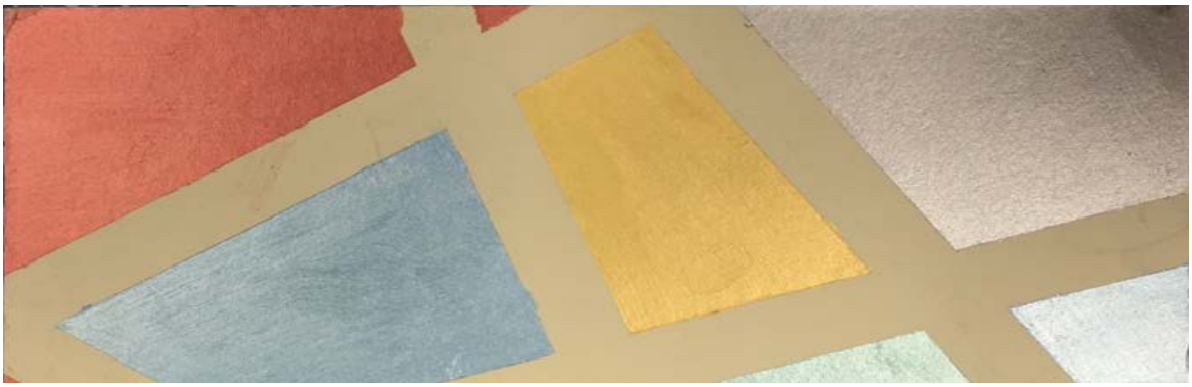

Welcome to the June 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the JCHR has questions for the Government about the delay to the LPS; anorexia and capacity, and Caesarean sections and P-centricity;

(2) In the Property and Affairs Report: Hegel and testamentary capacity, and cross-border management of personal injury settlements;

(3) In the Practice and Procedure Report: a freeze on freezing injunctions, and ss.48 and 49 MCA under the spotlight;

(4) In the Wider Context Report: Mental Health Act reform potential and pitfalls, an update to the Mental Health and Justice Capacity Guide, and food refusal in prison;

(5) In the Scotland Report: Issues with powers of attorney – an unprecedented tangle, the Powers of Attorney Bill and Implementation of the Scott Report.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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

Contents

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

LPS delay – Joint Committee on Human Rights questions for Government

The Joint Committee on Human Rights has written (by letter dated 26 May 2023) to the Minister of State for Social Care to express its view that the "delay [to implementation] is deeply concerning, given the serious problems with the DoLS system that we reported on last year," and identifying how "if anything, the problems with DoLS appear to be getting worse." The Committee finish its letter with four questions for the Minister to answer by 14 June:

1. Does the Government still believe that the system of DoLS is in need of reform? If so, given the delay in the implementation of the LPS, are any reforms of the system currently planned in the interim?

2. What steps are being taken to address the delays to the processing and completion of DoLS applications, with the aim of ensuring that no one is unlawfully deprived of their liberty in a care setting?

3. Will the availability of non-means-tested legal aid be extended to include those who may be subject to deprivation of liberty in care settings without an authorisation in place?

4. What steps are being taken to ensure that those involved in making DoLS decisions receive adequate human rights training, and fully understand the operation of DoLS?

For more on the implications of the decision to delay implementation, see our May 2023 Report, and also here.

Anorexia and capacity

North East London NHS Foundation Trust v Beatrice and Edward [2023] EWCOP 17 (Mostyn J)

Mental capacity – litigation – medical treatment

Summary

This case concerned 'Beatrice,' who was 50 years old; the second respondent, 'Edward'[1] was her father. An application was made by North East London NHS Foundation for declarations that a palliative care plan for Beatrice which would withdraw active psychiatric treatment was lawful and in her best interests.

Beatrice had had a diagnosis of anorexia nervosa since she was 14 years old and had a more recent diagnosis of autistic spectrum disorder. The judgment noted that she was highly intelligent, having obtained post-graduate degrees, with a variety of interests, and was "enthusiastic about giving her time to help other people" (paragraph 5).

Beatrice was profoundly unwell due to her anorexia, with a BMI of 11.5, and with a daily calorific intake of 260 calories. This followed a period during which she had not eaten at all. Beatrice appreciated that she would likely die if she continued with this pattern of highly restricted food intake. She had also stopped taking vitamins and her heart medication. The judgment records that "[s]*he now says that she cannot continue the fight*" against this condition paragraph 6).

Beatrice had requested to be taken to a hospice to die, and had rejected all food and drink, in late April 2023. She changed her mind for a brief period of time and began ingesting the minimal amounts noted above, but by the time of the hearing, she was again expressing a wish to go to hospice. In light of her change in position, Mostyn J did not make s.16 MCA orders, but made determinations solely as to

[1] In both cases, there were pseudonyms given by Mostyn J, who has a long-standing, and entirely understandable, dislike of the use of initials in Court of Protection.

Beatrice's capacity under s.15 MCA with a view to restoring the matter approximately two weeks later.[2]

The Trust submitted that Beatrice lacked capacity to make decisions regarding her care and treatment for anorexia because "*the effect of the disease is so powerful that it renders Beatrice almost, if not actually, delusional so that she believes she is overweight and fat. The applicant argues that this belief derives from an impairment of the mind and prevents Beatrice from using or weighing the treatment options for someone in her position*" (paragraph 19). Beatrice considered that she 'might' have capacity to make these decisions, though Mostyn J considered that this sent a subliminal message that Beatrice did not actually think she had capacity in these domains. Mostyn J had evidence from both Beatrice's treating psychiatrist and an independent expert concluding that she lacked capacity to take care and treatment decisions regarding her anorexia. Mostyn J concluded that

> *28.* […] *there is no doubt at all that Beatrice cannot weigh the information relevant to a decision about the options for her care and treatment. The weighing process requires her to recognise that into the scales go the stark fact that if she does not eat and hydrate normally, and very soon, she will die. I agree with Mr Sachdeva KC that for the purposes of the test there is nothing else to weigh. There are, pace Hedley J, no various, inter-relating, parts of the argument. There is nothing to put on the side of the scales objectively in favour of starvation*

Mostyn J's considered this inability to weigh was caused by her anorexia nervosa, returning to an earlier metaphor that anorexia had been a 'terrorist' which had 'invaded' and 'occupied' Beatrice's mind for most of her life:

> *34. …The evidence showed beyond any doubt at all that the key weighing component within Beatrice's decision-making process was not merely rendered faulty by the condition but rather that the condition caused it entirely to disappear.*

Mostyn J also made findings on litigation capacity, finding that Beatrice was necessarily unable to conduct proceedings relating to an issue on which she lacked substantive capacity:

> *36…I remain convinced, as a matter of logic (I forebear from saying common sense), that if Beatrice is robbed by the condition of the key element in the decision making process of weighing the relevant information, then she will be equivalently disabled from formulating and making submissions to a judge as to how he or she should undertake that very weighing exercise: see An NHS Trust v P (by her litigation friend, the Official Solicitor) [2021] EWCOP 27 at [33].*
>
> *37. The test for litigation capacity surely has to be premised on Beatrice acting in person for, if that were not so, there would have to be an invidious debate as to the quality of the legal team hypothetically engaged by her. I am not getting into that in this case as I am completely convinced that Beatrice, even if represented, would not be able to formulate valid instructions to her lawyers by virtue of the impact of the condition to which I have referred above.*

Mostyn J offered criticism of Hayden J's formulation of litigation capacity in *Lancashire and South Cumbria NHS Foundation Trust v Q* [2022] EWCOP 6, in which the latter had found that "*the court could*

[2] A subsequent hearing has had press coverage, but at the point of preparing the Report no written judgment has been made available.

take into account when analysing a hypothetical instruction by P of hypothetical lawyers that P would not be "required" to instruct her advisers in a particular way, and that "like any other litigant, in any sphere of law, [she] may instruct [her] lawyers in a way which might, objectively assessed, be regarded as contrary to the weight of the evidence"(paragraph 38). Mostyn J stated that:

> *39. I confess to finding the intellectual process which I should undertake under this formulation to be extremely difficult. I think it is being suggested that even though I have found that the anorexia has robbed Beatrice of the ability to weigh the relevant information she nonetheless may have the capacity to litigate that very issue because she has the facility to give completely unrealistic and objectively untenable*
> *instructions to her hypothetical lawyers. I do not accept that this is a valid or useful exercise for the purposes of the decision I have to make. I think the exercise is difficult enough without having to go down what I regard as an intellectual cul-de-sac.*

Mostyn J also set out an amended order on reporting restrictions, which was notably shorter than the typical transparency order, and was titled as a 'Reporting Restrictions Order.'

Comment

Mostyn J's findings on substance matter capacity were unsurprising in this very sad case. He continues to take a stance at odds from other High Court judges on capacity to conduct proceedings, considering as a matter of logic that a person does not need to understand and use and weigh any less information to litigate about a decision than to make that decision (a discussion about this issue in the context of *Re P(Litigation Capacity)* [2021] EWCOP 27 is included in our May 2021 report).

In the abstract, it is also hard to disagree with Mostyn J's observation that 'Transparency' orders are likely more appropriately headed as Reporting Restriction Orders. However, we would note that Practice Direction 4C – Transparency does create a default position in the Court of Protection for the making such an order, and that the court will not ordinarily undertake an 'intense balancing exercise' as is required where matters are going from public to private.[3] It is therefore a nice question as to whether there is a restriction on reporting, or whether the doors are simply being opened somewhat to enable transparency. In either event, we await with considerable interest the Law Commission's work in relation to contempt as an opportunity to make the whole area significantly less tangled.

Short note: P-centricity and Caesarean sections

Gloucestershire Hospitals NHS FT & Anor v Joanna [2023] EWCOP 21 concerned "Joanna", who was 26 years old, detained under s.3 of the Mental Health Act 1983, 38 weeks' pregnant and experiencing psychosis. An application was made to authorise serious medical treatment, namely a planned caesarean section, obstetric care and delivery of her child 3 days after the hearing. The evidence demonstrated on the balance of probabilities that she could not retain or weigh the relevant information to make decisions in relation to her obstetric care and that she lacked capacity to conduct the proceedings. As to best interests, Mostyn J adopted a P-centric approach and accepted that if Joanna had capacity she would likely choose a caesarean section after weighing up the risks as she was

[3] See also Alex's discussion of these issues in relation to an earlier decision of Mostyn J's.

terrified of a vaginal birth. Her mother also supported her having a planned caesarean and, in conclusion, this was in her best interests.

This was a serious medical treatment case because the plan envisaged the use of restraint if necessary. The outcome is perhaps unsurprising, given that adopting a P-centric approach accorded with the evidential best interests analysis.

PROPERTY AND AFFAIRS

Hegel and testamentary capacity

Baker & Anor v Hewston [2023] EWHC 1145 (Ch) (HHJ Tindal, sitting as a Judge of the High Court)

Other proceedings – Chancery

HHJ Tindal in *Baker & Anor v Hewston* [2023] EWHC 1145 (Ch) has ambitiously sought to undertake a Hegelian synthesis between the contrasting positions taken by Chancery and Court of Protection lawyers to the approach to take to testamentary capacity. As a judge who sits in both the Court of Protection and the Chancery Division, HHJ Tindal was eminently well-suited to the task,[4] and his judgment draws carefully and widely upon what are still in some ways two very different legal cultures.[5]

The key question is whether and how the common law test for testamentary capacity set down in 1870 in *Banks v Goodfellow* interacts with the test for capacity set down in ss.2-3 Mental Capacity Act 2005. This is a question which has been considered a number of times at first instance, but not yet by the Court of Appeal. In cases before the Chancery Division concerning whether to admit a will to probate, the weight of judicial opinion has been to the effect that testamentary capacity is governed by the common law. However, as Andrew Strauss QC (sitting as a Deputy High Court Judge) in *Walker v Badmin* [2015] WTLR 493 noted:

> *There has been a tendency in the cases and textbooks…to suggest the provisions Act are simply a modern restatement of Banks [and]…can, optionally, be applied and…will or may gradually….replace the formulation in Banks. It does not seem to me..this compromise solution is an available one. There are clear differences... The tests overlap, and will often produce the same result, but not always.*

As HHJ Tindal noted, this has meant that:

> *20* […] *a polarised debate has developed between Chancery and CoP lawyers:*
> *20.1 'In the red corner', Theobald now takes quite a trenchant view at p.4-004:*
>
> > *"Following the coming into force of the MCA, many judges and lawyers (and indeed the 17th edition of this work) assumed that the common law test for testamentary capacity had been replaced by the statutory test for capacity under the Act. However, it has now been established, albeit only at first instance, that the test remains the common law test. This, in the view of the present editors, is clearly correct. The clarity of this position was not helped by a confusing statement [at p.4.33 of] the "Mental Capacity Act Code of Practice" (……with some statutory force, but not binding)….*

[4] For instance, he was able to draw to the attention of the 'expert and experienced' Chancery practitioners appearing before him the decision of the Supreme Court in *A Local Authority v JB* [2021] UKSC 52, which – to Court of Protection practitioners – is now the starting point when it comes to considering capacity for purposes of the MCA 2005, but which had not apparently crossed the radar of the Chancery practitioners.

[5] Reading the judgment of HHJ Tindal reminded Alex of the article that he wrote with David Rees (now KC) almost a decade ago: *Property and Affairs Lawyers Are from Mars, Health and Welfare Lawyers from Venus* (2014) Elder LJ, 285.

> *"The Act's new definition of capacity is in line with the existing common law tests, and the Act does not replace them. When cases come before the court on the above issues, judges can adopt the new definition if they think that it is appropriate."*
>
> *In the light of the [first instance] cases…both sentences are plainly wrong."*

20.2 'In the blue corner', 'Court of Protection Practice 2023' now fumes at p.1.244:

> *"The reluctance of judges of the Chancery Division to mould the common law to assimilate the features of the statutory test is striking, and with respect, somewhat difficult to understand, not least because it means that lawyers and doctors have to consider two different tests in respect of a (live) testator with potentially impaired decision-making capacity."*[6]

This debate was reviewed by the Law Commission in their 2017 Consultation (No.231) 'Making a Will': It proposed replacing Banks with the MCA or alternatively putting it on a statutory footing (pgs.18-48 esp ps.32-8). An update report is due later this year.

HHJ Tindal continued:

21. Speaking as a Judge who sits in both the Court of Protection and (more recently) in the Chancery Division as well, I can see both sides. Caution not to discard the common law which has 'stood the test of time' is entirely understandable. However, I respectfully disagree with Theobald: in my view the MCA Code of Practice was right that ss.2-3 MCA are 'in line with the existing common law tests and the Act does not replace them' Munby J (as he was) in A LA v MM [2007] EWHC 2003 also did consider it 'appropriate' to adopt ss.2-3 MCA on various issues of capacity (not wills) at p.80:

> *"What is being said is that judges sitting elsewhere than in the Court of Protection and deciding cases where what is in issue is, for example, capacity to make a will [or gift]…. can adopt the new definition if it is appropriate….having regard to the existing principles of the common law. Since, as I have said, there is no relevant distinction between the [common law] test…in Re MB and… s.3(1) of the Act, and since the one merely encapsulates in the language of the Parliamentary draftsmen principles expounded by the judges in the other, the invitation to the judges by the Code is entirely understandable and..appropriate."*

22. I respectfully agree and pending the Law Commission's work, I tentatively propose (with respect to Mr Strauss QC in Walker) a 'compromise solution'. I make five points:

22.1 ss.2-3 MCA do not strictly apply to testamentary capacity in Probate cases;

22.2 ss.2-3 and general common law on capacity are aligned (and consciously so);

22.3 ss.2-3 are broadly consistent with the common law on testamentary capacity;

22.4 ss.2-3 and the Banks criteria are consistent and can 'accommodate' each other;

[6] Alex should declare an interest in that he is responsible for the relevant chapter in the Court of Protection Practice 2023.

> *22.5 ss.2-3 are 'appropriate', in a similar sense as in MM to be included by analogy within the common law approach to testamentary capacity in Probate cases.*

HHJ Tindal then developed his Hegelian synthesis in relation to each of these five points, before applying them to the facts of the case before him as a 'worked example.'

In relation to the first point, HHJ Tindal emphasised that there is a distinction between the situation where the Court of Protection is applying the MCA – as it undoubtedly is when making a statutory will for a person (at which point it must apply ss.2-3 MCA 2005 to decide whether the person has or lacks the relevant capacity) and the situation where the High or County Court is considering matters from a probate perspective. At that point, the court is not applying the MCA 2005, and hence the definition of capacity within the MCA does not apply, as it only applies for the Act's purposes.

As regards the second point, HHJ Tindal identified that

> *28.* […] ***if*** *the approach to testamentary capacity in common law is substantively different from that in the MCA, as the Law Commission notes in 'Making a Will' at ps.2.57-8, there could be different decisions about the capacity of the same (living) testator for the same will in different Courts. The Chancery Division could find P had capacity for a will at common law so it was valid; whilst the Court of Protection could find that P did not have capacity and so could make a statutory will. I accept those are different contexts (see HHJ Matthews in James p.80), as the Law Commission says at p.2.45, this may cause confusion. Still more seriously, as Falk J accepted in Clitheroe at p.75, if the other way around and the testator lacked capacity at common law but not under the MCA, in theory no valid will could be executed at all. Far from a theoretical risk, if there is a real difference on the presumption of capacity (which I consider below), that risk could be quite common. In my view, this would be an impracticable, illogical or inconvenient result (for these reasons and those of the Law Commission) and as Lord Kerr said at p.24 of R v McCool [2018] 1 WLR 2431 (SC):*
>
> > *"The court seeks to avoid construction producing an [impracticable, illogical, or inconvenient] result, as this is unlikely to have been intended by the legislature"*

HHJ Tindal found that the simple way to avoid such a result would be to interpret the MCA where it applies in the context of testamentary capacity as aligned with the common law test in *Banks* as clarified and modernised. As he noted, that conclusion could be expressed in different ways, HHJ Tindal preferring the analysis:

> *29.* […] *that the MCA's statutory background and the Law Commission reports which led to it (especially as one proposed a draft Bill in similar terms to the eventual Act) throw light on its interpretation (Black-Clawson) and demonstrate that it was intended to be aligned with the common law and indeed vice-versa.*

Having embarked upon a historical exegesis to make good this point, HHJ Tindal then turned to his third point, to the effect that the differences between the common law and the approach in ss.2-3 MCA 2005 had been overstated by Andrew Strauss QC in *Walker*. Of particular interest is his analysis of the apparent differences in the operation of the presumption of capacity. As HHJ Tindal identified:

> *34. Even with a dearth of evidence, if due execution (analytically distinct from capacity) is proved and 'the will appears rational on its face' there is a presumption of capacity even at common law. In Clarke, Zacaroli J found at ps.93-4 that a will was 'rational' even with unexplained changes of beneficiaries (see also Sharp p.79). Moreover, if the will is 'irrational on its face', that would rebut a 'presumption of capacity' under s.1(2) MCA anyway. So, with almost all validly executed wills, there will be a 'presumption of capacity'. Whilst the evidential burden can then shift back to the propounder of the will if there is 'real doubt', that is not just 'some doubt' (Clarke p.77) and is an evidential burden, not a legal one (see Phipson on Evidence (20th Edition, 2021) p.6.02. This resolves any 'inconsistency' with s.1(2) suggested in Kicks at p.67, as does the test applied of Asplin LJ (as she now is) in Gorjat v Gorjat [2010] 13 ITELR 312 p.139*
>
> > *"At common law, the burden of proving lack of mental capacity lies on the person alleging it. To put the matter another way, every adult is presumed to have mental capacity to make the full range of lifetime decisions until the reverse is proved. s.1(2) MCA….put the presumption of mental capacity on a statutory footing. This evidential burden may shift from a claimant to the defendant if a prima facie case of lack of capacity is established." (My underline)*

There is, HHJ Tindal accepted, an apparent difference between the common law and the MCA as interpreted in *JB* as regards the need to understand the interests of other people:

> *37.* […] *I accept Lewison LJ in Simon said testamentary capacity at common law 'does not require [a testator] to understand the significance of his assets to other people' whereas Lord Stephens in JB said that 'relevant information' under s.3(4) MCA 'can extend to the consequences for others'. However, Lord Stephens stressed this depended on the factual context and that capacity is 'issue-specific' depending on the 'matter' (see JB ps.68-9). It makes complete sense that s.3(4) MCA in the context of the capacity to engage in 'bilateral' sexual relations should encompass understanding of the consequences for one's sexual partner. But that does not mean in the context of capacity to make a 'unilateral' will, that s.3(4) MCA also requires understanding of the consequences for others. As stressed in the authorities (including Hawes at p.14 which was quoted in Simon) freedom of testation means a testator who has capacity is free to make a will which is 'hurtful, ungrateful or unfair'. It is a totally different decision.*

The third difference identified by Andrew Strauss QC in Walker between the two approaches was that s.3(1) MCA 'requires a person to be able to understand all the information relevant to the making of a decision', whereas Banks does not. As HHJ Tindal noted (at paragraph 38): "[t]*his begs the more fundamental question about what 'information' is 'relevant' to making a will, which I discuss next. But first, I respectfully suggest this is not how s.3(1) MCA works anyway*," a point HHJ Tindal amplified by reference to relevant MCA case-law, including, significantly, that of *Public Guardian v RI* [2022] WTLR 1133 (CoP)), a case which "*not only shows that an individual need not understand 'all relevant information' (which s.3 MCA does not say). It shows even with an LPA where a living individual hands over control of their property to another, 'the bar must not be set too high' and there is a crucial role for explanation, as Peter Gibson LJ also stressed for wills in Hoff*" (paragraph 39). Interestingly, HHJ Tindal observed that "*since the MCA is 'issue-specific' as discussed in JB, understanding of relevant information to make a will would be no higher and probably lower than for an LPA, because there would be few if any 'consequences' for the testator after they die, other than their 'legacy'*" (paragraph 40).

All of this led HHJ Tindal to his fourth point, which is that the straightforward way in which to reconcile the common law and the MCA approaches was for:

> *41.* […] *the first three limbs of the Banks test to be treated as the 'relevant information' under s.3 MCA and for the fourth limb to map onto s.2 MCA*
>
> i.e.
>
> *43.* […] *given the consistency between testamentary capacity at common law and ss.2-3 MCA, were it assessed under the MCA e.g. by the Court of Protection, the 'relevant information' would be the same as the first three limbs of Banks: [a] to understand 'the nature of making a will and its effects'* […] *[b] to understand and retain ('recollect' for a short period – s.3(3) MCA) 'the extent of his property'* […]*; and [c] to weigh 'the nature and extent of the claims upon him, both those whom he is including in his will and those he is excluding from it'* […]*. I am fortified in this view by its consistency with the view of the Law Commission in' Making a Will' at p.2.55 (which I consider is of significant weight)*

HHJ Tindal sought in equally Hegelian fashion to address an apparent inconsistency identified by the Law Commission in *Making a Will:*

> 44. […] *whilst the Law Commission suggests at p.2.95 that the rule in Parker v Felgate endorsed in Perrins is arguably inconsistent with the MCA, I suggest they can also be reconciled. As Lord Stephens said in JB at p.64, capacity can fluctuate over time and s.2(1) MCA applies 'at the material time' which is 'decision-specific'. In the context of deciding on a will, the 'relevant information' in Banks applies at that 'material time'. But if a testator has capacity but it deteriorates before execution, at that 'material time', the 'relevant information' for executing a will is just that listed in Parker/Perrins. After all, information need only be retained 'for a short period' under s.3(3) MCA. There is no wider 'memory test' under ss.2-3 MCA than at common law (see Hoff and Simon). I would add, as the Explanatory Notes to s.3(1)(d) MCA state (relevant to its meaning: R(O) p.30), the lack of ability to communicate will not commonly arise – certainly in relation to a will. It has not been suggested to be a relevant difference with Banks.*
>
> And later:
>
> *47.* […] *Should capacity to make the will be lost once the testator has instructed a solicitor, then the 'matter' under s.2 MCA changes from 'deciding' upon the will to 'executing' it and the 'relevant information' changes from the first three limbs of Banks to the four limbs of Parker as updated in Perrins.*

Finally, in relation to the issue of impairment / disturbance, HHJ Tindal noted that:

> *45. It has also not been suggested that the fourth element of Banks differs from the MCA in the cases suggesting there are such 'differences' between them such as Walker. However, at first sight, the language is clearly different. Yet the Law Commission in 'Making a Will' summarise the essence of the fourth Banks limb in modern language at p.2.19: 'Understanding must not be impaired by any disorder of the mind or delusions'. Stripped of its more complex language, that was essentially how it was applied in Banks itself, where the testator still had delusions, but the Court held his understanding was not impaired by them when making the will. Moreover, as the Law Commission also says at p.2.21, this element must be applied with a modern understanding of cognitive impairments and psychiatric diagnoses: see Key p.95 and Clitheroe p.106. There is a close correlation between 'disorders of the mind or delusions' in that modern sense and 'an impairment or disturbance of the mind or brain' in s.2(1) MCA influenced by Re MB (adopted by the MCA rather*

than the draft Bill's 'mental disability'). In both cases, there is a (slightly different) 'causative nexus' (see JB at p.78): in s.2(1) between 'inability to make a decision' and 'impairment/disturbance of the mind'; in the fourth Banks element rephrased by the Law Commission between 'impairment of understanding' and 'disorder of the mind or delusion'. The same is true if one returns to the key language in Banks: "no disorder of the mind….[or] insane delusion shall…bring about a disposal of it which, if his mind had been sound, would not have been made." s.2 MCA does not ask this counterfactual 'but for' causal question because it is general; Banks does because it focusses on a specific past will (even if not framed in exactly the same way as s.2 MCA).

HHJ Tindal was at pains to make clear that he was not suggesting:

46. […] *that ss.2-3 MCA applied to testamentary capacity on one hand and the common law test in Banks on the other are identical, simply that they are broadly consistent and one can 'accommodate' the other, depending on which applies. So, if a will is validly executed and 'rational on its face' there is a presumption of capacity either way (although if the will were irrational on its face, that would be the most powerful evidence to displace the presumption under s.1(2) MCA). 'The Golden Rule' that solicitors should obtain a capacity assessment if in doubt is a rule of practice not of law (Key / Burns) and so unaffected by s.1(2) MCA. s.3 MCA examine inability to make a decision and are expressed disjunctively ('or'), whilst the first three limbs of Banks examine ability to make a decision and are framed conjunctively ('and'). Either way, should a testator lack ability with any of the stated elements, they lack capacity.*

The last of HHJ Tindal's five points was to set out his analysis of whether it was appropriate to apply ss.2-3 MCA by analogy when applying the common law approach. Whilst he was clear that the Court of Protection could use the *Banks* test to put flesh on the bones of the MCA when discharging its functions, conversely:

49. Whilst a Probate case would involve 'accommodating' ss.2-3 MCA within the common law not vice-versa, it does not involve applying the MCA and using Banks to put 'flesh on bones', but rather applying Banks but using the MCA as a 'cross-check'. If the MCA suggests a different result, that does not trump the common law but suggests further consideration. This is using the MCA to 'supplement' the common law in HHJ Dight's word in Fischer v Diffley [2013] EWHC 4567 p.25; and indeed, taking a 'flexible approach' as suggested by Mr Rosen QC in Bray v Pearce (2014) (as quoted in James).

[…]

50. [Lord Burrows, formerly of the Law Commission, and now of the Supreme Court has given] *an example of applying a statute by analogy which may be reassuring to Chancery lawyers. It goes back to the time of Banks: applying statutes of limitation by analogy with issues of delay on equitable relief in Knox v Gye (1872) LR 5 HL 656, where Lord Westbury said at p.673:*

> *"…[A] court of equity acts by analogy to the Statute of Limitations…where the suit in equity corresponds with an action at law…in the words of the statute, a court of equity adopts the enactment of the statute as its own rule of procedure."*

It is this sort of familiar exercise I suggest with the MCA. As with the 'convergence' of common law and statute in the lead up to the MCA, this 'analogy' approach would smooth any legislative change to Banks. It may even show Parliament that buttressed by the MCA and with some of its language

updated, Banks remains as vital as ever.

Applying this analysis to the facts of the case before him, HHJ Tindal first considered the 2009 will purportedly made by the testator, about which there were three concerning features:

> [55] *Firstly, it was executed within two months of Stanley's discharge from compulsory 'section' in hospital which raises serious concerns about his state of mind and capacity. Secondly, it was prepared in the throes of a dramatic change: Stanley's separation from Kathleen and reconciliation with Agnes, which proved very short-lived. Thirdly despite that, Agnes is not even mentioned in the 2009 will. To make matters worse, there is a total absence of contemporaneous evidence.*

The 2009 will therefore acutely raised the concern of Andrew Strauss QC in *Walker* about the presumption of capacity in s.1(2) MCA: where "*there is a dearth of evidence and the burden of proof may be decisive; in such cases the common law position would be reversed if the Act applies*." Working through the Hegelian synthesis he had developed previously, however, HHJ Tindal found the answer. He started with the common law position:

> *56. At common law, given the three serious concerns I have outlined, I am prepared to accept that the omission of Agnes from the will means it is not 'rational on its face' (I accept 'on its face' is debatable and I will return to it). This means the common law presumption of capacity in Key does not apply. It is a very simple will indeed and the silence about the jointly-owned cottage with Kathleen is probably explicable in relation to the second Banks limb if they held it as joint tenants as they later did with the Bungalow (c.f. Simon). The absence of any evidence of explanation (Hoff) against the background of the recent mental health episode raises concerns on the first limb of Banks. However, the real concern is the third and fourth limbs of Banks. The unexplained exclusion of not only Kathleen but also Agnes would appear to undermine the third limb – Stanley's ability to 'comprehend and appreciate the claims to which he should give effect'. Moreover, this feature – especially Agnes' omission – with the close correlation of Stanley's mental health episode and his abrupt change of will the following year back to Kathleen (see below) would make it difficult to be satisfied on the balance of probabilities (with no presumption of capacity) that "no disorder of the mind….[or] insane delusion [had brought]…about a disposal of it which, if his mind had been sound, would not have been made." In short, I find the will is invalid because it has not been proved that Stanley had capacity to make it in December 2009.*

Turning, then to the MCA, as a cross-check, HHJ Tindal noted that:

> *57. […] a simple application of the 'presumption of capacity' under s.1(2) MCA might suggest a different result. Here, Mr Strauss QC was concerned in Walker that a dearth of evidence would mean that presumption was decisive and a will may be valid despite such concerns. As I have explained, a different result does not trump the common law test, but does suggest further consideration. In fact, this would show that far from being inconsistent as might first appear, the two tests once properly understood are consistent. However s.1(2) MCA may operate in prospective welfare decisions, for past property transactions (not wills), as Asplin LJ (as she now is) said in Gorjat at p.139, s.1(2) simply put a common law presumption of capacity on a statutory footing. As she added, under this, the evidential burden can still shift if there are concerns even applying that legal burden. The three serious concerns I have highlighted clearly do shift the evidential burden and the absence of contemporaneous documentation – especially of explanation from or to Stanley – meaning the three concerns (which are evidenced, indeed undisputed) cumulatively would rebut the s.1(2) MCA presumption of capacity. Moreover, if*

Stanley's 2009 will is actually 'rational on its face' (as would have been argued had any party sought to propound the 2009 will and which would be my own view), there would have been a presumption of capacity at common law too (Key), but the result would have been the same for the same reasons. To repeat: whilst statutory and common law approaches at first sight appear different, on reflection they are consistent and lead to the same result: Stanley did not have capacity to make his 2009 will. So, I place no evidential weight on it for any later wills.

Turning to a second, 2010, will, HHJ Tindall had:

60. […] *no concerns whatsoever about the validity of his 2010 will. It was validly executed and I infer Stanley had full knowledge and approval of it – not least as he signed it having prevaricated over Martin. Far from suggesting incapacity, that suggests Stanley was well-aware he was favouring Martin over his other children. Given the contemporary explanation from Kathleen and the reassurance for Stanley that he could change his will if he survived her, the will is rational on its face and so there is a presumption of capacity at common law. It is true the 2010 will was rather more sophisticated than the 2009 one, but it was clearly and simply explained by letter and following Hoff, the understanding required is that of an appropriate explanation of the relevant information to the decision: namely the nature and effect of the will, the extent of property and the different claims. There is no indication either of any lack of understanding of the extent of the various claims and who was being included and excluded (each catered for individually as reflected in both wills seen alongside one another); nor the extent of relevant property (clearly differentiated in the various legacies), nor indeed the nature of effect of the will. It is also clear any disorder or delusion Stanley may have had the previous year was not causative (like the testator in Banks). As a cross-check under the MCA, the result would be exactly the same for similar reasons: there was a presumption of capacity not rebutted indeed confirmed by Stanley's evident understanding, retention and weighing of the Banks 'relevant information' and the absence of 'causal nexus' to his past 'disturbance of the mind'. So, the will was valid.*

By 2014, the problem was a deterioration in the donor's mental state. However:

65. At common law, the rule in Parker as updated in Perrins could not apply to Stanley's apparently deteriorating mental state because his will had changed between instruction (of which there is no contemporary evidence of that change) and execution. However, as the June 2014 will was duly executed and rational on its face, a presumption of capacity applies at common law (Key) and the file note on that day evidences Stanley's understanding of the nature and effect of the will (hence his desire to save tax), the extent of his property (including the Bungalow by survivorship notwithstanding his promise to Diane) and the claims to which he should give effect (including Martin). Whilst Stanley may have experienced a recurrence of mental disorder some days later, his execution of the will on 13th July seems entirely rational, lucid and unrelated to it (if rather callous).

66. Using ss.2-3 MCA as a cross-check, the same result would be reached. The 'material time' under s.2(1) MCA was 13th June 2014 given Stanley's instructions had changed. Given the 'disturbance of his mind' less a week later, whilst there is a presumption of capacity under s.1(2) MCA, as with 2009, the evidential burden has shifted. However, whilst there was no 'Golden Rule' capacity assessment, that does not make the will invalid (Key and Burns). Unlike 2009, the points made above about the first three Banks limbs still apply and do prove Stanley's understanding, retention and weighing of the requisite 'relevant information' under s.3(1) MCA. Moreover, by analogy with s.3(2) MCA (and indeed Hoff at common law), the solicitor gave a detailed explanation to Stanley and received rational responses in return. However unfair this 2014 will was on Diane, that does not suggest incapacity (s.1(4) MCA; Sharp, Hawes in common law). Therefore, as it was

validly executed and known/approved, the 2014 will was valid.

Further wills followed, with the final one purportedly being executed in May 2020, about which (for reasons carefully explained in the judgment[7]) HHJ Tindall had no concerns; it therefore superseded all previous wills and was admitted to Probate.

Comment

This has been a lengthy summary, because, whilst HHJ Tindall's conclusions on the law can be (and were) shortly expressed at a high level, they require setting out in some detail to appreciate their nuances. It is particularly important and helpful that HHJ Tindall spent such time and effort explaining the two worlds – the CoP and the Chancery Division – to each other, and to explaining how apparent differences in fact mask important similarities. His analysis is not just of assistance to lawyers seeking to explain *Banks* to baffled GPs (or to Chancery Division judges wishing to use the MCA as a cross-check), but also to Court of Protection practitioners interested in the proper application of the presumption of capacity. The approach that HHJ Tindall sets out is – as Alex has suggested elsewhere – not only relevant to the retrospective analysis of testamentary capacity, but the retrospective analysis of such other important instruments as advance decisions to refuse treatment.

Whilst it was convincing to us, we are aware that HHJ Tindall's Hegelian synthesis may not necessarily appeal to everyone, as he did have to engage in some relatively heroic retrofitting of modern-day concepts onto the *Banks* test. For our part, it still remains unsatisfactory that, formally, there are two tests to apply depending on whether one is considering the real-time position for purposes of a statutory will, or after the event for purposes of Probate. Indeed, it might be thought to be even more unsatisfactory given that HHJ Tindall has now so elegantly identified how they will lead to the same outcome. It may be that the appellate courts in due course build on his analysis to find that, in fact, the common law has evolved to the point where it is indeed appropriate to apply the MCA. We are bound to say that it is difficult avoid the conclusion that it would be 'cleaner,' if the Law Commission's current Wills project were to lead to one statutory test to rule them all, albeit making clear that it is building (where appropriate) on the learning that has underpinned the common law in this area for well over a century

Short note: cross-border dual management

Potter Rees Dolan Trust Corporation Ltd v Wl & Anor [2023] EWCOP 19 concerned the management of funds awarded in a damages claim in England to a person now habitually resident in Poland. The case had a tangled procedural history, caused in large part by the attitude taken by a lawyer acting for a period of time by a guardian appointed for the man in Poland. However, ultimately, Senior Judge Hilder broadly endorsed (subject to a number of final points, including costs, to be addressed further in submissions) an approach which maintained a deputyship in place in England & Wales and a framework for transferring funds to the guardian in Poland. As she noted:

[7] Notwithstanding the 'ingenious' arrangement for witnessing required as a result of COVID-19, involving the witness watching the signature through the car window. Although this predated the amendment to the Wills Act permitting 'remote attestation,' HHJ Tindal was clear that it was a valid execution.

> *56. There is a degree of complexity inherent in maintaining dual management systems but, in this matter specifically, I am satisfied that any disadvantages in that complexity are outweighed by the advantages of addressing 'best interests' concerns which have arisen.*
>
> *57 […] . The proposals are detailed and have clearly been carefully considered on both sides. On a broad overview, they seem to me properly to address the practical realities of [the man's] habitual residence in Poland, [his mother's] natural love and affection for him, and her real caring responsibilities for him. They also seem to me to contain proper safeguards for* [the man] *in the light of concerns raised and communication difficulties experienced to date and aired in these proceedings.*

Cross-border management of personal injury awards are a notoriously complex area, and whilst the judgment in this case is intensely fact-specific, it is helpful in confirming that there may sometimes be a place for maintenance of a dual framework to secure the interests of the person.

Powers of Attorney Bill

The Powers of Attorney Bill will have its second reading in the House of Lords on 16 June.

PRACTICE AND PROCEDURE

A freeze on freezing injunctions?

EG & Anor v AP & Ors [2023] EWCOP 15 (Senior Judge Hilder)

CoP jurisdiction and powers – injunctions

Summary

Senior Judge Hilder has further refined our understanding of the scope of the Court of Protection's power to make injunctions. This issue has been the subject of recent appellate level consideration in *Re G (Court of Protection: Injunction)* [2022] EWCA Civ 1312, in which the Court of Appeal confirmed that the Court of Protection (1) has the power to make orders, including injunctions, to give effect to, or otherwise in connection with an order under s.16(2)(a) (i.e. a decision made on behalf of P); and (2), given that its power to make injunctions is founded upon s.47, which cloaks the Court of Protection with the same powers as the High Court 'in connection' with its jurisdiction, the Court of Protection is required to apply the test of whether an injunction is "just and convenient." Baker LJ gave two examples where an injunction might be found to be "just and convenient":

> *72.* […] *suppose that the Court decided under s16(2) that a fund held by A should be transferred to be held by B for P instead. If there is no reason to suppose that A will be obstructive, it may well be enough for the Court to decide that it is in P's best interests that the funds be transferred from A to B and make an order to that effect in the expectation that A would duly co-operate. If however there is a risk that A will seek to frustrate the order, the Court can undoubtedly add an injunction ordering A to transfer the fund. That would be an example of an ancillary order intended to make the s16(2) order effective.* ('the transfer example')
>
> *73.* […] *a useful analogy can be found in Broad Idea itself. There Lord Leggatt identified the rationale for the grant of freezing injunctions as the so-called "enforcement principle", namely the principle that the essential purpose of a freezing order is to facilitate the enforcement of a judgment or order for the payment of a sum of money by preventing assets against which such judgment could potentially be enforced from being dealt with in such a way that insufficient assets are available to meet the judgment. Then, having identified the relevant interest as the claimant's (usually prospective) right to enforce through the court's process a judgment or order for the payment of a sum of money, he continued at [89]:*
>
> > *"A freezing injunction protects this right to the extent that it is possible to do so without giving the claimant security for its claim or interfering with the respondent's right to use its assets for ordinary business purposes. The purpose of the injunction is to prevent the right of enforcement from being rendered ineffective by the dissipation of assets against which the judgment could otherwise be enforced."* ('the enforcement example')

Before SJ Hilder, the question – on appeal – was whether the Court of Protection could grant an injunction prohibiting capacitous persons from disposing of assets in which others alleged that P had an interest, but where that interest had not been determined. SJ Hilder concluded that it could not.

The factual matrix and procedural history was somewhat complicated, and SJ Hilder had a number of somewhat pointed observations to make about the procedural history. For present purposes, however,

of immediate relevance was that, against the backdrop of a dispute about the proceeds of sale of a house which had previously been owned by the donor of a power of attorney, an application was before the Deputy District Judge for an order under s.22 MCA. In the context of that application, the Deputy District Judge granted a proceeds of sale injunction (a 'freezing injunction'). Before Senior Judge Hilder, it was common ground that the Court of Protection had no jurisdiction to determine the extent of the donor's interest in the proceeds of sale.

Senior Judge's Hilder's first conclusion as to the Court of Protection's ability to grant a freezing injunction was linked to the fact that the application had been founded on s.22 MCA:

> *68. On the application formally before the Court, orders were sought pursuant to section 22 of the Mental Capacity Act, not section 16. That section has no direct equivalent of section 16(5). Instead s22(4) specifies the court's powers. In my judgment it would stretch the s47 concept of 'connection with' the s22 jurisdiction beyond what it can bear to suggest that a freezing injunction is so linked to a determination of validity of lawful authority as to be ancillary to preventing frustration of the validity decision. Both of the powers of s22(4) can be fully implemented irrespective of what happens to disputed assets.*

However, Senior Judge Hilder continued, even if the matter could be framed by reference s.16(2), the freezing injunction was a step too far:

> *69. I accept that the Deputy District Judge was considering - despite no such application having been made and apparently not immediately - granting someone authority to conduct proceedings on behalf of MMP in respect of the property dispute, then at least there is potential for a section 16 order (as provided by section 18(1)(k) of the Act) so section 16(5) would apply. Can it be said that a freezing injunction is 'necessary or expedient' for giving effect to, or otherwise 'in connection with' the granting of authority to conduct proceedings? Again, in my judgment the answer to that question must be negative. Litigation can be properly conducted irrespective of what happens to disputed assets. A freezing injunction goes materially beyond the conduct of litigation, into its determination. It is not within the realms of effectively conducting litigation to freeze disputed assets, even when the conduct of litigation has reached the point of enforcement; so such an order cannot be ancillary to preventing frustration of such authority. In substance and intent, a freezing injunction is ancillary to a power to determine the dispute, which the Court of Protection does not have.*

Senior Judge Hilder cross-checked her two conclusions against the examples given by Baker LJ in *Re G*:

> *70*
>
> a. *The transfer example: the clear assumption of the example is that the funds in question are held "for P" ie there is no dispute about P's beneficial entitlement; it is merely a question of who holds them for P. So the example tells us nothing directly about whether the Court of Protection can grant freezing injunctions against assets in which P may have an interest.*
>
> *The s16 decision contemplated is that B should hold P's funds. The ancillary order contemplated is an injunction to compel the current holder, A, to transfer the funds to the intended holder, B. Clearly the transfer is necessary to the decision, and clearly if A will not make it voluntarily, an order compelling him to make the transfer is ancillary to preventing*

frustration of the decision. The very clarity of connection between the decision and the injunction in this example reinforces my conclusion that a freezing injunction cannot be considered ancillary to either a determination of validity of LPAs or a decision to authorise conduct of litigation.

b. *The enforcement example: to Baker LJ the usefulness of this example was by analogy. He offered it as an illustration of meeting the 'just and convenient' test. The principle is that the purpose of a freezing injunction is to facilitate enforcement of an order. The decision to which that principle applies must therefore be that assets in the control of X are payable to Y. So far, this confirms my conclusions because, as all parties agree, the Court of Protection cannot decide the property dispute.*

However, Baker LJ went on to note that the principle applied "even though the order (i) may not yet exist but may only be a potential order and (ii) may not be an order of the relevant court at all but may be that of a foreign court."

Deputy District Judge Chahal clearly had enforcement issues in mind, as evident for example from paragraph 48 of her judgment. So does the enforcement example, and particularly Baker LJ's note of the extent of it, suggest that she can make an injunction to prevent frustration of an order which the civil court may make?

After anxious reflection I am satisfied that the enforcement example does not import such suggestion. In my judgment, the reason for that lies in section 47 of the Act. The Court of Protection's recourse to High Court powers is, pursuant to section 47, limited to use "in connection with its [own] jurisdiction." Baker LJ's analogy to the enforcement example is useful as an illustration of the principle of preventing frustration of an order but it is not – and on my understanding of the Re G judgment, was never intended to be - an illustration of when the Court of Protection is acting "in connection with its jurisdiction."

The Court of Protection does not have jurisdiction to determine the property dispute so an injunctive order to prevent frustration of that determination elsewhere cannot reasonably be understood as made "in connection with" Court of Protection jurisdiction.

Senior Judge Hilder noted, further, that she had:

71. […] *cross-checked **Conclusions 1** and **2** against Baker LJ's stated intention (at paragraph78) that the judgment in Re G does not "cast doubt on or lead to any significant change in practice" in respect of discretionary injunctions. Throughout my 12+ years sitting in the Court of Protection, the general approach has always been that third party disputes require a different forum, including for interim measures. I am not aware of any instances where freezing injunctions against third parties have been considered or even requested from the Court of Protection, and neither counsel referred me to any such instances. Contrariwise, I am aware that freezing injunctions were obtained against the former deputies in Matrix via parallel proceedings in the High Court. So, it seems to me that my conclusions are in accordance with existing practice, and in accordance with Baker LJ's stated intentions for the Re G judgment.*

Entirely separately, Senior Judge Hilder also had some important points to make about dispute resolution hearings ('DRHs'), a significant feature of cases on the property and affairs pathway:

59. The purpose of a dispute resolution hearing, as spelled out in paragraph 3.4(3) of Practice Direction 3B, is "to enable the court to determine whether the case can be resolved and avoid unnecessary litigation." It should be a singular opportunity for the court to "gives its view on the likely outcome of the proceedings" so that the parties can take a realistic view at an early stage of the merits of further litigation.

60. In order to achieve that purpose, the judge conducting the dispute resolution hearing needs to focus on what is in issue before the court, and to ensure that the parties do too. Often, this exercise leads to sensible compromise and proceedings can be brought to an end with a final order made by consent. However, at least at the central registry it is about as often the case that one party or another does not accept judicial insight and no agreement is reached.

61. A dispute resolution hearing may be considered successful if parties reach a position where proceedings can be concluded. It may nonetheless be effective as a dispute resolution hearing even if no concluding agreement is reached, in that the judge will have expressed a view about the likely outcome and the parties had an opportunity to consider their next steps in the light of such insight. It is only generally considered ineffective as a dispute resolution hearing if in fact no such opportunity for judicial explanation arises because, for example, one of the parties or one of the representatives for some reason fails to attend.

62. Once a judge has engaged in dispute resolution, whether successfully or not, that judge cannot properly engage in substantive decision-making in the case beyond what the parties agree. It would be procedurally unfair to do so because the judge has expressed views without any party having had the opportunity to give their evidence. Accordingly, paragraph 3.4(6) of Practice Direction 3B explicitly provides that if the parties do not reach agreement, the court will give directions for the management of the case and for a final hearing; and paragraph (7) specifies that the final hearing must be before a different judge.

63.In passing, I note that a question has previously arisen as to what the court may do where a dispute resolution hearing has been ineffective as defined above. It is indeed frustrating if an objecting party fails to attend a dispute hearing. An applicant may reasonably ask why the court cannot infer from non-attendance that the objection is abandoned, and go on to make final orders rather than give directions for further hearing. For practical reasons, it may be unsafe to infer abandonment of objection from non-attendance (not least because explanation of a good reason for non-attendance may reach the court only after the hearing). However, there is formal reason too in the wording of Practice Direction 3B. The preliminary words of paragraph 5 ("If the parties reach agreement to settle the case…") not being made out, the second half of the sentence ("the court will make a final order if it considers it in P's best interests") does not apply. In the absence of agreement, paragraph 6 applies. Any change to this approach would require amendment of the Practice Direction, which is not presently under active consideration by the Rules Committee. Meanwhile, any frustration about non-attendance is better dealt with as a costs consideration.

On the facts of the case before her, Senior Judge Hilder noted that:

64. In the matter currently before me, there is nothing in the order made on 21st July 2021 to explain why the dispute resolution hearing was considered "ineffective" as opposed to unsuccessful. It is expressly recorded that the applicant and both the respondents (jointly) were represented by counsel, SB and DG only being joined as parties by order made at conclusion of the hearing. Moreover, the identification of matters which were agreed and not agreed clearly indicates some judicial engagement. In accordance with Practice Direction 3B, the directions should therefore have

> *been simply for case management and final hearing before another judge. Regrettably, in my judgment the Deputy District Judge went procedurally astray in providing for "a further dispute resolution appointment" before herself. There is no provision in the Rules or Practice Direction for multiple dispute resolution hearings, and adopting such a practice would not serve the purposes for which such a hearing was devised, namely early conclusion of unnecessary litigation. The court is not a mediation service. If a dispute resolution hearing is unsuccessful, normal procedure should thereafter apply.*

Comment

Given how few cases are reported in relation to property and affairs cases, it is not surprising that DRHs do not feature heavily in reported cases. The observations about their purpose – and their 'one-shot' nature – are therefore particularly helpful.

As regards the question of the Court of Protection's jurisdiction to grant freezing injunctions, it is perhaps important to distinguish carefully between two situations.

The first is that under consideration by Senior Judge Hilder, where (1) it is not yet clear what the nature of the underlying interest to be protected is; and (2) resolution of that question is not for the Court of Protection. At that point, it must be right that the Court of Protection cannot grant a freezing injunction, not least because it would put the court which is actually charged with determining the dispute in a very difficult position because it would effectively had had its jurisdiction usurped. In this regard, Senior Judge Hilder's observations prompts consideration of the recent decision of Hayden J in *D v S* [2023] EWCOP 8, and the need for care (discussed here) to navigate the division of labour between the Court of Protection and the Family Court in relation to the question of the pursuit of divorce proceedings on behalf of a person with impaired decision-making capacity.

The second situation is where the nature of P's interests are clear, and it is a question of protecting them. This might be the 'transfer example' given by Baker LJ in *Re G* (in which the various enforcement mechanisms provided for in Part 70 of the Civil Procedure Rules, imported via COPR r.24.2 may also be in play). We would also suggest that it could be applicable in a situation where there is no dispute as P's interests in assets, but steps are being taken by a third party to disperse those assets. At that point, the underlying s.16 decision would be a decision on P's behalf not to agree to those steps, and the freezing injunction would be in support of that decision.

For completeness, and in relation to the observation of Senior Judge Hilder at paragraph 71 in relation to whether freezing injunctions have been sought before the court, we note, finally, that we are aware of at least one (unreported) case where a freezing injunction was granted by the Court of Protection against the assets belonging to a third party so as to seek to compel them to return P to the jurisdiction. A reported example of such a case, decided (because of a historical quirk) under the inherent jurisdiction, is that of Munby LJ in *PM v KH & Anor* [2010] EWHC 870 (Fam). It may in due course be the case that the question of how the interaction between ss.16 and 47 MCA 205 plays out in such a situation requires further consideration, ideally in a reported case.

Section 48 MCA 2005 (again)

A Local Authority v LD and RD [2023] EWHC 1258 (Fam) (Mostyn J)

CoP jurisdiction and powers – interface with inherent jurisdiction - mental capacity – assessing capacity

Summary

LD[8] lived with his mother, RD. He was in his 40s with Downs Syndrome, a severe learning disability, autistic traits and could only communicate through body language. He also had a heart defect. Neither were believed to have had the Covid vaccination and, throughout and since the pandemic, both continued to isolate at home. His mother would not let others in for fear of the risk they posed to her son who had scarcely been seen by anyone in the last three years. He was being confined upstairs to his bedroom and bathroom.

Following a safeguarding review an appointment was made for LD to attend a cardiac clinic. His mother said he would not be coming as they were confined at home due to the risk of Covid and she was not prepared to put him at risk. Further attempts to see LD at home were refused and only a 'doorstep assessment' could be done. She would only allow carers to meet with her on the doorstep and collect a shopping list, do the shopping and then return to drop off the supplies they had bought for her.

The local authority had great fears that LD was suffering emotional and physical harm, and his health and welfare were being seriously impacted. The application to the court was to authorise LD's removal to a place of safety where his capacity and health, welfare and caring needs could all be assessed. The local authority of course struggled to assess his capacity to make decisions as to residence and care. But from speaking to previous support workers and from reviewing LD's records, they thought it was highly likely that LD lacked capacity to make those decisions. The issues in this case were (a) the exact meaning and scope of MCA 2005 s.48 and (b) if s.48 did not apply, the extent of the power under the High Court's inherent jurisdiction to make an order which had the effect of depriving LD of his liberty.

Many decisions of the Court of Protection are taken on an interim basis under s.48 of the MCA 2005 which provides:

> *Interim orders and directions*
>
> *The court may, pending the determination of an application to it in relation to a person ("P"), make an order or give directions in respect of any matter if:*
> *(a) there is reason to believe that P lacks capacity in relation to the matter,*
> *(b) the matter is one to which its powers under this Act extend, and*
> *(c) it is in P's best interests to make the order, or give the directions, without delay."*

At paragraph 15, his Lordship noted that if s.48 applied, "*there is no doubt that the Court of Protection has power to make an injunction requiring RD to permit the applicant to enter the dwelling, by forcing the front door if necessary, and to permit the removal of LD to the place of safety*." The Official Solicitor accepted that the existing evidence was just sufficient to satisfy s.48 that there was "reason to believe

[8] It is not entirely obvious why Mostyn J was content to allow this decision to be promulgated with initials alone given his known concern at their depersonalising effect.

that P lacks capacity in relation to the matter" which Mostyn J went on to analyse:

> *19. The natural construction of these terms, without referring to any case-law or principles of statutory construction, suggests the following meanings.*
>
> *(i) The provision is not confined to emergency situations. It applies where the court considers it necessary to regulate the arrangements for P in relation to any matter pending the final hearing of the substantive application. It does so by making an interim order or direction.*
>
> *(ii) But to be able to make such an interim order or direction all three of the specified conditions must be met.*
>
> *(iii) Logically the first one to be considered is (b): the court must be satisfied that the matter that needs regulating is something that the court has substantive power to determine. As the court has power to make decisions about an incapacitated person's welfare and property and affairs, it is hard to think of something that falls outside the court's powers. A religious decision? Possibly.*
>
> *(iv) Second, the court has to be satisfied that there is reason to believe that P lacks capacity in relation to the matter. As a matter of plain English these words suggest that there has to be some evidence that goes beyond mere suspicion that P lacks capacity to make his own decision about the matter in question. On the other hand, the words suggest that the evidence does not have to be so strong that the court is certain P lacks capacity, or even that it is more likely than not.*
>
> *(v) Third, the Court has to be satisfied it would be best for P to make the order "without delay" i.e. here and now. If the court is not satisfied that it would be best to make the order now, but that it would be better to wait, then it cannot make such an order to take effect in the future.*
>
> *(vi) Where all three conditions are met the Court still has a discretion whether or not to make an interim order, although the decision under the third condition will almost always answer that question.*

His Lordship largely agreed with the analysis of MCA s.48 in *DP (By His Accredited Legal Representative) v London Borough of Hillingdon* [2020] COPLR 769 at paragraph 62, where Hayden J observed:

> *(i) The words of ... s.48 require no gloss;*
>
> *(ii) The question for the Court remains throughout: is there reason to believe P lacks capacity?;*
>
> *(iii) That question stimulates an evidential enquiry in which the entire canvas of the available evidence requires to be scrutinised;*
>
> *(iv) Section 48 is a permissive provision in the context of an emergency jurisdiction which can only result in an order being made where it is identifiably in P's best interests;*
>
> *(v) The presumption of capacity applies with equal force when considering an interim order pursuant to s.48 as in a declaration pursuant to s.15;*

(vi) The exercise required by s.48 is different from that set out in s.15. The former requires a focus on whether the evidence establishes reasonable grounds to believe that P may lack capacity, the latter requires an evaluation as to whether P, in fact, lacks capacity;

…

(viii) The objective of s.48 is neither restrictive, in the sense that it requires a high level of proof, nor facilitative, in the sense that it is to be regarded as a perfunctory gateway to a protective regime, and

(ix) There is a balancing exercise in which the Court is required to confront the tension between supporting autonomous adult decision making and to avoid imperilling the safety and well-being of those persons whom the Act and the judges are charged with protecting.

However, Mostyn J quibbled with (iv) as there was nothing in s.48 to suggest that it is reserved for emergency situations; "*nor does the court have to be satisfied that it is "identifiably" (which I take to mean "strongly") in P's best interests for the interim order to be made*." He also quibbled with (vi) because the question was whether P "lacks capacity" rather than "may lack capacity". His Lordship went on to note:

The key question is what is meant by "there is reason to believe that P lacks capacity in relation to the matter". Obviously, as Hayden V-P explains, it requires the court to alight on a degree of likelihood which falls short of the civil standard of proof. For if it meant that "it is more probable than not that P lacks capacity in relation to the matter" then the provision would be otiose because the Court would already have reached the required degree of probability or likelihood to find that incapacity is proved and could go straight to making a substantive declaration under s.15.

Mostyn J considered other legal contexts, one of which was the phrase 'reason to believe' used in the CPR 25.13(2)(c) in relation to an order for security for costs. He went on to decide:

29. In my judgment, the requisite degree of likelihood that will satisfy the criterion "has reason to believe" is not high and will be approximately the same as that for obtaining an interim (non-freezing) injunction or permission to appeal i.e. "a real prospect of success". I would say that the level is not less than 25%, or odds of 3/1 (see AO v LA at [26] – [42]).

30. In this case the future event is whether the applicant will show at the final hearing that LD lacks capacity. That question will be answered by a formal capacity assessment. So, in order to satisfy the s.48(a) condition the applicant has to satisfy me, at this stage, that the present evidence demonstrates there is at least a 25% chance that such an assessment will find LD to be incapacitous. That degree of proof would be met even if the evidence were to suggest that it is more likely than not that LD is not incapacitated; it would be met even if it were as much as three times more likely (that is, of course, the effect of a 75% chance of LD not being incapacitated, which is the other side of the coin of a 25% chance that LD is incapacitated).

[…]

32. Here, the witness statement of SG has an evidential minimum critical mass and satisfies me that there is a real prospect of a capacity assessment demonstrating that LD is incapacitated in relation to decisions about his health and welfare. I would put the likelihood rather higher than 25% or at odds rather shorter than 3/1 (but not odds-on). The mental

> *impairments suffered by LD are irreversible and so the fact that SG has not got much contemporaneous material on which to base her opinion is not as damaging to its validity as it would otherwise be. SG is qualified to give expert evidence as to mental capacity and so her opinion, that it is highly likely that LD is incapacitated in these domains, is admissible under s3(1) of the Civil Evidence Act 1972.*

Having come to the view that MCA s.48 was applicable, whether it was in LD's best interests to be removed was to be the subject of a separate judgment (para 35). Moreover, whether the inherent jurisdiction could be used to deprive a capacitous person of liberty was now irrelevant. But, obiter, Mostyn J observed that a capacitous person without a mental disorder could not be of "unsound mind" for Article 5 ECHR purposes:

> *41* […] *Put another way, where the evidence is clear, I cannot see that there could ever be room for a class or type of unsoundness of mind for the purposes of Article 5 which does not amount to mental incapacity under the Mental Capacity Act 2005 or a mental disorder under the Mental Health Act 1983.*
>
> *42. I accept that this may leave a gap in the law in that there may be out there fully capacitous, yet extremely vulnerable, adults being ruthlessly victimised and exploited by members of their family, or their carers, who the state cannot protect by forcibly removing them from their homes. That is a gap which, in my opinion, should be filled not by judicial legislation but by parliamentary legislation."*

Comment

The jurisdiction of the Court of Protection to intervene where capacity evidence is (to use a technical term) sketchy is a particularly important issue. As Hayden J observed in *DP, "At the core of Section 48 lies a balancing exercise in which the State's obligation to promote and support autonomous adult decision taking must be weighed, on the particular facts of the individual case, against the State's equally important duty to protect some of society's most vulnerable individuals in circumstances of crisis."* Other than in clear-cut cases where MCA s.15 declarations can readily be made on the evidence, how that balance is struck on an interim basis affects every other P coming before the court. We await with interest to see whether LD was in fact removed from the family home in this case on the basis of MCA s.48.

We note that in Mostyn J's detailed examination of the situation no reference was made in the judgment to MCA s.2(4), which provides: "*In proceedings under this Act or any other enactment, <u>any question whether a person lacks capacity</u> within the meaning of this Act <u>must</u> be decided on the balance of probabilities*". The question for MCA s.48 is precisely whether there is "*reason to believe that P lacks capacity in relation to the matter*". On the face of it, it might be said (and Neil certainly would say this) that s.2 therefore requires that this is decided on the balance of probabilities. It is of course being decided at an interim stage, where the focus of the evidential enquiry is on "reason to believe that P lacks capacity", rather than "whether a person has or lacks capacity" (MCA s.15). That must mean that the evidence required to satisfy the civil standard of proof may at that stage be less than for a s.15 declaration. But the balance of probabilities remains the benchmark. In this regard, we note the

decision of Keehan J in *A Local Authority v AA* [2020] EWCOP 66,[9] which proceeded on the basis that s.2(4) applied, such that the question was whether, on the balance of probabilities, there was reason to believe that the individual did not have capacity to make the relevant decisions.

It might, conversely, be said (and Alex would say this[10]) that s.48 sets out its own, specific, test, because the court is not determining that P lacks capacity to make a decision, but simply that there is reason to believe that P lacks capacity to make the decision. If this is the case, then it might be said that s.2(4) does not apply, in the same way that s.2(4) does not on its face[11] apply for purposes of relying on the defence under s.5 (at which point, the question is whether the person has a reasonable belief that the individual in question lacks the requisite capacity). However, in any event, it is unfortunate that Mostyn J did not grapple with the implications of s.2(4), if only to dismiss them.

Moreover, we suggest the statutory principles in s.1 MCA 2005 apply with equal rigour to MCA s.48 as they do to MCA ss.15 and 16. The assumption of capacity, inter alia, therefore must feature when analysing the current (lack of?) evidence. For these are not necessarily future events: the court is often asked to make best interests decisions, including authorisations to deprive liberty, on this interim basis now.

Mostyn J's observations in relation to the inherent jurisdiction were obiter but do reflect the growing consensus that it cannot be used to deprive the liberty of the capacitous. Where the person is believed to be suffering from mental disorder, s.135 of the MHA 1983 may be available if the criteria are satisfied. That could potentially have been used in this case, although it is more for short-term emergencies. For the longer term, we live in hope that the Law Commission may still be in a position to undertake work to codify the inherent jurisdiction in relation to vulnerable adults (not the least of the task being to work out precisely what language to use here).

Section 49 (again)

Cheshire and Wirral Partnership NHS Foundation Trust v JMC & Anor Ors [2023] EWCOP 14 (Hayden J)

Practice and procedure (Court of Protection) – other

Summary

Hayden J has returned to the vexed question of s.49 reports. As Hayden J noted:

> *8. In December 2022, I met with the NHS Mental Health Directors. Concern had been expressed about the burden experienced by the medical profession in reports requested pursuant to Section 49. There was a clear and strong feeling that some of the Section 49 requests were becoming disproportionate, overly burdensome, and wrongly authorised. Having been convinced of the legitimacy of this sensitively expressed complaint, I issued guidance to the profession to highlight the problem. As I noted in that guidance, there are obvious reasons (i.e., costs) why a Section 49 report might be preferred where what is truly required is an independent expert report. I also made*

[9] In which Neil was involved.
[10] But is not in so saying advocating a position where the court can simply weigh in on the basis of suspicion.
[11] Limited as it is to proceedings before a court – the entire point of s.5 being that it means many matters do not have to come before a court, as emphasised by Lady Hale in *N v ACCG* [2017] UKSC 22 at paragraph 38.

the following observation:

> *"Section 49 reports are, paradigmatically, appropriate where the NHS body (typically a Mental Health Trust) has a patient within their care, who is known to them. This ought to enable the clinician to draw quickly on his knowledge of the patient and respond concisely to the identified questions, which will be directed to the issues clearly set out in the Practice Direction. Importantly, it avoids the patient having to meet with a further professional with whom, he or she, has no existing relationship.*
>
> *Instructions under Section 49 should be clearly focused with tight identification of the issues. It should be expected that the reports will be concise and will not require extensive analysis across a wider range of questions than those contemplated in the Practice Direction. Reports requiring that kind of response should be addressed to an independent expert."*

In the instant case, a District Judge had granted an application for a direction for an NHS Trust to file a s.49 report, outlining her reasons for doing so thus:

> *18. I do have a very wide discretion pursuant to section 49 to call for information from, amongst other people, a local authority or an NHS body dealing with such matters relating to P as the court may direct. I must operate that section firstly, in accordance with the overriding objective of the rules of the Court of Protection … and with regard to PD 14E. The PD lists common factors that I may consider. Many are plainly not relevant to this case but my view is that factors (d), (e) and (g) are ones that I must consider.*
>
> *19. Very plainly if I do make a direction for section 49 report from an NHS Trust, I am always calling upon their resources in order to prepare that report. In this respect, resources are not just financial. Clinicians will be called upon to spend their time preparing and writing the report. The reality is that, if it is a report about a party with whom they are very familiar with and are engaged in treating, it may reasonably be said that the preparation of the report is less resource intensive that if they have a lesser degree of familiarity. It also seems to be self-evident that an NHS body can only provide a report relating to information which is within their remit. If any information that is required is properly within the remit of the local authority, then fairly self-evidently it is the local authority who should provide that information.*

The Trust sought permission to appeal the decision. Although it acknowledged that it had the most recent knowledge of P, he had disengaged as a patient and their involvement discontinued on 1st April 2020. The Trust further argued that the District Judge ought to have, at least, considered directing the Local Authority to provide a comprehensive care assessment and support plan, identifying their duties and proposals to support JMC to identify an alternative accommodation with a support package, pursuant to section 35 of the Social Services and Well-being (Wales) Act 2014; applying the Care and Support (Eligibility)(Wales) Regulations 2015. Regulation 3(a) provides that the criteria is satisfied if the needs arise from the adult's *"physical or mental ill-health, age, disability, dependence on alcohol or drugs or other similar circumstances"*. The Trust further contended that responsibility for providing the information sought by the District Judge had migrated to the GP, not the Trust; and that the wider panoply of P's needs become eclipsed by the local authority's own prevailing duties. Therefore, whilst the Trust had originally accepted a referral to assess and provide reports (under s.49) in relation to P:

> *However, on 1 April 2020 it decided to discharge him from their service on clinical grounds. That was a proper decision that was not challenged and could not be challenged other than on public law grounds. Thereafter, JMC has been referred on at least two subsequent occasions but on each occasion the Trust has decided not offer services to him based on proper clinical grounds.*

Accordingly, the Trust argued that the Court of Protection was directing the Trust to provide services that it has decided are not appropriate. As Hayden J identified: "[i]*f that were in fact the case, then manifestly, it would be wrong in law, see: N v A CCG [2017] UKSC 22*."

Hayden J had little hesitation in refusing permission. In so doing, he outlined some "clear general principles."

> *18. Firstly, section 49 of the MCA manifestly conveys upon the Court a broad discretion, when deciding to request a report and in respect of the scope of it. Inevitably, however, such a discretion is not to be regarded as unfettered. Thus, the Court is confined to considering questions directly relating to P. Here, the proceedings concern a determination of best interests under section 21(A) of the MCA, as a facet of the standard authorisation. It is well established that proceedings brought pursuant to section 21(A) are the mechanism by which the State must achieve compliance with Article 5 ECHR concerning P's deprivation of liberty at a relevant care facility. Article 5(4) ECHR requires that review, in the sense of keeping in scope the continued lawfulness of any detention, should always take place speedily. As Mr Patel has emphasised, the character of the Court of Protection jurisdiction is non-adversarial, inquisitorial, sui generis. Such a jurisdiction will always require a broad margin of discretion in eliciting information it considers* ***necessary*** *to illuminate the question in focus.* (emphasis in original)
>
> *19. Secondly, as I have already foreshadowed, the Court must have regard to the Practice Direction 14E. In particular, paragraph 3 identifies a list of "common factors" which the Court may consider. Proceedings in the Court of Protection are invariably highly fact specific. It is for this reason that the common factors identified in the Practice Direction are permissive and not mandatory.*
>
> […]
>
> *22. In my December 2022 Guidance (see para. 8 above), I identified the circumstances in which a section 49 request would 'paradigmatically' be made. It would be a misreading of that guidance to interpret a paradigm as if it were a rigid and unchanging template. That is not what is contemplated by the wording of section 49 nor, of course, is it what the word means (i.e., a pattern or a model). The circumstances DJ Hennessy was considering were different from those contemplated in my document, though there are some similar features. What, in my assessment of her judgment, the District Judge was seeking to achieve, was the most effective route to the most reliable evidence she could identify as likely to assist her in determining how JMC's best interests could effectively be met.*

On the facts, Hayden J considered:

> *23. The District Judge came to the conclusion that the Trust had sufficiently recent knowledge of JMC to make them the focus of the enquiry. In my judgment, she was entitled, on the available evidence, to reach that conclusion and having done so, her selection of section 49 as the appropriate route is unimpeachable. The other factors discussed by Mr Fullwood such as the availability of legal aid etc., gain no traction against this factual backdrop. Indeed, logically, the availability or otherwise of legal aid should have no bearing on the selected framework for ordering*

a report.

He also had little truck with the argument based on *N v ACCG*:

> *Mr Fullwood had also contended that an order under section 49, effectively triggered a direction to the Trust to provide services. A prototype of this argument was advanced before the District Judge and remodelled before me. With respect, I can see no mileage in the argument at all. Section 49 is a route by which information is acquired, it has nothing at all to do with the provision of NHS services. That would be to distort the plain words of the statute.*

It is also worth noting the endorsement by Hayden J of the reasons advanced on behalf of the ALR for P as to why a s.49 report would be preferable to an expert report in the instant case:

> *In this case, not only can the relevant information be provided by the relevant NHS Trust under section 49, but there are a number of reasons why such a report is more appropriate than an expert instruction, namely:*
>
> *(i) The Trust has pre-existing knowledge of JMC and has already provided two detailed reports to the court in respect of JMC and the appropriate care and treatment for him, having regard to his ARBD. The clinical guidelines in relation to the treatment of ARBD cut across both health and care and require a holistic and multi-disciplinary approach;*
>
> *(ii) The Trust promised to provide a further report to the court developing its analysis as to whether JMC's current placement was clinically suitable, having regard to his ARBD, which was the basis on which the previous proceedings finalised. The further report never materialised and the analysis in respect of whether the placement can meet JMC's particular needs, arising out of his ARBD, is not complete.*
>
> *(iii) The Trust is able to make recommendations in relation to local provision and interventions which it is aware of within the region;*
>
> *(iv) The Trust is able to offer a longitudinal and multi-disciplinary view regarding JMC's needs, as opposed to an 'snapshot' expert assessment being taken by an individual from out of area.*

Comment

As this is a decision refusing permission to appeal, it has no precedent value. However, it did give Hayden J the chance to read into the record the material parts of his December 2022 guidance, to clarify the limits of that guidance, and to reinforce the place of s.49 reports as part of court's armoury of tools.

The argument based upon *N v ACCG* was a novel one, at least in the reported cases. It is perhaps not surprising that it failed for the reasons identified by Hayden J. However, it is worth noting that it is not beyond the bounds of possibility that a direction to file a s.49 report could serve as a trigger for either a health body or a local authority to consider whether it is required to provide services to a person about whom they have been previously unaware. That the direction may have been for one purpose would not mean that the public body was not put on notice of its need to consider the person's needs for

another reason (in the same fashion – albeit not often enough recognised – that a request for a DoLS authorisation in respect of a self-funder should alert a local authority to the potential need to carrying out a needs assessment under s.9 Care Act / s.19 Social Services and Well-Being Act (Wales) 2014).

THE WIDER CONTEXT

Reforming the Mental Health Act – Approaches to Improve Patient Choice: the Parliamentary Office of Science and Technology

Whilst we wait to learn what the next steps may be in relation to mental health reform in England & Wales, the Parliamentary Office of Science and Technology has published the most recent of its 'POSTnotes' on Reforming the Mental Health Act – Approaches to Improve Patient Choice, summarising proposed reforms to the Mental Health Act (1983) to improve patient choice, highlighting relevant research evidence and stakeholder perspectives. Its key points include that:

- The Mental Health Act 1983 has been criticised as being overly restrictive, with inadequate scope for patient choice and autonomy.
- The Government's Draft Mental Health Bill proposes reforms to improve patient choice. A joint parliamentary committee report on the draft Bill recommended further changes to enhance choice, including a statutory duty to offer patients advance choice documents. Reports to date suggest that advance care planning could offer some benefits, but uptake can be low.
- Proposals to replace the Nearest Relative who has certain powers under the Act, with a Nominated Person of the patient's choosing, have been widely welcomed. There are questions about operationalisation and safeguarding.
- Alongside the reforms, the Government is piloting 'culturally appropriate advocacy', which preliminary findings suggest could help advocates better support patients from ethnic minority backgrounds.
- The draft Bill removes learning disabilities and autism as grounds for detention under Section 3 of the Act. Stakeholders have raised concerns about unintended diversion to more restrictive pathways, such as the criminal justice system. A range of stakeholders share the view that careful implementation is needed to maximise the benefits of proposed reforms.
- The Government has not announced when the Bill will be introduced.

We also take the opportunity to note here the report from Mind on Our rights, our voices Young people's views on fixing the Mental Health Act and inpatient care.

Professor Eldergill on Mental Health Reform

In his personal capacity, rather than a judge of the Court of Protection, Professor Anselm Eldergill has published a fascinating briefing note on the LPS and the draft Mental Health Bill, making the case – in relation to the latter – for a "small commission of experienced MHA practitioners to review the work that has been done and draft themselves a completely new Bill."

Update to the Capacity Guide

The Capacity Guide – research-informed, multidisciplinary guidance on assessing and recording capacity – was an output of the Wellcome Funded Mental Health & Justice Project. It can be found here, and has been updated to take account of recent case-law, as well as a recording tool (with thanks to James Codling of Cambridgeshire County Council).

Food refusal in prison

Alex has recorded an 'in conversation with' to Donna Phillips, Head of Safeguarding at Spectrum Community Health CIC, about the challenges that arise where prisoners refuse food, and about her research leading to a new toolkit to help work through the dilemmas that arise.

Disagreements in the care of critically ill children: literature review and the Means Test Review

As part of its DHSC-commissioned review, the Nuffield Council on Bioethics has published a literature review written by Dr Kirsty Moreton, Associate Professor in Law, Birmingham Law School, University of Birmingham. As the executive summary identifies, the:

> *thematic review sought to examine the literature and evidence base between 2017-2023 relating to three questions. First, what are the causes of disagreement in the care of critically-ill children in England? Second, what are the impacts of these disagreements on the child, their family, the healthcare professionals, the NHS and wider society? Third, what are the possible mechanisms for avoiding, recognising, managing and resolving disagreement?*
> *Eight possible causes of disagreement are identified, which have been grouped into internal, relational and external causes. Internal causes such as psychological responses, differences relating to religious beliefs and moral values, and expectations of medical science and the "good parent" are often manifested initially. These internal views can affect the relational interactions between healthcare professionals and families both in terms of communication, and behaviours. Breakdown of relational trust may then lead to external causes, such as families turning to the internet and social media or the involvement of third-party organisations. Finally, the growing recognition by families of the possibility of innovative treatments or care abroad can add to conflict.*
>
> […]
>
> *Appropriate mechanisms for resolving disagreement can be matched with the severity of the dispute. Internal approaches are suitable for mild conflicts, with the literature outlining the merits of sensitive, well-timed communication and shared decision-making, situated within Conflict Management Frameworks including elements such as structured communication tools, managerial processes and psychologist involvement. Escalation to moderate disagreement may call for third-party intervention, but doubts are expressed in the literature of the effectiveness of the common approach of seeking expert second opinion. The use of Clinical Ethics Committees is seen as more promising in bringing parties together, with even the potential for determinative decision-making, but a major reorientation of its role and remit would be required. Mediation has received sustained attention, with suggestions that its early use can be effective, although success may be limited where disagreements turn on religious beliefs or moral values. The strength of its voluntary nature is stressed, urging the avoidance of mandated participation. Legal resolution is generally needed in severe dispute and changes to the legal threshold for intervention from best interests to significant harm has received substantial attention, with strongly made arguments on both sides, but no clear consensus. Changes to the best interests test have also been advocated, along with alternative tests, and court structures. Whilst there is recognition of the problematic*

aspects of court proceedings, the value of a transparent and robust legal process is also recognised.

In respect of children, it is also relevant to note that as part of its response to the Means Test Review, the Government has committed to removing the means test for parents or those with parental responsibility facing withdrawal or denial of life-sustaining treatment for children under 18. The consultation document explains

257. There were 42 responses to this question: 36 (86%) agreed, one (2%) disagreed and five (12%) responded with maybe. This proposal was broadly supported in the consultation responses as it will positively impact individuals in a complex and stressful situation. However, some respondents, whilst in agreement with the proposal, did state that the policy should be extended to those with caring responsibility for adults facing withdrawal or withholding of life-sustaining treatment. Some respondents added that the current means testing of parents in this situation is wrong in principle, as they are being treated in a different way to parents in special Children Act proceedings – therefore the proposal to remove this means testing was welcomed. Respondents also believed that this approach would reduce delays in the appointment of legal representation and therefore reduce delays in decision making for the child.
Government response

258. These proceedings can be enormously difficult for all concerned and require an understanding of complex medical and legal arguments and private representation can therefore be expensive. Parents and those with parental responsibility must currently undergo a means test for legally aided representation and may therefore find themselves ineligible for legal aid on financial grounds. They are therefore often faced with trying to represent themselves, which may be very difficult considering both the complexity and the highly emotive context of these matters.

259. We acknowledge the assertion that the policy should be extended to those with caring responsibility for adults facing withdrawal or withholding of life-sustaining treatment, but our position acknowledges the significant importance of the welfare of the child, and of the consequences to their parents. We believe that legal representation must be available to ensure their position can be properly represented and we will implement this measure.

These changes will be brought about in 'Phase 1' of the statutory changes; the precise timing of this is not entirely clear, but it would appear that this is to be within the next 2 years.

The removal of means testing for parents / those with parental responsibility in life-sustaining treatment cases involving children is very welcome, not least as a step towards limiting the involvement of those with strong agendas 'supporting' desperate parents. Many of the themes in the literature review will resonate strongly with those involved in disputes relating to adults with impaired decision-making capacity – it might be thought that the arguments in relation to funding apply equally to those with caring responsibilities for adults.

SCOTLAND

Issues with powers of attorney – an unprecedented tangle

On 24th May 2023 a decision by Sheriff Robert D M Fife at Edinburgh Sheriff Court was published on the scotcourts website at [2023] SC EDIN 16. The decision was dated 11th January 2023. The case was an application by Fiona Brown, Public Guardian, for directions under section 3(3)(a) of the Adults with Incapacity (Scotland) Act 2000 in relation to two powers of attorney by A ("the Adult"), registered in 2014 and 2021 respectively.

At one level, Sheriff Fife was able to acknowledge the helpfulness of the parties in agreeing many of the facts in a Joint Minute, and that the court had been assisted by all of the witnesses, the credibility and reliability of whom "was not a live issue as far as the court was concerned". His disposal of the action by holding that the 2021 power of attorney ("the 2021 POA") was not competent, with the result that he directed the Public Guardian to delete it from the public register, was relatively straightforward. However, while the primary submission for the Public Guardian was that the 2021 POA was not competent and should be deleted from the public register, it was also submitted that *esto* the 2021 power of attorney was competent and registered, it was a matter for the court to determine on the evidence whether the adult had had capacity to revoke the 2014 POA and to grant the 2021 POA, and "to make such other decisions as were appropriate in all of the circumstances". The court had heard submissions in relation to the *esto* case. Sheriff Fife accordingly proceeded to determine the question of capacity to revoke the 2014 POA, and to grant the 2021 POA, notwithstanding that he had made the order described above on the question of competency.

Beyond those two points addressed in the judgment, however, it is remarkable what a tangle of practice issues is revealed by the helpfully full narrative in the judgment as having coincided in a single case. It was neither necessary, nor indeed in many respects appropriate, for the sheriff to identify and opine on such matters. However, because the practice issues are of significance, such restraints do not necessarily apply to this report, which does seek to identify and comment on at least some of them.

There follows a calendar of relevant events, also done by Sheriff Fife in his judgment, but supplemented from the unchallenged evidence also narrated in the judgment, and with comments on some practice issues where they seem best located. The grounds for Sheriff Fife's decisions are then summarised, followed by comments on some more general practice issues.

A had and has three children, her son T and her daughters V and W. Both POAs were both continuing and welfare POAs. The same solicitor, S, acted for A in relation to both. S described herself as a general practitioner, who "covered Wills, executries and residential conveyancing", and specialised in family law. She had acted in a number of matters over the years for A and A's late husband. She was "aware of the family dynamics and difficulties within the family that had existed". It appears from the narrated evidence as a whole that there was a rift of long standing between T and V on the one hand, and W on the other.

S acted as certifier signing the statutory certificates in relation to both POAs. S registered both of them electronically, using the Public Guardian's EPOAR system (electronic power of attorney registration). There is frequent reference in the judgment to certification of capacity, and the question of capacity.

There is no reference to the requirement for certification that the certifier has "no reason to believe the granter was acting under undue influence or that any other factor vitiates the granting [of the relevant POA]", nor of any potential relevance of those issues. In relation to both POAs, S certified capacity only on the basis of her own knowledge of the granter, without reference to having consulted anyone else.

9 May 2014

A granted the 2014 POA in favour of T and V, they consented to act, and S certified and registered the POA as above.

21 June 2014

The 2014 POA was registered by OPG. It is not narrated when S sent it for registration.

3 July 2020

Dr Limet, a consultant psychiatrist at Midlothian Community Hospital with particular experience in old age psychiatry, assessed A "due to concerns about deterioration in her memory". A memory test indicated that A "was borderline for dementia". A was diagnosed with mild cognitive impairment.

17 November 2020

Dr Limet interviewed A again. There had been a significant deterioration in A's cognitive impairment. A was diagnosed with early stages of Alzheimer's Dementia. A had short-term memory of approximately 5 – 10 minutes. When Dr Limet spoke to A later the same day, A had no recollection of the lengthy conversation with Dr Limet earlier that day. When giving evidence, Dr Limet opined that A was unlikely to have had capacity to grant any power of attorney as at November 2020, on a balance of probabilities

22 July 2021

A met S and "gave instructions that she wished to have all three of her children as attorneys, to revoke the first power of attorney and to grant a second power of attorney [in favour of all three children]". S was aware of the family dynamics, and the long-term difficulties within the family. Tantalisingly, there is no narration about any of the necessary matters that would require to have been addressed at that meeting, and/or subsequently, about the disadvantages of appointing joint attorneys among whom there was known to be a long-standing rift; A's understanding of and instructions regarding the multiple possibilities of sole decisions, majority decisions and/or unanimous decisions, including if the number of attorneys acting were to reduce to two; and to one. There is no narration of the welfare and continuing powers granted, including the general point as to whether they were simple or complex, and of the adult's instructions in relation to each. One would have thought that it might have been significantly relevant, in the context of the issues and descriptions of factors raising doubts as to the adult's capacity at that time, to know whether, when giving instructions, she appeared able to understand all of the factors such as the foregoing, and to discuss and make decisions about all of them, including the appropriateness of each of the powers conferred. If practice advice as to retaining notes of such discussions in such circumstances was followed, there is no narration of these or of relevant file notes. One remains curious as to how a necessarily quite lengthy and complex discussion

can be reconciled with Dr Limet's opinion as to the extent to which A's short-term memory had already deteriorated eight months earlier. When A's instructions were summarised at the end of the meeting, did A still have a clear memory of the advice that she had received and the decisions that she had made at the beginning?

30 September 2021

Following upon a previous request from S, Dr G (a general practitioner) carried out a capacity assessment of A and concluded that A did have capacity to revoke the 2014 POA and grant a fresh POA. S had written to the GP practice on 7 September 2021, following upon which a colleague requested Dr G (who had some prior experience of carrying out capacity assessments) to assess A's capacity. Dr G had not met A before. Arrangements to see her were made with W, but Dr G saw A by herself. She told Dr G that she wanted all three of her children to be her attorneys. The information provided to Dr G, both relevant background information and as to the various specific matters in relation to which he was asked to assess capacity, are not narrated; nor are we told whether Dr Limet's conclusions were available to Dr G.

7 October 2021

A granted the 2021 POA in favour of all three of her children and executed the Revocation of the 2014 POA. It appears that S signed the certificate for that POA without referring to having taken the advice of Dr G, and did not certify the Revocation. On both of those points, it is not explained why. Again, there is no explanation of the apparent discrepancy between Dr Limet's assessment, and the extent to which one would have expected A to have remembered the advice given and decisions made a week earlier.

20 October 2021

At a multidisciplinary meeting of the Midlothian Dementia Clinic, concerns were expressed about A's capacity. It is not narrated whether any of A's children attended, or were informed of what took place.

10 November 2021

S wrote to A advising A that T and V did not require to sign the attorney declaration form to enable the 2021 POA to be registered. In evidence, S accepted that her advice to that effect was wrong. S did not have confirmation from T or V that they were willing to act as attorneys under the 2021 POA, before the 2021 POA was submitted for registration. That raises questions of practice; of the requirement of section 19(2) of the 2000 Act (see under "Decision" below); and also of compliance with section 1(4)(c)(i) of the 2000 Act (taking account of the views of any existing continuing or welfare attorneys with relevant powers).

16 November 2021

S submitted the 2021 POA for registration, by EPOAR. An attorney declaration form signed by W was submitted, but attorney declaration forms were not submitted for the other two attorneys, nor had they been signed. The Revocation of the 2014 POA was not submitted for registration.

17 November 2021

Various relevant events occurred. Their order may not be material. Here, they are narrated in the order in which they appeared in the judgment. First so to appear was that S emailed the Office of the Public Guardian ("OPG") attaching an expedited registration request form. S stated that "it was now the adult's wish to revoke the first power of attorney, to have all three children appointed as her attorneys, and for the second power of attorney to be used as soon as possible". It is not explained how that was thought to be reconcilable with the only items sent the previous day; nor why that suddenly became A's instruction following the delay since the 2021 POA had been granted (on 7 October 2021); nor (again) the extent of A's recollection of discussions with S some six weeks earlier.

17 November 2021

Dr AB, a community consultant psychiatrist with Midlothian Dementia Service, "carried out a comprehensive assessment" of A. Dr AB concluded that A had advancing dementia and did not have capacity to make any decisions about her welfare.

18 November 2021

Dr AB contacted S and informed S about the assessment and outcome, and in particular that A lacked capacity to make any decisions about any power of attorney. While it might be inferred from this that A probably lacked such capacity when she signed the 2021 POA some six weeks earlier, Dr AB appeared not to express an opinion about that. Dr AB narrated in evidence that S was not interested in Dr AB's assessment, as A already had a capacity assessment from Dr G, and as the 2021 POA "was in the process of being registered".

19 November 2021

Dr AB wrote to S confirming the advice that she had given by telephone. That same day Dr AB contacted Dr G. It is narrated that Dr AB "had additional information about the family dynamics and how the adult was in the community", that information having been provided by the Community Health Team (it is not narrated when). Dr G stated in evidence that he would defer to the opinion of Dr AB, who had more experience and who had carried out a more detailed assessment. Dr G stated that if he had had the information about family dynamics and how the adult was in the community, he would have requested additional information from the Community Health Team before completing the capacity assessment carried out by Dr G. The clear implication is that Dr G had not been provided with, nor had access to, such information.

19 November 2021

Dr AB contacted OPG for advice, given the reaction of S to Dr AB's concerns about A's capacity.

6 April 2022

When giving evidence, W read out an "advocacy statement" from a member of an advocacy service, dated 6 April 2022, which stated that A wanted all three of her children to have "an equal say" and that she wanted all her children "to agree to what happens to me finally". It rather appears from this that A

was at least at that time, with such capacity as she then retained, hoping that the arrangements that she had made would heal the family rift. If the reference to "an equal say" can be related at all to the 2021 POA, it can only be seen as an intention that all acts and decisions should require participation by all three attorneys, with matters decided by majority vote if necessary. It is doubtful, however, whether A had or retained even most basic information about what a POA is, exemplified by these points and by the mysterious "finally" in those quotations.

I repeat that not all of the foregoing featured in the sheriff's findings, much of it being supplemented from narrative in the uncontested evidence. Sheriff Fife did however conclude that in the proceedings W had "acted reasonably and in the best interests" of A. Nowhere does there appear to be comment that as long ago as the Scottish Law Commission Report on Incapable Adults of 1995, which led directly to the 2000 Act, had explicitly rejected a best interests test in favour of the principles that now appear in the 2000 Act (see paragraph 2.50 of the 1995 Report). A "best interests test" belongs to child law but has no place in adult incapacity law. It is not clear in what capacity, and with what authority, W acted (whether applying the right or wrong test).

Decision

Section 19(2) permits the Public Guardian to register a POA document if "satisfied that a person appointed to act is prepared to act". Only one of the three attorneys appointed under the 2021 POA had consented to act. Sheriff Fife held that the 2021 POA was not competent. He directed the Public Guardian to delete the 2021 POA from the public register.

Notwithstanding the above lengthy narrative, the matter was disposed of as easily as that. However, Sheriff Fife considered that it was proper that the court also determined whether A had capacity to revoke the 2014 POA and grant the 2021 POA. Sheriff Fife accepted the capacity assessment by Dr AB that as at 7 October 2021 the adult was not capable of making any welfare decisions. It was proper for Dr G to retract his previous opinion about capacity, following his conversation with Dr AB. Sheriff Fife concluded that on the balance of probabilities A did not have capacity to revoke the 2014 POA and did not have capacity to grant the 2021 POA.

Practice issues

On the question of capacity, Sheriff Fife was thus able to reach, quite straightforwardly, a conclusion that – on the basis of the full narration that he had heard and that I have attempted to reflect above – cannot be said to be in any way surprising or controversial. As ever, the function of the court in such a case is to answer the questions put to it by the parties. In this case, it was neither necessary nor appropriate for the court to carry out a general investigation into, and to comment upon, the practice issues that may have arisen but had no direct bearing on the court's disposal of the case. Typically in such situations, such general investigations have most usefully been carried out by the Mental Welfare Commission. This report does however comment on some of the practice issues which jump out from the narration in Sheriff Fife's judgment.

They begin with that comment about the decisions reached by Sheriff Fife being relatively simple and straightforward, despite the large amount of evidence. What is not clear is whether anyone, among all these players able to act decisively in a way which would have rendered the litigation unnecessary, had

any such complete picture. Beyond the few communications narrated above, one cannot form a picture from the judgment as to who told whom what, when, what was the total information available to any one of the key players, and when; who should have been alerted to need for further enquiry; and who in any event should have enquired further before reaching conclusions.

The possibility of undue influence does not seem to have been addressed by anyone. I would suggest that the very combination of family dispute and an elderly family member caught in the middle of it, seeking to make such a major decision as granting a power of attorney, should almost automatically have triggered careful consideration of whether that adult's acts were free from overt or covert undue influence. As Mental Welfare Commission pointed out in their "Mr and Mrs D report", there can be an overlap between issues of undue influence and of capacity, particularly an adult's capacity to recognise and resist undue influence.

Apart from the question of the competency of registration under section 19(2) of the 2000 Act, there is a possible question about the meaning of "appointed to act" in section 19(2). One might suggest that it only applies to those appointed to act with effect from the granting of the POA document, and not to substitutes who might never be called upon to take up office, and with whom a contract of mandate can only be created if they were to accept appointment upon appointment being triggered by the substitution mechanism. Thus, the Public Guardian does not require evidence of consent to act from substitutes when the power of attorney document is first registered, but only if and when the substitution is triggered. If a POA document permits any one of three nominated attorneys to act alone, does that mean that if only one accepts office at that point, that one can act alone? That of course depends upon the precise terms of the appointment: in the present case, as pointed out above, no information is available about that.

A further question is whether it is appropriate for a certifier who has in fact relied upon information other than the certifier's own judgement (as seems to have occurred in this case) to certify only on the basis of the certifier's own knowledge. Perhaps, in the course of future law reform, consideration needs to be given to requiring a certifier to set out at least the main points of information on which the certifier has relied, both as to capacity and as to absence of undue influence or other vitiating factors.

Finally, reading the evidence as a whole raises at least some concerns as to whether the outmoded and discredited world of absolute capacity or absolute incapacity is not still casting some shadows. It seems improbable that any adult would never be able to make any welfare decisions at all, not even (for example): "Ouch! That hurts! Stop doing it"; or "That coffee tastes awful. There's no sugar in it. Please always put sugar in my coffee". It is in any event well established and accepted that capacity should be assessed for a particular purpose, so that capacity to grant a power of attorney is not dependent upon ability actually to do everything authorised, though the granter does need to know what the granter is authorising and the effect of doing so: see, for example, *Re K, re F* [1988] 1 All E.R. 358, generally accepted as accurately stating the law also in Scotland; and the relatively recent case of *The Public Guardian v RI* [2022] EWCOP 22. That 2022 case contains at paragraph 16 a useful checklist of minimum requisites for granting valid powers of attorney. Poole J evidently endorses a facilitative approach towards ability to grant a power of attorney, including by people with significant mental disorders – "*every person with learning disability (and every person with schizophrenia) is an individual*

with their own characteristics", paragraph 30. However, in the 2022 case Poole J nevertheless concluded that a purported power of attorney granted in 2009 had not been granted with adequate capacity, on grounds which in essence it would be difficult to distinguish from Sheriff Fife's similar conclusion. (I am grateful to Alex for drawing my attention to the 2022 case.) Capacity to grant a power of attorney should always be assessed negatively in the sense that the granter of a power of attorney may be able competently to grant some of the powers conferred but not others; and positively in the sense that an adult for whom guardianship is sought should not have any powers granted to the guardian in any particular matter in which the adult can competently act and/or decide.

It is perhaps unnecessary to re-state to the readership of this Report that acting in the granting of a power of attorney is an onerous matter requiring specialist professional knowledge and skills; and that under the code of conduct no solicitor should accept instructions except in a matter where the solicitor is competent to act. Giving an adequate service requires such knowledge and skills actually to be applied. The Law Society of Scotland's guidance on continuing and welfare powers of attorney, vulnerable clients' guidance, and guidance on capacity generally, could be taken as stating the minimum requirements; providing a helpful checklist; and in potentially difficult or controversial cases pointing out matters that might usefully be recorded in file notes. The powers of attorney guidance includes reference to the requirement under CRPD for support for the exercise of legal capacity, and the point that solicitors should not refuse to act, or refuse to certify, "in circumstances where such refusal could amount to discrimination on grounds of disability".

Adrian D Ward

Powers of Attorney Bill

I commented in the March Report on aspects of the Powers of Attorney Bill, a UK Bill, and I reported progress in the May Report. The Westminster Parliament has the dual role of legislature for both England & Wales and for the whole UK. Asymmetrical devolution of legislative powers within the UK has meant that a larger proportion of the Westminster Parliament's time, and it seems of its attention, has become focused upon its role for England & Wales only. There are still hopes that it can be effectively reminded of its responsibilities for the whole UK in the context of the Powers of Attorney Bill, so as to provide reciprocal explicit provisions for recognition and enforceability (and thus their practical operability) throughout the UK for powers of attorney granted in any of the UK jurisdictions. So far, the present Bill provides only for "one-way traffic" with such explicit provisions applicable when lasting powers of attorney granted in England & Wales require to be operated elsewhere within the UK. At present, recognition and enforceability in England & Wales of powers of attorney granted elsewhere in the UK, in face of resistance, can be achieved only by rather convoluted, and certainly time-consuming and costly, proceedings, rather than automatically. Moreover, there is ample evidence of difficulties in operating Scottish powers of attorney in England & Wales, or even in branches located in Scotland of organisations headquartered in England & Wales, an issue which the Bill so far fails to address; and no evidence of equivalent difficulties in the other direction, which apparently non-existing difficulties the Bill does seek to address. Because of the importance of this matter, rectification of which has been (for example) a policy objective of the Law Society of Scotland since well before the current Bill was introduced, we shall continue to follow progress of the Bill.

The Bill has now reached the House of Lords, where the second reading is scheduled for 16th June. It would normally proceed to Committee stage there about two weeks after the second reading. The relatively short and simple amendments necessary to correct the imbalance in the Bill have been drafted, and it is hoped that they can be addressed at committee stage.

The evidence of difficulties is derived from complaints from members of the public, the experience of practising solicitors, and individual MSPs contacting the Law Society of Scotland because of difficulties reported by their constituents.

Adrian D Ward

Implementation of the Scott Report

I last reported under the above heading in the March Report. As there indicated, I expect this to be a long-running theme. There is still nothing definitive to report, and nothing has yet been formally issued by Scottish Government, but I can nevertheless report that the positive trends described in March appear to be continuing and developing. Relevant Scottish Government officials continue proactively to address the massive challenge of moving towards implementation of the Scott Report, supported by continuing extensive engagement with stakeholders, a process that appears to be assisted by a continuing coming-together of the main stakeholders in support of the work of Scottish Government, not necessarily with complete consensus, but making their distinct contributions in a broadly collaborative and supportive way.

In private communication, (still relatively new) Minister for Social Care, Mental Wellbeing and Sport, Maree Todd MSP looks to that collaborative work to ensure that legislation and practice in incapacity law in Scotland continues to evolve, and to be at the forefront of developments. Latest indications from her officials are that we may expect to see a consultation document, derived from the current processes of engagement, in the relatively near future, quite possibly – I would estimate – in time for the next Mental Capacity Report, or the one next following it.

Adrian D Ward

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Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Parishil Patel KC is speaking on Safeguarding Protected Parties from financial and relationship abuse at Irwin Mitchell's national Court of Protection conference on 29 June 2023 in Birmingham. For more details, and to book your free ticket, see here.

Alex is leading a masterclass on approaching complex capacity assessment with Dr Gareth Owen in London on 1 November 2023 as part of the Maudsley Learning programme of events. For more details, and to book (with an early bird price available until 31 July 2023), see here.

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 July. 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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