Court of Protection

Welcome

To the third edition of our COP newsletter for 2021.

Our round up this quarter showcases a variety of issues that have come before the court and the one particular case that stands out for me at least, is the case of *Miss K* in which the court – once again - severely criticised the applicant trusts for not making their application for Miss K's obstetric care in a timely fashion.

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HILL DICKINSON

Welcome

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Guidance where a pregnant woman who lacks, or may lack, the capacity to make decisions about her obstetric care in certain circumstances was first provided by Keehan J in *NHS Trust & Ors -v- FG* in 2014. It is extremely regrettable, seven years on, to see that the courts continue to criticise NHS bodies for late applications with Lieven J in the *Miss K* case going as far as to say that judicial criticism of delay felt like "a waste of breath" rendering the Official Solicitor's role effectively a "tick box exercise". A salient reminder for NHS bodies I think, to go back to the drawing board, pull out Keehan J's guidance and make early contact with their legal teams so that informed decisions can be made first, as to the need for an application and second, the timing of any application.

For anyone who may have missed these, two reminders. First, that on 9 July 2021, two new practice notes were issued outlining how to work with the Official Solicitor in Court of Protection cases (welfare and property and affairs). These can be found on the gov.uk website. Second, that the *Guidance on the MCA 2005 and DoLS during the Covid-19 pandemic* was withdrawn on 10 August 2021 and that the urgent authorisation form (form 1B) in Annex B is no longer to be used, with form 1 instead to be used for all requests.

My thanks to all the contributors to this edition of the newsletter and if there is any burning topic or issue you would like to see covered in the next edition, do please let us know.

Kiran Bhogal
Partner and Head of Health Advisory London
kiran.bhogal@hilldickinson.com

Court of Protection cases from July to September 2021

Here is a round-up of the key Court of Protection cases from this quarter which we believe our readers will be most interested in. Please follow the link within the case summary to access the full judgment and contact our team to discuss any particular case in more detail.

Depriving a child of their liberty *In the matter of T (A Child) (Appellant)* [2021] UKSC 35

The limited number of approved secure children's homes in England and Wales has led local authorities to apply to the High Court, under its inherent jurisdiction, for authorisation of alternative restrictive placements for children and young people.

In July 2017, Caerphilly County Borough Council (CCBC) issued proceedings to address the care aspects of T, who at the time was 15 years old. CCBC sought an order under the inherent jurisdiction for T to be placed in accommodation that was not a registered children's home, nor approved secure accommodation in circumstances involving her being deprived of her liberty. The order was granted but the placement broke down. An alternative registered children's home (again not approved for use as secure accommodation) was found and the court authorised a move to another placement where it was also envisaged that T would be deprived of her liberty. T's position on both occasions was that she had capacity to consent to the care regimes proposed, wanted to be in those placements and consented to the restrictions placed on her. However, Mostyn J took the view that T's consent to the arrangements fell short of being 'enduring consent' which was necessary for the purpose of Article 5 of the European Convention of Human Rights (ECHR).

T appealed, challenging the judge's approach to the question of consent first to the Court of Appeal (dismissed in October 2018) and then to the Supreme Court. The two main issues before the Supreme Court were:

1. **Is it a permissible exercise of the High Court's inherent jurisdiction to make an order authorising a local authority to deprive a child of their liberty?** T argued (a) this would fall foul of Article 5 of the ECHR; (b) was barred by section 100(2) of the Children Act 1989; and (c) the inherent jurisdiction was not to be used in a way to cut across the statutory scheme in the Children Act 1989, as it would do here. Dismissing those arguments, the Supreme Court held that using the inherent jurisdiction to authorise the deprivation of liberty in cases like this is permissible.
2. **If such an exercise is permissible, what is the relevance of the child's consent to the proposed living arrangements?** T's argument appeared to be premised on the fact that as she had consented to the arrangements, she was not deprived of her liberty and there was therefore no need for an order authorising the arrangements. Lady Black considered that this argument was too simplistic an analysis of the court's role in these cases. She observed that consent given by a child may be quickly revised and/or reversed, but was clear that consent would form part of the circumstances that the court considered when determining the issues.

Lord Stephens noted that any order made under the inherent jurisdiction to authorise a deprivation of liberty where the placement is in an unregistered children's home does not authorise the commission of a criminal offence nor does it prevent an offence from being committed (see article below entitled: **Caselaw update: JB, Re C and Re T and how they connect** for further analysis of this point).

Lord Stephens placed emphasis on the matters that must be considered before a court when authorising a placement in an unregistered children's home, along with the ongoing monitoring which must take place. He noted that such a placement might be justified and required where the positive operational duties to take steps to protect life or prevent degrading or inhuman treatment under articles 2 and 3 of the ECHR are engaged.

Grave concern was expressed about the use of the inherent jurisdiction to fill a gap in the childcare system, with Lord Stephens referring to it as a "scandalous lack of provision… containing all the ingredients for a tragedy". It is clear that using the inherent jurisdiction in this way is a temporary solution; the long-term solution being the provision of appropriate accommodation for children and young people.

Withdrawal of life-sustaining treatment *Manchester University NHSFT -v- KM & Others* [2021] EWCOP 42

KM, a 52-year-old man, presented to Hospital A on 19 January 2021 with shortness of breath and pleuritic chest pain. On 24 January 2021, he was transferred to Hospital B and placed on an extracorporeal membrane oxygenation machine (ECMO). Attempts to wean him off the ECMO were unsuccessful and his condition sadly deteriorated. Treating clinicians deemed his condition to be 'irrecoverable and irreversible' and considered that continued treatment would be futile and overly burdensome. Accordingly, the NHS trust made an application to the Court of Protection for permission to withdraw life-sustaining treatment from KM which was supported by the Official Solicitor (acting as KM's litigation friend).

The application was however, strongly opposed by KM's wife, son and brother-in-law who gave evidence, along with the pastor of KM's church.

Keehan J accepted that their evidence reflected the wishes and feelings of KM, whose deeply held religious views would never allow the withdrawal of life-sustaining treatment. While great weight was given to the religious views and beliefs of KM and his family, Keehan J concluded that the medical evidence presented to the court was overwhelming and conclusive. It was evident that there were no other realistic alternative treatments, and that withdrawing treatment would allow KM to have a dignified death. Thus, the declarations sought by the NHS trust were granted and a plan of palliative care endorsed.

This case is another reminder that although significant weight should be given to the views and beliefs of P and P's family, such views are not determinative when it comes to assessing best interests.

COVID vaccination *A CCG -v- AD & AC* [2021] EWCOP 47

AD is a man in his 30s with a moderate learning disability, Down's Syndrome and autism. He was deemed to lack capacity to make decisions about whether he should have a COVID-19 vaccination ('the vaccine'), booster and associated medication. The relevant CCG made an application to court for a declaration that it was in AD's best interests to have the same.

The CCG with the support of the Official Solicitor submitted that AD was at high risk of contracting COVID-19 and was likely to refuse treatment if he did contract it. Risk factors such as the fact that he is part of BAME heritage, clinically overweight, extremely sociable and unable to comply with social distancing or the wearing of a mask, were highlighted. The CCG considered that the benefits of vaccinating AD outweighed the risks. The professionals involved in AD's care and his father agreed that he should receive the vaccine. However, his mother disagreed, raising concerns that the vaccine would cause psychological and physical harm, hence the court application.

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The court concluded that, on the balance of probabilities, AD lacked capacity to decide whether to have the vaccine. As regards best interests, in line with *SD -v- Royal Borough of Kensington and Chelsea [2021] EWCOP 14*, the views of AD's family were taken into account, but were not determinative. The evidence was overwhelmingly in favour of AD receiving the vaccine in accordance with the plan formulated by the CCG. However, in relation to the booster it was considered to be too premature to sanction due to AD's initial response to the vaccine being unknown and boosters not being part of government policy at that time.

Personal Welfare Deputy appointment and costs refused ***YH -v- CB and Others*** **[2021] EWCOP 43**

The case was brought by CB's sister, YH, to determine where it was in CB's best interests to receive care and reside. The parties undertook mediation and although they were unable to reach a conclusive agreement only two issues remained to be resolved by the time of the hearing before Keehan J.

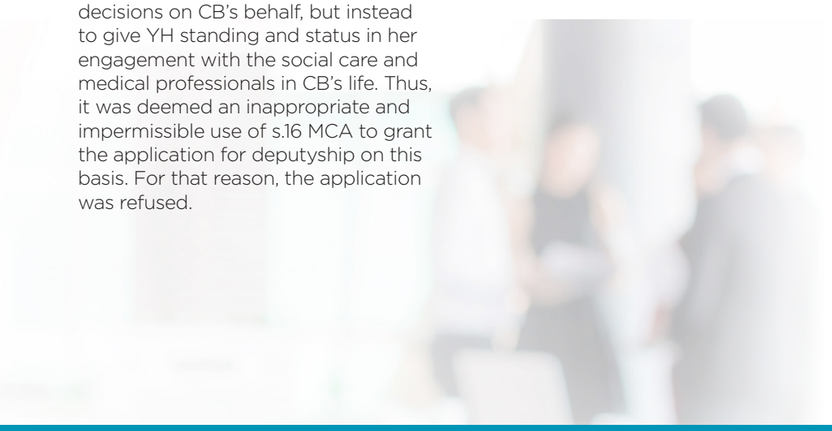
Firstly, whether YH should be appointed as CB's personal welfare deputy alongside her being CB's property and affairs deputy. YH had not distinguished a positive or productive working relationship with the local authority but this had improved following the appointment of a new social worker. Keehan J held that YH's purpose for seeking appointment as CB's personal welfare deputy was not to be able to make decisions on CB's behalf, but instead to give YH standing and status in her engagement with the social care and medical professionals in CB's life. Thus, it was deemed an inappropriate and impermissible use of s.16 MCA to grant the application for deputyship on this basis. For that reason, the application was refused.

Secondly, whether the local authority should be ordered to pay YH's costs. YH applied for costs arguing that the local authority had conducted the litigation unreasonably which warranted a departure from the usual rule of no order for costs pursuant to Rule 19.5 of the Court of Protection Rules 2017. Keehan J noted that there were neither findings of fact made by the court, nor an agreed factual matrix which demonstrated unreasonable conduct by the local authority. The facts and evidence relied upon by YH instead required the court to infer or assume unreasonable conduct on the local authority's part. On this basis, Keehan J was not satisfied that the circumstances justified a departure from the general rule, and accordingly the application for costs was refused.

Sexual relationships ***A local Authority -v- P and A CCG*** **[2021] EWCOP 48**

This judgment concerned the question of whether P had capacity in particular with regard to his contacts and sexual relationships.

P is a 24 year-old man with autistic traits and a very complex family history, including sexual abuse. P is known to enjoy using drugs and alcohol. He identifies predominantly as gay. Concerns grew in 2018 of P's sexual contacts and behaviour in the community and so plans to allow him to live independently were delayed due to him regularly disappearing. There was concern also that older men were taking advantage of him. At the time of these proceedings, P was living with two other residents but resented the restrictions placed upon him.



HHJ Williscroft accepted the evidence that P has the capacity to engage in sexual relations, but is unable to make decisions about who he has contact with. HHJ Williscroft also noted that it is 'rather odd that P can understand the basics of sex but not have the capacity to engage in a relationship that is based almost exclusively on the need for sexual activity but this is as a result of looking at domains of understanding for sex and contact separately and part of ensuring autonomy is only restricted where an analysis of lack of capacity is clear'. The judgment included a copy of a letter from HHJ Williscroft to P, explaining the decision she had made.

Landmark COVID-19 end of life case ***Cambridge University Hospitals NHS Foundation Trust -v- AH & Others*** **[2021] EWCOP 51**

AH is a 56 year old woman who was admitted to hospital in December 2020 suffering with severe symptoms of COVID-19. AH has been left brain damaged and paralysed from the neck down and treatment is described as futile and burdensome. The treating team and the expert instructed by the Official Solicitor consider that it was not in AH's best interests to receive long term mechanical ventilation, and instead it is in her best interests to transition to palliative care. AH's sister and some of her children disagree.

Mr Justice Hayden concluded that it is not in AH's best interests that ventilation be continued indefinitely, but it is in her interests that ventilation remains in place until such a point as all her four children and family members can be with her (one daughter lives in Australia). He was satisfied that this is what AH would want and she would be prepared to endure further pain to achieve it. Mr Justice Hayden was clear that it is in AH's best interests to be moved to a place which protects her privacy and affords her greater rest, and ventilation should be discontinued by the end of October 2021.

Julie Grifo
Paralegal

Emma Pollard
Associate

LPS – Likely, perhaps, soon (ish)

At the time of writing, the long-awaited draft Code of Practice and draft regulations for the Liberty Protection Safeguards (LPS) are... well, still awaited!

As you will know, the LPS are due to replace the Deprivation of Liberty Safeguards (DoLS) in their entirety. They are intended to bring (in theory) a more streamlined process and to tackle some of the main concerns about DoLS, extending the system to 16 and 17 year olds, and to all patients, not just those in care homes and hospitals.

After the legislation was passed in May 2019, the LPS were expected to be in force by October 2020. As late as July 2020, it was announced that they would be deferred until April 2022, though that depended on the Code of Practice and regulations being published in draft, for consultation, in "Spring 2021".

The Code of Practice, in particular, is no small thing since many of the sticky bits of the passage of the legislation through parliament were eased by saying that everything would be made clear in the Code of Practice. The Code will, of course, also be especially important as it will include an update of the Code of Practice for the Mental Capacity Act 2005 as a whole, as well as dealing with the new LPS system.

There will surely be plenty to talk about when the draft Code is published for consultation which, we have most recently heard, is now expected to be "in September" (presumably, this September).

Allowing for a three-month consultation period, which would take us past Christmas even if it were published now, it is very hard to see how the system could possibly be in place and effective by April 2022. Not least, the LPS system will rely on a new professional role – an Approved Mental Capacity Practitioner, or AMCP – largely replacing the Best Interests Assessor role under DoLS. The qualifications necessary for an AMCP are still unclear, and even when they are decided it will take some time for the institutions offering the relevant training to develop, fill and deliver the appropriate courses. Equally, the workforce plan will be absolutely critical for implementation, and we are told to expect this at the same time as the draft Code and regulations.

NHS bodies, for now, have the challenge of preparing for new, wider responsibilities, without much clarity on exactly how the system will work, or the workforce plan to deliver it, from the budget for next year, which was set many months ago.

No one would be surprised to see a further delay in implementation of LPS of 6 or even 12 months announced when the draft Code and regulations are published.

But in the meantime, DoLS referrals must still be made appropriately, and cases of deprivation of liberty in the community (or for under 18s) must still be referred to court for authorisation.

Please do get in touch if it would be helpful to discuss your preparation / transition to LPS, or any issues around mental capacity or deprivation of liberty in the meantime.

Ben Troke
Partner

Mother successfully appeals against being discharged as a party but is not awarded costs

(AA -v- London Borough of Southwark and others)

Background

P was at the time of the judgement, a 19 year old woman who suffered from cerebral palsy, atypical anorexia, post-traumatic stress disorder and selective mutism. At age 16, P was made the subject of a child protection plan for neglect.

In April 2019, P was admitted to hospital and was severely underweight for her age. Her condition deteriorated and the local authority issued Court of Protection proceedings on the basis that P lacked capacity to make decisions with regard to the conduct of proceedings, her place of residence, care needs and contact with others.

Court of Protection

In June 2019, P (by her litigation friend, the Official Solicitor) and her Mother ('AA') were joined as respondents to the proceedings. Vice president of the Court of Protection (the Court), Mr Justice Hayden ('the Judge') made an interim declaration pursuant to Section 48 of the Mental Capacity Act 2005 ('MCA') that there were reasons to believe P lacked capacity to conduct proceedings and to make decisions regarding her place of residence, care needs and contact with others.

It was ordered that P was to be removed from her family home and placed into residential care provided by the local authority. The Judge further ordered that direct contact between P and her mother be supervised and limited to once a week. Indirect contact by telephone and social media remained unrestricted.

The interim declaration that P lacked capacity was extended in October 2019, December 2019 and again in April 2020. In the interim, P continued with her ongoing psychiatric therapy.

In October 2020, P revealed to her psychiatrist that she had been subject to emotional abuse by AA through various WhatsApp messages. She also alleged that she had been physically and sexually abused by AA's new partner and father of P's half-sister (born in October 2020). P indicated that she no longer wished to live with or have any contact with AA.

In November 2020, the Judge ordered that all contact (both physical and indirect contact) between P and AA should cease. Rather unusually, the Judge ordered that AA be discharged as a party without putting AA on notice and without providing his reasoning. On making the order, the Judge directed AA to make representations in respect of the order (should she wish to do so) within three days.

In December 2020, AA made an application to the Court to request a copy of the judgment, and the Judge made an order to adjourn that application. In a further unusual turn of events, the Judge explained that he was adopting this approach because the other parties had disclosed information to the Court which he considered evidenced there was a risk that P would suffer serious harm should such information be disclosed to AA. On 22 December 2020, AA appealed both orders.

Court of Appeal

At the time of the appeal, AA was aware, in part, of the information on which the Judge relied upon when making the order to discharge AA as a party to proceedings. The Court of Appeal remained concerned of the risk of harm to P should AA receive any further disclosure. Consequently, the Court of Appeal determined it appropriate to conduct part of the hearing in closed session. A closed bundle was produced for the Court of Appeal and AA was represented by a Special Advocate (ie a barrister who appears in a closed hearing to represent a party who is themselves not permitted to hear certain evidence).

The Court of Appeal, chaired by Lord Justice Baker, determined that while it was necessary to withhold information from AA to protect P's welfare, this did not justify discharging AA as a party to proceedings. Lord Justice Baker concluded that the Judge at first instance "plainly went too far" by discharging AA as a party without giving her notice or the opportunity to make representations. Furthermore, the Judge had failed to consider alternative procedures which might have protected P's best interests, while limiting the infringement of AA's rights.

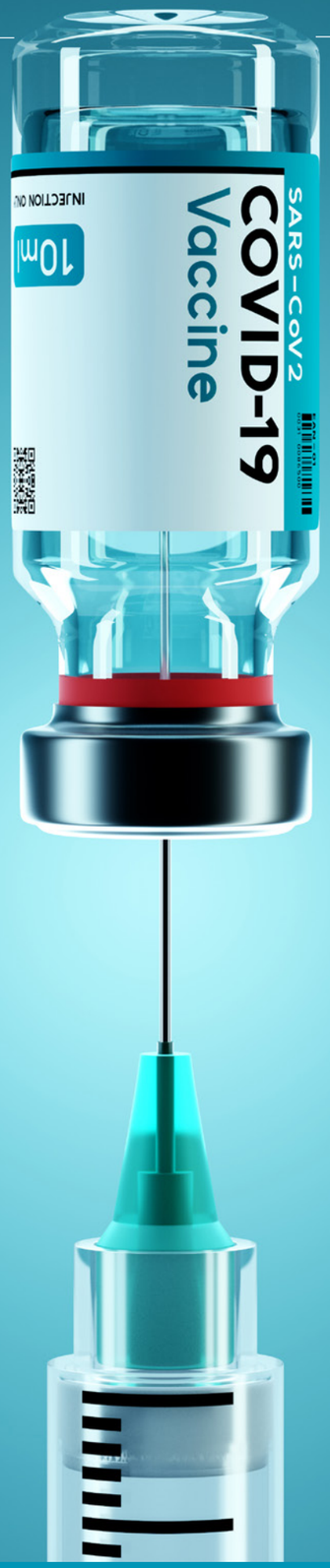
AA's appeal was unanimously allowed and she was restored as a party to the proceedings.

Costs

Despite AA's successful appeal, the Court of Appeal declined to make a costs order against the order discharging AA as a party to proceedings for the following reasons:

1) The Court has a discretion under CPR Part 44.2 (1) as to whether costs are payable and a discretion in deciding what costs order (if any) to make with regard for all circumstances under CPR Rule 44 (3).
2) In *Cheshire West* Lord Justice Munby acknowledged that while an appeal from the Court fell within CPR Part 44, the fact that it concerned a vulnerable adult was one of the circumstances to take into account when considering costs under Rule 44.2(2).
5) In the case of P, her vulnerability was the central feature of the proceedings and of the appeal. It was P's high degree of vulnerability that led the Judge at first instance to take the step of removing AA as a party.
6) The decision to discharge AA as a party was made without application from any party at a hearing listed to consider a different application. The Judge was fully entitled to make no order as to costs in accordance with CPR Rule 44.2 (2).

Sofia Bradford
Associate



Compulsory vaccination of care home workers

On 11 November 2021, the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 (the Regulations) come into force and require care home workers and visiting professionals to be fully vaccinated against COVID-19.

This is subject to exemptions including if the individual is (a) exempt from vaccination; (b) providing emergency assistance and/or attending to carry out duties as a member of the emergency services; or (c) providing urgent maintenance assistance.

The Department of Health and Social Care (DHSC) has provided:

- **Operational Guidance** aimed at helping care homes prepare for this change; and an
- **Impact Statement** which estimates that 3-12% (17,000 – 70,000) of care home workers will remain unvaccinated by 11 November 2021.

The Regulations apply to CQC registered adult care homes, so it follows that the CQC is responsible for monitoring compliance with the Regulations. To do this, the CQC will be seeking assurance from registered providers that they have robust processes in place to:

- monitor vaccination and COVID-19 status of staff;
- ensure staff maintain an up-to-date vaccination status and ensure staff maintain up to date best infection, prevention and control (IPC) practice
- monitor vaccination and COVID-19 status of personnel entering the care home, and
- where applicable, make reasonable adjustments to ensure people using the service receive safe care and treatment.

The DHSC is seeking views on whether or not to extend these vaccination requirements to other health and care settings, for both COVID-19 and flu. The **consultation** closes on 22 October 2021.

Emma Pollard
Associate

A timely reminder: making applications to court without delay

The case of *University Hospitals Dorset NHS Foundation Trust -v- Miss K* [2021] EWCOP 40 is another case of an NHS trust being severely criticised for the delay in bringing a caesarean section case before the Court of Protection in a timely manner.

Background

This was a joint application by University Hospitals Dorset NHS Foundation Trust and Dorset Healthcare University NHS Foundation Trust for declarations that it was in Miss K's best interests for her to have an elective caesarean section, the plan being that the caesarean section would take place the following morning. The first applicant was responsible for providing Miss K's obstetric care, and the second applicant was responsible for providing Miss K's mental health care. The case was heard on 10 June 2021.

Miss K is a woman in her late thirties and at the time was detained in a psychiatric intensive care unit under section 2 of the Mental Health Act 1983 ('MHA'). She had a long history of mental illness with a diagnosis of schizophrenia, which was medication-resistant and had been difficult to treat. Miss K was, at the time the application was made, 37 weeks and 4 days pregnant and this was her first pregnancy. She had a partner with significant mental health issues who was then under the supervision of the mental health trust as a forensic mental health patient in the community. He was not involved in the proceedings.

In February 2021 there was evidence of a telephone conversation with Miss K and her partner at 22 weeks' gestation. At that stage she was stable without medication and under the care of the community mental health team. The plan was for monthly checks to take place via telephone, presumably due to the COVID-19 pandemic, and safety netting advice was given. On 12 April 2021, Miss K could not be contacted by telephone for her appointment. This was raised with a community midwife and she was seen by the community mental health team. Following this date, Miss K was under the combined care of the community mental health team and perinatal mental health team.

By mid-May 2021, Miss K's mental health had deteriorated and she was admitted initially to a perinatal mental health unit and then to a psychiatric intensive care unit, where she remained, under section 2 of the MHA, as the first unit were unable to manage her complex needs. Importantly, on 20 May 2021, a child protection case conference took place and according to the chronology before the court, there was an agreed plan for the baby to be removed at birth by the police using their powers of protection pending the local authority applying for an emergency protection order. It was of considerable concern to the court that no notes of this conference had been produced and that it appeared that Miss K was not told of that plan until Tuesday 8 June 2021 – two days before the court hearing.

On Monday 7 June 2021 Dr A, the consultant obstetrician, first met Miss K. According to Dr A, at that meeting she discussed with Miss K the pros and cons of a vaginal birth versus a caesarean section and Dr A thought that Miss K had capacity to make treatment decisions regarding her obstetric care. She discussed with Miss K the benefits of having a planned caesarean section and Miss K agreed with that plan. It became clear when Dr A gave evidence to the court that she either did not know about, or had forgotten, that the plan was that the baby would be removed at birth and she said nothing to Miss K about this. It also appeared that she had not investigated Miss K's psychiatric history and did not know that during the previous week, Miss K had been significantly unwell and, having heard Dr B's evidence, was extremely unlikely to have had capacity to make treatment decisions regarding the birth of her child that past week or over the weekend. Both the judge and the Official Solicitor were extremely concerned regarding Dr A's apparent ignorance of Miss K's psychiatric background and the plans for the baby.

On 8 June 2021, Miss K's mental health significantly deteriorated, and concerns were raised regarding her capacity to consent to and cooperate with a caesarean section. The caesarean section planned for Wednesday 9 June 2021 was therefore cancelled and an urgent multi-disciplinary team (MDT) meeting arranged. On 9 June 2021, at the MDT meeting it was agreed that Dr A would go to the psychiatric intensive care unit to assess Miss K's capacity regarding the proposed birth plan. Dr A saw Miss K that afternoon and found her to be verbally aggressive, experiencing delusional beliefs, agitated and swearing at staff.

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Miss K was unable to engage in any conversation regarding the delivery of her child and was unable to recall her conversation with Dr A on Monday 7 June 2021. Dr A concluded, plainly rightly, that Miss K did not have capacity either regarding litigation capacity or with regard to a caesarean section and the birth plan.

The court application was issued on the morning of 10 June 2021 with the elective caesarean section planned for Friday 11 June 2021.

Outcome

The law was not in dispute and it was plain that Miss K lacked capacity regarding the issues before the court. The court was charged with determining whether it was in Miss K's best interests to have a planned caesarean section or not. Miss K had herself previously expressed a willingness to have a caesarean section. The Official Solicitor ('OS') did not feel able to put forward a position on behalf of Miss K at the hearing due to her limitations on only being instructed on the day of the hearing, alongside other reasons detailed in the judgment including the evidence of Dr A in respect of which the OS was "appalled". Dr A had given evidence that Miss K had capacity on 7 June 2021 when she chose a caesarean on the basis that she could hold and keep safe her baby earlier, when in fact it had been decided on 20 May 2021 that the child would be taken into care at birth.

Mrs Justice Lieven found that on the evidence before her, the caesarean section was in Miss K's best interests. The judgment has been helpfully updated to confirm that on 11 June 2021, Miss K was successfully transferred from the psychiatric hospital to the acute hospital earlier that morning without resistance and the need for restraint. Miss K has been compliant and walked into theatre and she was delivered of a live baby boy who had been transferred to the neonatal intensive care unit and was noted to be doing well.

Criticism of the trust

Mrs Justice Lieven at the outset of her judgment noted the following criticisms:

"Before turning to the facts of the case I will say something about the timing of the application. The application was made this morning, Thursday 10 June 2021…Whilst the documents in the bundle suggested initially that the need for the application had only arisen on Tuesday or Wednesday of this week, and therefore it initially appeared to me to have been made in good time, when I got to the end of the bundle I discovered a witness statement from Dr B (psychiatrist). It is entirely clear from his written and oral evidence that there was a very strong risk, at least from last week, that Miss K would lose capacity to give consent for the treatment proposed. In those circumstances, it was incumbent upon the Trusts to have made this application significantly earlier than today."

Whilst acknowledging that 'these cases are very difficult, and that everyone is trying to act in good faith and in the patient's best interests', judicial criticism of delay felt like 'a waste of breath' as it had been made so often. The OS had been instructed the same day, and was unable to form a view on best interests, rendering her role effectively a 'tick box exercise', with the judge noting that it was wholly unacceptable for NHS trusts to put the OS in such an impossible position, nor was it fair to the court. The judge also noted a failure between the two NHS trusts to work together and share information appropriately.

Lesson learning

This is another case highlighting the expectations of the court and OS that court applications will be made in 'good time'. While this is of course essential and delay is to be avoided wherever possible, the difficulty in doing so is does pose a significant practical issue for health and social care practitioners and their legal teams. It is often difficult to identify if a court application will be necessary while steps are being taken to try and resolve matters without court intervention where possible and appropriate.

If an application is made too early, this of itself may result in criticism being levied at the public bodies involved for not having necessary evidence to assist with the court's determination.

Trusts identifying when legal support may be required as early as possible is of significant assistance, alongside providing a central point of contact in the trust to assist in dealing with internal co-ordination. Working co-operatively between different trusts/services and sharing information, potentially via MDT meetings convened urgently (now more easily achieved utilising technology such as Teams and Zoom), with an understanding on the part of the professionals involved of the need to potentially give evidence, the level of detail that will be required, good documentation and the importance of joined up care planning greatly assists practitioners in being prepared. This in turn will assist in getting the best evidence to the legal team and allow any gaps to be identified at the earliest opportunity.

The criticism levied for delay in bringing an application can sometimes seem unfair when frequently professionals have undertaken much additional work to that which still needs to be done in their usual working day, often out of hours and with great commitment of the professionals involved to the court process. The court and OS are of course also under immense pressure and the more notice that can be given of the need for a hearing, the better. A mutual appreciation of the difficulties faced on all sides should help to focus what is required to make an application as timely and effective as possible, while keeping the person at the heart of the application at the forefront of everyone's minds.

Louise Wilson
Legal Director

Caselaw update: JB, Re C and Re T and how they connect

Court of Protection: *JB (Capacity: Consent to sexual relations and contact with others)* [2019] EWCOP 39

The key question in this case was whether in order to have capacity to decide to have sexual relations with another person, a person needed to understand that the other person must have the capacity to consent to the sexual activity and that they must in fact consent before and throughout the sexual activity?

Facts

JB is a single man in his 30s. He has a complex diagnosis of autistic spectrum disorder and impaired cognition. He has expressed a strong desire to have a girlfriend and engage in sexual relations. However, JB is restricted from socialising freely with women in order to prevent him from behaving in a sexually inappropriate manner towards them. There is a concern that his behaviour, if unrestricted, may result in his exposure to the criminal justice system and risk to potentially vulnerable females.

The local authority sought declarations as to JB's capacity in various areas, including his capacity to consent to sexual relations. The initial expert evidence recorded that JB understood the mechanics of sexual acts and the risks of pregnancy and sexually-transmitted disease, however, JB's 'understanding of consent is lacking'.

The court held that in order to have capacity to consent to sex, a person does not need to understand that their sexual partner must be able to consent to sex. It also held that a person does not need to understand that their sexual partner must consent before and throughout the sexual activity. The court therefore concluded on the evidence before it, that JB has capacity to consent to sex.

The local authority appealed the decision to the Court of Appeal.

Court of Appeal: *A Local Authority -v- JB [2020]* EWCA Civ 735

The Court of Appeal considered three fundamental principles of public interest:

1) Autonomy – the principle lying at the heart of the Mental Capacity Act 2005 (MCA)
2) That vulnerable people in society must be protected
3) That whilst the Court of Protection is concerned primarily with P and P's human rights, the court is part of a wider system of law and the administration of justice and as a public authority has an obligation under s.6 of the Human Rights Act 1998 not to act in a way which is incompatible with a right under the European Convention of Human Rights, which includes the rights of others.

The Court of Appeal (CoA) allowed the appeal and held that for someone to have capacity to consent to sex, they need to understand that their sexual partner also needs to have capacity to consent to sex and that they must consent before and throughout the sexual activity stating that 'sexual relations between human beings are mutually consensual. It is one of the many features that makes us unique. A person who does not understand that sexual relations must only take place when, and only for as long as, the other person is consenting is unable to understand a fundamental part of the information relevant to the decision whether or not to engage in such relations.'

The CoA left it to the Court of Protection to determine whether, given its decision, JB has the capacity to consent to sex.

JB then appealed to the Supreme Court.

>>> continues on page 12

>>> continued from page 11

Appeal to the Supreme Court

The Supreme Court will ultimately decide whether (a) in order for a person to have capacity to consent to sex, they need to understand that their sexual partner must have the capacity to consent to sex; and (b) a person needs to understand that their sexual partner must consent before and throughout the sexual activity.

The appeal was heard in July 2021 and the Supreme Court's judgment is awaited.

Re C [2021] EWCOP 25

In our last newsletter, we covered the *Re C* case and the issue of P's right to have sex with a sex worker. In contrast to the JB case, all parties agreed that C has capacity to engage in sexual relations. However, if the test changes following the ruling from the Supreme Court in JB, this may be an issue that need to be revisited, not only in C's case, but potentially in other cases where capacity to engage in sexual relations is being considered.

One of the key questions for the CoA in C's case was whether a care plan to facilitate C's contact with a sex worker could be implemented without the commission of an offence under the Sexual Offences Act 2003. Hayden J found that what C was seeking was not in principle going to lead to his care or support workers committing a criminal offence. This is the central issue which was appealed by the Secretary of State for Justice.

The appeal was heard in July 2021 and the Court of Appeal judgment is awaited.

Re T (deprivation of liberty of children) [2021] UKSC 35

A summary of this case is provided in the case law section above. Whilst this case does not concern the issue of sexual relations, parallels can be drawn in respect of the court's involvement in cases when there are potential issues around the commission of criminal offences.

This case raises important questions of law about the use of the inherent jurisdiction to authorise a local authority to deprive a child of his or her liberty in circumstances where the statutory criteria for making a secure accommodation order under section 25 of the Children Act 1989 are met, but where the child is not placed in a secure children's home (either because there is a shortage of placements in secure children's homes or the child's needs could not be met in such a placement). If the placement is in an unregistered children's home, a criminal offence will be committed by any person who carries on or manages the home.

The court was understandably concerned as to whether it is a permissible exercise of the inherent jurisdiction to authorise a local authority to place a child in an unregistered children's home in relation to which a criminal offence would be being committed. However, the court recognised that there are cases in which there is absolutely no alternative, and where the child (or someone else) is likely to come to grave harm if the court does not act.

Any order made by the court under its inherent jurisdiction to authorise a deprivation of liberty in an unregistered children's home does not authorise the commission of a criminal offence, and it does not prevent an offence being committed. The court 'authorises' but does not 'require' the placement by a local authority in an unregistered children's home despite the possibility that a person may be prosecuted and convicted of an offence under section 11 of the Care Standards Act 2000. It is sufficient for the court to be aware of the potential that an offence may be committed by another and to consider how that impacts on the best interests of the child. The court said: 'if a prosecution is brought, then it is a matter for the criminal courts to determine whether an offence has been committed and if so, as to the appropriate sentence to impose.' In short, the fact that a criminal offence may be committed by others does not relieve the court from taking the positive operational step in order to discharge its duties under articles 2/3 (right to life, freedom from torture and inhuman/degrading treatment) of the ECHR where these are engaged.

It will be interesting to see whether the CoA in *Re C* consider the criminal offence matters to be for the criminal courts to determine.

Leah Selkirk
Associate

COVID vaccine, Victoria Gillick and kids

At the start of the COVID pandemic, we were sometimes asked about how outstripped NHS resources should be prioritised – in crude terms, how to decide who gets the last ICU bed, or the last ventilator, when we have more patients in need than we can treat?

We should celebrate that, for now at least, medical progress has moved us on to different challenges – how to deal with disputes over vaccination – but it can still throw up some real problems. The Court of Protection has dealt with cases where a patient lacks capacity to make a decision about vaccination for themselves, and either there is a dispute over best interests (often between professionals in favour of the jab, and one or more of the family set against it), or giving the vaccine is likely to need significant restraint or coercion.

With the recent decision that the COVID vaccination will be offered to children between 12 and 15 years old, we have seen a flurry of strong opinions about the relative roles of government, parents and (less often) children themselves in making the decision about this.

At times, the politicians have been keen to emphasise their respect for parents' decisions, but the law on this was settled around 35 years ago.

In 1986, the House of Lords ruled that a child under 16 who has sufficient understanding and maturity to make the decision can consent to medical treatment without needing parental consent, or even parental knowledge. Mrs Victoria Gillick, the mother of five daughters under the age of 16, argued that Department of Health guidance was unlawful in allowing GPs to prescribe contraception to girls under 16 without parental consent. She lost the case, and so, ironically, gave her name to the test for a child to lawfully make a medical treatment decision for themselves, without involving the parent: 'Gillick competence'.

As we have seen from the last few months, the question of vaccination is not necessarily straightforward. There are uncertainties about the long-term effects both of any vaccine, and of COVID itself. Parents, or children, might also legitimately take into account wider issues, such as the potential impact on disruption to education if there were an outbreak of COVID, or even whether the vaccines ought to be offered to more vulnerable patients around the world than to healthy children here.

In COVID vaccination, it seems to be suggested that parents will be informed about the proposed vaccination and asked for consent. There have also been confusing references in the media to the need for 'consent as a family'. Perhaps, pragmatically, the child's own competence may be considered only if the parent, or the child, refuses vaccination. But strictly, where a child has enough understanding and maturity to be *Gillick* competent for the decision about vaccination, it becomes a matter for the child, and child alone, regardless of the parents' views. Discussion of the child's decision with the parents, without the child's consent, can become a matter of breach of the child's confidentiality.

Ultimately, in the event of a dispute, the court has the power to override a child's decision about medical treatment, and judges have time and again declared it to be lawful to force life-saving treatment to be forced on a child against their wishes, at least until they reach the age of 18, regardless of *Gillick* competence (under 16), or the assumption (under the Mental Capacity Act 2005) of capacity to make the decision for themselves from the age of 16. The welfare of the child is the court's paramount concern.

But, for a child who is able to make their own decision, the child's views are unlikely to be lightly overridden by the court in this context, and healthcare providers should take care to apply the normal rules of consent to treatment for children, as they would for any other intervention.

Ben Troke
Partner

Is a decision of the Court of Protection refusing permission to appeal susceptible to judicial review?

Summary

In *SM -v- The Court of Protection and The London Borough of Enfield* [2021] EWHC 2046 (Admin) (High Court (Administrative Court) the Court held that the Court of Protection (COP) is a superior court of record, on an equivalent footing to the High Court and that a decision by a judge of the Court of Protection to refuse permission to appeal is not amenable to judicial review.

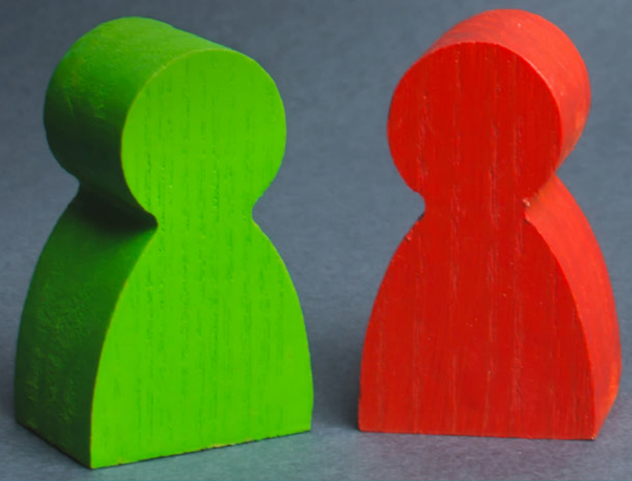
Background to the judicial review claim

By an application made on or about 4 May 2021, SM (the claimant) sought permission to challenge 'a COP decision on Best Interest on long term placement. Date of decision: 12th March 2021.'On 12 March 2021, HHJ Hilder had made an order in the Court of Protection that SM's daughter, RM, should reside and receive care at a placement; refused SM's application that the placement should be interim only and refused permission for SM to appeal her decision.

SM applied to a Court of Protection Tier 3 judge (High Court Judge) for permission to appeal. On 12 April 2021, Mr Justice Keehan refused the application (on papers) finding that "there is no reasonable prospect of the proposed appeal succeeding on the basis that there is no reasonable prospect of establishing that the decision of Her Honour Judge Hilder to approve a long term placement of RM was wrong. I consider the proposed appeal to be totally without merit."As SM had no further right of appeal. Permission to appeal having been refused, SM has no right to appeal that decision of the Court of Appeal (section 54(4) of the Access to Justice Act 1999) and for that reason, SM issued her application for judicial review which, Mostyn J, hearing the matter, noted "is a proxy for a prohibited appeal against the decision of Keehan J, and as such is likely to be an abuse."

The judicial review application gave rise to the core question: is a decision of the COP refusing permission to appeal susceptible to judicial review? If the answer was yes, then the reviewable decision would be that of Keehan J and not that of HHJ Hilder (which SM was now out of time for challenging).

This core question, required, Mostyn J said, consideration of the Divisional Court, the Court of Appeal and the Supreme Court in *R (Cart) -v- Upper Tribunal (Public Law Project intervening)* [2012] 1 AC 663, SC; [2011] QB 120, CA and DC and his analysis is set out below.



In *Cart*, the question was whether a decision of the Upper Tribunal (UT) refusing permission to appeal a decision of the First-tier Tribunal (FTT) was susceptible to judicial review. Through section 3 (5) of The Tribunals, Courts and Enforcement Act 2007 the UT is established as a superior court of record but has, by section 25 the same powers, rights, privileges and authority as the High Court in respect of some matters such as the attendance and examination of witnesses. The designation of the UT as 'a superior court of record' did not of itself render it immune from judicial review.

The Supreme Court in *Cart* went on to rule that the test for challenge in judicial review proceedings should be the same as that for a second-tier appeal under section 55 of the Access to Justice Act 1999 which provides that 'no appeal may be made to the Court of Appeal from that decision....[of an appeal to the County Court, the Family Court of the High Court].... unless the Court of Appeal considers that: a) the appeal would raise an important point of principle or practice, or (b) there is some other compelling reason for the Court of Appeal to hear it.'This led to a development in the Civil Procedure Rules, in particular the introduction of CPR 54.7A which applies where the UT has refused permission to appeal against a decision of the FTT and provides for the court to give permission to proceed only if it considers:

'(a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law; and

(b) that either –

(i) the claim raises an important point of principle or practice;

or

(ii) there is some other compelling reason to hear it.

And para (8) provides

'If the application for permission is refused on paper without an oral hearing, rule 54.12(3) (request for reconsideration at a hearing) does not apply.'

Although the Supreme Court 'clearly intended that the number of challenges capable of being made in such judicial review proceedings would be very small', the law of unintended consequences had led to the high volume of applications that have actually been made. Mostyn J noted and agreed with the report of the Independent Review of Administrative Law Panel, chaired by Lord Faulks QC, which identified that only a fraction of such claims have succeeded and recommended that the *Cart* jurisdiction around unappealable decisions of the UT should be abolished. He went further to say that if the *Cart* jurisdiction is to be abolished, it should be completely abolished.

Whether the *Cart* jurisdiction extends to the Court of Protection

Mostyn J noted that the eventual wording of the Mental Capacity Act 2005 is clear in section 45 to say that the COP is to be a superior court of record and by section 47 empowers it with general, not just supplementary powers which the court has "in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court."

He goes on to say: the position of the Court of Protection is far removed from that of the Upper Tribunal as considered in *Cart*. In contrast, the constitution, jurisdiction and powers of the Court of Protection clearly indicate that it is to be regarded as being of equal status, and in no sense inferior, to The High Court. This is what s.47(1) literally says."

In coming back to the order of HHJ Hilder in March 2021 and her decision on best interests regarding the long term placement and care in respect of RM, Mostyn J noted that before the Mental Capacity Act 2005 that order would have been made by the High Court exercising its inherent powers and that is a significant difference to the position in *Cart*.

He concluded that his answer to the core question is that "the Court of Protection cannot be regarded as a court inferior to the High Court, and therefore its unappealable decisions cannot be the subject of judicial review by the High Court," adding for completeness "if I am wrong in my answer to the core question, the application nonetheless falls to be dismissed both for a procedural reason and on the merits."

Interestingly, Mostyn J finds there is some uncertainty around decisions refusing permission to appeal made in the Family Court saying "it seems to me that the Family Court is probably to be regarded as inferior to the High Court. Therefore, a decision by an appeal judge within the Family Court refusing permission to appeal is seemingly covered by the reasoning of the Supreme Court and is susceptible to a judicial review challenge under the second-tier appeal test, although a definitive decision must be awaited."

Gareth Miller
Associate

Meet the team

Emma Pollard
Associate
Health Advisory London
+44 (0)20 7280 9268
emma.pollard@hilldickinson.com

Kiran Bhogal
Partner
Health Advisory London
+44 (0)20 7280 9344
kiran.bhogal@hilldickinson.com

Emma Galland
Partner
Health Advisory London
+44 (0)20 7280 9294
emma.galland@hilldickinson.com

Sharon Thomas
Partner
Health Advisory Liverpool
+44 (0)151 600 8249
sharon.thomas@hilldickinson.com

Joanna Trewin
Partner
Health Advisory Manchester
+44 (0)161 817 7373
joanna.trewin@hilldickinson.com

Ben Troke
Partner
Health Advisory Leeds
+44 (0)113 487 7963
ben.troke@hilldickinson.com

hilldickinson.com/health

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