# Mental Capacity Law Newsletter May 2014: Issue 46

# Compendium Issue

## Introduction

Welcome to the May issue of the Mental Capacity Law Newsletter family. The newsletters are significantly shorter this month, although we nonetheless have important developments to report upon:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter, we cover the spectrum from refusing blood transfusions (*Re J*) to looking for sexual partners (*Re TZ (No 2)*);

(2) In the Property and Affairs Newsletter, we cover giving to the Mormon Church *(Re P*) and the useful case summarising the principles relating to reconsideration of orders in the context of the revocation of LPAs (*Re MRJ*);

(3) In the Practice and Procedure Newsletter, we cover an important case about the Court of Protection's powers where a person has been found in contempt (*A Local Authority v B, F & G*) as well as a decision of the Court of Appeal which is required reading wherever a party to proceedings is deaf or hearing impaired;

(4) In the Capacity outside the COP newsletter, we note a range of developments both from within England and Wales and further afield including, importantly, the General Comment on Article 12 of the Convention on the Rights of the Persons with Disabilities (about which much more in the June Newsletter). We also include our first ever book review;

(5) Finally, in the Scotland Newsletter, we cover an important case upon powers of attorney, a symposium upon the Assisted Suicide Bill before the Scottish Parliament, and an update on the Scottish *Bournewood* case.


ThirtyNine ESSEX STREET

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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

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## Walking a tightrope – contact and sexual relations

*A Local Authority v TZ (No.2)* [2014] EWHC 973 (COP) (Baker J)

*Mental capacity – contact – sexual relations*

### Summary

This is a sequel to a case that we reported in the August newsletter, and has a number of extremely interesting things to say about contact and sex.

In July 2013, Baker J declared that TZ, a 24-year-old man with mild learning disabilities, atypical autism and hyperactivity disorder, who lacked the capacity to litigate, had the capacity to consent to and engage in sexual relations. At that hearing, Baker J adjourned two further issues, namely whether he had the capacity: (1) to make decisions as to his contact with other people, and (2) to make decisions as to his care needs. After further assessments, those issues, and others consequential issues, were listed for a further hearing in early December 2013.

At that point, it was generally known that the question of capacity to consent to sexual relations had been considered by the Court of Appeal in a case in which judgment had been reserved. Baker J therefore decided, with the agreement of the parties' representatives, to adjourn the hearing until after the Court of Appeal judgment was available, and to permit the parties to file addendum written submissions as to the impact of that decision on this case. In the event, the Court of Appeal judgment, *IM v LM and others* [2014] EWCA Civ 37, upheld the interpretation of the law concerning capacity to consent to sexual relations that Baker J had adopted in these proceedings. As a result, the

supplemental submissions delivered by the parties were brief.

In the event, the hearing in December took a slightly different course from that anticipated in July because of a refinement of the issues as identified by the parties. The principal focus of the latest assessments was the issues that may arise as TZ endeavoured to meet, and form intimate relations with, other men. TZ was clear that he wished to have the opportunity to have these experiences, and all professionals involved in supporting him agree that he should be given that opportunity. The question was whether he had the capacity in respect of decisions that may have to be made when that opportunity arises.

Baker J summarised the issues as follows:

1. What is the relevant decision in respect of which the question of capacity arises?

2. Does TZ lack capacity in respect of that decision?

3. If yes, what orders should be made in TZ's best interests?

4. Should the court appoint the local authority to act as TZ's welfare deputy?

*The relevant decision*

The local authority argued initially that the relevant decision in the case was whether TZ had the capacity to make decisions regarding contact with others, either generally or with one or more named individuals. As Baker J noted, the difficulty with this formulation was that it did not focus on what McFarlane LJ described in PC and NC v City of York Council [2013] EWCA Civ 478,as the "specific factual context" arising at this stage, namely the prospect of future contact of a personal and intimate nature between TZ and an individual or individuals as yet unidentified. Baker J noted that it was not asserted that TZ lacks capacity generally to make decisions as to contact. Equally, there were at present no named individuals who can be identified with whom he may have contact of a personal intimate nature.

The local authority reformulated their position, and ultimately submitted that risk was the live issue in this case, given the current situation in which the court had determined that TZ had capacity to consent to sexual relations and that TZ now wished to have contact with other men which may include intimate sexual relations. The local authority submitted that the key question in this context was whether TZ lacked capacity to assess risks to himself from such contact.

The Official Solicitor submitted that the key question was whether TZ could decide what support he requires when meeting unfamiliar adults. He also rejected the suggestion that the relevant decision could be characterized simply as a decision about contact in general or with any specific individuals. The Official Solicitor submitted that the better analysis was that the relevant decision at this stage was whether TZ can make a decision about whether or not to receive care and support when meeting unfamiliar adults. He argued that assessment of risk was part of the information relevant to making the decision.

Baker J found himself unable to accept either submission without some qualification. He did not agree with the Official Solicitor:

> *"15.* […] *that the relevant decision can be characterised merely as whether TZ can decide what support he requires when meeting unfamiliar adults. The question of support required when meeting unfamiliar adults only*

*arises if he lacks capacity in making decisions when meeting unfamiliar adults.*

*16. On the other hand, I do not accept Mr. Dooley's* [for the local authority] *formulation. I agree with Mr McKendrick that the assessment of risk is not the decision but rather part of the information relevant to making the decision This is indeed expressly set out in s. 3(4) of the MCA which provides that information relevant to a decision includes information about the reasonably foreseeable consequences of (a) deciding one way or another, or (b) failing to make the decision. It seemed to me that Mr Dooley in fact acknowledged this point himself in the course of his oral submissions when he observed that the decision must include consideration of the benefits and disbenefits arising from that decision. Thus the analysis of risk is part of the decision-making process, not the decision itself.*

*17. That analysis is required in situations when TZ comes into contact with certain types of people, namely those with whom he wishes or may wish to have sexual relations. That is the 'specific factual context' in this case. Thus the relevant decision is not the decision whether to have contact with people generally. That is too broad. It is not a decision whether to have contact with a named individual. Since no individual has been named, that is too narrow. The primary relevant decision is whether or not an individual with whom TZ may wish to have sexual relations is safe. The secondary relevant decision is whether, in those circumstances, he then has the capacity to make a decision as to the support he requires.*

*18. Accordingly, the questions arising here are:*

*(1) whether TZ has the capacity to make a decision whether or not an individual with whom he may wish to have sexual relations is safe, and, if not,*

*(2) whether he has the capacity to make a decision as to the support he requires when having contact with an individual with whom he may wish to have sexual relations."*

*Did TZ have these capacities?*

After a close analysis of the evidence, Baker J held that TZ lacked capacity in both domains. In respect of the first domain, he placed particular weight upon the expert evidence that, whilst he "*had the ability to understand and retain information, he lacks the ability to use or weigh up the information, including the ability to assess risk and, in the language of s. 3(4), to understand the reasonably foreseeable consequences of the decision. This is, in my judgment, a good example of the distinction identified in paragraph 4.30 of the Code of Practice between, on the one hand, unwise decisions, which a person has the right to make, and, on the other hand, decisions based on a lack of understanding of risks and the inability to weigh up the information concerning a decision*" (paragraph 37).

Baker J noted in conclusion on this aspect that: "[i]*n reaching these conclusions as to capacity, I have reminded myself, again, of the need to avoid what could be called the vulnerable person's protective imperative – that is to say, the dangers of being drawn towards an outcome that is more protective of the adult and thus fail to carry out an assessment of capacity that is detached and objective. I do not consider that I have fallen into that trap in this case*."

*What orders should be made in TZ's best interests*

Baker J set out a series of principles and dicta to guide his approach – of note are paragraphs 46-48, where he held:

*"46. Mr. McKendrick further submits, rightly, that in applying the principle in s.1(6) and generally, the Court must have regard to TZ's human rights, in particular his rights under article 8 of ECHR to respect for private and family life. As the European Court of Human Rights observed in Niemitz v Germany (1993) 16 EHRR 97 at para 29, 'private life' includes, inter alia, the right to establish relationships with other human beings. This has been reiterated on a number of occasions, see for example Pretty v UK (2002) EHRR 1 at paragraph 61 and in Evans v UK (2008) 46 EHRR 34 at paragraph 71. There is a positive obligation on the state to take measures to ensure that his private life is respected, and the European Court has stated that 'these obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves': Botta v Italy (1998) 26 EHRR 241 paragraph 33.*

*47. These principles plainly apply when considering what steps should be taken to protect someone, such as TZ, who has the capacity to consent to sexual relations but lacks both the capacity to make a decision whether or not an individual with whom he may wish to have sexual relations is safe and the capacity to make a decision as to the support he requires when having contact with such an individual. In such circumstances, the state through the local authority is under a positive obligation to take steps to ensure that TZ is supported in having a sexual relationship should he wish to do so.*

*48. In passing, it should be noted that this is consistent with the provisions of the United Nations Convention on the Rights of Persons with Disabilities, (ratified by the UK in 2009 although not yet incorporated into English law) and in particular article 23 which requires states to 'take effective and appropriate measures to eliminate discrimination against persons with in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others'."*

Noting that decision-making for incapacitated adults should, as far as possible, be a collaborative exercise, Baker J set out a series of observations as to the contents of a care plan that was to be drawn up for his approval, divided in (a) basic principles; (b) education and empowerment; (c) support; (d) intervention; (e) decision-making. Under 'basic principles,' he noted that its purpose is "*to identify the support to be provided to assist* [TZ] *in developing a sexual relationship without exposing him to a risk of harm*" (paragraph 56(6)). Under 'education and empowerment,' Baker J noted that "[w]*hen delivering a plan to address TZ's lack of capacity to decide whether someone with whom he may wish to have sexual relations is safe, the principal focus should be on educating and empowering him to make these decisions. Any provisions in the plan directed at protecting him and restricting his contact should be seen as interim measures until the time when he acquires skills to make such decisions for himself.*" Under 'support,' Baker J wanted to see, in practical terms, the support TZ would receive when he went out with a view to meeting individuals with whom he might wish to have sexual relations. Under 'intervention,' Baker J wanted to see a plan that clearly delineate the circumstances in which care workers might intervene to protect TZ and the steps they were entitled to take when intervening.

Finally, under 'decision-making,' Baker J rejected the proposal that immediate decisions under the care plan (for instance example in the event that TZ found himself in a situation that was unsafe) could be made by a welfare deputy in the form of the Director of Adult Social Care and Wellbeing. Baker J noted that he did:

*"82. … not consider that this is an appropriate case for the appointment of a welfare deputy. The Code clearly provides that deputies for personal welfare decisions will only be required in the most difficult cases (paragraph 8.38) and that, for most day to day actions or decisions, the decision-maker should be the carer most directly involved with the person at the time (paragraph 5.8). That is simply a matter of common-sense. If a situation arises in which TZ is perceived to be at risk, a decision needs to be taken by the person on the ground who is giving him support. It would be impractical to refer the decision to anyone else, either the Court or a deputy. Any decision that has to be taken arising out of an immediate risk of harm should be taken, so far as possible, collaboratively and informally by TZ's care worker.*

*83. The question arises as to the course to be followed if the support worker is unable to extract TZ from a situation where he is at immediate risk of harm. The MCA does permit a deputy to restrain P if certain conditions are satisfied: see s.20 (8) to (11). Parliament has expressly provided, however, that a deputy cannot make a decision preventing contact between an incapacitated adult and a named individual. By the time action is needed to remove TZ from a situation where there is a risk of harm, the individual or individuals who are the source of the risk will in all probability be identified or identifiable, so a deputy would be unable lawfully to prevent that contact with or without using restraint. If the situation cannot be resolved by the support worker, consideration must then be given to applying to the court for injunctive relief. In an emergency, the police should be called. To my mind, the appointment of a deputy to be given the power to make decisions for the removal of TZ from such situations, enforceable by acts of restraint under s.20, would be inconsistent with the provisions of the Act and Code.*

*84. Long-term decisions, such as whether or not TZ should move out of his accommodation and cohabit with another man, are plainly matters more appropriately decided by the Court, given the scheme of the legislation.*

*85. The appointment of a deputy to take such decisions is therefore both impractical and, in my judgment, inconsistent with the scheme of the Act and Code. It is also arguable that it would run counter to the principal focus of the plan, which should be to educate and empower TZ to make these decisions for himself.*

*86. Accordingly, I conclude that the care plan should provide that any immediate decisions concerning risk, for example whether TZ is safe in a social setting, should be made by his support worker. Long-term decisions should be referred to the Court of Protection."*

## Comment

The decision is a careful one, loyally following the guidance of the Court of Appeal in PC, and taking particular pains to ensure that the questions asked were neither too narrow nor too broad. Moreover, the assessment of where TZ's best interests lay was one that sought to take into account the (commendably shared) desire of all concerned to produce an outcome that allowed TZ to develop and explore his desires to form sexual relationships with other men in such a way that would at the same time (insofar as possible) not bring him into harm.

However, it might be said that the decision sheds light, in particular, upon the mismatch between the test for capacity to consent to sexual relations, which is act-specific, (*IM*, until and unless the Supreme Court revisits this issue), and questions of capacity to consent to contact, which is person specific. The approach adopted in this case could be said to bring in, by the back

door, a person-specific approach to the actual exercise of capacity to consent to sexual relations – the order made anticipating that the local authority will assess the risk of sexual assault from prospective partners on an individual basis.

One might also, potentially, question whether a test for capacity to decide whether a potential sexual partner is 'safe' is one that would withstand detailed analytical scrutiny. Whilst one can quite understand how it was arrived it for purposes of resolving the difficult issue before the court, it is one that we suspect may well be examined carefully in any future case in which the same issue arises.

Further, whilst the decision could be said in many ways (at least in its outcome) to be a case study in the exercise of the balance between protection and autonomy enshrined in the MCA 2005, whether it would be consistent with the approach mandated by the CRPD is a rather different question to which the answer is, we suspect, not that Baker J would have anticipated. We will have much more upon the CRPD and its implications for the MCA 2005 in our June issue.

One final point that should perhaps be noted that, whilst it is difficult to fault Baker J's decision not to appoint a welfare deputy on the facts of the case, it did not take into account the decision of Roderic Wood J in *SBC v PBA and Others* [2011] EWHC 2580 (Fam); [2011] COPLR Con Vol 1095, in which Roderic Wood J had held that the test to be applied when determining whether to appoint a deputy (whether to manage a person's property and affairs or take decisions regarding their health and welfare), was to be derived from the unvarnished words of the MCA 2005, and that there was no additional requirement to be derived from the Code of Practice that in order for a deputy to be appointed it was necessary that the case before the court be one of the 'most difficult' categories of case (the language used in the Code). For our part, the editors would prefer the approach adopted by Baker J at paragraph 82 (not least as Alex was arguing for it in SBC!) but we now have two directly inconsistent judgments upon the relevance of paragraph 8.38 of the Code in this regard.

## Advance directives and s.63 MHA 1983

*Nottinghamshire Healthcare NHS Trust v J* [2014] EWHC 1136 (COP) (Holman J)

*Mental Health Act 1983 – interface with the MCA 2005*

Summary

In this case the judge was asked to consider an urgent without notice application in a medical treatment case.

The case concerned J, a young man aged 23 who was in prison but detained under the Mental Health Act 1983. He suffered from what was described as a serious personality disorder, a symptom of which was that he had engaged in significant self-harm on a number of occasions which resulted in profuse bleeding (he was on anticoagulant drugs because of a history of thrombosis). He was a Jehovah's Witness and had made what purported to be an advance decision to refuse specified medical treatment, namely blood transfusions.

The first limb of the application asked for a declaration that a written advance decision was valid and was applicable to the treatment described in the advance decision. The judge considered sections 24 – 26 of the MCA 2005 and declared on an interim basis that the written advance decision was valid and applicable to that

treatment notwithstanding that (a) the young man's life may be at risk from the refusal of treatment and (b) that he was a patient detained under the Mental Health Act.

The second limb of the application brought by the NHS Trust related to the interrelation of the provisions of the MCA 2005 in relation to advance decisions to refuse treatment and the applicability in this case of section 63 of the Mental Health Act 1983 which provides: "*the consent of a patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering…if the treatment is given by or under the direction of the approved clinician in charge of the treatment*."

Holman J noted that there was clear authority to the effect that the words "*medical treatment given to him for the mental disorder from which he is suffering*" were wide enough to extend to medical treatment for physical conditions caused or arising as a result of the underlying mental disorder (*B v Croydon Health Authority* [1995] Fam 133). It followed that if a detained patient cut himself as a result of a self-harming mental disorder, then it may be lawful under that section to treat and stitch up the cuts. The judge held that it was little or no extension of that approach that if, as a result of the mental disorder from which he is suffering, a patient cuts himself and bleeds so profusely that he needs a blood transfusion, that transfusion would be covered by s.63. Hence this case squarely raised the issue of the interrelation between the provisions of the MCA 2005 in relation to advance decisions and the power under s.63 MHA 1983 to give medical treatment notwithstanding the absence of consent.

The man's responsible clinician described having 'some ethical difficulty' in using the MHA 1983 to override a capacitous patient's wishes based on religious wishes and stated that she "*would not chose to use* [her] *Mental Health Act powers to override his advance decision*." Holman J stressed (at paragraph 15) that it was not the business of a court to make any kind of ethical decision: "*all the court can do is state the applicable law and, where appropriate, apply it in the form of a legal, though not necessarily an ethical, decision*."

The second limb of the application asked the judge to make an interim declaration that "*it is lawful for those responsible for the medical care of the respondent to act in accordance with his written advance decision and withhold treatment by blood transfusion or with blood products in accordance with his expressed wishes notwithstanding the existence of powers under section 63 of the Mental Health Act 1983*."

Holman J held that he did not feel equipped or willing to make the declaration as he had only heard representations from one side without notice to the patient or any other person. He listed a hearing for the next day having made a preliminary inquiry of the Official Solicitor. He also directed that the NHS Trust use its best endeavours to facilitate and promote that the patient himself be represented at the hearing and to ensure that the patient's father be informed of the hearing and encouraged to attend.

### Comment

As the judge stated, this case raises a 'terrible dilemma', namely the interrelationship between a capacitous advance decision which has the effect of endangering life and the power under the MHA 1983 to override consent where treatment is for a mental disorder.

Given the NHS Trust's position that those treating the man would not exercise their s63 MHA 1983 powers in the face of a clear advance decision

based on religious views, the position at the hearing was that if physical restraints were removed from the patient and he was able to cause profuse bleeding he might die, whether he intended to bring about his death or not.

At a subsequent hearing, of which only press coverage is available, Mostyn J upheld the validity of the advance decision and the lawfulness of J's responsible clinician under s.63 MHA 1983 not to administer a blood transfusion.

## Personality and capacity

*Wandsworth CCG v IA and TA* [2014] EWHC 990 (COP) (Cobb J)

*Mental capacity – finance – medical treatment – residence*

### Summary

This case is a model of the approach to the assessment of the capacity to decide as to (1) ongoing medical treatment; (2) future residence and care; and (2) management of property and affairs.

IA was a 59 year old man suffering from Type 2 diabetes mellitus, who partially blind (due to diabetic retinopathy) and had limited mobility. He also had a serious kidney disease for which he required regular dialysis, and suffered from anaemia, as well as a number of serious complications as a result of his diabetes from which he was constantly at risk of severe infection.

In June 2007, IA was the subject of a violent criminal assault, being repeatedly kicked to the head; he sustained a serious head injury, involving skull fractures, brain haemorrhage and contusions to the right frontal area of the brain. As a result he suffered a degree of cognitive impairment for which he was treated at a specialist rehabilitation centre. The injury was said to have left IA with problems of memory, inflexibility of thought, impulsivity, and mood control. He had consequently exhibited deficits in executive functioning with reduced capacity to organise, judge and show control over decision-making.

IA had been an in-patient at a major London teaching hospital since November 2013, having been admitted as an emergency following an episode of diabetes-related hypoglycaemia. He was ready for discharge from hospital, and decisions were required as to his future care. The court had to determine whether IA had the capacity to make or contribute to the relevant decisions. There was before a care plan which provided proposals for post-discharge care which would either be delivered under the CCG's ordinary statutory duties (IA had been assessed as eligible for NHS continuing healthcare in part due to non-compliance with care interventions and challenging behaviour), or as being as a plan representing his best interests under s.4 MCA 2005.

In directing himself as to the law, Cobb J made specific reference to (1) the need not to set the threshold in relation to capacity to understand unduly high; (2) the need that the person only understand the salient factors in relation to the respective options; and (3) the 'clear guidance' of the Court of Appeal in *PC and NC v City of York* in relation to the causative nexus (which Cobb J slightly curiously described as the 'diagnostic test').

Cobb J noted that IA's capacity to take the material decisions had been 'repetitively' assessed over the course of 2 ½ years by a range of experts, a number of whom had not assessed

IA personally because of his refusal to cooperate with appointments or assessments. As Dr Grace (a consultant neuro-psychiatrist instructed) noted, "*assessment of capacity based on case notes is of necessity a relatively inadequate substitution for the complex assessments that occurs in a clinical interview.*" A strong body of opinion had built up over that period that IA lacked the material decision-making capacity, but this was not entirely consistent.

Cobb J set out in detail the conclusions of those who had assessed IA's capacity before continuing (at paragraph 52) that: "[g]*iven that discrepancy of professional opinion, it was sensibly agreed, at court on 15 July 2013, that the parties be given permission jointly to instruct a further consultant neuro-psychiatrist to obtain a report on IA's capacity to make the relevant decisions. There was a problem in actioning this instruction (IA did agree in principle to meet with a consultant psychiatrist, however of the fifteen experts suggested, only two were acceptable to IA; those two could not report in the prescribed time). At a subsequent hearing on 11 November 2013, TA agreed to identify two experts who would be acceptable to him, to assess IA's capacity. This led to the joint instruction of Dr Anjum Bashir, Consultant Neuro-Psychiatrist, whose written evidence has been before the Court and tested orally at this hearing. Notably, IA has cooperated fully with Dr Bashir's assessment*."

Dr Bashir concluded that IA *had* capacity in the material domains, giving a number of reports (individually and jointly with IA's treating clinicians). His oral evidence was that IA had indeed suffered a serious brain injury in the 2007 assault, but did not accept that this is necessarily a static condition. He told Cobb J that he had direct experience of victims of such assaults improving in their decision-making capacity over a period of time.

> *"63. [Dr Bashir] indicated in terms (when cross-examined by Ms Scott [for the Official Solicitor on behalf of IA]) that IA is able to make a fully capacitous decision about choice of his future accommodation. He nonetheless emphasised the importance of a fully effective plan: he indicated that if IA was left on his own to do everything himself, he would be at risk of neglect. That is why he needs a carefully constructed care regime. Dr. Bashir confirmed that IA knows what his needs are ('I asked him to specify his needs, and he did so. He does exhibit an understanding of his impairments')."*

Cobb J's discussion of whether IA had the capacity in the relevant domains ran to 23 paragraphs of close analysis. In summary, however, he concluded:

> *"66. **Summary**: On the evidence reviewed above, and for the reasons fully set out below, I find that the assumption of capacity (section 1(2) MCA 2005) has not been displaced in respect of any of the three issues on which I am invited to adjudicate (§4(i)-(iii) above).*
> *67. I am of the view that IA does have the capacity to make decisions about his medical treatment, future residential care, and property and financial affairs, and I shall so declare.*
> *68. It seems to me that it has been of considerable benefit to IA that practical steps have been taken (including careful explanation by a trusted professional, Dr. Bashir) to assist him to reach these decisions, weighing up the information relevant to that decision; I trust that such assistance will be available to him in the future.*
> *69. Although I am of the view that IA has made a number of unwise decisions in the past about his medical treatment and home living conditions, these*
> *i) are not demonstrative of lack of capacity;*

*ii) are more reflective of his somewhat challenging personality; and*

*iii) in some respects in any event ante-date his acute brain injury and could not therefore be attributable to acquired cognitive deficit (see §46 above).*

*Moreover, there is reason to believe that his resistance to social work intervention is probably founded in a long-standing grievance about the compulsory purchase of his home, exacerbated by his suspicions about the plans of the authority for his future care.*

*70 There is a risk that he will make further unwise decisions in the future – hence the importance of effective support for him in the community, and a closely monitored care plan."*

Perhaps unsurprisingly, Cobb J noted that "[t]he plan for IA's medical and other care will require very careful formulation and supervision. Appropriately trained care staff with experience of working with patients with brain injury will need to be engaged, with a proper level of expectation about IA's personality. It would be of considerable assistance in my view if Dr. Bashir – a professional whom IA trusts and with whom he has co-operated well – can be directly involved in the transition plans for IA, so as to maximise the prospects that they will be accepted" (paragraph 95).

### Comment

As noted at the outset, we would suggest that this decision is a model of careful capacity assessment, in particular in its careful delineation of the role played by IA's "*eccentric*" personality in his decision-making – a factor clearly falling outside the scope of the MCA 2005. An unusual feature of the decision is that IA (despite being judged to lack litigation capacity) was given a role in the selection of the independent psychiatric expert – with whom it is then clear he was able to form a trusting and co-operative relationship. This is perhaps a slightly unconventional approach, but is one that sits very comfortably with perhaps the most ignored principle of the MCA (albeit the one that is most important for purposes of compliance with the CRPD), namely that it is only if all reasonable steps have been taken to help a person to take a decision, but without success, that a person can be treated as lacking capacity. The decision is also of note for its – entirely proper – recognition that the fact that IA had decision-making capacity in the relevant domains (or, to be precise, that those asserting that he did not had not established their case) did not mean that he should therefore be left without support; whilst applauding the decision of Cobb J on the facts, we also equally clear that taking decisions in relation to IA's future care will be no easy task for any of those involved.

## *Cheshire West* guidance

Alex has pulled together on his website official guidance published to date on the implications of the *Cheshire West* guidance (including from CQC and ADASS), together with the most useful of the extensive commentary and notes written to date by both members of Chambers and others.

We should note in this regard that we understand that guidance is to be issued in short order by the Court of Protection as to the procedure to be followed for making applications in relation to authorise deprivations of liberty falling outside the scope of the DOLS regime (most obviously in relation to supported living placements). We will circulate this guidance by the usual channels as soon as we get our hands on it!

## Tithing to the Mormon Church

*A County Council v MS and RS* [2014] EWHC B14 (COP) (District Judge Eldergill)

*Mental capacity – finance*

Summary

MS was a Mormon. He was also mentally unwell and his property and affairs were managed by his local authority as his deputy. He wished to tithe 10% of a recent inheritance (amounting to just under £7,000) to the Church of the Latter Day Saints. His mother was extremely concerned as to the prospect of the donation. The local authority very properly brought the matter to the CoP. His then consultant psychiatrist considered that he did not have capacity to make the decision; MS asserted strongly that he did. A special visitor appointed by the CoP reported, and considered that he did have the requisite capacity.

In a detailed and fascinating judgment, District Judge Eldergill had to grapple both with the evidential questions that arose and rather more fundamental philosophical questions as to the interaction between mental illness and religious belief.

*The law*

As District Judge Eldergill noted, in the majority of cases involving gifts, the statutory test of capacity in the MCA 2005 will differ little (if at all) from the common law approach set out in *Re Beaney* 1 WLR 770, [1978] 2 All ER 595. In that case, it was held that the relevant information included that (1) the person was making a gift; (2) the subject-matter of the gift; (3) the identity of the person to whom the gift was being made; and (4) the effect of the gift upon the person's estate. As District Judge Eldergill noted (paragraph 68) "[i]*n the case of a simple and trivial gift, such as giving a small present to a friend, there is not much to it and very little to grasp in order to make a valid gift. More significant transactions — those where the reasonably foreseeable consequences are more significant for the person concerned — by definition require the capacity to understand and weigh the more significant consequences*."

*The medical evidence*

The Special Visitor considered (paragraph 74) that:

1. MS had a mental disorder. The "*diagnosis* [was] *one of a schizoaffective disorder with also an obsessive compulsive disorder;*"

2. He "*ha*[d] *a long-standing belief system that he is a prophet and that he is next to the trinity in status and powers. The beliefs do not change and have not been affected by treatment with neuroleptic medications;*"

3. He "*ha*[d] *no insight into his condition and feels he has been abused by psychiatrists who do not understand or accept his true calling;*"

4. He did not have the capacity to litigate;

5. He did not have the capacity to manage his property and affairs;

6. At present, he had the capacity to execute an LPA for property and affairs;

7. As to his capacity to make "To make a gift of ten per cent of his property on the tithes principle to his church":

> "*Mr S understands the process of tithing and also the implications for his own finances if he*

*gives away the £6,900.00 that he believes to be 10% of the original inheritance.*

*Mr S's desire to give this money to the Mormon Church is part of his religious beliefs but not in my opinion part of his delusional belief system.*

*I could find no evidence that his wish to do this was part of any `revelation', command or direct instruction from God.*

*On balance therefore I am of the opinion that Mr S does have capacity at this time to make a gift on the tithes principle to his church."*

MS's current treating psychiatrist agreed with most of the Special Visitor's report. The difference between the two was as to whether MS's desire to give this money to the church was part of his religious beliefs or part of his delusional belief system. MS's treating psychiatrist, Dr M, considered (paragraph 80) that:

*"… this issue is, of course, complex and addresses some real sensitivities. However, my opinion is that it would be reasonable for the Court to consider denying Mr S the right to pay this tithe on the inheritance he got some years ago. Mr S's pathology centres around a deep core of religious delusions in the form of a well organised delusional system. The core features of this system are that he believes that he is a messianic, exceptional leadership figure and that God has chosen him personally over all other people to lead the church. He believes he has a special mission from God. His beliefs are out of touch and out of sync with the mainstream of Christianity and also, as far as I understand, are out of sync with the beliefs and practices of his own church and that may be part of the reason why they are reluctant to allow him to become a member of the church. In some ways Mr S seems to have an ambivalent relationship with the church, on one hand he seems desperate to join and be recognised by his church and on the other hand he finds a special kind of satisfaction in being different, more extreme and at times misunderstood by his church as he feels that this was the lot of all religious illuminated leaders in the past. My opinion is that his beliefs about the tithe are an extension of his delusions and stem directly from them. He again demonstrates his tendency to practice religion in a way that is delusionally motivated based on a concrete black and white understanding of the Bible and is not really a requirement of all of his church members as I understand it."*

*Impairment of the mind or brain?*

District Judge Eldergill noted that it was common ground that MS had "*strong and sincere religious beliefs and values and that what he sees as religious zeal others interpret as beliefs held with delusional intensity*" (paragraph 85). As he continued "[t]*he beliefs and actions interpreted by others as evidence of mental illness include his belief that a fellow resident was the devil and his belief that the only people more powerful than him were God, Jesus Christ and the Holy Ghost*" (paragraph 86).

District Judge Eldergill continued:

*"87. I accept that sometimes it can be difficult to distinguish between a religious delusion and a particular religious belief or practice. There is a risk of pathologizing religious beliefs when listening to content alone. It is important to look at the degree of conviction, the pervasiveness of beliefs, the context of the individual's spiritual history and deviations from conventional religious beliefs and practices when determining whether a religious belief is authentic or delusional.*

> *88. As a judge I must decide the case on evidence. As MS pointed out himself, he has a problem establishing on evidence that he is a prophet and the first outside the Godhead. The way he put it was that he has a 'Mount Everest of a credibility problem'.*
>
> *89. The balance of the evidence before me is that he has an 'impairment of, or a disturbance in the functioning of, the mind or brain' and that therefore is my finding."*

*Effect on decision-making*

Notwithstanding the fact that MS suffered from an impairment of, or a disturbance in the functioning of, the mind or brain, District Judge Eldergill went on to hold that he preferred the evidence of the Special Visitor that it could not be demonstrated that MS's desire to give this money to the Mormon Church was part of his delusional belief system. In reaching this conclusion, he placed particular emphasis upon the fact that: "[t]*he fact that a person has a grandiose belief with a religious content does not demonstrate that the whole of their religion is delusionally-based and caused by mental illness. It may simply be that the content of their belief-system when they become ill reflects and accentuates pre-existing interests, concerns and pre-occupations, in this case a concern with religious and moral themes*" (paragraph 105); that "[t]he fact that relatively few people now tithe is neither here nor there. Nor does it matter whether a person's belief in tithing is a core belief required of members of a particular religion or a deviation and a matter of individual conscience" (paragraph 111); that "[i]*t is not sufficient that other people think his proposed tithe is unwise, a misinterpretation of a religious text or is misguided by reference to their own secular beliefs and values*" (paragraph 112); and that MS's belief was a matter of faith (paragraph 113).

District Judge Eldergill went on to consider two possible objections to MS's capacity, neither of which were properly articulated or developed by or on behalf of the deputy. The first was that "*MS's belief or hope that a tithe may be followed by God's financial bounty demonstrates that his capacity to understand the foreseeable consequences of the tithe, and the weight attached by him to objections that he cannot afford it, is compromised by mental illness*" (paragraph 116). He noted that the evidence was ambiguous, but (in a possibly unprecedented piece of judicial decision-making) placed some emphasis upon the fact that the belief or hope was founded upon a correct quotation from a particular passage in the Bible. The evidence was, in District Judge Eldergill's opinion, "*insufficient to displace the presumption of capacity. He may hope or have faith that a material reward will follow but his belief in the duty to tithe is not dependent on this*" (paragraph 119).

The other possible objection was that MS's "decision-making capacity has been undermined by mental illness in a more general but equally fundamental way: It is the form rather than the content of his thought that has been affected with the result that he is unable to think clearly or straight about the matter. This type of objection is associated with concepts such as concrete thinking, tangentiality of thought, loosening of associations, etc" (paragraph 120).

As District Judge Eldergill noted:

> *"121. There is a single reference to MS having a concrete black and white understanding of the Bible. However, many religious people take a literal view of their religious texts. There are also references to thought processes that are parenthetical or 'rambling' at times. However, the case was not argued in this way and the deputy's objection is based on the content of*

*his thought not its form. One can speculate about the sequence of events in 2004 and 2005 but my decision must be based on evidence and it is lacking. Furthermore, Dr T is a very experienced consultant and he has not raised the issue or found MS to lack capacity on such a basis.*

*122. The issue is finely balanced. In my view the presumption of capacity has not been displaced and the 'invisible weight of the presumption' tilts the scales in his favour."*

*Best interests*

District Judge Eldergill went on to hold that, even had he found that MS lacked capacity, he would have authorised the tithe on his behalf, and his reasoning (although obiter) is so illuminating of the proper approach that should be taken that the relevant passages merit reproduction in full:

*"124. Mr S tells me that he prizes his independence and autonomy and wishes to enjoy it more fully. This is important.*

*125. The law has always sought to show due respect for liberty of conscience and religious belief and the European Convention on Human Rights reinforces this. Even if a person lacks capacity in law to make a religious gift, there remains the need to show respect for genuinely held beliefs and values. Good reasons are required to interfere in matters of conscience and spiritual belief. A person's religion is no less real to them because some of their beliefs may be coloured by illness and their conscience is no less offended when they are not permitted to practise their religion. In MS's case, both his conventional and unconventional religious beliefs are well-established and unlikely to change in time. This is not a situation where ambiguous beliefs are being reinforced or acted on precipitously, or it is likely that he will regret his tithe in the foreseeable future. His religion is now part of his life and is embedded in his existence. What he wishes is now his will. Even if his choice is founded on a belief that facts exist which do not, it is now his authentic voice and a true expression of his mind and the world within which he moves; and, like everyone, he needs to find peace.*

*126. The insights of writers such as Sims (the former President of the Royal College of Psychiatrists), Clark, Kroll and Agosin are also very relevant. The content of a delusion often has meaning for the individual and may be an adaptive response, combating purposelessness and hopelessness. Clark has noted that for patients with psychotic disorders, and with schizophrenia in particular, religious beliefs can be a source of meaning, hope, strength, and recovery (See SM Clark and DA Harrison, How to care for patients who have delusions with religious content, Current Psychiatry, Vol. 11, No. 1, 47 at 48, and the authorities cited therein). Many people who experience mental illness identify themselves as religious and use religious activities or beliefs to cope, so that one must take great care before deciding that it is in their best interests to interfere with this expression of where they are in their lives.*

*127. The size of the gift is significant but one must keep it in proportion, and the proportion is that he retains 90%.*

*128. The fact that MS wishes to make his tithe to the Church of the Latter Day Saints rather than, say, the Church of England is irrelevant. It is not my function to interfere with people's religious or political preferences and choices but where possible to give expression to their wishes and beliefs."*

*Litigation capacity*

District Judge Eldergill parted company with the psychiatrists and held that MS had capacity to

conduct the litigation. He noted, in particular, that the substantive and procedural issues in this case were not complex and were well understood by MS, and that his belief that he was a prophet did not impinge on his capacity to argue and present his case with regard to the tithe and the other litigation issues. As he noted (paragraph 130) "[MS] *has prepared and presented his case very ably and I cannot identify any point of substance in support of his position that he has not articulated*."

### *Other matters*

District Judge Eldergill indicated that he did not consider that the evidence before the CoP did not yet support placing the management of all of MS's property back under his own control, but that all the options had not yet been fully explored because the application before him related only to the tithe. He noted, however, that as the Special Visitor had expressed the opinion that MS had capacity to make an LPA, for property and affairs, MS should "*discuss the advantages and disadvantages of this with a solicitor, with a view to making his own protective arrangements and asking the court to endorse these arrangements (see paragraph 12 of Schedule 1 to the Mental Capacity Act 2005). The reasonable costs of obtaining such advice and assistance should be authorised as necessary by his deputy*" (paragraph 133).

District Judge Eldergill concluded the judgment by praising the local authority for bringing the application on MS's behalf and for its respect for his dignity, wishes and feelings.

### Comment

It is distinctly cheering to be able to report upon a case in which a judge grapples so acutely with the requirements of the MCA 2005, both in terms of the assessment of capacity and (albeit obiter) the assessment of best interests. The sensitivity to the need to establish whether or not there was a causative nexus between the impairment of the mind or brain and the functional ability of MS to make the decision in question is, in particular, entirely *PC*-compliant (even if the case is not mentioned).

It also worth in our view making a special mention of the fact that this is precisely the sort of case that the local authority should have brought to the CoP rather than purporting to exercise its powers as deputy to (to apply *Neary*) stifle a real debate, and the (unnamed) local authority should therefore be commended for so doing. It is worth noting in this regard that all parties had agreed that, in order to keep the costs proportionate, District Judge Eldergill could determine the matter by way of telephone hearings, written evidence and submissions. If the terrible pun can be excused, the case therefore stands as evidence that a CoP application about heaven need not cost the earth.

## Reconsideration and revocation

*Re MRJ (Reconsideration of an order)* [2014] EWHC B15 (COP) (Senior Judge Lush)

*Lasting Powers of Attorney – Revocation – Practice and Procedure*

### Summary

This case considers Rule 89 of the Court of Protection Rules 2007 which provides that, where the court makes an order without a hearing, anyone who is affected by it may apply within 21 days for the order to be reconsidered.

The purpose of this rule and the way in which it operates was described by Her Honour Judge Hazel Marshall QC in *Re S & S* [2008] COPLR Con Vol 1074 in the following terms:

> *"[*61] *… Such a reconsideration is not an appeal. The processes in the Court of Protection are intended to give the court wide flexibility to reach a decision quickly, conveniently and cost effectively where it can, whilst preserving a proper opportunity for those affected by its orders to have their views taken into account in full argument if necessary. To that end, on receiving an application, the court can make a decision on the papers, or direct a full hearing, or make any order as to how the application can best be dealt with. This will often lead to a speedy decision made solely on paper which everyone is content to accept, but any party still has the right to ask for a reconsideration.*
>
> *[62] If this occurs, the court should approach the matter as if making the decision afresh, not on the basis that the question is whether there is a justifiable attack on the first order. The party making the application has not had a proper opportunity to be heard, and should be allowed one without feeling that s/he suffers from the disadvantage of having been placed in the position of an appellant by an order made without full consideration of his points or his views".*

This case concerned MRJ who was born in 1932 and had moderately advanced dementia. The applicants were her daughter (JT) and her grandson (KT). In 2010 MRJ had executed two LPAs – one for property and affairs and the other for health and welfare – appointing JT and KT jointly and severally to be her deputies. The LPA for health and welfare was registered in 2010 but there were technical defects in the LPA for property and financial affairs which meant that it was not registered until September 2013.

Senior Judge Lush had made two orders on the papers in September 2013.

The first order revoked the LPA for health and welfare and directed that the Public Guardian cancel its registration.

The second order:

(i) suspended the applicants from acting as MRJ's attorneys under a Lasting Power of Attorney ("LPA") for property and financial affairs until further order; and

(ii) appointed the authorised officer of Suffolk County Council as MRJ's interim deputy with instructions to investigate the applicants' management of her finances.

The applicants JT and KT applied to the court for the orders to be reconsidered.

Senior Judge Lush set out the legal framework relevant to the suspension of an LPA and the revocation of an LPA as follows:

> *"37. Section 23(2)(a) of the Mental Capacity Act provides that the Court of Protection may give directions with respect to decisions which the attorney under an LPA has authority to make and which the donor lacks the capacity to make. Pursuant to this provision, the court may direct the attorney to make no decisions at all and thereby suspend his or her authority to act under the LPA.*
>
> *38. The combined effect of subsections (3)(b) and (4)(b) of section 22 of the Act is that the court may revoke an LPA, if it is satisfied that:*
>
> *(a) the attorney (or, if more than one, any of them) has behaved, or is behaving in a way that contravenes his authority or is not in the donor's best interests; and*

*(b) the donor lacks the capacity to revoke the LPA.*

39. The use of the word 'may' in section 22(4)(b) means that revocation is not mandatory in these circumstances and that the court exercises a discretion when deciding whether or not to revoke an LPA. This discretion is subject to the provisions of the Act and, in particular, sections 1 (the principles) and section 4 (best interests).

40. Section 22(5) of the Act states that, if there is more than one attorney (as in this case), 'the court may under subsection (4)(b) revoke the instrument or the lasting power of attorney so far as it relates to any of them.' The effect of this is that, where attorneys have been appointed to act jointly and severally (as in this case), the court can revoke the appointment of just one of them. Thus, if I were minded to do so, I could revoke the appointment of KT but allow the LPA to remain in force with JT acting as the sole attorney.

41. Article 8 of the European Convention on Human Rights provides that:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

*42. Resolution 1859, which was passed by the Parliamentary Assembly of the Council of Europe on 25 January 2012, refers to protecting human rights and dignity by respecting the previously expressed wishes of patients. It states that there is 'general consensus based on Article 8 of the European Convention on Human Rights on the right to privacy that there can be no intervention affecting a person without his or her consent,' and provides that 'continuing powers of attorney should, in principle … be fully taken into account when properly validated and registered.'*

*43. Unless such interference is warranted under Article 8.2, the revocation by the Court of Protection an LPA, which a donor executed when they had capacity and in which they chose a family member to be their attorney, would be a violation of their Article 8.1 right to respect for their private and family life: Re Harcourt [2013] COPLR 69. The same applies to an order under section 23(2)(a) of the Mental Capacity Act suspending the attorney's authority to act".*

Senior Judge Lush accepted the evidence of the social worker for Suffolk County Council which set out that KT had been cynically and systematically misappropriating his grandmother's money. He stated that "*it appeared that KT and JT exploited MRJ's lack of capacity and transferred the money from her Think Money Account largely for their own purposes*" and found that "*KT callously and cynically manipulated this account to his own advantage*."

Given the above evidence, after satisfying himself that MRJ lacked capacity to revoke the LPA, the judge (i) confirmed his order revoking the LPA for health and welfare and (ii) confirmed the order suspending the authority of JT and KT to act under the LPA for property and financial affairs and (iii) formally revoked the LPA for property

and financial affairs and appointed Suffolk County Council as substantive deputy.

The judge concluded that the revocation of the property and affairs LPA was in MRJ's best interests, was in accordance with the law and was a necessary and proportionate response for the prevention of crime and for the protection of MRJ's right to have her financial affairs managed competently, honestly and for her own benefit.

### Comment

Whilst it does not set down any new legal principles, this case provides a useful summary both of the purpose/function of Rule 89 of the Court of Protection Rules 2007 and the legal framework for suspending and/or revoking an LPA. It should be noted that one outcome of a reconsideration of a suspension of an LPA may be that the immediate revocation of the LPA upon the court's fresh consideration of the issue.

## Press and the CoP

*London Borough of Redbridge v G, C and F (No. 2)* [2014] EWHC 959 (COP) (Cobb J)

*Media – court reporting*

Summary

This is a sequel to a case that we reported in the February Mental Capacity Law newsletter.

In February 2014, Russell J had to consider applications made by the London Borough of Redbridge ('Redbridge') in relation to an elderly lady, G, considered to be a vulnerable adult, arising out of concerns regarding the behaviour of her live-in carer, C, and another carer, F, and their influence over G, her home and her financial affairs and with respect to her personal safety. Russell J held that G lacked the capacity to take the material decisions, such that proceedings relating to her welfare (and, in particular, as to the continued residence of G with her) were to continue in the Court of Protection.

Subsequent to that decision, on or about 13 March G and C took part in a demonstration or protest outside Ilford Town Hall; the protest appeared to be about the local authority's involvement with G. It appears from that the incident provoked not inconsiderable interest among the public. A passer-by, an off-duty police officer, who observed the protest, made the observation that C: *"appeared to be engaged in a rant rather than clear, logical speech. I got the gist of her announcement and believed she was asking the crowd to support her in preventing a relative being taken away and put into a mental home*." The officer in question managed to speak with G at the location of the protest. G indicated to him that "*she wanted to go back to her home with the masked woman*" [both G and C had masked their faces with scarves]. *"I asked her if she was warm enough and commented on the fact that she was shaking. She said she was well and didn't need any help …* [G] *said she wanted to go … While they were waiting I noticed that* [G] *was still shaking*." An ambulance was called to attend to G. On 18 and 19 March 2014, it appears that G was taken to the Houses of Parliament where (on 18 March) the Select Committee was receiving evidence on the function of the Court of Protection. While at Parliament it appears that G (on that or the subsequent day) signed a petition[1] (on the encouragement of an MP[2]) asking the Government to intervene in her dispute with the local authority.

It appears that reporters may have subsequently been in contact with G – the day before the hearing before Cobb J, she told the solicitor instructed by the Official Solicitor as her litigation friend the day that "*reporters are always at her home or phoning her*," and "*she wants people to know what is happening to her and that it has gone all around the world already.*" She did not remember the name of anyone she had spoken to.

G's legal representatives experienced difficulties obtaining access to meet her. Her social worker also tried to visit her on the day after the protest. When she reached the home she saw two police officers at the front door and was advised that "*she* [that is, C] *had been aggressive towards them … It was clear to see that G was visibly upset over my arrival and in order to prevent her from*

[1] The petition is available on the internet. We are not going to provide further details of where or link to it because it contains G's name.
[2] Again, whilst we know the name of the MP we are not going to give it here.

*experiencing further distress I advised the police that nothing further could be done that day."*

Redbridge sought by an application issued in the Court of Protection on 18 March an order "forbidding C and F, whether by themselves or instructing or encouraging others, from making any decision on behalf of or in relation to G, other than those in relation to day to day care without first discussing the same with G's litigation friend or litigation friend's representative." That general form of relief was distilled down and adapted into more specific provisions, of which the most material was the order sought that: "until further order C be forbidden, whether by herself or instructing or encouraging others, from taking G or involving G in any public protests, demonstrations or meeting with the press relating to any aspect of these proceedings…" And further: "requiring C and F to facilitate visits by an employee of the applicant authority to G twice weekly on Tuesdays and Fridays. For those purposes C and F would be required to provide full and unfettered access to G and ensure they do not remain in the property during the visits."

The matter came on for a hearing before Cobb J which was attended (with his permission) by authorised accredited members of the press, subject to a Reporting Restriction Order. Much of the hearing was dedicated to consideration of what, if any, orders he should make in relation to G's (or C's) contact with the press concerning these proceedings. As noted by Cobb J at paragraph 18, the issue was of very considerable significance, given that:

> *"a. G has already, on occasions, met with representatives of the press and discussed her situation;*
>
> *b. the press has an obvious interest in these proceedings;*
>
> *c. the press is limited by order as to what it can report on these proceedings; it must, of course, take no steps to report the proceedings in any way which would contravene section 12 Administration of Justice Act 1960, albeit (as I have been advised) Associated Newspapers may in the future apply to vary or discharge the Reporting Restriction Order (there is a reasonable probability that such an application will be made);*
>
> *d. that G herself has expressed views both positive and negative about the involvement of the press in her life in the recent past – sometimes indicating a wish to engage with the press and sometimes indicating she does not trust it;*
>
> *e. there is a concern that C is influencing G to involve herself in publicity in order to further what was described in today's hearing as 'an agenda'"*

Cobb J emphasised that he recognised that:

> *"19… access to the press and freedom of parties to litigation to communicate with the press engages powerfully the competing rights under Article 8 and Article 10 of the European Convention of Human Rights. There is, in my judgment, a legitimate public interest in the reporting of proceedings in the Court of Protection concerning our vulnerable, elderly and incapacitous. There is a separate legitimate public interest in the court protecting the vulnerable, elderly, and the incapacitous from public invasion into their lives. These are, in stark terms, the competing considerations at play.*
>
> *20. Of note, but not specifically influential in my decision-making today, is the fact that some of the press reporting of these*

> *proceedings thus far, as is apparent from the three reports which I have read, does not provide a balanced account of this case, nor does it faithfully or accurately, in my judgment, reflect the substance of Russell J's judgment or the evidence heard by the court. That is highly regrettable."*

We return to this below.

Cobb J concluded that he had, as a first step, to determine whether G had capacity to communicate directly with the press, and ordered a capacity assessment upon the point "*specifically directed to the question of whether or not G has the capacity to communicate, and engage, with members of the press, with all the implications of so doing*" (paragraph 26). Cobb J required that "*Dr. Barker carefully, as he has in the past, to perform the functionality test in relation to this difficult question, inviting him to consider the implications for G's decision-making, on the basis alternatively that (a) the Reporting Restriction Order remains in place, and/or (b) the Reporting Restriction Order is varied or discharged. Plainly, G is provided with not insubstantial protection from invasion into her private and family life for as long as the Reporting Restriction Order is in place. But that protection may be dismantled if the court, undertaking the competing Article 8 and 10 review, reaches the conclusion that the Reporting Restriction Order cannot or should not stand in its present form"* (paragraph 27).

In the interim, Cobb J held that he had power under s.48 MCA 2005 to make an order relating to G's contact with the press – noting, in passing – that "*in relation to section 48(b) the question of her discussions or communications with the press is indeed a matter (perhaps unprecedented) on which the Court of Protection can be invited to exercise its powers under the 2005 Act.*" In terms of the balancing exercise, he noted that, on the one hand, there was evidence before the court that G indeed wishes to communicate with the press. That evidence was provided not only by G herself, but also by Ms Reid, a journalist who had now met with G on one occasion at her home. There was, Cobb J considered, "*a powerful case for permitting G to communicate with the press at will, the court being reassured (pending the specific capacity assessment) that at present there are justified limits on what the press can report of this process and of matters germane to G's private and family life*" (paragraph 35). On the other hand, there was evidence that at other times G has expressed less than positive views about the involvement of the press in her life, and Cobb J noted that that "[t]*here is evidence, but I make no finding about it, that G is being used as the instrument of others to pursue publicity in relation to her particular situation, and that she is not exercising her free-will at all. I specifically reference the fact that she has, in discussions with Miss Moore* [the solicitor instructed by the Official Solicitor]*, graphically described herself as the fly 'in the spider's web … the fly cannot get out of the spider's web'. She has confirmed elsewhere and to others that C is 'the spider'*" (paragraph 37).

Cobb J held, at paragraph 40, that:

> *"… weighing these matters one against the other, it is not in G's best interests for her to be able or permitted to communicate with the press at this stage; she has expressed at least ambivalent feelings, it appears, about the engagement of the media. I am further concerned that any private information which G vouchsafes to a journalist at this stage may, of course, be exposed to more public examination in the event that the Reporting Restriction Order is subsequently varied or discharged. Until the court can take a clearer view about G's capacity to make such relationships with the press it is, in my*

> *judgment, clearly in G's best interests that I should make an interim order that she should not make such communications. It follows that the injunctive order sought by the London Borough of Redbridge, shall be granted (in paragraph 3 of the draft order as earlier recited) until 2nd May."*

Cobb J also held that it was necessary – on an interim basis – for an order to be made requiring C and F to facilitate visits by the London Borough of Redbridge social workers, going forward. In so doing, he found himself "*satisfied on what I have read that it is indeed necessary for G to be monitored as to her welfare in her home at present. I wish to make clear that there is no evidence whatsoever but that the home is well-maintained, comfortable, and that G has adequate food and nutrition. But, as I have indicated in my judgment (and as is clear from the judgment of Russell J), there is considerable scope for the view that C, and to a lesser extent F, are not just failing to meet G's needs but are actually abusing her within her home. C and F, it should be noted, strenuously deny this. Monitoring in those circumstances in the interim period is, in my judgment, vital*" (paragraph 47).

### Comment

This is a profoundly troubling case. In our comment upon the decision of Russell J, we expressed some doubts about the method by which the judge reached her conclusions that G lacked the capacity to take the material decisions, because she had not referred to *PC and NC v City of York*, but it seemed to us entirely clear on the facts as set out in the detailed judgment that either (a) G lacked capacity or; (b) was a vulnerable adult requiring the protection of the inherent jurisdiction. Nothing in this second judgment suggests anything to the contrary, and it is very difficult to escape the feeling that G is, indeed, caught in a spider web, and – troublingly – that the spiders are not just C and (potentially) F, but also members of the press who wish to use her story to forward their own agenda.

We note in this regard that the subsequent hearing in this matter was before the President, Sir James Munby, whose judgment we await with great interest.

## Contempt in the CoP – making the sanction bite

*A Local Authority v B, F & G* [2014] EWHC B18 (COP) (HHJ Cardinal)

*Practice and procedure – other*

### Summary

In this case, HHJ Cardinal was invited to make a *Hadkinson* order in respect of P's father, who was in contempt of court having breached an injunction preventing him from having contact with P, and subsequently refusing to attend court or to enter England from Scotland where he lived. A Hadkinson order is an order preventing any application to the court by a person who is in contempt of court until that person has purged himself of his contempt (*Hadkinson v Hadkinson* [1952] P 285). In that case, Lord Denning stated the principle in the following terms:

> *"... the fact that a party to a cause has disobeyed an order of the Court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues it impedes the course of justice in the cause by making it more difficult for the Court to ascertain the truth or enforce the orders which it may make, then the Court may, in its discretion, refuse to hear him until that impediment is removed or good reason is shown why it should not be removed."*

On the facts of the instant case, HHJ Cardinal was satisfied that the father's disobedience was impeding the course of justice, saying "*I can neither investigate the truth of father's case, nor can the Court deal with his disobedience of past orders until he submits himself to this Court's jurisdiction. This is particularly important in a case where it is said that the injunctions are necessary in the best interests of B, and the very case itself turns on the Court's ability to see that its orders are enforced and enforceable*."

The judge held that *Hadkinson* orders could be made in the Court of Protection, against any party, and that there was no infringement of the father's rights under Articles 6 or 8 ECHR. The order was made in the following terms:

> *"Unless F attends at this court in person at each hearing in this application he is not permitted to do the following:*
>
> *(a) file any evidence and/or any preliminary documentation setting out his position in respect of the applications before the Court at that hearing,*
>
> *(b) advance a positive case through counsel, advocate, legal representative or other person on his behalf at that hearing in respect of the application of the Local Authority to determine the capacity of B to make decisions as to her residence, her contact with others and her care and her best interests in respect of these areas of decision-making,*
>
> *(c) be heard through an advocate in court at that hearing, save for on an application to vary the terms of this paragraph."*

### Comment

This is the first reported decision in which a *Hadkinson* order has been made in the Court of Protection and provides useful confirmation that such orders can be granted, in appropriate circumstances. We note that the question for the court upon such an application is:

> "*whether, taking into account all the circumstances of the case, it is in the interests of justice not to hear the contemnor. Refusing to hear a contemnor is a step that the court will only take where the contempt itself impedes the course of justice. What is meant by impeding the course of justice in this context comes from the judgment of Lord Justice Denning in Hadkinson v Hadkinson [1952] P 285 and means making it more difficult for the court to ascertain the truth or to enforce the orders which it may make.*"
>
> *JSC BTA Bank v Mukhtar Ablyazov)* [2013] EWHC 1979 (Comm) at paragraph 13 per Popplewell J

## A fair hearing for those without hearing

*In the Matter of C (A Child)* [2014] EWCA Civ 128 (Court of Appeal (Rimer, McFarlane and Vos LJJ)

*Practice and procedure – other*

### Summary

Six days after the birth of their daughter, the parents agreed for her to be accommodated in foster care. The local authority sought a care order after their consent was withdrawn. During the proceedings the parents agreed to a document, in which they conceded that the threshold criteria was met, a full care order was subsequently made and their child was placed for

adoption. The mother was of Turkish Cypriot origin, had a low level of cognitive functioning and a degree of speech and hearing impediment, although she could hear and speak in English without an interpreter. The father was of significant intelligence, from the Angolan Portuguese community, and was profoundly deaf and communicated using British Sign Language.

The Court of Appeal allowed their appeals because inadequate provision of interpretation (as opposed to translation) support had been provided to the father. He required both a sign language interpreter and a Deaf Relay Interpreter – a form of intermediary between him and the sign language interpreter – to ensure "cultural brokerage". The court observed:

> *"18 … Communication between a profoundly deaf individual and professionals for the purpose of assessment and court proceedings involves a sophisticated, and to a degree bespoke, understanding of both the process of such communication and the level and character of the deaf person's comprehension of the issues which those in the hearing population simply take as commonplace. For a profoundly deaf person, the "commonplace" may not be readily understood or accessible simply because of their inability to be exposed to ordinary communication in the course of their everyday life. What is required is expert and insightful analysis and support from a suitably qualified professional, and the advice this court has in the reports we have, a suitably qualified professional who is themselves deaf, at the very earliest stage."*

The consequence of the approach adopted by the first instance court, was a failure to meet the disability needs of the parties and a failure to produce an effective evaluation of the parents' potential to look after their child. Drawing upon Baker J's decision in *Wiltshire Council v N and Ors* [2013] EWHC 3502 (Fam), the court provided the following (paraphrased) guidance:

1. It is the duty of those who are acting for a parent who has a hearing disability to identify that as a feature of the case at the earliest opportunity;

2. Both those acting for such a party and the local authority should make the issue known to the court at the time that the proceedings are issued;

3. It should be a matter of course for the provision of expert advice on the impact of the deaf person's disability in the particular circumstances of the case to be fully addressed at the case management hearing with an application for leave to instruct the expert;

4. The issue of funding needs to be grappled with at the earliest stage.

Significantly it was noted:

> *"31 … The court as an organ of the state, the local authority and CAFCASS must all function now within the terms of the Equality Act 2010. It is simply not an option to fail to afford the right level of regard to an individual who has these unfortunate disabilities."*

## Comment

We mention this case for two reasons. First, to illustrate the importance of fairness in the decision-making process: failing to take practicable steps to meet the person's needs prior to seeking their consent risks bringing the fairness of their agreement into question. This is equally applicable in proceedings before the Court of Protection.

Secondly, the guidance and, in this particular case, the call for an intermediary between the deaf person and the sign language interpreter, very much reflects the supported decision-making philosophy of the CRPD. Without meeting the need arising out of their disability, the parents lost their child: by meeting that need, they may or may not, depending on the outcome of the case having to be reconsidered.

## Court of Protection Fees

The Government has now set out its response to the consultation Court Fees: Proposals for Reform. The table and supporting information below is taken from that response in which the Government indicated the levels of fees that are to be introduced at some (as yet unidentified) point in the future.

| Application | Fee |
|---|---|
| Simple application fee | £220 |
| Application fee (all other applications) | £410 |
| Appeal fee | £410 |
| Hearing fee | £515 |
| Copy of a document (10 pages or less) | £10 |
| For each subsequent page | 50p |
| General application (on notice or by consent/without notice) | £50 |

The division between 'simple' and other types of application is a new division.

### Applications where the £410 fee will be applicable

- Application relating to statutory wills codicils settlements and other dealings with P's property (Practice Direction 9D)
- Applications relating to the registration of lasting powers of attorney
- Applications relating to the registration of enduring powers of attorney
- Applications relating to the use or operation lasting powers of attorney
- Applications relating to the use or operation enduring powers of attorney
- Applications for permission
- Applications relating to P's personal welfare
- Applications made under section 21A of the Mental Capacity Act (Deprivation of Liberty Safeguards)
- All other originating applications
- Appeals against a decision of the court

### Applications where the £220 fee would be applicable

The simple application fee will be charged in those applications relating to the appointment of a property and affairs deputy, applications where the deputy was applying for additional powers and New Trustee applications. The Government notes that "[t]*hese applications are usually non contentious, do not require judicial time and are dealt with by Authorised Officers of the Court,*

*who are civil servants experienced in Court of Protection matters. Property and Affairs applications account for 94.5% of the court's work*."

- Application relating to property and affairs including an application to appoint a deputy for property and affairs

- Application by currently appointed deputy relating to the deputy's powers and duties in connection with making decisions in relation to P's property and affairs

- Applications to appoint or discharge a trustee (Practice Direction 9G)

The fee for making an application within proceedings is also new. The Government has indicated that it will not be charged in the following circumstances:

- Applications relating to Hearings in accordance with Rules 90, 91 or 92 of the Court of Protection Rules

- Applications relating to the transfer of P's property under the control or ownership of another person when 'P' ceases to lack capacity

- Applications relating to the appointment of a litigation friend for 'P' or a protected party

- Applications relating to reconsideration of a court order made without a hearing or without notice to any person

Costs proceedings

The fees that apply in relation to the determination in the Senior Court Costs Office of costs incurred in the Court of Protection (by virtue of the Civil Proceedings Fees Order 2008, as amended) are now as per the table below.

| Paragraph of Civil Proceedings Fees Order | Type of case | Fee |
|---|---|---|
| 6.1(a) | Where the amount of costs does not exceed £3,000 | £115 |
| 6.1(b) | All other cases | £225 |
| 6.2 | Appeal (detailed assessment proceedings) | £65 |
| 6.3 | Request/application to set aside a default costs certificate | £65 |

The first two fees were increased following the consultation exercise set out above.

## Children on the cusp

*An NHS Foundation Trust v A, M, P and A Local Authority* [2014] EWHC 920 (Fam) (Hayden J)

*Best interests – medical treatment*

### Summary

This case from the Family Division which concerned a 15 year old girl is covered here as it sets out some elements of best practice for an NHS Trust when dealing with medical treatment cases; it also gives an opportunity to note a point about the role that the MCA 2005 might play in relation to those under 16.

At the time of the application, the young girl, 'A' weighed just 5 ½ stones and had been in hospital for 10 months. Her weight had become dangerously low because she vomited up to 30 times a day (but not at all during the night). She had been subject to a battery of tests and 3 separate experts had concluded that there was no gastroenterological cause for A's vomiting. A and her mother disputed the view of the experts. There was an emerging concern that A was suffering under a form of fabricated and induced illness. There was evidence that in the absence of immediate intervention A could have no more than around 8 to 12 weeks to live.

The NHS Trust applied for declarations that:

1. It was lawful and in the best interests of A to have a Nasojejunal tube inserted and reinserted on any occasion that it is removed;

2. It was lawful and in the interest of A to receive fluids, nutrition and medications through a Nasojejunal tube;

3. It was lawful and in A's best interest to receive treatment (to include psychiatric, psychological and medication as prescribed by her consultant treating psychiatrist) and assessment by the child and adolescent mental health team.

Mr Justice Hayden made the orders sought. He also suspended contact between A and her mother for the first two weeks of her treatment and made her a ward of court (on the basis that the relationship between the hospital, social services and A had become conflictual and the judge had heard evidence that A required decision making from an independent authority figure).

The judge held that A was not competent to make decisions as to the appropriate course of medical treatment (on the basis of two psychiatric opinions). He commented that if she were an adult and he were applying the criteria of the MCA 2005 he would conclude that A lacked capacity to take the medical treatment decisions.

The judge stated that the starting point in such cases was that there was a "strong presumption in favour of a course of action which would prolong life, but that presumption is not irrebuttable" (*Kevin Wyatt v Portsmouth NHS Trust* [2006] 1 FLR 554*).* The judge then set out the 'intellectual milestones' which Wall LJ (as he then was) identified in that judgment:

1. The judge must identify what is in the best interest of the child (an objective exercise);

2. In doing so, the child's welfare is a paramount consideration;

3. The Judge must look at it from the assumed point of view of the patient;

4. There is a strong presumption in favour of the course of action which would prolong life but, that presumption is not irrebuttable;

5. The term 'best interests' encompasses medical, emotional and all other welfare issues.

Hayden J endorsed the preparation of a 'Benefits/Disadvantages Table' for each of the treatment options contemplated (see also the judgment of Holman J in an *NHS Trust v MB (A Child represented by CAFCASS as Guardian ad litem)* [2006] 2 FLR 319). The use of the table, supplemented by oral evidence, led the judge to conclude that the treatment solution proposed by the Trust was in A's best interest. The treatment options proposed by A and her mother contained far greater risks and fewer benefits. The judge annexed the table to his judgment 'in the hope that it might stand as a template for future practice'.

### Comment

The 'Benefits/Disadvantages Table' annexed to the judgment and described by the judge as 'comprehensive in its simplicity' is a useful template for NHS Trusts in medical treatment cases in the COP as well as the Family Division.

As Hayden J noted (at paragraph 13) he was not applying the MCA 2005 because A was below 16 (with the exception of certain decisions relating to property and affairs, no decisions can be taken under the MCA 2005 in relation to those under 16 (s.2(5)) MCA 2005)). In essence, though, he applied exactly the same approach even though the result was cast in the language of competency. We would suggest that this case further highlights the anomalous situation identified (extra-judicially) by McFarlane LJ in '*Mental Capacity: One Standard for All Ages?*' [2011] Fam LJ 479, in which he expressed the view that, in his view, there was no reason why the scheme for evaluating capacity should be different as between the two groups of people (i.e. those above and below 16).

## A power of entry in Wales

Those of who were following (with increasing sadness) the debate in relation to whether a power of entry should be introduced into the Care Bill may be interested to note that such a power will be introduced in in Wales in the form of clause 127 of the Social Services and Well-being (Wales) Bill, which has been passed and now awaits Royal Assent. Orders, entitled 'Adult Protection and Support Orders' may be sought under clause 127, which reads as follows:

> *127 Adult protection and support orders*
>
> *(1) An authorised officer may apply to a justice of the peace for an order ("an adult protection and support order") in relation to a person living in any premises within a local authority's area.*
>
> *(2) The purposes of an adult protection and support order are—*
>
> *(a) to enable the authorised officer and any other person accompanying the officer to speak in private with a person suspected of being an adult at risk,*
>
> *(b) to enable the authorised officer to ascertain whether that person is making decisions freely, and*

*(c) to enable the authorised officer properly to assess whether the person is an adult at risk and to make a decision as required by section 126(2) on what, if any, action should be taken.*

*(3) When an adult protection and support order is in force the authorised officer, a constable and any other specified person accompanying the officer in accordance with the order, may enter the premises specified in the order for the purposes set out in subsection (2).*

*(4) The justice of the peace may make an adult protection and support order if satisfied that—*

*(a) the authorised officer has reasonable cause to suspect that a person is an adult at risk,*

*(b) it is necessary for the authorised officer to gain access to the person in order properly to assess whether the person is an adult at risk and to make a decision as required by section 126(2) on what, if any, action should be taken,*

*(c) making an order is necessary in order to fulfil the purposes set out in subsection (2), and*

*(d) exercising the power of entry conferred by the order will not result in the person being at greater risk of abuse or neglect.*

*(5) An adult protection and support order must*

*(a) specify the premises to which it relates;*

*(b) provide that the authorised officer may be accompanied by a constable;*

*(c) specify the period for which the order is to be in force.*

*(6) Other conditions may be attached to an adult protection and support order, for example—*

*(a) specifying restrictions on the time at which the power of entry conferred by the order may be exercised;*

*(b) providing for the authorised officer to be accompanied by another specified person;*

*(c) requiring notice of the order to be given to the occupier of the premises and to the person suspected of being an adult at risk.*

*(7) A constable accompanying the authorised officer may use reasonable force if necessary in order to fulfil the purposes of an adult protection and support order set out in subsection (2).*

*(8) On entering the premises in accordance with an adult protection and support order the authorised officer must—*

*(a) state the object of the visit,*

*(b) produce evidence of the authorisation to enter the premises, and provide an explanation to the occupier of the premises of how to complain about how the power of entry has been exercised.*

*(9) In this section "an authorised officer" means a person authorised by a local authority for the purposes of this section, but regulations may set restrictions on the*

*persons or categories of persons who may be authorised.*

It will be very interesting to see how this power is used when it comes into force (which will not be for some time) and whether – as in Scotland – the existence of the power serves as much as an anything else as a negotiating tool as between local authority officers and those reluctant to allow entry.

## Monitoring care

Many of our readers will no doubt have read about or watched the deeply depressing investigation into the conduct of certain staff at the Old Deanery care home in Essex. It is perhaps difficult to escape the impression that, despite its implications for privacy, undercover filming should not be used by the CQC as part of investigatory tools.

## The uptake of LPAs – an OPG survey

With thanks to Caroline Bielanska for drawing this to our attention, the OPG has recently published a research report it commissioned from Ipsos MORI to better understand the potential "customer base" for lasting powers of attorney.

This report brought together data from ten qualitative interviews, fourteen discussion groups and a nationally representative quantitative survey with adults aged over 45 (some 1,886 adults), and was further informed by the findings of ten in-depth interviews with deputies.

The findings were perhaps not hugely surprising (and were consistent with the evidence given to the House of Lords Select Committee):

- a large proportion of the population aged 45 and over did not know much about LPAs. Around a quarter (26%) said they knew a great deal or a fair amount about LPA, while almost half (45%) had never heard of it, or knew nothing about it. When they are were told about it, around a third (34%) were interested in setting up an LPA at some point in the future while 61% were not interested. Those most likely to state interest in an LPA were those who knew someone who had an LPA and those who knew someone who had lost mental capacity;

- In the qualitative research, experience of a friend or family member losing capacity was also more strongly associated with interest in LPAs than demographic factors. Participants who had acted as an attorney or, a deputy, as well as some who knew someone who had lost capacity, tended to be the most positive about the benefits of LPAs;

- Of those who were interested in applying for an LPA, 64% said they were unlikely to do so in the next 12 months, and a third (33%) thought they would wait until they were diagnosed with a condition that affected their mental capacity to get their LPA(s). However, the qualitative research among those who were recently diagnosed suggested that this often did not act as a trigger in the same way that undiagnosed potential customers thought it would, arguing that it would be much more emotionally difficult to accept than others may consider.

The survey also identified a number of barriers to take up, some of which could be overcome by providing information, but some of which were more intractable. As the report noted (page 54):

> *"Attitudinal and emotional barriers which mean that people focus on the negative aspects of the issue rather than considering the potential positive benefits of LPA are also likely to be difficult to overcome. Losing capacity is not something people want to consider and so they will attempt to put it off for as long as possible, hoping they will never need to deal with it. There are also cultural issues at play such as superstition and considering discussion of losing capacity as taboo, both of which encourage lack of engagement with LPA. Such views are deep-seated and may be difficult to change."*

## Vulnerable Adults Protection Website

The Notaries in Europe have now launched a website with factsheets in three languages (English, French and German) on protective measures for vulnerable adults in the 22 Member States that have the notarial system. This does not include the United Kingdom, but the factsheets represent a useful primer upon protective measures in these countries, including headline pointers as to the approach that is likely to be taken to 'foreign' powers of attorney and advance decisions to refuse treatment. At the launch event, Ms Alexandra Thein for the European Parliament and Ms Patrizia de Luca for the European Commission were unanimous on the need to encourage the Member States to join the Hague Convention on the International Protection of Adults.

## General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities

The Committee on the Rights of Persons with Disabilities has now adopted its General Comment on Article 12 (Equal Recognition before the Law). We will be returning to this in due course, and we hope to have at least part of the June Mental Capacity Law Newsletter dedicated to a discussion of the import of this General Comment and of the CRPD more widely. But in the meantime, I would draw your attention to paragraphs 22 and 23:

> "22. In its concluding observations relating to article 12, the Committee on the Rights of Persons with Disabilities has repeatedly stated that the State parties concerned must "review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences"
>
> 23. Substitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain common characteristics: they can be defined as systems where (i) legal capacity is removed from a person, even if this is just in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will or (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences."

On its face, this interpretation of the CRPD, by the treaty body charged with its oversight, strongly suggests that the MCA 2005 is incompatible with the Convention. The full implications of the CRPD in this regard are being worked out over time (including through a project being run by the Essex Autonomy Project

with the Ministry of Justice with which both Neil and Alex are involved): watch this space.

## Book review: Elderly People and the Law (2nd edition)

[Editorial note: see below for the first book review on this site, written by Alex. If anyone has any books that they think that it would be useful for us to review in the field of mental capacity law, do please let us know – and, shameless pitch, we are always in the market for review copies, albeit that this cannot guarantee a positive review!]

Book review: Elderly People and the Law (2nd Edition: Gordon Ashton OBE and Caroline Bielanska: Jordans, 2014, £55)[3]

It must be a rare book upon the law that includes epigraphs from Harry Potter and South Park. This is, however, no ordinary legal textbook. Rather, it is a compendious and above all practical guide to almost every conceivable legal issue that can could arise from the perspective of either those in or concerned with the welfare of that somewhat nebulous but extremely important group of 'the elderly.' The first edition of this book was published in 1995, in an almost entirely different legal world, and so this second edition is very welcome indeed.

The chapter headings give an idea of the book's scope: starting with the role of the law, the book moves on to consider the mental capacity jurisdiction; the older person; family and carers; housing; residential care: regulation, choice and contracts; community care; health care; challenging the authorities; financial affairs; financial affairs and incapacity; and testamentary provision and death. The appendices contain directories of useful resources – but in an indication of the depth and breadth of the text, the appendices run to only some 20 odd of its 672 pages. The authors do not then seek to include relevant legislation – a sensible decision given how wide a terrain is covered.

Each chapter stands as a mini-textbook upon the relevant area and, despite its name, the book would serve as a useful primer for anyone wishing a broad overview of the core components of the law relating to adults of any age with potential vulnerabilities. Some chapters also include helpful practical examples of the steps that should be taken to ensure that that the law serves rather than the hinders the interests of the elderly person in question: I would single out, in particular, the discussion in the chapter on financial affairs and incapacity as to what should be done where it appears that a person is starting to lose the capacity to manage their own affairs.
Inevitably in this area, the law continues to evolve – whilst the key provisions of the Care Bill are highlighted in the chapter on Community Care, and the decision of the Supreme Court in *Cheshire West* is anticipated, there will be a need for a third edition before very much longer, especially if (as is fervently to be hoped) the post-legislative scrutiny report of the House of Lords Select Committee generates real action in relation to the better implementation of the MCA 2005. Alternatively, if Gordon and Caroline can be persuaded, perhaps they can provide 'rolling' updates of its e-book version.

[3] Full disclosure: (1) Alex is very grateful to Jordans for providing him with a copy of this for purposes of this (unpaid) review; (2) Gordon Ashton edits the annual Jordans' Court of Protection Practice textbook to which Alex contributes.

If I had a criticism, it would be that from the perspective of a particularly enthusiastic mental capacity nerd, the chapter on the mental capacity jurisdiction could perhaps have done with a little more citation from the authorities that have been decided since the MCA 2005 came into force. The essential judicial task (at least in cases concerning the assessment of capacity) has been held to be, wherever possible, to apply the plain words of the Mental Capacity Act 2005 directly to the facts of the particular case, avoiding complicating factors such as case-law pre-dating the statute: *RT v LT and A Local Authority* [2010] EWHC 1910 (Fam) paragraphs 49-50 per Sir Nicholas Wall, P. But even in that case, Sir Nicholas acknowledged that there would be cases in which it would be necessary to look to pre- and/or post-Act authority, and the bones of the Act have now been fleshed out in some important (and occasionally surprising) ways by judges from the Court of Protection to the Supreme Court.

This is, though, a very minor criticism. The book's primary purpose is not to serve as a mental capacity law handbook; in any event, what it has to say about mental capacity law comes with the authority of a (recently retired) judge truly specialist in the area, a judge, moreover, who has a real understanding of the point of the MCA 2005 and the tension it enshrines between autonomy and protection. I have already whilst writing this review fired off several emails to myself with thoughts generated by the book, and I know that I shall be regularly consulting it in the months and years ahead. I would unhesitatingly recommend that this book should take up an immediate place on the bookshelf of advisers (both in the private and public sectors) concerned with this vitally important area.

## Registered Power of Attorney held to be invalid

A Continuing Power of Attorney in a bank's standard form registered with the Office of the Scottish Public Guardian ('the OPG') has been held by a Sheriff not to have been validly constituted, and the court held that even if the form had been validly constituted, proposed Guardians should be preferred to administer the Adult's affairs so that the Continuing Power of Attorney would have been revoked. The Guardianship application was granted.

The Continuing Power of Attorney had been granted by the Adult, Mrs W, in favour of a bank in 2008 shortly after the death of Mrs W's husband. Mrs W subsequently lost capacity and her niece and cousin (being unaware of the existence of the Power of Attorney) applied for Financial & Welfare Guardianship of Mrs W under Sections 57 & 58 of the Adults with Incapacity (Scotland) Act 2000 ('the Act'). As part of the statutory procedure, the application was intimated to the OPG. When responding to the Applicants' solicitor, the OPG advised that they already held a Continuing Power of Attorney granted by the Adult in favour of the Bank on their register. Despite the Applicants having alerted the local branch of the Bank to Mrs W's deteriorating mental health in 2013, the Bank had taken no steps to exercise their powers as Continuing Attorney and the Applicants were left to assist the Adult with her financial affairs on an informal basis pending the outcome of the Guardianship application.

In light of the information received from the OPG, the Applicants amended their application to seek revocation of the existing Continuing Power of Attorney in terms of Section 20(2)(e)(ii) of the Act. The Bank opposed the application for revocation and a hearing was held at Glasgow Sheriff Court on 29 April 2014 before Sheriff Baird to determine the matter. Sheriff Baird held that, despite having been registered with the OPG, the Continuing Power of Attorney in favour of the Bank had not been validly constituted in terms of Section 15 of the Act. He noted that there was no express statement that Mrs W had intended the powers to be continuing powers in terms of Section 15(3)(b) of the Act. In addition, there was no statement within the Power of Attorney in terms of Section 15(3)(ba) of the Act that Mrs W had considered how her incapacity was to be determined. As such, there was no need to revoke the Power of Attorney and the Applicants were appointed as Mrs W's joint Financial Guardians. Given that the Continuing Power of Attorney was in the Bank's standard form, the decision raises questions about whether a large number of Powers of Attorney prepared in the Bank's standard form are in fact valid.

Interestingly, Sheriff Baird indicated that even if there had been a validly constituted Power of Attorney, he would have been persuaded to revoke it and appoint the Applicants as Mrs W's Financial Guardians as the Bank had not taken steps at any time to exercise their powers as Mrs W's Attorney. In the circumstances, he was prepared to treat the parties as being competing applicants and apply the criteria for appointment of guardians contained in Sections 59(3) and 59(4) of the Act to both parties.

It is understood that a written decision will be issued in due course.

[Editorial Note: We thank Alison Hempsey of TC Young LLP, who acted for the successful Applicants in this case and provided this note. We are always interested in receiving equivalent case updates from readers who are aware of unreported cases of importance]

## Symposium on the Assisted Suicide (Scotland) Bill[4]

The Ampersand stable of Advocates in partnership with the J K Mason Institute for Medicine, Life Sciences and the Law at the University of Edinburgh's Law School hosted a full day seminar in Edinburgh on 24th April 2014 on "The Assisted Suicide Bill: Does Scotland Need to Legislate?" Relevant topics were allocated to sessions on principles, practicalities, palliative care and policing. The day concluded with general debate.

The Bill is in the early stages of procedure before the Scottish Parliament. It has been allocated to the Health and Sport Committee (rather than the Justice Committee), whose call for evidence requests submissions by 6th June 2014. The Bill was introduced by the late Margo MacDonald, MSP, who also proposed its predecessor, the End of Life Assistance (Scotland) Bill in 2010. Margo – uniquely known simply by her first name throughout Scotland – was an indefatigable campaigner for this and many other causes, an independent MSP highly respected across the political spectrum, and a much-liked person who will be greatly missed.

Non-lawyers present at the Seminar were dismayed that lawyers who spoke all critically dissected the drafting of the Bill. It was necessary to reassure them that this in no way reflected views on the principles of the Bill. Subject to the caveat that some participants left and others arrived during the course of the day, it is interesting to note that votes cast at the outset were 37% in favour of the principle of the Bill, 42% against and 21% undecided; and those at conclusion 52% in favour, 31% against and 22% undecided – indicating, if nothing else, that a day of high quality discussion and debate can influence the development of opinion.

For present purposes it is unnecessary to record all the points of criticism of the Bill as drafted and introduced, as there was apparent consensus that it would be unworkable without substantial re-drafting. Realistically, such a level of re-drafting would be difficult to achieve at stage 2 of a Private Members' Bill, even assuming approval in principle at stage 1, though on some points the similar Bill for England and Wales before the House of Lords would appear to provide satisfactory solutions: examples are the exemption from liability provisions, and delineation of the difference between assistance and euthanasia. Also, it would probably be helpful to introduce existing, well-understood concepts in place of attempted new, untried and often unclear – and undefined – terms and phrases in the present Bill. An example would be "not persuaded or similarly influenced" in place of undue influence and other existing concepts. Another is the attempted new, and apparently flawed, definition of capacity with no evident reason for not using the precise converse of the definition of "incapable" in section 1(6) of the Adults with Incapacity (Scotland) Act 2000. Similar concerns apply to the undefined use of "condition" as an alternative to "illness", producing criteria such as "a condition that is ….. progressive and …. terminal" (life itself, at least for the ageing person?).

There was concern at the absence of any provisions in respect of conscientiously objecting medical practitioners, though participants were cautioned against making claims that a slippery slope from assisted suicide to morally problematic and unlawful conduct had occurred in jurisdictions where assisted dying had been legalised in the absence of substantiating

[4] With thanks to Isra Black of Kings College London for comments upon this article.

evidence, which is often unavailable. It was also observed that there was no general trend of expansion of the legal criteria in the jurisdictions that permit assisted dying'. Also dispelled was a misapprehension that "autonomy," in this or any other context, equates to uncaring selfishness.

The session on palliative care – as with the other sessions – was not without controversy but was carefully debated, and was informative. Myths dispelled here were that it is almost entirely about the care of cancer sufferers (it is not) or consists mostly of administration of large, even potentially fatal, doses of morphine (which very clearly indeed, it is not).

From the policing session emerged a general view that a requirement simply to report deaths under the procedure to the police would be inadequate. There was a strong case for a supervisory body with power to review individual applications of the proposed procedure and also able to build – for purposes of monitoring and future review – a statistical picture. There would in any event require to be protocols for police and Crown Office, with engagement of the medical professions, extending to such basic points as certification. Regardless of the progress of this Bill, Scotland is in any event at risk of a finding of non-compliance with article 8(2) of the European Convention on Human Rights unless and until guidance for prosecutors is published, similar to that now in place in England and Wales following *R (Purdy) v Director of Public Prosecutions* case [2009] UKHL 45.

In summary, the case for not continuing to deny assistance with suicide to anyone at all who might ever seek it, and denying the reassurance of potential availability of such assistance if ever desired, was if anything strengthened, but the suitability of the present Bill as a vehicle for delivering such provision with necessary protections and clarity – unless substantially amended – was fairly comprehensively rejected.

Speakers, in the order in which they first addressed the Seminar, included David Stephenson, QC, Dr Miles Mack, the Reverend Dr. Donald M MacDonald, Professor Graeme Laurie, Adrian Ward, Isra Black, Dr Stephen Hutchison, Mark Hazelwood, Dr Gillian MacDougall, Norma Shippin, Ailsa Carmichael, QC and Dorothy Bain, QC.

*Adrian Ward*

## The Scottish *Bournewood*

By way of an update on the case of *DC v Mericourt Limited and Others* that we reported upon in March, the hearing fixed for 30 April 2014 was on 29 April discharged by the Court upon the unopposed application of the petitioner, and a three-day hearing fixed to commence on 14 October 2014. The Report of the Scottish Law Commission on deprivation of liberty is expected later this year, so it may have been published or be about to be published by the time of the hearing.

*Adrian Ward*

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## Conferences at which editors/contributors are speaking

### Hot topics in adult incapacity law

Adrian will be speaking on hot topics in the incapacity field at the Solicitors' Group Wills, Trust & Tax conference in Edinburgh on 7 May 2014. Full details are available here.

### Bonnar Accident Law Conference

Adrian is speaking at the Bonnar Accident Law residential conference on 15 and 16 May 2014 on incapacity matters relevant to court practitioners; for details, email Adrian.

### Annual private law conference convened by the Royal Faculty of Procurators

Adrian will be speaking at the annual private law conference convened by the Royal Faculty of Procurators in Glasgow on 29 May 2014. Full details are available here.

### The Hague Convention on the International Protection of Adults – a quiet revolution?

Alex will be presenting a progress report upon his work on the cross-border protection of adults at a free seminar at the Centre for Medical Law and Ethics at Kings College London Strand Campus (Moot Court Ante Room, Somerset House East Wing) on 27 May from 16:00-17:30. To register, please email Isra Black.

### The Deprivation of Liberty Procedures: Safeguards for Whom?

Neil is speaking at the day-long conference arranged on 13 June by Cardiff University Centre for Health and Social Care Law and the Law Society's Mental Health and Disability Committee, to discuss the extent to which the DOL procedures comply with international human rights standards, and whether they offer adequate protection for the rights of service users and their carers. The Conference will focus on the implications of the ruling of the Supreme Court *Cheshire West* as well as the likely impact of the Report of the House of Lords Committee on the Mental Capacity Act. Other speakers include Richard Jones, Phil Fennell,





### Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Lucy Series, Professor Peter Bartlett, Sophy Miles and Mark Neary. Full details are available here.

## Other conferences of interest

### Withholding and Withdrawing Treatment from Patients in a Vegetative or Minimally Conscious State

This day-long conference, arranged jointly by the University of York's Chronic Disorders of Consciousness Research Centre and the Court of Protection Practitioners Association, feature Baker J as keynote speaker, reflecting upon the decision in W v M and Ors [2011] EWHC 2443 (Fam). There will also be talks from a range of experts covering the ethical, clinical, philosophical, economic, and sociological perspectives of withdrawing treatment from vegetative and minimally conscious patients. For full details, please click here.

### BABICM Summer Conference

The British Association of Brain Injury Care Managers is holding its summer conference on 25 and 26 June 2014 at the Hilton Birmingham Metropole. Entitled "Nobody Does It Better! Current Practical Issues in Brain Injury," the conference will examine issues facing brain injury case managers: (1) sex, capacity and the law; (2) what constitutes privileged documentation; and (3) the implications of the judgment in *Loughlin v Singh*. For more details and to register, please click here.

# Chambers Details

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


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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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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.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. 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.

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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.

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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click here.

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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.

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