally, and perhaps unfairly, it is perhaps worth flagging up some of the language within the judgment relating to capacity. The medical evidence referred to PS's lack of "insight" into her dementia, and her disorientation with respect to time and space; Judd J referred to the fact that PS did not know who HS was and that she was not able to "appreciate" the negative and positive effects that contact with him has upon her. None of these aspects are, in fact, part of the functional test in s.3 MCA 2005 (to which Judd J then referred in her judgment, so there is no suggestion that she reached an unlawful determination). The 'translation gap' between the language of the Act and the language of (and phenomena encountered in) every day practice is striking, and is driving much of the current work of the Mental Health and Justice project.

RPRs, BIAs and legal aid

The London Borough of Hillingdon v JV & Ors [2019] EWCOP 61 (Senior Judge Hilder)

Article 5 ECHR – DoLS RPR

Summary

A 73 year old woman, JV, was subject to a Standard Authorisation for deprivation of liberty in her living arrangements at a care home, Care Home A. She had first been subject to a DoLS authorisation in respect of another care home, Care Home R. Her two children, whom she had appointed jointly and severally as her attorneys, supported the placement. Whilst at Care Home R, she had been supported by three different RPRs, two of whom had been selected by one of her attorneys, and the last, RV (her son), by the BIA.

The attorneys failed to pay the fees due. As a result, the placement was terminated. The London Borough of Hillingdon arranged for JV to receive 24 hour care in a Travelodge for a period of 4 days to avoid her being 'street homeless.' Thereafter, on 17th September 2019 she was placed at Care Home A as an emergency placement. An urgent authorisation having been granted, Hillingdon both took the matter to court under s.21A and granted a standard authorisation. Hillingdon appointed a paid RPR.

RV and his sister made an application for RV to be "reinstated" as JV's attorney, on the basis that Hillingdon had sought to remove RV as the RPR.

Having conducted a careful review of the provisions of Schedule A1 and the accompanying regulations, Senior Judge Hilder held that:

> *37. Schedule A1 and the regulations appear to conceive of the appointment of an RPR as specific to a particular standard authorisation, not as a general status such as may 'roll over' from one authorisation to the next. The wording of paragraph 139(1) of the Schedule envisages a fresh appointment with each granting of a standard authorisation, and regulation 12 provides that*

> *appointment "must be for the period of the standard authorisation." The explanation of the RPR role set out at paragraph 7.2 of the Code[1] seems to follow this approach, and so too did the Applicant Local Authority and the Second and Third Respondents in the series of three selections of RPR for JV whilst she was living at Care Home R.*

This meant, therefore, the appointment of a paid RPR upon granting the current standard authorisation in respect of JV's living arrangements at Care Home A was not a 'termination' of RV's appointment under the third authorisation in respect of Care Home R, but rather a fresh selection. RV had previously been appointed as RPR, but in respect of a completely different placement.

Senior Judge Hilder then had to examine the basis upon which the paid RPR had been appointed, in circumstances where regulation 6 of the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representatives) Regulations 2008, SI 2008/1315 provides that, if the BIA determines that the relevant person does <u>not</u> have capacity to select the RPR but has either a deputy or an attorney with authority to do so, pursuant to Regulation 6 that attorney or deputy may select the RPR, including potentially him/herself. There is fallback provision if the attorney or deputy does not wish to make the selection. After a further review of the (complex) regulations, Senior Judge Hilder concluded that the BIA had erred:

> *67. Having come to the view that she could not confirm RV's selection of himself as RPR because he did not appear to her to meet the eligibility requirements, the Best Interests Assessor should have invited RV to make another selection. That did not happen. It was not open to the BIA either to choose the RPR, or to notify the supervisory body that she had made no selection. Therefore the circumstances of regulation 8(5) have not arisen, and it was not open to the supervisory body to select for appointment a paid RPR.*

Senior Judge Hilder noted that one of the arguments advanced on RV's behalf was that

> *64. Effectively therefore, in pointing out that "Removal of the RPR would mean that he would be unable to apply for legal aid" the suggestion is that, if RV was the appointed RPR, he would be entitled to public funding for representing his own position, not for representing JV (whose litigation friend, presently at least, takes a different position.) None of the parties before me has made any detailed submissions as to whether this suggestion is in fact the correct interpretation of the Civil Legal Aid Regulations. I make no assumptions on that point. Mr. Boden asserts simply that funding issues are irrelevant to the approach to be taken to the selection of the RPR.*
>
> *65. Of course the court recognises the importance of access to legal representation for all litigants, and is slow to reach any conclusion which closes a possible avenue of funding such representation. However, in so far as there may be an issue about whether an RPR who is not acting as the litigation friend of the person deprived of their liberty is nonetheless entitled to public funding for his own representation in s21A proceedings, that issue is clearly not within the jurisdiction of the Court of Protection. More immediately, I can find no basis for disagreeing with Mr. Boden's submission* [on behalf of the local authority] *that access to funding is not a relevant consideration for selection of an RPR.*

She therefore concluded that:

> *69. The primary function of the RPR in this matter has been discharged already, in that proceedings are already before the court in respect of the standard authorisation. In so far as an RPR has a wider remit than that, it seems to me to fall within the range of tasks which RV can anyway discharge as JV's son and within the active authorisations of also being her welfare attorney.*
>
> *70. JV's position is appropriately secured by being party to these proceedings in her own right, and the appointment of the Official Solicitor as litigation friend for her. Wider issues of entitlement to public funding are outside the jurisdiction of this court, and not relevant to selection of an RPR in accordance with the regulations.*

Comment

DoLS may be towards the end of its life, but the regime is not quite dead yet (and will, in any event, continue to run for a period in parallel with LPS when the latter comes into force). This judgment is therefore helpful confirmation of how BIAs should consider questions of appointment of an RPR where there is a welfare attorney (or deputy) in play. It therefore reads as a useful follow-on to the judgment of Baker J in *Re AJ* [2015] EWCOP 5, in which guidance was given as to how to determine whether a proposed RPR was eligible.

Further, and whilst we do not know from the judgment why Hillingdon brought the application itself, they should be commended for doing so because that ensured (as the case then fell under s.21A) that JV would be entitled to non-means-tested legal aid. It made no difference to Hillingdon to take this route to seek consideration of JV's position. But had they sought decisions and declarations about JV under the provisions of s.16, any eligibility for legal aid would have been means-tested and, on the facts of this case, it looks most unlikely she would have received it.

Short note: finding the right balance with constrained resources

The decision in *AG v AM and Others* [2020] EWCOP 59 is a useful reminder of the distinction between public law decisions and best interests decisions (the Court of Protection having jurisdiction over the former but not the latter) and the way in which, in practice, public law decisions may limit significantly the best interests decisions that can sensibly be made.

In summary, the case concerned a s.21A challenge to a DoLS authorisation and the two available options were: (i) P remaining in the nursing home where he was residing at the time; or (ii) P returning home with a package of care funded by the CCG. However, the CCG was not prepared to keep P's place at the nursing home open while the home care option was trialled. Moreover, the home care option relied on standard GP services – the CCG was not willing to provide enhanced GP services.

From the outset DJ Eldergill recognised that:

> *…there is a limit to what the NHS can or is willing to spend on care at home as an alternative to care*

> *in a nursing home.* […] [P]*rovided they do not act so irrationally as to be unlawful, etc, it is NHS bodies, local and other public authorities – not judges – who decide how to allocate their limited resources between the local citizens for whom they must provide.*
>
> *I accept that this court cannot direct a local authority or NHS body to provide services which they have assessed that AM does not require or which they have decided at their reasonable discretion not to provide.*

As such, he was limited to the available options. This meant that although DJ Eldergill indicated that he would have wanted to trial the home care package (while keeping P's current nursing place open), this course of action was not open to him.

The decision is also a useful example of the balance sheet analysis, with the Judge considering in detail the advantages and disadvantages of the two available options as a means of reaching his final conclusion on best interests. In short, the Judge found that the home package had much to commend it, including the provision of care by loved ones, cultural familiarity (P was originally from Somalia), visits from friends and neighbours, as well as being a significant package of care. However, the critical factor weighing against P's return home was that under the package offered by the CCG, P would have to rely on standard GP services for his medical care (whereas at the nursing home 24 hour medical support would be available). The likely consequences for P of this reduced medical input included an increase in the number of hospital admissions as well as an increased risk of premature death. DJ Eldergill considered the seriousness of this issue to be underlined by the fact that none of the local GP practices with whom P's case had been discussed had expressed a willingness to register him as a patient (even if the CCG could ultimately compel them to do so). In such circumstances the judge concluded: "*…I believe that granting AG's application carries a significant risk of her husband losing his place and current quality of life at X Nursing Home without there being a corresponding 'risk of gain' which justifies the risk of harm*."

Improperly resisting a deputy application

TQ v VT [2019] EWCOP 68 (HHJ Clayton)

Deputies – welfare matters

Summary

This case concerns an application to be appointed personal welfare made by VT's former professional care worker, TQ. It provides a salutary warning against poorly considered decision-making based on blanket policies.

VT was a severely disabled young man who suffered from Lennox-Gastaut syndrome, a severe form of epilepsy as well as severe global delay. He had learning disabilities and could not walk; some of his difficulties were considered likely to have arisen as a result of neonatal drug addiction.

At the time of the application, VT was 18. His mother had never been able to care for him and had died in 2015. He had never known his father. His aunt had looked after him from birth, but had died in 2013 when P was 12. He did not have relationships with any other family members, his siblings having variously been adopted or placed in special guardianship.

In 2014, the First Respondent Birmingham Children's Trust ('BCT') obtained a care order to have VT placed in a residential care home. Here he met TQ who was appointed his key worker and developed a particular attachment to him, manifested in, among other things, taking him on holiday to Disneyland Paris.

In March 2019, having turned 18, VT was moved by BCT to a new adult placement. TQ, wishing to maintain her relationship of care with him, and in light of his having effectively no other family support, made an application to be appointed is personal welfare deputy. Following this application, between April and June 2019, there was no contact between TQ and VT.

At a hearing in June 2019, the court made an interim order under s.48 MCA 2005 that VT lacked capacity to make decisions regarding contact and that it was in his best interests to have contact with TQ on notice. The court made concomitant orders against BCT and the CCG responsible for funding his care to provide statements setting out why TQ's deputyship was opposed including any evidence and reasoned best interests analysis for this and every other decision made on his behalf since his 18th birthday.

In light of what the judgment describes as 'poor quality' written evidence, oral evidence was required. Neither resisted the appointment of TQ as deputy per se but both insisted on serious restrictions to her appointment. BCT and the CCG both gave oral evidence, at the conclusion of which both withdrew their objections to the application.

BCT and the CCG's evidence was, in the submission of the OS which the court adopted in full, 'there was a need to bring the relationship between TQ and P to an end for no other reason than the pursuit of a "policy" that professional relationships are time bound.' (para 16). This 'rigid' thought process, guided entirely by the belief that it was inappropriate to blur the boundaries between a professional carer and friend resulted in what the court considered to be ill thought-through and indefensible decision making, by both the statutory bodies and the care home which rejected TQ's desire to visit as a non-relative as "a nonsense".

The Official Solicitor made an application for her costs which were awarded against both parties, HHJ Clayton observing:

> 22. […] *there was a pursuit of a flawed policy by both BCT and the management at Placement 1 and that the CCG, in failing to challenge the decisions taken acquiesced in them. The pursuit of this policy was a fundamental flaw. It infected the decision making of BCT, the CCG and Placement 1. The pursuit of the policy resulted in the requirements of section 4 of the MCA being ignored. The policy became the only factor in determining P's best interests on issues surrounding his ongoing*

relationship with TQ. To fail to consider the benefit to P of TQ spending time with him, helping to stimulate him, feed him, talk to him and to show her genuine care of him, when he had no other single person in his life who was willing to do that, outside of a professional relationship which had commenced in 2018 or 2019, was bewildering and shocking.'…

[…]

24. The Mental Capacity Act Code of Practice sets out precisely what should be recorded by those professionals involved in the care of a person who lacks capacity when working out the best interests of that person for each relevant decision. Records should be made of how the decisions were reached, why the decisions have been taken, who participated and what particular factors were taken into account. The record should remain upon the person's file.

25. The failure to comply with the MCA 2005 was not a technicality. It led to a wholesale failure of best interest decisions in respect of P as to his contact with TQ; a failure to include TQ, as a person important to P, in the decision making process; a lack of structure in any decision making as to whether TQ should be appointed as P's PWD; failure to make timely decisions as to repair of damage furniture in P's bedroom, to order a new hoist sling to replace the damaged one being used, to agree funding for his sleep system which he had been assessed to need; failure to apply for authorization of his deprivation of liberty under schedule A1 MCA 2005 prior to his move to Placement 1 so that he was unlawfully deprived of his liberty and without the protection of the Deprivation of Liberty Safeguards for a period of time.

26. It was no surprise once the extent of the failings became clear that the BCT and CCG withdrew their opposition to TQ being made PWD without limit save for medical issues. The benefit to P of her being appointed PWD is obvious following the failings of the BCT and CCG as I have described. It is clear, too, that she has demonstrated an unwavering commitment to P and his right to have his voice heard. Without her application it is a voice that would continue to have been lost. I cannot praise her highly enough for her quiet, selfless and dignified determination. I have no hesitation in appointing her PWD.

[…]

28. […] *I cannot escape the inevitable conclusion that this application was only made by TQ as a result of P's rights being violated and her despair at the failings of the system, of which she knows a great deal, as a professional carer for P previously and a continued professional carer for other young people lacking capacity. I have considered Part 19(5) of the COP Rules and noted that I may depart from the general rule that there is usually no costs ordered in welfare decisions when taking account of certain factors. I have described in detail the failings before and during the proceedings. I have taken account of the change in position by the parties without the requirement for TQ to give evidence, with only their own evidence causing the BCT and the CCG to decide TQ's application should not be opposed. I have come to the conclusion that the costs of the OS should be born in full by the BCT and CCG in equal shares.*

Comment

Unfortunately, the parties having agreed the legal framework, there is no further analysis of the law, save for a reference to Hayden J's decision in *Mottram, Lawson and Hopton (Re: Appointment of Welfare Deputies)* [2019] EWCOP 22 – but no further consideration on what that judgment might mean in terms of general application. It is significant that HHJ Clayton referred to the application as being unusual and having been made "*as a result of* [VT's] *rights being violated and* [TQ's] *despair at the failings of the system*" (para 28). VT was transferred to a new placement without a standard authorisation in place and with no formal capacity assessment on best interest decision-making. This case should not, we suggest, be viewed as setting any precedent for care workers generally taking on roles as personal welfare deputies for 'Ps' who have been in their care as minors.

What this judgment is useful for, however, is demonstrating the importance of maintaining focus on P's best interests throughout rather than being guided by blanket policies. It is also useful for demonstrating the importance of thorough and effective written evidence. Witness statements in the case were criticised for being served in bullet points, unsigned, and lacking in detail and analysis. HHJ Clayton observed that had the information required been set out appropriately in written evidence it was likely that those involved would have realised prior to the hearing that the case was unusual and that there was a real need for P to have a personal welfare deputy.

Short note: DoL and PVS

The permission decision in *Chadha v HM Senior Coroner for West London* [2017] EWCA Civ 2710 was considered in November 2017 although it has only recently appeared in the public domain on www.bailii.org. Timewise, it was decided between the first instance decision and Court of Appeal decision in *R (on the application of Ferreira) v HM Senior Coroner for Inner South London* [2015] EWHC 2990 (Admin) and [2017] EWCA Civ 31.

In summary, Mr Chadha applied for permission to appeal against an order of Sir Stephen Silber dismissing his application to apply for judicial review of the Coroner not to investigate the death of his wife. The claimant's wife, Mrs Chadha, had been in a persistent vegetative state in hospital for four years before she died. The Coroner decided to discontinue his investigation because of a natural cause finding of death and there being no other reason to continue his investigation. Mr Chadha argued that there were three reasons to suspect that Mrs Chadha had been in "state detention": (1) she had been in a persistent vegetative state for four years and this was, therefore her living state, (2) two nurses regarded the hospital as "detaining her", and (3) Mr Chadha had attempted to have his wife removed from the hospital but the hospital would not agree.

Lady Justice Sharp refused permission on the same grounds as Sir Stephen Silber and Simon LJ who had refused permission to appeal on the papers. The court found that Mrs Chadha was not confined by compulsion; she was simply unable to move and was receiving essential medical care in hospital. The fact that she did not have capacity to consent to treatment and was being treated on a "best

interests" basis did not mean that she was being compulsorily detained by a public authority. Although it was not clear whether there was a deprivation of liberty authorisation in place at the time of her death, even if there was, it would not mean that she was in fact deprived of her liberty. In reality, she was not being kept confined; she was simply unable to leave hospital in the time she was taken there after her injury. Sharp LJ does not seem to have addressed the third contention advanced by Mr Chadha, namely that he was prevented from removing his wife from hospital.

Association of Anaesthetists award for Alex

His fellow editors congratulate Alex on being awarded a 'Foundation Award' from the Association of Anaesthetists of Great Britain and Ireland for his work supporting the Association in the development of guidance.

Dr Steve Yentis, Consultant Anaesthetist, said of Alex:

> The Association is both fortunate and grateful for the hard work that he has devoted to all those working in the field in general, and to the Association in particular, for which he truly deserves the honour of a Foundation Award.

Alex received his award at the Association's Winter Scientific Meeting 2020 which took place in January.

PROPERTY AND AFFAIRS

Death of the former Master of the Court of Protection

With thanks to former Senior Judge Lush for informing us, we are sad to report that Mrs Anne Bridget ('Biddy') MacFarlane, died on Sunday 24 November 2019. She was 89. She was the first female County Court Registrar (District Judge) in England & Wales, and was appointed as Registrar of Bromley County Court in 1978. She became the first female Master of the Court of Protection (indeed, the first female Master in the Court Service) in 1982 and was also the first solicitor to be appointed to that office. She retired in 1995.

The OPG, investigations and costs

The Public Guardian v DJN [2019] EWCOP 62 (HHJ Marin)

CoP jurisdiction and powers – costs

Summary

In this case P executed an LPA and subsequently became incapacitous. The OPG became concerned about the actions of the attorney and also about whether P had capacity to execute the LPA and so issued proceedings to revoke the LPA on the grounds that P had lacked capacity to grant it and on the grounds of the attorney's alleged misbehavior. At the same time the OPG sought and obtained interim without notice orders suspending the operation of the LPA and appointing an interim deputy.

The attorney disputed the application on all grounds and, after a 2 day hearing, he was vindicated and the application dismissed and the interim orders discharged. The attorney had, however, incurred £82,000 in costs and the question arise as to who should pay.

The usual rule in property and affairs is, of course that P's estate pays. Rule 19.2 of the COPR 2017 sets out the general rule for costs in cases relating to property and affairs, namely:

> *19.2 Where the proceedings concern P's property and affairs the general rule is that the costs of the proceedings, or of that part of the proceedings that concerns P's property and affairs, shall be paid by P or charged to P's estate.*

Rule 19.5 provides that:

> *(1) The court may depart from rules 19.2 to 19.4 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances including –*
>
> > *(a) the conduct of the parties;*
> > *(b) whether a party has succeeded on part of that party's case, even if not wholly successful; and*
> > *(c) the role of any public body involved in the proceedings.*
> > *(2) The conduct of the parties includes –*

> *(a) conduct before, as well as during, the proceedings;*
> *(b) whether it was reasonable for a party to raise, pursue or contest a particular matter;*
> *(c) the manner in which a party has made or responded to an application or a particular issue;*
> *(d) whether a party who has succeeded in that party's application or response to an application, in whole or in part, exaggerated any matter contained in the application or response; and*
> *(e) any failure by a party to comply with a rule, practice direction or court order.*
>
> *(3) Without prejudice to rules 19.2 to 19.4 and the foregoing provisions of this rule, the court may permit a party to recover their fixed costs in accordance with the relevant practice direction.*

In this case, the court ordered that the OPG should bear its own costs and 50% of the attorney's costs. There were a number of reasons for this, summarized at paragraphs 47-58 of the judgment as follows.

> *47. It was abundantly clear at the outset that the real issue was JN's capacity at the time of the sale of his property.*
>
> *48. Accordingly, before commencing proceedings the Public Guardian should have reviewed the capacity evidence. In my judgment, had he done so with care, he would have concluded that it was weak. Indeed, even the Special Visitor's report was guarded.*
>
> *49. Nonetheless, the Public Guardian was content to commence proceedings solely on the basis of the desk-top evaluation of the case carried out by an investigator. I am clear that this led to proceedings being issued which went beyond what was necessary and reasonable.*
>
> *50. The Public Guardian should have appreciated the obvious deficiencies in the capacity evidence. He could have invited DN to agree to a joint expert being instructed to consider the matter before issuing proceedings so that he could consider his position carefully or he could have issued proceedings and asked the court to adjudicate only on the issue of capacity. Instead, he embarked upon litigation which sought a range of reliefs and orders.*
>
> *51. It is particularly concerning that the Public Guardian sought without notice orders of a very serious nature, namely the suspension of the LPA and the appointment of an interim deputy.*
>
> *52. This approach completely ignored the fact the DN was co-operating with the Public Guardian and had offered to place monies in an account to cover all care costs.*
>
> *53. It is not surprising that interim orders were made on paper given that the tenor of the application and evidence in support suggested serious wrong-doing on the part of DN that required a response from the court. This did not though reflect the reality.*
>
> *54. At the very least, the application for interim orders should have been on notice to DN. Had this happened, the court would have had a fuller picture and the case could have been directed on a path to address the real issues that arose. My view is that the application for interim orders should never have been made; that it was reflects the lack of consideration given to this case by the Public Guardian.*

> *55. What flowed from the interim orders was acrimonious litigation with DN defending every issue raised against him and the appointment of an interim deputy which caused further acrimony and litigation costs, as well as achieving next to nothing for JN at a high price for which he ultimately had to pay.*
>
> *56. The Public Guardian adopted what seemed to be a standard approach to litigation based on his approach to other cases. This was a serious failure especially when rule 1.4 COPR 2017 expects litigants to comply with the overriding objective. This obligation applies equally to the Public Guardian.*
>
> *57. His approach also seemed strange in the context of JN having told Dr C that he was upset about the investigation of DN and the history of joint financial dealings between JN and DN at times when JN had capacity.*
>
> *58. This all amounts in my judgment to a good reason to depart from the normal costs order especially having regard to rules 19.5(2)(a) to (c). I accept Ms Galley's criticisms in this regard.*

Comment

Orders for costs, especially against public bodies whose task it is to investigate and protect the interests of those lacking capacity, are unusual but this case illustrates the type of behaviour that might give rise to such an order. On a procedural point, the interim orders (which were of draconian effect) were made without notice and without a return date for their reconsideration (although there was a liberty to apply). In other jurisdictions in such circumstances a return date is mandatory.

Testamentary Capacity. *Banks v Goodfellow* (still) rules

There has been some debate about whether the courts, when assessing a deceased testator's capacity to make a will proof of which is being sought, should continue to apply the test in *Banks v Goodfellow* (1870) LR 5 QB 549 namely:

> *It is essential … that a testator shall understand the nature of his act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.*

Or apply the MCA test of capacity. So far, the courts have held Banks is still the correct test. The latest example of this is *Todd v Parsons and others* [2019] EWHC 3366 (Ch), a decision of HHJ Matthews sitting as a judge of the Chancery Division, where the point was not argued though one of the parties reserved the right to argue it on appeal.

In a similar vein, the High Court in Northern Ireland determined a dispute about such capacity applying the *Banks* test in *Guy v McGregor and others* [2019] NICh 17. Along the way, there was a helpful

discussion about the weighing of relevant evidence as follows at paragraphs 10-15 per McBride J.

> *10. The burden of proof as to testamentary capacity was conveniently summarised by Briggs J in Re Key (Deceased) [2010] EWHC 408 (Ch) as follows at paragraph 97:*
>
> *The burden of proof in relation to testamentary capacity is subject to the following rules:*
>
> > *(i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity.*
> >
> > *(ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.*
> >
> > *(iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless: see generally Ledger v Wooton [2008] WTLR 235, paragraph 5, per Judge Norris QC."*
>
> *The standard of proof is on the balance of probabilities.*
>
> *11. The test for testamentary capacity set out in Banks v Goodfellow is not a medical test although the court will pay particular attention to and will generally be greatly assisted in most cases by expert medical opinion. The court will however also take into account and give weight to the evidence of drafting solicitors and lay witnesses who knew the testator.*
>
> *12. Obiter dicta in some recent cases has given rise to academic debate about whether there is a hierarchy of evidence in cases where capacity is disputed. In Hawes v Burgess [2013] EWCA 94 Mummery LJ compared the view of an expert medical witness who had never met the testator, unfavourably against the first hand opinion of an independent experienced solicitor. Mummery LJ stated at paragraph 60:*
>
> > *"My concern is that the courts should not too readily upset, on the grounds of lack of mental capacity, a will that has been drafted by an experienced independent lawyer. If, as here, an experienced lawyer has been instructed and has formed the opinion from a meeting or meetings that the testatrix understands what she is doing, the will so drafted and executed should only be set aside on the clearest evidence of lack of mental capacity. The court should be cautious about acting on the basis of evidence of lack of capacity given by a medical expert after the event, particularly when that expert has neither met nor medically examined the testatrix, and particularly in circumstances when that expert accepts that the testatrix understood that she was making a will and also understood the extent of her property".*
>
> *13. The comments made by Mummery LJ were strictly obiter. They have however been the subject of academic criticism, not least by the authors of Theobald On Wills who note that the value of the view of a busy solicitor, lacking in medical training should not be overstated. They also note that numerous solicitor-drafted wills have been held to be invalid on the grounds of testator incapacity.*

14. In my view, in determining whether a testator has capacity the court must consider the evidence of all the witnesses including the medical experts, the drafting solicitor and the other lay witnesses. The weight to be given to each type of evidence will depend upon a number of factors, including the witness's expertise, knowledge, experience and independence. In some cases the assessment of a medical expert may be limited by the fact he has never met nor examined the testator and there are limited medical notes and records available to him, for example in respect of the severity of the testator's speech problems or memory loss as of the date of execution of the will. In such cases the weight to be attached to the medical evidence may be significantly less than that attached to the evidence of an experienced solicitor who knew the testator well or who carried out a specific assessment of capacity at the date of execution of the will. In other cases the nature of the medical evidence may be such that it outweighs the evidence of even an experienced solicitor. In general the weight to be attached to the view expressed by a solicitor as to capacity will depend on that solicitor's experience, his knowledge of the testator, and the nature of any assessment carried out by him in respect of capacity. The weight to be attached to the evidence of lay witnesses will generally depend on their independence, experience and knowledge of the testator. In cases where there is a divergence in the views of the expert medical witnesses or where there is a paucity of medical notes and records, the evidence of lay witnesses who can give detailed evidence of the testator's behaviour, demeanour and activities around the time of the execution of the will, by reference to conversations they had with the testator or in respect of activities conducted by the testator at the relevant date, will be of much assistance and will be given great weight.

15. Accordingly, I consider that there is no hierarchy of witnesses. Each case will be fact specific. In some cases the medical evidence will be the weightiest factor. In other cases the evidence of the solicitor will be of magnetic importance and in yet other cases the evidence of the lay witnesses will be decisive."

OPG blog on LPA applications and common mistakes:

The OPG published on 10 January 2020 a blog entitled "Get it right the first time - hints and tips to help you complete your LPA application."

It is a useful read and includes the top 8 errors and how to avoid them, namely:

- Missing and mixing pages
- Signing the application in the wrong order
- Family members as certificate providers
- Using initials instead of full names and not signing in the appropriate boxes
- Pencil, Tippex and photocopies
- Bound applications
- Being unclear in the life sustaining treatment section

- Contradictions in instructions and appointment types

E-filing for professional deputies

Professional Deputies who are appointed by the Court of Protection are required to submit estimates of costs and bills for assessment at the end of a reporting period. From Monday 20 January 2020, deputies have been required to send a Bill of Costs, N258 and authority to assess (deputyship order) through the e-filing system in PDF Format. For more details, see here.

The National Will Register

[*We are pleased to include here a guest article on behalf of the National Will Register, highlighting the importance of Will searches, not merely in relation to probate disputes, but also in relation to decisions about property and affairs, as well as health and welfare, for living individuals with impaired capacity*]

The National Will Register (operated by Certainty and endorsed by the Law Society of England and Wales), plays a crucial role in the work of those involved in applying for Statutory Wills, or who need to expedite their Property and affairs, and Welfare deputy and attorney responsibilities with the utmost due diligence.

The SRA Ethics Guidance Access to and disclosure of an incapacitated person's will states that the Will forms part of the financial affairs belonging to the donor and highlights scenarios of possible adverse outcomes which can occur without knowing the contents of the Will.

Having knowledge of the contents of the will and/or codicils(s), means that the attorney or deputy is in a position to act in the best interests of the person, to make appropriate investments; apply to the Court of Protection for an order to save a specific legacy, create a Statutory Will, dispose of an asset or arrange for safekeeping and storage of the asset.

The content of an existing or past Will will help to avoid adverse outcomes, and to understand the emotional mindset and relationships of the person both in property and affairs, and in relation to their welfare. What is the impact of a financial decision, for example, regarding the cost and location of a care home upon the welfare of the person? Notionally, financial decisions can have an impact on the wellbeing of the person, so it is important to understand the mindset and relationships of P/donor, and as former Senior Judge Lush has said "I can think of no written statement that is more relevant or more important than a will" in determining a person's wishes and wishes for purposes of s.4(6) MCA 2005 (*Re Treadwell decd* [2013] WTLR 1445).

We understand that the Official Solicitor recommends that a Will Search should be conducted in appropriate cases for Statutory Will applicants. The Official Solicitor will require an exhaustive search of the existence of any unknown Will(s) prior to the creation of a Statutory Will and be satisfied that the Will presented is the last Will. Certainty, the National Will Register, has created a new digital portal for Statutory Will applicants.

Where it is thought that the person did not have a Will it is important to undertake a Will search to ensure an unknown Will has not indeed been registered with the National Will Register or is being stored with a law firm or Will writer.

It is therefore essential that professional and lay deputies and attorneys are aware of the service the National Will Register's Certainty Will Search provides, in order to ensure Will search due diligence and the ability to honour the wishes of the testator, as far as is possible, both in life as well as in death.

Deputies and attorneys can conduct a Certainty Will Search via the Certainty website.

PRACTICE AND PROCEDURE

Serious Medical Treatment – Practice Guidance

The Vice-President of the Court of Protection, Hayden J, has published guidance on serious medical treatment applications in the Court of Protection. It covers (1) situations in which consideration must be given as to whether an application should be made and (2) the court's expectations in relation to the making and progress of an application. It is expressly designed to operate until such time as it is superseded by the revised Code of Practice to the Mental Capacity Act.

Not only inimical… but potentially fatal: medical treatment cases and delay

Sherwood Forest Hospitals NHS Foundation Trust & Anor v H [2020] EWCOP 5 (Hayden J)

Best interests – medical treatment – Practice and procedure (Court of Protection)

Summary

This latest example of delay in bringing and then resolving an application relating to medical treatment was "*not only inimical but* […] *potentially fatal*" to the person in question. It concerns a 71 year old woman, Mrs H, living with her daughter, Miss T. Mrs H suffered from squamous cell carcinoma ('SCC'), which had manifested on the left cheek. The recommended treatment is surgical excision which will require a general anaesthetic and free skin flap to cover the affected area. Mrs H had first became aware that all was not well with her, in mid to late 2018. She sought the advice of her General Practitioner in October 2018 and she made a referral for treatment to the Sherwood Forest Hospitals Trust. Mrs H had had episodes of mental ill health, including, most relevantly, that:

> *7. In 2014 Mrs H was admitted under the Mental Health Act, to two successive mental health units. She continued treatment under section 2 and section 3 of that Act, until 24th December 2014. It was at that stage that she was diagnosed with Bipolar Disorder and treated with olanzapine and valproate. I have been told, convincingly, that whilst she was in hospital, she effectively deceived the medical establishment into believing she was taking her medication when in fact she was not. The discharge summary in the medical records describes paranoid and persecutory feelings. It is plain that this period of detention in hospital had, in itself, a very negative effect on Mrs H and, it may in part, explain why, upon receiving her diagnosis, she refused effectively to engage with it.*
>
> *8. Mrs H is described by virtually all who have encountered her but, most particularly by her daughter, as* "proud and stubborn". *It is obvious that she can be very combative when confronted with beliefs which do not accord with her own. It is an important feature of the case that initially, when the diagnosis was conveyed to Mrs H, she appeared to accept it; but my impression from the papers is that that was a deception, not dissimilar to her pretence that she had been taking her medication. She expressed that she would consent to surgery, she engaged with the options for reconstruction and, she expressed interest in the cosmetic result. But that was as far as it went. She did not attend the appointments made to carry out the surgery and, it seems likely that her mental health*

deteriorated. She entirely rejected the diagnosis of cancer and she expressed herself to be of the strong view that a different doctor had told her the lesion on her face would resolve with the application of cream.

Importantly, Hayden J emphasised that:

9. […]. It does not, to my mind, follow automatically that having articulated an alternative diagnosis, which could not in fact be rooted in the evidence and, in refusing to contemplate cancer, one can extrapolate from that that she lacked the capacity to weigh up and evaluate the options. As Mr Pollock, the consultant plastic surgeon who gave evidence before me, observed, people react to such diagnoses in a wide variety of ways.

In May 2019, Mrs H was assessed as lacking the capacity to make decisions in relation to her medical treatment, but it was not until 20th December 2019 that an application was made to this Court actively to address her carcinoma. As Hayden J noted:

10. I do not doubt that all those involved in her care have been concerned to do the right thing for her, but it requires to be confronted that the delay in this case may mean that a life is lost that could well have been saved. That is quite simply a tragedy. It is also profoundly troubling.

[…]

13. One of the reasons that treatment was not progressed more effectively was that the treating clinicians were perplexed as to whether it was appropriate and if so in what circumstances for Mrs H effectively to be forced, physically and by coercion if necessary, to attend for her treatment and, if so, how that might be achieved. The reality, in my assessment of the chronology, is that this issue had been identified very clearly by April or, at the latest, May of 2019, and certainly following the capacity assessment on 30th May 2019. I have now, in a number of judgments, emphasised that whilst avoidance of delay is not incorporated into the framework of the Mental Capacity Act in specific terms, it is to be read into that Act as a facet of Article 6 and Article 8. It is self-evident and, indeed, striking, that time here was of the essence and delay was likely to be inimical to Mrs H's welfare.

[…]

32. The Mental Capacity Act creates what can both conveniently and accurately be described as a presumption of capacity and, where it is absent, imposes upon those best placed to do so, an obligation to deploy all reasonable options available to them in order to promote a return to capacity. A reasonable period before making an application might have been a week, two weeks, three weeks, but it was certainly not 6 months.

The position was then compounded by the fact that that there was a delay of almost a month until it could be heard by the court, as it was filed at the end of the court term – during that period, the growth on Mrs H's cheek had grew dramatically. In the circumstances, Hayden J encouraged reflection on behalf of the Official Solicitor as to how her appointment could be expedited in such cases; he also

read into the judgment (so it now forms part of the case-law), the guidance he had issued on 17 January on medical treatment applications. He reiterated (at paragraphs 16 and 17 of this judgment) the core points, namely that

> *16. […] is important, firstly to consider whether steps can be taken to resolve, if possible, the relevant issues without the need for proceedings but thereafter it has to be recognised that delay will invariably be inconsistent with P's welfare and, if resolution cannot be achieved, having particular regard to P's own timescales, then proceedings should be issued.*
>
> *17. If, at the conclusion of the decision making process, there remain concerns that the way forward is finely balanced, or if there is a difference of medical opinion, or a lack of agreement, or a potential complication of some kind, or if there is opposition, then it is highly probable, in those circumstances, that an application to the Court of Protection is appropriate and it is important that consideration* ***must*** *(I emphasise)* ***always*** *be given to whether an application to the Court of Protection is required.*

On the facts of the case, Hayden J found, with the assistance of Miss T's:

> *12.* […] *simple and unembroidered account of how her mother talks to herself and "hears voices", as Miss T puts it, she was able to help me unify the capacity assessments with her direct lay observations and arrive, with very little difficulty, at the conclusion that this is a woman who is simply unable to absorb and accept the diagnosis she has been given. T tells me that her mother's rambling monologues, throughout the night, are frequently a verbalisation of her emotional struggle to accept the diagnosis. In my judgment, it follows from all this that Mrs H is unable to weigh and evaluate the treatment options. That includes not only the potential for curative treatment but the palliative options too.*

As to her best interests, there were a number of options, of which the only viable one was surgical excision, even that not necessarily being viable. Hayden J noted that:

> *22.* […] *Mrs H has been sent an appointment card telling her to attend for treatment in a few days' time. She has not, for the reasons I have referred to, taken on board the scope and ambit of the diagnosis, but what is clear is that she finds this awful growth unsightly and, I sense, rather demeaning. She is also tired, which her daughter told me is often a precursor to deterioration of her mental health more generally. The growth has now very significantly, for all the reasons I set out, impacted on Mrs H's quality of life, which is desperately diminished. This combination of her tiredness, the unsightliness of her growth and the trust she has been able to place in Mr Pollock, has enabled a shift in her position. She now welcomes the treatment. That is not to say that she understands it, she is now prepared to engage with it, to remove the discomfort. It reflects her aspiration to be more comfortable. Sadly, it has to be recognised, as Mr Pollock did, that there is a real risk that intervention at this stage may now be too late.*

Having explained the key role of Mr Pollock, who had played an important role in drawing up the plan for her treatment with her daughter, Hayden J noted that:

> *35.* […] *whilst it was initially contemplated that Mrs H should be sedated and physically coerced into*

treatment, her acquiescence to the treatment is now likely to make that unnecessary. I emphasise that sedation remains the Trusts' fall-back position. It also requires to be highlighted that whilst Mrs H is physically acquiescent, she is not agreeing in any capacitous way. And so, her daughter and Mr Pollock have devised a plan, which is now reflected in the Care Plan, which is, in my judgement, both unusual as well as intensely sensitive.

36. When I first read the papers, I was concerned that Mrs H might be inveigled into serious treatment that she did not understand, in circumstances where there is no longer any plan to try and explain it to her. But as I have been able, through counsels' assistance, to drill down more deeply into the evidence, I have accepted that this is the appropriate and kindly way forward and one that respects, in different ways, Mrs H's dignity, her autonomy and the very grave circumstances that she finds herself in. The plan, I have concluded, is in Mrs H's best interests.

37. It is, and it requires to be recognised as, a different and more subtle form of coercion, but it is also, in my judgement, both proportionate and justified. I am particularly confident in endorsing it having heard the evidence of those who will be involved.

Comment

Deciding the point at which the Court of Protection should be involved is an exercise which is depressingly easy to identify in retrospect. In this case, it is unclear whether and when the team looking after Mrs H first thought that they might need to get the assistance of the court, but this case illustrates dramatically how important it is that doctors and other professionals are supported within their organisations to understand the points at which they need to consider an application (and, in turn, are then supported to bring that application).

On one view, of course, had Mr Pollock become involved in Mrs H's case at a much earlier stage than at the end of 2019, it might have been possible for the situation to have been resolved without the need for the involvement of the court, on the basis that those responsible for her could proceed on the basis of ss.5 (and 6, given the potential for restraint) MCA 2005. However, even with his earlier involvement, and with the support that he gave, Hayden J was no doubt right to consider that the (subtle) coercion that was to be exercised, together with the contingency planning for sedation, required approval by the court in any event.

Contingencies, capacity and Caesarean sections

GSTT & SLAM v R [2020] EWCOP 4 (Hayden J)

Mental capacity – fluctuating capacity – medical treatment

Summary

In this case, Hayden J has come back to the extremely thorny question of what the court is meant to do where it is confronted with the position that the person before it currently has capacity to make the relevant decision(s), but has clear evidence that under some circumstances they may not to do. A

number of recent judgments (in particular that of Francis J in United Lincolnshire NHS Hospitals Trust v CD [2019] EWCOP 24) have grappled with this question, but Hayden J's judgment is by the fullest consideration of the position.

Hayden J had been required to determine at very short notice, an application concerning R who, on the day he determined the case, was 39 weeks and six days into her pregnancy. She had a diagnosis of Bipolar Affective Disorder which was characterised by psychotic episodes. R was detained in a psychiatric ward which fell within the jurisdiction of South London and Maudsley NHS Trust; GSTT was the Trust responsible for R's obstetric care. Given the urgency of the application, Hayden J had given his decision on the spot, on the basis of certain key facts:

> *2. […] All the treating clinicians agreed: R had capacity to make decisions as to her ante-natal and obstetric care; there was a substantial risk of a deterioration in R's mental health, such that she would likely lose capacity during labour; there was a risk to her physical health, in that she could require an urgent Caesarean section ('C-section') for the safe delivery of her baby but might resist.*

Procedurally, the position was problematic, because Hayden J had been in the "entirely invidious position" of having to determine applications which have an obviously draconian complexion to them, in circumstances which were far from ideal. There was not time to appoint the Official Solicitor to represent R, although the Official Solicitor was able to act as Advocate to the Court, a role "*which involves very different obligations and is not to be conflated with the role of the Official Solicitor as litigation friend*." However,

> *6. […[self-evidently, a decision had to be made. I was satisfied that the application was well founded and that the declarations contended for met R's best interests. I do however deprecate the delay in bringing the application. The delay was avoidable but perhaps not so starkly so as first appeared. It became clear to the applicants, only ten days before the August hearing, that R had stopped taking her anti-psychotic medication. This manifestly required a re-evaluation of the risk and the need to reassess the birth plan.*

Hayden J made declarations under s.15 MCA and pursuant to the inherent jurisdiction of the High Court to the effect that R currently had capacity to make decisions regarding her obstetric care and the delivery of her baby, and that in the event that she came to lack that capacity, it would in her best interests for care and treatment to be delivered in accordance with the care plan before the court including, if required, to deprive her of her liberty.

However, Hayden J had been concerned at the time as whether the declarations that he had made fell properly within the scope of s.15 MCA 2005 or fell to be made under the inherent jurisdiction of the High Court. He therefore required further written submissions from the applicant Trusts and the Official Solicitor as Advocate to the Court:

> *11. […] in order that I could properly identify the framework of the applicable law with greater clarity. It is axiomatic that if anticipatory declarations are to be made relating to the capacitous and which*

have the effect of authorising intervention and/or deprivation of liberty at some future point where there is unlikely to be recourse to a court (following a subsequent loss of capacity) that should be rooted very securely in law.

In fact, however, R:

> *12. […] did not give birth until 8th September 2019. She was cooperative throughout the labour and her healthy child was born by spontaneous vertex vaginal birth. There was, as it transpired and as R had always asserted would be the case, despite the cogent medical concerns, no need for a caesarean. This was her sixth child and such records as were available indicated that C section had not been necessary in the past. I have been told that the police attended and a Police Protection Order (PPO) was issued followed by Local Authority applications for an Emergency Protection Order (EPO) and an Interim Care Order (ICO).*
>
> *13. Of course, these developments render my earlier concerns somewhat academic. Nonetheless, I granted these draconian orders and they require, properly to be justified in law. Moreover, they should, in my judgement, be clarified properly for future cases.*

The judgment is necessarily complex, but can be reduced to the following key points in terms of jurisdiction.

First: it is never proper for the court to make a decision under s.16 in respect of a person who **currently** has capacity. Not only did Hayden J consider that explicit wording of s.16(1) specifically and unambiguously curtails the ambit of the section, empowering the court to exercise a jurisdiction under s.16 in respect of a person who does not lack capacity but, who may lose on some future contingency, would be infringing the cardinal principle of s.1(2) MCA 2005 i.e. that a person is not to be treated as unable to make a decision, unless all practical steps have been taken to help him to do so without success. Logically, such steps could not have been taken with an individual who remained capacitous at the time of the application;

Second: conversely, there is no such limitation in s.15(1)(c), so that the court is able to declare whether an act yet to be done (in respect of a person who currently has capacity to make the decision) will be lawful or not. As Hayden J noted, there is:

> *35 […] the recognition within the Act that capacity might be 'fluctuating' and, further, that various strategies may be deployed to enable an incapacitous individual to achieve capacity in a particular sphere of decision taking, where properly and appropriately assisted. This may require the salient issues to be distilled into a format which resonate more comfortably with P's own experiences in life and his personal characteristics. It may, in different circumstances, involve a change, perhaps even temporarily, to P's medical regimen. In another context it may involve the appointment of an intermediary e.g. to assist in achieving capacity to litigate. All this recognises that 'capacity' is not a static concept. It follows that, inevitably, this Court will find itself involved in situations in which an individual may have capacity to take decisions on some issues but not on others and facing circumstances where P may be able to take decisions on one day that he is unable to on another.*

> *Manifestly, it is neither practical nor desirable for the Court to resolve questions of fluctuating capacity on a day to day basis. It may, depending on the individual facts, have to make orders which anticipate a likely loss of capacity if it is going to be able to protect P efficiently.*
>
> *36. Any declaration relating to an act* 'yet to be done' *must, it seems to me, contemplate a factual scenario occurring at some future point. It does not strain the wording of this provision, in any way, to extrapolate that it is apt to apply to circumstances which are foreseeable as well as to those which are current. There is no need at all to diverge from the plain language of the section. In making a declaration that is contingent upon a person losing capacity in the future, the Court is doing no more than emphasising that the anticipated relief will be lawful when and only when P becomes incapacitous. It is at that stage that the full protective regime of the MCA is activated, not before.*

Third: the power to make declarations of lawfulness under s.15(1)(c) does not extend to authorisation of deprivation of liberty, because the MCA itself limits the circumstances under which it can be used for these purposes. Drawing upon the previous decision of Baker J (as he then was) in *An NHS Trust v Dr A* [2013] EWHC 2422 (COP), Hayden J held that it would, however, be lawful to use the inherent jurisdiction to authorise a deprivation of liberty in such circumstances, because the wording of the MCA would otherwise leave a gap:

> *44.* […] *Having concluded that Section 15 (1) (c) is apt to authorise contingent declarations, it would be rendered nugatory if there were no mechanism to authorise the contemplated intervention as being lawful. This is, to my mind, a paradigmatic situation for recourse to the inherent jurisdiction.*

On the facts of the case itself, Hayden J noted that:

> *56. The mother in the case before me was reported as having told medical staff that a caesarean section would be 'the last thing she would want'. People use this phrase loosely, frequently it means it is something they would never want. It can also be interpreted very literally as being an option only to be contemplated 'last' of all. I do not consider that it would be morally or intellectually honest of me to give it the latter construction. I think that would be to distort the essence of the evidence and the impression of the mother's wishes that the medical staff were interpreting and which generated this application. It is, I think, important to acknowledge, as others have done, that judges in the past may have strained to conclude that women, in these difficult circumstances, lacked decision making capacity in order, for the highest of motives, to protect the life or health of both the mother and her unborn child. To give the mother's articulated position this very limited interpretation would, on careful reflection, be sophistry, designed to enable me to protect the mother and her unborn child without confronting what I consider to be the true evidential picture.*
>
> *57. The particular challenge presented by the facts of this case and those before Cobb and Francis JJ's is that unlike her capacitous coeval, the mother, upon losing capacity, would lose the opportunity to express a changed decision. The birth process is, self-evidently, highly dynamic. It will frequently require obstetric re-evaluation. With considerable diffidence, I suspect that many birth plans are changed, when confronted with the painful realities of a complicated labour. Many expectant mothers who may have vociferously disavowed epidurals re-evaluate this choice in labour. This is true of the whole gamut of obstetric options, including both induction and caesarean section. Accordingly, the*

> *strength and consistency of previously expressed views must be considered with intense subtlety and sensitivity in this highly uncertain and emotionally charged obstetric context. Thus, it seems to me, that I must balance my instinctive inclination to protect the autonomy of a woman's control over the invasion of her own body, with my obligation to try to ensure that her options on losing capacity are not diminished. It may be that this is not capable of resolution in principle. As always in this sphere, much will depend on the circumstances of the individual case. What, I speculate, would the medical staff be expected to do if, the Court having granted a declaration as to the unlawfulness of intervention, they found themselves confronted with a desperate but incapcitous woman screaming for unspecified medical assistance during the birth process? Certainly, there would not be time to contact a judge. Moreover, in those circumstances, I find it hard to see how the judge's evaluation would be likely to add anything to the assessments of the nursing and medical team.*
>
> […]
>
> *63.* […] *The caselaw has emphasised the right of a capacitous woman, in these circumstances, to behave in a way which many might regard as unreasonable or "morally repugnant", to use Butler-Sloss LJ's phrase. This includes the right to jeopardise the life and welfare of her foetus. When the Court has the responsibility for taking the decision, I do not consider it has the same latitude. It should not sanction that which it objectively considers to be contrary to P's best interests. The statute prohibits this by its specific insistence on 'reasonable belief' as to where P's best interests truly lie. It is important that respect for P's autonomy remains in focus but it will rarely be the case, in my judgement, that P's best interests will be promoted by permitting the death of, or brain injury to, an otherwise viable and healthy foetus. In this case it may be that R's instincts and intuitive understanding of her own body (which it must be emphasised were entirely correct) led to her strenuous insistence on a natural birth. Notwithstanding the paucity of information available, I note that there is nothing at all to suggest that R was motivated by anything other than an honest belief that this was best for both her and her baby. It is to be distinguished, for example, from those circumstances where intervention is resisted on religious or ethical grounds. In the circumstances therefore, it seems reasonable to conclude that R would wish for a safe birth and a healthy baby.*

Hayden J tested his reasoning by considering whether R:

> *65* […] *by parity of analysis, should be regarded as being in essentially the same position as an individual who had prepared an Advance Decision in the correct manner. Had R done so, could this application have been sustained? I say, at once, that I consider that an Advance Decision, properly constructed, with the appropriate safeguards in place would, in my judgement, be binding on the Court. I do not however, consider that R is in an analogous position. In preparing and drafting a carefully worded Advanced Decision, which is compliant with the statutory safeguards, P will, of necessity, have been required to identify the clear circumstances in which the refusal to comply is made. Neither, in my view, is the requirement for a signature in the presence of a witness to be regarded as a mere legal formality. It is part of a process in which a competent and capacitous adult can safely be regarded as having made prospective instructions on issues of the utmost gravity. Self-evidently, a statement, as made here, that a caesarean section is 'the last thing I would want' would not be compliant with the provisions. This is not because it is expressed in lay terms, it is because it is not sufficiently choate. A woman might choose, for example, not to have a caesarean even though*

> *her own life is at risk but elect to do so if the life or health of her baby is compromised. Also, and unequivocally, the capacitous adult who has prepared a statutory compliant Advanced Decision, has consciously waived the right to change her mind upon loss of capacity. R cannot be regarded, on the available evidence, as being in that position.*

Hayden J made two further observations of wider importance.

First, he re-emphasised the crucial importance of clear and timely planning, particularly in cases involving obstetric care and caesarean section, referring to the guidance given by Keehan J in *NHS Trust & Ors v FG* [2014] EWCOP 30. As Hayden J noted:

> *16. Careful planning and the avoidance of delay, where that is not purposeful, is intrinsic to every case in the Court of Protection, without exception. The focus however is, as Keehan J has emphasised, particularly acute in cases such as this. The need for an informed birth plan, identifying the appropriate support required, reviewed by the Court in a way which permits it properly to be scrutinised and facilitative of representation for P is essential. So too, is the need for a fully transparent process, given the fundamental rights and freedoms that are engaged here. As Keehan J highlights, these rudimentary requirements are a facet of the Article 6 rights of all involved. Moreover, failure to plan in a careful and properly informed manner may jeopardise the health, even the lives of the mother and the unborn baby. Thus, it follows, to my mind, inexorably, the court will need to be involved in a way which anticipates rather than being merely reactive to crisis or emergency.*
>
> *17. None of this can be permitted to occlude the reality that the court is being invited to make orders of a profoundly intrusive nature which also contemplate a deprivation of liberty. In this case the application arises in the face of opposition by a woman who, all agree, was capacitous at the time of the application and unrepresented. It is a profound understatement to say that such a situation should give any court real concern for the autonomy of the individual at the centre of the process.*

Second, Hayden J noted that he was not being asked to authorise medical intervention in relation to a capacitous adult:

> *33.* [...] *I am being invited to determine whether, if the adult in question loses capacity, a medical intervention can be authorised which is contrary to her expressed wishes, whilst capacitous. In virtually every application that comes before this Court, relating to medical treatment, the answer to the question posed here would be a resounding 'no'. There is now a raft of case law, including many of my own judgments, which illustrate the efforts the Court of Protection will go to in order to identify what the likely wishes of P would be, in circumstances where P has lost the capacity for the relevant decision making (see e.g: Cumbria NHS Clinical Commissioning Group v Ms S & Ors [2016] EWCOP 32; Briggs v Briggs [2016] EWCOP 53; Salford Royal NHS Foundation Trust v Mrs P [2017] EWCOP 23; PL v Sutton Commissioning Group [2017] EWCOP 22). Whilst the identified wishes of P will not in and of themselves be determinative, they will always be given substantial weight and are highly likely to be reflected in the order or declaration the Court makes. This careful approach, forged by the case law of the last few years, is adopted by the Royal College of Physicians and the British Medical Association in their guidance 'Clinically – assisted nutrition and hydration (CANH and Adults who lack the capacity to consent'*

Comment

Hayden J did not shy away from what he had been asked to do, or what he did. Even if, as so often, the worst that had been anticipated did not come to pass, it was right for the court to have been asked to consider the position in advance – even if, in reality, it was only able to do so in a very problematic fashion because of the delay in issuing the proceedings. It is to be hoped that the guidance Hayden J issued in January 2020 may start to trigger the processes required to bring proceedings at much earlier stages – and, in particular, to reinforce the message that going to the Court of Protection is not necessarily a failure (and hence to be avoided), but rather a recognition of the gravity of the intervention that is being contemplated (and hence a necessary step to protect the rights of the person). In this context, this paragraph from the judgment has a particular resonance:

> *48. The case law, to which I have referred, emphasises the 'exceptional' circumstances of the particular cases. However, in the context of the applications that come before Tier 3 (i.e. High Court) judges of the Court of Protection, many cases may properly be described as exceptional. Certainly, the families of those involved would consider them to be so. The cases frequently present issues of medical, moral, legal complexity. The MCA emphasises the importance of identifying P's capacity to take individual decisions. The jurisdiction is highly case or fact specific. Against this backdrop it is easy to see that the concept of 'exceptional' is vulnerable to being corroded i.e. interpreted as having wider application than that which the Court might intend. The right of all individuals to respect for their bodily integrity is a fundamental one. It is every bit the right of the incapacitous as well as the capacitous.*

Amongst other parts of a judgment which will no doubt be the subject of considerable commentary from those concerned with the Court of Protection, the MCA, reproductive rights, and the balancing of rights (to pick but a few), it may just be worth noting that Hayden J appears to have contemplated that it would be possible for a woman to make an advance decision to refuse a Caesarean section. This is logical (if it is analysed as being a 'treatment'), reinforces the need to think about advance decisions in the context of perinatal psychiatry, but poses some very stark questions as to the consequences.

What is the permission threshold?

Re D (A young man) [2020] EWCOP 1 (Mostyn J)

Practice and procedure (Court of Protection) – other

Summary

In this case, Mostyn J had to consider a question that had previously been the subject of only very limited judicial consideration, namely the test for permission under s.50 MCA 2005. The case concerned a young man, D, aged 20, with autism. He had been looked after by his father and his stepmother, C, since the age of 3.

D's mother, who was subject to a civil restraint order, applied for permission to make a substantive

application concerning the nature and quantum of her contact with D. Mostyn J granted her leave under the terms of the civil restraint order to make the application for permission to make the application itself.

Under the terms of ss.50(1) and (2) MCA 2005, the mother needed permission to make a substantive application as she did not fall into one of the categories where permission is not required set out in section 50(1). Section 50(3) provides:

> *In deciding whether to grant permission the court must, in particular, have regard to –*
> *(a) the applicant's connection with the person to whom the application relates,*
> *(b) the reasons for the application,*
> *(c) the benefit to the person to whom the application relates of a proposed order or directions, and*
> *(d) whether the benefit can be achieved in any other way.*

Mostyn J noted that:

> *4. A permission requirement is a not uncommon feature of our legal procedure. For example, permission is needed to make an application for judicial review. Permission is needed to mount an appeal. Permission is needed to make a claim under Part III of the Matrimonial and Family Proceedings Act 1984. In the field of judicial review, the permission requirement is not merely there to weed out applications which are abusive or nonsensical: to gain permission the claimant has to demonstrate a good arguable case. Permission to appeal will only be granted where the court is satisfied that the appellant has shown a real prospect of success or some other good reason why an appeal should be heard. Under Part III of the 1984 Act permission will only be granted if the applicant demonstrates solid grounds for making the substantive application: see Agbaje v Akinnoye-Agbaje [2010] UKSC 13 at [33] per Lord Collins. This is said to set the threshold higher than the judicial review threshold of a good arguable case.*
>
> *5. There is no authority under section 50 giving guidance as to what the threshold is in proceedings under the 2005 Act. In my judgment the appropriate threshold is the same as that applicable in the field of judicial review. The applicant must demonstrate that there is a good arguable case for her to be allowed to apply for review of the present contact arrangements.*

The case had had a very lengthy and unhappy history, contact arrangements between D (at that stage a child) and his mother having been fixed some seven years previously. Having rehearsed the history, the possible scope of proceedings before the Court of Protection and (in his view) the irrelevance of the fact that D had turned 18, Mostyn J held that he applied:

> *13* […] *the same standards to this application as I would if I were hearing an oral inter partes application for permission to seek judicial review. I cannot say that I am satisfied that the mother has shown a good arguable case that a substantive application would succeed if permission were granted. Fundamentally, I am not satisfied that circumstances have changed to any material extent since the contact regime was fixed seven years ago and confirmed by me two years ago. I cannot discern any material benefit that would accrue to D if this permission application were*

> *granted. On the contrary, I can see the potential for much stress and unhappiness not only for D but also for his family members if the application were to be allowed to proceed.*

Mostyn J therefore refused the mother's application for permission.

Comment

Being pedantic, Mostyn J was not correct to say that there was no authority on s.50. In 2010, Macur J had in *NK v v VW* [2012] COPLR 105 had refused permission on the basis that she considered that "*section 50(3) and the associated Rules require the Court to prevent not only the frivolous and abusive applications but those which have no realistic prospect of success or bear any sense of proportional response to the problem that is envisaged by NK in this case*." Fortunately, not least for procedural enthusiasts, that approach is consistent with the more detailed analysis now given by Mostyn J.

Habitual residence and alleged kidnapping

TD and BS v KD and QD [2019] EWCOP 56 (Cobb J)

International jurisdiction of the Court of Protection – other

Summary

QD was a man in his 60's who suffered from dementia connected with an atypical form of Parkinson's disease. Until September 2019, he was living with his second wife, KD, in Spain and had been so for several years. In September 2019, he flew to this country with his son and daughter from his first marriage, TD and BS, without KD's knowledge or agreement. TD and BS then sought a range of welfare orders in the Court of Protection including, in particular, that he reside in a care home in England, that he not return to Spain, and that he have only supervised contact with his wife, KD.

The matter was listed before Cobb for the determination of a preliminary issue, namely whether the Court of Protection had jurisdiction to determine the application or whether the case should be stayed pending transfer to Spain.

TD and BS argued that while QD was habitually resident in Spain until September 2019, he was now habitually resident in England. As a feature of this argument, TD and BS contended that the removal of QD from Spain was not wrongful but was justified under the common law doctrine of necessity, alternatively urgency. Alternatively, if the Court found that QD was habitually resident in Spain, then the Court should invoke the inherent jurisdiction so as to make substantive orders in relation to QD as a vulnerable adult in relation to his care, contact with others, and residence.

QD (by his litigation friend, the Official Solicitor) and KD argued that QD was at all material times habitually resident in Spain and that the Court of Protection's powers were therefore limited to making protective orders pending transfer of the proceedings to the Spanish Court.

After setting out the relevant provisions of Schedule 3 to the Mental Capacity Act and case law in relation to habitual residence, Cobb J concluded on the facts that QD was habitually resident in Spain. In reaching his conclusion, Cobb J was particularly influenced by the following factors identified at paragraphs 28-30 of his judgment:

- When he had capacity, QD chose to live in Spain and this appears to have been his permanent home;
- QD had lived in Spain for main years (he first moved there in 2012 and became a legal resident in Spain in 2014);
- QD had more than one property in Spain;
- QD received health care in Spain;
- QD was integrated into life and a community in Spain where he appeared to have a social life;
- It was conceded by TD and BS that prior to September 2019, QD was habitually resident in Spain;
- QD's wife continued to live in Spain and sought to regularize the care arrangements for QD in Spain by initiating proceedings for legal guardianship in Spain some weeks before QD was relocated to England
- QD's move to this country was achieved by stealth.
- There was no urgent need to make substantive orders to avert an immediate threat to life or safety or an immediate need to for further or other protection.

Cobb J also rejected the use of the inherent jurisdiction as a means of making substantive orders in relation to QD as he considered that to do so would be "*to subvert the predictable and clear framework of the statute in an unprincipled way*" (para 31). In the circumstances, Cobb J exercised the limited jurisdiction available to him pursuant to Schedule 3, para 7(1)(d) to make a protective measures order which provided that QD was to remain at and be cared for at a care home in England and that the authorisation of his deprivation of liberty would be continued until such time as the national authorities in Spain determined what should happen next.

Comment

Disputes of jurisdiction in the Court of Protection are not often reported and this case provides a useful summary of the principles to be applied in determining the court's jurisdiction of in cases where there is an international aspect. It is also an interesting and useful addition to the body of case law on the exercise of the inherent jurisdiction post-MCA.

Disclosure to a non-party – the correct approach

Re Z [2019] EWCOP 55 (Morgan J)

Practice and procedure (Court of Protection) – other

Summary

Morgan J had made a detailed substantive order on the papers in mixed health and welfare and property and affairs proceedings concerning Z. In that order:

- The court made a declaration as to Z's capacity following a consideration of the evidence.
- The order recorded a number of declarations (as to contact and LPAs) to be by the consent of the parties.
- The balance of the order was expressed to be by the consent of the parties.

JK, a son of Z who was not a party to the proceedings, subsequently made an application for the disclosure to him of certain documents which have been filed by the other parties in the course of the proceedings. The application was made pursuant to rule 5.9 of the Court of Protection Rules 2017 and the inherent jurisdiction.

Morgan J held that the inherent jurisdiction of the court "*allows the court to give effect to the constitutional principle of open justice and relates to certain documents in certain circumstances*." It was accepted by JK that rule 5.9 exists in order to give effect to the same principle of open justice. By way of reminder, rule 5.9 differentiates between different types of documents:

- Rule 5.9(1) gives a person who is not a party to the proceedings a right to inspect or obtain from the court records a copy of any judgment or order given or made in public.
- Rule 5.9(2) gives the Court a discretion whether to authorise such a person (on application to the court) to:
    - inspect any other documents in the court records; or
    - obtain a copy of any such documents, or extracts from such documents.

The documents sought by JK were:

1. The expert medical reports filed in the original proceedings together with the instructions and material upon which those reports were based;
2. Copies of all witness statements filed, together with exhibits (if the latter are part of the court file);
3. Copies of any skeleton arguments filed;

4. Any documents held on the court record which were relevant to the settlement reached with CD.

In determining this application Morgan J held that the following points were salient:

- While JK was not joined as party to the proceedings, he was bound by the declarations regarding Z's capacity in the same way that the parties were. He therefore had the right to apply for reconsideration of the order. However without disclosure of the documents had no access to the documents that were before the court when it made the order.
- JK was notified of the proceedings and could have either at the outset or at any later time, become a party to the proceedings. He did not do so. But had he done so, it is likely he would have been joined and the documents disclosed to him.
- The solicitors for AB had on a number of occasions, and in a number of ways, offered to engage with JK to give him information about the proceedings. JK however had not responded to these offers.
- JK relied on the open justice principle which is designed to assist public scrutiny of cases which ought to be heard in public, however, the original proceedings were not dealt with in public and were never going to be dealt with in public. Further, JK did not apply for an order opening up the documents which he sought to public scrutiny but acceptedthat any documents which he was permitted to see must remain confidential.

With respect to the legal framework, Morgan J held that:

- Rule 5.9(1) had no application as JK was not seeking (nor was there) an order or judgment made in public. JK was given a copy of the substantive order made in private.
- The analysis as to what formed part of the Court record was set out in the previous Supreme Court authority of *Dring v Cape Intermediate Holdings Ltd* [2019] UKSC 38. The judge held that "*it would not extend to many of the documents which are sought by JK. In particular, it would not extend to the expert medical reports, the witness statements for the trial or the skeleton arguments*."

Much of the argument and analysis was taken up by consideration as to whether, in proceedings which were held in private, the principle of open justice was in play at all. The court held, after an analysis of the case law, that were the substantive order was made without a hearing in open court, but after the court considered certain documents on the papers, the principle of open justice was engaged in relation to matters which involved a judicial decision. As regards matters which were agreed between the parties and which did not involve a judicial decision, the principle of open justice was not engaged save that there remains a power for the court to permit access to documents filed with the court if there are strong grounds for holding that such access is necessary in the interests of justice. What this meant on the facts of this case was that:

- There was an element of judicial decision making involved in the declarations about capacity and

the declarations by consent.

- There was no judicial decision as to who would have succeeded if the disputed matters were to be determined at a trial. Accordingly, in relation to the substantial body of evidence which related to that dispute, the open justice principle was not engaged but there was a power to allow JK to have access to that material if there were strong grounds for holding that it is in the interests of justice to allow him to have access.

Ultimately, the judge was not persuaded that any of the documents should be given to JK and the application was dismissed. The reasons for reaching that decision are entirely fact specific and so are not set out here.

Comment

This is a fascinating and detailed consideration of the issues at play in a disclosure application from a person who is not a party to proceedings. The authors are not aware of this having been the focus of a previous judgment.

Importantly, Morgan J was clear (and undoubtedly right) that the decision he was making about disclosure was not a best interest decision, but the best interests of Z fell to be considered when conducting the balancing exercise as to whether to disclose documents.

When to name the treating team

Manchester University NHS Foundation Trust v Namiq (RRO) [2020] EWHC 181 (Fam) (Family Division (Lieven J))

Media – court reporting

Summary

This is the judgment made in relation to the application for a reporting restriction order (RRO) in the Midrar Nadiq case, noted in the Wider Context report.

Lieven J had directed that the proceedings (usually heard in private pursuant to rule 27.10 of the Family Procedure Rules 2010) should be heard in open court given the subject matter (namely the withdrawal of ventilation from a baby). By the time of the final hearing:

(i) The Guardian and the court had agreed that the baby who was the subject matter of the proceedings, Midrar should be named, along with his family members.

(ii) It was agreed that the hospital should be named.

The only issue between the parties was whether the names of the treating clinicians (who numbered in the hundreds) should be anonymised, or whether they should be made public. The applicant Trust

sought an order resisting publication of their names which was opposed by the parents and the Press Association.

The parties' positions can be summarised as follows:

(i) The Trust were concerned about being at the centre of a media storm, with all the potential disruption to staff, patients and their families that comes with this. In addition they submitted that if named, staff would be discouraged from expressing honestly and sincerely held views, and potential experts would be dissuaded from becoming involved in these controversial cases.

(ii) The Father's position was that openness is important for public confidence, and that it aids accountability.

(iii) The Press Association argued that the Trust's submissions were insufficient to override the Article 10 EHCR rights at play. It further submitted that finding it traumatic being named in a press report was not a good ground to grant anonymity.

Lieven J carried out a balancing exercise between on the one hand open justice, transparency of the court process, the public interest in the freedom of the press to report without restriction, and the need for the public to understand what is happening in difficult and sensitive cases, against on the other, the competing interests of the treating professionals and the protection of their private lives, allowing treating professionals doing an important and difficult job to do so without their work being jeopardized, and the public interest in ensuing that appropriately qualified people do not avoid these cases for fear of hostile comment.

Lieven J concluded that on the facts of this case:

(i) The public interest in open justice was very largely protected by holding the proceedings in public and the judgment in public.

(ii) Relevant to open justice was the fact that the hospital and the child have been named. There was therefore no question of the public not being informed about what is going on.

(iii) In such circumstances it was difficult to see why either open justice or the public interest is harmed other than by a minimal degree by anonymisation of the treating professionals. Particularly as this was not a case in which any substantiated allegations of wrong doing were being made against the treating professionals.

(iv) Importantly, that while there had been no hostile comment in the press or social media at the time of judgment, her Ladyship noted that these type of cases about very ill young children raised strong views and there was a well-documented history of hostile and distressing comments about treating staff in other cases.

On this basis the Judge granted the RRO to protect the identity of the treating staff.

Comment

Of particular interest in this judgment is her Ladyship's express disagreement with the judgment of the (ex) President, Sir James Munby, in *A v* Ward [2010] EWHC 16 (Fam)as to where the balance lay. She stated as follows:

> *In my view there is an important distinction between professionals who attend court as experts (or judges and lawyers), and as such have a free choice as to whether they become involved in litigation, and treating clinicians. The latter's primary job is to treat the patient, not to give evidence. They come to court not out of any choice, but because they have been carrying out the treatment and the court needs to hear their evidence. This means they have not in any sense waived their right to all aspects of their private life remaining private. In my view there is a strong public interest in allowing them to get on with their jobs without being publicly named. I do not agree with the President that such clinicians simply have to accept whatever the internet and social media may choose to throw at them. I note that the President's comments were made before the well publicised cases of Gard and Evans, and perhaps at a time where the risks from hostile social media comment were somewhat less, or at least perceived to be less. There may well be cases where the factual matrix makes it appropriate not to grant anonymity and each case will obviously turn on its own facts. But in my view the balance in this case falls on the side of granting the order.*

Following the extraordinary public scenes arising from the Gard and Evans cases, there has been an acceptance by many on the bench that the impact on front line clinicians who become involved in such cases can be extreme. It is significant that the public interest in protecting such clinicians has been given significant weight in this application. Even if cases before the Court of Protection are not always as emotive to the public, the logic of this case could apply equally in a situation where a particular case fall into a similar category.

Short note: costs and 'even-handedness'

In *Re W (A Child)* [2020] EWCA Civ 77, the Court of Appeal departed from the general 'no order as to costs' rule in relation to application to costs in respect of children (which is the same as in welfare proceedings). That general rule also applies in relation to appeals, as Baroness Hale confirmed in *Re S* [2015] UKSC 20, in which she also confirmed that "*costs orders should only be made in unusual circumstances*," for example, as identified by Wilson J (as he then was) in *London Borough of Sutton v Davis (Costs) (No 2)* [1994] 2 FLR 569 where "*the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable*." In the instant case, the departure was justified because there was:

> *10.* [....] *a failure to be even-handed on the part of the Local Authority in their presentation of the case to the judge at first instance and thereafter a failure to recognise (save to a very limited extent) that the judgment as drafted could not justify the order that was made. In those circumstances and in the unusual circumstances of this case, I would order the Local Authority to make a contribution towards the costs of the appellant.*

Court of Protection fees refund

The Ministry of Justice has introduced a refund scheme relating to court fees, including the Court of Protection. For the Court of Protection, the scheme relates to those who paid court fees between 1 April 2016 and 31 March 2018 for applications and appeals:

			Date you paid the fee			
			22 Apr 2014 to 31 Mar 2015	1 Apr 2015 to 31 Mar 2016	1 Apr 2016 to 31 Mar 2017	1 Apr 2017 to 31 Mar 2018
Misquoted Fee code	Correct Fee Code	Fee description	Maximum refund amount			
Court of Protection Fees						
FEE0253	FEE0525	Application	No refund	£22	£14	£35
FEE0524	FEE0239	Appeal	No refund	£2	£82	£169
n/a	FEE0302	Hearing	No refund			£11

In addition, if you paid a hearing fee between 1 April 2017 and 31 March 2018, you may also be eligible for a refund.

Misquoted Fee code	Correct Fee Code	Circumstance	Maximum refund amount
Court of Protection Fees			
FEECODE n/a	zero	You paid a hearing fee of £500 for a hearing which did not fully dispose of the case or appeal. For instance a hearing to consider an interlocutory application where no final order, declaration or decision was made in respect of the case or appeal. You should have paid no fee.	£500

For more details, see here. and the guidance document here.

Queries regarding the scheme should be directed to the helpdesk as follows:

Telephone: 0300 1233077

Email: Civil_Refunds@justice.gov.uk.

Association News

Court of Protection Bar Association

DOLS Debate

There will be a debate about the definition of deprivation of liberty chaired by District Judge Anselm Eldergill at Doughty Street Chambers at 17:00 on 4 March 2020, at which Alex Ruck Keene will be speaking along with Ulele Burnham. To reserve a place please contact Claire van Overdijk (cvo@outertemple.com).

AGM and annual lecture

The CPBA Annual General Meeting and Annual Lecture will be on 24 March 2020 at 17:30 and will be hosted by 39 Essex Chambers. The Annual Lecture will be delivered by Sir James Munby.

Spring conference

The CPBA Spring Conference will be on 29 April 2020 (time to be confirmed) and will be hosted by 39 Essex Chambers.

All three of these events are member only. To join, see here. Further details for reserving a place at the debates will be announced shortly.

Court of Protection Practitioners Association

Withdrawal of clinically assisted nutrition and hydration: a look behind the media headlines

London CoPPA are holding a training and networking event to discuss the legal and medical complexities surrounding the decision to withdraw clinically assisted nutrition and hydration. The event will be on Tuesday 18 February 2020 at 5:30. For more details, and to book, see here.

Please note CoPPA has indicated that, given the emotive nature of the topic, any non-members who wish to attend must apply in advance and admission on the night will be at the discretion of the Association.

THE WIDER CONTEXT

Brain death and the courts

Two recent cases have required the courts to consider both the approach to the definition of brain death and the court's role.

The first case, *Oxford University NHS Trust v AB* [2019] EWHC 3516 (Fam), came before the court for determination as to whether AB had met the criteria for death. The facts of the case are tragic. AB was a fourteen year old girl who was found hanging at her home. She was airlifted to hospital where she was given emergency treatment including being provided with an i-Gel supraglottic breathing device. Despite this emergency treatment, she was pronounced dead at 10:26 on 22 October 2019. AB's family, committed Christians, objected to the withdrawal of AB's ventilation.

Francis J noted that there was no statutory definition of death, but relied on code of practice devised by the Academy of Royal Colleges in 2008 establishing the legal criteria for death entitled 'A code of practice for the diagnosis and confirmation of death'. The criteria for death set out in the Code of Practice (and adopted by the court) is:

> *(2.1.) The irreversible cessation of brain-stem function whether induced by intra-cranial events or the result of extra-cranial phenomena, such as hypoxia, will produce this clinical state and therefore irreversible cessation of the integrative function of the brain-stem equates with the death of the individual and allows the medical practitioner to diagnose death.*

Francis J acceded to the Trust's application on three grounds:

(i) First because the evidence from the medics (as supported by the Code of Practice) was that even if the body of AB remained on respiratory support, the loss of integrated biological function would inevitably lead to deterioration and organ necrosis within a short time.

(ii) Secondly because AB had met the neurological criteria for death as set out in the Code.

(iii) Thirdly further treatment by way of ventilation was futile *"because it will be pointless; it is impossible that anything will happen to bring AB back."*

The second case, *Manchester University NHS Foundation Trust v Namiq* [2020] EWHC 180 (Fam), concerned the treatment of Midrar Namiq, a baby born at full term, with no detectable heart rate and no respiratory output. His heart was restarted and he was placed on a ventilator at the Neonatal Intensive Care Unit. Three brain stem death tests to assess whether he was dead by neurological criteria (DNC) were carried out, the first on 1 October 2019. Each concluded that Midrar was DNC.

The Trust therefore brought the matter to Court seeking a declaration that that it was lawful to withdraw ventilation from Midrar. This was opposed by his parents.

The mother argued that when the court's inherent jurisdiction is invoked to declare a person dead then the court must apply a best interests test. Lieven J had no difficulty rejecting this argument, holding:

(I) That the question of whether a person is dead is a question for the medical professionals in the first instance, applying the relevant clinical tests as set out in the two relevant Codes of Practice. Firstly, "A Code of Practice for the Diagnosis and Confirmation of Death", dated 2008 and produced by the Academy of Medical Royal Colleges, and secondly in the case of babies under 2 months of age guidance called "The diagnosis of death by neurological criteria in infants less than two months old" dated April 2015 and produced by the Royal College of Paediatrics and Child Health.

(II) 'If a patient is brain stem dead then there are no best interests to consider. Once those criteria are met the patient has irreversibly lost whatever one might define as life'

Lieven J did however agree with the mother, that when determining whether the criteria for DNC is met the court must give the matter 'anxious scrutiny', and if there is any doubt, it would be most unlikely that declarations would be made.

Comment

The first time this issue came before the Court was in 2015 when the case of *Re A (A Child)* [2015] EWHC 443 (Fam) was heard by Hayden J. It is unclear why there have been three further cases heard in the last four months; the decision of Francis J noted above; this case; and a case that was heard by Hayden J before Christmas in which judgment is awaited.

What is striking about the case before Lieven J is the fact that it took almost two months from date of issue to final determination. While in most cases this would be an extremely swift timetable, in cases like this, where the issues are, although important, straightforward (Lieven J pointed out, the 'medical evidence could not have been clearer or more unequivocal' on the issue of whether Midrar met the DNC test), they ought to be capable of swift resolution. This is by no means a criticism of the court, who was faced here by two applications for adjournments including one which was appealed to the Court of Appeal.

Finally, we note that it now appears to be clear that where there is a genuine dispute about whether or not the DNC criteria are met, then it is appropriate to bring that dispute before a court for a determination. Such applications should be brought in the High Court pursuant to the inherent jurisdiction. We suggest that this applies equally to adults, because the question is not one either of capacity or of best interests.

However, if it is accepted that DNC are met, the decision to withdraw the treatment is a public law decision which can only be challenged in the administrative court.

CQC Monitoring the Mental Health Act 1983 report

The CQC's annual monitoring report for 2018-2019 has now been published. The Government's White Paper to respond to the independent Review of the Mental Health Act 1983 should soon be appearing. The review placed a strong emphasis upon greater respect for the choices of individual patients. In that context, that the CQC found that in 11% of care plans they reviewed there was no evidence of patient involvement at all shows how simply relying upon guidance – as it done at present – has been entirely inadequate.

Care Act needs mean needs

In *R (Antoniak) v Westminster City Council* [2019] EWHC 3465 (Admin), the High Court (Mr CMG Ockelton) provided important clarification in respect of the nature of a local authority's duty under s.9 of the Care Act 2014 to assess an adult's needs for care and support.

The court clarified that s.9 requires the relevant local authority to identify any needs for care and support regardless of whether, at the time of the assessment, all or any of the needs are being met. In other words, the needs assessment is provision blind – it is simply a question of whether the individual in question has needs. This logic applies not just to the initial identification all needs, but also to the application of the eligibility criteria and the wellbeing test.

In the claimant's case, Westminster determined that he did not have any eligible needs for care and support because his needs could be met by existing voluntary or private-sector agencies (by a therapist as regards home, by a charity as regards the community and by the Job Centre or a charity as regards work). As a result, the assessment and resulting eligibility decision were unlawful.

Deprivation of liberty and young people (1)

A London Borough v X, Y and Z [2019] EWHC B16 (Fam) (Family Division)(Theis J))

Article 5 – deprivation of liberty – children and young persons

Summary

This was a wardship application brought by the local authority in respect of Z, a 17 year old boy who had a range of very complex health needs rendering him wholly dependent on his parents to meet his day to day needs.

Initially the applicant local authority had issued care proceedings, seeking the removal of Z on the basis that he was suffering or likely to suffer significant harm due to the failure of the parents to follow medical advice regarding his care or take him to medical appointments. This arose primarily as a result of the mother's mental health problems which had arisen in about mid-2018. Prior to this time, his parents had provided Z with a very good level of care.

During the care proceedings, the court made a series of orders aimed at enabling Z to access appropriate medical treatment while remaining in the care of his father in the family home. Ultimately this was only achieved once Family Law Act proceedings had been issued by the father, excluding the mother from the family home.

By the time the matter came on for final hearing it was agreed that Z should be looked after by his father, with the mother remaining in the family home but prohibited from exercising parental responsibility in respect of Z.

There remained a dispute however as to whether or not Z was deprived of his liberty in the family home within the meaning of Article 5 of the ECHR. It was agreed that his living arrangements (in which he was under constant supervision and not able to go out on his own) were a restriction on his liberty when compared to others of his age. However, the local authority argued that the objective criteria was not met for a deprivation of liberty because Z was not confined within the home beyond the ordinary requirements in any home (for example a locked front door; he was not locked in his room). Unsurprisingly, Theis J rejected this submission and found that there was indeed a deprivation of liberty because:

1. The objective criteria were met on the facts of this case. The court was struck by the fact that Z was assessed as requiring 2:1 care when attending his education provision.
2. Z lacked capacity to consent to the deprivation of liberty and following *Re D*, the father in the exercise of his parental responsibility could not consent on Z's behalf.
3. The deprivation of liberty was imputable to the state because the court had made Z a ward of the court and in so doing had retained control over Z's living arrangements, despite the fact that he was living in the family home and being cared for by his family.

Comment

Point 3 in the summary immediately above is of some interest – following *Re D*, Z's deprivation of liberty would have been imputable to the state even if the court had not made him a ward of court. As Lady Hale observed in *Re D,* in rejecting the argument that parental responsibility could serve to prevent a confinement being seen as a deprivation of liberty, one context in which such an argument might be advanced ""*is where the parent is the detainer or uses some other private person to detain the child. However, in both Nielsen and Storck it was recognised that the state has a positive obligation to protect individuals from being deprived of their liberty by private persons, which would be engaged in such circumstances.*"

The court stated that Z was to remain a ward of the Court until his 18th birthday, at which point an application would need to be brought before the Court of Protection for authorisation of the arrangements. Of course, given Z's age (17), the matter could have been dealt with in the Court of Protection in any event.

As with most of the reported cases in this area now, and following the unfortunate lacuna in the template order endorsed by the former President, the judgment does not state the grounds upon which the deprivation of liberty is justified: was it Article 5(1)(d) (educational supervision) or Article 5(1)(e) (unsoundness of mind)? And, if the latter, was the court provided with medical evidence of mental disorder sufficient to satisfy the *Winterwerp* criteria?

Deprivation of liberty and young people (2)

Hertfordshire CC v NK and AK [2020] EWHC 139 (Fam) (Family Division)(MacDonald J))

Article 5 – deprivation of liberty – children and young persons

In this case, MacDonald J declined to make an order a DoL order in respect of a 16 year old, on the basis that he did not consider that the child's current circumstances amounted to a deprivation of his liberty. Those circumstances at AK's placement, described at paragraph 10, were these:

> *i) The internal and external doors are not locked and AK is able to exit the property (AK has for example left for a cigarette with the knowledge of the staff and returned of his own accord);*
>
> *ii) AK has flexible, unsupervised contact with his mother two or three times a week and the length of those visits is dictated by AK and his mother. AK is dropped off and collected by the staff from [Y]. The collection occurs when AK states he is ready to return;*
>
> *iii) During his time on the unit he is subject to 2:1 supervision (AK has stated he would like this to reduce to 1:1 supervision)*
>
> *iv) AK has* **unlimited** *access to, and use of his mobile telephone, the Internet and to his X-Box.*
>
> *v) When in his room at the unit AK is checked on every 15 minutes;*
>
> *vi) AK's room is* **not** *searched and neither is AK;*
>
> *vii) AK has a planned daily schedule and is rewarded financially for compliance.* (emphasis in original)

MacDonald J found that:

> *33. The question of whether AK is restricted to an extent that constitutes a deprivation of his liberty by reference to the applicable criteria set out above is as a matter of fact that falls to be determined by comparing the extent of the AK's actual freedom with someone of the child's age and station whose freedom is not limited. Having regard to the current situation for AK in his placement, I am not satisfied that the level of supervision and control to which AK is subject is sufficiently different from a child of AK's age and station to constitute a deprivation of liberty for the purposes of Art 5 of the ECHR.*

MacDonald J was further unpersuaded that the local authority had in place a more restrictive care plan which would be implemented if AK's behaviour deteriorated. First, whilst he accepted an anticipatory order could be made in principle, it was an exceptional remedy and one to be used sparingly. Second, he considered that in deciding whether given restrictions constitute a deprivation of a child's liberty, it was the *current* situation of the child that ordinarily falls for consideration by the court. Third, there was a significant concern with the approach being urged upon him by the local authority:

38. The local authority's position amounts to the court being asked to confer upon an applicant local authority a continuing and contingent authority to deprive a child of his or her liberty *if* it becomes necessary to do so at some unidentified future point upon the *local authority's* assessment that this course of action is in the child's best interests. In *Re D* at [41] Baroness Hale made clear that the protection afforded by Art 5 of the ECHR is precisely so that there can be an *independent* assessment whether the arrangements that constitute a deprivation of liberty can b[2020] EWHC 139 (Fam)

> *e said to be in a person's best interests. It is implicit in the authorities that I have mentioned above that that assessment by an independent authority falls to be made at the point at which it is said the person is deprived of their liberty. Within this context, the making of an anticipatory order in favour of the local authority that will govern a situation that may or may not pertain in the future deprives the court of the ability to conduct an independent assessment of the circumstances of AK at the point in time his liberty is said to be deprived, in a situation that is likely to be highly fluid and that could change on a day by day basis.*
>
> *39. Whilst on behalf of the local authority Ms Branson submitted, relying the observations of Sir James Munby, P in* A-F *[2018] EWHC Fam 138 at [46] to [49], that a DOL order does not need to authorise each and every element of the circumstances that constitute confinement, the court's evaluation prior to granting such an order* must *condescend to the detailed circumstances which are said to justify the order at the point at which it is said that order is justified. In an urgent situation, this can be achieved by an immediate application to the urgent applications judge sitting in the Family Division, made to the Out of Hours Judge if necessary.* (emphasis in original)

Further, he could see wider disadvantages to the making of contingent or anticipatory DOL orders authorising the deprivation of liberty of vulnerable children on the happening of some future event.

> *40.* [...] *The current use of DOL orders to restrict the liberty of children in residential placements is a remedy that sits outside the statutory regime established by Parliament, after due consideration and debate, for the secure accommodation of children pursuant to s 25 of the Children Act 1989.*
>
> *41. In these circumstances, in the absence of a clear legislative intent and where the liberty of the subject is at stake and any restriction on that liberty will constitute a serious interference with the fundamental rights of the individual, the court must be extremely chary of proceeding in a manner that would have the effect of conferring on a local authority a wide discretion to regulate the deprivation of a child's liberty (as I am satisfied would be one of the clear effects of granting a contingent or anticipatory order to be implemented at some future date upon the local authority's own best interests assessment at that time) without the strict oversight that comes with granting a*

> *DOL order only after the court has evaluated the child's current situation by reference to the demands of the imperatives contained in Art 5 of the ECHR. I agree with Mr Sharp that this would amount to a significant, and undesirable, extension of the use of the inherent jurisdiction in cases of this nature.*

MacDonald J did not rule out that an order would never be granted in respect of an arrangement that had not yet been implemented, but would be:

> *42. […] However, I anticipate that before making such an order the court will need cogent evidence that the regime proposed will be the regime that will be applied to the child if the DOL order is granted, rather than the far more speculative situation that pertains in this case.*

MacDonald J emphasised:

> *46. It is important that the local authority understands what the decision I have reached does* **not** *do. The decision of the court does* **not** *allow the local authority now to implement its stated care plan in full without a DOL order. Similarly, in circumstances where the local authority has contended before the court that the full implementation of the care plan at some future date would constitute a deprivation of AK's liberty for the purposes of Art 5, my decision does* **not** *absolve the local authority of the need to apply to the court for a DOL order if it decides at some future point to implement its stated care plan in full. In such circumstances, if the local authority determines at that future date that AK's welfare requires the care plan to be implemented in full, the local authority will need to at that point make the appropriate application and the court will make its determination. The decision of the court simply reflects, for the reasons I have given above, the consequence of none of these contingent events having yet come to pass.*

Comment

Each case is fact specific, but we suggest particular caution before seeking to translate MacDonald J's conclusions in respect of AK's circumstances to an adult. The 'acid test' in relation to those under 18 would still appear to be capable of being 'nuanced' to reflect the restrictions society would expect to be in place for a young person. But such nuancing falls away when the person turns 18.

Further, whilst MacDonald J was undoubtedly correct to be concerned at the speculative nature of the contingent declaration being sought by the local authority, it should perhaps be observed that the Court of Protection is very routinely asked to endorse plans amounting to a deprivation of liberty that are not yet in force, but will be upon discharge (say) from hospital. Indeed, both DoLS and (in due course) LPS are predicated also upon the ability to authorise a deprivation of liberty up to 28 days in advance. Perhaps the key difference in the instant case was the local authority had not put sufficient evidence before the court: (a) that the restrictions would, in fact, be put in place; and (b) to satisfy the court that they amounted to a deprivation of liberty and were necessary and proportionate.

Disabled Children: A Legal Handbook

Thanks to the Council on Disabled Children and Legal Action Group, all of the chapters of the third

edition of this invaluable book (by Steve Broach and Luke Clements) can be downloaded for free here. We particularly recommend chapter 7 "Decision-making: the legal framework" for those seeking to understand the complexities of the interaction between the common law and the MCA 2005.

2020 World Congress in Argentina

Information is now available about the 6th World Congress to be held at Buenos Aires University, Argentina, from 29th September to 2nd October 2020, under the full title "Adult Support and Care" and the sub-title "From Adult Guardianship to Personal Autonomy". We shall report when the website for the 6th World Congress is available. The details that have now been issued are in the meantime available here. The first five World Congresses were held in Japan, Australia, United States, Germany and Korea, all using the title "World Congress on Adult Guardianship". Increasingly, the reference to "Guardianship" failed to encapsulate the much broader scope of the World Congresses. The International Advisory Board accordingly agreed that each successive World Congress from and including the 6th should be able to propose its own title for approval.

The 6th World Congress is building extensive support and involvement from throughout Latin America. Its aims include establishing a Latin American network on adult guardianship. There will be a focus upon the elderly generally, as well as adults with disabilities. The objectives include deepening understanding of the standards of the UN Convention on the Rights of Persons with Disabilities and of the Inter-American Convention on the Protection of the Human Rights of the Elderly, in relation to the day-to-day exercise of rights. It also seeks, on a worldwide basis, to foster interaction and exchange of information and experiences, among experts, supporters, assistants, guardians and representatives of the elderly and adults with disabilities, NGOs, public institutions, judges and authorities; and also to link people, NGOs and public policy makers with private companies interested in development products, which improve the lifestyle of adults and elderly persons with disabilities who require support and care.

See the Scotland section of this Report for announcement of the commitment by the Law Society of Scotland to be a main sponsor of the 7th World Congress in Scotland on 7th – 9th June 2022, which will return to the more generalised (but improved) title "World Congress on Adult Capacity", similar to the titles for the first five World Congresses with the alteration from "Guardianship" to "Capacity."

RESEARCH CORNER

We highlight here recent research articles of interest to practitioners. If you want your article highlighted in a future edition, do please let us know – the only criterion is that it must be open access, both because many readers will not have access to material hidden behind paywalls, and on principle.

This month, we highlight the article by Carmel Davies and others *What are the mechanisms that support healthcare professionals to adopt assisted decision-making practice? A rapid realist review*. BMC

Health Serv Res 19, 960 (2019). Designed to support implementation of the Irish Assisted Decision-Making (Capacity) Act, the article provides a very useful overview of tools and approaches that could be used to support decision-making, equally applicable in other jurisdictions.

Also of interest is the article by Lara Pivodic and others, *Physical restraining of nursing home residents in the last week of life: an epidemiological study in six European countries*. International Journal of Nursing Studies (104) (April 2020), examining practice in Belgium, England, Finland, Italy, the Netherlands and Poland.

SCOTLAND

Independent Review of Learning Disability and Autism in the Mental Health Act: supplemental reports

In January 2020 the Review published some supplemental reports which are a report on the Review's process, and an evidence resource for future developments. Its final report was published in December 2019. The Review's reports can be accessed here (and the final reports here, at links which will not be disturbed when the Review's website ceases to exist later in 2020).

Jill Stavert

Scottish Mental Health Law Review (Scott Review): Consultation and website launched

On 3rd February 2020 the Scott Review launched a 12 week consultation seeking people's views and experiences of current mental health laws in Scotland. This includes you if you have had personal experience of these laws in Scotland because of a mental disorder or have supported, cared for or acted as a Named Person for someone in that position. It also includes any organisations or persons who work with this law. A link to the consultation website with further information on it can be found here.

The Review has also launched its official website which, for information more generally about the Review, can be accessed here. All future announcements about the Review will also be posted on this website which will be added to over the next few weeks (for example, to include information about the Review's Advisory Groups).

The Review can also now be followed via Twitter @MHLRScot and emailed via its Secretariat email address: secretariat@smhlr.scot. *Jill Stavert*

Law Society sponsors World Congress

The Law Society of Scotland has committed to supporting, as a main sponsor, the 7th World Congress on Adult Capacity to be held at the Edinburgh International Conference Centre on 7th – 9th June 2022. The firm lead taken by the Society as the first supporting organisation to commit to sponsoring the event is of major significance as an endorsement of the importance and status of the event, will be the first time that such a small country will host the event, and only the second time ever that it will take place in Europe. Further financial support will be required, and it is to be anticipated that the example of confidence in the event set by the Society will encourage others. The event will showcase not only Scotland's position as a world leader in the development of adult incapacity law, but also the quality and scope of the legal contribution and legal services that Scotland can offer worldwide. Further sponsorship packages will be developed and made available shortly. Some of the opportunities, such as free exhibition space, will be necessarily limited. Any enquiries or notes of interest should be sent to Adrian or Jill, both of whom (for the purposes of this and future coverage) declare interests as

members of the organising committee for the 2022 event, as President and leader of all programme aspects, respectively. Adrian is also a member of the steering group of the International Advisory Board for successive World Congresses.

See also the item in the Wider Context Report on the 2020 World Congress in Buenos Aires, Argentina.

Adrian D Ward

Colin McKay moves

Scotland has benefited from a succession of outstanding Chief Executives of the Mental Welfare Commission for Scotland, none less than Colin McKay, who has announced that next month he will step down as Chief Executive of the Commission and, having been a visiting Professor at Edinburgh Napier University, now takes up a part-time post as a Professor there, working with Professor Jill Stavert, who leads the highly respected Centre for Mental Health and Capacity Law at the University. Colin will continue his work as a member of the review team on the Scott Review, but intends to have time to help Jill to further develop the work of the Centre and other related activities.

Colin and Jill jointly co-organised the law reform scoping exercise which resulted in publication of "Scotland's Mental Health and Capacity Law: the Case for Reform", which substantially influenced the establishment of the Scott Review, and the significance of which was emphasised by the co-option of both to the Review's executive team.

Colin is currently a board member of JustRight Scotland and a member of the expert advisory group to the Centre for Mental Health and Capacity Law.

We aim to include a retrospective coverage of Colin's term as Chief Executive of MWC after he has stepped down. His professorship with Edinburgh Napier University is initially for a six-month period, funded by the Scott Review. The Commission now seeks a new Chief Executive. The post has been advertised. For information about the post, see https://www.aspenpeople.co.uk/MWCS/.

Adrian D Ward

Closure of facility halted after users sidelined

On 26th June 2019 the South Ayrshire Integrated Joint Board ("IJB") decided to close the Kyle Adult Day Care Centre. Carers of adults attending the Centre were informed of the impending closure at a meeting on 10th September 2019. They included Mr Roy McHattie, who on 5th September 2019 had been appointed guardian to his son Craig McHattie, aged 32, who is described as having severe learning and mobility issues. He had attended the Kyle Centre five days a week for the last 13 years. He and his parents were relying on the facilities provided at the Kyle Centre. He had developed important relationships with the carers. Outings in the wider community present significant hurdles for Craig, and the facilities of the Centre provided an alternative to such outings.

South Ayrshire Council determined that Kyle Centre should close on 24th December 2019.

On 9th December 2019, Roy McHattie lodged a petition for judicial review, seeking production and reduction of the purported decision to close dated 26th June 2019; declarator that the respondent, South Ayrshire Council, by reaching that decision without consultation with the petitioner and other service users and guardians, had frustrated the legitimate expectation of the petitioner; declarator that in reaching that decision the Council failed to perform its statutory duties under section 149 of the Equality Act 2010; and declarator that the decision dated 26th June 2019 was irrational, lacking in reasons, and unreasonable.

On 13th December 2019 Lord Woolman heard a motion for permission to proceed, for first orders, and for interim orders. He dispensed with intimation and service. Upon hearing that the respondent did not oppose permission being granted, he granted permission to proceed and made no interim order. He found the petition suitable for urgent consideration. The petition came before Lord Boyd of Duncansby for hearing on 19th December 2019. On 23rd December, the day before closure was due to take effect, Lord Boyd issued an interlocutor reducing the decision to close the Centre and making declarators as sought. Lord Boyd's Opinion dated 27th December 2019 is available at [2020] CSOH 4.

See that decision for a full narration of the background and for Lord Boyd's reasons for his decision. He narrated that there was no properly minuted decision to close the Centre. The IJB had decided on 26th June 2019 to make budget savings on the budget for 2019-2020. It was not evident from the Minutes of the Meeting available to the public that in agreeing to "further efficiency measures … not previously approved" IJB had in fact sanctioned the closure of the Centre. While at that point it was suggested that the decision to close had to be ratified by the Council's Leadership Panel, the report to a meeting of that Panel on 29th October merely recommended "noting" the decision taken by IJB to close Kyle Day Care Centre. It appears that lost in the course of that process were the requirements to consult and produce an Equality Impact Assessment under section 149 of the Equality Act 2010, and in accordance with the specific duties imposed on local authorities by the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012/160, and in particular the requirements under Regulation 5 to assess and review policies and practices.

Lord Boyd referred to what he described as "a useful summary of the law" in *Bracking and others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 and *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin). He picked out in particular that the duty upon the local authority had to be fulfilled before a policy that might affect a particular class of protected person is adopted; that the duty must be exercised in substance with rigour and an open mind (not just ticking boxes), and that the duty is a continuing duty which does not end, for example, once an Equality Impact Assessment has been completed. Lord Boyd further had regard to the guidance in two booklets from the Equality and Human Rights Commission: guides for Public Authorities in Scotland entitled 'Essential Guide to the Public Sector Equality Duty' and 'Assessing Impact and the Public Sector Equality Duty'. Applying these principles and guidance to the facts of this case, he noted that when the

Council's Business Plan was developed, the indicative timescale in it recognised the need for an EIA to be carried out before the proposal for closure was put to the IJB in June 2019, but that did not happen. The only EIA that was carried out was on the budget for 2019-2020, and did not mention the Kyle Centre. While it might be assumed that the members of the IJB anticipated that their decision to make the proposed savings would be subject to a further decision with a full EIA available, that was not the way in which the Council dealt with the matter. The Leadership Panel proceeded on the basis that the decision of the IJB was sufficient authority to close the Centre. The failure to carry out a formal EIA might have been excusable if it could be shown that in substance the duty under section 149 had been observed, but Lord Boyd was not satisfied that the Council could demonstrate that.

Lord Boyd also held that Mr McHattie had a legitimate expectation of consultation on the proposal to close the Kyle Centre, given his son's long history of daily attending there, and the extent to which it was an integral part of his son's life, upon which his son and the son's parents relied. Lord Boyd did not consider the failure to consult as being "at best a procedural impropriety". It was one which went to the heart of the decision-making process, which was fundamentally flawed by the failure to consult persons who had a legitimate expectation of such consultation.

In view of his other findings, Lord Boyd did not consider it necessary to consider the question of "Wednesbury unreasonableness" further.

Having reached those conclusions, Lord Boyd still had a discretion to determine whether the decision to close the Centre should be quashed. He was not impressed by submissions that the effective date of closure was to be 24th December; that the manager and all but three of the staff had accepted severance payments; that regulations required each such service to have a manager in full-time day-to-day charge; or that Craig McHattie was the only user of the Centre in respect of whom alternative provision had not been accepted. On the last point, he took the view that other users had accepted alternatives only because they understood the decision to close to be a fait accompli, which was a situation entirely of the Council's own making. Lord Boyd took the view that the court should be slow to refuse to quash an illegal decision by a public authority. The onus was on the authority to make out a good reason why the decision should not be quashed. Where the decision-maker would require to re-take the decision, it would only be where it was plain and obvious that the outcome would be the same that it would be right to refuse to reduce an illegal decision. The court should not attempt to take over the decision-making process or to speculate as to what the outcome might be. Lord Boyd took the view that the fundamental principle at stake was the rule of law: "An illegal decision is an affront to the rule of law". At times a pragmatic decision might be necessary in the interests of good governance and the wider interests of society in ensuring certainty.

No enquiry had been made as to whether departing staff would be prepared to stay on if the closure decision were reversed. Alternatively, staff could be re-assigned from elsewhere. There was no suggestion that if the Centre were to remain open, other users would want to remain with the new arrangements that had been made, rather than stay there. Lord Boyd confirmed that he was not

persuaded that he should exercise his discretion to refuse to reduce the closure decision.

Adrian D Ward

Decisions of Glasgow City Council not reduced

In *Terri McCue as guardian of Andrew McCue* [2019] CSOH 109 the court was asked to review the refusal by Glasgow City Council to take into account, in calculating charges to be made in accordance with the Council's Charging Policy, of the full amount of the "disability related expenditure" of Andrew McCue, who was aged 24, had Down's Syndrome and lived with his parents. His mother, Terri McCue was his carer and guardian. She brought the petition as her son's guardian.

The petitioner was entitled in law to community care services from the Council in terms of section 12A of the Social Work (Scotland) Act 1968 and section 5 of the Social Care (Self-directed Support) (Scotland) Act 2013. The question in the case was whether certain items of regular expenditure incurred by Andrew should be taken into account as deductions in calculating his income in arriving at whether and to what extent he should pay charges. However, having considered relevant law on the extent of the jurisdiction of the Ombudsman, Lady Wolffe concluded that the petitioner had an available alternative remedy in the form of a complaint or application to the Ombudsman for all of the grounds of challenge contained within the petition, and she accordingly sustained the Council's plea of no jurisdiction. At this stage we do not report her decision at greater length as her Judgment narrates that it has been issued in response to intimation of an appeal against her decision. *Adrian D Ward*

The Independent Inquiry into Mental Health Services in Tayside: Final Report

5th February 2020 saw the publication of the Final Report of the Independent Inquiry into Mental Health Services in Tayside.

Background

The Inquiry was commissioned by NHS Tayside after serious concerns were raised in the Scottish Parliament in May 2018 about the provision and adequacy of mental health services in Tayside following reports of ill-treatment and suicides of patients. Led by David Strang (formerly Her Majesty's Chief Inspector of Prisons for Scotland with a preceding long career with the police) the inquiry's objective was to look at the accessibility, safety, quality and standards of care provided by mental health services across the Tayside region.

Following a Call for Evidence an interim report was published in May 2019 which identified six key emerging themes which were patient access to mental health services, patient sense of safety, quality of care, organisational learning, leadership and governance.

This final report follows an investigation and analysis of the issues which had been identified.

Final Report findings: the title says it all!

A reading of the very detailed report is strongly recommended. However, as its title *Trust and Respect* suggests, it highlights the need for trust[4] and respect across the sector noting that good healthcare provision is only possible where there are good functioning relationships between and within healthcare providers, partner organisations (such as local authorities, Integration Joint Boards, third sector agencies, and Police Scotland) and patients, their families and carers and which operate at and between all levels.

The report makes it clear that, from the evidence presented to the inquiry, whilst there have been examples of good provision there have been 'too many' breakdowns of trust in many aspects of the provision of mental health services across Tayside. Cited examples include, the shortage of consultant psychiatrists undermining patients' belief that NHS Tayside are able to deliver necessary treatment and care, perceived gaps between the stated values of the organisation and observed behaviour and some staff not trusting the organisation's motivation and experiencing a culture of fear and blame manifesting in a failure of the organisation to take responsibility, defensiveness and lack of transparency.

A mutual lack of respect was also reported as being experienced by all people affected by or involved in the provision and receipt of mental health services. As well as patients and families some staff also described a lack of respect from both patients, families and carers and their employers leaving them feeling undervalued, disempowered and therefore less inclined to contribute positively to improvements. Hostility between professional groupings and mutual blaming between managers and clinicians was noted as well as problematic relationships between NHS Tayside, Integration Joint Boards and local authorities and with the Scottish Government.

The inquiry has essentially recommended a radical new approach to restore and build trust is urgently needed and this will require a change to the organisational culture. The report identifies five cross-cutting themes which will need to be addressed to improve Tayside's mental health services. These are strategic service design, clarity of governance and leadership responsibility, engaging with people, a learning culture and communication. 51 recommendations are made to assist in achieving this.

As the report states[5], this:

> *'…represents a major opportunity for Tayside to develop and put in place world class mental health services. Tayside's NHS Board and the Health and Social Care Partnerships, together with support from the Scottish Government, are in a position to tackle the underlying barriers to progress and to make the radical changes necessary…'*

[4] Essentially relating to trust in the ability and reliability of those delivering the services and their motivation to act with transparency and openness.
[5] Para 1.22.

Watch this space.

Jill Stavert

New Scottish Government guidance

The Scottish Government has recently published some new guidance on self-directed support relevant to adults with incapacity:

Managing self-directed support for adults with incapacity: guidance

Self- directed support and powers of attorney: Frequently Asked Questions

Jill Stavert

Scottish Parliament Social Care Inquiry - Call for views by the Health and Sport Committee

As a result of residential care facilities closures and funding issues relating to independent, voluntary and council run facilities the Scottish Parliament Health and Sport Committee is undertaking an inquiry into social care for adults over 18 years with the intention of exploring future social care delivery in Scotland. Full details of the inquiry as well as details about submitting views to the inquiry (the deadline for this being Thursday 20th February 2020) can be found here.

Jill Stavert

Mental Welfare Commission for Scotland: *Scotland's Mental Health Rehabilitation Wards: Themed Visit Report*

On 30th January 2020, the Mental Welfare Commission published a new report on its visits to all 22 of Scotland's NHS rehabilitation wards. The patients on these wards are likely to have severe and complex mental health needs and remain in hospital for considerably longer than some other mental health patients. The Commission therefore reviewed standards of care in light of the impact of such prolonged hospital stays and visited 130 patients and spoke to 26 carers or family members.

The report's findings are very mixed and a read of the actual report is of course recommended. For example, treatment was being properly authorised for those patients subject to compulsory treatment, most patients were aware of advocacy, were in contact with advocacy services and found it helpful and families and carers tended to be positive about service delivery although a lack of meaningful activity on wards seems to have been an issue. There was also found to be an improvement (although this was varied) since the Commission's last visit in terms of patients having regular access to their local communities, and in assessment, care planning and reviews.

Jill Stavert

Stakeholder survey: how well is the Mental Welfare Commission doing?

The Commission is seeking feedback on its roles and work from people who have been in touch with the Commission on either a personal or professional basis. The survey closes at 5pm on 25th February 2020 and a link to more information about it and how to respond can be found here.

Jill Stavert

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Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: To view full CV click here.

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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

LSA Mental Health conference

Adrian will be chairing and Jill speaking at the LSA Mental Health conference in Glasgow on 13 February. For more details , and to book, see here.

The law and brain death

Katie will be chairing and Tor speaking at a seminar and discussion taking a critical look at cases concerning brain death in the High Court and Court of Protection. It will take place on 26 February in London. For more details, and to book, see here.

SOLAR conference

Adrian will be speaking on "AWI: Don't wait for legislation – the imperatives apply now!" at the annual conference of the Society of Local Authority Lawyers and Administrators in Scotland, being held on 12 and 13 March in Glasgow. For more details, and to book see here.

Approaching complex capacity assessments

Alex will be co-leading a day-long masterclass for Maudsley Learning in association with the Mental Health & Justice project on 15 May 2020, in London. For more details, and to book, see here.

Other conferences and events of interest

Mental Diversity Law Conference

The call for papers is now open for the Third UK and Ireland Mental Diversity Law Conference, to be held at the University of Nottingham on 23 and 24 June. For more details, see here.

Peter Edwards Law courses

Peter Edwards Law have announced their new programme of courses, covering a wide range of topics across the mental capacity and mental health field. For more details, see here

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 the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in March 2020. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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