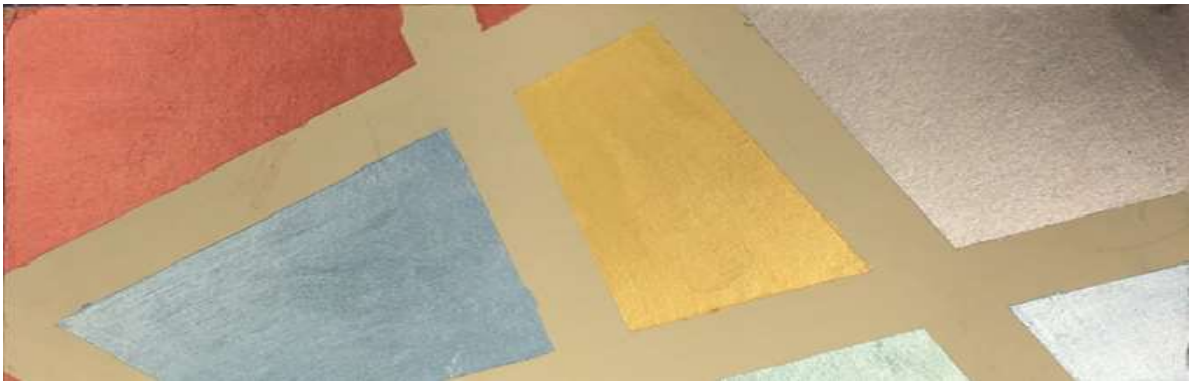

Welcome to the May 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Protection, COVID-19 and the rule of law; best interests and dying at home; and capacity and silos (again);

(2) In the Property and Affairs Report: further guidance from the OPG in relation to COVID-19 and an unusual case about intestacy, minority and the Court of Protection;

(3) In the Practice and Procedure Report: the Court of Protection adapting to COVID-19; remote hearings more generally; and injunctions and persons and unknown;

(4) In the Wider Context Report: National Mental Capacity Forum news, and when can mental incapacity count as a 'status?';

(5) In the Scotland Report: further updates relating to the evolution of law and practice in response to COVID-19. We also note that 9 May 2020 was the 20th anniversary of the Adults with Incapacity (Scotland) Act 2000 receiving Royal Assent.

You can find our past issues, our case summaries, and more on our dedicated sub-site here. Chambers has also created a dedicated COVID-19 page with resources, seminars, and more, 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

The Court of Protection, care homes, the rule of law and deprivation of liberty

The Vice-President of the Court of Protection, Hayden J, has written to Directors of Adult Social Services (in a letter which can be shared more widely) to highlight a number of key points relating to the operation of the MCA 2005 in the context of COVID-19 and care homes.

The wide-ranging letter takes in remote assessments and a protocol for managing DoLs prepared by Lorraine Currie, MCA/DoLS lead for Shropshire County Council; it notes that:

> It was expressed to me, at the *Hive group*, that there appear to be some who believe that careful adherence to proper legal process and appropriate authorisation may now, at times, be required to give way to other pressing welfare priorities. I understand how this view might take hold in establishments battling to bring calm and reassurance to intensely distressed people, both in the Care Homes and within their wider families. It is important, however, that I signal that whilst I am sympathetic to the pressures, I am very clear that any such view is entirely misconceived. ***The deprivation of the liberty of any individual in a democratic society, holding fast to the rule of law, will always require appropriate authorisation. Nothing has changed. The Mental Capacity Act 2005, the Court of Protection Rules and the fundamental rights and freedoms which underpin them are indispensable safeguards to the frail and vulnerable.*** *(emphasis in original)*

The letter also notes that:

> There has been a striking and troubling drop in the number of Section 21A (MCA 2005) applications which has occurred, in some areas, alongside a significant reduction in referrals to advocacy services. It needs to be emphasised that where there has been a failure properly to authorise deprivation of liberty one of the consequences is that, in the absence of authorisation, there will be a loss of entitlement to public funding and inevitably an obstruction to the individuals absolute right to challenge the deprivation of liberty. For the present I simply highlight my concern and restate the importance of the statutory requirements.

In terms of remote assessments, this document prepared by Lorraine Currie is of considerable assistance; she also contributed to a webinar for the National Mental Capacity Forum (chaired by Alex) on the subject, which can be found here.

COVID-19, care homes, and remote assessments

BP v Surrey County Council (No 2) [2020] EWCOP 17 (Hayden J)

Article 5 – Deprivation of liberty

Summary

This is the second decision concerning an 83 year old man, BP. It follows the earlier one on 25 March 2020, the first time that the Court of Protection had to consider the impact of COVID-19 in the care home setting. At the earlier hearing, Hayden J had refused the application made by BP's daughter and litigation friend (FP), for a declaration that it was in his best interests to return home and into her care. At that stage, Hayden J had identified that there:

> were fundamental difficulties with FP's plan. FP had been unable, due to the present health crisis, to identify any package of professional support. BP's lack of understanding of his own health issues occasionally causes him to overestimate his practical abilities and, as such, puts him in physical danger. Plainly FP would not have been able to care for and supervise her father in such circumstances for any length of time. BP's wife, Mrs RP, did not, at that stage, support the plan.

However, and perhaps slightly surprisingly given the above, the matter came back before Hayden J on 17 April, by which agreement had been reached that:

> BP would be able to move to his daughter's care. This will require assessment of BP's needs within his home and some adjustments to his accommodation. I have been told that it has been possible to identify carers who will assist FP. There was some debate as to how long this process would take but it is ultimately a balance between a comprehensive assessment of BP's needs and a recognition that his best interests now lie in a return home as soon as possible.

It appears that – thankfully – the care home was, at the time of the judgment, still COVID-19 free. The judgment also shows the (understandable) impact upon BP, and others in his position, of social distancing. At paragraph 6, Hayden J noted that all agreed that "*BP has struggled to cope with or understand the social distancing policy which it has been necessary to implement. FP said that she believes her father thinks that he is being punished in some way. This, to my mind, reinforces the view of Dr Brett Du Toit that BP has little insight into his own health and his dementia. It is thought that the deprivation of contact with his family has triggered a depression. BP has been prescribed anti-depressant medication*." Neither the care home nor the family had tried to instigate video conferencing, because FP had attended (it appears) daily, to sit outside the French windows of her father's room, communicating with him as best she could. The staff at the Care Home told FP that her father derived comfort from her visits, though FP was uncertain about this herself.

At the previous hearing, Hayden J had held that the outstanding assessment of capacity (required for purposes of the s.21A application) could be completed remotely. However,

> *8. On the 6th April 2020, Dr Babalola indicated that he was not prepared to assess BP's capacity using remote means. The challenges presented by the potential arrangements are self-evident and I entirely understand why Dr Babalola felt uncomfortable. The Care Home was not prepared to accede to Dr Babalola's suggestion that he attend and wear suitably protective clothing. I make no criticism of that decision indeed, it strikes me as entirely appropriate. The Care Home has remained Covid free (in so far as it is possible to be sure) thus, the risk was not to Dr Babalola from the residents but the risk he*

> *might have presented to them. In my Guidance, dated 19th March 2020, I addressed some of the concerns identified by the professions and observed the reality that for the time being many, perhaps most, capacity assessments would require to be undertaken remotely. I stated, "there is simply no alternative to this, though its general undesirability is manifest". I further emphasised that with "careful and sensitive expertise" it should be possible to provide sufficient information. I specifically contemplated that video conferencing platforms were likely to play a part in this process as they now do in so many other spheres of life and human interaction. If BP had remained at the home it would have been necessary to instruct a different assessor. I remain of the view that creative use of the limited options available can deliver the information required to determine questions of capacity. It may be that experienced carers well known to P and with whom P is comfortable can play a part in facilitating the assessment. Family members may also play a significant role in the process. I am aware that in many areas of the country innovative and productive approaches of this kind are proving to be extremely effective.*

Hayden J also took the opportunity to clarify observations that he had made in his earlier judgment about derogation from the ECHR, making clear that he had intended to – and in fact – had notified the Government in order that the Government might itself might decide whether to issue a notification of derogation.

Comment

That (assuming that all goes to plan) BP will be able to move to his daughter's care (it appears, although it is not entirely clear, in his own home) is undoubtedly hugely significant for him, although the precise basis of the arrangement is specific to the facts of his case. Of broader significance – beyond the recognition of the impact of social distancing on individuals with dementia – is the reinforcement of the message by Hayden J that assessments (of capacity, but also other relevant assessments) will have to proceed, even if by increasingly pragmatic/creative methods.

Best interests, death at home and the Court of Protection

VE v AO & Ors [2020] EWCOP 23 (Lieven J)

Mental capacity – medical treatment – residence

Summary

In this case, Lieven J was asked to determine whether it was in the best interests of a terminally ill woman to leave the care home where she was residing to move to live with her daughter and her family. The circumstances of the woman, AO, had been before the Court of Protection in 2010, at which point an order had been made to the effect that it was in her best interests to live in a care home, and to have staying contact with her daughter, VE. When AO was staying with VE over Christmas 2019 VE became concerned about her mother's health and her swollen abdomen. She took AO to the GP who referred her to King's College Hospital for a scan. She was diagnosed with advanced terminal ovarian cancer which had spread to her other vital organs. AO had stayed with VE for some six weeks over Christmas.

She was admitted to King's College Hospital (KCH) in mid-January 2020.

VE was very concerned about the care of her mother at the care home and applied for the 2010 order to be discharged and for AO to be allowed to move to live with her. On 6 March 2020, she issued an application for personal welfare orders in respect of her mother seeking AO's discharge from hospital into her care. Within those proceedings VE issued a further application on 9 April 2020 and the proceedings were reconstituted as a s.21A Mental Capacity Act challenge to AO's deprivation of liberty.

On 20 March 2020, an order was made to the effect that it was in AO's best interests at that stage to be discharged back to the care home, with a further hearing listed to determine whether it was in her best interests to move to live with her daughter and family. It was on that same day that, in the light of the emerging COVID-19 pandemic, the Department of Health and Social Care produced guidance described by the judge as "*preventing family members from visits to care homes except in exceptional situations such as end of life*."

AO was discharged to the care home on 23 March, and, as the judge described it:

> *Since that date she has not had any face to face contact with her family. TO, for very understandable reasons in the light of the current pandemic, is not allowing any visits from family members to residents. Some contact has been maintained by telephone calls and, on one occasion, a video call using a carer's mobile phone but, given AO's condition, this is not an effective way of maintaining contact with the family. There was some suggestion at the first hearing of AO using an iPad or similar device to maintain contact but, again, given her mental state, this was not a practical or effective solution in the longer term. Therefore, adequate contact could not be maintained at the present time between AO and her family, and this was accepted by all parties by the hearing of 20 April 2020.*

Lieven J heard this matter on 16 April 2020 and ordered that further statements be produced for the second hearing (20 April 2020) and that the AO's representative (Ms Hobey-Hamsher) speak with the manager of TO and produce a note of that conversation:

> *17. Ms Hobey-Hamsher talked both to the manager of TO and the staff member who has had the most contact with AO. In terms of AO's condition, it seems that she is significantly more dependant than when she was admitted to Hospital. It was not clear the degree to which her condition had changed since she had returned to TO in March. There were slightly conflicting views as to how ill AO currently is. However, it appears that she is not yet entirely bed bound and she can communicate. There was also a somewhat unclear situation at the time of the hearing on 20 April 2020, by which Ms Hobey-Hamsher had been told that AO had a cough and was being isolated within the home.*
>
> *18. The Manager told Ms Hobey-Hamsher that TO had not accepted any residents who had tested positive for Covid 19 and none of the existing residents had themselves tested positive. However, this is in the context where none of the existing residents were being tested. She said that there were residents who were showing symptoms which could indicate they had Covid 19 and they were being cared for in isolation. There were residents who had recently died who might have had the virus, but it was not possible for the carers to know given that they had not been tested for Covid 19. The Home*

> *is doing everything it can to prevent infections and to stop any spread within TO. TO is in lockdown with no outside visitors. Bio-security measures are being taken including handwashing, and separation/isolation of residents within the Home. It has to be said however that it is inevitably going to be extremely difficult to prevent spreading the disease within a home such as TO.*

The court also had evidence before it from the CCG, from a Ms Clegg, in the following terms:

> *21. Ms Clegg gave oral evidence at the second hearing. She is an Associate Director of Integrated Commissioning within the South East London Clinical Commissioning Group (the CCG), previously the Lambeth Clinical Commissioning Group. The CCG had not assessed AO's needs so necessarily what she said about care that could and would be provided to AO was in general rather than specific terms. She said that staff, such as district nurses, were still visiting people in their own home and that staff had access to Personal Protective Equipment (PPE) where appropriate. The service to those being looked after at home has not changed with the current pandemic, and in fact the CCG has commissioned additional capacity. In terms of the care that a district nurse would provide to AO, Ms Clegg said that there would be support for the family, ensuring that AO had the right equipment and any basic nursing care that AO needed at home. It was clear from Ms Clegg's answers that there was no reason to believe that AO would not get appropriate support from the CCG if she went home. At the moment the only pain relief that AO is receiving is paracetamol and obviously that can be provided at home.*
>
> *22. The other important area covered by Ms Clegg was the end of life care that AO would receive. Ms Clegg said that the CCG were very familiar with providing that type of care for people at home, including people lacking capacity. End of life care would be provided through St Christopher's Hospice, and a community based palliative care service. Pain relief can be provided, as appropriate, through pain relief patches and subcutaneous infusion and the district nurses can set this up. The district nurse service is familiar with, and sensitive to, issues around the patient's dignity towards the end of life including respecting cultural beliefs and privacy. Mr Paget asked Ms Clegg about the levels of support that could be provided, and Ms Clegg said that it was difficult to answer such questions without a full assessment. She initially said that an assessment would take 4-6 weeks, but it was quite clear from her evidence that if there was a need an assessment could be carried out more quickly. She said that she could not rule out the need for AO to be in a 24 hour residential setting at the end of her life, but said that could be left open as an option and the CCG would endeavour to do its best for her to remain at home.*

Lieven J considered the case of *BP v Surrey CC* [2020] EWCOP 17,[1] in which Hayden J had found that the plans for BP to return to live at home, cared for by family members, was not in truth a realistic option, and therefore the consideration of the court focused on the issue of contact with the family. As Lieven J noted:

> *28. The principal factual difference from AO's case to that of BP is that AO has been diagnosed as having terminal cancer and is likely to have something between a few weeks and 3-6 months to live. This case concerns, as BP did not, questions as to whether it is in AO's best interests to be allowed*

[1] The second judgment in the case not yet having appeared.

to live with her family in the last period of her life. The ability to die with one's family and loved ones seems to me to be one of the most fundamental parts of any right to private or family life. That how a person dies can fall within the ambit of article 8 is now well established, see as but one example Pretty v UK [2346/02] at [65]. I have not been able to find any case law on the degree to which an inability to die with one's family engages article 8, but it would seem to me self-evident that such a decision by the state that prevents someone with a terminal disease from living with their family, must require a particularly high degree of justification under article 8(2). Wider public health considerations, such as the protection of the community by restricting visits to a care home were considered in BP, but are not the issue in the present case. It was not argued that there was any public health reason to prevent AO leaving TO to live with her family.

29. In this case the central question concerns whether it is in AO's best interests, as a person without capacity, to be allowed to leave TO to go to her family to die. In respect of a best interests decision in similar circumstances in A NHS Trust v DU and others 2009 COPLR 210 Hedley J said as follows;

> *[10] This case illustrates the breadth of the concept of best interests which the court is bound to apply. The focus of the case was very much on treatment and where she should be. But, of course, the introduction of the possibility of Nigeria adds a new dimension. It is an integral part of the concept of best interests when dealing with a person of this age that the court recognises the imminent possibility of death and the importance of making arrangements so as to secure that the experience of death may be in a context which is the most congenial and peaceful that can be devised. Also implicit in the concept of best interests is the importance of the country and culture of origin and the whereabouts of the family. They will often take precedence over, for example, the question of risk avoidance or the exact quality of care that may be available. It is not possible to travel without some incidence of risk, but that is a risk that may be easily outweighed by the benefits of successful travel. It may be the case, insofar as it is remotely the business of the court to investigate it, that the quality of care at the point of destination may not be the same as the quality of care at the point of departure. Those are matters also which may easily be overcome by the benefits of relocation, and it is in consideration of those matters that the question in principle of this lady's transfer back to Nigeria is no longer controversial. It is clearly in her interests, having regard to her condition, her background and the whereabouts of her family, that she should if possible be transferred to Nigeria, and the evidence suggests that that is probably practicable.*

Lieven J made the decision at the end of the second hearing that it was in AO's best interests to leave TO and go to live with VE immediately. The order took immediate effect and AO moved on the evening of 20 April 2020. She emphasised that:

> *34.* […] *the arguments before me turned on the fact that AO had terminal cancer and was going to die within a relatively short time. Nobody argued before me that I should not allow AO to leave TO because of the risk of Covid 19, or that any possible public interest in not allowing her to move outweighed her best interests, or her article 8 rights. At the time I made my decision it was not clear whether or not any of the other residents at TO had Covid 19, and it was not being said that AO had Covid 19, but this is a possibility given some accounts of her current symptoms. This is important because this judgment is solely about what is in AO's best interests in circumstances where she had terminal*

cancer and her family wanted her to die at home with them.

In her analysis of the position, Lieven J started with:

> *35.* […] *the basic proposition that most people would strongly wish to die with their family around them. I entirely agree with what Hedley J said in DU that the court should seek to ensure circumstances of P's imminent death that are as peaceful and dignified as possible. Given the Covid 19 pandemic, the need to minimise the spread of the virus and the current Government guidance if AO were to stay at TO, then the most contact that she would be likely to have would be one short visit from one family member at or around the time of her death.*

On the evidence before her, Lieven J concluded that "*if AO was capable of expressing her wishes and feelings it is highly likely that she would say that she wished to leave TO and spend the time left to her with VE.*" She was satisfied that AO could be properly cared for if she moved to live with VE, because she had been staying regularly with them, including for a period about 6 weeks before she was admitted to KCH. Lieven J was:

> *39.* […] *was much more concerned about end of life palliative care, and in particular pain relief. However, Ms Clegg made clear that the CCG could commission such care, and this would include visits by district nurses who could ensure appropriate palliative care was provided. I am very grateful to Ms Clegg for the very straightforward and realistic evidence she gave, and the efforts the CCG is going to in these most difficult of times, to continue to provide end of life care to people at home. In those circumstances I have no hesitation in finding that AO can be fully and properly cared for at home, and I am no longer concerned that she will suffer unnecessary pain at the end of her life.*
>
> *40. In the light of Ms Clegg's evidence, I saw no benefit to AO in acceding to* [the submission by the local authority that there should be] *a delay so that further assessments could be carried out. To the degree further assessment was necessary it could be done once AO was living with VE.*

Lieven J emphasised that, whilst all concerned were conscious of the risk of AO contracting COVID-19 – and, potentially, spreading it to her family if she moved to live with them, it was unquantifiable and not raised as a factor for her to take into account at the hearing:

> *42. The approach I took at the hearing was simply to assess what was in AO's best interests, and to conclude it was in her best interests for her to go to live with VE and to spend her last days with her family. Other considerations of wider public interest which might have arisen in another case were not raised in this case.*

Finally:

> *44. It was necessary to consider the Health Protection (Coronavirus Restriction) Regulations 2020 (SI 2020/350) in order to ensure that in allowing VE or a family member to collect AO from the care home I was not inadvertently allowing a breach of the Regulations. Regulation 6(1) prohibits any*

> *person from leaving home without a reasonable excuse. Regulation 6(2) lists, apparently non-exhaustively, matters that would amount to a "reasonable excuse". At regulation 6(2)(d) these include providing care or assistance to a vulnerable person. For a family member to collect AO from TO is to provide assistance to a vulnerable person and thus falls within that sub-regulation. It would in any event also accord with the order of the court. I therefore made the order sought so that AO could move on the evening of Monday 20 April 2020.*

A postscript made clear that AO died very much more quickly than might have been anticipated from the judgment – some 2 days later. It is not clear where she died, what she died of, or whether she had, indeed, contracted COVID-19.

Comment

As with the earlier judgment of Hedley J in *Re DU* which also – coincidentally – concerned a Nigerian person, this judgment is significant for recognising the importance of where and surrounded by whom you die, Lieven J recognising that "[t]*he ability to die with one's family and loved ones seems to me to be one of the most fundamental parts of any right to private or family life*." Although Lieven J was at pains to make clear that the direct risks of COVID-19 to AO (or, via her, to her family) were not factors in her decision, it is doubtful whether she would have made the order that she did – to take effect with immediate effect – if the consequences of COVID-19 had not been to limit contact at the care home so dramatically.

The postscript to the judgment does raise a lurking concern. Given what was described as the "straightforward and realistic" evidence of Ms Clegg as to what the CCG could arrange as regards palliative care, it does not appear that the commissioning of such care had, in fact, taken place at the point when Lieven J (presumably almost immediately after hearing that evidence) ordered that AO be discharged from the care home. In the ordinary course of events, one would have anticipated that the court would wish to have seen, at a minimum, a plan for such care – it is not entirely clear whether Lieven J had such a plan before her. It is, further, not entirely clear whether such plan or arrangements as the CCG could commission had been implemented by the time that AO died.

These are undoubtedly not ordinary times, and from the judgment it is clear why Lieven J felt she was both in a position, and indeed effectively compelled, to order discharge at the point of the hearing. However, more broadly, the importance of dying at home surrounded by one's family must be weighed in the balance alongside the importance of dying with effective symptom and pain control.[2]

Capacity and silos (again)

London Borough of Tower Hamlets v A & KF [2020] EWCOP 21 (Senior Judge Hilder)

[2] Whilst the case was not about COVID-19, Baroness Finlay has written a guide for family members who are looking after a person who is dying at home with COVID-19, which may be of relevance in circumstances where community palliative care teams may be very stretched.

Mental capacity – assessing capacity – residence

Summary[3]

This case was concerned with whether A – a 69 year old woman who had suffered a stroke and been diagnosed with Korsakoff's dementia – had capacity to make decisions about her residence. It was agreed that she lacked capacity to make decisions about her care, and the court did not revisit this agreement.

A had been admitted on an interim basis to a care home after a hospital stay, but wanted to return to her flat. There was no dispute that she required care to maintain her nutritional status, to ensure compliance with her medication regime and to provide the opportunity for some sort of structured social activity. It was also agreed to be essential that A continued her abstinence from alcohol.

The dispute between the local authority and the Official Solicitor on behalf of A boiled down to whether one could properly separate the issue of A's capacity to make decisions about her residence and care. The local authority argued that "*an understanding of the kind of care required is fundamental to any decision on residence*", relying on the Court of Appeal case of *B v A Local Authority* [2019] EWCA Civ 913 in which the court had (at paragraphs 63-4) accepted the criticisms of the first instance judge's approach of analysing B's capacity in respect of different decisions as self-contained "silos" without regard to the overlap between them. In particular it was, in B, said that the first instance judge's conclusion on capacity in relation to residence "*was fundamentally flawed in (1) failing to take into account relevant information relating to the consequences of each of those decisions, and (2) producing a situation in which there was an irreconcilable conflict with his conclusion on B's incapacity to make other decisions, and so (3) making the Local Authority's care for and treatment of B practically impossible.*"

Thus it was argued by the local authority in this case that, as A could not recall and *"does not accept her historical difficulties, and therefore cannot use and weigh that information in making decisions about the care she requires or, as a consequence, the place in which she needs to live in order to receive such care*" (emphasis added)

The Official Solicitor, on the other hand, argued that assessing care and residence separately did not mean they had been separated into silos. Rather what was required was "*an individualised assessment that best interests decision will be made in respect of an appropriate care package and, in those circumstances, A is able to understand, retain, use and weigh the relevant information in coming to a decision on residence.*"

The court rejected the local authority's approach, reminding itself that in "*cases which come to the Court of Protection for determination, decisions about where a person lives and decisions about what care a person receives are usually considered as individual domains of capacity*" and that such "*an approach is clearly in keeping with the Act's 'issue-specific' approach to decision-making.*" Accordingly. Senior Judge Hilder

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

found, there "*is ample authority for considering residence and care as individual domains of capacity*." She accepted that there was an overlap between the two, but resisted the idea that lacking capacity in one domain (here, care) means that one also lacks capacity in another (here, residence). That amounted to conflating the two domains. In other words, "*it is not necessary to make a capacitous decision about care in order to make a capacitous decision about residence*."

On the evidence before her, and applying this approach, Senior Judge Hilder found that A had capacity to decide upon residence, even though she lacked capacity to decide upon her care arrangements.

Comment

This case lays bare the real difficulty in reconciling the decision- and time- specific structure the MCA requires when assessing capacity with the approach of the Court of Appeal in the *B* case.

In the case of B, it was perhaps more obvious that in concluding B had capacity to make decisions about her residence but lacked capacity to make decisions about contact with Mr C, in circumstances where she was choosing to live with Mr C, the judge produced "*a situation in which there was an irreconcilable conflict with his conclusion on B's incapacity to make other decisions, and so … making the Local Authority's care for and treatment of B practically impossible*."

However in the case of A, as:

- there was a difference in the kind of care that she was going to receive between the two different available residence options – her own flat and the care home – and this was likely to impact on her functioning and well-being;
- the court accepted that the care that she would receive in both places (at least in broad terms) was part of the relevant information A was required to understand to make decisions about residence; and
- A lacked the capacity to make decisions about her care needs,

it is arguably difficult to see how A could be said to be able to weigh the different care regimes in the balance when choosing between the two options, and hence difficult to see how she could properly be said to have capacity to decide upon her residence.

The Supreme Court have given conditional permission to appeal in the *B* case, and so it is likely that there will be more on this issue to come – so watch this space…

It is also worth noting that Senior Judge Hilder observed, almost in passing at the end of the judgment, that a determination that a person lacks capacity to determine the care that they should receive necessarily means that they lack capacity for purposes of the DoLS regime. This observation is logically impeccable, but it is, on one view, odd that a person could have capacity to decide upon residence – i.e. where they live – but nonetheless still meet the capacity requirement for DoLS.

In due (but at the time of writing unknown) course, when the Liberty Protection Safeguards come into force, this particular oddity may be removed because the focus of the question will not be tied up with residence and/or care, but upon capacity to consent to the arrangements that confine the person for purposes of enabling their care and treatment.

Best interests, contraception and participation

Oxford University Hospitals NHS Foundation Trust v Z [2020] EWCOP 20 (Knowles J)

Mental capacity – best interests - contraception

Summary

In this case the court considered whether the implantation of an intrauterine device ('IUD') into a 22 year old woman against her wishes would be in her best interests. Z was a 22 year old woman with a chromosomal abnormality, chromosome 17q12 microdeletion, as a result of which she had mild learning disabilities and a bicornate or heart shaped uterus. Z was 35 weeks pregnant with her fifth child at the time of the application. Of her four previous children, one had died in the first week of life and the three others had been taken into care. Due to the risks in a natural birth as a result of her bicornate uterus, Z had been booked for a pre-term caesarean section to which she had been assessed as capacitous to consent.

The application was brought by the treating NHS Trust for a declaration on capacity and best interests that would authorise the insertion of an IUD at the same time as Z's C-section was carried out. Z did not want an IUD fitted although she did agree to having long-term contraceptive injections. Nonetheless, the application was unopposed by her litigation friend, the Official Solicitor.

This was one of the first remote hearings following the Covid-19 "lockdown". Arrangements were made for the parties to attend by Skype. For reasons that are not made clear in the judgment, it was not possible for Z to join the Skype hearing. She did, however, contact the Trust once the hearing had begun, and arrangements were made for her to participate by means if a doctor at the Trust holding his mobile up to the Skype hearing while on the phone to Z.

In terms of capacity, the court heard that Z had mild learning disabilities and an IQ of between 60 and 69. She had been assessed as having capacity to make decisions regarding her antenatal care and mode of delivery. As to contraception, however, the court heard that there was "*an extremely high-risk individual where any future pregnancy would carry with it a significant risk to her and her baby's health*" and that Z had a history of annual pregnancies which pointed to poorly controlled fertility.

Knowles J noted Bodey J's test for capacity to decide on contraceptive treatment in *Re A (Capacity: refusal of contraception)* [2011] Fam 61 that is:

> *… the test for capacity should be so applied as to ascertain the woman's ability to understand and*

> *weigh up the immediate medical issues surrounding contraceptive treatment ("the proximate medical issues" per Mr O'Brien), including; (1) the reason for contraception and what it does (which includes the likelihood of pregnancy if it is not in use during sexual intercourse); (2) the types available and how each is used; (3) the advantages and disadvantages of each type; (4) the possible side effects of each and how they can be dealt with; (5) how easily each type can be changed; and (6) the generally accepted effectiveness of each.*

She further noted (para 25) that

> *Given the medical evidence, both parties accepted that the information relevant to the decision in respect of contraception included the risks to Z's health if she were to become pregnant again. However, both parties differed as to whether the social consequences of any future pregnancies should be considered as information relevant to Z's decision about contraception. I did not need to resolve that difference of view given the overwhelming evidence about the risks to Z's physical health if she were to become pregnant once more.*

Knowles J concluded that the evidence of three different clinicians demonstrated that:*"Z did not have a sufficient understanding of her own health status to enable her to relate the generic risks and benefits of contraception to her individual circumstances."* (para 26). Further:

> *when asked to explain why she had decided a contraceptive injection was best, Z was unable to do so, saying "I just have. I'm having the injection". She lacked any understanding that her compliance might be in issue, saying "I will have the injection", when Dr Camden-Smith pointed out to her that she was not complying with her other medication for diabetes, anaemia and nutritional deficiencies. Z was unable to remember any factors, other than that she might die, which those involved in her care might be concerned about and appeared to be dismissive or unable to remember when Dr Camden-Smith suggested people might be worried about her losing blood, developing diabetes, the death of her baby or the need for life-altering surgery such as a hysterectomy.*

In fact, the only real reason that Z could articulate for not wishing to have an IUD was because *"it's my body"* (paragraph 12).

Knowles J had little difficulty in concluding that Z both lacked capacity to make decision regarding contraception and that it would be in her best interests to have an IUD inserted, despite her objections, holding:

> *Whilst I accept that the use of an injectable contraceptive accorded with Z's wishes and took account of the least restrictive approach set out in s.1(6) of the Act, it did not in my view effectively achieve the purpose for which contraception was sought, namely to prevent the very serious risks to Z's physical health which further pregnancies would undoubtedly bring. Z's poor compliance with not only past injectable contraceptives but with medical treatment in this pregnancy militated against me endorsing Z's wish to have an injectable contraceptive.*

Comment

It is perhaps important to note that, unlike as sometimes has been the case, there was no suggestion that the insertion of the IUD should be carried out covertly. We do not know how Z responded to the court's determination that she have a contraceptive device inserted into her womb against her express wishes, because when Knowles J informed her of her decision, Z hung up the telephone.

It is possible, however, that Z might have felt disempowered by a process in which she could legitimately have contended that no one saw fit to argue her case before the court. Whilst the evidence to Z's capacity might have been compelling, and the medical evidence in favour of the insertion of an IUD being in her best interests equally compelling, there is – as we have had cause to note on a number of occasions (not infrequently in the context of reproductive rights) – a real difference between the outcome and the process by which that outcome is reached. If that process does not involve an actual argument being advanced on behalf of P in support of their expressed wishes and feelings, then, whatever the outcome, there must remain lurking concerns as to the nature of that process.

PROPERTY AND AFFAIRS

Office of the Public Guardian: further COVID-19 guidance

The Office of the Public Guardian has issued guidance about executing a LPA during the restriction period. It was last updated on 29 April and so may well be changed again soon.

The first suggestion is to delay and only make the LPA if necessary. Then there is a reminder that everyone must sign one copy of the LPA and that the rules for witnessing signatures have not been relaxed together with suggestions of how to comply.

The OPG has also published some advice about how to be a deputy or attorney whilst maintaining social distancing.

These include the obvious ones of using teleconferencing and encouragement of those who are self-isolating to continue in post.

Short note: the Court of Protection, minority and intestacy

An application for an interim payment in a large clinical negligence claim threw up an unusual but interesting issue in *JXM v An NHS Trust* [2020] EWHC 919 QB.

C suffered major brain damage as a result of a serious assault by his father when an infant. The father was imprisoned and the mother convicted of neglect. C claimed damages against the NHS Trust that had failed to spot broken ribs which were clearly the result of non-accidental injury when C had previously been admitted to hospital and, therefore, failed to take the protection measures that would have protected him form the later assault. Liability and causation had been admitted on behalf of the Trust.

C made the interim payment application to provide adapted accommodation. There was no issue on the application itself.

C, however, was under 18 so the Court of Protection could not authorise the making of a statutory will on his behalf. This raised the possibility that, if C died before the claim had settled, the proceeds of the remaining claim would by the rules of intestacy devolve on his parents.

The judge, Martin Spencer J, addressed the position thus at paragraphs 8-11:

> *8. There is, however, this complication. The claimant, were he to die before he is 18, would necessarily die intestate because no statutory will can be made on his behalf until he is 18 assuming at 18 that he does not attain capacity, which appears unlikely. The defendant has raised with the court, rightly and responsibly, the issue as to whether the interim payment in particular and the damages in general would potentially accrue to the claimant's mother and father were he to die before the age of 18, they being his heirs under intestacy. To that end, an application has been made to the Court of Protection for the creation of a trust whereby it is hoped that arrangements could be made for any property of*

the claimant to be held in trust and to accrue to others other than his heirs on intestacy should he die before the age of 18.

9. In any event, although I have not had any detailed submissions in relation to this, I would expect that upon an application to the court upon the death of the claimant, the court would have the power to make an order that the estate of the claimant be distributed other than on the normal rules of intestacy upon the basis that should either of his parents inherit any money from him, that money would be almost certainly representing the damages payable to the claimant by the defendant as a result of the criminal acts of his parents and, in particular, his father. Therefore, the court would be able to trace the source of the money as being the unlawful acts of his parents and order that they should not gain from their unlawful acts by inheriting.

10. The immediate risk is that the claimant dies before the Court of Protection has the opportunity to make the trust order which has been sought but were that to happen, then the interim payment would be effectively repayable to the defendant subject to the claim for damages which the court could then make in the different circumstances which would apply. It might involve the sale of the house but not if the eventual damages exceed the amount of the interim payment. However, the court could make an order that the money be held pending an appropriate order from the intestacy court or the court of protection.

11. In the circumstances, I do make the order sought and I simply comment that whilst I do not believe that the concerns of the defendant are likely to result in practice in either of the parents gaining from their criminal activities, I nevertheless recognise that as the partial guardian of public funds and to taking a responsible attitude towards their position as guardians of public funds, the defendant has rightly brought this matter to the attention of the court so the court is appraised of the circumstances and is able to monitor the situation relatively carefully because of the risk which has been identified.

PRACTICE AND PROCEDURE

Court of Protection and HIVE update

On 4 May, Hayden J published a letter providing an update upon the steps taken by the Court of Protection to respond to the pandemic, and, in particular, the work of the HIVE group since its establishment in late March 2020 across the full spectrum of the Court's work.

The HIVE mailbox (hive@justice.gov.uk) is now live, and can be used as the first point of contact to raise specific issues relating to the operation of the Court of Protection during the pandemic. It is not to be used for issues relating to specific cases (for instance case progression or appeals).

The members of the HIVE group are:

- Hayden J
- HHJ Carolyn Hilder
- Sarah Castle (the Official Solicitor)
- Vikram Sachdeva QC
- Lorraine Cavanagh QC
- Nicola Mackintosh QC (Hon)
- Alex Ruck Keene
- Joan Goulbourn (Ministry of Justice)
- Mary MacGregor (Office of Public Guardian)
- Kate Edwards

Separately, in a letter from the Vice-President published on 11 May 2020, he has emphasised that "[s]t*riving to achieve a transparent process in the Court of Protection, whilst sitting "remotely", remains an important objective*." To that end, he has made:

> a small practical suggestion to improve access to the business of the Court when press or other members of the public join a virtual hearing. Whilst the judge and the lawyers will have read the papers and be able to move quickly to engage with the identified issues, those who are present as observers will often find it initially difficult fully to grasp what the case is about. I think it would be helpful, for a variety of reasons, if the applicant's advocate began the case with a short opening helping to place the identified issues in some context.

Remote hearings

In two recent cases the Court of Appeal has given guidance on the circumstances in which it is appropriate to hold a "remote" hearing (as opposed to a "live" hearing) in the context of the COVID-19 pandemic. Although the cases in question (*Re A (Children) (Remote Hearings)* [2020] EWCA Civ 583 and *Re B (Children) (Remote Hearing: Interim Care Order)* [2020] EWCA Civ 584) were family cases involving

children, the principles are just as applicable to Court of Protection cases.

In *Re A* the court began by identifying the following "cardinal points":

> *i) The decision whether to conduct a remote hearing, and the means by which each individual case may be heard, are a matter for the judge or magistrate who is to conduct the hearing. It is a case management decision over which the first instance court will have a wide discretion, based on the ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. An appeal is only likely to succeed where a particular decision falls outside the range of reasonable ways of proceeding that were open to the court and is, therefore, held to be wrong.*
>
> *ii) Guidance or indications issued by the senior judiciary as to those cases which might, or might not, be suitable for a remote hearing are no more than that, namely guidance or illustrations aimed at supporting the judge or magistrates in deciding whether or not to conduct a remote hearing in a particular case.*
>
> *iii) The temporary nature of any guidance, indications or even court decisions on the issue of remote hearings should always be remembered. This will become all the more apparent once the present restrictions on movement start to be gradually relaxed. From week to week the experience of the courts and the profession is developing, so that what might, or might not, have been considered appropriate at one time may come to be seen as inappropriate at a later date, or vice versa. For example, it is the common experience of many judges that remote hearings take longer to set up and undertake than normal face-to-face hearings; consequently, courts are now listing fewer cases each day than was the case some weeks ago. On the other hand, some court buildings remain fully open and have been set up for safe, socially isolated, hearings and it may now be possible to consider that a case may be heard safely in those courts when that was not the case in the early days of 'lockdown'.*

As for the factors that are likely to influence the decision whether to proceed with a remote hearing, these "will vary from case to case, court to court and judge and judge" (paragraph 9). However, they will include:

> *i) The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?*
> *ii) Whether there is a special need for urgency, or whether the decision could await a later hearing without causing significant disadvantage to the child or the other parties;*
>
> *iii) Whether the parties are legally represented;*
>
> *iv) The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote proceedings meaningfully. This factor will include access to and familiarity withthe necessary technology, funding, intelligence/personality, language, ability to instruct their lawyers (both before and during the hearing), and other matters;*
>
> *v) Whether evidence is to be heard or whether the case will proceed on the basis of submissions only;*

> *vi) The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence;*
>
> *vii) The scope and scale of the proposed hearing. How long is the hearing expected to last?*
>
> *viii) The available technology; telephone or video, and if video, which platform is to be used. A telephone hearing is likely to be a less effective medium than using video;*
>
> *ix) The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology;*
>
> *x) Any safe (in terms of potential COVID 19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or magistrates.*

On the facts of *Re A* the issue was the lawfulness of the judge's decision to list the final hearing in care proceedings (at which long-term care arrangements for the Appellant's children would be determined) in "hybrid" form, such that only the children's parents were expected to attend court in person (and not their legal representatives). The court allowed the appeal against this decision due to: (i) the Appellant's inability to engage adequately with remote evidence (either at home or in the courtroom) (the court having found that the Appellant had "*limited abilities, and some disabilities, which render him less able to take part in a remote hearing*"); (ii) the imbalance of procedure in requiring the parents, but no other party or advocate, to attend before the judge; (iii) the need for urgency was not sufficiently pressing to justify an immediate remote or hybrid final hearing.

Re B, in which the court referred to the above principles from *Re A*, is a troubling example of the remote process leading to errors and ultimately an unlawful decision (the imposition of an interim care order removing a child from his grandmother's care). The court reiterated the benefits of remote hearings, but stressed the need to remain alert to their dangers so that:

> *…the dynamics and demands of the remote process do not impinge upon the fundamental principles. In particular, experience shows that remote hearings place additional, and in some cases, considerable burdens on the participants. The court must therefore seek to ensure that it does not become overloaded and must make a hard-headed distinction between those decisions that must be prioritised and those that must unfortunately wait until proper time is available.*

Subsequent decisions have shown Family Division judges grappling with the implications of the Court of Appeal's decision. The decisions are self-evidently fact-specific, but are of importance as examples of judicial calibration to the changing situation.

In *SX* [2020] EWHC 1086 (Fam) Lieven J considered *Re A* and *Re B* in the context of a case management decision about whether to continue a trial remotely in relation to care proceedings (the medical

evidence having been heard remotely), or whether to adjourn so that the lay witnesses, notably the relevant child's parents, could give live evidence. Drawing on the Court of Appeal's observations in *Re A*, Lieven J gave a helpful summary of the factors that are relevant to whether it will be appropriate for lay witnesses to give evidence remotely, observing that there is nothing inherently objectionable to the giving of evidence in this manner:

> *43. In respect of the lay evidence there are a number of different factors. The first and most important must be whether it is just to the parties to proceed with them giving their evidence remotely. They must be able to follow the questions and be able to give their best in the answers. If the technology works, and they are in a position to understand the documents, then in principle a remote hearing is capable of being fair. As Mr Goodwin and Mr Verdan have pointed out, vulnerable witnesses routinely give evidence remotely in the family and criminal courts. Subject to all the protection in PD3AA, the assumption must be that such a process is capable of being fair and meets the requirements of Article 6. A judge will have to be astute in a remote hearing to ensure the witness is following the question and where appropriate has the relevant document. It is easier to do this in a live hearing because one can see more easily what the witness has in front of them, and sometimes tell by their body language if they are completely lost. However, it is perfectly possible with a little sensitivity to do the same task remotely.*

On the facts of the case, Lieven J was satisfied that both the child's mother and father would be able give evidence and participate in the hearing remotely. However, the judge stressed that she would keep this under careful review, especially in relation to the father who had complained that his mental state was deteriorating as a result of the proceedings (an expert having been instructed who advised that although the father was finding the trial difficult, he was nonetheless coping).

In *A Local Authority v The Mother & Ors* [2020] EWHC 1233 (Fam), Williams J addressed the question of whether a fact-finding hearing in relation to the death of a three year old girl should continue either remotely or semi-remotely or whether the case should now be adjourned until an in-person hearing of pre-Covid 19 format can take place; possibly in September or possibly later.

Expert evidence from seven witnesses had been heard remotely. No party sought that police or social work witnesses give oral evidence. The only evidence remaining was the oral evidence of the mother, the father, the paternal grandmother and possibly the maternal grandmother.

Williams J gave a very detailed analysis of the position, finding that the least bad outcome would be to adjourn the hearing until June to enable the mother to participate in person at that hearing albeit without the physical presence of her leading counsel. He concluded that "[t]*hat hearing can be a fair one to the mother and to the other parties. That will then enable the facts to be determined which will lead to a final welfare hearing in September and will avoid a further 3 to 4-month delay, which acceding to the mother's submissions would inevitably require.*"

Research from the Nuffield Family Justice Observatory

Shortly after the judgments of the Court of Appeal were handed down, the Nuffield Family Justice

Observatory published research on the use of remote hearings in the family court arising from the COVID-19 pandemic. The research comprised a consultation exercise with over 1,000 parents, carers and professionals in the family justice system across England and Wales. The main findings of the research are summarised below:

- Consultees were evenly balanced in terms of their overall positive and negative reactions to remote hearings, although most consultees considered that remote hearings were appropriate for certain cases in the circumstances.
- Concerns were raised about the fairness of remote hearings in certain cases. In particular, concerns related to cases where the lack of face-to-face contact made it difficult to read reactions and communicate in a human and sensitive way, difficulties ensuring a party's full participation in the hearing, and issues of confidentiality and privacy.
- Specific concerns were commonly raised in relation to specific groups, such as parties in cases involving domestic abuse, parties with a disability or where an intermediary or interpreter is required.
- Respondents observed considerable variations in the types of cases being heard remotely, indicating that some national guidance would be valuable.
- Video hearings were considered more effective than telephone hearings.

The Court of Protection, injunctions and persons unknown

Re SF (Injunctive Relief) [2020] EWCOP 19 (Hayden J)

COP jurisdiction and powers – injunctive relief

Summary

In *Re SF (Injunctions)* [2020] EWCOP 19, Keehan J was concerned with a young woman, SF, who had a diagnosis of Autism Spectrum Disorder and also had learning disabilities. She resided in a supported living establishment where she received 1:1 support 24 hours per day. In September 2019 the care and support provider became aware that SF was communicating with a number of men via social media and the internet. Further, it became apparent that some of these men were attending her placement and having sexual relations with her. Only one of those men had been identified, as VK.

On 28 January 2020 the local authority applied for an injunction against VK to prevent him from attending SF's accommodation. On 5 February 2020 the local authority applied for an injunction in the same terms against 'persons unknown'.

Keehan J had not, initially, been persuaded that the Court of Protection had the power to grant an injunction against either a party or a non-party. He convened a hearing on the specific point, and this

judgment contains his reasons for concluding that it does have the power, in summary because:

> *i) s.47(1) of the 2005 Act is drafted in wide and unambiguous terms;*
>
> *ii) it must follow that the Court of Protection has the power which may be exercised by the High Court pursuant to s.37(1) of the 1981 Act to grant injunctive relief;*
>
> *iii) this conclusion is fortified by the terms of s.17(1)(c) of the 2005 Act which permits the court to prohibit contact between a named person and P;*
>
> *iv) it is further fortified by the terms of ss. 16(2) & (5) of the 2005 Act. The provisions of s.16(5) are drafted in wide terms and enable the court to "make such further orders or give such directions…….as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order…….made by it under subsection (2)";*
>
> *v) finally, the 2017 Rules, r.21 & PD21A, make provision for the enforcement of orders made by the Court of Protection including committal to prison for proven breaches of court orders.*

Whilst the judgment is a careful analysis of the position, it is (with respect) a little odd in 2020 for it even to have been a question-mark over whether the Court of Protection had such a power. The chapter in the Court of Protection Handbook addressing enforcement notes – for instance – the case of *W v M* in 2011, in which Baker J had observed that there was "*no doubt about the power of the Court of Protection to make injunctions*." Indeed, until recently suspended by COVID-19, the entire approach of the transparency Practice Direction depended upon the making of injunctions in the transparency order in each case against identified individuals/categories of individuals.

What is more interesting, but tantalisingly not addressed in detail in SF's case, is the power to make an injunction against persons unknown. This power has not to date been addressed in a reported case, although in *EXB v FDZ* [2018] EWHC 3456 (QB), Foskett J, sitting both as a High Court judge and a judge of the Court of Protection, was asked in the context of a case as to whether an individual should be told the size of their personal injury award to consider making "*an order – effectively in the form of an injunction – preventing any person who knows of the size of the award from disclosing that information to the Claimant. It would be akin to an order for possession against 'persons unknown' in possession proceedings*." Foskett J declined to do so, because whilst he could "*see the attractions of a mandatory order such as that suggested* […], *I am not at all sure how such an order could be policed and how anyone in breach of it could be dealt with. An order with a penal notice attached seems somewhat disproportionate and draconian in the circumstances and an order without teeth is arguably an order that should not be made*" (paragraph 42). Foskett J made an order (under both s.16 and s.15(1)(c) MCA 2005) to the effect that "[i]*t shall be unlawful for any person (whether the Claimant's deputy or any other person who has knowledge of the amount of the Settlement) to convey by any means to the Claimant information about the amount of the Settlement, save that this declaration does not make unlawful the conveyance of descriptive information to the Claimant to the effect that the Settlement is sufficient to meet his reasonable needs for life*." However,

because of his previous analysis, what Foskett J did not then do was then go one stage further and consider whether he could, in fact, seek to back such an order by way of an injunction.

The order against VK could clearly be made as a step required to enforce the decision of the Court of Protection (permitted by s.17(1)(c) MCA 2005) to permit contact between VK – as a named individual – and SF. That would not apply in relation to the injunction against 'persons unknown.' However, as a matter of logic, if the Court of Protection has the same 'powers, rights and privileges' as the High Court, it is necessarily to look back up the line to the High Court for the answer. The Supreme Court has relatively recently considered the position – by reference to civil litigation – in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6. Lord Sumption, on behalf of the Supreme Court, identified that that there are conceptual difficulties in relation to the bringing of a claim in relation to those who are not only anonymous but cannot even be identified. However, where, as in a case such as the present, the potential respondents are potentially identifiable (and could also, in principle, be served with the application form – by a person waiting at the placement and giving it to them), these difficulties do not arise, proceedings can be brought, and injunctions then granted to enforce the relief granted in those proceedings (see also *Canada Goose UK Retail Ltd & Anor v Persons Unknown & Anor* [2019] EWHC 2459 (QB)).

Mental capacity – international aspects

The Law Society has updated, and made more easily accessible, guidance on the international aspects of mental capacity for solicitors who do not regularly give advice to clients who are:

- moving or retiring abroad
- returning from living abroad
- owners of property or other assets overseas.

THE WIDER CONTEXT

National Mental Capacity Forum news

The National Mental Capacity Forum will be holding the last of three rapid-response online meetings on Wednesday 3 June, 16:30-17:30. The event will focus on the challenges of ensuring both protection for public health and respect for human rights during the COVID-19 pandemic.

The meeting, in the form of a Zoom Webinar, will be chaired by Baroness Ilora Finlay, with hosting provided by the Autonomy Project at the University of Essex. Alex will be contributing, as he has done to the previous two.

Advance registration is required as spaces are limited. Please click here on the following link to register your interest.

Please click here to access the recordings of the two earlier webinar events (1 and 28 April 2020).

Under the auspices of the Forum, Alex also chaired a (recorded) conversation with Lorraine Currie and Chelle Farnan on remote assessments, which can be found here.

COVID-19, testing and mental capacity

Members of the Report team have produced a guidance note on testing for COVID-19 and mental capacity, available here.

Updated NHSE legal guidance on mental health, learning disability and autism

NHS England has issued updated (19 May) guidance on the impact of the coronavirus (COVID-19) pandemic on the use of the MHA 1983 and supporting systems to safeguard the legal rights of people receiving mental health, learning disability and autism services, including specialised commissioned services. The guidance includes a section (developed with and approved by DHSC) on using the MHA Code of Practice.

When does mental incapacity constitute a 'status'?

MOC (by MG) v SSWP (DLA) [2020] UKUT 0134 (AAC) Upper Tribunal (Administrative Appeals Chambers) (Upper Tribunal Judge Ward)

Other proceedings – Tribunal

Summary

Can impaired decision-making capacity constitute a 'status' for purposes of purposes of the law relating to discrimination? That was the question posed before the Upper Tribunal in *MOC (by MG) v SSWP* [2020] UKUT 0134 (AAC) in the context of Disability Living Allowance ('DLA'). The claimant had learning disabilities. He had Down's Syndrome. He was also deaf and blind. He also had a number of

significant physical disabilities. His sister was his appointee for benefit purposes, and also his welfare deputy.

The claimant had been in receipt of DLA at the highest rate of each component since 6 December 1993. He was admitted to hospital in 2016, and remained in NHS hospitals for somewhat over a year. When he reported the hospital admissions to the DWP, the DWP took a decision that his DLA was not payable after the 28th day of his inpatient admission, pursuant to the operation of the relevant provisions of the Social Security (Disability Living Allowance) Regulations 1991/2890. The equivalent regulations had been disapplied in relation to those children following the decision of the Supreme Court in *Mathieson v SSWP* [2015] UKSC 47 that they breached the rights of such children under Article 14 and Article 1 and Article 1 of Protocol 1 to the ECHR and fell to be disapplied applying s.3 HRA 1998. The claimant sought by his sister to contend that the same logic applied to adults.

The Secretary of State conceded that in light of *Mathieson* the claimant had the status of a severely disabled adult in need of lengthy inpatient hospital treatment. It was submitted that there were two other statuses to which he might properly lay claim, namely:

(a) an incapacitous severely disabled adult in need of lengthy in-patient hospital treatment; and/or

(b) a severely disabled adult who lacks capacity to make decisions about care and medical treatment in need of lengthy in-patient treatment.

The Secretary of State resisted both alternative forms of status "essentially on the ground that because issues of capacity are issue-specific and because capacity may come and go, they lack a sufficient quality of durability to constitute a status and that a court should be slow to find a status based on lack of capacity because of the administrative difficulties to which it would give rise."

Upper Tribunal Judge Ward accepted that:

> *7.* […] *there is no easy proxy for determining whether or not a person is lacking in capacity, whether for decisions about care and medical treatment or otherwise. In the present case, a Deputy has been appointed, with functions which make the question relatively straightforward to answer. Others may have given a lasting power of attorney in respect of personal welfare decisions, in which case the Office of the Public Guardian should have been informed if it is suspected that a person is losing capacity. In yet further cases, no such formal arrangements will have been put in place and whether a person has capacity for a particular decision or not will have to be assessed on the spot in accordance with the provisions of the Mental Capacity Act. Whilst it may be the case that assessments of the capacity of a person who is in hospital but who does not have a Deputy nor has given a power of attorney for personal welfare may have to be carried out and should be recorded, not only would it be a considerable burden on the DWP to obtain that record and on NHS staff to provide it, but more fundamentally, if lack of capacity is the trigger for finding that there has been a breach of a claimant's human rights, a breach which is not present when the person does have capacity, there is a risk of people moving in and out of being the subject of a breach of the ECHR on a virtually daily basis.*

Whilst Upper Tribunal Judge Ward considered that the Secretary of State was right to accept that a fair degree of 'refining down' of the group considered to have a status was permissible:

> *10. Nonetheless, while mindful of that approach, I prefer Ms Richardson's submissions* [on behalf of the Secretary of State] *on the unsuitability of capacity as a key element in identifying a "status". I derive no assistance from Ms Bartlam's reliance on the decision of the European Court of Human Rights in Siddarbras v Lithuania (Case 55480/00). While it illustrates that a status may be acquired based on past events (past membership of the KGB), it does not help with whether a status can be defined by reference to anything as potentially evanescent as a loss of capacity (as in some cases it will be, even if in others it is anything but)*

Nonetheless, because the claimant had been conceded to have one status in any event UTJ Ward went on to consider the question of whether, if there was any differential treatment, it was justified. He found that it was, essentially on the basis that in both principle and practice, in-patient admission to hospital meant that all relevant needs of a disabled person to be met. In this, he noted that he did not consider it made a material difference that a person was acting as Deputy:

> *22.* […] *Whilst anyone acting as Deputy, or indeed under a welfare lasting power of attorney, would need to have an understanding of the patient's needs and wishes, I agree with Ms Richardson it does not follow that it has to be acquired from a hands-on caring role. The reports submitted to the Court of Protection by the appointee are not in evidence and there is no evidence permitting me to conclude that acting as Deputy carried with it responsibilities to provide care to the extent claimed. The responsibilities of the Deputy are cast in terms of taking decisions, rather than the direct provision of care.*
>
> *23. There is some limited evidence suggesting that in this particular case, the appointee was required to become involved in certain respects. In a statement appended to her appeal form to the FtT the appointee explains that:*
>
> > *"Deputy/ carers required all times of day/night to be included with Multi Disciplinary Team in all decisions affecting [the claimant]. Medical staff require attendance of Deputy/carers to advise/allow them to carry out all procedures. To attend NUMEROUS meetings to discuss treatment, sign official forms and Medical/Social Services re care or treatment or transfer of [the claimant]." (emphasis in original).*
>
> *It is clear that those requirements were principally those which flowed from the function of the Deputy to take decisions on the claimant's behalf, which would be far more limited than a requirement to assist in the actual provision of care. Her oral evidence to the FtT as recorded in the FtT's Record of Proceedings in my judgment showed her involvement in consenting to procedures which the claimant had to undergo, plus the sort of involvement based on personal knowledge of the patient which up to a point the relatives of any person in hospital would have, but which will be particularly important in the case of a patient with learning disabilities.*

Having reached this conclusion, UTJ Ward at paragraph 32 noted that:

> *32. Returning to the question of a comparator, the position is different from that of a severely disabled child in need of lengthy inpatient hospital treatment, because of what is shown by the evidence about differing patterns of care for adults and children. That is unaffected by Ms Bartlam's efforts to persuade me, by considering the respective legal frameworks applicable to children and vulnerable adults, that they are in a similar position, which I do not find of assistance in the present context. Nor am I persuaded by her argument based on the particular position of 16 and 17 year olds with regard to the giving of consent. The position is different from a severely disabled person who is not in receipt of lengthy hospital inpatient treatment because the person who is not in hospital is not receiving publicly funded care via the NHS, while the person in hospital is. As regards the complaint of Thlimmenos discrimination by failing to treat the claimant differently from a capacitous severely disabled adult in need of lengthy in-patient treatment, this would depend on showing that the consequences of the claimant's lack of capacity were such that their situations were relevantly different. However, that has failed on the evidence.*

UTJ Ward noted that both parties had accepted that it was appropriate for him to have regard to the UN Convention on the Rights of Persons with Disabilities, but found that specific consideration had been given to the needs of "incapacitous severely disabled individuals," in particular in the form of the DWP's Equality Impact Assessment on retention of the hospitalisation rule, which noted that:

> *29.2.3 We have considered whether severely mentally impaired claimants who are unable to act for themselves and need help from support workers should be exempt from the policy. However, in addition to the double funding issue, this would be extremely difficult to administer and would introduce different treatment by disability type.*
>
> *29.2.4 More broadly it is arguably unfair to discriminate on specific mental health grounds and the ability to effectively identify and award such cases would be complex. In conclusion, we have no evidence to suggest that the NHS is not able to provide the right types of services for patients and no grounds therefore to continue to award care and mobility components.*

UTJ Ward therefore found that the Secretary of State was entitled to rely upon the relevant regulations to deny the claimant DLA after the 28th day of his inpatient admission.

Comment

Whilst one can admire the ingenuity of the argument advanced on behalf of the claimant, it was, in reality a claim – at least in relation to the claim based upon a status of incapacity – that was both doomed to fail on the facts and should have been doomed to fail in principle. Although not stated in terms by UTJ Ward, the very point of the concept of mental capacity as applied in England & Wales is that it is meant to be functional and decision-specific, and to be decisively different to a status based approach. One could ask as to the extent to which this always applies in practice (does, for instance, a diagnosis of severe and enduring anorexia lead almost inevitably to a conclusion that the person lacks capacity to make decisions about their nutrition?) but had the Upper Tribunal acceded to the claimant's argument, it could only have done so on the basis that (a) there was something 'stable' in the concept of mental incapacity; and (b) it was, therefore legitimate to find that lacking mental

capacity was a status in and of itself. This would have been a distinctly retrograde step. Indeed, as UTJ Ward (and, in fairness, the Secretary of State recognised), the real issue was not so much who might be making decisions for the claimant but how the claimant's needs were to be met. The former might be a question for the MCA; as Lady Hale made clear in *N v ACCG* [2017] UKSC 22, the latter is not logically related to the MCA at all.

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 which Alex has contributed to on 'Isolation of patients in psychiatric hospitals in the context of the COVID-19 pandemic: An ethical, legal, and practical challenge' now available (in pre-print) in the International Journal of Law and Psychiatry's Special Issue: "Mental health, mental capacity, ethics and the law in the context of Covid-19 (coronavirus)." The article examines the impact of the Coronavirus Act on health and social care outside hospital; public health restrictions; the MCA under strain; the Court of Protection; medical decision-making, the MCA and scarce resource; and mental health law.

It is also available in pre-print via ResearchGate here.

SCOTLAND

Covid-19: AWI law and practice – update

This item continues the narrative in the April Report under the heading "AWI law and practice: the cooperative response of the legal community", which promised an update in this issue. That item concluded by describing tensions between the Office of the Public Guardian and agents acting for applicants for registration of powers of attorney over timescales from presentation of applications to completion of registration. Only after completion of registration can a power of attorney be brought into force. The public is being encouraged to implement anticipatory care planning, and often specifically to consider granting powers of attorney and advance directives. For example, at least some GP practices have been communicating those recommendations to all of their patients. The public generally expects that if they have gone to the trouble of granting a power of attorney, then if it becomes required at very short notice, it can be operated. It seemed to the Law Society that this expectation could only be met, during the crisis, by a provision that powers of attorney could become operable following presentation for registration. Safeguards would obviously be necessary, and the Law Society proposed that a temporary measure to this effect should also require a certificate from a solicitor taking responsibility to confirm that (in effect) the power of attorney had been properly prepared and submitted, so that there would be no risk of registration being refused.

The Law Society went further. It formulated provisions relaxing the otherwise mandatory requirements for reports to accompany guardianship applications, before they can be received in court and thus, for example if needed, interim orders promptly obtained. As for public expectations that advance directives would be effective, general publicity had failed to identify that the requirements for a valid advance directive, and the effect in law, remained unclear compared with the position in England & Wales. A provision making good that deficit had been provided as long ago as 1995 in the Scottish Law Commission's Report No 151 on Incapable Adults. That provision was not incorporated into legislation at the time, in anticipation that the courts would continue to develop the law regarding advance directives. That has not happened. The "ready-made" solution from 1995 was accordingly incorporated among temporary modifications proposed by the Law Society. These and other proposals were submitted by the President of the Law Society to the Cabinet Secretary for Health and Sport by letter dated 15th April 2020 (available here), accompanied by draft proposed temporary modifications to the Adults with Incapacity (Scotland) Act 2000 and a full explanation (available here).

The Cabinet Secretary for Health and Sport replied to the President of the Law Society by letter dated 8th May 2020. The Cabinet Secretary wrote that she had been advised that "The removal of safeguards to the adult was not proportionate to the benefit brought to the adult by the amendments. In some instances, the same effect was able to be achieved by guidance and in others the proposals were not specifically to deal with the urgent situation created by the Covid-19 pandemic." It was not explained which proposals appeared not specifically to deal with the current emergency, when all had been presented with an explanation of why they were. However, the assertion that the desired outcome

could be achieved by guidance was most welcome, as it indicated that needs could be met without amending existing requirements. That in turn implies that adequate resources have been made available to achieve that. At time of writing, that cannot yet be verified either from experience "on the ground" or from detail as to the resources made available. A quite separate positive, however, is that in the case of registration of powers of attorney documents, following vigorous communication by the Office of the Public Guardian as to what to expect and what can be done in the case of documents urgently required, the disquiet that we reported last month appears to have been calmed.

A welcome development is that the Equalities and Human Rights Committee of the Scottish Parliament has instituted an Inquiry in relation to Covid-19. Submissions were invited, but this will not be a "single submission" inquiry. It will seek to follow the developing situation, so that the evolving picture through snapshots provided by individual submissions can be tracked. A submission by the Law Society is in the course of being assembled at time of writing, and is expected to include information already provided by the Mental Health and Disability Sub-Committee of the Law Society ("MHDC"). Unlike other submissions which have already been made by other bodies, which generally follow a "top down" pattern of narrating temporary modifications to legislation, guidance and other items that have been issued, and analysing them, the Law Society's approach is "bottom up", narrating actual case histories provided by individual members of MHDC. These have been anonymised and the individuals contributing them have been anonymised, but they are nevertheless derived from personal information as to actual experience. This, disappointingly, appears to demonstrate significant deficits between the "official" top-down picture, and what is actually happening in practice. In particular, it appears to demonstrate practices that are discriminatory on grounds of disability and of age, in relation to selective provision of services. In the case of court processes, it demonstrates issues both in relation to access to justice, and in relation to discrimination, which seem to be attributable to pressures on court staff, coupled with available resources, creating a shortfall in actual provision. The case histories are narrated in the following item.

As we go to press, the Coronavirus (Scotland) (No. 2) Bill is before the Scottish Parliament. It has been indicated in the course of the debates that no further emergency legislation by the Scottish Parliament is to be expected.

Adrian D Ward

Covid-19: the case histories

There follow, without further comment, the case histories referred to in the preceding item.

Case A

A is detained in a hospital rehabilitation unit under a civil order in terms of the 2003 Act. He is recovering well, with a good prognosis to return to the community within the next 12 months. He has well-controlled Type 2 Diabetes and some non-progressing cognitive deficits, secondary to his mental

illness. He is described as engaging in all aspects of his care and treatment, and enjoying an optimal quality of life with semi-independent activities of daily living. He has feasible plans for the future.

A developed mild Covid-19 symptoms and went into self-isolation. He developed more serious symptoms and was referred to a local general hospital. Following admission there, he tested positive for Covid-19. His symptoms improved and he was discharged back to the care of the rehabilitation unit. The consultant responsible for his care there ("the consultant") discovered that a DNA-CPR form had been completed by the general hospital medical team. That surprised him. A's condition then worsened again, and he was referred back to the general hospital. The consultant spoke to the medical senior registrar at the general hospital and expressed concern about the DNA-CPR form. The consultant was alarmed to discover that the form was not the result of any miscommunication or misunderstanding. He was informed that the practice of that hospital, which he has since discovered to be a general practice, is to identify all patients upon admission as either suitable for full escalation or not. All those not identified for full escalation automatically had a DNA-CPR form issued. Those in the "full escalation" category qualified for access to a ventilator. The others did not. The basis of allocation depended upon the number of ventilators available in the unit in question at the time. Thus if ten patients were admitted one day, when only four ventilators were available, four would qualify for "full escalation" and the other six would have a DNA-CPR form completed. If a patient for whom a DNA-CPR form has been issued subsequently returns (as A did) there is no re-assessment. The DNA-CPR remains in place.

Cases B and C

B and C are two care homes. A solicitor has clients in both. Upon enquiry, the solicitor has been advised that upon blanket decisions by the general practitioners serving those homes, the records of all residents have been marked "not for hospital transfer". Thus they will all be denied referral to hospital in circumstances where persons not resident in those care homes, or otherwise in a situation where such policies apply, would be referred.

Case D

Adult D resides in D's own home. The local authority applied for a welfare guardianship order, with power to move D into care. D was and remains opposed to the move. D's opposition was accurately recorded in the statutory reports accompanying the application.

The application was lodged in court as a matter of urgency. In the light of D's opposition, the sheriff appointed a safeguarder (an experienced solicitor advocate), but at the same time granted an interim welfare guardianship order as sought. The safeguarder sought an assurance from the local authority that a short period would be allowed for investigation by the safeguarder, before steps were taken to move D. The local authority's legal department failed to respond. They refused to discuss the matter by telephone. They said that they would only communicate by emails, but did not do so.

The safeguarder nevertheless immediately commenced urgent enquiries with relevant professionals and D, and instructed an independent social work report. The safeguarder's concerns included the relatively high levels of incidence of Covid-19 infections and resulting deaths in care homes such as that to which it was proposed to move D. The safeguarder proceeded on the basis that robust enquiry was required.

Four days after the interim appointment, the MHO advised that D was due to be moved in three days' time. As the safeguarder still did not have any agreement from the Council to allow a short period for investigation, and in particular to obtain the independent social work opinion, the safeguarder tried to contact the relevant court to obtain an order for directions under section 3 of the 2000 Act. The safeguarder made countless attempts to contact the relevant sheriff court hub, other hubs, the direct email addresses for two clerks, and extension numbers of relevant clerks, with no success. An email to the Scottish Court Service enquiry lines remains unanswered.

Following urgent requests for help to the Law Society and other bodies to which the safeguarder had access, the safeguarder was provided with yet another email address for another clerk, on the basis that the address would not be shared. That then resulted in the matter being actioned and allocated to a clerk to phone the safeguarder. That clerk then advised that clerks were working only by email. In the meantime, the independent social worker had called at D's home and met D urgently there. D confirmed to the independent social worker D's opposition to several points in the local authority application. However, in view of two incidents which occurred during the preceding few days, the independent social worker concluded, and advised the safeguarder verbally, that on balance a move to a nursing home "would comply with the general principles" of the 2000 Act.

Case E

An MHO sought an urgent warrant under section 292 of the 2003 Act. There was serious risk to the adult and the warrant was urgently required. When the MHO arrived at court, an attempt was made to turn him away at the door. He was advised that there were no clerks in the building. He insisted, and eventually it transpired that after all there was a clerk there. The papers were passed over to the clerk. A warrant was granted. The sheriff saw fit to convey apologies to the MHO that, despite the serious circumstances of the adult, the MHO had encountered such difficulties over access.

Case F

Adult F had a welfare guardian. The local authority sought to move F to supported accommodation without the guardian's consent. The move did occur and the guardian was negotiating regarding arrangements for contact with F. The local authority submitted an application to court, by way of Minute, seeking directions under section 3 of the 2000 Act designed to suspend the operation of the guardian's powers to determine residence and care. The application named the guardian's solicitor, but the guardian's solicitor was not provided with a copy of the application. The guardian's solicitor was informed by a clerk of court that the sheriff wished to hold a telephone hearing the next morning

to consider the application and to allow the participation of the guardian's solicitor. The sheriff then granted the order sought on an interim basis without a hearing. No safeguarder was appointed.

Adrian D Ward

Covid-19: beyond the immediate urgency

A picture is beginning to emerge of lessons to be learned, and issues worthy of consideration, in managing the exit from lockdown, to prepare for future emergencies, and in any event to update areas of law.

Legal and notarial firms in China have already been managing their way towards full resumption of services. The lessons learned have been publicised in newsletters both by the Royal Faculty of Procurators in Glasgow, and the Paisley Faculty of Procurators. In China, even in places well away from Wuhan, experience indicates that gradual exit from the constraints of lockdown require to be carefully managed, and to introduce new constraints. The general pattern seems to have been that colleagues are permitted to meet each other first of all, then gradually moving towards allowing public to come to their offices, subject to careful precautions. Every client meeting requires participants to wear face masks and maintain social distancing. Offices require to be cleaned frequently: in at least one city, they require to be disinfected every two hours. On the other hand, some cities are now said to be experiencing no new infections, except for incomers. Inter-city business travel is happening.

The underlying message that Covid-19 is here to stay, at least until widespread effective immunisation is possible, nevertheless remains. Even then, it will not be eliminated. It is perhaps unfortunate that in the United Kingdom some elements of the press, when covering the celebrations to mark the 75th anniversary of VE Day, explicitly referred to the forthcoming "VC Day". There seems to be little prospect of the highly contagious Covid-19 being entirely eliminated from the planet. The disease is not going to sign a peace treaty and oblige itself to cease its attacks upon humankind. Wherever it has the opportunity, it will remain as virulently contagious as at present. Not even polio has been successfully eliminated from the world, despite decades of major and coordinated attempts to achieve that, which have often reduced incidence to minimal levels, only to see resurgence where constraints have not been maintained, usually through local conditions in particular areas.

We must wait to see whether regulatory requirement for precautions to apply during and following gradual easing of lockdown will appear as mandatory.

We must also wait to see the extent to which legal firms and others will consider it necessary to continue to maintain premises of the same size as hitherto, with home working as an exception, rather than transferring permanently to methods that allow greater effectiveness and flexibility of remote working, coupled with reduced need for accommodation at the firm's own premises, and the efficiencies of less time spent commuting by staff. Such a trend would present particular challenges in relation to adult incapacity and mental health practice, where direct personal interaction with clients

is more likely to be necessary. However, there may be ways of achieving that without requiring all employees to commute each working day to office premises, and to leave them during the day for face-to-face meetings with clients.

Particularly for people with incapacity and mental health issues, there could be potential for some positive outcomes. The general public is gaining a better understanding of restrictions that may affect the general public temporarily, but which are a permanent way of life for many people with disabilities, including limitations on movement, difficulties in accessing services, and so forth. One could say that the gap between people with disabilities and people without significant disabilities has been reduced. That raises the question whether at least some of that deficit for people with disabilities, essentially a discriminatory deficit, can be permanently reduced.

It will also be time to review whether the UK can better prepare for future such emergencies. A pandemic, most likely a respiratory viral infection, has been top of the threat list for many years. One such pandemic has now occurred. That will not reduce the threat of another. Issues of diagnosis, testing, treatment, and immunisation are likely to be specific to each pandemic. Work can only start when the virus responsible has emerged. However, there will have to be enquiry as to the extent of preparation for such an emergency generally. Was overall provision, ranging from availability of personal protective equipment to capacity for intensive care treatment, and having necessary legislative and regulatory controls ready to be put in place, adequate? The discriminatory and unsatisfactory experience exemplified by the case histories narrated in the preceding article raise a question whether, against known future threats, resources of health and care services, and of services necessary to the administration of justice in order to avoid inappropriate discriminatory differentiation of people with disabilities, have been adequate. In the case of healthcare services, that could be viewed as a question of whether Scottish Ministers have (albeit with the benefit of hindsight) complied with their statutory obligation in terms of section 1 of the National Health Service (Scotland) Act 1978 to "continue …. to promote in Scotland a comprehensive and integrated health service designed to secure [*inter alia*] the prevention, diagnosis and treatment of illness. That is an unqualified duty, and the word "continue" refers back to the establishment of the NHS in Scotland by the initiating provisions of the National Health Service (Scotland) Act 1947, section 1 of which expresses the duty as being "to promote the establishment in Scotland of a comprehensive health service …. and for that purpose to provide or secure the effective provision of services in accordance with [the provisions of that Act]". A question arises as to whether those duties have been met when the emergence of a known and identified threat appears in practice to have resulted not in a "comprehensive" service, but one which has discriminatorily excluded some categories of people, not upon individual assessment, but because (for example) they happen to be resident in a care home, or (apparently) because they happen to have learning disability or other issues.

The final lesson concerns whether law and legal practice would require aspects of some of the temporary provisions now in force and proposed, in one form or another (not necessarily the current form), to be retained in order to bring law and legal practice fully into the 21st century. Typically,

urgently convened discussions to assist preparation of temporary guidance have concluded with the beginnings of a conversation about possible long-term changes, cut short with recognition that these were not an immediate priority. But the issues have been there, and have been identified. One of these can best be introduced by reference to the scheduled list of amendments to the Coronavirus (Scotland) (No. 2) Bill, which became available immediately before we went to press. Amendment 8, tabled by Michael Russell MSP, proposes that a requirement arising from an enactment or rule of law for a solicitor, advocate or notary public to be physically in the same place as another person when that person signs or subscribes a document, takes an oath, or makes an affirmation or declaration should, as a temporary modification, not apply. For the longer term, there requires to be a review of what are the supposed advantages of being physically in the same place, and the extent to which they might be impaired or even enhanced by "electronic" presence. If one takes the example of a deaf-blind person entirely dependent for hearing upon a device, what is the difference if the transmission of sound to that person's hearing is over a distance rather than in "physical presence"? Drawing from the etymology of "presence", one could suggest that a purposive construction of "in the presence of" in the 2020s might be somewhere along the lines of meaning that the two parties involved are simultaneously in full communication and contact with each other, engaged in – and perceived by each other to be engaged in – the common business in hand, and so far as necessary influencing that common business. Is that not what happens every time technology is used to convene a meeting of persons not physically present in any one place? These are thoughts for the future of course, yet this opportunity should perhaps be taken to note the potential for future discussion, and not to lose sight of it.

Adrian D Ward

Scottish Mental Health Law Review (Scott Review): Review on capacity and SIDMA assessing in practice

The SMHLR has commissioned Sandra McDonald, the former Public Guardian for Scotland, to undertake a review and to report on capacity and significantly impaired decision making practice by practitioners and clinicians in Scotland.

In respect of this, the remit of the SMHLR is to consider

- How far capacity might be a universal threshold for compulsory measures under both mental health and incapacity law
- How capacity and significantly impaired decision making are assessed by clinicians and practitioners
- How to maximise a person's ability to make decisions for themselves under mental health and incapacity law, including provision of support for decision making

The current work focuses on the second of these bullet points.

Sandra has been asked to consider how capacity and SIDMA occurs in practice, what training there is for this, as well as if, and if so how, things should be improved. The review also seeks opinions on the embedding of support for decision making, to meet the UNCRPD ambition of supporting disabled persons in their exercise of legal capacity. Sandra is seeking to involve as wide a cohort of practitioners and clinicians as is possible to inform her review.

Please find attached a link to a questionnaire if you wish to offer your views.

If you would prefer to speak to Sandra about this she is able to take responses verbally and in which case please email her on sandra@ex-pg.com. If possible, responses should be sent to Sandra at the above email address by close of play on Friday 29 May.

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

Jill Stavert

Reduction of assured tenancy

In *SW v Chesnutt Skeoch Limited*, [2020] UT 12 UTS/AP/19/0032 the Upper Tribunal on 28th November 2019 refused an appeal against a decision of the First-tier Tribunal for Scotland Housing and Property Chamber refusing to consider a submission by the appellant that a lease be reduced. The First-tier Tribunal had also refused to allow the appellant to contend that the lease was voidable due to facility and circumvention, the tenant's original defence having been on the basis that the lease was void due to the fact that the tenant did not have capacity to enter it. It is reported that on 28th January 2020 leave to appeal the Upper Tribunal's decision was refused. In a broad sense, this is a situation not unfamiliar to adults with incapacity practitioners in which there were assertions that a document be reduced on grounds either of lack of capacity, or alternatively of facility and circumvention. This particular case turned largely upon procedural rules relevant to proceedings before the Housing and Property Chamber, including in particular the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (SSI 2017/328).

This report is limited to noting the following two points. Firstly, in procedure before the Sheriff Court or Court of Session a party may competently seek within that party's pleadings to have a document reduced *ope exceptionis* (though that term does not appear in the decision in the *SW* case). However, under relevant Tribunal rules, that is not competent. There must be a specific application for such a ruling. Secondly, an argument that a party to a document lacked adequate capacity, on the one hand, and an argument that there was facility and circumvention, on the other, are two distinct arguments, and if only one of those arguments is pled, then it can be hazardous to try to "change horses" at an advanced stage of procedure, when a hearing has already been fixed and prepared for, and the other party to those proceedings has prepared for one case and not the other.

Adrian D Ward

Termination of a power of attorney

We draw attention to an article by Roddy MacLeod, Advocate, entitled "Termination of powers of attorney and the Adults with Incapacity (Scotland) Act 2000" at 2020 SLT (News) 87, published on 15th May 2020 in Issue 15 of SLT 2020. In relation to termination of powers of attorney that fall within the definition of continuing or welfare powers of attorney under the Adults with Incapacity (Scotland) Act 2000, Mr MacLeod comments on issues of revocation, reduction on the grounds of incapacity at time of granting, the interplay of such terminations with guardianship, and ancillary considerations relevant to contentious cases. In particular, Mr MacLeod addresses situations where, notwithstanding the certification requirements for such powers of attorney, it might still be possible – albeit unusual – for a power of attorney to be reduced on grounds relating to capacity or certification. If such a power of attorney purportedly revoked a previous power of attorney, and it was established that the subsequent power of attorney was "totally void" because of lack of capacity, that could result in a lacuna in the management of the adult's affairs if there was no party with the necessary authority to instruct re-registration of the previous power of attorney. In any event, if at time of termination the granter lacked capacity in relevant matters, a question arises as to how such a lacuna can be avoided. The author explains the potential relevance in such situations of a guardianship application and of directions under section 3 of the 2000 Act. The author concludes by acknowledging that the issues which can (and do) arise under the 2000 Act "are varied and interesting", that in many cases of termination of a power of attorney there will be no difficulties, and that the comments in this article "are made in a hypothetical context". It is my experience over many years that sooner or later circumstances that one may have considered and addressed hypothetically will come back to bite in reality!

Adrian D Ward

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. She sits on the London Committee of the Court of Protection Practitioners Association. To view full CV click here.

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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). 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

At present, most externally conferences are being postponed, cancelled, or moved online. Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

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 June 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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