



Mental Capacity Law Newsletter

Editors: Alex Ruck Keene, Victoria Butler-Cole, Neil Allen and Michelle Pratley

Introduction

Happy New Year, and welcome to the January issue of the Mental Capacity Law Newsletter. We hope that you are well rested after the holiday break, because this is a truly bumper issue, so large, in fact, that the contents have to appear on the next page.

To start off, we cover a number of important English cases including the first contested decision upon the Court of Protection's powers to consider hypothetical options; an important decision of the President on the Court's international jurisdiction; a decision exemplifying the power of advance statements; and clarification upon the proper procedure to follow when seeking to commit for contempt in the CoP. We also provide coverage of what actually happened in the 'forced C-section' case, together with a note on an eagerly anticipated decision of the Court of Appeal relating to the duties of litigation friends which in the end was a complete non-starter. We also cover developments in practice and procedure including the abolition of the Official Solicitor's waiting list for welfare cases and a significant consultation on civil court fees which proposes sweeping changes to the CoP fee structure. Amongst other Parliamentary business we cover the last evidential session of the House of Lords Select Committee considering the MCA 2005, hearing from Lord McNally and Norman Lamb MP. We also highlight in particular the new and important guidance from the Royal College of Physicians on Prolonged Disorders of Consciousness.

As trailed in last month's issue, we are delighted to announce that with effect from this issue, we have expanded our coverage to include a stand-alone

Scottish section covering case-law and other developments north of the Border. Our Scottish contributors are Adrian Ward, of TC Young Solicitors, a leading figure in Scotland in the field of mental capacity law, there termed adult incapacity law, and Jill Stavert, Reader in Law and Director of the Centre for Mental Health Law and Incapacity Law, Rights and Policy at Edinburgh Napier University. In the Scottish section this month is included an important decision upon the circumstances under which it is appropriate to grant an intervention order for purposes of executing a will. This case – as with the approach taken in Scotland to questions relating to adult incapacity more generally – serves as a useful mirror to practice and procedure in England and Wales, a point highlighted by the note upon the approach to deprivation of liberty taken in Scotland that we circulate with this issue. We also include a discussion of the Assisted Suicide (Scotland) Bill recently introduced into the Scottish Parliament.

We hope that our Scottish readers will find useful food for thought in the first part of the newsletter – and, to encourage cross-fertilisation, we have in fact covered a Scottish case (upon contempt on the part of social workers) in the English and Welsh section and commented upon it from an English perspective. Developments for reporting in the Scottish section of the newsletter should be sent in the first instance to [Adrian](#) or [Jill](#).

Where transcripts are publicly accessible, a hyperlink is included. As a general rule, those which are not so accessible will be in short order at www.mentalhealthlaw.co.uk. We include a QR code at the end which can be scanned to take you directly to our previous case comments on the CoP Cases Online section of our website.

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The right to make foolish decisions

We start this issue and the year with a link to the speech given by Sir Mark Hedley to the 2013 Mental Health Lawyers Association Conference (with his and the MHLA's kind permission). The speech is available [here](#), and makes compelling reading in its reminder of the proper balance between protection and autonomy.

When can the Court of Protection go beyond the available options?

ACCG & Anor v MN & Anor [2013] EWHC 3859 (COP) (Eleanor King J)

COP jurisdiction and powers - Interface with public law jurisdiction

Summary¹

At the final hearing of an application for declarations as to where a young man should live (and receive education and care), and for regulation of his contact with his parents and other family members, the relevant funding body, ACCG, made it clear that it was not prepared to fund contact between P and his family at the parents' home. ACCG therefore submitted that this was not an option for the Court to consider when making best interests decisions; Counsel for the parent submitted that the Court should embark upon a trial in relation to home contact (and to the delivery of personal care by the man's mother). The jurisdictional issue to which this gave rise – i.e. as to the precise scope of the Court of Protection's powers – arose very late in the day, but it having been fully argued, Eleanor King J gave a full judgment upon the point.

Eleanor King J conducted an extensive review of the authorities, beginning with those decided

under the inherent jurisdiction, and concluding with the dicta of Baroness Hale in *Aintree v James* [2013] UKSC 67 to the effect that the CoP has no greater powers than P would have if they had full capacity. She noted that: “[a]n inevitable consequence of a person lacking capacity is that a public authority will often be providing services to that incapacitated person pursuant to various statutory duties. There is a danger of a blurring of the distinction as between the Court of Protection's statutory duties in a private law context, (namely to consider the best interests of an incapacitated adult), with public law challenges in relation to the willingness, unwillingness, reasonableness or rationality of the services a public authority is willing or able to provide” (paragraph 34).

Rejecting the submission on behalf of the parents that the proper course was for the Court to consider where MN's best interests lay in relation contact first, and only then to turn to consider the question of funding options, Eleanor King J noted that this could mean that the Court of Protection “would potentially be using a best interests decision as a means of putting pressure upon the ACCG to allocate their resources in a particular way and in doing so would be going against the first principle now enshrined in Aintree that this Act is concerned with enabling the court to do for the patient what he could do for himself if of full capacity, but it goes no further” (paragraph 52).

Eleanor King J noted that:

“57. There will undoubtedly be cases where courts wish to explore with providers the possibility of funding being made available for packages of care which may, for example, have been identified by independent social workers. In my judgment such discussions and judicial encouragement for flexibility and negotiation in respect of a care package are actively to be encouraged. Such negotiations are however a far cry from the court embarking on a “best interests” trial with a view to determining whether or not an option which has been said by care provider (in the exercise of their statutory duties) not

¹ Permission to appeal this decision by MN's parents is being sought. Michelle continuing to be instructed by the Second Applicant, this comment appears on behalf of Alex, Tor and Neil.

to be available, is nevertheless in the patient's best interest.

58. If the providers are unreasonable or irrational in reaching the decisions which have lead to the identification of the available options, that is a public law issue and that decision is susceptible to judicial review. Miss Bretherton makes the point that such an approach is unwieldy, but I return to the observations of Munby J in A v A, that the crucial distinction goes to the identity of the decision maker, if the decision which the judge has been asked to review consider or endorse is overturned as the case may be is that of the public authority exercising its statutory discretion, then the dispute properly falls to be considered by reference to public law principles.

59. Any delay or increased expense of litigation can be ameliorated to a considerable extent by an early identification of the issues and, if needs be, as in the case of A Local Authority v PB and P, the matter being listed before a Judge of the Division who also holds an Administrative Law ticket. In my judgment such a course not only reflects the law as it stands but avoids a situation arising where the already vastly overstretched Court of Protection would be routinely asked to make hypothetical decisions in relation to "best interests" with the consequence that CCGs are driven to fund such packages or be faced with the threat of expensive and lengthy judicial review proceedings. Such an approach undermines the first principle that the court can only make a decision that the incapacitated person can make from choices which are available or can, through discussion and negotiation, be made available."

Eleanor King J also considered – separately – the submission that a failure to include consideration of all options (including hypothetical options)

would mean that the Court had failed adequately to assess the proportionality of the proposals put forward and amount to a breach of the parties' Conventions rights in particular Articles 8 and 6. Importantly, she held that it is open to a party to bring a challenge based upon the HRA within existing CoP proceedings, by virtue of the operation of s.7(1)(b) HRA 1998, but that such challenge is additional and must be separately pleaded to the general consideration of Article 8 rights that inevitably forms part of the Court's analysis of best interests (applying *K v LBX* [2012] EWCA Civ 79). She held that:

"71... If a human rights issue is properly raised and pleaded and appears to the court on the pleadings to have some credibility, the court may choose exceptionally to conduct a best interests analysis which includes a consideration of hypothetical options. This would be ordered so as to determine whether the assertion that there is a breach of a party's Article 8 rights, consequent upon the provider failing to provide funding for their preferred option, has been made out.

72. I should be absolutely clear that it does not follow that in every case where a provider has declined to fund a package, or limited the available options, that there should thereafter routinely be an assessment of whether such an option would be in the best interests of the patient in order to ascertain whether there has been a breach of Article 8 rights. Far from it.

73. The law, as I have found it to be presently stated, is that the court may choose only between the available options in the same way as a person would if of full capacity. It may be, that in certain rare circumstances, a court may choose to hear a best interests argument, (as for example Bodey J did in Re SK where there was a possibility of a third party providing funds). Another example is in cases where there is a properly pleaded case showing a credible

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argument that a provider, in failing to agree to fund a package of care, has in doing so, breached or might breach the human rights of one or more of the parties to the proceedings."

Drawing the threads together, Eleanor King J concluded (at paragraph 86) that:

"i) As restated by Baroness Hale in Aintree 'the court has no greater powers than the patient would have if he were of full capacity'.

ii) Judicial review remains the proper vehicle through which to challenge unreasonable or irrational decisions made by 'care providers' and other public authorities.

iii) There may be rare cases where it appears to those representing a party that a public authority, in failing to agree to provide funding for or a particular form of care package, is acting in a way which is incompatible with Convention rights. In those circumstances, notwithstanding the fact that such an option is not available and before the court, the court may exceptionally, pursuant to a formal application made under s7(1)(b) HRA, conduct an assessment of the person's best interests beyond the scope of the available options, in order to determine whether the public authority has acted in a way which is disproportionate and incompatible with a convention right.

iv) Protection of the Article 8 rights of the parties are otherwise protected by a consideration of them by the court as part of all the relevant circumstances when carrying out a section 4 MCA 2005 best interests assessment."

Comment

This decision is of some importance, because it represents a reasoned judgment upon an issue which, as Counsel for the parents put it, "has

been bubbling under the surface" for some time in CoP proceedings. We have had dicta from a number of judges suggesting that the pre-MCA 2005 approach (and that adopted in cases involving children) should be adopted, but this is the first fully contested decision to be reported. Whilst it included a minor mis-quotation from the decision in *Re SK* (cf paragraph 50 of ACCG and paragraph 10 of *SK*) we would respectfully suggest that it is entirely correct, both as regards the 'conventional' distinction between proceedings in the CoP and proceedings in the Administrative Court, and as regards the exceptional circumstances in which (as with care proceedings) a party can require the Court to go beyond a consideration of the options actually on the table.

We also note that, although we do not understand that the judgment of Charles J in *YA (F) v A Local Authority* [2010] EWHC 2770 (COP) was cited to the Court, the decision of Eleanor King J is entirely consistent with this earlier decision in terms of the approach adopted to the ability of the Court of Protection (in appropriate cases) to consider HRA claims.

One practice note that arises from the judgment is as to the early identification and pleading out of the issues (in particular any claim based upon s.7(1)(b) HRA 1998). It was fortunate that the parties were in a position to deal with the jurisdictional issue when it crystallised at the outset of the final hearing; 3 days of Court time would otherwise potentially have been wasted. Practice Direction 13B (which drew upon the dicta of Charles J in *A Local Authority v PB* [2011] EWHC 502 (COP to which Eleanor King referred in her judgment) requires that, 'where appropriate,' the preliminary documents for a directions or interim hearing before a High Court judge or for an hour or more, should include (inter alia) "(b) a particularised account of the issues in the case; (c) the legal propositions relied on, and in particular whether it is asserted that any issue is not governed by the Mental Capacity Act 2005; (d) any directions sought concerning the identification and determination of the facts that are agreed, the facts the court will be invited to find and the factors it will be invited to take into account based on such agreed facts or findings of

New Vice President of the Court of Protection

We hope that our readers will join us in welcoming the appointment of Charles J as Vice President of the Court of Protection. He had been discharging the non-statutory role of judge in charge of the Court of Protection since 2011; with effect from 31 January 2014, he will be transferred from the Family Division to the Queen's Bench Division and appointed Vice President of the Court of Protection for a three year term.

facts; [and] (e) any directions sought concerning the alternatives the court will be invited to consider in determining what is in P's best interests." The difficult question, of course, is as to when the appropriate stage is for such matters to be set out, but it is suggested that robust case management and judicial continuity can only assist in this.

Clarification of key provisions of Schedule 3 to the MCA 2005 (and re-affirmation of the doctrine of necessity)

JO v GO & Ors [2013] EWHC 3932 (COP) (Sir James Munby P)

COP jurisdiction and powers – International jurisdiction

Summary²

PO, who was some 88 years of age, was the mother of four children: the applicant JO, her brothers GO and RO and her sister MP. She lacked capacity to decide where to live. She had

been habitually resident in England and Wales, living in her own home in Worcestershire with a mixture of family and other support and care, in particular support from Worcestershire County Council which had been involved since 2009. In April 2012 PO's son, GO, moved her to Scotland, initially to his own house but quite shortly after to a care home located within the area of responsibility of Inverclyde Council. The Council became aware of PO and her circumstances early in May 2012. The Council applied to the Sheriff Court for a welfare guardianship order under the relevant provisions of the Adults with Incapacity (Scotland) Act 2000. The application was made on the basis that, although PO was not habitually resident in Scotland, she was present there and it was urgent that the application be dealt with, so that the Scottish courts had jurisdiction by virtue of paragraph 1(c) of Schedule 3 to the 2000 Act (the analogous English provision being paragraph 7(1)(c) of Schedule 3 to the MCA 2005). It is on that basis that the Sheriff Court accepted and has since exercised jurisdiction. An order was made in December 2012 appointing the Council PO's welfare guardian for a period of 3 years.

In the meantime, JO had made an application to the Court of Protection seeking a return of her mother to England and Wales. The Council responded by making an application under Rule 87 of the Court of Protection Rules 2007 for a declaration that the Court of Protection has no jurisdiction to hear JO's application, PO being no longer habitually resident in England and Wales, alternatively declining to exercise any jurisdiction it may have. JO's three siblings supported the Council's stance. At a later stage, JO made a separate application seeking to restrain the sale of PO's house in Worcestershire, an application that was dismissed in the first instance by Senior Judge Lush.

JO's application and the Council's application were heard before the President. In a detailed judgment, he reviewed certain aspects of the 2000 Hague Convention on the International Protection of Adults and of Schedule 3 to the MCA 2005, which seeks to implement (in rather curious fashion) the 2000 Convention. In summary, the President concluded as follows as regards the legal framework:

² Note: permission to appeal this decision is being sought by JO. Alex continuing to be instructed by the Council, this comment appears on behalf of Michelle, Tor and Neil.

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- (1) Schedule 3 to the MCA 2005 is not entirely in force in England and Wales, because the Convention is not yet in force ‘in accordance with Article 57’ of the Convention (as the Government only ratified the Convention in respect of Scotland);
 - (2) Jurisdiction over personal welfare arises on the basis (ordinarily) on the basis of habitual residence; jurisdiction over property arises on the basis of the location of the property;
 - (3) Habitual residence is a question of fact to be determined having regard to all the circumstances of the particular case. Further:
 - a. Habitual residence can in principle be lost and another habitual residence acquired on the same day;
 - b. In the case of an adult who lacks the capacity to decide where to live, habitual residence can in principle be lost and another habitual residence acquired without the need for any court order or other formal process, such as the appointment of an attorney or deputy;
 - c. In deciding whether the actions taken by relatives or carers have led to a change in the habitual residence of P, the doctrine of necessity is relevant, which requires that the decisions taken by the relative or carer be reasonable, arrived at in good faith and taken in the best interests of the assisted person;
 - d. There will be no change in the habitual residence of the person if the removal from the jurisdiction has been wrongful (e.g. in the sort of circumstances that prevailed in *Re MN* [2010] EWHC 1926 (COP) – i.e. in contravention of the terms of an advance directive as to healthcare) or in breach of a court order)
 - e. It is permissible to take into account wishes and feelings and the extent to which the person is settled in deciding whether habitual residence has changed.
 - (4) The doctrine of *perpetuatio fori* does not apply when it comes to determining changes in habitual residence – i.e. the position falls to be considered as at the point of the hearing, not at the point of issue of the relevant application;
 - (5) The doctrine of *forum non conveniens* applies in the context of incapacitated adults as between England/Scotland in the same way as it would with children, and applying the *Spiliada* principles; it would also apply subject to the provisions of the Convention as and when ratified;
 - (6) A decision to refuse to exercise jurisdiction on the basis of *forum non conveniens* is not a decision falling within the scope of s.1(5) MCA 2005.

On the facts of the case, the President found that PO’s habitual residence had changed between the time of her move in April 2012 and the hearing in July 2013. He therefore found that he had no jurisdiction to consider any application in relation to her personal welfare. Whilst he had jurisdiction to consider a renewed application brought by JO in respect of PO’s property in Worcestershire, he made a declaration under Rule 87(1)(b) that he would not exercise such jurisdiction because the convenient forum for this issue was Scotland, being inextricably linked with the issues of her personal welfare which fell to be considered in Scotland.

Comment

This case is significant for a number of reasons, not the least of which being the clarification (somewhat amazingly, still required 6 years after the Act formally came into force) that not all of Schedule 3 is, in fact, in force. The relevant provisions that are yet to come into force are those which are, in essence, predicated upon England and Wales being a ‘Convention country’ in a position to undertake reciprocal arrangements with other Convention countries as regards transfers of jurisdiction.

Outside the further clarifications given as to the

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interpretation of Schedule 3 and, in particular, of ‘habitual residence,’ the decision is also relevant to practitioners who are not remotely concerned with cross-border issues. This is because of the exploration by the President as to the operation of s.4-5 MCA 2005 in the context of informal decision-making: a key question in determining whether PO’s move to Scotland had been ‘wrongful’ concerned the motives of the family members in question. As the President noted, here – as in other contexts – the doctrine of necessity applied and “*put shortly, what the doctrine of necessity requires is a decision taken by a relative or carer which is reasonable, arrived at in good faith and taken in the best interests of the assisted person. There is, in my judgment, nothing in the 2005 Act to displace this approach. Sections 4 and 5, after all, pre-suppose that such actions are not unlawful per se; they merely, though very importantly, elaborate what must be done and provide, if certain conditions are satisfied, a statutory defence against liability*” (paragraph 18). At paragraph 20, Sir James Munby P noted that “[o]f course, the doctrine of necessity is not a licence to be irresponsible. It will not protect someone who is an officious busybody. And it will not apply where there is bad faith or where what is done is unreasonable or not in the best interests of the assisted person.” As the President found, the authority that the three relevant family members required to move their mother to Scotland lay in the doctrine of necessity – and this was not negated by the fact that JO was of different opinion; nor did they require the concurrence or involvement of either potentially relevant statutory authority.

This approach therefore represents a strong endorsement of the requirement of reasonableness identified by the Court of Appeal in *The Commissioner of Police for the Metropolis v ZH* [2013] EWCA Civ 69. In that case, reasonableness dictated that the police take careful steps before intervening to take steps to remove an autistic man from by the side of a swimming pool; in PO’s case, reasonableness did not prevent informal decision-making of the kind that occurs up and down the country day in day out.

Life-sustaining treatment can be withheld in the face of evidence that the individual would have wished it to be provided under all circumstances

An NHS Foundation Trust v VT and A [2013] EWHC B26 (Fam) (Baillii citation) (Hayden J)

Best interests – medical treatment

Summary

This medical treatment case concerned a male patient who had previously suffered a stroke which had rendered him housebound. He sustained a cardiac arrest which caused his brain to be deprived of oxygen for some 17 minutes, resulting in a further serious deterioration in his condition. The NHS Trust sought declarations that it would be unlawful to provide intensive care and/or resuscitation other than bag and mask resuscitation to address an acute episode, should VT’s condition deteriorate any further. VT’s family considered that it was in VT’s best interests for such treatment to be provided. The judge summarised their position thus: They all believe that VT would have wanted to avail himself of every possible opportunity for survival in its crudest, most basic sense, no matter what the pain involved, no matter what the prospects for long-term survival might be, no matter what quality of life might lie at the end of the journey or, indeed, during it. Those ultimate decisions they believe to be for Allah alone. They believe that VT’s suffering would also cleanse him from sin, would prepare him for death and would be borne by him with stoicism, in recognition of that process.

The unanimous medical evidence, including that from an expert instructed by the family, was that VT was minimally conscious, that he had suffered a severe brain injury, and that there was very little prospect of any meaningful recovery for example communicative ability or motor function. At most, he might live for a further year if provided with all possible treatment, most probably still in a minimally conscious state. The

court heard graphic evidence of what are often simply described as the ‘burdens’ of intensive care treatment, and noted the evidence that less than 1 in 5 people resuscitated in hospital survives to discharge. VT’s treating clinician told the court that even if VT’s family “had accurately described what VT’s view would have been, were he able to communicate them”, pursuit of those wishes would be “...against all the things I stand for as a doctor.”

The judge accepted that the interventions at issue would be “wholly contrary to the central medical objectives of intensive care,” noting that treatment would “at best only preserve the existing parlous situation.” CPR, even if successful, would result in further damage to VT’s brain. Even bearing in mind VT’s likely wishes, to administer CPR would be “to expect doctors to cause pain for no justifiable medical reason other than to accommodate the religious or other beliefs of a patient. It would require those who, through medical training and personal beliefs, want to help the patient, to do the exact opposite – that would be neither ethical nor lawful in my judgment.” However, the use of manual suction to remove respiratory blockages was lawful. Admission to intensive care would be ‘wholly futile’ because it would be:

1. Likely to cause distress, discomfort and probably pain;
2. Unable to achieve any positive medical benefit;
3. Life-threatening, in and of itself;
4. To further compromise VT’s vital organs, and therefore medically harmful.

Hayden J rejected attempts by the Trust and Official Solicitor to suggest that VT himself would have agreed with the medical view, accepting that the family was most likely to be correct, particularly having regard to their religious beliefs, particularly the ‘right’, if necessary, to suffer in accordance with his faith. Nevertheless,

VT’s likely wishes could not require doctors to provide futile and harmful treatment to him.

Comment

This case is of particular interest as an illustration of what might be termed the *Aintree* approach: the giving of significant weight to P’s likely wishes even in a case where the medical evidence is that further life-sustaining treatment is highly unlikely to result in any meaningful recovery. The evidence cited in the judgment suggests that it was highly unlikely that an intensive care team would have been willing to admit VT, or that the staff already treating him would have administered CPR, since, as the judge held, that would have been to cause harm VT for no purpose. However, there was no positive assertion by any party that the option of receiving treatment was not in fact available (an issue which readers will recall troubled Moylan J in the *Re L* case recently). Despite the apparent absence of an ‘available option’, the Trust no doubt applied to court because of the fundamental disagreement with VT’s family, but the lay observer may remain puzzled as to why so many public resources were expended in such circumstances. One explanation may be that there remains an unanswered question as to whether a clinician who says they would not provide treatment is making a clinical decision or a best interests decision. The decision of the Supreme Court in *Aintree* suggests that clinicians can make clinical decisions which the Court of Protection cannot interfere with, yet if the clinician’s decision relies heavily on their view as to the prospect of meaningful recovery for P, it is easy to see how the distinction between a clinical decision and a best interests decision will be more apparent than real.

The court concluded that the burden of the (theoretically) possible treatments outweighed the benefit (as perceived by VT) of continuing even the merest glimmer of life, conscious or not. This was not the result of the balancing exercise that VT would have conducted, had he been able, but the result was justified on the basis that causing harm to patients by providing treatment which carries no real prospect of sustaining conscious life is unethical, even if the patient’s

religious or personal views support it. It does not appear that VT's case fell within the class identified in Burke and endorsed in Aintree in which "*the patient is close to death... the object may properly be to make his dying as comfortable and as dignified as possible, rather than to take invasive steps to prolong his life for a short while*" as there was medical evidence that if VT was admitted to intensive care, he might live for as long as a year, albeit in a minimally conscious state or worse. If VT was not within the class of the patient who is close to death, then the judgment suggests that notwithstanding the *Aintree* approach, the global best interests decision is likely to coincide with the patient's clinical best interests in a case where severely burdensome treatment will not improve the patient's condition, even if it sustains a quality of life which the patient would have been content to endure.

The power of the advance statement

RGB v Cwm Taf Health Board & Ors [2013] EWHC B23 (COP) (Baillii citation) (Moor J)

Best interests – contact

Summary

Mr B applied for contact with his wife, Mrs B, who was 70 and suffered from very advanced Alzheimer's disease. She had been in hospital since June 2012 but the relevant Health Board had not permitted her husband to visit her. Mr B sought declarations that the Health Board had acted unlawfully in depriving him and/or his wife of the right to a family life and the right to freedom of assembly and association and as well as an order directing the Health Board to afford him access to his wife, information about her care and damages. All aspects of Mr B's application were dismissed.

Moor J found that Mrs B had expressed a clear wish to separate from and subsequently divorce Mr B (having moved out of their shared home in November 2010), and had no wish to see him or have him involved in her care. Moor J was satisfied that these were her own wishes reached

of her own accord and there was absolutely no evidence to support Mr B's claim that she had been subject to undue influence by her children from a previous marriage. Moor J also accepted expert evidence that, although Mrs B was assessed in December 2012 as lacking the capacity to make decisions concerning her care and circumstances, she retained the capacity to make an Advance Statement in December 2011, stating that she did not want Mr B contacted if she became unwell and, if she went to hospital and was discharged, she wanted to return to live with her daughter and did not want to live with Mr B.

Moor J took into account that Mrs B had issued divorce proceedings in May 2011, which were later stayed by DJ Dawson because she lacked the capacity to litigate the divorce. He found that, if it had not been for her lack of litigation capacity, on the balance of probabilities, her divorce petition would have been concluded with a decree absolute dissolving her marriage to Mr B.

Moor J concluded that the Health Board was entirely right to act in accordance with her previous wishes after she lost capacity and, indeed, took the view that the Health Board had no alternative in light of her Advance Statement, citing the judgments of Munby J in *Burke v The GMC* [2004] EWHC 1879 (Admin) and *HE v A Hospital NHS Trust* [2003] EWHC 1017 (Fam). Moor J went on to say (at para 39):

"I do however accept that I now have jurisdiction in relation to Mrs B pursuant to my role as a Judge of the Court of Protection. I could, in theory, make a different determination based on Mrs B's best interests. In deciding what is in her best interests, however, I take the clear view that her wishes and feelings as clearly articulated in her Advance Statement are absolutely central to the matter. There would have to be some extremely compelling reason to go against such clearly expressed wishes. Moreover, in this particular case, I am absolutely satisfied that there is no such reason at all."

Comment

It is likely, on the facts of this case, Moor J would have reached the same conclusion even without Mrs B having made an Advance Statement, as numerous witnesses gave evidence that she clearly and consistently indicated that she wished to end the marriage and did not wish to have anything more to do with Mr B. Despite this, the great weight that was given to the Advance Statement in the best interests analysis underscores the importance of individuals, especially those who are vulnerable or do not wish to have contact with members of their family, making such a statement while they still have the capacity to do so. Whilst such statements do not have the same formal statutory place as advance decisions to refuse medical treatment, they must be taken into account by virtue of s.4(6)(a) MCA 2005. Further, as this case indicates, they can – and should – serve as powerful tools by which individuals can seek to secure future respect for their capacitous decisions.

As a practice point, Moor J was critical of orders made earlier in the proceedings. Commenting on an application made by Mr B - on without notice basis - in November 2010 for an order for the immediate return of his wife to the family home, Moor J said "*I do not understand why the application was made without notice. It appears that an order was made that [Mrs B's daughter] make Mrs B available for collection and return. Having heard the case in full, I am quite satisfied that the order made was not the order that should have been made. It shows the dangers of without notice applications.*"

Correct DX for the Court of Protection

We understand that the correct DX number for the Court of Protection is not as widely known as it should be, and is **NOT** the same as that for the Principal Registry of the Family Division (even though the two occupy the same building). The correct DX is DX 160013 Kingsway 7.

What (and what not) to do when seeking to commit for contempt of court in the CoP context

Re Whiting [2013] EWHC B27 (Fam) (Bailii citation) (Hayden J)

COP jurisdiction and powers – Contempt of Court

Summary

This judgment provides very useful guidance upon the requirements that must be followed in applications for committal to prison for contempt upon the basis of a breach of an order of the Court of Protection.

For present purposes, the facts can be summarised very briefly. CoP welfare proceedings were on foot concerning a woman identified as WAJ. A Leslie Whiting formed a relationship with WAJ. During the course of the proceedings he was made a Respondent. Social Services were concerned about the dynamic of this relationship. They were worried, too, about a conviction recorded against him in 2009 for a sexual offence relating to exploitation of a vulnerable adult. Although Mr Whiting declined to participate in the proceedings, his role in WAJ's life fell under scrutiny and was the subject of detailed professional evaluation. The conclusion that was reached was that his influence was essentially malign.

On 21st August 2012 an injunction was made by District Judge Rogers, which was designed to protect WAJ and to extricate Leslie Whiting from her life. The terms of that order were as follows:

"(1) Leslie Whiting should be forbidden by himself or acting jointly with any other person from: (a) allowing or threatening any unlawful violence against the first respondent (WAJ); (b) coming within 100 metres of a property in which it was thought she was living at the time, or any other property that he became aware that she might be visiting; (c) communicating with the first respondent, whether by letter,

telephone, text message or other means of communication; (d) threatening the first respondent; (e) instructing or encouraging any other person to do anything which is forbidden by the terms of the order."

In the autumn of 2012, and certainly by December, the Adult Services in Peterborough believed that they had grounds upon which to establish that Leslie Whiting had breached the terms of the district judge's injunction. An application for committal was issued in January 2013. Repeated procedural irregularities led to repeated adjournments, until – finally – the matter was transferred to be heard before a High Court Judge, Hayden J, and heard in December 2013.

Hayden J prefaced his analysis of the breaches alleged against Mr Whiting by a number of important remarks relating to the committal process. Firstly, he endorsed District Judge Eldergill's referral to the relevant statutory provisions and guidance in the form of: "*the Court of Protection Rules 2007, and in particular to Part 21 and Rule 9, Court of Protection Practice Direction PD21A; committal for contempt of court (practice guidance) [2013] 1 WLR 1316, 2013 EWHC B4 (COP); committal for contempt of court (supplemental practice guidance) [2013] EWHC B7 (COP); Part 81 of the CPR and the relevant case law.*" Hayden J then went on to highlight:

"12. [...] some crucial features of the committal process:

(1). the procedure has an essentially criminal law complexion. That is to say, contempt of court must be proved to the criminal standard, i.e. so that the judge is sure. The burden of proof rests throughout on the applicant (see: Mubarak v Mubarak [2001] 1 FLR 698);

(2). contempt of court involves a deliberate contumelious disobedience to the court (see: Re: A (A Child) [2008] EWCA Civ 1138);

(3). it is not enough to suspect recalcitrance; it must be proved (see: London Borough of Southwark v B [1993] 2 FLR 559);

(4). committal is not the automatic consequence of a contempt, though the options before the court are limited – for example: (a) do nothing; (b) adjourn where appropriate; (c) levy a fine; (d) sequester assets; (e) where relevant, make orders under the Mental Health Act (see: Jamie Malcolm Hale v Rachel Tanner [2000] 2 FLR 879);

(5). the objectives of the application are usually dual, i.e. to punish for the breach and to ensure future compliance;

(6). bearing in mind the dual purpose of many committal proceedings, they should be brought expeditiously, whilst primary evidence is available and the incidents are fresh in the mind of the relevant witness. This is particularly important in the Court of Protection where there may be reliance on a vulnerable witness and where capacity might have to be assessed.

It follows, therefore, that where injunctive orders are made, they should be clear, un-ambivalent and drafted with care. In my judgment, simplicity should be the guide. Similarly, where breaches are alleged, they should be particularised with care, both so that the alleged contemnor knows exactly what, where, when and how it is contended that he is in breach, so as to be able to marshal his defence, but also to help the applicant focus on what evidence is likely to be required to establish the breach to the requisite standard of proof."

Hayden J then analysed the four breaches, each of which were supported by an affidavit and oral evidence of a social worker. He was unimpressed by the affidavit and the supporting evidence: “[t]here were fundamental difficulties with the affidavit, with the chronology and indeed the oral evidence. Timescales and dates were vague. There was heavy reliance on hearsay evidence from a variety of sources. There was a dearth of primary material – for example, mobile phone records – even though it appears they may have been capable of being obtained. The passage of time also meant that the social worker's evidence was characterised by a lack of detail, but so too, it must be said, the affidavit and the chronology were decidedly sparse” (paragraph 15). He then went on to find that none but the last were made out, before concluding with the following remarks of general importance:

“14. The commitment and sincerity of all the professionals working in this area is beyond any doubt. It has been on display in this case. What is required, however, is an intellectually rigorous relationship between the lawyers and the social workers in every aspect of the Court of Protection, of course, but particularly on an application of this kind. The lawyers preparing the case must realise that establishing breaches to the criminal standard of proof requires forensic precision and the careful identification of evidence to support each of the particulars of the breach. It seems to me that nobody has hitherto engaged directly in that exercise... The process requires the lawyer and the social worker to work closely together to look at the order, to identify the breach and to marshal the material as if proving the constituent parts on a count on an indictment. Nothing less will do where the liberty of the individual is at stake.

15. The Court of Protection is, as the title makes clear, here to protect the vulnerable. The breadth of its work is very wide; its injunctive powers may well not yet have been fully utilised, but it is important, as they develop, that they are

deployed with forensic rigour and, where possible, as here, subject to public scrutiny. Collating evidence when working with those who, in certain areas of their lives, may lack capacity is inevitably challenging...”

Hayden J declined to take any action upon the one breach that had been established, a year having passed and there having been no subsequent allegations.

Comment

Hayden J went out of his way at the outset of his judgment to highlight what he considered to be the good practice of Peterborough Social Services in their work with WAJ in developing trusting relationships with social workers to assist in protecting her from men who might be dangerous to her, as well as equipping her to protect herself as best she could. In outlining the criticisms set out above, he was at pains to note that was seeking to be constructive and to restate guidance.

The judgment, indeed, stands as extremely helpful guidance to those considering bringing applications to commit for contempt of court, identifying in one place all the key statutory provisions and the core principles derived from the case-law. In its emphasis upon the importance of close working between lawyers and social workers to ensure forensic analysis is brought to bear at an early stage, it also sits as a companion piece with the costs judgment of District Judge Eldergill in *A Local Authority v HS & Ors* [2013] EWHC 2410 (COP) (for Westlaw subscribers, see also Alex's article in the Encyclopaedia of Local Government Law Bulletin on 'Safeguarding and the Court of Protection' (E.L.G.L.B. 2013, Nov, 10-12)

One final point is that it appears that Hayden J – politely – questioned whether it was necessary for the matter to have been transferred to a High Court judge. It appears that this took place because it was thought that the office of the Tipstaff might be required. As Hayden J noted (at paragraph 11): “[t]hat is, of course, concerned with the apparatus of enforcement but it is

perhaps important to note that section 47(1) of the Mental Capacity Act 2005, which relates to the general powers and effect of orders et cetera made in the Court of Protection provides: '(1) The court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court.'" We would respectfully suggest that s.47(1) cloaks all judges sitting in the Court of Protection with the same powers as a High Court judge when it comes to matters relating to the exercise of its jurisdiction, including – in an appropriate case – committal for contempt. This means, in turn, that there would be no need to transfer a case to the High Court solely for purposes of a High Court judge considering the application for committal (indeed, we note that in the case of Wanda Maddocks, the only other case relating to contempt to have been publicised, the judge considering the matter was a Circuit Judge – HHJ Cardinal).

Specifically in relation to the Tipstaff, however, the position is not entirely clear, because the Tipstaff serves as the enforcement officer for orders made in the High Court, rather than the Court of Protection. It is clear that the Tipstaff can act so as to enforce orders made under the inherent jurisdiction in relation to incapacitated adults: see [PM v KH and HM](#) [2010] EWHC 3279 (Fam). There is an argument that by virtue of s.47(1) MCA 2005, an order of the Court of Protection stands as if it were an order of the High Court and therefore falls to be enforced by the Tipstaff. Absent judicial clarification, however, we suspect, though, that in any case where it is seriously envisaged that the office of the Tipstaff will be required, then prudence should dictate that the committal proceedings should be transferred to a High Court judge.

The case that wasn't – no jurisdiction to hear appeal relating to withdrawal of s.21A MCA 2005 application by Official Solicitor

***TA v AA and Knowsley Metropolitan Borough Council* [2013] EWCA Civ 1661** (Court of Appeal (Moses, Black and Gloster LJJ))

Litigation friend – Official Solicitor

Summary

The father and Relevant Person's Representative ('RPR') of a forty-year-old man ('AA') challenged his son's deprivation of liberty at a residential care home. The first MCA 2005 s 21A challenge was withdrawn upon His Honour Judge Gore QC acceding to the Official Solicitor's application, having concluded that all the qualifying requirements were met. But six months later he made a second MCA 2005 s 21A challenge to a further standard authorisation. Mr Justice Peter Jackson directed that the matter should be listed before HHJ Gore QC and the father would "*be required to satisfy the court as to the purpose of these further proceedings*" (paragraph 21).

HHJ Gore QC replaced the father with the Official Solicitor as applicant in the proceedings, made the father the second respondent, and granted permission to the Official Solicitor to withdraw the second MCA 2005 s 21A application. His Honour considered the review process in Part 8 of MCA 2005 Schedule A1 to be a more suitable mechanism by which the father could demand a review by the Local Authority of the standard authorisation and address concerns as to place of residence, care plan, care regime and input in relation to rehabilitation. It would also "*avoid the need for the detailed legal representation and submissions and the costs consequence of what would be called for in a full-blown section 21A appeal*" (paragraph 25).

The father sought permission to appeal that first instance decision to Peter Jackson J (rather than to the Court of Appeal), contending that by failing to determine the legality of AA's continued detention, HHJ Gore QC had breached Article 5(4) ECHR. His Lordship, acting as a "junior appellate court", refused permission on the papers because the appeal was out of time with no real prospect of success. Moreover:

"AA's rights under Art. 5 (4) were respected. Section 21A MCA 2005 provides that the court may determine questions relating to standard authorisations. The court must determine how it approaches that task; it is not compelled to carry out a full

inquiry regardless of the merits. The Judge was entitled to have regard to the fact that AA's deprivation of liberty could be and is to be reviewed."

The father then made an application for permission to appeal that refusal to the Court of Appeal. However, with Lady Justice Gloster giving the leading judgment, the Court of Appeal held that it had no jurisdiction to hear an appeal against that refusal; i.e. the application to appeal to Peter Jackson J (rather than to the Court of Appeal). Crucially perhaps, no application was made by the father to Peter Jackson J for permission to appeal to the Court of Appeal (the "senior appellate court"). Thus, in essence, the appeal process adopted by the Appellant resulted in a jurisdictional flaw between the junior and senior appellate courts which regrettably prevented the significantly important substance of the case being determined at the senior level.

As to the substantive issue regarding the extent to which a challenge under MCA 2005 s 21A must be considered by the Court in order to satisfy the detained resident's Article 5(4) rights, in addition to Peter Jackson J's comments is the short judgment of Lord Justice Moses:

"73. The comprehensive judgment of Gloster LJ has demonstrated why this Court has no jurisdiction to consider the appellant's application for permission to appeal against the decisions of either Peter Jackson J or of HHJ Gore QC. I agree. It must be a rare case that judicial acuity is a source of regret. But I do regret that this court has no jurisdiction to determine this particular appeal.

74. My regret stems from the course taken by HHJ Gore QC, who may have misunderstood the direction given by Peter Jackson J on 20 January 2012 (see [21] of Gloster LJ's judgment). This direction and the Official Solicitor's application to forestall the application led HHJ Gore QC to permit withdrawal. This, in turn, led to the complaint in this application that the appellant was

unlawfully deprived of the opportunity of exercising his right to appeal against the standard authorisation. Since this court has no jurisdiction I am unable to say whether the judge acted unlawfully.

75. But it may be useful, to prevent any repetition of this unfortunate history, to record that the Official Solicitor did not in these proceedings dispute the proposition that HHJ Gore QC was required to determine the appeal and could not lawfully refuse to consider it, however obvious the outcome and however short the hearing and disposal of the appeal. The only argument was whether, on a fair reading of his judgment, HHJ Gore QC did dismiss the appeal without proper consideration. I need only emphasise that due and proper consideration of an appeal under section 21A MCA 2005 may not require any lengthy consideration. A full hearing is not necessarily a lengthy, time consuming or expensive hearing. The irony is that, the process by which this appeal was withdrawn, without, at least arguably, a full hearing, has occupied more time and incurred more expense than a short hearing would have entailed." (our emphasis)

Comment

Along no doubt with many others, the editors share the regret expressed by Lord Justice Moses. It seems that the Court of Appeal would have had jurisdiction if the father had either (a) applied for permission to the decision of HHJ Gore QC directly to the Court of Appeal, or (b) asked Peter Jackson J for permission to appeal to the Court of Appeal against his refusal to grant permission to appeal the decision of HHJ Gore QC. A recent example of the former scenario is *In the matter of L (a child)* [2013] EWCA Civ 1557 where, having considered the merits with no jurisdictional difficulties, the Court of Appeal refused permission to appeal against the decision of HHJ Hughes sitting in the Court of Protection. Had Peter Jackson J refused permission in the latter scenario, the father could then have made a

renewed application for permission to appeal to the Court of Appeal (paragraph 58).

As for AA's Article 5(4) rights, the [Part 8 mechanism](#) for reviewing deprivations of liberty is currently something of a rather unknown quantity. It enables the Local Authority as supervisory body to review its own authorisation at any time and must review it if requested to do so by the detained resident, the RPR or the managing authority. If none of the qualifying requirements appear – it would seem to the Local Authority – to be reviewable, then no further action is required. Otherwise, it “*must secure that a separate review assessment is carried out in relation to each qualifying requirement which appears to be reviewable.*”

If the best interests requirement is reviewable only on the grounds that there has been a change to the person’s case which makes it appropriate to vary the conditions and that change is not significant, then the best interests review assessment is not required because it is “non-assessable”. Where it is reviewable but non-assessable (?) the Local Authority may vary the conditions “*in such ways (if any) as the supervisory body think appropriate in the circumstances.*” However, in deciding whether a full reassessment of best interests is necessary, it “*should consider whether the grounds for the authorisation, or the nature of the conditions, are being contested by anyone as part of the review request*” (DoLS Code of Practice, para 8.14).

Part 8 does have a number of advantages. It can be more responsive than attempts to list legal proceedings. More timely assessments can be secured of, for example, mental capacity and best interests. It enables a degree of flexibility and sensitivity in the variation of conditions when tailoring the terms of the standard authorisation to the person’s present best interests. It is, of course, cheaper than legal proceedings. In 2012-3, we [know](#) that of the 1973 requests for Part 8 reviews, 46.2% were initiated by the supervisory body, 48.8% by the managing authority, and 5% by the detained resident or their representative. Whilst the 5% figure may be a cause for concern, conclusions are difficult to draw because responsible supervisory bodies and managing

authorities may be requesting a review on behalf of the detained resident. We also note that the DoLS [data](#) for 2014-5 will expressly capture the number of reviews and their outcome.

However, what is clear is that Part 8 is not, and was never intended to be, a pre-requisite or alternative to a MCA 2005 s 21A challenge. It lacks a certain independence, given that it is carried out by the initial body that authorised the deprivation of liberty. It lacks the necessary judicial character and, although it may achieve a review assessment, there appears to be little scope to challenge the merits of that assessment within the review process. Recourse to the Court of Protection is the principal Article 5(4) guarantee and Part 8 should not be a legal or practical obstacle barring the person from being able to benefit from such a procedural guarantee ([MH v UK](#) [2013] ECHR 1008, para 93).

From the comments of Moses LJ it would appear safe to conclude that where proceedings are initiated under MCA 2005 s 21A, the Court must give due and proper consideration to, and determine, the appeal, however obvious the outcome. Hopeless challenges by those other than the detained resident or their RPR can no doubt be filtered at the permission stage. But there must otherwise be such judicial consideration of the appeal to safeguard the person’s Article 5(4) rights. Moreover, as Sir Nicholas Wall held in *A Local Authority v A* [2011] EWHC 727, “*the court cannot simply act as a rubber stamp, however beneficial the arrangements may appear to be for the individual concerned.*” There, the person’s Article 5(4) rights and the court’s overriding objective were met by obtaining a report from the Court of Protection Visitor, funded by the Court. If, as the parties (but not the detained resident) agreed, it was to confirm that the person lacked the relevant capacity and that the continued deprivation of liberty was in his best interests, the case could properly be dealt with by way of a written consent order and judicially considered on the papers.

The ‘forced C-section’ case – what actually happened

Re AA [2012] EWHC 4378 (COP) (Mostyn J)

Best interests – Medical Treatment

Summary

The judgment in the ‘forced C-section’ case has now been published, and reveals what many suspected at the time of the media storm that we touched on in our [December](#) issue, namely that the facts were very far from those which were reported. As Sir James Munby P has noted, however, in the decision upon reporting restrictions in the proceedings relating to the child [\[2013\] EWHC 4048 \(Fam\)](#):

“43. ... there are two points that require to be addressed with honesty and candour. Both relate to the fact that, when this story first ‘broke’ on 1 December 2013, none of the relevant information was in the public domain in this country.

44. The first point is this: How can the family justice system blame the media for inaccuracy in the reporting of family cases if for whatever reason none of the relevant information has been put before the public?

45. The second point is, if anything, even more important. This case must surely stand as final, stark and irrefutable demonstration of the pressing need for radical changes in the way in which both the family courts and the Court of Protection approach what for shorthand I will refer to as transparency. We simply cannot go on as hitherto. Many more judgments must be published. And, as this case so very clearly demonstrates, that applies not merely to the judgments of High Court Judges; it applies also to the judgments of Circuit Judges.

Returning to the proceedings in August 2012 before Mostyn J, however, it is of some note that

– for the first time in the editors’ recollection – the transcript of the ex tempore judgment was accompanied by the transcript of the urgent application hearing itself. Readers will recall from our coverage in the previous issue that the mother was Italian, with two previous children. We now know that she is (and can be named as) Alessandra Pacchieri. Ms Pacchieri had had problems with her mental health since 2007, and there were admissions to psychiatric hospitals in Italy. As of 2011, her two children were in the care of their grandmother, and proceedings relating to the children were on foot in 2012 when the mother came to England. The woman, who suffered from bi-polar disorder, became very unwell during a work-related visit to England in 2012, a visit she undertook whilst pregnant. On 13 June 2012 she was detained under s.2 and subsequently s.3 of the Mental Health Act, and was profoundly unwell.

From the transcript and the judgment delivered at the hearing on 23 August 2013 (together with the unusual covering note drawn up by Mostyn J on 4 December 2013), the following further information becomes clear:

1. It was an urgent application first made at 16:16 on 23 August 2012 by the NHS Trust with responsibility for Ms Pacchieri, supported by the evidence of a consultant obstetrician and the patient’s own treating consultant psychiatrist, seeking a declaration and order that it would be in her medical best interests that Ms Pacchieri, who had undergone two previous elective caesarean sections, but was incapable of making decisions about the birth method, to have this birth, the due date of which was imminent (she was 39 weeks pregnant), in the same manner on the next day;
2. The primary risk identified by the NHS Trust was that of uterine rupture with a natural vaginal birth. Mostyn J identified the risk – put at as much as 1% – as ‘significant.’ Mostyn J also took into account that he considered that it would be in the ‘mental health best interests’ of the mother that her child be born alive and healthy, and that it not be exposed to risk during his or her birth;

3. In holding that it was in AA's best interests to undergo a Caesarian section (including by use of reasonable force if required), Mostyn J considered that he was applying conventional principles set down by the Court of Appeal in the case of *Re MB (Medical Treatment)* [1997] 2 FLR 426;
4. Essex County Council were not represented before the Court, but it appeared that the Trust understood that the Council intended to invite the police, under s.46 Children Act 1989 to exercise their powers to remove the child into police protection for a period not exceeding 72 hours, as the Act provides, on the basis that the police would, by virtue of information supplied by the local authority, have reasonable cause to believe that the child, once born, would be likely to suffer significant harm. The Official Solicitor raised his concerns via Counsel about this course of action; Mostyn J agreed that it would be 'heavy handed,' and instead required that the local authority be advised by way of preamble to the order made to make an application on notice to the Official Solicitor to him for an interim care order. It appears that, in fact, an interim care order was applied for in the Chelmsford County Court on 24 August, immediately after the baby was born; Mostyn J then consented to the application being dealt with by the relevant Circuit Judge in Chelmsford. The proceedings concerning the baby (known thereafter as 'P') are beyond our remit to cover.

Comment

In Sir James Munby P's judgment upon the reporting restrictions application noted above there appears the following slightly Delphic passage (at paragraph 22) in relation to the Court of Protection proceedings: "*there is interesting comment by various legal commentators on the blogosphere, including suggestions that some of the orders made might be vulnerable to legal challenge. Since these matters may yet require judicial determination I say nothing more.*"

It is perhaps too easy to identify in retrospect

matters that should have been done differently, and we would emphasise that there is nothing in the judgment or the surrounding material that necessarily suggests that the decision of Mostyn J would be appealable on the basis set down in *Aintree*: (i.e, following *Re B (A Child) (Care Proceedings: Appeal)* [2013] UKSC 33, [2013] 1 WLR 1911) that, where a judge of the Court of Protection has correctly directed himself as to the law, an appellate Court can only interfere with his decision as to the evaluation of best interests if satisfied that it was wrong). Nonetheless, we would identify the following matters of significance and/or possible concern by way of practice points for the future:

1. To the best of our knowledge, this is the first reported (or – to be more precise – published) judgment of the Court of Protection approving a caesarean section since the coming into force of the MCA 2005. It is therefore of some importance in confirming (albeit at the end of what was clearly a short hearing arranged at very short notice) that the principles set down in *Re MB (Medical Treatment)* [1997] 2 FLR 426 remain good law. As a side-note, another similar case was decided very shortly after the media storm broke in this case – as yet, no transcript is available but – perhaps unsurprisingly in the circumstances, the hearing and judgment itself were reported contemporaneously; we will note this further when a transcript is published;
2. In our previous issue we identified one point that Alex – in particular – was interested to see discussion regarding in the judgment, namely the fact that Ms Pacchieri was at the material time clearly habitually resident in Italy but yet being the potential subject of an order of the Court of Protection. Nothing in the judgment in *JO v GO* discussed elsewhere in this newsletter casts doubt upon the proposition that Ms Pacchieri was habitually resident in Italy, and in the cold light of day, it is perhaps of some note that there was apparently no discussion during the hearing of whether the Court had jurisdiction at all to make an order of the nature sought. By virtue of paragraph 7(1)(c) of Schedule 3 to the MCA 2005, the Court of Protection only has

jurisdiction on the basis of presence alone if the matter is ‘urgent.’ This word derives from the 2000 Hague Convention on the International Protection of Adults, mirrored by Schedule 3. The approach of the Court of Protection has been to seek to interpret the provisions of Schedule 3 compatibly with the Convention, and to have to regard to the Explanatory Report thereto (see *Re M* [2011] EWHC 3590 (COP)). From that Explanatory Report, it is clear that ‘urgency’ for purposes of the Hague Convention, and hence Schedule 3, should be interpreted strictly in the medical context. Ms Pacchieri’s position as at the time that it came before the Court might quite properly be described as urgent given that the procedure was scheduled for the next day (although this gives rise to a separate question discussed below); in future cases, we would perhaps expect to see the judge recording in a preamble that they were satisfied that they had jurisdiction on the basis that paragraph 7(1)(c) of Schedule 3 to the MCA 2005 was met;

3. Perhaps more troublingly, it is not clear on the face of the transcript of the judgment why it was that the application was only made the day before the procedure was scheduled. After all, it was presumably evident to the NHS Trust – who had been caring for Ms Pacchieri for several weeks under the provisions of the MHA 1983 – that (a) she was in the later stages of pregnancy; and (b) she had had at least one previous Caesarean section. Given that the primary basis upon which the procedure was said to be in her best interests was the risk of uterine rupture if she underwent a vaginal birth following her previous Caesarean sections, it would therefore on one view seem rather obvious that the Trust should have moved with greater speed to bring the matter to Court in advance of the procedure. The Court of Appeal in *Re MB* and – even more emphatically – in *St George’s Healthcare NHS Trust v S* [1999] Fam 26 stressed the importance of bringing applications regarding Caesarean sections to Court in a timely fashion. Assuming (if such is a correct assumption) that the procedure had to take place on 24 August, and hence the

proceedings could not be adjourned, the fact that the application was only issued the day before radically limited the ability of the Official Solicitor to take steps to investigate and (if appropriate) consult with Ms Pacchieri to obtain her views;

4. Leading on from this, it is not entirely clear from the transcript whether the fact that Ms Pacchieri appears not to have been consulted in advance (and was not to be informed subsequently) was the result of a considered decision that such was not in her best interests. If it were – and it is quite possible to envisage why that might have been so – then one would perhaps have expected to see this recorded in the judgment. If not, then some potentially difficult questions arise as to whether the decision could be said to have complied with s.4(4) MCA 2005.

We do not comment further here upon the potential impact that this case (and the associated proceedings relating to Ms Pacchieri’s child) will have upon the reporting of proceedings before and the publishing of judgments of the Court of Protection, save to note that we understand that the draft [Guidance](#) upon transparency promulgated by Sir James Munby will be out early in the New Year; as matters stand, we would be surprised if it were to be watered down at all.

We also note, finally, that this is the second case to have been reported in recent months concerning a pregnant sufferer from bi-polar disorder. The first was *Re SB* [2013] EWHC 1417 (COP), in which a sufferer from bi-polar disorder was found (in the face of the expert evidence) to have had capacity to decide to terminate her pregnancy. Such cases pose particularly difficult acute questions, not least because of the correlation (that was very clearly apparent in *Re SB* and may – we think – potentially be inferred from Ms Pacchieri’s case) between pregnancy, ceasing compliance with medication (in SB’s case out of a concern for the impact of the side-effects upon the foetus) and then an onset of severe symptoms. Ms Pacchieri’s case is extremely unusual legally because of its foreign element, but is not, sadly, altogether unusual from a

clinical perspective. We venture to suggest that these cases can and should serve as prompts to professionals to consider better ways in which to assist women suffering from bi-polar disorder to make plans in advance to secure respect for their wishes in the event that their mental health deteriorates during the course of their pregnancy, whether by way of advance decisions or otherwise.

Interfering with the assessment of expert evidence

Re L (A Child) [2013] EWCA (Civ) 1557 (Court of Appeal (Black LJ))

Practice and procedure – Other

Summary

We make brief note of this case (which is also touched upon in relation to *TA v AA*, discussed elsewhere in this newsletter) in large part because it was the subject of some media coverage at the time.

In brief terms, a mother wanted to appeal against declarations by the first instance judge made in the Court of Protection that her son did not have capacity to decide upon his residence and educational arrangements and that it was in his best interests to remain in his current placement so that he could continue to attend the school that he had been attending for some time. The son had spastic cerebral palsy from birth and, resulting in significant physical and developmental disabilities. He cannot speak but ways had been found to ascertain what his responses are in various situations. The mother considered that he had capacity under the MCA 2005 to make decisions for himself and her view was supported by Dr Thompson, who was a clinical psychologist. Dr Essex is a consultant neurodevelopmental paediatrician. He disagreed with the assessment of the mother and Dr Thompson and considered that the son did not have capacity to make his own decisions.

In refusing permission to appeal, Black LJ noted that Dr Thompson's expertise was in assessing people who have suffered a trauma, rather than

those who have been mentally impaired from birth. Dr Essex had, in contrast, done very considerable work with people who had been mentally impaired from birth. The judge at first instance had much preferred the evidence of Dr Essex. Black LJ noted (paragraph 9) that "*the assessment of witnesses, including expert witnesses is very much a matter for the judge who conducts the hearing.*" Interestingly, neither expert had asked the son the central question of where he would live and what he would do about school. Black LJ held that the judge was entitled to prefer the evidence of Dr Essex, and that there was no prospect of a successful appeal against her decision on this point.

Black LJ also refused permission to the mother to appeal against the decision of the first instance judge – founded in significant part upon the evidence of an independent social worker – as to the son's best interests. It would appear that the mother contended that the son was being deprived of his liberty by being required to attend school and that the judge should have considered the school in that light and concluded that it was not in his best interests to attend it or necessary for him to do so to keep him from harm. Black LJ noted that she considered it to be clear from the judgment that the judge was in fact of the view that the education that the son was receiving was good for him and was in his best interests and that he was happy at school.

Comment

Being a decision upon an application for permission to appeal, this decision cannot be cited as a precedent (see Practice Direction (Citation of Authorities) [2001] 1 WLR 1001. It is, however, of some interest as regards the approach that is taken by superior courts to the exercise of evaluation by first instance courts in the CoP sphere. It should, perhaps, be noted that the test is now as laid down by Lady Hale in *Aintree v James* [2013] UKSC 67, i.e. that "*if the judge has correctly directed himself as to the law... an appellate court can only interfere with his decision if satisfied that it was wrong: Re B (A Child) (Care Proceedings: Appeal) [2013] UKSC 33, [2013] 1 WLR 1911.*"

It would have been interesting to see the arguments relating to deprivation of liberty as they were addressed in the underlying judgment – *prima facie* (and pending the decision of the Supreme Court in *Cheshire West*) that it is in someone's best interests for them to receive education at a particular case goes to whether a deprivation of liberty is justified, not whether it is objectively occurring. Similarly, contentment on the part of an incapacitated adult does not constitute consent. However, it may very well be that the matters were developed at greater length at first instance.

Official Solicitor's waiting list abolished

The Official Solicitor, Alastair Pitblado, has informed the editors that as from October 2013 his waiting list in respect of acceptance of CoP healthcare and welfare applications has been eliminated. He instituted the waiting list at a time of sustained increases in caseload with several key staff on long term sick and other absence. Where his acceptance criteria are met (as to last resort and funding), he will accept the court's invitation to him to act as litigation friend. He then expects that a case manager will be allocated to the case within two to four weeks of acceptance but will consider any circumstances requiring more urgent allocation.

Legal aid and s.21 MCA applications – round 3 (and family members as litigation friends)

We have over the past few issues been covering developments in the practice and procedure relating to s.21A MCA 2005 applications and the circumstances under which non means-tested legal aid will be provided. Whilst we await the judgment of Charles J in the case of *UF* which sets out important concessions made by the Ministry of Justice, an agreed note of the judgment is now available [here](#). The outline note also suggests that

the judgment will be of importance as regards the suitability of family members to act as litigation friends, Charles J discharging P's daughter as litigation friend and appointed the Official Solicitor in her place. It would appear that the judge indicated that P's daughter, as a person with strong feelings on her mother's care with which siblings disagreed, was not able to objectively evaluate the option's for P's care and was not able to "fairly and competently conduct proceedings on behalf of [P]" for purposes of COPR r.140(1)(a).

Settling personal injury cases with fluctuating capacity

AA v (1) CC (2) MIB [2013] EWHC 3679 (QB) (Swift J)

Practice and procedure – Other

Summary and comment

We make brief note of this personal injury case which has recently appeared on Lawtel for its confirmation of the powers of the civil courts under CPR Part 41 to authorise periodical payments where the claimant has fluctuating capacity to manage their property and affairs. In the case before Swift J, the claimant at the point that the court was being asked to endorse the settlement of a personal injury claim lacked the material capacity; he was, however, expected to regain it in due course, albeit that both parties wished to provide for a potential further deterioration which might lead to a further loss of such capacity.

Swift J held that she could not construe the provisions of CPR Part 41 so as (in effect) to provide that periodical payments related to costs before the Court of Protection only be paid when the claimant lacked the requisite capacity such that his affairs would be managed by a deputy. Swift J also held that the proposed arrangements did not fall within the scope of the Damages (Variation of Periodical Payments Order) 2005. However, she was entirely happy to endorse as being in the Claimant's best interests a Tomlin order providing for such payments notwithstanding that they could not be made by the Court; such periodical payments forming part

of an agreement endorsed by the court, they would be exempt from taxation.

As with the decision in *Coles v Perfect*, this decision shows the willingness of the civil courts to endorse pragmatic solutions to problems that pose themselves in the settlement of claims brought by those who appear incapable of managing their property and affairs. We await, however, the decision of the Supreme Court in *Dunhill v Burgin* (which was to be heard in November 2013, but is to be relisted for a future date), relating to the retrospective impact of litigation incapacity upon settlements.

Contempt and social workers – a cautionary tale

One practical question that arises on a relatively regular basis is as to the circumstances under which it is necessary to bring welfare proceedings back to court following their conclusion. In other words, if the Court of Protection has decided (say) that P should reside in a particular location, does that decision hold for all time or are there circumstances under which relevant professionals can take a fresh best interests decision without recourse to the court? A case recently decided in Scotland emphasises, by analogy, the need for caution on the part of professionals before acting in a way inconsistent with the terms of a Court order. We report the case here, rather than in our Scottish section, because it is of equal importance for practitioners in England.

In summary, the Court in public law children proceedings set in place particular contact arrangements between mother and children. The relevant team leader for the Council social services team disagreed with the decision of the Court, believing that it had reached the wrong decision about what was in the best interests of the children (and aggrieved that she had not been called to give evidence about the children's circumstances). Although it would appear that the arrangements were initially complied with, the team leader then took the decision to terminate the contact; whilst further hearings took place, they took place in ignorance of the change in arrangements. The matter was finally

brought to the attention of the Court by solicitors acting on behalf of the mother and contempt proceedings were issued. The team leader and her manager (CM and GL) admitted not complying with the terms of the order, but denied that such amounted to contempt. Sheriff Mackie held that their actions amounted to contempt; in so doing she made the following remarks which are of wider application:

[116]. During the course of his initial explanation of the actings of CM and GL Mr Ellis described a situation where a social worker would not comply with an order of the court or Children's Hearing as "not uncommon". As an experienced Advocate of some standing I am satisfied that Mr Ellis would have chosen his words carefully following receipt of full instructions. However CM and GL did not accept that description in their evidence. It was accepted that such a situation was not "unheard of". Whether there is any material difference between the expressions may be a moot point. There is anecdotal evidence to suggest that it may occur more frequently than even GL was prepared to acknowledge. It must be emphasised, however, that social workers are in no different a position from anyone else and require to comply with orders of the court, Children's Hearings and the general law. They have no authority to act unilaterally however strongly held their views may be. Given the situations that children and families social workers can face at times, it may be that it cannot be said that there could never be an extreme situation when a social worker may believe it unsafe to comply with a legal requirement. There may be an occasion when to comply would place a child at immediate risk of serious harm to life or limb. However, in my opinion, in order to maintain a fair and proportionate system it is necessary to ensure that if there is a proposal to act in conflict with an existing order it must be scrutinised and reviewed by an appropriate body at the earliest opportunity...."

With the benefit of hindsight, this situation (which may well ring bells with those involved in welfare proceedings before the Court of Protection) could perhaps have been avoided in three ways: (1) by seeking to persuade the Court initially that any order made had to provide flexibility for suspension in the event of (appropriate) social work concern; (2) by the Council appealing the initial decision; or (3) the Council taking immediate steps to bring the matter back to Court in light of the concerns expressed by the social workers. It is perhaps not surprising that the Sheriff was unimpressed that the social workers took matters into their own hands (although her decision has troubled [UNISON](#)). In the English context, we would suggest, further, that an analogy can be drawn with the position that prevails in respect of decisions taken by Mental Health Tribunals. In other words, there can only be grounds to proceed other than in strict accordance with the decision of the Court of Protection if the social workers or clinicians in question reasonably and in good faith consider that they have information unknown to the court “*which put a significantly differently complexion on the case as compared with that before the [court]*” (*R (Von Brandenburg) v East London and City NHS Trust* [2004] 2 AC 280 at paragraph 10 per Lord Bingham). Otherwise, the appropriate course of action is either to seek to appeal the original order or to take urgent steps to return the matter to Court for it to be varied.

Challenges to determination of lack of capacity to litigate

John Hemming MP recently presented a [petition](#) to the House of Commons on behalf of a Ms Sarah Matthews, seeking an investigation by the Justice Committee into the procedures that are used to remove capacity in the English and Welsh courts and calling for the provision of independent legal assistance for those people who wish to resist the removal of their capacity.

It would appear from the limited facts contained within the petition that the circumstances did not concern the Court of Protection. However, it does give us occasion to note – again – a real

oddity within the Court of Protection Rules 2007:

1. If P is a party to proceedings, then they must have a litigation friend (COPR r.141);
2. The COPR specifically provide that P *themselves* can make an application for an order discharging the litigation friend acting on their behalf (COPR r147(3)(a)). This is an important safeguard for a ‘P’ who wishes to dispute that he lacks capacity to make the relevant decision(s) and/or to litigate;
3. However, the structure of COPR r 141 and 147, in effect, require P to prove that he or she *does* have capacity (i.e. a reversal of the normal presumption of capacity). The difficulties that this poses are particularly acute in light of the requirement for evidence of capacity to be provided with the application (by paragraph 20 of Practice Direction 17A).

The Review Committee set up to consider the operation of the COPR [recommended](#) in 2010 that COPR r141 be reconsidered. Unfortunately, whilst the recommendation was accepted by the then-President of the Family Division, no further steps have been taken to implement it.

Pending any review of COPR r141, it is suggested that, in a case where P wishes to challenge the appointment of a litigation friend on the basis that they assert that they have litigation capacity, P can properly in their application for an order for discharge: (1) raise any difficulties that they have encountered in obtaining evidence in support of that assertion; (2) pray in aid the presumption of capacity; and (3) seek urgent directions from the court for the resolution of the question of their litigation capacity before any further steps are taken in the litigation.

Update on House of Lords Select Committee on the Mental Capacity Act 2005

Following on from our previous updates on the work of the House of Lords Committee, we have summarised the final oral evidence session, held on 3 December 2013. The Committee has also

published the written submissions it received, contained in two volumes: [A-K](#) and [L-W](#). Readers may be particularly interested in the detailed statistical analysis of the Court of Protection's functioning set out in the annexes to the written evidence submitted by Mr Justice Charles. For instance, of the 24,586 applications received by the Court of Protection in 2012/13, only 1570 (or 6.38%) led to a hearing taking place and only 1271 (or 5.17%) were health and welfare applications. The median waiting time for determining uncontested applications as at June 2013 was 11.1 weeks.

The Committee's reporting deadline is 28 February 2014, so we will hopefully bring you a summary of its recommendations in the not-too-distant future. Further information about the Committee's work is available [here](#).

3 December 2013

On 3 December 2013, the Committee heard evidence from:

- Lord McNally, Minister of State for Justice, Ministry of Justice³
- Norman Lamb MP, Minister of State for Care and Support, Department of Health

The uncorrected transcript of their oral evidence is available [here](#).

Success of the MCA 2005

The first witnesses to appear when the Committee held its first oral evidence sessions were officials from the Ministers' respective departments. They claimed that the MCA 2005 had been a success. The Committee Chairman began by asking the Ministers whether they had revised this assessment, as the Committee had

heard a lot of evidence since then to suggest that the Act is not used or understood as widely as it should be, that the expected culture change is not widely in evidence and there are significant concerns about non-compliance. Lord McNally said that stage one, getting the legislation onto the statute book, was a great success. Stage two is making sure that the Act is implemented fully and understood, and that those whom it serves and those who provide the service all understand fully its implications. He accepted that this is work in progress and expressed the hope that the Committee's work will help with this.

Lord McNally also agreed that part of making the Act work is to achieve a profound change in the culture of dealing with these matters. As examples of the work that is being done in this regard, Lord McNally noted that the Office of the Public Guardian is working with the Law Society to develop practice notes relating to the Act and his department is in contact with third-sector organisations such as the Alzheimer's Society to help with the dissemination of the Act. Efforts are also being made to raise public awareness. In terms of changes, Lord McNally said consideration was being given to whether the Public Guardian needed more powers to enhance his ability to investigate allegations of wrongdoing.

Norman Lamb MP described the MCA 2005 as brilliant visionary legislation. He said that a lot had been done but we should not be complacent. He said that he was conscious that Winterbourne View uncovered that there were so many people wrongly and inappropriately in institutional care - people who are capable of living independently with support - and that this demonstrated to him how far we have to go in implementing what the whole thrust of what the Act is about. He was unable to give a timescale for achieving cultural change but said that when he came to office and was briefed on the Winterbourne View situation and the number of people in institutional care, he formed the view it was a national imperative to tackle this with a sense of absolute urgency.

Mental Capacity Act steering group

The Minister for Health was asked to explain the

³ Lord McNally ceased to be the Minister of State with effect from 18 December 2013. There is no longer such a position.

rationale behind the establishment of the new Mental Capacity Act steering group and to comment on whether the apparent exclusion of service users and their families and carers was a deliberate choice. Baroness Andrews noted that the existence of the steering group was uncovered during evidence and came as somewhat of a surprise to the Committee. Norman Lamb MP said it would be ridiculous not to engage very thoroughly with users of services and their families and he thought that now, as a result of the Committee's intervention, the steering group will hold proper sessions with users.

Culture of change

In response to a question about how a culture of change can be implemented and measured, Norman Lamb MP said that one thing he will focus on quickly is the Care Quality Commission, which is appointing a Deputy Chief Inspector to cover mental health and has announced details of the inspection regime for mental health facilities. He went on to say he is very open to ideas of what more can be done to gain a better understanding of the Act and, critically, to apply pressure on the system to change the culture.

Deprivation of liberty and addressing the Bournewood Gap

The Ministers were asked whether they believed that there is still a Bournewood Gap to be filled, given that this was recognised at the time the MCA 2005 was introduced. Norman Lamb MP asked to be reminded of what was meant by the Bournewood Gap and said that he would respond to this important question by way of a written note to the Committee.

In response to a question about whether the Government plans to extend the DOLs scheme to supported living accommodation or arrangements, Norman Lamb MP noted that the current DOLs scheme applies to hospitals, care homes and nursing homes but not to other settings, where it is a question of going to the Court of Protection. He said there is no plan now to extend DOLs to cover the other settings but that he was absolutely happy to keep this under

review.

Protection against financial and other forms of abuse

The Ministers were asked about the ability of s.44 MCA 2005 to adequately protect individuals against abuse, as a number of other people had commented that it was deficient for this purpose. Lord McNally said that, overall, he was satisfied that s.44 enables people to be protected in financial terms, but he was willing to explore further with the Crown Prosecution Service whether there are significant issues with the requirement for assessment of mental capacity that might affect how this section of the Act is being used. He described section 58(1)(h) of the MCA 2005, which provides the Public Guardian with powers to deal with complaints against deputies and attorneys, as rather passive power and said he was looking at whether the Public Guardian should have the power to be more proactive. He said that there were 122 convictions under section 44 up to April 2012 and the Fraud Act 2006 has been used successfully to prosecute deputies and attorneys. Some 549 deputies and attorneys have been removed by the Office of the Public Guardian since 2008 and the Crown Prosecution Service has produced guidance on how to deal with crimes against older people, including those who may lack capacity.

Code of Practice

The Ministers were asked whether a further revision of the code of practice would be helpful in attempting to embed the provisions of the Act more firmly. Norman Lamb MP said that you can get the code and legislation absolutely right on paper but that does not necessarily mean that it happens on the ground and changes people's lives, so at this stage it is more about how you hold organisations to account. He referred to the intention to allow the CQC to prosecute for serious breaches of fundamental standards. When pressed for a definitive answer as to whether the code of practice will be updated, Lord McNally said that it was most likely that the code of practice would be updated but that this is a work in progress and he was unable to give a

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firm date for when it would be ready, noting that the department had suffered 25% cuts since 2010 and has already lost some 20,000 staff.

Mediation

Norman Lamb MP said that he strongly supported mediation as an option but was not sure this should be forced, as this might introduce another delay in getting cases before the Court of Protection. He commented that mediation is, on the whole, cheaper than formal court proceedings so there is a reasonable prospect of the NHS and local authorities funding and resourcing this. Lord McNally said that he was an absolute enthusiast for the use of mediation in all parts of the justice system and the Office of the Public Guardian is currently piloting the use of a mediation service, which it is funding itself. He warned that, whatever the mediator comes up with, the Court of Protection remains the final arbiter.

Court of Protection Rules

The Ministers were asked to explain what is preventing the implementation of the ad hoc Court of Protection rules committee from 2010. Lord McNally said that a key recommendation, the introduction of the authorised court officer, was implemented in 2011. The remaining changes would require a major overhaul of the Court of Protection rules. Given the pressure on resources, the recommendation on the role of the court officers was prioritised and priority has also been given to the work of transforming the services of the Office of the Public Guardian. Lord McNally said he has discussed this issue with Sir James Munby, the current President of the Family Division, and believes that Sir James is now looking very carefully at this matter. Sir James may come to conclusions that will bring forward a review of court rules, practices and procedures in 2014. However, Lord McNally was not sure that parliamentary time would be found for primary legislation so priority would be given to what can be achieved without legislation.

Transparency

Lord McNally was asked about secrecy in the Court of Protection and said that he believed that

transparency is the best disinfectant against abuse by people in power. He said that he hesitates when it comes to the Court of Protection, because it deals with vulnerable people under extremely stressful conditions, and press reports in the last few days had showed that the media can handle such matters in a sensational way, not letting facts get in the way of a good story. He said that he is a small “c” conservative on how transparent the Court of Protection should be, but Sir James Munby is more confident and determined to find ways of making the court more open, more transparent and more accountable, while still taking on that protection of the vulnerable. Lord McNally expressed great admiration and confidence in Sir James.

Delays in the Court of Protection

Lord McNally was also asked about the backlog and delays in the Court of Protection as a result of the increase in its workload and corresponding decrease in staff resources. He said that it has been a fact of life for the last few years that public servants have been asked constantly to do more with less. He said that it was an urgent work in progress to get some of the less contentious work done by officers of the court and more judges qualified to sit in the court. The Crime and Courts Act 2013 will increase the pool of judges who can be deployed and makes provision for deputies and Upper Tribunal judges to sit in the Court of Protection.

Legal aid and deprivation of liberty

The Chairman asked Lord McNally for an explanation of why there is a non-means-tested legal aid if you are subject to a DOLS but this is removed if, in the course of the proceedings, the DoLS expires and the court exercises its supervisory jurisdiction. Lord McNally said that Government and Parliament decided that non-means-tested legal aid representation should be available to enable a person to challenge an authorisation to detain them under Schedule A1 to the Act. The reason for this policy is that such cases are regarded as a particularly strong example of state intervention involving the human rights of a vulnerable individual. Other

Mental Capacity Act matters - that is, not proceedings under Section 21A - that are within the scope of civil legal aid are subject to means tests, including cases involving medical treatment, welfare issues and other best-interest decisions. Lord McNally said it was intended that the application of legal aid would be layered in a way that gave absolute access when it was a question of liberty and then to phase it out with what was considered to be less essential issues.

Compliance with the UNCRPD

Finally, Lord McNally confirmed that he would provide the Committee with a copy of the review of whether the MCA 2005 is compliant with the United Nations Convention on the Rights of People with Disabilities when it was received, but was unable to give an expected date for this.

Subsequent written evidence: Norman Lamb MP

As indicated above, the two Ministers undertook to give supplementary written answers in respect of a number of questions posed. Norman Lamb MP returned to the question of the Bournewood Gap and indicated that he considered that the Gap had been filled, whilst accepting that remained issues of awareness and appropriate use of the DoLS, and that not all care homes and hospitals understand fully when the DoLS should be used. He accepted that further work is needed in this area. He indicated that he did not consider that there was a gap in relation to supported living, as an application could be made to the CoP for an authorisation. Whilst he indicated that this might be revisited in future, for the moment he was content that local authorities continued to seek authorisations from the CoP. Again, there was no gap in the circumstances identified in the *Dr A* case because the High Court could authorise the deprivation of liberty under its inherent jurisdiction.

Norman Lamb MP also re-emphasised the need to ensure that the empowerment message is as well understood as the safeguarding one.

Subsequent written evidence: Lord McNally

Lord McNally gave further information in relation to

the mediation pilot and the nature of offences prosecuted under s.44 MCA 2005 and those under the Fraud Act 2006. There was a dearth of statistical evidence provided in relation to the latter, but more details emerged of the mediation pilot. This is being run from January 2014 by Browne Jacobson solicitors, selected by the OPG, to see whether an in-house mediation service is a feasible option. The pilot will cover 15-20 cases selected by the OPG, primarily relating to property and affairs matters; it will be free to participants and will take place by telephone. Browne Jacobson will report to the OPG with recommendations by April 2014.

New guidance on prolonged disorders of consciousness

The long-awaited Royal College of Physicians national clinical guidelines on Prolonged Disorders of Consciousness (PDOC) were [published](#) in December. They update guidance dating from 2003, and are accompanied by various guides for family and friends and a template Advance Decision to refuse life-sustaining treatment.

Particular points of interest are as follows:

1. There are a number of changes in terminology. Artificial nutrition and hydration (ANH) is now known as clinically assisted nutrition and hydration (CANH). More significantly, coma, vegetative state and minimally conscious state are all grouped under the heading 'prolonged disorders of consciousness' (PDOC). This is not just stylistic but appears to reflect the lack of clear clinical boundaries between the various classifications, which has its own implications for the continued application of the analyses relied on in *Bland*. There is a distinction drawn between "continuing" VS or MCS, and "permanent" VS or MCS. There are different timescales for the classification of permanent VS according to the cause of injury – 6 months in a VS where the cause is anoxic or other metabolic brain injury, and 1 year following traumatic brain injury. The guidance notes that further targeted monitoring may be

required in cases of genuine clinical uncertainty. No definition is given of permanent MCS due to lack of data, but various pointers are identified, concerning patients who have been in continuing MCS for 3-5 years or more with no demonstrable improvement.

2. The guidance recommends the use of three instruments for structured assessment – the familiar SMART and WHIM tools, and the JFK Coma Recovery Scale – Revised. The guidance sets out a protocol for assessment, decision-making and review, which will assist in meeting the court's requirement that the classification (whether VS or MCS) be known before applications to withdraw CANH are made, and should promote the chances of a swifter resolution where the court's input is required. This includes a formal best interests meeting being held within 4 weeks after the onset of PDOC.
3. The guidance states that for a patient in a permanent VS, it is "necessary to consider" withdrawal of all life-sustaining treatments. This, together with the protocol for assessment and best interests decision-making may result in an increase in applications to the court, as the question of withdrawal must be expressly confronted. It is of interest that the guidance does not state clearly that it must be in the best interests of a patient in a permanent VS not to receive CANH. This is the reading of *Bland* that appears to have been accepted in *Aintree*, in which Baroness Hale cites Lord Goff's analysis that for a patient in PVS, life-sustaining treatment "*is futile because the patient is unconscious and there is no prospect of any improvement in his condition*" and says that there is no balancing exercise to be conducted in such cases, a point which the guidance recognises. Perhaps the reluctance to spell out the necessary implications of this analysis is borne out of a wish to minimise distress to families, and a recognition of the practical reality that there are patients in permanent VS who have continued to receive CANH either through self-funded care or NHS care for long periods of time, and it would be a brave Trust that applied to the court for declarations in

such cases, or in the face of strong objections from a family. There remains an interesting question as to whether even futile treatment such as CANH may lawfully be provided to someone in a permanent VS in that person's best interests if it is what s/he would have chosen, and there is a clinician willing to administer it, and the RCP guidance seems to have left this door open for further debate.

4. The guidance recommends that NHS commissioning bodies should bring proceedings to seek declarations as to the withdrawal of CANH rather than requiring family members to take that responsibility, and notes that applications must be made where there is a dispute as to best interests, where there is a consensus that CANH should be withdrawn, and where there is evidence that a patient in MCS would not have wanted to continue to receive life-sustaining treatment. It is possible that this advice will result in an increase in applications to the court in respect of MCS patients.

Legal aid and incapacity

The Civil Legal (Remuneration) Amendment Regulations 2013 (SI 2013 No. 2877) came into force on 2 December 2013, substantially cutting legal aid rates for Counsel acting in - *inter alia* - Court of Protection cases. This is not the place for polemics, but we make the prediction that those who most require advice and assistance of Counsel truly specialist in the area will find it substantially more difficult to do so at the end of 2014 than they did at the end of 2013.

In a not-unrelated development, the Human Rights Joint Committee of the Houses of Parliament has delivered a withering [report](#) upon the implications for access to justice of a number of the MOJ's proposals to further reduce legal aid funding. Paragraphs 116-124 of the Report make essential reading, but for reasons of space we reproduce only the Committee's conclusions:

"122. We are concerned about access to legal aid for the small group of individuals who are protected parties pursuant to the Mental Capacity Act

2005. This group, while small, has an obvious need for legal representation; given that its members are prohibited from litigating in person, any right of access to justice cannot be practically and effectively exercised if (subject to means and merits) they are denied legal aid. We do not think that the residence test can be justified in its application to this group.

123. We do not accept the Lord Chancellor's response on this issue. The response does not take sufficient account of the obstacles already faced by litigants lacking mental capacity, as explained by the Official Solicitor in his evidence. If protected parties fail the residence test, they are prohibited from appearing before the Court as a litigant in person. To refuse funding to a protected party would mean that they could not litigate, there would be no need to assess whether their access was practical or effective, as they would have no access to the court whatsoever.

124. We do not consider that the exceptional funding scheme, even if it were operating correctly (a question we consider below), could appropriately satisfy the needs of those who are protected parties pursuant to the Mental Capacity Act 2005 because, as the Official Solicitor made clear in his evidence to us, the discretionary nature of the scheme is not a sufficient safeguard to meet the concern about the position of those with impaired mental capacity, who cannot gain access to justice in any other way.”
(emphasis in original)

Consultation on civil court fees proposes sweeping changes to CoP fee structure

In a consultation closing on 21 January, the Ministry of Justice is proposing significant reforms to the costs structures in civil courts, including

the Court of Protection, with a view to making all civil courts pay their own way. The MoJ is consulting on proposed changes whose purpose is that “those using the civil court system would, in future, be expected to meet the cost of the service where they can afford to do so, and for certain types of proceeding would be expected to contribute more than the cost. Fee remissions will continue to be provided for those who qualify, so that access to justice is not denied” (consultation proposal paragraph 7).

The proposals relating to the Court of Protection are sweeping, including the introduction of a fee for the making of applications within proceedings and the introduction of a fee for an application to object to the registration of a LPA or EPA. We set out the detail of the proposals in full below, and would urge readers to respond to the online consultation which is available [here](#):

“Court of Protection

107. The Court of Protection is a specialist court which makes specific decisions, or appoints other people to make decisions, on behalf of people who lack the capacity to do so for themselves.

108. Current fees are set out in the Court of Protection Fees Order. Two main fees are currently charged: one of £400 to file an application for an appeal, and one of £500 for a hearing. Hearing and appeal fees broadly achieve full-cost recovery; therefore, the government proposes to maintain them at their current level.

109. However, unlike all other court fees, the hearing fee in the Court of Protection is charged at the end of proceedings. This can make the fee difficult to collect after proceedings have concluded. In other courts, the fee is collected before the hearing. The government therefore proposes to move the point at which the hearing fee in the Court of Protection is charged to before the hearing.

110. The government also wishes to revise the fee-charging structure for

application fees to better reflect the two distinct categories of application which can be made: simple and complex. Many simple applications - for example, applications to appoint a deputy for property and affairs - are dealt with by authorised court officers (appointed civil servants), whilst complex applications - for example, those involving health and welfare - are, given their complex nature, dealt with by judges. The difference in complexity means that these two processes consume different levels of resource and therefore incur different costs.

111. Therefore, in-keeping with the proposals for cost recovery outlined in this consultation paper, the government proposes to introduce two application fees which will recover the full cost of these processes: a lower fee of £220 for a simple application and the current fee of £400 for all other applications.

112. Furthermore, there are some procedures in the Court of Protection for which no fee is currently charged. One such process is applications within proceedings (made under Part 10 of the Court of Protection Rules 2007), for which the government proposes to introduce the general application fees outlined at paragraphs 83 to 87 above [i.e. £150 for general applications made on notice and £50 for those made by consent or without notice]. This would bring the Court of Protection in line with other jurisdictions where a fee is already charged for applications made within proceedings, and would also contribute to the government's cost recovery plan.

113. The government also proposes to introduce a fee for applications to the

Court of Protection objecting to the registration of Enduring or Lasting Powers of Attorney. The fee proposed is £400, which is the same as for a complex application."

App to assist with MCA 2005/MHA 1983 decision-making in medical setting

With thanks to Imperial College NHS Healthcare Trust for permission to share this, we note with interest an excellent [app](#) that they have recently developed to assist with decision-making under the MCA 2005 and the MHA 1983 in the acute setting. This is a really good example of how the innovative use of technology can assist by guiding front-line staff to ask the right questions in the right order. We would point out, though, before Imperial are deluged, that the function of the app that relates to bringing about liaison psychiatry referrals is only intended for Imperial staff!

Can an intervention order be granted for purposes of executing a will?

Application by Adrian Douglas Ward (Sheriff Principal
B A Kerr)

Summary and Comment

This [decision](#) dated 17 December 2013 is the first appeal decision in Scotland on what in England is termed statutory will-making, a term not appropriate in Scotland because there is no express procedure there for that purpose. A practice has been developed of sheriffs at first instance occasionally authorising execution of documents with testamentary effect for an adult with impairments of capacity in an intervention or guardianship order under Part 6 of the Adults with Incapacity (Scotland) Act 2000.

John Kerrigan concluded his article “Estate Planning and the Adults with Incapacity (Scotland) Act 2000”, 2013 SLT (News) page 39, in which he reviewed such cases to date, with the comments: *“The author awaits with interest what might be seen by some as a step too far – an intervention order seeking the authority of the court to grant a wholly new Will for an incapax adult who has never made a Will”*; followed by the concluding sentence: *“We live in interesting times”*. It is unsurprising that emails between John and Adrian preceding the hearing of this case were headed *“Interesting times”*. In this case the adult had never made a Will. If he were to die intestate, his estate would pass to the children of a deceased cousin. He repeatedly told Adrian, the applicant in this case, that he did not wish them to inherit. The applicant discussed with him who should inherit. He prepared a Will. The adult repeatedly declined to execute it. The medical evidence submitted with the application confirmed that the adult’s mental disorder blocked him from acting decisively. This prevented him from committing to the terms of the Will which had been drafted, and executing it.

The applicant submitted an application for an intervention order to Paisley Sheriff Court.

Various other powers sought in the order were granted. Authority for the applicant to execute the Will on behalf of the adult was refused. The applicant appealed to the Sheriff Principal. The Sheriff Principal allowed the appeal. He recalled an Interlocutor of 5th September 2013 which refused the crave for power to execute the Will. He remitted the case back to the sheriff to hear proof in accordance with requirements suggested by the Sheriff Principal in the Note appended to his Judgment.

No party lodged written Answers. At the hearing before the sheriff the applicant was requested by the sheriff to address the court on the competence of the court granting the authority sought, and did so. A solicitor representing the local authority made a brief submission. A mental health officer addressed the court, stating her opinion that the adult did not have capacity to instruct the applicant regarding making a Will. The application quoted an earlier written opinion from the Chief Executive of the Mental Welfare Commission for Scotland that the adult not only had capacity to instruct a solicitor but (in the circumstances then pertaining) ought to do so, though this was not in the context of making a Will.

There was no contradicitor at the hearing before the Sheriff Principal. The applicant’s submissions related principally to the questions of the competence of seeking authority by way of intervention order to execute a Will for an adult; if that were competent, the criteria which the court should apply in deciding the matter; and the application of those criteria to the facts before the sheriff. On the first point, the applicant argued that such an application was competent. On the second, he argued that the matter ought to be determined by reference to the principles in section 1 of the 2000 Act, and in particular whether the outcome to be achieved by execution of the Will would accord with the wishes and feelings of the adult and thus be of benefit to the adult, rather than by reference to the criterion adopted by the sheriff, namely whether the adult had capacity to instruct the Will. With reference to the benefit test, the applicant argued that there was greater benefit to the adult in permitting execution of the Will

than in the alternative of allowing the adult's estate to pass according to the rules of intestacy. He drew attention to the view of the Scottish Law Commission that the rules of intestacy were not a recommended or preferred option, but merely a "fall-back" arrangement requiring a person to grant a Will if intestacy would not produce a desired outcome. On the third point the applicant argued that if the correct test was the capacity of the adult to instruct the applicant (which the applicant did not accept), then the sheriff erred in basing his decision upon the submission of the mental health officer.

The Sheriff Principal held that the application was competent; that for it to succeed there required to be evidence of testamentary capacity and the expression of a testamentary intention; but that on the facts of the case an evidential hearing was required to determine whether the adult had had the requisite testamentary capacity and expressed the requisite intention. It is implicit in the Sheriff Principal's decision that he recognised the possibility that the adult might have capacity for some of the elements of the process of making a Will but not for others – because otherwise the court's jurisdiction under the 2000 Act would not have been available at all, and indeed upon the information before the court the adult would have executed a Will and rendered procedure under the 2000 Act unnecessary. It is to be anticipated that this approach will give support to the views expressed by Adrian in Chapter 15 ("Constructing Decisions") of his book Adult Incapacity – though not explicitly referred to in the Judgment – that when a decision comprising several elements requires to be made, competent decisions by the adult in relation to even a few of those elements ought to be decisive, and the decision as a whole constructed on that basis.

The Sheriff Principal criticised the procedure adopted by the sheriff and held that "*The sheriff was incorrect in determining the question before him solely (or almost solely) by reference to an oral submission made to him by a mental health officer at the bar of the court*". It is to be hoped that this element of the Sheriff Principal's Judgment will encourage greater clarity in future in proceedings under the Incapacity Act,

particularly as to whether the sheriff is hearing submissions or taking evidence. The lack of clarity over that in the present case caused the Sheriff Principal to refer to the mental health officer's "utterances".

The Sheriff Principal concluded his Judgment by holding that "*In order to justify the granting of an intervention order such as that sought here by the Pursuer the court has to be satisfied on appropriate evidence that the WI adult had testamentary capacity when he expressed a testamentary intention which remains the same at the time of granting that order*". It remains to be seen whether another Sheriff Principal, or the Court of Session on further appeal, might take a different view where the evidence before the court constituted a strong and clear expression of wishes and feelings which would support the granting of such an order in changed circumstances which arose only after the adult lost capacity; or in some other situation where the section 1 principles of the Act clearly pointed towards the granting of such an order where an adult had never had testamentary capacity, or had never addressed circumstances which in fact had arisen at a time when the adult had testamentary capacity. The very first words of the 2000 Act stipulate that the section 1 principles "*shall be given effect to in relation to any intervention in the affairs of an adult under or in pursuance of this Act, including any order made in or for the purpose of any proceedings under this Act or for or in connection with an adult*". The competence of rejecting that test in favour of another proposed by the court is perhaps open to question.

Like many before him, the Sheriff Principal wrestled with terminology and coined "WI" (With Incapacity) as used in the quotation above. He was invited to comment upon a timescale in which the application had been submitted to the sheriff clerk on 28th March 2013 and not warranted until 5th July 2013. He declined to criticise the delay.

Assisted Suicide (Scotland) Bill

The [Assisted Suicide \(Scotland\) Bill](#), a Member's Bill, was introduced by MSP Margo MacDonald into the Scottish Parliament on 13 November 2013, and follows the previously failed End of Life Assistance (Scotland) Bill 2010 also introduced by Margo MacDonald. At the time of writing, the current Bill is at Stage 1 of the legislative process (see Scottish Parliament, [Understanding the Legislative Process](#), for information on the legislative process in the Scottish Parliament).⁴

Whilst, as is the case elsewhere in the UK, suicide and attempted suicide are not illegal in Scotland it would appear that the encouragement or assisting in someone's suicide may result in a criminal conviction, for example, for homicide or assault. It is in the discretion of the Crown Office and Procurator Fiscal Service whether or not to prosecute those assisting suicide and there are currently no guidelines such as those issued by the DPP for England and Wales following the House of Lords ruling in *R(on the application of Purdy) v DPP* [2000] UKHL 45. The Bill therefore seeks to address this.

It is not proposed to enter into a detailed discussion of the important moral and ethical arguments supporting and against the introduction of assisted suicide legislation, existing case law and history behind the Bill here. Its content will, however, be briefly considered particularly regarding areas of potential concern.

Content of the Bill and its safeguards

The Policy Memorandum accompanying the Bill essentially states that the Bill is to provide legal certainty for those wishing to avail themselves of assistance to end their life whilst at the same

time endeavouring to balance respect for an autonomous decision to end one's life with safeguards for vulnerable persons. To this end, it proposes to legalise assisted suicide (or attempted assisted suicide). This is actively assisting in the death of another person such death being the consequence of the deliberate act of such other person and specifically not euthanasia (s.18). It goes beyond requests to withdraw treatment or not to treat which, provided made by a person with capacity, are lawful protects those who assist suicide within the context of the proposed legislation from criminal and civil liability (ss1, 2 and 24).

Whilst it is strongly advised that the Bill itself is referred to for more specific detail (see the link provided above), its salient elements are as follows:-

1. It provides for a three step process allowing a person who is at least 16 years old and registered as a patient with a medical practice in Scotland at the time to make:
 - a. A preliminary declaration in which they indicate that they have an interest in seeking assistance to commit suicide. This can be either in relation to an existing condition or illness (as identified by the legislation) or in the event that they should later be subject to such condition or illness (ss4-7).
 - b. The declaration must be in a prescribed form (found in Schedule 1) and witnessed by a "qualified" witness not being a close family member, someone with a financial relationship to the person making the declaration or involved in the medical or nursing care of that person in relation to that condition or illness (s.4(2) and Schedule 4). A registered medical practitioner must endorse the declaration which must be recorded in the person's medical notes at the practice where they are registered (s.5).
 - c. The person may then make a "first request" (at least 7 days after the preliminary declaration) and then a

⁴ This note is prepared by Jill; the views expressed herein are not necessarily shared by all other members of the contributor team.

"second request"(at least 14 days after the first request) (ss8-11) for assistance. Such requests must be in a prescribed form (found in Schedules 2 and 3) and state that, after reflection, their quality of life is unacceptable on the basis that they suffer either from a terminal or life-shortening illness or a progressive and either terminal or life-a terminal or life-shortening illness or a progressive and either terminal or life-shortening condition and see no prospect of improvement in the quality of their life (ss.8(3)-(5) and 9(3)-(5)). Both requests must each be endorsed by two registered medical practitioners who must also confirm these facts and that the person has capacity (ss.9(2) and 11(2)).

2. In terms of capacity to make the first and second requests, s.12 states that the person will be considered to possess the requisite capacity if they:

- a. Do not have a mental disorder within the meaning of s.328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act) which might affect the making of a request; or
- b. do not lack capacity (such lack of capacity being assessed in a manner similar to that specified under s.1(6) of the Adults with Incapacity (Scotland) Act 2000 although for some reason the drafters of the Bill saw fit to make no specific reference to the 2000 Act by way of assurance of consistency here).

What is clear, however, is that should a person lose capacity or whose decision to end their life by suicide is affected by their mental disorder at any time before the second request for assistance is validly made and recorded then the process is stopped and the assisted suicide cannot take place.

3. The act of suicide must take place within 14 days of the second request for assistance (s.17). However, although the Policy Memorandum refers (para 38) to it being

"envisaged" that a GP will supply the drugs necessary to end the person's life there is no specific mention in the Bill itself of what assisting the suicide will actually entail.

4. There is reference to independent licensed facilitators (ss.17-23) who are to be trained and licensed to provide assistance to persons wishing to end their own lives. However, again there is a lack of clarity here as to the precise role they will play in the suicide itself.

Moreover, they will function and be regulated in accordance with regulations, directions and guidance made by the Scottish Ministers. The content of these is not known at this stage but given the gravity of the consequences of assisted suicide it would be entirely reasonable to expect that such functioning and regulation should be dealt with by way of primary, rather than secondary, legislation.

5. There is also provision for proxies to sign the preliminary declarations and first and/or second request for assistance on behalf of the person where they are blind, unable to read or sign provided the proxy is satisfied that the person understands the effect of the document to be signed (s.16). Such proxies are specified as being solicitors, advocates, Justices of the Peace and notary publics (or their equivalent) not being those included in the list of prohibited from being qualified witnesses.

Human rights considerations

All devolved legislation enacted in Scotland must be ECHR compliant and be implemented in accordance with ECHR rights (ss29(2)(d) and 57(2) Scotland Act 1998 and s, 2,3 and 6 Human Rights Act 1998).

The European Court of Human Rights has indicated that Article 8(1) (right to private and family life) may be engaged where an individual is seeking assistance with their suicide and that certainty of process is required for compliance with it. However, it has not ruled that a right to end one's life can be implied into the right to life in Article 2. It has also shied away from the issue

of whether or not a failure to enact legislation permitting assisted suicide is a violation of one's right to autonomy under Article 8(1) or that to enact such legislation is in fact unlawful (see *Pretty v UK [2002] ECHR 423*, *Koch v Germany (2013) 56 EHRR 6*, *Haas v Switzerland (2013) 53 EHRR 33* and *Gross v Switzerland (Application no. 6710/10) [2013] ECHR 429* (note, however, that this case was referred to the Grand Chamber in October 2013) for greater detail).

The Bill will not therefore be remedying a violation of ECHR rights in terms of providing for lawful assisted suicide. Whether it will ultimately provide the clarity of process required by Strasbourg also remains to be seen.

Areas of concern

Whilst the Bill does contain a number of protective safeguards, there nevertheless remain a number of areas of concern. For instance:-

1. Safeguarding against undue influence

The Bill goes to some lengths to remove from the equation those with a potential vested interest in the death of the person who might bring pressure to bear on them to end their life. However, it is impossible to completely safeguard against all forms of undue influence, particularly where subtly applied to vulnerable persons. Indeed, this must be an ever present concern with legislation of this nature despite the best intentions of the legislators.

2. Assessments of capacity

There will clearly be a need for robust assessments of capacity by registered medical practitioners endorsing the preliminary declarations, first and second requests for assistance and of understanding of the consequences of signing the documentation by proxies. However, as drafted, the Bill presents a number of difficulties in this respect:

- a. There is no requirement that any registered medical practitioners endorsing the first and second requests is from the practice where the person is registered. Individuals must be

protected from unscrupulous doctors but will the possible absence of a practitioner who may have more complete knowledge of their patient, militate against accurate capacity assessment, particularly in cases where a person may have fluctuating capacity or be subject to undue influence from others?

- b. The same comment concerning better patient knowledge can be made in relation to the fact that the Bill only requires that the person is registered with a medical practitioner in Scotland. It does not stipulate a minimum length of time for such registration;
- c. s.12 of the Bill states that a person will be deemed to possess capacity where they do not have a mental disorder within the meaning of s.328 of the 2003 Act which might affect the making of a request. However, it is not inconceivable that a person who has a mental disorder as defined as by the 2003 Act may also be subject to its compulsory measures. Whilst it is possibly unlikely that such an individual would be deemed to possess the necessary capacity to make a first or second request it nevertheless needs to be resolved which legislation will prevail in such circumstances.
- d. It is also worth mentioning the Bill's provisions should to be considered in light of extreme interpretations of the UN Convention on the Rights of Persons with Disabilities – including, apparently, that of the Conventions implementation body, the Committee on the Rights of Persons with Disabilities, in its recent *Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law*. In essence, such interpretation advocates no removal of legal capacity on the basis of disability, strongly promotes supported (not substituted) decision making (and the removal, therefore, of guardianship) and the abolition of laws providing for the compulsory treatment of mental disorder. The UK is bound under international law to comply, as a state party, with its obligation to protect and promote the rights identified in the CRPD. If this radical approach is to be strictly adhered to then it does beg the question of how best

to protect vulnerable individuals in light of the type of legislation this Bill proposes.

Conclusion

Wherever one stands on the issue of the legalisation of assisted suicide, it is suggested that the above issues have yet to be adequately addressed before an acceptable level of procedural clarity, respect for autonomy and necessary safeguards can be reached.

Edinburgh Napier University's Centre for Mental Health and Incapacity Law, Rights and Policy

The Centre for Mental Health and Incapacity Law, Rights and Policy was formally launched at Edinburgh Napier University on 4th November 2013. As its name suggests, the focus of the Centre will be on mental health and incapacity law, rights and policy and this will also include considering matters beyond specific mental health and incapacity legislation such as employment, welfare rights and financial services.

The Centre's objective is to bring together what has hitherto been a fragmented wealth of knowledge and expertise in mental health and incapacity law and human rights throughout the public, private and voluntary sector in Scotland. The intention is that this will better assist practice to inform academia and for academia to respond to the needs of practice, specifically the needs of those individuals that the law and rights seek to support and protect.

Drawing on interdisciplinary expertise within and outside (nationally and internationally) Edinburgh Napier, the Centre seeks to be an interface between theory, practice and policy. It will particularly identify those areas where research and training will be of use with a view to undertaking this. In addition, to ensure that any work undertaken by the Centre is directly relevant to practice and policy, an expert advisory group, comprising Edinburgh Napier staff and external specialists, has been appointed and this will meet for the first time in January 2014.

Scottish mental health and incapacity legislation is internationally regarded as examples of good practice but this does not remove the need to keep it and related matters under constant review. Indeed, the Centre has come into being at a time when there are several important developments involving mental health and incapacity law and human rights in Scotland. For example, the Scottish Government has just launched a [consultation](#) on a draft Mental Health Bill that it will introduce during the current Scottish Parliament session to amend the Mental Health (Care and Treatment) (Scotland) Act 2003 in terms of advance statements, independent advocacy, named persons, medical reports and suspension of detention. This will also perhaps provide an opportunity to consider areas of inconsistency between our mental health and incapacity legislation. In addition, a single devolved tribunals structure is to be created together as well as a proposed administrative merger the courts and tribunals, both of which have inevitable consequences for the Mental Health Tribunal for Scotland. As mentioned elsewhere in this newsletter, the Article 5 ECHR (right to liberty) compatibility of Scottish legislation, most notably the Adults with Incapacity (Scotland) Act 2000, is being considered in light of the European Court of Human Rights *Bournewood* ruling and possible deprivation of liberty issues arising from this in relation to care settings. The full implications of Article 12 (equal recognition before the law) of the UN Convention on the Rights of Persons with Disabilities in the context of psychiatric care and treatment and supported or substituted decision-making and the impact this may have on incapacity and mental health laws is also yet to be unravelled.⁵

For more information on the Centre please visit its [webpage](#).

⁵ See the [Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law](#), adopted by the UN Committee on the Rights of Persons with Disabilities at its tenth session (2-13 September 2013)

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David Barnes Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle Practice Manager
sheraton.doyle@39essex.com

Peter Campbell Practice Manager
peter.campbell@39essex.com



For further details on Chambers please visit our website: www.39essex.com

London 39 Essex Street, London WC2R 3AT Tel: +44 (0)20 7832 1111 Fax: +44 (0)20 7353 3978
Manchester 82 King Street, Manchester M2 4WQ Tel: +44 (0)161 870 0333 Fax: +44 (0)20 7353 3978
Singapore Maxwell Chambers, 32 Maxwell Road, #02-16, Singapore 069115 Tel: +(65) 6634 1336

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CONTRIBUTORS: ENGLAND AND WALES



Alex Ruck Keene
alex.ruckkeene@39essex.com

Alex is frequently instructed before the Court of Protection by individuals (including on behalf of the Official Solicitor), NHS bodies and local authorities, in matters across the spectrum of the Court's jurisdiction. His extensive writing commitments include co-editing the Court of Protection Law Reports, and contributing to the 'Court of Protection Practice' (Jordans). He also contributed chapters to the second edition of 'Mental Capacity: Law and Practice' (Jordans 2012) and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). [To view full CV click here.](#)



Victoria Butler-Cole
vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). [To view full CV click here.](#)



Neil Allen
neil.allen@39essex.com

Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. [To view full CV click here.](#)



Michelle Pratley
michelle.pratley@39essex.com

Michelle's broad range of experience in the Court of Protection encompasses deprivation of liberty, residence and contact, forced marriage, serious medical treatment, capacity to consent to marriage and capacity to consent to sexual relations as well as applications for financial deputyship. She is recommended as "responsive and approachable" and a "formidable presence" in the Court of Protection in Chambers and Partners 2013. [To view full CV click here.](#)

CONTRIBUTORS: SCOTLAND



Adrian Ward

adw@tcyoung.co.uk



Adrian is a practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,*" he is author of *Adult Incapacity, Adults with Incapacity Legislation* and several other books on the subject. [To view full CV click here.](#)

Jill Stavert

J.Stavert@napier.ac.uk



Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. [To view full CV click here.](#)