

Compendium

Introduction

Welcome to the June 2016 Newsletters. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: Neil Allen comments on the Law Commission's interim statement, Charles J on deputies and Article 5, and an updated Guidance Note on judicial authorisation of deprivation of liberty;
- (2) In the Property and Affairs Newsletter: Senior Judge Lush on the difference between property and affairs and welfare deputies and new OPG guidance;
- (3) In the Practice and Procedure Newsletter: an appreciation of Senior Judge Lush by Penny Letts OBE ahead of his retirement in July;
- (4) In the Capacity outside the COP Newsletter: a major report on the compliance with article 12 CRPD of the three jurisdictions of the United Kingdom and a guest article by Roy McClelland OBE on the new Mental Capacity (Northern Ireland) Act 2016;

In large part because its editors have been all but entirely subsumed with work on the report on CRPD compliance, there is no Scotland newsletter this month.

Remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site [here](#). 'One-pagers' of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE [website](#).

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The “Revised Approach” to Deprivation of Liberty¹

On 25 May 2016, the Law Commission published a brief 10-page “[Interim Statement](#)” following a formal request from the Minister of State for Community and Social Care. It essentially provides a heads-up of the Commission’s current way of thinking. A summary of the likely general direction of travel for reform; but not a final position. Nevertheless, after 83 nationwide events and 583 written responses from interested persons and organisations, the statement reveals what can only be described as a substantial change of approach.

Amongst the key messages arising from last year’s consultation were:

- Avoid duplication with existing legislation, excessive legalism and unnecessary bureaucracy;
- Use existing care plans to provide authority for deprivation of liberty;
- Cater for article 8 rights in the scheme;
- The likely number of those in supportive care is small, given how low the threshold is for article 5;

¹ Note: Alex is on secondment to the project and is not able to comment upon the statement. This note has been prepared by Neil Allen.

- Use a tribunal, not the Court of Protection, due to its efficiency, accessibility, flexibility and simplicity;
- Have a bespoke system for hospitals;
- Have a new admission mechanism under the Mental Health Act 1983;
- Concerns raised over coroner's inquests;
- Lack of money;
- Any system based on *Cheshire West* is unsustainable.

The consultation reinforced the Commission's provisional view that DoLS needs to be replaced. The current safeguards were criticised for being overly technical; legalistic; failing to deliver improved outcomes for people; not designed for the now "deprived" populace; and expensive. But the Law Commission plans to depart significantly from its original "protective care" proposal. Many felt that it would be too costly and "*any new scheme needed to focus much more on securing cost efficiencies and value for money*". In response, the Commission stated:

1.36 There is some force in these arguments. Nevertheless, we do not accept that safeguards should be reduced to the bare minimum or that we should not consider any reforms that may generate additional costs. We remain committed to the introduction of a new scheme that delivers article 5 ECHR safeguards in a meaningful way for the relevant person and their family. Moreover, there are some reforms that remain fundamental to our new scheme

and will need to be properly financed, such as rights to advocacy.

1.37 Nevertheless, it is our view that the new scheme must demonstrably reduce the administrative burden and associated costs of complying with the DoLS by providing the maximum benefit for the minimum cost. With this in mind, we have therefore concluded that the new scheme should focus solely on ensuring that those deprived of their liberty have appropriate and proportionate safeguards, and should not seek to go as widely as the protective care scheme." (emphasis added)

Before considering the highlights of the yet-to-be-named scheme of safeguards, it is important to analyse the proposed amendments to the 'core' of the Mental Capacity Act 2005. The reason being, some of the potential criticisms of the new scheme may in part be met by them.

1. Amendments at the Core

What is potentially encouraging is the Commission's desire to maintain "*as much as possible*" the article 8 protections contained in its former supportive care scheme but "*in such a way as to minimise the demand on services*". These protections primarily aim to ensure that there is proper consideration given, and necessary assessments undertaken, before a best interests decision is made as to the need to remove someone lacking capacity into institutional care. They aim to confer better preventive measures. The original version envisaged independent advocates, or an "appropriate person", being tasked with ensuring that the person had access to the relevant review or appeals processes (eg under the Care Act, Social Services and Well-Being (Wales) Act, or the

Court of Protection). It required local authorities to keep the health and care arrangements under review, and to ensure the care plan included a record of capacity and best interests assessments, setting out restrictions and confirming the legal arrangements under which the accommodation was being provided. In short, it aimed to secure better implementation of the 2005 Act and better access to advocacy services.

The second important core amendment proposes to give “greater priority to the person’s wishes and feelings when a best interests decision is being made.” This is hugely significant and furthers (although may fall short of ultimately achieving) one of the aims of the UN Convention on the Rights of Persons with Disabilities. It seems likely, therefore, that the MCA s.4 best interests checklist will contain either a hierarchy of factors or a rebuttable presumption. The latter may be the wiser bet. What might be on the horizon, for example, is something similar to Northern Ireland’s Mental Capacity Act 2016 which requires that the decision maker “must have special regard” to the person’s past and present wishes and feelings, beliefs, and values, so far as they are reasonably ascertainable. And the more others intend to depart from those, the more is needed by way of justification.

Another interesting, and potentially weighty, proposal is “qualifying the immunity from legal action” under MCA s.5 “to provide additional procedural safeguards in respect of certain key decisions by public authorities.” This could be the key to the provision of better article 8 safeguards. The Commission does not give any indication as to what these key decisions might be. But, again, if Northern Ireland is anything to go by, they could be wide-ranging. The 2016 Act provides additional safeguards for serious interventions and certain treatments:

“Serious interventions” include interventions which (a) involve major surgery, (b) cause serious pain/distress/side-effects, (c) affect seriously the options available to the person in the future or have a serious impact on their day-to-day life, (d) in any other way have serious physical or non-physical consequences, (e) any deprivation of liberty, (f) imposition of a treatment attendance requirement, (g) a community residence requirement. Other than in an emergency, the Northern Irish Act requires a recent enough “formal capacity assessment” by a suitably qualified person and a corresponding statement of incapacity. It also requires a nominated person to be in place for P with whom to consult when determining best interests.

“Certain treatments” cover electro-convulsive therapy and, broadly, what amounts to serious medical treatment under our 2005 Act. For these, a second opinion must be obtained.

If the Law Commission was to adopt something similar, it would mean that others would not have a liability defence for acts done or decisions made on behalf of those lacking capacity unless and until those safeguards were fulfilled. It may result in the better implementation of the 2005 Act by reinforcing the stick of article 8 procedures that accompany the carrot of a defence to liability. With these core amendments in mind, let us now consider the main highlights of the Commission’s proposal for the replacement of DoLS.

2. The Revised Approach

a. “Deprivation of liberty”

It appears that the new safeguards will continue to be triggered by a “deprivation” of liberty. There is no suggestion that this will be defined in the legislation. It seems likely, therefore, that entry into these revised safeguards will continue to be governed by case law and, ultimately, the Strasbourg Court. This should come as no surprise given that any hope of legal certainty in borderline cases is little more than a search for the philosopher’s stone. Parliament would either have to provide a trigger that was pitched below the article 5 threshold (so as to avoid otherwise unlawful deprivations of liberty) or leave it to case law.

If the entitlement to additional safeguards is going to hinge on “deprivation of liberty”, the judiciary are likely to continue to err on the side of caution, keeping the bar low. More case law seems likely. Although the scheme embraces article 8 concerns, it is most disappointing to hear that article 5 will remain the trigger. And it may mean no getting away from the negative connotations of the language of “deprivation of liberty”.

b. Responsibility for securing the safeguards

The plan is for this to shift away from the care provider to the commissioning body that is arranging the care. This should help streamline the process and better embed the safeguards when making care arrangements. But it remains to be seen how this will apply to self-funders, or where there is more than one commissioning body, such as hybrid funding package between the NHS and a local authority.

Noticeable by its absence is a supervisory body. The role will be abolished. Instead, the authorisation to deprive liberty derives from the commissioning body itself. So local authorities and presumably NHS bodies will essentially authorise themselves to detain. Query, again, how this might work for self-funders and hybrids. On the face of it, authorising oneself to detain a vulnerable person could be a significant cause for concern. But whether that concern is justified will depend upon the detail to follow. Who within the commissioning body will authorise? What checks and balances will there be? We will have to wait for the draft Bill at the end of the year to see exactly what the Commission has in mind.

c. Access all areas

Aside from the defined group below, the proposed authorisation scheme is very much a one-size-fits-all. It therefore applies anywhere including hospitals, care homes, supported living and shared lives schemes, domestic and private settings.

d. Evidence required

The evidence necessary for a DoL authorisation from the commissioning body will include (a) a capacity assessment; (b) objective medical evidence of the need for a deprivation of liberty on account of the person’s mental health; (c) arranging provision of advocacy (or assistance from “an appropriate person”); (d) consultation with family members and others; (e) an existing care plan. This is not an exhaustive list. But notable by its absence is any reference to best interests. The DoL evidence focuses more specifically therefore upon whether the person’s mental health warrants detention. We wait to see whether and how best interests is provided for in the draft Bill.

e. Article 5 safeguards

The Interim Statement provides examples of the safeguards; so there may be more. For now, the person (and others, such as family members and advocates) will have the right to seek reviews of the DoL, bring legal proceedings to challenge it, and comprehensive rights to advocacy. The Commission wants to ensure that the current processes under the Care Act and the Social Services and Well-Being (Wales) Act can be used to review the DoL. And, where appropriate, commissioning bodies should be able to rely on existing assessments to avoid unnecessary duplication. The availability of well-funded advocacy services and the scope of non-means tested legal aid will clearly be critical here.

Unlike the current DoLS scheme and the Mental Health Act 1983, no-one independent of the commissioning body will be deciding whether the person ought to be deprived of liberty. This may be one of the most controversial proposals in the Commission's revised approach. After all, the reason why the Supreme Court in *Cheshire West* dropped the threshold was to promote independent scrutiny:

Policy

57. Because of the extreme vulnerability of people like P, MIG and MEG, I believe that we should err on the side of caution in deciding what constitutes a deprivation of liberty in their case. They need a periodic independent check on whether the arrangements made for them are in their best interests. Such checks need not be as elaborate as those currently provided for in the Court of Protection or in the deprivation of liberty safeguards (which could in due course be simplified and

extended to placements outside hospitals and care homes). Nor should we regard the need for such checks as in any way stigmatising of them or of their carers. Rather, they are a recognition of their equal dignity and status as human beings like the rest of us.

Ironically, it seems that the bar is so low, and the number of people deprived is so high, that providing an independent check is unaffordable. The Commission states:

1.42 In addition we are considering whether a defined group of people should receive additional independent oversight of the deprivation of their liberty, which would be undertaken by an Approved Mental Capacity Professional. Owing to the vast number of people now considered to be deprived of their liberty following Cheshire West, it would not be proportionate or affordable to provide such oversight to all those caught by article 5 of the ECHR. Whilst we are still working to develop the precise criteria that would operate to identify this group, we envisage that this group would consist of those who are subject to greater infringement of their rights, including, in particular, their rights to private and family life under article 8 of the ECHR. (emphasis added)

Clearly the right to bring legal proceedings will at least entitle the person to have an independent judicial best interests check at periodic intervals, depending on the availability of legal aid. But that may be after the damage is done. The issue is whether independent scrutiny – the “cornerstone” of the current best interests assessment – is required before the detention

occurs. The increased provision of advocacy services may to some extent mitigate the risks of misjudgments and professional lapses. But many people may be concerned about this aspect of the scheme. The “precise criteria” are going to be key here.

The extra safeguard for this group will be a referral to an Approved Mental Capacity Professional who, in light of the accompanying DoL evidence, would “agree or not agree” to the proposed DoL: “*Their role would not extend to ongoing reviews and the monitoring of cases*”. The adequacy of this safeguards will depend upon the detail. Will AMCPs merely say “yay or nay”? Or will they have the power to impose conditions? If so, what type? Will they see the person before approving the DoL? These issues will have a bearing on the risk of rubber stamping.

f. Mental Health Act 1983

The Commission’s original proposal was to introduce a lower-level power for compliant incapacitated patients, with the MHA reserved for those objecting. After consultation, this has been abandoned. Instead, the new scheme will not apply to those detained in hospital for the purpose of mental health assessment/treatment. So if compliant incapacitated patients “*are to be admitted to hospital (general or psychiatric) for purposes of assessment and treatment for mental disorder, their admission should be on the basis of the existing powers of the Mental Health Act*”.

This will avoid the difficult interface we presently have between DoLS and the MHA. If the purpose of admission is physical healthcare, the NHS body will authorise the DoL under the Commission’s scheme. Whereas if the purpose is mental healthcare, the MHA will be used. In legal terms,

this has the benefit of simplicity and more effectively closes the *Bournewood* gap. In medical terms, however, it means having to categorise the person’s treatment and determine the key purpose. But the distinction between “physical” and “mental” healthcare is likely to remain so long as we have an Act specifically catering for mental health. Only a fused system would avoid it and that does not appear on the table.

The increased use of the MHA will inevitably lead to more people being entitled to section 117 aftercare. It would not be at all surprising therefore if this provision receives close attention during the parliamentary process. No mention is made in the Interim Statement of the interface between the MHA and the Commission’s scheme when it comes to deprivations of liberty in the community. So it remains to be seen whether there will be tensions between the scheme and section 17 leave, guardianship, community treatment orders, and conditional discharges. If the commissioning body is self-authorising the DoL under the MCA, there is perhaps less room for confusion and disagreement.

Many people may worry about the resulting increased use of the MHA. Apparent stigma was a concern raised in the consultation. Although it would be at the outer reaches of, and perhaps beyond, the remit of the Commission’s brief, there is a timely opportunity to amend perhaps the most stigmatising aspect of the MHA, namely the compulsory treatment powers. Unless the government decides to grasp that nettle during the parliamentary process, the opportunity seems likely to be missed this time round.

g. Coroners

The Commission proposes to remove the scheme from the definition of “State detention” in the

Coroners and Justice Act 2009. Deaths will be reported to the new medical examiner system proposed by the Department of Health, which will make enquiries and referrals to a coroner if the death is attributable to, amongst other matters, a failure of care. This is likely to be welcomed by many.

h. Tribunal or COP?

Here the law reform jury is out. The Commission “will be considering our position further over the coming months”.

i. The Name

The frontrunner from the consultation for the new scheme appears to be the “liberty safeguards”, followed closely behind by “capacity safeguards”. But it might be worth reflecting on whether a name is actually required. The proposed scheme will be part of the 2005 Act and should not be something separate to it. That Act contains safeguards already. So perhaps the best option is simply not to assign a name: they are merely extra safeguards for key decisions. Suggestions are sought by 23 June 2016 to Olivia.Bird@lawcommission.gsi.gov.uk. Please avoid “Boaty McBoatface”!

Neil Allen

Ever spreading tentacles? Article 5 and deputies

Staffordshire CC v SRK & ors [\[2016\] EWCOP 27](#) (Charles J)

Article 5 ECHR – “deprivation of liberty” – deputies

Summary

SRK acquired a brain injury following a road traffic accident, necessitating 24-hour care. The compensation funded the purchase of an adapted bungalow and his care regime. The effects of his injuries meant that he had to be under continuous supervision and control, was not free to leave, and lacked capacity to consent to the care arrangements. The care was arranged by a specialist brain injury case manager and provided by private carers. The accommodation and care costs were privately-funded and administered by a financial deputy, without any input from the local authority. An issue arose as to whether this confinement was attributable to the State, directly or indirectly, so as to engage Article 5.

Direct responsibility

Charles J held that the State does not become directly responsible simply because of steps taken by a local authority investigating an alleged deprivation of liberty, or by actions of the CQC: “Such steps are part of the supervision and regulation of private providers of care and do not found a sufficient direct participation by the State as a decision maker, provider or otherwise in the creation and implementation of SRK’s (private) deprivation of liberty within Article 5” (para 131). The same is true of an application for a welfare order, a civil court awarding damages, the Court of Protection appointing a deputy, and the deputy itself: none of these make the State directly responsible (para 132-3).

Indirect responsibility

However, the civil court awarding damages, the COP when appointing a deputy, the deputy itself, and trustees or someone acting under a lasting power of attorney to whom a damages award is

paid and who must make best interests decisions, they should all be aware that a regime of care and treatment can create a (private) deprivation of liberty. And “[t]hat knowledge of the courts means that the State has that knowledge...” (para 135). The State thereby can become indirectly responsible by failing to comply with its positive obligations under Article 5 to prevent arbitrary detention. The following guidance was therefore given to deputies:

58. As a result, in my view, a deputy should raise those issues with the relevant providers and the relevant local authority with statutory duties to safeguard adults. By so doing he would be taking proper steps to check whether D and/or the local authority could put in place arrangements that meant that P was not objectively deprived of his liberty or that would make the care arrangements less restrictive and/or remove any restraint. More generally he would be enabling public authorities and others with duties to safeguard adults to perform such duties and so the role described by Munby J in Re A and Re C, which is an important part of the regime of law, supervision and regulation in England and Wales.

Equally, “the court awarding the damages, the COP and trustees or an attorney to whom damages are paid should also ensure that such steps are taken” (para 136). As a result, the local authority with the adult safeguarding role will know, or should know, of the situation and this “triggers its obligations to investigate, to support and sometimes to make an application to court (or to consider doing those things)” (para 137, emphasis added). A failure to make a welfare order in these cases would breach the State’s positive obligations and mean that the State was responsible for the deprivation of liberty (para 146):

147. I have reached this conclusion with real reluctance because it seems to me that in this and many other such cases a further independent check by the COP will add nothing other than unnecessary expense and diversion of private and public resources which would be better focused elsewhere.

148. But, in my view, the cautious approach taken in Cheshire West, and the points that:

- i) the need for a welfare order and evidence supporting it will focus the minds of those involved on the ground, and thereby reduce the risk of misjudgements and professional lapses (see paragraph 121 of HL v United Kingdom cited above) by promoting both (a) decision making and reviews, and (b) investigation, supervision and regulation on a properly informed basis,*
- ii) deputies and local authorities will not act in the same way in all cases,*
- iii) not all Ps will have supporting family members or friends,*
- iv) a different regime dependent on the identity of those involved would be impracticable or arbitrary, and*
- v) when, as here, a deputy, providers and a local authority have properly examined the issues, and their conclusion is supported by the family, a streamlined and so paper procedure for the making of the initial welfare order and paper reviews is likely to be appropriate.*

Comment

This is the first domestic case since *Re A and Re C* [2010] EWHC 978 (Fam) to thoroughly examine

the issue of State responsibility in the Article 5 context. The outcome is not surprising, given the breadth of the positive obligations. In essence, courts awarding damages, the COP, trustees, deputies and others to whom damages are paid “should” consider the issue and raise it with the local authority. The State’s knowledge arising from that referral then triggers indirect responsibility for the deprivation of liberty. This accords with the position under DoLS for self-funding detained residents, whereby the State becomes indirectly responsible when the care home requests a DoLS authorisation.

In this case, the deputy had notified the local authority which made a *Re X* application using COP DOL10. What is not altogether clear is what should happen if a local authority fails to seek judicial authorisation for the detention. Paragraph 59 might suggest that the person who notifies should themselves ensure that an application is made. And that is why the cost of doing so should be factored into the calculation of damages awards in the future (para 10(6)). For solicitor deputies, who owe P a duty of care as well as other professional obligations, following the streamlined procedure may be a surmountable challenge. But for family members or friends, it is not altogether clear why and how they should be expected to make the application. This will not be within the contemplation of a would-be LPA. And it is an onerous task for them, bearing in mind that typically there will have been little State involvement. Who will assess capacity? Who will draft the best interests determination? Who will provide the medical evidence? Confronting the challenges of the *Re X* process will therefore not be easy.

Updated Guidance Note: Judicial Authorisation of Deprivation of Liberty

In light of the myriad of developments since we last updated our Guidance Note, we have updated it to take account of developments up to and including *Re SRK*: it can be found [here](#).

Deprivation of liberty for the under-16s

Re Daniel X [\[2016\] EWFC B31](#) (Family Court (HHJ Roberts))

Article 5 ECHR – “deprivation of liberty” – children and young persons – inherent jurisdiction

Summary

Daniel X is the youngest (reported) person since *Cheshire West* to satisfy the nuanced acid test. He was 10 years old with severe autistic disorder and severe learning disability and accommodated in a specialist children’s home, attending school. He was constantly supervised and physical restrictions were used to prevent him leaving. He had regular contact with his parents who agreed with the care order. For reasons explained [elsewhere](#), because of the care order his parents could not consent to his confinement. Article 5 was therefore engaged. As a result, the care proceedings before the magistrates were transferred to a judge of the High Court to have the deprivation of liberty authorised for 12 months.

The inherent jurisdiction and children’s services are still getting to grips with the impact of the Supreme Court’s decision. But this decision is helpful when it comes to authorisation renewals and the evidence expected:

12. ... the burden should be on the Local Authority to apply back to the court on an application for renewal of the order if appropriate and to prove their case again, albeit on paper, if unopposed and considered appropriate.

[...]

34. It is agreed that 35 days before the expiry of this order Thurrock Borough Council, if it seeks to renew the order, will lodge an application to that effect and include medical evidence to confirm that Daniel still requires that type of accommodation; the evidence lodged will include evidence from the social worker about Daniel's up to date circumstances, possibly a school report, and a report from the [independent reviewing officer] that Y Home is still suitable for Daniel. The parents would then have the opportunity to respond within 14 days of being served. If the parents agree to the order being renewed or do not reply, the court will consider the application on paper. The Court has the option of appointing a Guardian for Daniel under rule 16.4 of the FPR if thought necessary but I do not think it necessary for a Guardian to be appointed on issue of the application. The Court may make the declaration sought on paper or may list the application for a hearing.

Comment

All parties agreed that Daniel was deprived of liberty. So there is little analysis in the judgment as to exactly how the care arrangements satisfied the acid test. But chapter 9 of the Law Society [guidance](#) considers the issue. In order to minimise the risk of duplication, and unnecessary costs, in cases where a child is or may be deprived of liberty, local authorities may want to have the care proceedings listed before a Judge with a High Court so that both the care order and the deprivation of liberty can be addressed in one

go. There will then be (at least) an annual review of the deprivation of liberty on the papers where there is consensus.

The horns of the dilemma

Cambridge University Hospitals NHS Foundation Trust v BF [\[2016\] EWCOP 26](#) (MacDonald J)

Best interests – medical treatment

Summary

This case concerned an application by Cambridge University Hospitals NHS Foundation Trust ('the NHS Trust') in relation to BF, a 36 year old woman with a diagnosis of paranoid schizophrenia. At the time of the hearing BF was detained in a mental health unit pursuant to section 3 of the Mental Health Act.

BF had been referred to the NHS Trust with a history of bloating and abdominal distention that had worsened over a period of months. After a CT scan, examination and blood tests the medical consensus was that BF was likely to have ovarian cancer which required surgery. The planned surgery would involve a total abdominal hysterectomy which would mean the loss of BF's fertility.

BF was originally assessed as having capacity to consent to the surgery but following a problem with the anaesthetist finding a vein, BF suffered a psychotic episode and BF refused surgery stating that her distended abdomen was not due to a tumour but 'bad air'. Following this episode there were various assessments of BF's capacity the last of which concluded that she lacked capacity and so the application was made to the court.

The Trust sought the following declarations:

That BF lacks the capacity to consent to or refuse medical treatment, in particular total abdominal hysterectomy with bilateral salpingo-oophorectomy and omentectomy and bowel resection and colostomy, general anaesthetic, sedation and further ancillary treatment

And

It is lawful being in BF's best interests to undergo total abdominal hysterectomy with bilateral salpingo-oophorectomy and omentectomy and bowel resection and colostomy, general anaesthetic, sedation and further ancillary treatment.

In his judgment, MacDonald J recapitulated his summary of the principles applicable to the assessment of capacity from the [C](#) case. He also gave a pithy summary of the key principles applicable to the determination of best interests, noting in so doing that, whilst the “balance sheet is a very useful tool, the court must still come to its decision as to best interests by reference to the principles he had set out which were grounded in s.4 of the MCA 2005” (para 29).

The medical evidence before the court strongly suggested that BF had stage IIIB ovarian cancer. Mr L (Consultant and Lead Gynaecological Oncologist) considered that the probability of ovarian cancer was at least 80% and in this case even higher than 80%. The Official Solicitor acting on behalf of BF did not challenge the medical diagnosis.

Mr Justice MacDonald concluded that BF lacked capacity to decide to consent to or refuse the identified medical treatment. He further concluded that it was in her BF's best interests to undergo the medical treatment that her doctors wanted to give to her. He placed particular emphasis upon the fact that she had previously

consented to the proposed surgery when she had capacity to do so. Whilst MacDonald J gave “anxious consideration” to the fact that BF had said that she wanted to have a child and the proposed treatment would render her infertile, he also had in mind that she had consented to the treatment which she knew would render her infertile prior to the episode when the anaesthetic could not be administered causing her to have a psychotic episode. Given the prognosis the judge also considered that if the hysterectomy did not take place she would die within a period much shorter than that required to carry a baby to term.

Comment

On its facts, the case represents the sensitive application of the principles of capacity and best interests set out in the MCA to an extremely difficult dilemma. Of note, however, are the following:

- The application was, again, for declarations rather than decisions. Sir James Munby P in [Re MN](#) made clear his view that where (as here) what is being sought is a decision (i.e. to consent to the procedures in question), what should be sought is an order under s.16(2)(a) MCA consenting on P's behalf. A declaration as to lawfulness under s.15(1)(c) provides added comfort to the treating clinicians (but should not be framed as a declaration as to lawfulness and best interests, as s.15(1)(c) does not provide for such to be made);
- The unusual reporting of a happy ending. Before judgment was handed down the NHS Trust informed the court that the surgery had been performed as planned and the results of the testing undertaken during the

operation indicated a benign or borderline tumour with no evidence of macroscopic residual disease. Mr L was therefore able to preserve BF's uterus and the right fallopian tube and right ovary, thus preserving BF's ability to have children in the future should she so wish. The tragic choice described in the judgment between a likely fatal prognosis and certain infertility was thus averted.

Attorneys and attorneys

The Public Guardian v PM &SH [\[2016\] EWCOP 25](#)
(Senior Judge Lush)

Lasting powers of attorney – revocation

Summary

In this case the Senior Judge was dealing with an application for the partial revocation of a property and affairs LPA and the revocation of a welfare LPA.

P's daughter was the welfare attorney and was also, jointly and severally with her brother, the property and affairs attorney.

The application centred on the daughter's behaviour. As regards the property and affairs LPA, the Senior Judge reminded himself of the ruling in *Re F* [2004] 3 AER 277 where Patten J had said;

"It seems to me that to remove an attorney because of hostility from a sibling or other relative, in the absence of any effective challenge to his competence or integrity, should require clear evidence either that the continuing hostility will impede the proper administration of the estate or will cause significant distress to the donor which would be avoided by the appointment of a receiver."

In the end, the Senior Judge concluded that there was such hostility and the proper administration of the estate had been impeded so the LPA for property and affairs was partially revoked and P's son became the sole attorney.

As regards the welfare LPA, the Senior Judge held that rather different considerations applied (see paragraphs 47 and 48). In particular, he noted, a

welfare attorney can only take decisions which P lacks capacity to take and there is protection for P where, as here, the attorney had suffered a temporary lapse in her ability to perform her duties, in that s.5 MCA has the effect that the vast majority of welfare decisions are taken in collaboration, informally, with a range of agencies. In those circumstances there is a safety net for P.

In the end, therefore, the Senior Judge refused to discharge the welfare LPA.

Comment

This decision – one of the last that Senior Judge Lush will give prior to his retirement (see further the appreciation by Penny Letts elsewhere in this Newsletter) provides a useful reminder of the clear conceptual, and in turn practical, differences between the two forms of powers of attorney that can be granted under the MCA.

New OPG Guidance on Family Care Payments

The OPG has published a very welcome [practice note](#) on the circumstances in which deputies can make payments to people other than professional third party providers who provide P with care. The practice note is also aimed at attorneys whose power allows them to make such payments.

The practice note starts by considering what is "family care." It covers relatively informal arrangements where a family member or friend is providing care with the motivation of natural love and affection rather than reward. It does not cover formal arrangements where a person works set hours, with set duties and an expectation of reward. That would be more

correctly categorised as a contract, possibly of employment.

The question of payment for such care must be judged in P's best interests and it is important that the deputy must consider whether the decision to pay for the care puts him in a position where his interest conflict with P's.

The practice note refers to three recent cases: (1) [Re HC](#) [2015] EWCOP 29; (2) [Re A](#) [2015] EWCOP 46; and (3) [Re HNL](#) [2015] EWCOP 77 (all of which can be found in our case summaries database by clicking on the relevant hyperlinks).

Re HC is particularly helpful as, in that case, the Senior Judge valued such care in the same way as is done in personal injury cases, taking a commercial rate and deducting 20% for the fact that the care is given gratuitously and not subject to tax (though 25% is the usual deduction in the Queen's Bench).

So far as COP approval is concerned, the practice note states that in general, a professional deputy does not need to seek it. This will be a relief for such deputies as the OPG had previously suggested the reverse. The practice note suggests seeking approval where such payment may prove controversial.

So far as non-professional deputies are concerned, approval is always required to make a payment to the deputy and the practice note states that the Public Guardian may require such approval where the payment is to someone closely connected to the deputy. The latter seems to suggest that before going to court for approval, the deputy should seek the views of the Public Guardian.

The practice note then goes on to make practical recommendations about working out the amount

of the payment, reminds us that such payments are treated by HMRC as gratuitous and, therefore, tax free, suggests that there could be some form of indexation and stresses the need for a record of the decision making process as well as the payments themselves (which should be kept under review).

New OPG guide for lay attorneys and deputies on the making of gifts

The OPG has published a [guide](#) (to accompany its more detailed [practice note](#)) for non-professional attorneys and deputies on the making of gifts. The guide contains a useful summary of the rules and restrictions relating to gifts. It emphasises that an interest free loan would amount to a gift. It also emphasises the importance of involving P if at all possible in the decision making process.

It states unequivocally that deputies and attorneys cannot make gifts with the aim of avoiding P having to make a contribution to care home etc fees.

It reminds deputies and attorneys that if they exceed their authority they may face sanctions and that if a gift is proposed that is in excess of authority an application to COP for approval is necessary

The guidance contains a short checklist as follows:

If you can answer 'yes' to all three questions below, you don't need permission from the Court of Protection to give a gift:

- 1) *Is the gift to someone related to, or connected with, the person – or to a charity they might normally have given to?*

- 2) *If the gift is to a person, is it being made on a customary occasion?*

- 3) *Is the gift of reasonable value, given the size of the person's estate and their expected future needs?*

Denzil Lush – an appreciation

[Editorial Note: we are delighted that Penny Letts OBE, has prepared the following appreciation of Senior Judge Lush, ahead of his imminent retirement in July: he will be a huge loss, and we will miss him greatly]

My first contact with Denzil was during the late 1980s when I was Secretary to the Law Society's Mental Health and Disability Committee. Part of my role was to promote the provision of comprehensive legal services to older people and people with mental and physical disabilities and also to answer queries from solicitors relating to their practice in these areas. Denzil, then a solicitor in private practice in Exeter, was one of the first to recognise the law relating to older people as a speciality in its own right, encompassing not only wills and probate but also the need to prepare for old age and possible incapacity through (at that time) Enduring Powers of Attorney and 'Living Wills'. There was no need to answer queries from Denzil – he was already an expert in the field – but he readily shared his expertise to enable me to answer queries from others. In particular he sent me a precedent for a Living Will, unusual in those days, but a regular request in my postbag. This was one of a number of precedents and checklists that Denzil had drafted himself, drawn from his own experience in practice, which later found their way into his book *Elderly Clients: A Precedent Manual* (Jordans, 1996), now in its 5th edition (Caroline Bielanska (Ed), 2016) and an essential resource for elder law practitioners.

Recognising such flair and expertise, it was not long before Denzil was appointed as a member of the Mental Health and Disability Committee in the early 1990s (with his perfect memory for details, I know Denzil will remember the exact

date, but I can make no such claim!) and he served on the Committee until his appointment as Master of the Court of Protection in April 1996. Those were exciting years for the Committee, particularly in its work campaigning for reform of the law relating to mental capacity and in its efforts to fill in the gaps while waiting for legislative change. Denzil took a major part in that work. He represented the Committee on the BMA steering group which produced the code of practice on *Advance Statements about Medical Treatment* (BMA, 1995) and was also a member of the working party which produced *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* (BMA and Law Society, 1995). Denzil's contributions to the guidance continue to be influential (see for example *Masterman-Lister v Brutton & Co* [2002] EWHC 417 (QB)) and have survived into the 4th edition (Alex Ruck Keene (Ed), 2015). Denzil was also the moving force behind the Law Society's *Enduring Powers of Attorney: Guidelines for Solicitors* (Law Society, 1995) which later became one of the Law Society's first Practice Notes.

Even after becoming Master of the Court of Protection, Denzil continued to support the Committee's work and to encourage me in my own attempts at writing about related areas of law. In November 2000, he paid me the greatest compliment by putting my name forward to join him and Niall Baker, solicitor (now partner) at Irwin Mitchell, as key speakers from the UK to give presentations at two conferences in Japan, focussing on adult guardianship and the protection of people who lack mental capacity. The trip was a truly memorable experience and a lot of fun – not least our first evening in Yokohama when looking for somewhere to have a quiet drink, we inadvertently found ourselves in a brothel! Denzil dined out on that story for months after! But this trip, organised by

Professor Makoto Arai of Chibo University and special adviser to the Japanese government, was later to lead to both Denzil and Prof Arai becoming members of the international team of lawyers who drafted the Yokohama Declaration on Adult Guardianship Law in 2010.

I left the Law Society in 2001, since when I have worked as an independent consultant, writer and trainer on mental health and capacity law. I owe much of my freelance career to Denzil, both in terms of work he has put my way and the support he has given me through generously sharing his knowledge, expertise and contacts. In particular, Denzil was a keen supporter and major contributor to the *Elder Law Journal* (Jordans) which I had the privilege to edit during the first 5 years of its existence. That he had time for me during those busy and demanding years - when he, first as Master and then as Senior Judge of the Court of Protection, was fully involved in the lead up to and implementation of the Mental Capacity Act 2005 – is testament to the kind, generous and helpful person he is.

As for retirement, I have just beaten Denzil to it! While enjoying the freedom, I still find it strange that I no longer need to try to keep up with the ongoing developments in mental capacity law! But what I will miss most is regular contact with the admirable and inspirational people involved in this area of law – particularly Denzil. I wish him all the best for a happy and fulfilling retirement.

Protecting P – lessons from the family court?

Re E (A Child) [2016] EWCA Civ 473 (Court of Appeal (McFarlane, Gloster LJ and Macur LJ))

Other proceedings – family – public law

Summary

This appeal followed care proceedings involving four children: A, B, C and D. D alleged that she had been sexually abused by her father and by her brother, A. A, who was 15 years old, was assessed as having a ‘borderline to low average’ ability in most areas of function, but with an ‘extremely low to low average’ ability to process information that was given to him. He was represented in the proceedings by a CAFCASS guardian and was not capable of instructing a solicitor directly.

The appeal raised a number of issues, including the approach to whether a child witness should be called in the course of family proceedings, and the process and content of the ‘Achieving Best Evidence’ interviews conducted by the police. For present purposes, we focus upon the Court of Appeal’s examination of the approach to be taken by those representing a child where the child is themselves accused of being the perpetrator of abuse.

A’s solicitor and guardian visited A to go through the evidence against him and the judge directed the guardian to file a statement giving an account of the visit. A apparently indicated that inappropriate sexual behaviour had occurred in which he had been involved. The judge at first instance made findings that A had been controlled by his father into committing acts of indecency. The father appealed against the judge’s findings of fact made against him and his son, A.

The court found that there were a number of aspects relating to A’s involvement in the proceedings and the findings that were made with respect to him that gave rise to real concern. At paragraphs 90-91, Lord Justice McFarlane said:

The first relates to the professional responsibilities of A's solicitor and guardian during the process of trying to obtain his instructions on the allegations that were to be made against him in the proceedings. A, as a party to the proceedings who is represented by his own solicitor, must be entitled to the same protection afforded to all other individuals who undertake communications with their lawyers. No suggestion was made in the hearing of this appeal that any different standard or approach should be taken to A either because he is a child or because he may lack the capacity to instruct his solicitor directly...

It is obviously most important that, in the case of a vulnerable young person, those who are instructed to act on his behalf where he or she is facing serious factual allegations are utterly clear as to their professional responsibilities and astute to ensure that their young client's rights are properly acknowledged and protected.

The Court of Appeal expressed "very grave doubt as to the evidential value of this whole procedure." The court allowed the father's appeal. It set aside the findings of fact and remitted the case to be heard before a different judge.

Comment

As McFarlane LJ noted, the guidance given by Lady Hale in *Re W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12 as to the need to give appropriate consideration to a child giving evidence in a case appears to have been largely ignored in the years since the judgment of the Supreme Court was handed down. However, it will soon be given further endorsement by amendments to the FPR 2010 and Practice Directions in accordance with recommendations

from the President's working group on children and other vulnerable witnesses. It is to be hoped that it will also be matched in due course by guidance as to the need to give equivalent consideration to P giving evidence.

The court's comments in relation to the procedural obligations incumbent upon those dealing with vulnerable individuals are highly relevant to COP practitioners. Although a guardian is not in the same position as a litigation friend, the comments made by McFarlane LJ would appear equally pertinent to litigation friends and the lawyers that they instruct. This means, in particular, that real care must be exercised before information is put before the court in the form (for instance) of an attendance note of attendance upon P which discloses that P may have committed offences.

Treading a very careful line – disclosure of sensitive information

Local Authority X v HI [2016] EWHC 1123 (Fam) (Family Division (Roberts J))

Other proceedings – family – public law Summary

This case concerned a 15 year old boy (I) in care proceedings. He revealed certain sensitive information about himself to professionals. His strong wish was that the information should not be disclosed to his parents and stepmother. I's guardian made an application to restrain the local authority from disclosing to I's parents the information which I had shared with professionals. I's father and stepmother opposed the application. The court expressed the view that it was difficult to see how the information had any relevance to the issues to be decided. However, the court was prepared to assume that

it had some tangential relevance and to apply the balancing test.

On one side of the balance was whether disclosure of the information would involve a real possibility of significant harm. The court was satisfied that there was a clear risk that the consequences of disclosure of the material might result in I's disengagement from the professionals who had provided him with guidance and support since his reception into care. It was essential that I believed that he could repose trust and confidence in those professionals and the care and support they would be providing. Moreover, any prospect of repairing the relationship between I and his father would inevitably involve some therapeutic input from professionals. It would be harmful to I if the chance to restore some form of relationship with his father was jeopardised because of disclosure of information which I regarded as confidential.

The next stage of the balancing exercise was whether the overall interests of I would benefit from non-disclosure. At this stage, the court had to weigh the interests of I in having the material properly tested and the magnitude of the risk that harm would occur and the gravity of that harm. As the court had already indicated that the information was of doubtful relevance there was little benefit to I in ventilating the material before the court. If I's wishes were overruled, the distress in relation to disclosure to his parents would be compounded by the knowledge that these very private matters might be the subject of forensic scrutiny and debate in court. The distress might compound fears about maintaining an open relationship in future with professionals who were charged with responsibility for his wellbeing. There was ample evidence to substantiate the positive benefits which had already flowed from I's ability to confide in

others. The court found that both the magnitude of the risk of the harm occurring and the gravity of that harm would be substantial and significant. The balance at this stage clearly fell in favour of non-disclosure.

The final step was to weigh up the interests of the respondents (I's father and stepmother) in having the opportunity to see and respond to the material. This involved a rigorous consideration of the engagement of their Article 6 and Article 8 ECHR rights. The court decided that whilst the respondents' Article 8 rights were engaged, they could not take precedence over I's Article 8 rights and I was clearly expressing a wish for no communication with his father or stepmother. As to the respondent's Article 6 rights, the court could have already decided that the information was of tangential or minimal relevance and would not impact upon the outcome of the proceedings or future planning for I. The court's clear conclusion was that the harm which would be caused by disclosure of information which had little, if any, relevance to the issues would be wholly disproportionate to any legitimate forensic purpose. The information would therefore not be disclosed to I's parents.

Comment

The court in this case provided some helpful general guidance as to the proper approach to be taken when balancing competing interests in relation to disclosure of sensitive information. The court placed particular weight on the fact that I had "*expressed in the clearest terms his wish that the family should not have access to the information. Those wishes deserve the court's respect, albeit in the context of the overall balancing exercise.*" Such an approach resonates with section 4(6) of MCA which places an obligation on the decision maker to take into

account P's wishes and feelings so far as reasonably ascertainable when making any best interests decision.

Psychologists as experts in the Family Courts in England and Wales: Standards, competencies and expectations

This joint guidance from the Family Justice Council and the British Psychological Society is aimed at family law practitioners but is equally valuable to COP practitioners. Psychologists are often invited to conduct adult mental capacity assessments relating to capacities to engage in the legal process, to give evidence or to give consent in matters such as adoption, sexual contact, financial matters or living arrangements. The guidance provides helpful practical advice for psychologists who act as expert witnesses in court including the time ranges which would typically facilitate appropriately detailed assessments which are often requested by the courts. It is also useful for those instructing expert witnesses and includes a handy checklist for instructing solicitors at appendix 5. The guidance is available [here](#).

Short note: Exceptional Funding – back to square one

The Court of Appeal has recently overturned the decision of Collins J declaring the Exceptional Case Funding Scheme as operated is unlawful. In (1) *The Director of Legal Aid Casework* (2) *The Lord Chancellor v IS (a protected party, by his litigation friend the Official Solicitor)* [\[2016\] EWCA Civ 464](#), the Court of Appeal (Briggs LJ dissenting) held that the scheme was lawful, although noting that the extent of difficulties identified by solicitors in accessing the scheme was “troubling.”

International family law guidance documents

The President, Sir James Munby, has recently published Guidance on Liaison between Courts in England and Wales and British Embassies and High Commissions abroad, available [here](#). Whilst predominantly aimed at practitioners/the judiciary concerned with children cases with an international element, this Guidance will also be relevant for those concerned with cross-border cases involving adults with impaired capacity.

Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK

[Editorial Note: we reproduce below the Executive Summary of the major report [published](#) on 6 June by the Essex Autonomy Project as the culmination of a collaborative sixteen-month project undertaking an assessment of mental capacity/adult incapacity legislation in the three legal jurisdictions of the United Kingdom: England & Wales, Scotland, and Northern Ireland. Three of the editors of the Newsletter, Alex, Adrian and Jill are also authors of the report, alongside Wayne Martin, Sabine Michalowski, Colin Caughey, Alison Hempsey and Rebecca McGregor.]

The *Essex Autonomy Project Three Jurisdictions Report* is a contribution to an ongoing process of legal reform across the UK and around the world, the broad aim of which is to ensure respect for the rights of persons with disabilities.

The report is the culmination of a collaborative sixteen-month project undertaking an assessment of mental capacity/adult incapacity legislation in the three legal jurisdictions of the United Kingdom: England & Wales (which together comprise one jurisdiction for these purposes), Scotland, and Northern Ireland. It is intended (i) to provide technical research support to UK officials who will be involved in the forthcoming UN review of UK compliance with the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD); (ii) to make recommendations in support of ongoing efforts across the UK to reform mental capacity/adult incapacity legislation in order to achieve CRPD compliance; and (iii) to provide analysis, both of

current legislation and possible alternatives, that will be useful to those around the world who are involved in the reform of mental health and mental capacity legislation in accordance with the human rights requirements of the CRPD.

Compliance with the CRPD is a work-in-progress in the three jurisdictions of the UK, and this work must continue. We identify a number of recent legislative innovations that have the potential to bring the UK closer to compliance. We consider measures commonly employed in the three jurisdictions but hitherto hardly addressed in discussion of CRPD compliance, in particular autonomous measures such as powers of attorney and advance directives, which present particular challenges and opportunities in the context of CRPD compliance. We also identify a number of other areas in which the statutory arrangements in the UK still fall short of compliance with CRPD Art. 12. We advance a series of recommendations about how the three UK jurisdictions can remedy these areas of non-compliance.

The main recommendations of the report are as follows:

Recommendation 1: Respect for the full range of the rights, will and preferences of everyone must lie at the heart of every legal regime. That must be achieved regardless of the existence and nature of any disabilities. Achieving such respect must be the prime responsibility of anyone who has a role in taking action or making a decision, with legal effect, on behalf of a person whose ability to take that action or make that decision is impaired. The role may arise from authorisation or obligation. The individual with that role should be obliged to operate with the rebuttable presumption that effect should be given to the person's reasonably ascertainable will and preferences, subject to the constraints of

possibility and non-criminality. That presumption should be rebuttable only if stringent criteria are satisfied. Action which contravenes the person's known will and preferences should only be permissible if it is shown to be a proportional and necessary means of effectively protecting the full range of the person's rights, freedoms and interests.

Recommendation 2: All three UK capacity/adult incapacity statutes should incorporate an attributable duty to undertake all practicable steps to determine the will and preferences of persons with disabilities in applying any measure designed to respond to impairments in that person's capabilities.

Recommendation 3: In any process that impacts upon the ability of a person with disability to exercise their legal capacity, the primary obligation of an independent advocate shall be to support the person to overcome obstacles to such matters as comprehension or communication so as to enable them to exercise that capacity for themselves. If such support does not secure the independent exercise of their legal capacity, the duty of the advocate shall be to support the person by identifying and articulating, insofar as it is practicable to do so, the will and preferences of the disabled person in the matter.

Recommendation 4: Statutory advocacy services should be funded at a level that ensures genuine and effective access to independent advocates by persons with disabilities in any matter that impacts upon their ability to exercise legal capacity.

Recommendation 5: The scope of statutory requirements regarding the provision of support should be expanded to encompass support *for*

the exercise of legal capacity, not simply support *for communication* (as in AWIA s1(6)) or support *for decision-making capacity* (as in MCA s1(3)).

Recommendation 6: Statutory provisions regarding support in the exercise of legal capacity must be attributable. For example, statutes that state only that support *should be provided* must be supplemented with clear guidance about who bears the responsibility for providing that support.

Recommendation 7: Existing measures such as powers of attorney and advance directives should be recognised for their potential as instruments of support for the exercise of legal agency in circumstances where decision-specific decision-making capacity is impaired, intermittent or absent. In order to fulfil this potential, however, such measures must be embedded in robust Art. 12.4 safeguards.

Recommendation 8: The three jurisdictions should develop definitions (and related guidance) on the concepts of undue influence and conflicts of interest which will be suitable for providing robust safeguards across all aspects of exercise of legal capacity, and in so doing should include consideration of weaving in aspects of related concepts such as "facility, circumvention, lesion" in Scots law and "unconscionable bargains" in English law.

Recommendation 9: Principal mental capacity/adult incapacity legislation should be structured to ensure that provisions and procedures necessary to ensure CRPD compliance apply throughout each respective legal system, and not only to measures relating to the exercise of legal capacity contained within the principal legislation.

Recommendation 10: A regular programme of monitoring and review should be maintained to review compliance with capacity/adult incapacity legislation in all three jurisdictions of the UK.

Care England Mental Capacity Act Implementation Survey: Report

Care England, prompted by the Law Commission's review of mental capacity and deprivation of liberty legislation and the formation of the National Mental Capacity Forum, recently carried out a survey to discover the 'how' and 'how much' of Mental Capacity Act (MCA) implementation in care homes. The report was published on 29 March 2016 and can be found [here](#). Care England, a charity, is a representative body for independent care services in England.

Saskia Goldman, policy officer of Care England, commenting on the report in a recent [article](#) for *Community Care*, wrote in respect of its findings that:

The MCA is not embedded in practice as it should be across health and social care. Care homes, despite pockets of good practice, are no exception.

In carrying out its research the charity, using its membership network and social media, surveyed 84 care home managers covering 50 local authority areas. The majority (over 50%) of the respondents' main user groups were adults with dementia, 35% adults with learning disability and 15% adults with mental health problems. The respondents answered questions on the five principles of the MCA, which were aimed at discovering how well the managers lead and supported their staff to understand and enact these principles. The report cautions that the respondents to the survey "could be, to some

extent, a self-selecting group" and that "mainly those who are already confident in MCA implementation have come forward to respond to this survey."

Yet even within this self-selecting group the respondents showed varying approaches and practices which highlighted the problems of giving and managing care in accordance with the MCA. For example in response to the question: "how do you support your staff to understand that the resident or service user must be assumed to have capacity, unless it is proved otherwise?" the respondents' replies showed an over reliance on MCA training alone and did not combine the training with embedding the MCA in everyday good practice. The report comments that "*the most promising approaches, took multiple approaches to communication of the Act, from the classroom to caring, and via a range of communication methods.*" There were several heartening examples of how the MCA had given clients more independence.

The responses to a question on unwise decisions showed a worrying lack of understanding by some managers of the principle of an "unwise decision." As the report states, "*taking a chance is about positive risk-taking, which is not always or necessarily the same thing as supporting someone to make an unwise decision.*" The report highlighted the need for more training in this area. Another area of concern was in response to the question about recognising, recording and minimising restraint in accordance with the MCA. Although 86.25% of the respondents felt confident in doing this, 13.75% of respondents did not feel confident. The report reflects that "*self-assessment of MCA knowledge and implementation is not the surest indicator, especially considering that some who felt confident in this aspect of MCA implementation had needs that they had not identified.*"

In response to the question “*what would help your home/service to better implement the MCA?*” respondents wanted more training, guidance documents, better support from their local authority and more local ‘good practice’ schemes. Training providers and organisations that provide easy-reader accessible materials explaining the MCA may like to note one particular response: “*Accessible training often [is poorly] pitched and is either insulting or overly complicated.*”

One of the greatest barriers to MCA implementation was seen to be information and knowledge not filtering down in homes where “*managers considered that the MCA, capacity assessment, Best Interest Decisions and DoLs were the concern of managers only.*” The report responds that “*this should not be the cases and all staff should be engaged with, and inform these processes.*”

In conclusion, this was a very useful survey and report. It showed amongst other things that managers who responded most confidently to the survey were those that tended to use a range of approaches to implementation of the MCA. The report also showed evidence of best practice in many care homes, but reflected that the data is not consistent with experiences across the sector as gathered in feedback to the research at the National Mental Capacity Action Day in March 2016. There is therefore a pressing need for further research to be carried out to assess the MCA implementation in care homes more widely.

Beverley Taylor

Disappointing appointees

A recent [report](#) by the Local Government

Ombudsman into the way in which Halton Borough Council discharged its obligations as appointee for a woman, Miss Y, with disabilities rendering her unable to manage her own financial affairs makes dismal reading. The Council, which charged Miss Y for the privilege of its appointee services “*for at least seven years and possibly longer [...] failed to effectively manage Miss Y’s money while it was responsible, as appointee, for her financial affairs,*” including by:

- failing to identify that Miss Y was being overpaid income support and miscalculating her entitlement to housing benefit, which resulted in an overpayment. When both of these errors became apparent the council repaid the amounts, leaving Miss Y with nothing in her account when the family took over her finances again;
- overpaying utility bills on her behalf for communal services she used in the supported living placement where she lived, to the sum of around £400;
- failing to provide her with money for clothes, leading her sister to have to spend almost £300 of her own money on clothes for her; and
- failing to make a proper best interests determination as to whether she should spend around £800 to go on a holiday.

One point that the report could have emphasised, but did not, is the very limited scope that appointees have (or should have) to make decisions regarding the money of those whose benefits they are administering. Unless they are also property and affairs deputies, the scope of

their authority to administer the money (and in particular) the capital of the person is very limited. For further discussion of this, we recommend the excellent [report](#) by Empowerment Matters on making financial decisions.

Sexual exploitation and learning disability

At the second in the (excellent) 'Safeguarding Adults and Legal Literacy' [seminar series](#), Alex's attention was drawn to an extremely helpful toolkit of training materials prepared under the auspices of the Association for Real Change to assist those with learning disabilities to protect themselves against sexual exploitation. The materials, developed in conjunction with experts by experience, including both peer education and staff training materials, and can be accessed for free [here](#).

Short note: coercive and controlling behaviour

South Yorkshire Police [report](#) that a man from Sheffield has been jailed for two years and four months after pleading guilty to the new offence of coercive and controlling behaviour under s.76 Serious Crime Act 2015 and to eight counts of assault and criminal damage. This is the first successful conviction for South Yorkshire Police (and must be one of the first in the country) under new legislation enabling police to prosecute for coercive and controlling behaviour.

The court heard that the man had abused his partner over an almost two-year period, controlling her diet, exercise, what clothing she wore and when she could see her friends and family, as well as ensuring that he was with her at all times.

Click [here](#) for all our mental capacity resources

Those whose practice includes inherent jurisdiction cases will be aware of the evidential difficulties in such cases, where it is being argued that an individual is subject to a controlling influence. It appears that in this case, but unlike many others, the woman who was subject to the abuse came forward to the police.

Short Note: Children and Social Work Bill

By way of heads-up, readers will want to keep a close eye out on the progress of the [Children and Social Work Bill](#) introduced into the House of Lords on 20 May 2016, because it promises to bring the regulation of social workers back under the direct control of government, as opposed to being devolved to the Health and Care Professions Council. This will also have implications, we anticipate, for the way in which Best Interests Assessors are accredited in their specific roles. A useful article can be found in [Community Care](#) outlining some of the Bill's key provisions.

Amended Law Society Practice Note on Representation in Mental Health Tribunals

An [updated version](#) of this Practice Note has now been published, taking into account (in particular) the decision of Charles J in [Re YA](#) as to the approach that representatives are to take when acting under rule 11(7), as well as information on Care & Treatment Reviews.

Short Note: Capacity to appeal

In the linked cases of *London Borough of*

Hillingdon v WW (Special educational needs : Other) [\[2016\] UKUT 253 \(AAC\)](#) and *Buckinghamshire County Council v SJ (Special educational needs: Other)* [\[2016\] UKUT 254 \(AAC\)](#), Upper Tribunal Judge Jacobs gave a helpful analysis of the route by which the right of a young person to appeal against relevant decisions of a local authority under s.51 Children And Families Act 2014 may be made effective where the young person lacks the capacity to bring an appeal. Readers with a specific SEN interest are directed to the analysis at paragraphs 11-19 in the first or 12-20 in the second judgment (being identical), where Upper Tribunal Judge Jacobs addresses in turn each of the four potential scenarios in relation to an appeal, namely that: (1) the young person has capacity; (2) the young person lacks capacity; (3) the young person's capacity is in doubt; or (4) the young person's capacity changes during the course of the proceedings.

Of wider importance, perhaps, is UT Judge Jacobs' observation at paragraph 9 that

“capacity depends on the matter in respect of which a decision has to be made: section 2(1). So a person may have capacity at one time but not at another, and may have capacity in respect of one matter but not another. The matter I am concerned with is the bringing of an appeal; that is what I mean when I refer to (lack of) capacity. The young person may have capacity in respect of that, but not in respect of other decisions that have to be made in the course of the proceedings. Equally, a person may lack capacity to bring an appeal, but have capacity to make other decisions in the course of the proceedings.”

By analogy, we suggest, it would be entirely possible that a person would have the capacity to bring an application under s.21A MCA but not to have the capacity then to instruct his or her legal

representatives in respect of all the decisions that may need to be brought during the course of that application.

Short Note: independent panels and discharge

In *South Staffordshire and Shropshire Healthcare NHS Foundation Trust & Anor v The Hospital Managers of St George's Hospital* [2016] EWHC 1196 (Admin), Cranston J confirmed that, in principle, an NHS Trust detaining a patient under the Mental Health Act 1983 can bring judicial review proceedings against the panel of hospital managers to which it has delegated powers under s.23(6) of the Act to decide whether to discharge a patient. He emphasised, however, that such a challenge would only rarely succeed.

The Northern Ireland Mental Capacity Act

[Editorial Note: we are delighted that Roy McClelland OBE, who led the Bamford Review (described below) to its conclusion has written this description for us of the key points of the new Mental Capacity (Northern Ireland) Act 2016. We understand that a more detailed article co-written by Professor McClelland will be forthcoming in the [International Journal of Mental Health and Capacity Law](#)]

Introduction

Alex Ruck Keene's article in the [August 2014 Newsletter](#) “Throwing down the gauntlet – the mental capacity revolution in Northern Ireland” drew attention to new legislative proposals being consulted upon by the Department of Health, Social Services and Public Safety (NI) in 2014. With the granting of Royal Assent in March 2016 those proposals have finally found their way onto

the statute book in the form of the Mental Capacity (Northern Ireland) Act 2016.

Background

While the initial stimulus for legislative reform has origins in UK case law² going back more than 20 years the policy steer for NI's Department of Health, Social Services and Public Safety (DHSSPS) and the Department of Justice (DoJ) came from the outworking's of a major review of mental health and learning disability, the Bamford Review, established in 2002. The Review continues to provide the citizens of NI with a road map for mental health reform, including reform of legislation.

The vision underpinning the Bamford Review and its implementation is "a valuing of all who have mental health needs or a learning disability, including rights to full citizenship, equality of opportunity and self-determination."³ Equality goes to the heart of the Review and as its report Equality of Opportunity states "because a person has a mental health problem or a learning disability does not of itself mean that he or she is incapable of exercising his or her rights."⁴

The Review's final report A Comprehensive Legislative Framework⁵ proposed a rights-based approach as the guiding principle for reform of legislation. A core principle of the Framework is respect for the decisions of all who are assumed to have the capacity to make their own decisions. Grounds for interfering with a person's autonomy should be based on impaired decision-making

capacity. The legislative framework also proposed that the provision of care and treatment for mentally disordered offenders should be under the same legislative framework.

Central to the Bamford proposals for legislative reform were five key demands:

- repeal of separate and discriminating mental health legislation;
- a single legislative framework in which all health and welfare issues are considered equally;
- principles supporting the dignity of the person should be explicitly stated in the legislation;
- a presumption of decision-making capacity, with respect for decisions and provision of all necessary;
- support to enable participation in a decision;
- where an individual's capacity is impaired the best interests of the person should be protected and promoted.

Together these have formed the litmus test for the fidelity of the present legislative proposals with the Bamford Review.

Northern Ireland Mental Capacity Act

The DHSSPS and DoJ responded to the challenge. Beginning in 2008 it has been a lengthy process. To the Departments' credit a significant factor has been extensive engagement with stakeholders throughout. The Mental Capacity Bill entered the Northern Ireland Assembly in June 2015 and after a rigorous process of debate

² *Re T (Adult: Refusal of Treatment)*; CA 1992

Re C (Adult: Refusal of Treatment); FD 1994

³ Bamford Review of Mental Health and Learning Disability (2007). [A Comprehensive Legal Framework for Mental Health and Learning Disability](#). Belfast: DHSSPS.

⁴ Bamford Review of Mental Health and Learning Disability (2006). [Human Rights and Equality of Opportunity](#).

⁵ Footnote 2.

and consultation completed its journey in March 2016. Royal Assent was granted in March 2016.

Fundamental for the Bamford vision for legislative reform, the Act will provide equally for all circumstances and for all aspects of a person's needs – financial, welfare, health – *including mental health*.

The Act is principles-based. The principles are set out at the start and underpin the entire legislation: First Principle: capacity. A person is not to be treated as lacking capacity unless it is established that the person lacks capacity in relation to a matter. The person is not to be treated as unable to make a decision for himself or herself about the matter unless all practicable help and support to enable the person to make a decision about the matter have been given without success. The person is not to be treated as unable to make a decision for himself or herself about the matter merely because the person makes an unwise decision. Second Principle: best interests. The act must be done, or the decision must be made, in the person's best interests. The person making the determination must have special regard to the person's past and present wishes and feelings, the beliefs and values that would be likely to influence their decision if they had capacity and any other factors that they would be likely to consider if able to do so.

Conclusion

The Mental Capacity Act (N Ireland) sign-posts an end to discriminatory mental health legislation. Speaking during the Final Stage debate, Health Minister, Simon Hamilton said: *"First and foremost, this Bill is about reducing the stigma still felt by many people suffering from mental disorder. It will introduce a new rights based legal*

*framework that applies equally to every adult where there is a need to intervene in their lives on health grounds."*⁶ This statement not only reflects the innovation at the heart of this new legislation it signals ownership of its value base by Northern Ireland's political leaders.

Legislation per se is only one part of the process of reform. Appropriate resources must be allocated to enable effective implementation. A detailed Code of Practice is required to provide clarity on many aspects. Training will be needed for a wide range of professionals. A comprehensive information programme must be provided for service users, carers and attorneys. Nevertheless, this legislation provides the framework for a societal shift in its care and treatment of those with a mental disorder.

Strasbourg and the principles of participation

AN v Lithuania [\[2016\] ECHR 462](#) (European Court of Human Rights (Fourth Section))

Other proceedings – EctHR

Summary

In the most recent in a long string of cases considering "incapacitation" proceedings in Eastern European countries, the ECtHR has drawn together a number of important threads as regards the application of both articles 6 and 8 to these proceedings. The observations of the court are – again – ones that resonate in different ways for practice in the Court of Protection.

Article 6

⁶<https://www.health-ni.gov.uk/news/global-first-legislation-reduce-mental-health-stigma-passes-final-stage>.

The Court reiterated a number of important general principles relating to proceedings for removal of legal capacity, thus:

89. *In the context of Article 6 § 1 of the Convention, the Court accepts that in cases involving a mentally-ill person the domestic courts should also enjoy a certain margin of appreciation. Thus, for example, they can make appropriate procedural arrangements in order to secure the good administration of justice, protection of the health of the person concerned, and so forth (see Shtukaturv v. Russia, no. 44009/05, § 68, ECHR 2008).*

90. *The Court accepts that there may be situations where a person deprived of legal capacity is entirely unable to express a coherent view. It considers, however, that in many cases the fact that an individual has to be placed under guardianship because he lacks the ability to administer his affairs does not mean that he is incapable of expressing a view on his situation. In such cases, it is essential that the person concerned should have access to court and the opportunity to be heard either in person or, where necessary, through some form of representation. Mental illness may entail restricting or modifying the manner of exercise of such a right, but it cannot justify impairing the very essence of the right, except in very exceptional circumstances, such as those mentioned above. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental health issues, are not fully capable of acting for themselves (see D.D. v. Lithuania, cited above, § 118).*

91. *The Court also reiterates that there is the importance of ensuring the appearance of the fair administration of justice and a party to civil proceedings must be able to participate effectively, inter alia, by being able to put*

forward the matters in support of his or her claims. Here, as with other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures (see P., C. and S. v. the United Kingdom, no. 56547/00, § 91, ECHR 2002-VI)."

In circumstances where the applicant had not been present at, or aware of, the proceedings for incapacitation (brought at the behest of his mother on the basis of the schizophrenia from which he was suffering), the court highlighted that:

96. *The applicant was indeed an individual with a history of psychiatric troubles. From the case material, however, it appears that despite his mental illness, he had been a relatively independent person. Indeed, and despite his suicide attempts in 2004 and 2006, for most of the time he lived alone, and could apparently take care of himself. Furthermore, the Court notes that the applicant played a double role in the proceedings: he was an interested party, and, at the same time, the main object of the court's examination. His participation was therefore necessary, not only to enable him to present his own case, but also to allow the judge to have at least brief visual contact with him, and preferably question him to form a personal opinion about his mental capacity (see Shtukaturv, cited above, § 72). Given that the potential finding of the applicant being of unsound mind was, by its very nature, largely based on his personality, his statements would have been an important part of his presentation of his case (see D.D. v. Lithuania., cited above, § 120; see also Principle 13 of the Recommendation No. R (99) 4 by the Council of Europe).*

The court could not, further, be satisfied that the hearing was fair despite the fact both the

applicant's mother and the prosecutor attended the hearing, because *"there was no one at the court hearing who could, on the applicant's behalf, rebut the arguments or conclusions by his mother or the prosecutor"* (paragraph 98). The court placed particular weight upon the fact that there was a lack of any meaningful involvement by the relevant social services department in determining the merits of the applicant's case. Furthermore, it transpired *"that the court ruled exclusively on the basis of the psychiatric report without summoning the medical expert who wrote it for questioning (see D.D. v. Lithuania, cited above, § 120). Furthermore, that medical expert report to the effect that the applicant could not take care of himself appears to be based on an account by the applicant's mother, without there being any proof that those circumstances had been verified by the State or municipal authorities themselves. Similarly, the Court observes that the Akmenė District Court did not call anyone else as a witness so that more light could be shed on the applicant's state of health."*

The court was also distinctly unimpressed by the fact that, in subsequent proceedings for his forced hospitalization, *"the lawyer appointed by the Legal Aid Service 'represented' him without even having seen or talked to him"* (paragraph 103).

The court held that the applicant had deprived of a clear, practical and effective opportunity to have access to court in connection with his incapacitation proceedings, and particularly in respect of his request to restore his legal capacity which was (essentially) fobbed off on formal grounds, such that there had been a violation of article 6(1) ECHR.

Article 8

The court noted that it has consistently held that:

... deprivation of legal capacity undeniably constitutes a serious interference with the right to respect for a person's private life protected under Article 8 (see, for example, Matter v. Slovakia, no. 31534/96, § 68, 5 July 1999). It reiterates that Article 8 secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his personality (see Smirnova v. Russia, nos. 46133/99 and 48183/99, § 95, ECHR 2003-IX (extracts)). It has not been disputed by the Government that the Akmenė District Court's decision of 31 January 2007 deprived the applicant of his capacity to act independently in almost all areas of his life: at the relevant time he was no longer able to sell or buy any property on his own, work, choose a place of residence, marry, or bring a court action in Lithuania. The Court cannot but hold that the deprivation of legal capacity thus amounted to an interference with his right to respect for his private life (see Shtukaturv, cited above, § 83). (paragraph 111).

Further, whilst national authorities should enjoy a wide margin of appreciation in a *"complex matter as determining somebody's mental capacity"*, *"the margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. A stricter scrutiny is called for in respect of very serious limitations in the sphere of private life"* (paragraphs 116-117) The court reiterated that *"whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8 (see Görgülü v. Germany, no. 74969/01, § 52, 26 February 2004). The extent of the State's*

margin of appreciation thus depends on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism (see Shtukaturv, cited above, § 89)” (paragraph 118).

In finding that the applicant’s Article 8 rights had been infringed, the court had particular regard to the fact that the proceedings before the Akmenė District Court did not give the judge an opportunity to examine the applicant in person. *“In such circumstances, it cannot be said that the judge had the benefit of direct contact with the person concerned, which would normally call for judicial restraint on the part of the Court. Furthermore, the applicant’s incapacitation proceedings ended at one level of jurisdiction, his participation in that decision-making process being reduced to nothing” (paragraph 120).*

The court emphasised that *“when restrictions on the fundamental rights apply to a particularly vulnerable group in society that has suffered considerable discrimination in the past, the Court has also held that then the State’s margin of appreciation is substantially narrower and must have very weighty reasons for the restrictions in question. The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs. In the past, the Court has identified a number of such vulnerable groups that suffered different treatment, persons with mental disabilities being one of them (see Alajos Kiss v. Hungary, no. 38832/06, § 42, 20 May 2010, and Kiyutin v. Russia, no. 2700/10, § 63, ECHR 2011)” (paragraph 125).*

Comment

In light of the principles set out above, what would the Strasbourg court make of a decision (say) by the Court of Protection made on the papers to appoint a property and affairs deputy for a person, a decision that can only be made on the basis of a determination that the person is factually incapable of making decisions as to their property and affairs? In light of Rule 3A of the Court of Protection Rules, introduced in July last year, and the express direction to the court to consider how the person concerned is to participate in what (in effect) are partial incapacitation proceedings, there are grounds to think that the court might think somewhat less dimly of such proceedings. However, the ringing – and consistent – statements that, in principle, persons to be subject to such proceedings should see the judge (and that judge should, in essence, conduct their own capacity assessment upon them) do not sit entirely easily with Court of Protection practice even as modified by Rule 3A. They should also – we suggest – serve as a reminder that justification will always be required in relation to any steps that are to be taken away from participation in CoP proceedings by way of full party status, together with representation by a representative charged with putting matters forward in support of P’s contentions (we suggest either as to capacity or best interests). In other words, party status and ‘direct’ representation (i.e. representation on the basis of such instructions as can be obtained from P, not ‘best interests’ representation as at present) should be the starting point, not the end point, in any consideration of how rights under Articles 6 and 8 ECHR (let alone 12 and 13 CRPD) are to be secured.

Conferences at which editors/contributors are speaking

The Use of Physical Intervention and Restraint: Helpful or Harmful?

Tor will be speaking at this free afternoon seminar jointly arranged by 39 Essex Chambers and Leigh Day on 13 June. Other confirmed speakers include Bernard Allen, Expert Witness and Principal Tutor for 'Team-Teach,' two parents / carers and Dr Theresa Joyce, Consultant Clinical Psychologist and National Professional Advisor on Learning Disabilities on the CQC. For more details, and to book, see [here](#).

Mental Health Lawyers Association 3rd Annual COP Conference

Charles J will be the keynote speaker, and Alex will be speaking at, the MHLA annual CoP conference on 24 June, in Manchester. For more details, and to book, see [here](#).

ESCRC seminar series on safeguarding

Alex is a member of the core research team for an-ESRC funded seminar series entitled 'Safeguarding Adults and Legal Literacy,' investigating the impact of the Care Act. The third seminar in the series will be on 'Safeguarding and devolution – UK perspectives' (22 September). For more details, see [here](#).

Deprivation of Liberty in the Community

Alex will be doing a day-long seminar on deprivation of liberty in the community in central London for Edge Training on 7 October. For more details, and to book, see [here](#).

Taking Stock

Both Neil and Alex will be speaking at the 2016 Annual 'Taking Stock' Conference on 21 October in Manchester, which this year has the theme 'The five guiding principles of the Mental Health Act.' For more details, and to book, see [here](#).

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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.

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

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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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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 consultant at 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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Professor 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 2015 updated guidance on Deprivation of Liberty). **To view full CV click here.**