Mental Capacity Law Newsletter May 2015: Issue 56

Compendium

Introduction

Welcome to the May 2015 Newsletters, which are a little late, but delayed so as to be able to bring you the crucial Court of Appeal decision in *Re MN*, handed down on Thursday. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: a difficult decision on DOLS and Guardianship and best interests in the real world

(2) In the Property and Affairs Newsletter: when (and what) deputies can pay themselves for care and clarification as to when an LPA can be revoked on the basis of animosity between the attorneys;

(3) In the Practice and Procedure Newsletter: *Re MN*, setting out the boundary between the Court of Protection and the Administrative Court; revisiting litigation capacity; and transparency and the Court of Protection ;

(4) In the Capacity outside the COP Newsletter: the new POST note on Vegetative and Minimally Conscious States;

(5) In the Scotland Newsletter: the importance of careful drafting when it comes to powers of attorney and an appreciation of two recently retired members of staff of the MWC.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here.

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For all our mental capacity resources, click here. Transcripts not available at time of writing are likely to be soon at www.mentalhealthlaw.co.uk.

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Guardianship and DOLS (again)

NM v Kent County Council [2015] UKUT 125 (AAC) (Upper Tribunal (Administrative Appeals Chamber (Upper Tribunal Judge Jacobs))

Article 5 ECHR – DOLS ineligibility – Mental Health Act 1983 – conditional discharge – interface with MCA

Summary

This judgment considers the relationship between DoLS and guardianship. Mr M was in his early forties and was described as having mild learning disability and paedophilic sexual interests. He had previously set fires alight, been verbally and physically aggressive, hoarded materials relating to children, and sought to contact them by dropping notes in the street inviting them to contact him.

Mr M's local authority guardian required him to reside in a residential home and meet with clinicians and therapists for treatment. He was also subject to DoLS which had been endorsed by the Court of Protection. Mr M contended that guardianship was no longer necessary because of the DoLS authorisation. He was said to have capacity to decide where to live but lacked capacity with regard to the level of supervision required to keep him and children safe. The professional view was that if discharged from guardianship he would try to leave and not return.

The First-Tier Tribunal rejected Mr M's contention, deciding that guardianship was necessary in the interests of his welfare and that of the children with whom he sought contact. His appeal was dismissed by the Upper Tribunal where it was said that "there is a fine line" between guardianship and DoLS. Judge

Jacobs accepted the following important differences between them, albeit that this list was not comprehensive:

- DoLS assumes that the person lacks capacity to make the relevant decisions in their best interests. Guardianship is not based on an assessment of the person's best interests.

- DoLS cannot impose a requirement that the person reside at a particular address, whereas a guardian can, enforced by taking the person into custody and returning them to their required residence.

- DoLS cannot authorise anyone to give, or consent to, treatment for someone with a mental disorder.

It was noted that it may in some cases be possible for DoLS to provide sufficiently for a person's welfare and the protection of others so that guardianship was not necessary (para 19). Tribunals, Judge Jacobs held, must be alert to the potential relevance and practical effect of DoLS. And "*guardianship may not be necessary for a person who is physically unable to leave a care home, whereas this is not necessarily the case for a person who has the will and ability to abscond*" (para 20). It is necessary to take account of the practical effect of DoLS. Judge Jacobs held that "*There is no rule that a DOLS always trumps guardianship, any more than there is a rule that guardianship inevitably trumps a DOLS*" (para 22). He went on to decide:

> "*26. I do not accept the argument put by Mr M's solicitors that a DOLS is sufficient protection as it allows the home to prevent Mr M leaving. That argument does not deal with the possibility that he may abscond, especially given his wish to live elsewhere and the tribunal's findings that he is devious in the pursuit of his own objectives. This is a limitation inherent in the nature of a DOLS; nothing in the Court of Protection's declaration could have affected this reasoning.*"

Accordingly, Mr M was to remain under DoLS and guardianship.

Comment

This decision confirms – if ever there was any doubt – that guardianship can be used alongside DoLS. With regard to the apparent differences between the regimes identified by Judge Jacobs, we would make the following observations. First, both DoLS and guardianship can have the effect of requiring someone to reside somewhere. The guardian's power is exclusive, even to the Court of Protection; DoLS provides authority to deprive those lacking residential capacity of their liberty. Second, neither DoLS nor guardianship can authorise treatment, whether for physical or psychiatric ill health. Such treatment is governed by the MCA if the person lacks the relevant capacity: a guardian can require the person to attend a place for treatment but guardianship provides no power to treat. Finally, guardianship can clearly trump DoLS as the residence requirement is exclusive: so if DoLS is inconsistent with a MHA requirement the person is not eligible for it.

The list provided by the Upper Tribunal is of course not exhaustive. Other differences are that, for those with learning disability, guardianship (but not DoLS) requires the condition to be associated with abnormally aggressive or seriously irresponsible conduct. DoLS is only available for hospitals and care

homes, whereas guardianship is not so limited and can be used elsewhere. The individual's family has more powers under guardianship. For the nearest relative can veto it (subject to being displaced in the County Court), unlike DoLS (unless they have been appointed under a health and welfare LPA). Moreover, the nearest relative can order the person's discharge from guardianship (with a responsible clinician having no power to bar it); whereas only the supervisory body or the Court of Protection can terminate DoLS.

The Upper Tribunal's rejection of the argument that DoLS allows the home to prevent Mr M leaving does not – in our view – properly address the legal complexities that are in play here. A supervisory body has of course authorised the managing authority to deprive the person of their liberty so the person can be prevented from leaving. However, if they abscond, Parliament deliberately decided not to include a conveyance power within the DoLS authorisation (although some case law suggests that it is implied). MCA ss.5-6 can, of course, be used to exercise proportionate restraint to convey the person back if the statutory requirements are met, provided the conveyance itself does not constitute a deprivation.

The professional view on Mr M's mental capacity is a somewhat bizarre finding which may have stemmed from the error of using a blank canvass (see *CC v KK*). Clearly, by virtue of the DoLS authorisation, he had been found to lack capacity to decide whether to be accommodated in the care home for the purpose of receiving the necessary care or treatment.

Finally, we should highlight the 2015 Code of Practice to the Mental Health Act 1983, which states that:

> "*30.12 Where an patient aged 16 or over is assessed as requiring residential care but lacks the capacity to make a decision about whether they wish to be placed there, guardianship is unlikely to be necessary where the move can properly, quickly and efficiently be carried out on the basis of:*
>
> - *section 5 of the MCA or the decision of an attorney or deputy, and*
> - *(where relevant) a deprivation of liberty authorisation (a DoL authorisation) (in relation to a patient aged 18 or over) or deprivation of liberty order (Court of Protection order) under the MCA.*
>
> *30.13 But guardianship may still be appropriate in such cases if:*
>
> - *there are other reasons – unconnected to the move to residential care – to think that the patient might benefit from the attention and authority of a guardian*
> - *there is a particular need to have explicit statutory authority for the patient to be returned to the place where the patient is to live should they go absent, or*
> - *it is thought to be important that decisions about where the patient is to live are placed in the hands of a single person or authority – eg where there have been long-running or particularly difficult disputes about where the person should live.*
>
> *30.14 It will not always be best to use guardianship as the way of deciding where patients who lack capacity to decide for themselves must live. In cases which raise unusual issues, or where guardianship is being considered in the interests of the patient's welfare and there are finely balanced arguments about where the patient should live, it may be preferable instead to seek a best interests decision from the Court of Protection under the MCA.*

The question of the interaction between the MCA and the MHA is one that continues to vex – and to no obviously sensible aim as regards the delivery of proper clinical care. We will cover in the next issue the decision in *A Local Health Board v AB* [2015] EWCOP 31 which arrived too late for us to consider fully for this issue, but illustrates this point in spades.

Best interests in the real world

Bedford Borough Council v (1) Mrs LC (2) Mr C [2015] EWCOP 20 (Bodey J)

Best interests – residence

Summary

This case concerned LC's (Mrs C's) best interests in relation to residence, contact with her husband and a deprivation of her liberty.

Mrs C was a 74 year old woman with a diagnosis of dementia, diabetes and strike-related illness. Mrs C had been married to Mr C for over fifty years. Until June 2010, they had lived together in their matrimonial home. In June 2010, there was an incident in which a carer reported that Mr C had pushed Mrs C in the face. Mr C pleaded guilty to assault and was given a community sentence. Following this incident, she was taken to a care home as a place of safety and has remained there ever since.

Mrs C did not wish to see her husband for some time after the assault. After 8.5 months, Mrs C wished to see her husband. Gradually, Mr and Mrs C rebuilt their relationship. The current arrangements were that Mrs C goes to the matrimonial home twice a week for up to four hours and her husband is able to visit the care home whenever he likes. The couple have "supported rather than supervised" telephone contact at Mr C's instigation. Mrs C did not have the capacity to initiate a telephone call.

Mr C contended that it was in his wife's best interests to return to the family home. However, the local authority disagreed and contended that it was Mrs C's best interests to remain in the care home and for all contact with her husband to be supervised.

One factor for the judge's consideration was that the local authority could not afford or would not agree to fund a package of care at home which costs more than £700 per week. In particular, the local authority would not fund 24 hour care for Mrs C in the matrimonial home. Having regard to the level of funding, the judge had to decide which one of three options was in Mrs C's best interests:

1. To return to the matrimonial home with a personal budget of £700 per week, sufficient to buy approximately 50 hours of care per week, or 25 hours of double-handed care;
2. To continue residing at the care home; or
3. To reside in a different care home.

After making detailed findings of fact and weighing up the various competing opinions, District Judge Eldergill decided that it was in Mrs C's best interests to remain in the care home. Of particular concern was the evidence that Mrs C's needs had increased since 2010 but the local authority would not or could not fund more than £700 of care per week which was the same level of care that Mrs C received in 2010. The judge concluded that Mrs C would not receive the care at home that she required.

Comment

In reaching a best interests decision, District Judge Eldergill carefully considered the various factors set out in section 4 MCA 2005. In particular, he was satisfied that Mrs C's present wishes and feelings were to live at home with her husband. However, he was constrained by the local authority's position regarding funding. He stated at paragraphs 26-27:

> "*26. This court does not have the power to review the lawfulness of this financial needs assessment and it has not been challenged by any of the parties by way of judicial review.*
>
> *27. I must proceed on the basis that the local authority's financial needs assessment in this respect is lawful and binding on me unless and until it is set aside by the appropriate court or modified by the local authority, if ever.*"

Therefore, despite finding that it was Mrs C's wish to return home to her husband, the judge held that it was not in her best interests because she would not receive the care she required on the level of funding that the local authority was prepared to provide. No viable alternative care package, whether from friends, family or volunteers, had been put forward by Mr C.

In addition to the factual issues, District Judge Eldergill made a number of general remarks about Court of Protection procedure and hearings. First, he criticised the local authority's "unacceptable delay" in bringing the matter to court. Mrs C was admitted to the care home in June 2010 but it was not until December 2012 that the local authority applied for declarations in relation to residence, deprivation of liberty and other issues. After further delay, the matter reached the judge on 7 March 2014, by which time Mr and Mrs C had been separated for almost four years without a hearing of the issues. The judge said:

> *"Bearing in mind the length of her marriage, any objective view of her best interests should have led a local authority to facilitate an early determination of the issues. That was the overriding procedural consideration."*

The judge was also critical of the documentation that he received:

> *"The Court received a 1500-page bundle of documents which included applications and application notices, orders, directions, position statements, capacity assessments, witness statements, exhibits, correspondence, a jointly instructed independent social work report… a jointly instructed independent SALT report, Scott Schedules/Particulars of Allegations and preserved Deprivation of Liberty forms. In my view, it is fair to say that the bundles were confusing and the court worked from two different bundles."*

He also expressed several concerns about the way in which the local authority had prepared its care and about the quality of some of its evidence, for example:

- Allegations were made which could not be substantiated and which ought not to have been part of the case;
- There was a tendency to look to hold Mr C responsible for all care difficulties;
- Mr C was described as 'lacking insight' when sometimes he simply took a different view to that of the professionals; and
- The local authority's witnesses were unable to provide basic care planning information.

This is a reminder of the burden on local authorities thoroughly to investigate the issues and to bring the matter to court in a timely manner. The case – more broadly – may also be thought to stand as an illustration of the issues that have led to the trenchant comments of Sir James Munby P in *ACCG* as to the conduct of welfare proceedings discussed in the Practice and Procedure Newsletter.

Care and the deputy

Re HC [2015] EWCOP 29 (Senior Judge Lush)

Best interests – deputies – property and affairs

Summary

In this case the Senior Judge was faced with the Public Guardian's application for the revocation of a deputyship order in favour of P's son.

The Public Guardian brought the application because of the deputy's failures properly to account for expenditure on the renovation of P's house and payments he had made to himself and (to a lesser extent) his sister for caring for P.

P suffered from vascular dementia and had moved from Bristol to London to live with the deputy. The deputy gave up his work as a quantity surveyor to look after P. He explained that the work to P's home in Bristol had been necessary and the decision not to sell the property had been made after consulting other family members and because the property was P's pride and joy. It had originally been the intention that P should return to Bristol but that was no longer possible.

The Senior Judge was obviously impressed with the deputy who was supported by his siblings. He gave retrospective approval for the expenditure on the house and the payments to the deputy and his sister. He did not revoke the deputyship order though he did set out clear accounting requirements.

Of general interest was the Senior Judge's treatment of the payments for care. He approached these in the same way as would be done by a court hearing a personal injury claim allowing a commercial rate discounted by 20% because the payment is not taxable in the recipient's hands (though commonly in personal injury claims the deduction is 25%).

He also provided for annual increases in line with Annual Survey of Hours and Earnings (ASHE) 6145 – carers and home carers.

The amount approved was £1,500 per month for the deputy and £100 per month for his sister. Expenditure, as the Senior Judge noted, significantly less than any alternative care package that might be available.

Comment

It is a pleasant change to see a case before the Court of Protection in which the court was able to bless rather than condemn the actions of a deputy. The approach to payments for care is of wider application than to the facts of the individual case and can be read with other cases in which Senior Judge Lush has

sought to give specific guidance to deputies and attorneys as to the discharge of their duties as regards the management and use of P's assets (see, in this regard, in particular, *Re Buckley*, *Re Treadwell* and *Re GM*).

Short note: removing attorneys

In *Re EL* [2015] EWCOP 30, Senior Judge Lush helpfully confirmed that, where there is "corrosive animosity" between attorneys under an LPA, leading to an impasse as to the management of the donors affairs, the court has the power to revoke the LPA. As he noted, the law relating to revocation of LPAs is different to that relating to EPA (rehearsed in *Re ED* [2015] EWCOP 26):

1. An EPA can be revoked on the ground that, having regard to all the circumstances and in particular their relationship to or connection with the donor, the attorneys were unsuitable to be the donor's attorneys: MCA 2005, Schedule 4, paragraph 16(g);

2. An LPA cannot be revoked on the ground of unsuitability of the attorney(s), but on the "narrower and more focused" (Re J v [2011] Con Vol 716) basis set out in s.22(3) MCA 2005, namely that the donee (i) has behaved, or is behaving, in a way that contravenes his authority or is not in P's best interests, or (ii) proposes to behave in a way that would contravene his authority or would not be in P's best interests.

At paragraph 39, Senior Judge Lush confirmed, however, that where the conduct of attorneys under an LPA towards each other shows that they cannot be "*be trusted to act in the manner and for the purposes for which the LPA was intended*," this can serve to satisfy the court that the "*attorneys have behaved in a way that is not in the donor's best interests*," and hence a ground for revocation under s.22(3)(i).

In the instant case, Senior Judge revoked the LPA on the grounds not merely of the attorneys' conduct to each other, but also on the basis that they had contravened their authority by making gifts to themselves from their donor mother's funds, which are far in excess of the limited authority conferred upon attorneys generally by s.12 MCA 2005. He made clear that the outcome was the same "*as it would have been if EL had executed an EPA, instead of an LPA, and I had found that, having regard to all the circumstances, the attorneys are unsuitable to be her attorneys, but the methodology is different*" (paragraph 40).

As if to prove, however, that sibling 'bickering' is insufficient, Senior Judge Lush declined to revoke an LPA several days later in *Re MC* [2015] EWCOP 32 where this contention was, in part, advanced as a basis for revocation.

The Court of Protection comes of age

In the Matter of MN (Adult) [2015] EWCA Civ 411 (Court of Appeal (Sir James Munby P, Treacy and Gloster LJJ))

COP jurisdiction and powers – Interface with public law jurisdiction

Summary

As Sir James Munby P, giving the lead judgment of the Court of Appeal noted, this appeal "*raise*[d] *fundamental questions as to the nature of the Court of Protection's jurisdiction and, in particular, the approach it should adopt when a care provider is unwilling to provide, or to fund, the care sought, whether by the patient or, as here, by the patient's family*." The Court of Appeal also took the opportunity to give guidance as to conduct of welfare proceedings before the Court of Protection and to clarify when decisions, rather than declarations, should be sought.

The appeal was brought, separately, by both parents of a young man, MN, against the judgment of Eleanor King J (as she then was) [2013] EWHC 3859 (COP). In very brief summary, at the final hearing of an application for declarations as to where a young man should live (and receive education and care), and for regulation of his contact with his parents and other family members, the relevant funding body, ACCG, had made it clear that it was not prepared to fund contact between P and his family at the parents' home. ACCG therefore submitted that this was not an option for the Court to consider when making best interests decisions; Counsel for the parents submitted that the Court should embark upon a trial in relation to home contact (and to the delivery of personal care by the man's mother). The jurisdictional issue to which this gave rise – i.e. as to the precise scope of the Court of Protection's powers – arose very late in the day, but it having been fully argued, Eleanor King J gave a full judgment upon the point. Eleanor King J held that the Court of Protection was – in essence – bound to choose between the options that were actually available.

The scope of the Court's jurisdiction

After a characteristically thorough review of the authorities, Sir James Munby P had no hesitation in concluding that Eleanor King J was correct essentially for the reasons that she had given:

> *"80. The function of the Court of Protection is to take, on behalf of adults who lack capacity, the decisions which, if they had capacity, they would take themselves. The Court of Protection has no more power, just because it is acting on behalf of an adult who lacks capacity, to obtain resources or facilities from a third party, whether a private individual* or *a public authority, than the adult if he had capacity would be able to obtain himself. The A v Liverpool principle* [[1982] AC 363] *applies as much to the Court of Protection as it applies to the family court or the Family Division. The analyses in A v A Health Authority and in Holmes-Moorhouse likewise apply as much in the Court of Protection as in the family court or the Family Division. The Court of Protection is thus confined to choosing between available options, including those which there is good reason to believe will be forthcoming in the foreseeable future.*

> *The Court of Protection, like the family court and the Family Division, can explore the care plan being put forward by a public authority and, where appropriate, require the authority to go away and think again. Rigorous probing, searching questions and persuasion are permissible; pressure is not. And in the final analysis the Court of Protection cannot compel a public authority to agree to a care plan which the authority is unwilling to implement. I agree with the point Eleanor King J made in her judgment (para 57):*
>
> > *'In my judgment, such discussions and judicial encouragement for flexibility and negotiation in respect of a care package are actively to be encouraged. Such negotiations are however a far cry from the court embarking on a 'best interests' trial with a view to determining whether or not an option which has been said by care provider (in the exercise of their statutory duties) not to be available, is nevertheless in the patient's best interest.'"*

The President identified four reasons why the Court of Protection should not embark upon hypothetical examinations of where an individual's best interests lie:

1. It is not the proper function of the Court of Protection to embark upon a factual inquiry into some abstract issue the answer to which cannot affect the outcome of the proceedings before it;

2. It is not a proper function of the Court of Protection (nor of the family court of the Family Division) to embark upon a factual inquiry designed to create a platform or springboard for possible future proceedings in the Administrative Court.

3. Such an exercise runs the risk of confusing the very different perspectives and principles which govern the exercise by the Court of Protection of its functions and those which govern the exercise by the public authority of its functions – and, in consequence, the very different issues which arise for determination in the Court of Protection in contrast to those which arise for determination in the Administrative Court.

4. Such an exercise runs the risk of exposing the public authority to impermissible pressure. The President noted that Eleanor King J had rightly identified at paragraph 59 of her judgment the need to:

> "*avoid a situation arising where the already vastly overstretched Court of Protection would be routinely asked to make hypothetical decisions in relation to 'best interests', with the consequence that CCGs are driven to fund such packages or be faced with the threat of expensive and lengthy judicial review proceedings.*"

Sir James Munby noted that the present case illustrated the point to perfection: "*The present case, it might be thought, illustrates the point to perfection. The proposal was that the judge should spend three days, poring over more than 2,000 of pages of evidence, to come to a 'best interests' interest on an abstract question, and all for what?*"

Human Rights

A separate issue on the appeal was as to whether the Court of Protection had jurisdiction to determine claims raising issues under the HRA 1998 and (if so) how it should proceed to determine such claims where they were pleaded during the currency of 'substantive' proceedings. Sir James Munby agreed with the approach adopted by Eleanor King J, holding (at paragraph 85) that "*the decision of the Court of Appeal in Re V is clear authority for the proposition that the Court of Protection (which in this respect can be in no worse position than the family court or the Family Division) has jurisdiction to determine a human rights claim brought under section 7 of the Human Rights Act 1998*." Sir James Munby agreed with Eleanor King J that such a claim must be clearly identified and properly pleaded. He emphasised, however, that nothing in *Re V* had cast doubt upon the proposition that the HRA 1998 had not collapsed the fundamental distinction between public law and private law. As he had stated previously in *R (Anton) v Secretary of State for the Home Department* [2004] EWHC 2730/2731 (Admin/Fam): "[a] *case which, properly analysed, is a public law case is not transformed into something different merely because Convention rights are relied upon*."

Practice and procedure: when should declarations be used?

As the President noted, there had been a certain amount of debate during the course of oral argument as to the use of declaratory orders in the Court of Protection. Whilst he noted that this was not the occasion for any definitive pronouncement, he made three observations:

1. The "still inveterate use of orders in the form of declaratory relief might be thought to be in significant part both anachronistic and inappropriate." This use originated at a time when, following the decision of the House of Lords in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, it was believed that the inherent jurisdiction of the Family Division in relation to incapacitated adults was confined to a jurisdiction to declare something either lawful or unlawful. This had already been shown to be unduly narrow before the MCA 2005 had come into force, and the Court of Protection has, in addition to the declaratory jurisdiction referred to in section 15 of the 2005 Act, the more extensive powers conferred by section 16.

2. The CoP is a creature of statute, and s.15 MCA 2005 is very precise as to the power of the Court of Protection to grant declarations. Given these very precise terms, the President noted, "*it is not at all clear that the general powers conferred on the Court of Protection by section 47(1) of the 2005 Act extend to the granting of declarations in a form not provided for by section 15. Indeed, the better view is that probably they do not: consider XCC v AA and others [2012] EWHC 2183 (COP), [2012] COPLR 730, para 48*." Further, as the President emphasised: "i*t is to be noted that section 15(1)(c) does not confer any general power to make bare declarations as to best interests; it is very precise in defining the power in terms of declarations as to 'lawfulness'. The distinction is important: see the analysis in St Helens Borough Council v PE [2006] EWHC 3460 (Fam), [2007] 1 FLR 1115, paras 11-18*."

3. A declaration has no coercive effect and cannot be enforced by committal: see *A v A Health Authority*, paras 118-128 and, most recently, *MASM v MMAM and others* [2015] EWCOP 3.

All in all, the President concluded,

> *"*91.. . *it might be thought that, unless the desired order clearly falls within the ambit of section 15, orders are better framed in terms of relief under section 16 and that, if non-compliance or interference with the arrangements put in place by the Court of Protection is thought to be a risk, that risk should be met by extracting appropriate undertakings or, if suitable undertakings are not forthcoming, granting an injunction."*

Practice and procedure: identification of issues

The President reiterated the importance of the need identified by Charles J in *A Local Authority v PB and P* [2011] EWHC 502 (COP), [2011] COPLR Con Vol 166, paras 31-33, to identify, flag up and address, well before a personal welfare case comes on for hearing in the Court of Protection, (i) any jurisdictional issues and the legal arguments relating to them and, more generally, (ii) the issues, the nature of each party's case, the facts that need to be established and the evidence to be given. This identification had not taken place until a very late stage before Eleanor King and, as he noted "[s]*teps need to be taken to ensure, as best can be, that there is no repetition of this kind of problem.*"

This led on to wider observations by the President as to the conduct of welfare proceedings before the Court of Protection:

1. Whilst he was "very conscious" that one must not push too far the analogy between personal welfare proceedings in the Court of Protection and care proceedings in the family court, the President noted that they do share a number of common forensic characteristics. "*Even allowing for the fact – not that it arose in this particular case – that cases in the Court of Protection may involve disputes about capacity which, in the nature of things, do not feature in care cases, there is a striking contrast between the time some personal welfare cases in the Court of Protection take to reach finality and the six-month time limit applicable in care proceedings by virtue of section 32(1)(a)(ii) of the 1989 Act. The present case, it might be thought, is a bad example of what I fear is still an all-too prevalent problem*."

2. The delays in the instant case, the President held, were not caused by any one party nor by any one factor. "*The truth is that this case, like too many other 'heavy' personal welfare cases in the Court of Protection, demonstrates systemic failures which have contributed to a culture in which unacceptable delay is far too readily tolerated*."

3. The President emphasised the nature of the "cultural revolution" that had taken place in the family court with the introduction of the Public Law Outline; he considered (and noted that others had also noted in judgments), that the Court of Protection needed to learn from this, stressing in particular (1) the harm that can be caused by the search for an ideal solution, leading to decent but imperfect solutions being rejected; and (2) the need to concentrate on the issues that really need to be resolved, rather than every conceivable legal or factual issue. He therefore endorsed the call made by Peter Jackson J in *Re A and B (Court of Protection: Delay and Costs)* [2014] EWCOP 48 for the same disciplines to be introduced into the CoP as now apply in the family court, noting in this regard the work of the ad hoc Court of Protection Rules Committee;

4. The President deprecated in particular the quantity of material before the court, noting that he confessed to being surprised "*and that is a pretty anaemic word*" upon learning that the evidence ran to 2,029 pages of evidence. He noted that it might be thought that PD13B should be amended to bring it into line with PD27A in the Family Court, providing that the bundle must not exceed one lever arch containing no more than 350 pages unless a larger bundle has been specifically authorised by a judge.

5. Finally, the President considered that "*early consideration needs to be given*" to the amendment of COPR r.121 to bring into line with s.13(6) Children and Families Act 2014, so as to limit expert evidence to that "*necessary to assist the court to resolve the proceedings justly*."

Comment

Jurisdiction

In many ways, the judgment of the President (with whom Treacy and Gloster LJJ agreed) as to the jurisdiction of the Court of Protection should have come as no surprise, reflecting as it did the application of a long line of authorities (dating back over 25 years). However, this does not diminish its importance or the clarity of mind that it then requires all those concerned with the MCA 2005 to bring to decision-making in relation to those who lack capacity in one or more domains related to their care arrangements. Indeed, the judgment is perhaps as if not more important for those concerned with the MCA outside the court arena, reinforcing as it does the need always to be clear what decision is being taken in relation to a person who may lack capacity in one or more domains:

1. There are some decisions where the person's decision-making capacity is irrelevant. A stark example is the decision of a doctor not to offer a particular treatment to a person because they consider it is futile. This decision does not depend upon the person's ability to consent or refuse it. Even if they demanded it they could not compel the doctor to provide it: see *Aintree v James*;

2. There are some decisions where the person's capacity is vitally important and, if they lack the capacity, a best interests decision must be taken on their behalf. For instance, a decision must be taken about whether a person should go into care home A or care home B, either of which is available. They cannot decide and a decision must be taken on their behalf;

3. Most decisions regarding care and treatment are taken informally in reliance upon s.5 MCA 2005. This provides a defence to liability in respect of acts in connection with care or treatment where the person or body carrying out the care or treatment reasonably believes that the person lacks the capacity to take the decision and the steps taken are in their best interests; This was emphasised by Baker in *G v E* [2010] EWCOP 2512: "*the vast majority of decisions are taken informally and collaboratively by individuals or groups of people consulting and working together*;"

4. But it is vitally important to remember that the MCA 2005 only provides that a best interests decision is taken where the individual would take or participate in the taking of a decision.

5. This means that not all decisions taken by a public body about care provision – i.e. how to meet the assessed needs of the individual – are best interests decision. As Nicholas Paines QC the Deputy Judge said in *R (Chatting) v (1) Viridian Housing (2) London Borough of Wandsworth* [2012] EWHC 3595 (Admin) "*the fact that Miss Chatting is mentally incapacitated does not import the test of 'what is in her best interests?' as the yardstick by which all care decisions are to be made*" (a passage specifically endorsed by Sir James Munby P in *ACCG*);

6. That does not mean that such decisions are not to be taken without reference to the individual's welfare or their views, but they are decisions which are, ultimately, decisions that are taken by the public bodies in discharge of their public law obligations, not decisions taken on behalf of the individual in question. They are therefore not best interests decisions, and (1) any meetings which are convened to discuss them should not be labelled best interests meetings; and (2) any challenge to them lies not in the Court of Protection but in the Administrative Court.

None of the points set out above are – or should be – surprising, but in and out of the court arena we do continue to find that confusion creeps in, leading – where it is not checked – both to (inadvertently) misleading conversations with families and in some cases to expensive and misguided legislation. One particular area that we find where this happens with considerable regularity is in relation to discharge planning from hospital: it is absolutely vital that the relevant statutory bodies are clear with themselves in advance of any meeting with the patient/family members precisely which options are on the table, and which (in proper discharge of their public law functions) they are not prepared to fund.

It is perhaps helpful by analogy to have in mind the *One Chance to Get It Right* guidance on care-planning at the end of life and the very clear distinctions drawn there between several types of conversations that clinicians may have. In other words, is the conversation that the public body employee would wish to have with the person whose capacity is in issue a conversation to:

1. Inform them about a decision;

2. Consult them about a decision;

3. Involve them about a decision; or

4. Seek that they take that decision?

The first type of conversation can never lead to a best interests decision being taken where P lacks the capacity formally to engage in it; the second may not, even the third may (in some circumstances), and it is only in respect of the fourth type of conversation that it will be clear that a best interests decision will be made. Put another way, it is only if the decision-maker is standing in the shoes of P that we can properly say that a best interests decision is being made.

Importantly, if a public body brings a matter to the Court of Protection for determination as to where an individual's best interests lie, then it lies in the court's power to direct the public body to file evidence (including care plans), even though the plan's contents may not or do not reflect its formal position, "*for it is not for the local authority (or indeed any other party) to decide whether it is going to restrict or limit the evidence that it presents: see Re W (Care Proceedings: Functions of Court and Local Authority) [2013] EWCA Civ 1227, [2014] 2 FLR 431*" (*ACCG* at paragraph 37). The analogy between child care proceedings and welfare proceedings will be further strengthened in this regard come 1st July 2015, when Rule 87A comes into effect, requiring the permission of the court before proceedings may be withdrawn. In other words, there will be times when public authorities either may or must seek the assistance of the Court of Protection in discharging their obligations towards those for whom they have responsibility; when they do – and for forensically similar reasons to those which apply in relation to child care proceedings – they must work in partnership with the court.

Decisions/declarations

As a significant amount of the debate before the Court of Appeal as regards the proper place to use decisions involved Alex, it is perhaps not entirely surprising that he entirely endorses the observations of the President! More seriously, it is perhaps obvious when we raise our heads above the parapets (1) that is appropriate to make clear when the CoP is deciding on behalf of an individual as to a matter that they cannot determine because they lack capacity so to do; and (2) the easiest way for the Court to do this is for the Court simply say that it is by making an order under s.16(2)(a). A side-benefit of this is that this makes it considerably easier to identify when it is, in fact, a decision that the individual can take, and hence – hopefully – avoiding the elephant traps into which those concerned fell in *ACCG*.

Case management

The President's observations as to case management are noteworthy primarily for their trenchancy – they are otherwise entirely consistent with a rising drum-beat of judicial observations that the time has come to get the Court under control. Precisely how this is to be done is a matter that will be exercising the ad hoc Rules Committee significantly over the coming few months.

Revisiting litigation capacity

Evesham and Pershore Housing Association Ltd v Werrett [2015] EWCOP 29 (High Court (QBD)(Nicol J))

Mental capacity – litigation

Summary

In this civil case the judge was faced with the defendant's application for permission to appeal and, if granted, the appeal from a decision that the defendant had capacity to litigate.

The judge had to decide a number of procedural issues, one of which was whether the finding of capacity was a final or an interim finding. The judge held that the finding was final, thus restricting the court's ability to review it pursuant to CPR 3 (1) 7 to exceptional circumstances (see paragraphs 21 and 22).

Another procedural issue that the judge had to decide was whether the court below had been right to allow the claimant to participate in an adversarial way. The defendant submitted that the Court of Appeal's decision in *Folks v Faizey* [2006] EWCA Civ 381 was authority for the proposition that the other party in litigation did not have a sufficient interest in the capacity issue.

The judge distinguished *Folks* on the basis that in that case, the other party was not prejudiced by the capacity decision and, therefore, had no interest in its outcome. In this case, the claimant, who was seeking possession on the grounds of the defendant's behaviour, had a close interest, so the judge held that it was right that the claimant was allowed to participate in the hearing of the issue (see paragraph 27).

As to the defendant's capacity, the judge held that the court below had been right to find that the defendant had capacity. In those circumstances, he refused permission to appeal.

Comment

This decision is interesting for its findings on the procedural issues and also on the substantive issue of capacity even though it enunciates no new principles. The defendant had certificates from a consultant psychiatrist and a consultant neuropsychologist to the effect that he lacked capacity and the Official Solicitor had written to the defendant's solicitor stating that that was clearly so and indicating a willingness to act as the defendant's litigation friend. The first instance judge's decision (which the appeal court upheld) was based very much on the finding that, with help, the defendant could understand the nature of the proceedings and give instructions. This was a robust decision but demonstrates that challenges to assertions of lack of capacity can successfully be made.

Transparency in the Court of Protection

The sterling work to examine the activities of the Court of Protection being done by Lucy Series and her colleagues at Cardiff Law School continues apace, with the publication of a major report on transparency.[1] The full report is available here; we reproduce the opening summary with the kind permission of Lucy (with footnotes omitted):

> "*This report describes the discussions at a roundtable on the theme of Transparency in the Court of Protection. It was held in September 2014 at the Nuffield Foundation headquarters, and was attended by participants from a range of backgrounds, including members of the judiciary, lawyers with experience of*

[1] Full disclosure – Alex was meant to be but could not attend the roundtable and contributed some comments upon the draft report.

acting for litigants in CoP welfare cases, media lawyers, journalists and other professionals working in media, civil servants and researchers.

Proceedings in the Court of Protection involve a delicate balance between transparency and open justice, on the one hand, and the preservation of the right to respect for privacy for the intimate details of the life of the person who is alleged to lack capacity. All participants expressed support for the principle of 'open justice'. Media reporting on CoP cases, and the publication of judgments, were said to be important for the following reasons:

- *To enhance public understanding of the CoP's work;*
- *To protect against miscarriages of justice;*
- *To promote public confidence in the court;*
- *'Open' and 'accessible' judgments were said to be important for access to justice for litigants in person who might not have access to law reports or legal advice.*

It was also suggested that media reporting could include facts and details which were not apparent in a published judgment but which might aid public understanding of a case, whilst published judgments were important as a corrective against poor or inaccurate journalism.

Whilst all participants broadly supported the principle of 'transparency', there was some disagreement about what this entailed in practice. Some participants highlighted the limited evidence base for claims that transparency protected against miscarriages of justice. There was concern about the potential harm to individuals about facts from their private lives being in the public domain, including the distress which could arise from reading published reports about one's own case – even if this did not result in further harms. Lawyers with experience of CoP litigation warned that even with 'watertight' reporting restrictions, anonymity could not always be guaranteed, commenting that although transparency was important 'there is a price to be paid'.

There was unanimous agreement that there were some serious shortcomings with current arrangements for media access and reporting on CoP cases. In particular, representatives of the media argued that the need to apply formally to attend a hearing was costly, and could have a chilling effect on reporting CoP cases – this would have a disproportionate impact on smaller media organisations. All participants felt that arrangements in the CoP for media attendance at health and welfare cases should be brought in line with the family courts, where the media do not need to make an application to attend private hearings, but the court has powers to exclude them on specific grounds and restrict the publication of information.

A significant area of concern was how the media could, or should, be informed about important cases. There was disagreement among the participants about whether it is lawful for a party, or their lawyer, to alert the media to an important case; there is an urgent need for clarity on this issue. Some participants felt that the court listings should be more informative, so that the media could see which cases might be important in order to send a journalist to attend the hearing. There were also concerns about the procedures for notifying the media about reporting restrictions.

On the basis of discussions at the roundtable, we have identified the following issues for further exploration:

1. *Consideration should be given to whether the court should adopt a rule change to permit the media to attend important welfare hearings, as well as serious medical treatment cases, without making an application first - mirroring the practice in the Family Court;*

2. *Consideration should be given to improving the system for informing the media of important CoP cases;*

3. *There is a need for greater legal clarity about when parties and legal representatives can lawfully inform the media about a case;*

4. *Practice Direction 13A may need to be updated to remind the parties of the need to notify the media of any order imposing reporting restrictions, in addition to notifying them of any application for reporting restrictions;*

5. *The court, or researchers, should explore ways to collect statistics on how effectively the transparency guidance on the publication of judgments is being complied with: how many judgments meeting the criteria for publication under the new guidance are, and are not, being published?*

6. *More research is needed on: the views of litigants about media reporting on CoP cases and the publication of judgments; the users of published judgments and their information and access needs; the effect of 'transparency' on the behaviour of the judiciary and other actors within the legal system.*"

The issue of transparency is likely to occupy much of the time of the ad hoc Rules Committee over the next few months; this report will ensure that the questions are very squarely framed – even if the answers are far from obvious!

Vegetative and Minimally Conscious States

POSTNOTE Number 489 March 2015: Vegetative and Minimally Conscious States

The Parliamentary Office of Science and Technology (POST) issued this paper in March. POST is an office of both Houses of Parliament, whose remit is to provide independent and balanced analysis of policy issues that have a basis in science and technology.[2] The paper discusses the medical, legal and ethical challenges associated with the care of patients in vegetative (VS) and minimally conscious states (MCS) relying heavily on the prolonged disorders of consciousness (PDoC) national clinical guidelines published by the Royal College of Physicians (RCS) in 2013 (RCP Guidelines).

The POSTnote focuses its discussion on the challenges associated with adult patients in PDoC. PDoC refers to a state where a patient has wakefulness but absent or reduced awareness for more than 4 weeks. It encompasses both the vegetative state and the minimally conscious state. These challenges are said to include the lack of accurate diagnosis and prognosis in the absence of objective clinical tools or statistics, difficulties with commissioning and providing appropriate care and debates on withdrawing and withholding treatment.

Issues with diagnosis:

The paper reports that diagnosis of VS and MCS is still mainly carried out by specialist doctors and other health professionals who observe patients for behaviours that suggest awareness of self or of their environment. Misdiagnosis is said to be common (up to 43% of patients initially thought to be in VS are subsequently found to be in MCS) despite the use of several assessment tools that have been developed to improve accuracy of diagnosis (such as the SMART and WHIM tests) and the use of technologies such as fMRI (Functional MRI), EEG and DTI (defusion tensor imaging) where appropriate. This is seen as important because misdiagnosis can have an effect on the care, rehabilitation and funding that the patients receive. The paper recommends that in order to improve diagnosis patients in MCS and VS are assessed and treated in specialist units to identify and treat reversible causes, that they are treated in specialist rehabilitation centres, provided with specialist care and re-assessed at regular intervals.

Providing and paying for care:

Although the numbers of patients with such conditions are unknown (because there is no national registry) the paper estimates that there are between 4,000-16,000 patients in VS and three times as many in MCS. It further estimates that it costs in the region of £7,500 per month to look after a patient in PVS (permanent vegetative state) and a similar amount for those in MCS. The paper states that in England the first 3-4 months of care is usually commissioned and paid for by the NHS and that thereafter care is usually paid for by local clinical commissioning groups. The paper highlights the problem with this, namely patients may require specialist treatment for longer, and conflicts can arise between those paying for and providing

[2] Full disclosure: both Tor and Alex provided comments upon a draft of the paper.

long term care. The paper notes that the RCP Guidelines recommend that national specialist commissioning should fund all active healthcare and that continuing healthcare should fund all long-term care costs.

Withdrawing and withholding treatment:

Decisions about when to give, withhold or end treatment are guided by the patient's wishes (if known), professional ethics and codes of practice, and relevant legislation and case law. The paper refers to the challenge of applying these principles to patients who lack capacity to refuse treatment and about whom there often remains uncertainty about diagnosis, prognosis and the benefits of various treatments. It highlights that very few patients have made advance decisions to refuse treatment or have made a welfare LPA's and that in these circumstances those making treatment decisions must act in accordance with the MCA in the best interests of the patient [see *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67; United *Lincolnshire Hospitals NHS Trust v N* [2014] EWCOP 16].

The paper cites a European wide survey that has recorded that most people would not wish to be kept alive in a vegetative or minimally conscious state. It is certainly well recorded that in most withdrawal cases the families or those close to the patient report that the patient 'would not have wished to live like this' [see *W v M and others* [2011] EWHC 2443 (Fam)],

Withdrawing Clinically Assisted Nutrition and Hydration (CANH)

The paper records that treatments to support or prolong life, such as ventilation, dialysis, or cardiopulmonary resuscitation are often withheld or withdrawn when the clinician and family are in agreement that the patient would not benefit from them. It notes that judicial approval is required for the withdrawal of CANH in all PVS cases and that the withdrawal of CANH is treated differently from the withdrawal of any other type of treatment The reasons give in the paper for CANH being treated differently from other forms of treatment are that the mode of dying is different and that the death can be protracted and distressing for carers and members of the family to witness. I would add that withdrawing nutrition and hydration, which is seen as nurture, from a person who is otherwise in good health has an ethical and emotional dimension that sets it apart from the withdrawal of other kinds of treatment.

It should also perhaps be noted that judicial approval for withdrawal of CANH is also required for patients in MCS (COPR 2007 PD9E para 5(a) referred to by Baker J in W v M at paragraph 257

> *'First, it is important to reiterate that a decision to withhold or withdraw ANH from a person in VS or MCS must be referred to the court:'*

Applications to the Court of Protection to withdraw CANH from patients in PVS and MCS:

The paper states that it is necessary to go to the Court of Protection to apply for withdrawal of CANH from a patient in PVS even if the families, doctors and lawyers are in agreement that withdrawal is in the patient's best interests. As set out above it is also necessary to apply to the court for withdrawal of CANH

for patients in MCS. The paper sets out the usual objections to the current procedure-delay, legal costs, and emotional costs and media attention.

It is suggested, interestingly, that if the family, clinicians and lawyers are in agreement that the patient is in PVS and that it is in the patient's best interests for CANH to be withdrawn that the application to withdraw should be made by written submissions only (rather than written and oral submissions). This suggestion seems to have emanated from communication between the author of the paper and Baroness Elizabeth Butler-Sloss, the former President of the Family division who presided over a number of these cases. It is in line with the suggestion made in the seminal PVS case of *Bland in 1993* that "*similar cases should go to court until a body of experience and practice has been built up which might obviate the need for application in every case*."

It is easy to see the attraction of this idea. But it is difficult to identify how such a procedure would ensure public confidence in the judicial process, as Baker J said in W v M:

> *'Provided that the privacy of the individuals involved is fully respected, it is imperative that the press should be as free as possible to report cases of this sort. The issues involved are of fundamental importance to all of us, both collectively and individually. For society as a whole, they touch upon the very challenging issues, currently the subject of much public debate, about the treatment of those suffering from severe disability, and those nearing the end of their lives. For each of us as individuals, they draw attention to the question of how we would wish to be treated should we find ourselves in a vegetative or minimally conscious state. The public needs to be informed about how such questions are resolved, be it under the advance decision procedure in sections 24 to 26 of the Mental Capacity Act or by application to the Court of Protection. It is therefore in the public interest for such cases to be reported as widely and freely as possible, provided that due respect is paid to the wishes of the family to protect their privacy'.*

The Court of Protection Rules and Practice Directions are currently under review, and it is possible that consideration will be given to amending the rules and PD9E to facilitate the changes referred to above and give effect to judicial guidance set out in *W v M* and *NHS Trust & Ors v FG* [2014] EWCOP 30.

Terminal sedation

The paper ends by making reference to the debate over terminal sedation. It suggests that the advantages of terminal sedation would be a predictable time of death, fewer physiological manifestations and that it would enable organ donation to take place after death. It notes the opposing view centres upon the legal and ethical distinction between acts and omissions and that a number of groups are opposed to euthanasia in any context. The paper does not attempt to take the discussion any further; this is unsurprising since there does not appear to be any public appetite for such a change in the law.

Beverley Taylor

Rights Info

Finally, a plug for the new site rightsinfo.org, established (with some very zippy infographics) to dispel the lazy myths about human rights. It is an excellent resource, which may – depending on what happens in the next few days and weeks – be of no little use in explaining to our new political masters what human rights have ever done for us.

KFC, Executry: Glasgow Sheriff Court, 31st March 2015

Viewed strictly, this decision by Sheriff John Neil McCormick at Glasgow would not have a place in this Newsletter. A partner in a legal firm applied for Confirmation in the estate of the deceased KFC, acting not as executor nominate or executor dative, but as attorney acting under a power of attorney granted by one of the executors nominate, the Royal Bank of Scotland plc. The issue before the court was whether it was competent for an executor nominate which is a company, acting as such executor nominate, to appoint an attorney. Sheriff McCormick held that it was not. He observed that the only provision in legislation relevant to an executor having the power to appoint an attorney was the provision in the Consular Conventions Act 1949 section 2, under which an executor residing abroad might appoint someone in Scotland as his attorney.

We draw attention to the case in this Newsletter because continuing and welfare powers of attorney are a species of powers of attorney. If intended to be capable of coming into operation, or of continuing in operation, following the incapacity of the granter, they must comply with, and are subject to, the provision of the Adults with Incapacity (Scotland) Act 2000. Subject to those specialities, they are powers of attorney to which the general law of powers of attorney applies. A general point applicable to all powers of attorney, to be drawn from this decision, is that it emphasises – if further emphasis is still required – that drafting of any power of attorney requires skill and care, *inter alia* to ensure that powers purportedly conferred upon an attorney can competently be so conferred.

Three concluding observations by Sheriff McCormick are also worthy of mention. Firstly, a departure from settled commissary practice should properly be drawn to the sheriff clerk's attention and a hearing sought before the sheriff "rather than wait for a vigilant sheriff clerk to notice". Secondly, the sheriff recorded with concern receipt by the court, quite separately, of a purported power of attorney by another Scottish bank, purporting to appoint "an unspecified number of unnamed (described only by eight job titles such as 'estates manager', 'trust manager' and the like) employees of a separate bank, having its registered office in London". Although the deceased had been resident in Scotland and the power of attorney was executed in Scotland, it stated that it should be governed by English law. The sheriff's strictures should perhaps be borne in mind in any situation where it might be contemplated that roles under the 2000 Act be assigned in similar manner.

Finally, the sheriff commented that he was "drawn to the possibility that to certain executors, the fiduciary duties accompanying that office may have become an administrative inconvenience occurring between death and fees". If that were the case, such an approach was to be deprecated.

Adrian D Ward

Retirement of Charlie Burns and George Kappler from the MWC

[The editors are very grateful to Dr Donny Lyons for providing the following appreciation. Dr Lyons is the former CEO of the MWC, retired general and old age psychiatrist and continuing member of public bodies and human rights organisations in Scotland]

The Mental Welfare Commission for Scotland recently said farewell to two long serving members of staff, Charlie Burns and George Kappler.

Charlie Burns joined the Commission in 1995 and held the post of administration manager. The title barely does justice to Charlie's skills. Charlie was the oil in the Commission's wheels. Read any report on the Commission's website and it will contain Charlie's handiwork. Charlie took minutes of Commission meetings, supervised the information systems that provided statistical reports, organised many of the investigations and cast his expert eye over all the investigation reports for errors and inconsistencies. It is in no small measure thanks to Charlie that the Commission has gained huge respect for the quality of its output, documenting and guiding the state of mental health and incapacity law and practice in Scotland.

George Kappler joined the Commission as social work officer in 1994. Originally from Pennsylvania, he had been in Scotland since 1981 and worked the voluntary sector and social work. Since 2005, George headed up the Commission's social work activity, led the Commission's work in the North of Scotland and played the lead role in some of the Commission's most important investigations. This work has resulted in major challenges to the justice system, "Justice Denied", operation of powers of attorney, "Powers of attorney and their safeguards", and the benefits system, "Who Benefits?". Read these reports on http://www.mwcscot.org.uk and you will see George's stance on issues of abuse and discrimination and his willingness to challenge professionals and support individuals who would otherwise not have a voice.

Both have also done sterling community work in the sports arena; football coaching (Charlie) and softball coaching (George). And despite Charlie being a diehard Hearts supporter and George a Hibs fan, they got on surprisingly well.

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Conferences at which editors/contributors are speaking

Mentally Disordered Offenders – disposals, risk and remedies

Jill is speaking at this Legal Services Agency seminar "Mentally Disordered Offenders - disposals, risk and remedies" on 18 May in Glasgow, addressing "The Mental health Bill and Mentally Disordered Offenders."

'In Whose Best Interests?' Determining best interests in health and social care

Alex will be giving the keynote speech at this inaugural conference on 2 July, arranged by the University of Worcester in association with the Worcester Medico-Legal Society. For full details, including as to how to submit papers, see here.

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.

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 been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (2015, Oxford University Press) and Jordan's 'Court of Protection Practice.' He is the general editor of the fourth edition of 'Assessment of Mental Capacity' (Law Society/BMA, forthcoming). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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

Annabel Lee
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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click here.

Simon Edwards
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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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