Mental Capacity Law Newsletter September 2015: Issue 58

Compendium

Introduction

Welcome to the September 2015 Newsletters: Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: an update on the *Re X* saga, clarification over DoLS and conditional discharges, scrutiny of DoLS scrutinisers, an important decision on withdrawal of treatment, and a guest article by Dr Gareth Owen and capacity and brain injury;

(2) In the Property and Affairs Newsletter: an important decisions on P's use of funds for school fees in the context of mutual dependency, successive deputies, adverse costs orders and interest free loans, bad LPA behaviour, and family members as deputies;

(3) In the Practice and Procedure Newsletter: clarification over the (lack of) funding of s49 court reports, the importance of participation in proceedings, and habitual residence;

(4) In the Capacity outside the COP Newsletter: CRPD Committee's guidelines on article 14, assisted suicide, and litigation capacity in other proceedings;

(5) In the Scotland Newsletter: questionable policies and article 8 ECHR, the Education (Scotland) Bill, new guidance and ordinary residence, and new DOL guidance.

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

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

Judicial deprivation of liberty update

Judicial authorisations – Party status – Litigation friends

The fall out from *Re X* continues. We anticipate judgment being handed down very shortly by Charles J, the Vice-President of the Court of Protection, in *NRA & Ors*, considering the question of the participation of the person concerned in proceedings for the judicial authorisation of the deprivation of liberty. In response to the Court of Appeal's (non)decision in *Re X (Court of Protection Procedure)*, District Judge Marin listed a number of cases before him on 8 July to identify common issues for resolution by the Vice-President (*Re MOD & Ors* [2015] EWCOP 47). The Vice-President identified further issues to be addressed at a hearing which took place on 30 and 31 July; judgment is awaited. The issues raised are urgent and serious, in particular in the light of the apparent absence of

IMCAs available to act as litigation friends. As DJ Marin identified in his initial judgment:

> *"55. What results therefore is a complete impasse. The Court of Appeal strongly suggests that P should be a party. If so, he must have a litigation friend before he can become a party. If family members cannot take on this role either because it is legally or procedurally wrong or simply because none exist, then all eyes turn to the Official Solicitor. But he says that he cannot act as he has no resources to do so. The result therefore is that the cases all stand still and cannot proceed as will hundreds and potentially thousands of other cases. The ramifications of this are huge. In fact, I cannot think of a more serious situation to have faced a court in recent legal history."*

A key issue that will be determined by Charles J is whether (and how) the new Rule 3A and the menu of options identified therein may present alternative ways in which to secure the necessary degree of participation. Mostyn J has already opined (in advance of the coming into force of the Rule) on this point – it will be of considerable interest to see whether Charles J agrees with him.

Re X considered (and limited)

HSE Ireland v PD [2015] EWCOP 48 (Baker J)

Foreign Protective Measures – Deprivation of liberty – Party status

Summary

Baker J has had cause to consider *Re X* and Rule 3A on the very first day of the latter's life. In *HSE Ireland v PD* [2015] EWCOP 48, Baker J was asked to consider whether the subject of an application for recognition and enforcement of a foreign protective measure providing for their deprivation of liberty in England and Wales had to be made a party to the English proceedings.

This case, the sequel to *HSE Ireland v PA & Ors* [2015] EWCOP 38, required him to consider both the effect of *Re X* and the scope of the powers available to the court under Rule 3A. In relation to *Re X* Baker J noted that:

> "14. […] *the Court concluded that the President had no jurisdiction to determine the issues upon which the appellants were appealing and, accordingly, the Court of Appeal had no jurisdiction to entertain the appeals. It could then be argued that the observations of the judges of the Court were (at best) obiter dicta or (possibly) merely dicta. It would, however, be extremely unwise for any judge at first instance to ignore what was said by the Court of Appeal. On the contrary, I consider that I must treat the dicta as the strongest possible indication of how the Court of Appeal would rule on the question before it, in the event that the issue returns to that Court as part of a legitimate appellate process."*

Baker J held that:

> "*31. In Re X, the judges of the Court of Appeal were considering proceedings for orders authorising in the deprivation of liberty by the Court of Protection exercising its original jurisdiction under the MCA 2005. They were not asked to consider applications for the recognition and enforcement of foreign orders under Schedule 3. Their clear statements of principle, however, serve as a strong reminder of the importance to be attached to ensuring that P's voice is heard on any*

> *application where deprivation of liberty is in issue."*

Hearing P's voice was, though, at the heart of the process of recognition and enforcement. Therefore, when carrying out the limited review of the process before the foreign court mandated by Articles 5 and 6 ECHR, the Court of Protection "*must therefore bear in mind the observation of Black LJ at paragraph 86 that 'it is generally considered indispensable in this country for the person's whose liberty is at stake automatically to be a party to the proceedings in which the issue is to be decided." To my mind, however, where the adult has been a party and represented in the proceedings before the foreign court, it is not 'indispensable' for that adult also to be a party before this court on an application for recognition and enforcement of the foreign order, given the limited scope of the enquiry required of this court when considering an application under Schedule 3."*

Baker J continued:

> "*[e]ach case will turn on its own facts. In some cases, the court will conclude that the adult needs to be joined as a party immediately. In other cases, the court will adopt one or other of the alternative methods provided in Rule 3(A)(2). In a third category of case, the court will be satisfied on the information before it that the requirements of Schedule 3 are satisfied without taking any of the measures provided by Rule 3A(2)(a)-(d). In very urgent cases, the court may conclude that an interim order should be made without any representation by or on behalf of the adult, but direct that the question of representation should be reviewed at a later hearing. Such a course seems to me to be consistent with the analysis of Black LJ at paragraph 104 of Re X. In every case, however, when carrying out that analysis, the court must be alive to the danger identified by Black LJ, at paragraph 100 in Re X that the process may depend 'entirely on the reliability and completeness of the information transmitted to the court by those charged with the task' who may 'be the very person/organisation for P to be deprived of his liberty*.'"

Baker J anticipated that in the majority of applications for recognition and enforcement of this nature, joinder of the adult as a party will be considered necessary, but that in the majority of cases it will not. He further noted that the flexibility provided for by Rule 3A was well-suited to Schedule 3 applications, and expressed the hope that a panel of Accredited Legal Representatives would be swiftly established because the appointment of an ALR would in many cases facilitate a quick but focused analysis of the particular requirements of Schedule 3. Pending such appointment, the court would need to consider in each case what other Rule 3A step should be taken.

Baker J emphasised that this decision was taken in an area "*where the principles of comity and co-operation between courts of different countries are of particular importance in the interests of the individual concerned. The court asked to recognise a foreign order should work with the grain of that order, rather than raise procedural hurdles which may delay or impeded the implementation of the order in a way that may cause harm to the interests of the individual. If the court to which the application for recognition is made has concerns as to whether the adult was properly heard before the court of origin, it should as a first step raise those concerns promptly with the court of origin, rather than simply refuse*

recognition." Further, *"The purpose of Schedule 3 is to facilitate the recognition and enforcement of protective measures for the benefits of vulnerable adults. The court to whom such an application is made must ensure that the limited review required by Schedule 3 goes not further than the terms of the Schedule require and, in particular, does not trespass into the reconsideration of the merits of the order which are entirely a matter for the court of origin."*

Comment

Baker J's conclusion as to the status of the dicta in *Re X* is not surprising. Nor, we suggest, is the conclusion that he reached as to how those dicta apply in the narrow (but important) field of recognition and enforcement. It is clearly of the highest importance that the individual concerned is properly heard (or properly enabled to participate) before the court that is taking the decision to deprive him/her of their liberty. It is not immediately obvious why it is that they should then need to be joined as a party to proceedings for recognition and enforcement of that order before the Court of Protection, so long as the COP is both enabled – and indeed required – to assure itself that the individual in question has been so heard.

Conditional discharge and deprivation of liberty – sanity prevails

Secretary of State for Justice v KC and C Partnership NHS Foundation Trust [2015] UKUT 0376 (AAC) (Charles J)

MHA/MCA interface – Conditional discharge of restricted patients

Summary

Ever since the decision in *SSJ v RB* [2011] EWCA Civ 1608 it has been difficult to discharge restricted patients from detention under the Mental Health Act 1983. Often they require robust conditions in the community that amount to a deprivation of liberty. And the Court of Appeal decided that it was unlawful for a tribunal to discharge from MHA detention into what effectively amounted to community detention because that was not a "discharge" from detention. Many have long questioned the validity of that decision. This comprehensive judgment addresses a large number of issues, not all of which are relevant to MCA practitioners. Our focus, therefore, will be on the interface between the MHA and the MCA.

KC was a restricted patient and lacked capacity to make decisions in relation to residence and care regime. The tribunal made a provisional decision to discharge him from hospital on the following conditions:

1. He will reside at the placement and will not leave the premises unless accompanied and supervised at all times by an appropriate member of staff.
2. He will comply with all aspects of the care package which is devised for him by the NF organisation, and accept supervision and support from their staff.
3. He will accept psychiatric and social supervision from his community responsible clinician.
4. He will refrain from taking any alcohol and submit to any routine testing which may be required of him.

All agreed that this amounted to a deprivation of liberty. The placement was not a care home or hospital and so would require the authorisation of the Court of Protection. The main issue was

whether it was lawful for a first-tier tribunal ('FTT') to discharge KC in such circumstances.

MHA protective conditions: MCA/DoLS/MHA interface

Having analysed the legislation, Charles J set out an important aspect of the interface insofar as the relationship between the various statutory decision makers was concerned:

> *"62. In my view the points made in the last two paragraphs confirm that:*
>
> *(1) the Court of Protection and the DOLS decision makers are ill equipped to make and should not make decisions on the arrangements and thus the protective conditions required to provide appropriate protection to the public and the patient as and when the patient moves from hospital into the community,*
>
> *(2) the statutory responsibility for making the decision on what the protective conditions should be is placed on the MHA decision maker (and so the Secretary of State or the FTT), and so*
>
> *(3) the decision under the MHA on what the protective conditions should be limits the choices available to the Court of Protection or the DOLS decision makers, with the result that*
>
> *(4) the Court of Protection and the DOLS decision makers have to determine whether a regime of care, supervision and control that includes the protective conditions is in the patient's best interests and in doing so they cannot choose a regime that does not include the protective and other conditions decided on by the MHA decision maker (see paragraph 36 hereof).*
>
> *63. An alternative route to the same result is that it would be a waste of time and money for the Court of Protection and the DOLS decision makers to consider the care arrangements for a conditionally discharged restricted patient without knowing what the protective conditions decided on by the MHA decision maker are because the patient will not be, and indeed should not be, discharged into any care arrangements that do not include them.*
>
> *64. Conclusion. The FTT (and the Secretary of State) cannot lawfully pass responsibility for deciding what the protective conditions are to be to the Court of Protection or the DOLS decision makers. This is so even though breach of the statutory duty created by s. 73(4)(b) of the MHA does not of itself trigger a recall to hospital.*
>
> *117. … the Court of Protection or the DOLS decision maker could refuse to authorise any such placement and if that happened the provider would be likely to refuse to continue to provide it.*
>
> *118. If that was to happen the Secretary of State could vary the conditions or recall the restricted patient or, subject to timing the restricted patient would have the right to make an application to the FTT under s. 75 of the MHA…"*

Those lacking capacity to consent to their confinement

Charles J confirmed that "*A restricted patient who is conditionally discharged is not ineligible to be deprived of his liberty by the MCA and so if the implementation of the conditions selected by the MHA decision maker would result in a deprivation of liberty it can be authorised under the MCA by the Court of Protection or under the DOLS (provided of course that the relevant tests and assessments are satisfied).*" (para 113).

Those with capacity who consent

In *RB*, the Upper Tribunal's view was that the patient could not validly consent to his

deprivation of liberty because it was not "free and unfettered" and "*consent to alternative conditions of his detention regime is not the same as his consent to the existence of the regime itself*". All parties in the present case agreed that this conclusion was obiter (para 46). This is important because the Court of Appeal's subsequent reasoning assumed that *RB* had capacity but could not give a valid consent.

Charles J provides obiter comments on these obiter comments. He fundamentally disagrees with the approach to consent and provides detailed reasons (para 124-133). His Lordship makes the crucial point "*the existence of only unpleasant choices does not prevent the individual patient having the right to choose or the Court of Protection from choosing on his behalf*" (para 130). At the same time, one must "*be alive to the possibility that an expression of consent may not be "real", but if real consent is given to the relevant protective conditions there will be no deprivation of liberty under or in breach of Article 5. Given that many patients are legally represented before the FTT by panel solicitors, if a represented patient gives consent after discussing the matter with his lawyers then the FTT can usually be reassured that the consent is real*" (para 132). His Lordship also considers the risk of such a patient withdrawing their consent (para 134-139).

Timing of DoL authorisations

His Lordship held that:

> *"114. A standard authorisation under the DOLS can provide for it to come into force at a time after the time at which it is given (see paragraph 63 of Schedule A1 to the MCA). Also, in my view the Court of Protection can approve a care plan and authorise any deprivation of liberty it would create from a date in the future (i.e. when it comes into effect)."*

Conclusions

The conclusions of this detailed judgment can be found at paragraph 141:

> *"2. The FTT has power to impose (and so direct a conditional discharge on) conditions that when implemented will, on an objective assessment, give rise to a deprivation of liberty that is lawful because it has been authorised by the Court of Protection under the MCA or pursuant to the DOLS contained in the MCA (the MCA authorisations) and so complies with Article 5.*
>
> *3. The FTT should consider and generally should include in the protective conditions it imposes an ability to apply to it for a variation or discharge of them on the basis of a material change in circumstances (a) if a variation or discharge is refused by the Secretary of State or the FTT agrees to consider the application, and (b) if the FTT is invited to consider such an application by the Court of Protection (or a DOLS decision maker).*
>
> *4. The MCA authorisations can only be given if the relevant restricted patient lacks capacity to consent to the relevant conditions and is not ineligible to be deprived of his or her liberty by the MCA. Provided that the terms and conditions that give rise to the deprivation of liberty do not conflict with conditions the FTT have decided are necessary and have identified the restricted patient will not be ineligible and such authorisations can be given under the MCA applying the tests it sets out.*
>
> *5. Both of the MCA authorisations can be given to come into effect at a future date or on a future event but the MCA decision*

maker needs to know the conditions (including those that when implemented will objectively give rise to a deprivation of liberty) that the FTT considers necessary to satisfy the tests under the MHA, before the MCA decision maker can properly make the relevant MCA decision.

6. So, the FTT needs to identify what conditions it considers need to be in place as and when the direction for the conditional discharge of the restricted patient takes effect so that the MCA decision maker knows what they are when applying the MCA tests.

7. The FTT will need to be satisfied that the proposed placement on the relevant conditions (and so the relevant care plan) is sufficiently defined and an available option in practice and if it is not when it will be so available (see KD v A Borough Council, the Department of Health and Others [2015] UKUT 0251 (AAC) at paragraph 68).

8. The parties will therefore need to provide the necessary evidence on this and any other factors that will need to be taken into account by the FTT

9. The FTT should apply the guidance given by Upper Tribunal Judge Jacobs in DC v Nottinghamshire Healthcare NHS Trust and the Secretary of State for Justice [2012] UKUT 92 (AAC) on when the FTI should adjourn, make a decision under s. 73(7) of the MHA or a provisional decision in reliance on R (H) v SSHD [2003] QB 320 and [2004] 2 AC 253).

10. The Court of Protection and the DOLS decision makers cannot override the conditions identified by the FTT and so can only choose between alternatives that include them."

Comment

This is a very important decision as it significantly limits the damage done by the controversial *RB* decision. It is entirely possible for a person lacking capacity as to residence/care to be given a conditional discharge from detention under the MHA 1983 if the conditions amount to an objective deprivation of their liberty, so long as that deprivation of liberty is authorised in advance either by the Court of Protection (for supported living placements etc) or DoLS (care homes or hospitals). The MHA and the MCA can therefore work in parallel, achieving different purposes.

A degree of controversy is likely to continue, however, regarding those with capacity who consent to community confinement. This is because Charles J in *KC* disagrees with Collins J in *R (G) v MHRT* [2004] EWHC 2193. We are convinced by the powerful reasoning of Charles J but inevitably the higher courts will need to resolve the issue on another day. The analysis around the meaning of "consent" in such coercive circumstances as mental health is particularly interesting and is equally relevant to patients' capacitous decisions to "voluntarily" be admitted to psychiatric hospitals. If they withdraw their consent, the holding powers under MHA s 5 are available. If conditionally discharged patients withdraw their consent, paras 137 to 138 of the KC judgment provide further food for thought.

The implications of the decision go beyond conditional discharges, and surely suggest that it is equally possible (as the wording of Sch 1A to the MCA, the DOLS Code of Practice and the 2015 MHA Code of Practice suggest) for section 17 leave to be given for a detained patient for them to receive treatment for a physical disorder in a general hospital in circumstances amounting to a

deprivation of their liberty – i.e. that (as we made clear in our note) *A Local Health Board v AB* [2015] EWCOP 31 was wrongly decided.

Avoiding hypotheticals

DW v KW and LCC [2015] EWCOP 53 (DJ Bellamy)

Deprivation of liberty – Interface with public law

Summary

KW had resided in her current placement since 2010. Her sister challenged a standard DoLS authorisation, seeking a declaration that it was in KW's best interests to move from Rotherham to London. The local authority accepted that more appropriate accommodation should be sought for KW but, until an alternative had been identified, a best interests declaration could not be made. The expert social work view was that the placement met her assessed needs and recommended that it was in KW's best interests to remain there. However, the local authority should continue to explore alternative residential and supported living provisions within the Rotherham area.

The court accepted the local authority's submission that, without a geographic area being identified, it was impossible for the court to make a declaration that, for example, it was in KW's best interests to live in London. This ran the risk of the court straying into making hypothetical decisions:

> *"57 … There is no available option currently before the court (or indeed the likelihood of a further option in the foreseeable future) such as to permit the court to consider such declaration. (Re MN [2015] EWCA, followed)."*

Accordingly, the MCA s21A challenge was dismissed although the court expressed the hope that significant lessons would be learnt by the history of failings by the local authority to fully understand and then act upon their duty under the MCA.

Comment

Although the issue did not arise on the facts of this case, it strikes us that there is a significant issue regarding the relationship between best interests and Article 5. If the State is not able or willing to find a less restrictive option, does the decision in *Re MN (Adult)* [2015] EWCA Civ 411 mean that best interests decision makers (including the Court of Protection) must sanction an overly intensive deprivation of liberty regime in the absence of an alternative? Or can *MN* be distinguished where the right to liberty is at stake? We hope to be able to report further on this soon. In the meantime, *DW* can be contrasted with *P v Surrey CC* where the alternative placement was less hypothetical.

Supervisory bodies: Detached authorisers or proactive investigators?

P v Surrey County Council and Surrey Downs CCG [2015] EWCOP 54

DoLS authorisations

Summary

P was 26 years old with severe learning disability and autistic spectrum disorder. His placement broke down and he was urgently moved into a care home on 5 September 2014. On 24 November 2014 an urgent authorisation was

issued and, on 23 December 2014, a standard authorisation was granted by Surrey County Council expiring on 18 October 2015. His mother, acting as relevant person's representative and litigation friend, successfully challenged the authorisation and the court declared that it was in P's best interests to move to a Homes Caring for Autism placement after a period of transition.

The court held that P had been unlawfully deprived of liberty prior to the urgent authorisation and between its expiry and the commencement of the standard authorisation. Although the best interests assessor had recommended a maximum of 12 months' authorisation, HHJ Cushing was very critical of the supervisory body, naming its authoriser, in a number of respects:

With regards to the duration (emphasis added):

> *"19. What was, in my judgment, not open to the supervisory body was to do what it did, namely to receive un contradicted information from three separate sources that the care home was only suitable in the short term or for a short period and then proceed to grant the standard authorisation for a substantial period, i.e. 80% of the maximum permitted duration. Having regard to the period of time that P had been deprived of his liberty prior to the urgent authorisation, the ultimate decision on duration is drawn into sharper focus. Furthermore, in my judgment, in deciding on the duration of the standard authorisation, Mr Butler placed too much weight on the desirability of avoiding further assessments. There was no evidence that the assessment by the best interests assessor had caused P any actual distress."*

In terms of pursuing a less restrictive alternative:

> *"27. I cannot speculate how long it would have taken for the alternative proposed by the relevant person's representative and P's other parent and his non-appointed advocate to be fully investigated, but, in my judgment, given it was recognised that BR, the relevant person's representative and his mother, was acting appropriately and in her son's interests, as is clear from the assessment, it was incumbent on the best interests assessor to investigate her proposal to see whether in fact it offered a less restrictive, more suitable environment in which P could be cared for and, to the extent necessary in his best interests, to have his liberty circumscribed. The alternatives had to be considered by the supervisory body as part of its determination independent of the best interests assessor's recommendation of the period for which the authorisation of deprivation of liberty would be granted.*
>
> *…*
>
> *29. In my judgment, the best interests assessor and/or the supervisor body failed to analyse the four necessary conditions sufficiently. Had they done so, they would have asked themselves three questions:*
>
> *i) What harm, if any, may P suffer if his continued detention is authorised? The circumstances were that not less than two-to-one staffing ration was considered appropriate and necessary to limit self-harm.*
>
> *ii) What placement or type of placement would be a more appropriate response?*
>
> *iii) How long will it take to investigate the availability and suitability of a more proportionate response? Mr Butler said in his oral evidence that he had had several discussions with Mr Hill, as undoubtedly*

> *was necessary to enable him to approach his task correctly, but it was also necessary that he approach his task as a detached supervisor. It was evident that he did engage with the issue and brought his own judgement to the question, but in my judgment he also failed to ask the three questions. His reasons for authorising deprivation of liberty for 10 months did not relate to the qualifying requirements or the least restrictive principle.*
>
> …
>
> *32. The [supervisory body] had the duty to investigate whether a less restrictive alternative was available. It could not delegate its responsibility in this regard to the relevant person's representative or the non-appointed advocate. It already knew that the care home was not suitable in the medium or longer term because it had been told so by the social worker undertaking the best interests assessment. Being in possession of that knowledge, the obligation was on the first respondent to be proactive, and they failed in that obligation.*
>
> *33. It was submitted on behalf of the [supervisory body] that it was not unreasonable to authorise P's deprivation of liberty for 10 months on the basis that P's relevant person's representative or his family members could apply to discharge it. That is, in my judgment, the wrong approach. It is for the supervisory body to ascertain the least restrictive alternative, including the question of duration. It is not for the family to apply, although they have the opportunity to do so under the Act."*

Comment

This is an important decision in a number of respects. First, it illustrates the significance of the proactive nature of the supervisory body's role in the DoLS process. The legislation says that if all qualifying requirements are met an authorisation must be given. But determining whether those requirements are, in fact, met can never be a tick-boxing exercise where a vulnerable person's liberty is at stake. In the instant case, the authoriser had discussed the case with the best interests assessor but there was no contemporaneous record of this discussion. Note, therefore, that it would be prudent for authorisers to take such a note of that critical conversation if they do not do already. But even such a conversation would not have satisfied the judge, who went further by saying "*an alternative approach which would have been less restrictive of P's liberty would have been to call for further information before granting the standard authorisation at all or for the duration in question*". (para 18) Some might suggest that the "supervisory" body may in fact need to be more of an "investigatory" body.

What is particularly interesting in this case is that P was entitled to NHS continuing healthcare so the CCG commissioned his care and was responsible for the arrangements that amounted to a deprivation of his liberty. But the court emphasised that it was the local authority in its supervisory body role that had a duty to investigate whether a less restrictive alternative was available. To some extent this may overcome the fact that DoLS conditions only 'bite' on managing authorities when often the fault in finding alternatives lies elsewhere. Note, also, that the Judge emphasised that P's mother and non-appointed advocate were under no duty to investigate the cost or availability of a room at the Homes Caring for Autism facility. They had done all that they need to do by raising the existence of a more suitable alternative.

The second noteworthy feature of this case is its confirmation that deprivation of liberty is not a binary question – i.e. is it, or is it not, in P's best interests? Rather, it involves questions of degree: P may need to be deprived of liberty but not to this intensity. For example, two members of staff were following P wherever he went inside the care home. His opportunities for safe, positive interaction with his fellows were limited by the fact that the home's client group was older than him. The intensity of the deprivation can vary. Moreover, and thirdly:

> *"21 … the deprivation of liberty authorisation relates to the circumstances in which P is deprived of his liberty, not to his condition, i.e. it is situation specific, not person specific. It does not authorise P's detention in any other location, and so, on moving P to a different care facility, a fresh deprivation of liberty authorisation would have had to have been applied for."* (emphasis added)

These notions are not novel: but it does not hurt to be reminded.

What the judgment does not address is the question of which organ of the state was responsible for the unlawful deprivation of liberty. Of course, as regards P himself, this was irrelevant – the obligation is on the state. The judgment implies that it was the local authority which breached P's rights under Article 5(1), but had a claim for compensation and/or damages in fact been pursued, some interesting arguments would no doubt have ensued as to the relative responsibility of the CCG and the LA.

Balancing best interests and amputations

Surrey and Sussex Healthcare NHS Trust v Ms AB [2015] EWCOP 50 (Keehan J)

Best interests - Amputation

Summary

The NHS Trust applied for the court for a declaration that an above the knee amputation was in a patient's best interests. By the time of the application there was a stark choice between the amputation proceeding quickly or the patient dying. The application was briefly adjourned in order for the Official Solicitor to instruct his own experts to advise on capacity and best interests.

Both The Trust's psychiatrist and the Official Solicitor's psychiatrist agreed that the patient suffered from a predominant persecutory delusional state which meant that she lacked capacity to take a decision about the need for amputation. She did not understand that the alternative to amputation was death. She believed that the doctors and nursing staff were responsible for the problems she had with her leg and that it would get better if she went home.

The judgment sets out a series of considerations in relation to whether amputation was in the patient's best interests (see paragraph 59(a) – (h)). The judge balanced the disadvantages with the advantages and concluded that in this case it was in the patient's best interests for the amputation to take place. He notes that he should only grant permission if he was satisfied that no other course would save the patient's life and avert her imminent death.

Summary

Although developing no new propositions, this is a useful case which sets out the relevant case law and a detailed balance sheet approach.

SMART at end of life

CWM Taf University v M [2015] EWHC 2533 (Fam) (Newton J)

Summary

F was born in 1948. From 1993 onwards, she had significant liver failure caused by chronic abuse of alcohol. She had been admitted to hospital on a number of occasions in 2000, 2001 and 2006. On 11th January 2007 she was found slumped across her bed apparently with concussive symptoms. She had suffered an acute and bilateral subdural haematoma. Over the next two days, whilst in hospital, there was a reduction in her level of consciousness. On 28th February 2007 F was transferred to a different hospital where she remained.

She has been assessed over a long period (8 years) as being in a vegetative state with no perception of her surroundings. She was not communicative, although she made moaning sounds and could blink her eyes (but these were considered to be entirely reflexive movements). In 2010 it was recorded by a nurse that F was in a persistent vegetative state, having had no communication or interaction with family or care staff.

In 2013 a best interests meeting concluded unanimously that it was not in her best interests to undergo invasive surgery. The application to the court was triggered, by an anxiety about a PEG feeding tube. At the time of the application a temporary solution to the issue had been found.

An application was issued by the Trust on 25th February for a declaration under s.15 of the Mental Capacity Act that F lacked capacity to make decisions about her clinically assisted nutrition and hydration CANH), that it was not in F's best interests for CANH to be continued and that it was lawful and in her best interests for CANH to be withdrawn. The application was supported by F's family. The Official Solicitor was appointed by the court to act as litigation friend of F.

In support of the application the treating clinicians had provided reports that confirmed that in their view F had been in a vegetative state for 8 years with no prospect of recovery. F had been observed routinely and informally by staff and formally using the WHIM procedure. Professor Wade had been asked to provide a report for the Trust and he had agreed with the treating clinicians assessment that F was in a permanent vegetative state (PVS) and was of the view that undertaking further assessments of the level of awareness *'would delay matters and no realistic prospect of identifying awareness.'* His report supported the Trust's application.

During the course of carrying out his enquiries the Official Solicitor appears to have been concerned that there were unusual entries in F's medical records 2007 between April and December that may have been evidence of some signs of awareness - the last unusual entry being 31st January 2010. He instructed Mr Badwan to provide a further report. Mr Badwan concluded that notwithstanding the unusual entries in 2007 between April and December the records were consistent over five years and that, on the balance of probability, F has been in a vegetative for at least five years, and very probably eight. He agreed with Professor Wade that further treatment was futile and would not result in any

improvement of the patient' s level of awareness or clinical status.

The judge found that F was in a permanent vegetative state and had been so for five years and probably eight and that F would neither improve nor would she recover awareness. The treating doctors, clinicians, the independent experts, family members and the Official Solicitor acting for F agreed that it was in the best interests of F for CANH to be withdrawn. The judge approved the withdrawal of the CANH from F and made the declarations sought.

During the course of giving judgment Mr Justice Newton expressed concern that the Royal College of Physicians' National Clinical Guidelines on Prolonged Disorders of Consciousness (2013) had not been strictly complied with and that the patient's diagnosis had not been clear before the application was made. In the judge's view structured assessment tools should ordinarily always be used by those applying to the court in such cases and failure to do so would result in summary rejection of the applications:

> *"14…The Court must examine therefore diagnosis with some considerable degree of care. In essence, without setting out the entirety of the guidance which is substantial, it seems to me that the guidelines which are set out in them ordinarily should always be followed by applicants in circumstances such as this. Indeed, the guidance itself sets out that it is an area where the tools which are set out extensively within them are ones which should be precursors to applications being made. There are good examples, but I preface it all by the fact that it is evidently of the utmost – indeed the most vital – importance that every step should always be taken to diagnose a patient' s true condition before the application is made. If that does not occur what has happened in this and indeed in other cases in my experience is that there is inevitably delay, uncertainty and anxiety, as well as increased cost."*
>
> *"16… Those assessments are there for good reason. Authorities must understand that in future without that evidence, it is likely that the application may be subject to summary rejection. The guidance makes it clear that structured assessment tools should ordinarily always be used for assisting the court, and those who apply to it. It refers to three main assessment processes: The first is the Wessex Head Injury Matrix ("WHIM"); second, is the Sensory Modality Assessment and Rehabilitation Recovery Scale as revised ("CRSR"). The guidance recommends that the use of one or more of those three assessments should be used as instruments of formal structured assessment over time in such applications. Though it is not necessarily prescriptive it does recommend, for example, that if there were to be a WHIM assessment that should be carried out on a specific number of occasions (in fact ten) and over an extended period over a number of weeks. In relation to the SMART assessment, it is a detailed assessment. It is developed to detect awareness, functional and communication capacity. The SMART assessments are ones which need to be carried out by suitably qualified persons. They are very sophisticated tools of invaluable insight and assistance. The court expects a high level of certainty with respect to diagnosis, because as earlier cases have shown it is easy to reach a diagnosis which in fact is*

subsequently shown to be incorrect (some 40% I am told). The court can only reach a safe conclusion once it has regard to the clinical evaluation and having regard to the WHIM or the CRSR or probably better still a SMART if that is necessary in the particular case. If there is any degree of uncertainty or disagreement on the level of responsiveness then the SMART test, as the court's experience shows, is essential to resolve it.'

' 17…Ideally the guidance suggests that at least two of those assessments should be carried out (the WHIM, the CRSR or the SMART) in support of any application made to the Court of Protection. Additionally, where assessments are to be used in support of an application to the court to withdraw treatment as life sustaining therapy or treatment, a SMART assessment should also be used. Here no SMART assessment has been carried out. Here, fortunately from the experts familiar to the court, it is considered that the equivalent of a CRSR assessment "can be properly deduced and inferred" from the length of time. There were WHIM assessments (although they were in fact not carried out in compliance with the guidance as suggested)."

Mr Justice Newton was prepared to make the declarations sought because Mr Badwan had supported the other evidence in the case.

"24…The advices of Dr. Bagwan, which are always helpful and to the point, are clear and support the other evidence in this case; the court is therefore prepared to make the declarations as sought. The guidelines are set out for good reason. It is not just that it is good practice and a gold standard that should be adhered to, but because the court is in fact being asked to sanction a course of conduct which, If granted, almost always leads to the death of a patient. The law recognises the overriding importance of the sanctity of life. Therefore the guidance must be complied with in relation to all such applications so that the court can deal with the matter swiftly, humanely and justly."

Comment

This is an extempore judgment given by Mr Justice Newton. This is the third case which Mr Justice Newton has sat on recently where he has had cause to comment on the failure of the applicant to comply with the RCP Guidelines or to provide adequate evidence and analysis to enable the court to carry out the necessary analysis and balance (see *St George's Healthcare NHS Trust v P &Q* [2015] EWCOP 42(Newton J) and Comment at http://www.39essex.com/content/wp-content/uploads/2015/07/MC-Newsletter-July-2015-HWDOL.pdf).

The RCP Guidelines set out to provide a more consistent approach to diagnosis and management of patients with prolonged disorders of consciousness (PDOC) including the vegetative state and minimally conscious state. The Guidance covers the definitions and criteria for diagnosis of vegetative and minimally conscious state, the assessment, diagnosis and monitoring of patients in PDOC, and care pathways for acute and long term management of patients in PDOC. It attempts to set out for clinicians, service providers and commissioners what members of the working party considered best practice within the existing legal framework. (https://www.rcplondon.ac.uk/sites/default/files/pdoc_web_final_navigable_2014.pdf)

The court quite rightly requires a high level of certainty concerning the diagnosis of the patient's condition because, as Mr Justice Newton says, if the diagnosis is PVS, the court is being asked to sanction a course which will lead to the patient's death. The Court therefore requires a firm diagnosis to have been made in accordance with the RCP Guidance before an application is made to the Court.

It appears from the reported cases that the Court interprets the Guidelines as requiring a SMART assessment to be carried out in almost all cases that come before the court. This has consequences in terms of delay and cost and it is not always appropriate. As Professor Wade comments in his report:

> *"22 (2) 'Although the guidelines had indicated the need for a SMART assessment it was justified in this case stating there must always be an element of clinical judgement, pragmatism and interpreting and in using the guidelines to the specific case in hand. He additionally made the point that the guidance had focused very much on people in early stages of recovery and, without in any way wishing to be glib, effectively the guidance is just that guidance."*

And later

> *"21 (6) As to the suggestion that a SMART assessment should be undertaken now, this assessment has no pre-eminent superiority or position and indeed increasingly uses evidence taken from nursing staff and family as an important part of the assessment. Clinically, there is no justification for the expenditure of considerable resources or time on undertaking this assessment in addition to the existing evidence."*

If there is some doubt or ambiguity in the Guidance as to when a SMART assessment is appropriate, then supplementary Guidance should to be given to clarify when it is appropriate. It is essential that the Guidance is clear on this point and it is equally essential for the RCP to ensure that those carrying out the assessments using the structured assessment tools set out in the Guidance have received sufficient training and are sufficiently experienced in their use.

Beverley Taylor

Guest Article – Dr Gareth Owen

Assessing mental capacity in brain injury – yes it's hard but that's not a reason to avoid it.

The recent House of Lords Select Committee on the MCA had a very large number of submissions relating to brain injury. Many submissions reported major concerns about financial and welfare vulnerabilities in this group. Submissions also spoke to the difficulties of assessing mental capacity. Impulsivity in decision-making and problems with insight were referred to.

With this level of practical concern together with our decade (now decades) of the brain – one might be forgiven for assuming a large research industry on the topic of decision-making capacity and brain injury. Well, in fact, the literature is tiny and provides little to guide practitioners in assessments. If the difficulty of an area is proportional to the research that has not been done on it then it really is no surprise that we are

struggling with brain injury in mental capacity policy and practice.

The area is difficult to research. That is true but it was a good reason to persuade the Wellcome Trust to fund an in depth interview study that would allow a return to first principles: to talk carefully to people with experience of the disability itself and try to hear what they are telling us.

I spoke to the most challenging group – the so-called "Frontal Lobe syndrome". Here, it is often said, practitioners can get it wrong by taking what is said at interview at face value. Instead, so the folk knowledge goes, you are better advised to look at what a person does - and does impulsively (or unwisely). The problem of course is section 1(4) of the MCA: "A person is not to be treated as unable to make a decision merely because he makes an unwise decision."

The results of the interview study are here and free to read for all practitioners with brain injury clients (see note). Interview data revealed that people with severe frontal brain injuries, where others have expressed concern about their decisions, can show awareness of disability and can think about their psychological states (hence the difficulty of these mental capacity assessments). But, go a little deeper, and one can see how the awareness of disability may not be effectively integrated into their decision-making. Without this *online* awareness the ability to appreciate or use and weigh information in the process of deciding financial or welfare matters can be threatened. We give some advice for practically incorporating these considerations within assessments of Mental Capacity.

Practitioners should shout loudly when they are expected to make important assessments with a poor research base upon which to do so. I hope this study helps practitioners who are tasked to perform these assessments but it would be gratifying to see the study stimulate more research investment. The concerns expressed to Parliament require society's *online* awareness.

Note: For those wanting a longer read that also addresses the question of "overlap" between people with brain injury and people who are impulsive (all of us) another paper is upcoming here.

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DoH, MCA 2005 – Valuing every voice, respecting every right: One Year On

This document is an update on the progress made by the Department to address the concerns of the last year's House of Lords Select Committee report. It provides a useful summary of what is happening across the country and its hyperlinks to resources you may find particularly useful.

Law Commission's DoLS Impact Assessment

The Law Commission has published its estimate of the costs of the options that exist in light of its proposals:

Option 1 (Fully fund DoLS) - £1,584,971,094 (best estimate), with a present value over ten years of

£13,181,579,036 (best estimate) and transitional costs of £2,564,274.

Option 2 (New protective care) - £529,534,670 (best estimate), with a present value over ten years of £4,403,930,855 (best estimate) and transitional costs of £3,886,420.

Option 3 (New protective care without automatic tribunal review) - £209,713,321 (best estimate), with a present value over ten years of £1,744,102,921 (best estimate) and transitional costs of £3,886,420.

We remind people also that the consultation is still open, and will be until 2 November 2015. Do please make sure that you have your say.

DoLS improvement tool

This improvement tool has been has been developed throughout 2014/15 by the sector, with funding from the Department of Health and support from the Local Government Association (LGA) and the Association of Directors of Social Services (ADASS). The key areas of focus have been used in a number of peer challenges and as a means of self-assessment. The characteristics of a well-performing and ambitious organisation are also described.

Putting the MCA principles at the heart of adult social care commissioning: A guide for compliance

Commissioners are likely to be greatly assisted by this guide which has been jointly published by ADASS and the LGA to support the commissioning process to apply the MCA.

Voiceability's 'Guidance to support advocates in challenging decisions or actions with or on behalf of individuals'

This is an essential guide for anyone acting on behalf of an incapacitated or vulnerable person. It is particularly valuable for IMCAs, RPRs, litigation friends and family members seeking to ensure that a person's voice is heard. Written in helpful plain English, the guide offers practical tips and advice to support personal choice, and ensures that issues are raised appropriately and sensitively in a variety of different contexts, both a formal and informal. It covers important topics such as bringing legal challenges under the Mental Capacity Act 2005, Mental Health Act 1983 and the Care Act 2014.

The full guidance can be found here.

Dementia Law Clinic

Neil has set up a clinic to provide **free** legal and nursing advice on all matters relating to dementia. It assists those with dementia, their families, and carers with issues like LPAs, mental capacity or best interests disputes, DoLS, welfare services and NHS continuing healthcare assessments, advance decisions. It is a collaboration between the University of Manchester and the mental health charity, Making Space. One-to-one legal consultations with supervised students via Skype are available and face-to-face consultations with a Consultant Admiral Nurse are available on the Making Space site. The project is starting its life in Warrington but hopes to expand nationwide in due course. So if you or someone you know needs help (whether in Warrington or elsewhere), contact

free.legal@manchester.ac.uk or 0161 275 7976
or rachel.yates@makingspace.co.uk.

And, yes, it is entirely free!

School Fees and Mutual Dependency

David Ross v A [2015] EWCOP 46 (Senior Judge Lush)

Summary and comment

In this case P's professional deputy made an application to authorise the payment of P's brother's school fees from P's clinical negligence award. The Official Solicitor acting as P's litigation friend opposed the application and submitted that the deputy ought to reimburse P's fund in relation to school fees that had already been paid.

The Senior Judge allowed the application, making it clear at the end of his judgment that this case was decided (as all such cases are) on its own facts and should not be taken as any precedent for the payment of siblings' school fees from damages awards.

Notwithstanding that warning, there are some aspects of the case that deserve further mention. The first is that at paragraph 30 the Senior Judge castigated the Official Solicitor's approach as unnecessarily intrusive and hostile. The Senior Judge considered that the Official Solicitor had failed to understand the natural and inevitable mutual dependence of P and P's family in cases such as this, as had been described by the Court of Appeal in *Re B (deceased)* [2000] 1 All ER 665.

The second is the way in which the Senior Judge considered that it would be appropriate to review decisions that the professional deputy had already taken, in this case to pay the fees without first having the court's authorisation.

At paragraph 40, he noted section 4 (7) (d) MCA (which requires the court to take into account the views of any deputy) and held that where a professional deputy had carefully gone through the checklist of matters to be taken into account when making a best interests decision, the court should be reluctant to interfere unless the decision was plainly wrong. In the end, he held that the deputy's decision had not only not been plainly wrong, it had been right.

Finally, at paragraph 36, the Senior Judge again emphasised the reasons why the court will normally appoint a professional deputy to administer damages awards on behalf of protected beneficiaries. This is to avoid the potential for conflicts of interest or hidden agendas that might otherwise arise.

Successive Deputies

Re H, on the application of F and M [2015] EWCOP 52 (Senior Judge Lush)

Summary

In this case P's parents applied to be appointed as P's deputies for welfare and property and affairs. They also applied for the appointment of successive deputies pursuant to section 19(5) MCA.

The Senior Judge remarked at paragraph 7 that such appointments were very rare. In the circumstances, therefore, he ordered a report from the Public Guardian pursuant to section 49 MCA into the appointment of successive deputies both in the instant case and generally.

P was 26 at the date of the hearing and lived with her parents. She had suffered severe injuries at birth but there was no damages award. She was severely autistic.

The report highlighted the difficulties that those suffering from autism encountered in communicating with others and the need that they have for someone familiar who can interpret how they feel.

The Senior Judge also sought and considered representations from a representative from the Building Societies Association as to the practicalities of successive deputies in terms of their recognising the successor deputy.

On what appears to be a fine balance from the checklist the Senior Judge approved the successive appointments principally because it would give P's parents peace of mind having arranged matters properly for the long term, that the successive deputies would be more likely to take part in P's life and this would filter through to P.

Again the Senior Judge referred to the United Nations Convention on the Rights of Persons with Disabilities ('UNCRPD'), which the United Kingdom ratified on 7 August 2009 which stipulates in article 12.4 that:

> *"States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests."*

He made the point that that would point towards limiting (in time) the terms of appointment of deputies and away from successive appointments. He held, however, that in this case P's best interests were served by such appointments. He noted that in any event limited appointments would be unpopular and administratively inconvenient.

Adverse costs and interest free loans

DC TT and ST v MA and PB [2015] EWCOP 49 (Senior Judge Lush)

Summary

In this case the applicants (three of P's children) sought a reconsideration of the appointment of the respondents (two of P's children) as attorneys pursuant to a LPA.

The application was dismissed but the Senior Judge ordered the applicants to pay the respondents' costs because they had made a weak application, failed to answer the evidence the respondents filed and did not turn up to the hearing.

Of note is the form of order. The Senior Judge made each applicant liable for an equal share of the costs. He also authorised the attorneys to make an interest free loan to each applicant to pay the costs, such loan to be repaid from the applicant's share of P's estate on his death. This novel form of order meant that he could make an

order reflecting the outcome of the case and his disapproval of the applicants' conduct notwithstanding the fact that they contended that they were unable to pay them.

LPA revocation for bad behaviour

The Public Guardian v DA, YS and ES [2015] EWCOP 41 (Senior Judge Lush)

Summary

In this case the Public Guardian applied for the revocation of a LPA on the ground that the donees had failed to keep accounts and had used their position to advance their own interests by using the proceeds of sale of P's property for their own purposes and obtaining large shares for themselves in the property bought with the proceeds.

The application was granted and a panel deputy appointed with the Senior Judge predicting litigation in the Chancery Division to restore P's assets. As regards costs, the Senior Judge departed from the general rule and made no order costs.

The attorney's behaviour in this case was particularly poor. It might have been a case where they ought to have paid the Public Guardian's costs.

Familial Deputies

Re PAW [2015] EWCOP 57 (Senior Judge Lush)

Husband (ARW) and wife (PAW) both had Alzheimer's dementia. He applied with other family members to become her deputy for property and financial affairs. One of their sons objected.

The Senior Judge reiterated the court's general preference to appoint a relative or friend as deputy rather than a stranger if it was in P's best interests. Such a starting point accorded with Article 8 and had practical reasons:

> *"25. A relative will usually be familiar with P's affairs, and aware of their wishes and feelings. Someone with a close personal knowledge of P is also likely to be in a better position to meet the obligation of a deputy to consult with P, and to permit and encourage them to participate, or to improve their ability to participate, as fully as possible in any act or decision affecting them."*

The court went on to outline some examples of when a family member would not be appointed:

(a) *the proposed deputy has physically, emotionally or financially abused P;*
(b) *there is a need to investigate dealings with P's assets prior to the matter being brought to the court's attention, and the proposed deputy's conduct is the subject of that investigation;*
(c) *there is an actual conflict of interests, rather than simply a potential conflict;*
(d) *the proposed deputy has an unsatisfactory track record in managing his or her own financial affairs;*
(e) *there is ongoing friction between various family members, which is likely to interfere with the proper administration of P's affairs; and*
(f) *there is a need to ensure that P is free from undue influence, particularly the*

> *influence exerted by the person who is seeking to be appointed as deputy.*

On the facts, the husband was not appointed because of his health issues and he would probably prefer to be relieved of the worry. Instead, the sister and brother of her first cousins (who were originally proposed with ARW) would instead be appointed jointly.

Section 49 reports are free

RS v LCC & Ors [2015] EWCOP 56

Summary

Somewhat surprisingly, the question of the responsibility of NHS bodies/local authorities to provide s.49 MCA reports at no cost to the parties has not been the subject of a reported judgment until now (although I am aware of both unreported judgments and observations expressed by judges in the course of hearings). District Judge Bellamy has now stepped into the breach, although, as he noted, the difficult questions arising the provision of s.49 reports and their consequences for public bodies may ultimately have to be considered elsewhere.

The detailed facts of the case are of not relevant. Suffice it to say to say that, during the course of a s.21A application, the court required a s.49 report to be provided by the mental health Trust responsible for P, addressing her capacity "as the gateway to the jurisdiction of the court." The relevant NHS Trust declined to provide the report, both on the basis that it was impossible to provide it, and – more fundamentally – that it was inappropriate for the evidence sought to be provided by way of an order under s.49. The Trust's objections were both specific to the nature of the evidence sought and more generally directed to the application of s.49 in respect of individuals for whom they already had a clinical responsibility. The Trust advanced 10 reasons to support their view that it was inappropriate for the required evidence to be obtained by way of Section 49. As District Judge Bellamy then addressed each of these reasons in turn, it is convenient to set out each of the objections together with his conclusions on each point in turn:

(1) *The Trust has no clinical involvement or knowledge of P (other than the information contained in the applicant's enclosed letter). P is not a patient under the Mental Health Services of the Trust.*

> *Conclusion: While I note the argument there is no such distinction* [i.e. between patients and non-patients] *drawn within the powers given in Section 49 and the accompanying Rules or Practice Direction. In my view it would be wrong for the court to undertake such distinction either in the preparation of its orders generally or in this order in particular.*

(2) *There appears to be a clear dispute on capacity the outcome of which may have a significant impact on P's future care and welfare. Such a dispute should properly be resolved by way of a jointly instructed independent court expert. It is not appropriate to seek quasi expert evidence through Section 49.*

> *Conclusion: The dispute as to capacity has arisen following a report from a consultant psychiatrist dealing with matters pertaining to a lasting power of attorney. There is an existing assessment by a consultant psychiatrist Dr Loosmore and a very experienced social worker. A question has therefore arisen in relation to RS as to the extent or otherwise of her capacity. It is a matter well suited for determination by Section 49 which is a proportionate response as opposed to an instruction to an independent expert. Such direction would have additional funding and cost consequences particularly in the instant case where*

three of the parties are either publicly funded or public bodies and the fourth is privately paying albeit acting in person. Furthermore a Section 49 Report would [or should at any rate] incur significantly less delay.

(3) *A Section 49 Report is not a joint instruction and therefore can potentially leave open a dispute in the event that the evidence is not accepted by all parties. We understand that the first Respondent was not in agreement that Section 49 is appropriate.*

Conclusion: A Section 49 Report is a direction of the court. If a letter of instruction cannot be agreed the court will deal with any such dispute. It was the court's direction and not that of any specific party.

(4) *The Trust's consultants are not court experts: they do not have the expertise in preparation of Medico Legal reports and should not be expected to do so, particularly where it is not in connection with a patient under their care.*

Conclusion: The Rules and in particular the Practice Direction are clear as to the contents and format of a report. If that format is followed specific medico legal experience is not required. However, given the significant growth in the volume of work undertaken by the Court of Protection and in particular Section 21A or related challenges, it is no doubt a level of expertise that all consultant psychiatrists particularly dealing with the elderly will acquire if they have not already done so.

(5) *We understand a report in the proceedings has been prepared on a private instruction by Dr Gonzalez (of the Trust). There is a potential conflict of interests in seeking a further report from a consultant of the Trust.*

Conclusion: The court can see no potential conflict of interest in another consultant of the Trust preparing a report. Again the duty of the author of the report is fully set out in the Rules and Practice Direction.

(6) *The request was a publicly funded body into proceedings of which it has no involvement.*

Conclusion: The provisions of Section 49 are clear. There is a wide range in power to direct a report from an NHS body as the court considers appropriate. It is common for Section 49 Reports to be directed in this way.

(7) *Complying with the request places a significant and disproportionate burden on limited NHS resources.*

Conclusion: The court has sympathy with the effect of its order upon the Trust. However as is noted earlier no provision is made within Section 49 in relation to fees or expenses incurred by the author of the report (be it NHS body, Trust or otherwise). What the court will do is to carefully consider resources and listen to any argument from the Trust particularly in relation to the time for compliance and the scope of the work to be undertaken. That would appear to be both a reasonable and proportionate approach.

(8) *A consultant would need to cancel clinics to make time to prepare the report; putting vulnerable patients at risk.*

Conclusion: While this is noted the answer to 7 would seem to cover this.

(9) *There is no provision for costs of the report in order to enable the Trust to employ locum cover for the report author. The Trust is already under significant pressure to reduce its locum cover:*

Conclusion: I have already dealt with this in 7 above.

(10)Even where locum cover can be sourced this can be detrimental to patients if they are not able to see their usual consultant with whom they have built a trusting professional relationship. Consistency of care is an important factor in mental health care and should be maintained wherever possible.

Conclusion: As stated above every effort will be made to accommodate the preparation and extent of the report so as to limit wherever possible the disruption in healthcare provided by a consultant to his patients.

District Judge Bellamy therefore declined to vary or alter the principle behind the original order directing the s.49 report, although he noted that: "i*t must be right that compliance with any order is subject to reasonable adjustment on application by the Trust in relation to the scope and extent of any report ordered and the time for compliance. However such applications must be made promptly and supported by evidence on behalf of the Trust or NHS body*."

Comment

On the very specific facts of this case, an immediate question comes to my mind as to why District Judge Bellamy did not seek a report (under s.49) from a Special Visitor. If the issue to be addressed was that of P's capacity, and the court felt that it needed independent expertise in order, the obvious route to obtain that evidence is undoubtedly that provided for by the Special Visitor route. There may well have been reasons not apparent on the face of the judgment why such a course was not open to him, and, if so, then the course adopted would appear to have been both proportionate and reasonable. The conclusion that a public body cannot seek to recoup the costs of preparation of such a report is also undoubtedly correct.

The case, though, does raise a wider point about the importance of s.49 reports that may be at risk of being lost in the (understandable) concerns expressed by public bodies as to the time and resources that may be required where they are directed to provide such reports. The Court of Protection is a strange beast. It is regularly said to be inquisitorial in its jurisdiction: see, e.g. *Re G* [2014] EWCOP 1361 at paragraph 26. However, by comparison with the Family Division/Family Court, which is also said to discharge an inquisitorial jurisdiction, the Court is strangely underpowered – there is, in particular, no equivalent to a children's guardian (whether a consequence is that the role of litigation friend in the COP is being distorted is something Alex is working on at present). If COP judges are to be put in a position where they are able properly to assess the questions of P's capacity and best interests, it is crucial that they are, themselves, able to identify and call for such evidence as they see fit. Section 49 is therefore vital, both as regards the ability to call for reports from (Special) Visitors and for evidence from NHS bodies/local authorities. There is undoubtedly a price to be paid in consequence by such bodies, but, societally, it is a small one to pay for the proper determination of such cases.

Short note: learning disability and participation

In *Re Jake (A Child)* [2015] EWHC 2442 (Fam), Sir James Munby P has strongly reiterated the need to ensure that parents with learning disabilities are not excluded from proceedings relating to the welfare of their children. In a case concerned

with the medical treatment of a gravely ill 10-month old child, where the court ultimately endorsed an agreed order providing for the withholding of certain treatments in the event of deterioration, Sir James Munby P emphasised that:

> "*the fact that, sadly, both the father and, to a greater extent, the mother have their own difficulties is absolutely no reason at all why their views, their wishes, their feelings should not be taken fully into account by everybody involved in the process, whether treating clinicians or lawyers. Of course they have been fully involved in the process throughout, very properly, by the treating clinicians. [I emphasise] the point that the fact that the parents may lack capacity does not in any way … reduce the importance of listening to – whether it is the lawyers listening to or the doctors listening to – the views of the parent.*
>
> *The fact is, on the fundamentals, these parents, faced with this dreadful situation, very much understand the fundamental dilemmas and the fundamental problems. In relation to the fundamentals, they are, so far as I am aware, in just as good a position as any other parent to have views and to express those views. I would be very concerned if the thought … got about that somehow one pays less attention in these terrible and tragic circumstances to the views, wishes and feelings of parents just because they may have limitations than one would to other parents."*
>
> *45. That leads on to the second point:*
>
> *the demonstration that [the parents] may not be able to assess and evaluate all the hypotheticals on a range of possible future scenarios has got to be taken within sensible bounds. One asks, rhetorically, how many parents in this situation would actually be able to grapple with these profound issues which are, in part, tied up with very profound medical issues.*

This is very much (and correctly) in line with sentiments expressed previously by other judges, most fully Peter Jackson J in *An NHS Trust v Mr and Mrs H & Ors* [2012] EWHC B18 (Fam), in which the pithy point was made that in the analysis of welfare for purposes of s.4 MCA 2005 (which he applied by analogy): "*It is the validity of the views that matter, not the capacity of the person that holds them*."

Short note: habitual residence

In *Re NH (1996 Child Protection Convention: Habitual Residence)* [2015] EWHC 2299 (Fam), Cobb J gave some useful guidance about the circumstances in which a child will be considered to have no habitual residence for purposes of the 1996 Hague Child Protection Convention ('Hague 34'). The guidance is of relevance to practitioners concerned with adults with impaired capacity because:

(1) The authorities are clear that 'habitual residence' should be given consistent interpretation in instruments concerned with family law matters, including those concerned with the international protection of adults: see *An English Local Authority v SW* [2014] EWCOP 43;

(2) The 2000 Convention on the International Protection of Adults ('Hague 35') to which Schedule 3 to the MCA 2005 effectively incorporates into English law, is expressly intended to the mirror to Hague 34.

Cobb J noted that (as has also been held to be the case with Hague 35 and Schedule 3) habitual residence is to be assessed at the date of the hearing, rather than at the date of the issue of

the application. He further noted (at paragraph 39) that:

> "*It will, I consider, be a relatively rare case where it is impossible to establish a child's habitual residence; such a conclusion is likely to reflect a material level of rootlessness in a child, which is not common and may indeed be indicative of some interference with the child's emotional and/or physical welfare and development.*"

However, he noted that it would be wrong for him to "*strain to find facts to establish a habitual residence simply to achieve an outcome more generally contemplated by the 1996 Convention, particularly where the potential target of the determination is a country which does not itself support that conclusion*."

In reaching the conclusion that the English courts were entitled (and indeed required) to exercise the 'jurisdiction of necessity' to make welfare decisions in the case of a child with whom England and Wales had only tenuous connections, Cobb J identified a list of factors, but was ultimately most swayed by the fact that the authorities of the country of the child's previous habitual residence had (for reasons that are irrelevant here) made clear that they would not regard him as continuing to be so habitually resident, and specifically contended, indeed, that the child was one whose habitual residence could not be established.

Not all the factors identified by Cobb J in *NH*'s case would be equally relevant in the case of an adult with impaired capacity. In particular, it is questionable whether the purposes and intentions of their parents will be of relevance (save, potentially, where the adult is entirely dependent upon the parents for their care, as this may then factor into whether it can be said that their residence is likely to be permanent in the place of asserted habitual residence). However, the general observations and approached adopted are useful by analogy for those still finding their feet in the terra only slightly cognita of Schedule 3 to the MCA and Hague 34.

Unfairly disparaging of Counsel

Re G (A Child) [2015] EWCA Civ 834

In this case, a judge's findings of fact were set aside due to her unfair conduct of a trial and disparaging remarks made about counsel. The Court of Appeal recognised that judges had to manage hearings robustly and that this required intervention at times. However, in this case, the frequency of the judge's interventions, and their hostile nature and tone, created an impression of unfairness. Her findings were set aside and the case remitted to a different judge. The points made about case management apply equally in the Court of Protection and are all the more pertinent as the court's case load continues to swell.

Vulnerable Witness Consultation

The Family Procedure Rule Committee has published a new draft Part 3A of the Family Procedure Rules 2010 on Children and Vulnerable Persons: Participation in proceedings and giving evidence. The Committee is current seeking views on the draft rule and on some specific questions.

The consultation follows a report published by the Children and Vulnerable witness Working Group in March 2014. The working group was established by Sir James Munby to review judicial guidance for judges meeting children, including

consideration of how the voices of children and young people could be brought further to the fore in the family courts. The deadline for responding is 25 September 2015.

The full consultation document can be found here.

Article 14 CRPD

The Committee on the Rights of Persons with Disabilities has published guidelines on Article 14 of the CRPD. It makes fascinating reading and presents State parties with a real challenge. Explaining to the Committee why the United Kingdom has authorised the detention of hundreds of thousands of disabled people in their best interests is going to be an interesting conversation. Amongst the highlights include:

> *"6 … article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment. However, legislation of several States parties, including mental health laws, still provide instances in which persons may be detained on the grounds of their actual or perceived impairment, provided there are other reasons for their detention, including that they are deemed dangerous to themselves or to others. This practice is incompatible with article 14 as interpreted by the jurisprudence of the CRPD committee. It is discriminatory in nature and amounts to arbitrary deprivation of liberty.*
>
> *7 … article 14(1)(b) prohibits the deprivation of liberty on the basis of impairment even if additional factors or criteria are also used to justify the deprivation of liberty….*
>
> *9. Enjoyment of the right to liberty and security of the person is central to the implementation of article 19 on the right to live independently and be included in the community…*
>
> *10. Involuntary commitment of persons with disabilities on health care grounds contradicts the absolute ban on deprivation of liberty on the basis of impairments (article 14(1)(b)) and the principle of free and informed consent for health care (article 25). The Committee has repeatedly stated that States parties should repeal provisions which allow for involuntary commitment of persons with disabilities in mental health institutions based on actual or perceived impairments. Involuntary commitment in mental health facilities carries with it the denial of the person's legal capacity to decide about care, treatment, and admission to a hospital or institution, and therefore violates article 12 in conjunction with article 14.*
>
> *…*
>
> *13. Through all the reviews of State party reports, the Committee has established that it is contrary to article 14 to allow for the detention of persons with disabilities based on the perceived danger of persons to themselves or to others. The involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty.*
>
> *14. Persons with intellectual or psychosocial impairments are frequently considered dangerous to themselves and to others when they do not consent to and/or resist medical or therapeutic treatment. Like persons without disabilities, persons with disabilities are not entitled to pose danger to others. Legal systems based on the rule of law have criminal and other laws in place to deal with those matters. Persons with disabilities are frequently denied equal protection under these laws by being derogated to a separate track of law, mental health laws. These laws commonly have a lower standard when it comes to human rights protection, and are incompatible with article 14 of the Convention.*

> *15. The freedom to make one's own choices established in article 3(a) of the Convention includes the freedom to take risks and make mistakes on an equal basis with others. In its General Comment No. 1, the Committee stated that decisions about medical and psychiatric treatment must be based on a determination of the person's autonomy, will and preferences. Deprivation of liberty on the basis of impairment or health conditions in mental health institutions which deprives persons with disabilities of their legal capacity also amounts to a violation of article 12 of the Convention….*
>
> *23. The Committee has also called for States parties to ensure that persons with disabilities are not denied the right to exercise their legal capacity on the basis of a third party's analysis of their "best interests", and that practices associated with "best interests" determinations should be replaced by the standard of "best interpretation of the will and preferences" of the person."*

Assisted Suicide in Europe

Nicklinson and Lamb v UK (Applications 2478/15 and 1787/15)

The European Court of Human Rights declared that the applications to the court from Mrs Nicklinson and Mr Lamb were inadmissible.

This was the latest stage in a series of cases challenging the UK law on assisting suicide and followed a decision of the Supreme Court in 2014 (see July 2014 newsletter, pg8).

Mrs Nicklinson argued that the UK Courts had failed to determine the compatibility of the law in the UK on assisted suicide with her and her husband's right to respect for private and family life (Article 8).

Mr Lamb argued that his rights under Articles 6, 8, 13 and 14 had been infringed by the failure to provide him with the opportunity to obtain the permission of the Court to allow a volunteer to administer lethal drugs to him, with his consent.

The Nicklinson application was judged inadmissible because the Court held that Article 8 does not impose procedural obligations on domestic courts to examine the merits of a challenge in relation to primary legislation. The margin of appreciation was in play and the UK state had designated to Parliament the role of assessing the merits of the law on assisted dying and Parliament had considered the law several times in recent years. The UK Supreme Court was entitled to give weight to Parliament's views and had addressed the substance of the applicant's claim (see paras 81 – 86).

The Lamb application was judged inadmissible because he had not exhausted all domestic remedies as required before applying to the Court. The argument now advanced (there should be a judicial procedure to authorise voluntary euthanasia in certain circumstances) had not been pursued before the Supreme Court.

Assisted Suicide and GMC guidance

R (on the application of AM) v The General Medical Council [2015] EWHC 2096 (Admin)

Judicial review of the General Medical Council (GMC) guidance in relation to doctors assisting suicide brought by a man (named Martin in the anonymised judgment) who suffers from 'locked in' syndrome. Martin had formed a 'long standing, considered and settled wish to end his life'. He wanted to have medical advice about

methods of committing suicide and would have liked to receive a medical report from a doctor to provide to Dignitas in Switzerland if necessary. He accepted that a doctor providing the medical report or giving the relevant advice would be committing the crime of assisting a suicide. He considered that the relevant guidance from the DPP would be likely to mean that the doctor would not be prosecuted but that the General Medical Council (GMC) guidance suggested that a doctor providing Martin with the report and/or advice would risk having disciplinary proceedings taken against him.

The judicial review application argued that the GMC guidance constituted a breach of articles 8 and 10 of the European Convention on Human Rights and that as a matter of domestic law the guidance was Wednesbury unreasonable.

The application was dismissed.

Article 8 encompasses the right when and how to die. However, the ECtHR had held that it was not a disproportionate interference with that right to impose a blanket ban on all forms of assistance (see *Pretty v United Kingdom* (2002) 35 EHRR 33) as the UK had done with section 2(1) of the *Suicide Act 1961*.

The GMC guidance (*Guidance for the Investigation Committee and case examiners when considering allegations about a doctor's involvement in encouraging or assisting suicide* and *when a patient seeks advice or information about assistance to die*) did engage article 8 as it would discourage doctors from giving Martin the advice/report he sought. The critical question was whether it was justified under Article 8.2.

Previous case law confirmed that section 2 of the *Suicide Act 1961* was compatible with article 8. If a blanket ban on assisted suicide did not infringe article 8, it must follow that any step taken to discourage a doctor from assisting a suicide could not infringe the article. The GMC did not have to adopt the more lenient policy of the DPP in order to be article 8 compliant. It could not possible be contrary to article 8 for the GMC to take as its starting point the principle that a doctor has a duty to obey the law and to structure its guidance accordingly.

The article 10 argument added nothing in the context of this case to the article 8 argument. The justification for interfering with the right under article 10 was the same as the justification for interfering with the article 8 right and the two arguments stood or fell together.

Elias LJ gave short shrift to the Wednesbury head of challenge which was that it was irrational of the GMC not to amend its policy to bring it into line with the DPP. He held that: (i) the duty to formulate guidance was by statute conferred on a specialist professional body which was far better placed than the court to decide how best to protect the interests of the profession; (ii) the argument obliges the GMC to take its lead from the DPP and there was no proper constitutional reason why it should and every reason why it should not; (iii) it could not be wrong for the GMC to adopt the position that doctors obey the law whatever views people may have about the law's merits; (iv) the GMC could not fetter its discretion by giving an assurance that it would not, in certain circumstances, take fitness to practice proceedings against a doctor; (v) it was not the function of guidance to tell doctors when they could break the law without realistic risk of fitness to practise proceedings and the courts could not require the GMC to fashion its guidance in that way; (vi) it was not self-evident that the public interest would be better served by the

adoption of a relatively lax policy towards certain breaches of the law. It was for the GMC to assess what the public interest required.

Bankruptcy and Litigation Capacity

Ellis-Carr v Levy [2014] UKFTT 0987 (PC)

Recently published, this case concerned an application for registration of a notice of home rights in the Land Registrations Division of the First-tier Tribunal. A trustee in bankruptcy had applied for an order declaring that he and a Mrs Ellis were beneficially entitled to a property in equal shares. The declaration was granted and an order made that the property be sold with vacant possession. When the trustee sought to enforce the order, it was discovered that there was a potential issue as to Mrs Ellis' mental capacity to litigate at the time of the order. When the capacity issue came to light, the trustee issued a second application in which it sought the same declaration. The outcome of the second application was that the first order was declared valid, notwithstanding that Mrs Ellis may have lacked capacity within the meaning of the Mental Capacity Act 2005. That decision was upheld on appeal. It was therefore not open to the court in this jurisdiction to reach a different conclusion and the court accepted the validity of the first order.

Litigation capacity – what to do (and not to do)

Re D (children) [2015] EWCA Civ 749

Litigation capacity

Summary

This case concerned a care and placement order made in respect of a 20-month-old girl. The parents were vulnerable young adults who had significant learning difficulties. The mother, who was 19 years old, was assessed by a consultant child psychiatrist as lacking capacity to instruct a solicitor. She was therefore represented by the Official Solicitor as her litigation friend who consented to the care and placement order on her behalf. At a subsequent hearing, the mother made an informal request to the judge for a further assessment of her capacity to litigate by another expert and the judge agreed. The expert concluded that the mother had capacity. The Court of Appeal was highly critical of the way in which the mother's capacity had been assessed and considered that it amounted to serious procedural irregularity. However, on the facts, the Court of Appeal concluded that there was no practical difference to the outcome as a consequence and the proceedings, including the care and placement order, were retrospectively validated.

Comment

It is impossible to stress strongly enough the importance of obtaining a robust capacity assessment where mental capacity is in doubt. Although the issue of capacity made no difference to the eventual outcome on the facts of this case, there are many other cases where the outcome will depend crucially on the assessment of capacity. Even if there would be no difference to the practical outcome, it is essential to ensure procedural fairness and to safeguard rights under Article 6 ECHR. It is also in the interests of all parties and the court that further time and costs are not incurred further down the line due to unresolved issues surrounding

capacity which could have been addressed at the outset.

The Court of Appeal emphasised the following points which are of significance to practitioners:

- If either party takes issue with the outcome of a capacity assessment, it is open to that party to apply to the court for a second report by a different expert. In this case, no application was made by those representing the mother for permission to put expert evidence before the court. No consideration was given to whether a further assessment was necessary.
- The purpose of the prescriptive approach to the instruction of experts found in the Family Procedure Rules 2010 (and by analogy the Court of Protection Rules 2007) was to ensure that an expert dealt with the relevant issues. Failure to provide an adequate letter of instruction, or all of the relevant documents, could lead an expert failing to apply the correct test or adequately addressing the key issues which, in turn, could lead to delay. The letter of instruction wholly failed to comply with the relevant practice direction.
- Where a report was deficient or revealed a disagreement in view as between other experts, the Rules provided for written questions to be put to the expert and for an experts' meeting with a view to reaching agreement or at least narrowing the issues between them. Absent agreement between the experts, the court would hear evidence and make a determination. In this case, one expert report made no reference to MCA 2005 and the MCA 2005 test did not feature in the report. The other conflicting report was not brought to the attention of the judge and no consideration was given as to how to resolve the conflict, whether by additional questions, an experts meeting or by hearing short oral evidence.
- Although process should never be slavishly followed at the expense of achieving the right welfare outcome without delay, the informal course adopted in this case, which Lady Justice King called "procedural anarchy", went far beyond a pragmatic and practical approach to case management and amounted to serious procedural irregularity.

Plan Well, Die Well

The charity, Compassion in Dying, has published research that revealed that 1 in 5 dying patients receive treatment their friends and family say they would not have wanted, with 47% feeling their loved one had a bad death. The results are based upon a poll of 2000 people and an analysis of users of the charity's free information service.

Welsh MHA 1983 Code

The Welsh Government consultation on the Welsh Code to the MHA 1983 is now open. The deadline for responses is 27 November 2015.

Professor Jill Stavert

The appointment as professor at Edinburgh Napier University of Jill Stavert has received a delighted welcome from all those throughout Scotland and beyond who know her and her work. After graduating in law and psychology from what is now Oxford Brookes University, Jill qualified as a solicitor in England & Wales in 1987 and worked in private practice in London until she moved to Scotland in 1991. She qualified as a solicitor in Scotland early in 1994, then was drawn ever further into the human rights field. While raising a young family in Malaysia she undertook Ph.D research with Lancaster University into international human rights standards and their reflection at national level. Using Malaysia and its internal security laws as a case study, she focused in particular on cultural/religious relativist arguments against so-called universal human rights standards. After the award of her Ph.D in 2001 she worked as a tutor at Edinburgh University Law School and as a contract researcher, then joined Edinburgh Napier University in 2004. In addition to her lecturing and research, she became the Law Group's Research Leader in 2011 and was promoted to Reader of Law in 2012. Her greatest achievement to date, nevertheless, was to realise her dream – prompted by many others in the field – to meet the need for a multi-disciplinary academic centre which would undertake research, but which would have strong links with practice in relevant fields, bringing together the academic and practical in ways in which each would inform, benefit and motivate the other. Such is the massively beneficial extent to which that aspiration has already been achieved, that it is difficult to comprehend that it is still less than two years since the Centre for Mental Health and Incapacity Law, Rights and Policy was finally established, and very effectively "went into business", in November 2013.

Jill's appointment as professor with effect from 1st August 2015 is both an accolade richly deserved by her personally for her drive, vision, ability and at times courage in all that she has achieved so far, and at the same time a recognition of the importance of the subjects to which she has dedicated her academic energies which all of us working in the field – both academic and practical – can celebrate.

Jill's appointment came barely a month before – but not after – publication of figures showing that only 21.8% of professors in Scottish universities are women, and a call from Ms Angela Constance, Scottish Education Secretary, for appointment of a higher proportion. Without any doubt, Jill's appointment has been achieved on merit, recognising abilities which shine through her consistently mild, considerate and helpful manner.

Her emphasis upon partnership between academia and practice reflects the philosophy of her university, and is exemplified (among many other ways) in the extent to which she has drawn me – a practitioner – into the work of the Centre; a partnership between her Centre and my firm of TC Young which sees two of us from each within the core research group for the "Three Jurisdictions" work of the Essex Autonomy Project (click here for details), and her willingness to join me as joint contributors to the Scottish section of this Newsletter.

Jill is a valued member – and the only academic member – of the Law Society of Scotland's Mental Health and Disability Sub-Committee.

Adrian D Ward

Local authority in breach of Article 8, ECHR?

Practitioners have drawn to the attention of the Newsletter a number of instances indicating that at least one Scottish local authority has recently adopted a policy of pressurising people with social care needs, who live in their own homes, either to move into group homes or alternatively to accept lodgers or tenants (the proposed status has not yet been made clear) in their own homes. There is no prospect of any benefit to the householders in question, if one discounts the implied threat of a reduction in standards of support if they do not comply. It would appear that the purpose of this policy is to allow necessary support to be provided more cheaply, by grouping together people with similar support needs. The policy raises a question as to whether it is in breach of the right for respect to private and family life in terms of Article 8 of the European Convention on Human Rights. Some may see a first step back towards institutionalisation.

Adrian D Ward

Education (Scotland) Bill

Aspects of the Education (Scotland) Bill, at present in Stage 1 of its progress through the Scottish Parliament, have received widespread expressions of concern and requests for reconsideration. The Mental Health and Disability Sub-Committee of the Law Society of Scotland has suggested in its submission that the Bill as drafted contains an apparent non-compliance with Article 6 of the European Convention on Human Rights ("ECHR") which would render the Bill ultra vires of the Scottish Parliament; an apparent non-compliance with the requirement of the UN Convention on the Rights of Persons with Disabilities ("UN CRPD") which would render enactment of the Bill liable to be prevented by the Secretary of State as contravening the UK's international obligations, and an apparent weakening of the case for maintaining that Scotland's adult incapacity regime is not such a regime as requires to be abolished, having regard to General Comment No 1 (2014) "Article 12: Equal Recognition before the Law" of the UN Committee on the Rights of Persons with Disabilities dated 19th May 2014 ("the General Comment").

The Committee's concerns centre on proposed amendments to the Education (Additional Support for Learning) (Scotland) Act 2004 contained in the Schedule to the Bill. In relation to Article 6 of ECHR, it would appear that the Bill as drafted would permit an education authority, notwithstanding that it would itself be a party to any proceedings before the Additional Support Needs Tribunals, itself to decide whether a child or young person should be permitted to take such proceedings. The Bill proposes both a "capacity" test and a "best interests" test. It is understood from discussions that it is intended that these be tests to apply for the purpose of access to assessment procedures, not access to the Tribunals. The Committee has nevertheless argued that the proposed "maturity" element of the capacity test should be eliminated in the case of 16 and 17-year olds, as they are adults for the purposes of incapacity law; and that if the purpose of the "best interests" test is to allow children to be shielded from potentially harmful information, then the approach should not be that a "best interests" test should be satisfied, but rather a question of whether application of safeguards to prevent any such apprehended harm would be justified. The introduction of a "best interests" test in Scots law – bearing in mind that such a test was explicitly rejected for the purposes of adult incapacity law – seems particularly inappropriate at a time when the concept of a paternalistic "best interests" test has been rejected in the General Comment as being incompatible with UN CRPD.

Adrian D Ward

New guidance – old flaw – or new interpretation of the law?

In the July Newsletter under the heading "New guidance – old flaw?" we reported the introduction on 1st June 2015 by Scottish Government of new "Guidance on the Recovery of Expenditure on Accommodation and Services under Section 86 of the Social Work (Scotland) Act 1968". We expressed surprise that the new guidance still followed previous guidance in its interpretation of relevant case authority on the question of when ordinary residence moves when persons lacking sufficient capacity to decide the matter themselves in fact move from one local authority area to another. However, as we noted at the end of that item, Annex A to the new guidance concluded with a note that the guidance would be reviewed and, if necessary, amended following the decision of the Supreme Court in the *Cornwall* case. As reported more fully, that decision has now been issued. Significant from a Scottish viewpoint is the emphasis by Lord Carnwath in his leading Judgment, with which the majority of justices agreed, that the decision focused upon a provision which is purely "administrative and fiscal", which does not affect the rights of the person concerned, but only the allocation of responsibility as between local authorities. A different approach might be justified as compared to one directed to a person's entitlement to a benefit (see paragraph 57 of the Judgment).

Three local authorities were involved in the case. As a child, the person to whom the case related – "PH" – was placed by Wiltshire in South Gloucestershire, where he remained until he reached the age of 18. He was then placed in Cornwall. However, relevant legislation provides that such placements do not give rise to what would otherwise be a change of ordinary residence. The Supreme Court held that this disapplication continued through the transition from child to adult provision. Lord Carnwath accordingly held that: "PH's placement in South Gloucestershire by Wiltshire is not to be regarded as bringing about a change in his ordinary residence. Throughout the period until he reached 18 he remained continuously where he was placed by Wiltshire, under an arrangement made and paid for by them. For fiscal and administrative purposes his ordinary residence continued to be in their area, regardless of where they determined that he should live. It may seem harsh to Wiltshire to have to retain indefinite responsibility for a person who left the area many years ago. But against that there are advantages for the subject in continuity of planning and financial responsibility. As between different authorities, an element of arbitrariness and 'swings and roundabouts' may be unavoidable."

On the one hand, this decision may help resolve past difficulties where people had moved from an English local authority area to one in Scotland, the English local authority refused to accept no further financial responsibility on the basis of English guidance, but the Scottish authority took the view that it was not liable under Scottish guidance. On the other hand, it seems that Scottish guidance can no longer safely rely upon the "*Vale*" tests. There would appear to be a question as to whether even a move of an adult lacking capacity from one local authority area to another, agreed by an attorney or guardian with relevant powers, will necessarily always result in a change in ordinary residence. There also now seems to be scope for greater divergence between habitual residence for the purposes of adult incapacity legislation and ordinary residence in relation to local authority duties; without adding the further complication of the concept of "living in" a place under the Care Act 2014 and subordinate legislation.

Further clarification from Scottish Ministers is awaited with interest, and with the hope that it may be preceded (unlike the guidance issued on 1st June 2015) by consultation beyond the circle of local authorities themselves, to take account of the interests of people who are the subject of such provisions, and those who represent them.

Adrian D Ward

Essex Autonomy Project – update

In the April Newsletter we reported the extension to cover all three United Kingdom jurisdictions of the Essex Autonomy Project to advise UK Government departments on compliance of mental capacity/adult incapacity laws with the UN Convention on the Rights of Persons with Disabilities, having regard to the interpretation of the Convention by the UN Committee on the Rights of Persons with Disabilities in General Comment No 1 (2014) entitled "Article 12: Equal Recognition before the Law". It has now been confirmed that Essex Autonomy Project has been commissioned by the Arts and Humanities Research Council and Economic and Social Research Council to provide technical research support to UK Government bodies in preparation for the forthcoming United Nations review of UK compliance with the Convention, in relation to all three UK jurisdictions. TC Young, Solicitors, are also contributing to funding and have provided a base in Edinburgh at which the project team has been meeting. Additional funding and support come from the Law Society of Scotland, and the Centre for Mental Health and Incapacity Law, Rights and Policy at Edinburgh Napier University. The members of the core research team are Professors Wayne Martin and Sabine Michalowski of the University of Essex; Professor Jill Stavert and her colleague Rebecca McGregor of Edinburgh Napier University; Adrian Ward and Alison Hempsey of TC Young, Solicitors; Alex Ruck Keene (of 39 Essex Chambers and University of Manchester) who is the common member of the Mental Health and Disability Committees of both the Law Society of England & Wales and the Law Society of Scotland; and Colin Caughey of the Northern Ireland Human Rights Commission.

Adrian D Ward

Mental Health (Scotland) Act 2015

The Mental Health (Scotland) Act 2015, amending mainly the Mental Health (Care and Treatment)(Scotland) Act 2003, and also the Criminal Procedure (Scotland) Act 1995 and the Criminal Justice (Scotland) Act 2003, received Royal Assent on 4th August 2015 http://www.legislation.gov.uk/asp/2015/9/contents/enacted. For further details of the changes it will bring see the July issue of the newsletter.

Jill Stavert

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Conferences at which editors/contributors are speaking

The Mental Capacity Act 2005 – Ten Years On

Alex will be delivering his paper, '(Re)presenting P', and Neil will be delivering, 'The (not so?) great confinement' at this major conference hosted by the University of Liverpool on 9 and 10 September 2015. For further details and to book, see here.

Court of Protection Practitioners' Association National Conference

Alex will be speaking at COPPA's national conference on 24 September 2015. For further details, and to book, see here.

Queen Mary University

Jill will be a discussant at the Rethinking Deprivation of Liberty in a Health and Social Care Context Conference at Queen Mary University of London on 30 September 2015.

Bromley Safeguarding Adults Board 2015 Conference

Annabel is speaking at this conference on 6 October 2015 about the role of the Court of Protection.

Jordan's Court of Protection Conference

Alex will be delivering, 'More Presumptions Please? Wishes, feelings and best interests decision-making' at Jordan's Annual Court of Protection Conference on 13 October 2015. For further details, and to book, see here.

Seventh Annual Review of the Mental Capacity Act 2005

Neil and Alex will both be speaking (along with Fenella Morris QC) at this annual fixture in York on 15 October 2015, under the auspices of Switalskis solicitors. For further details, and to book, see here.

Taking Stock

Neil will be speaking on 16 October 2015 at this annual fixture, arranged by Cardiff Law School and the University of Manchester, at the Royal Northern College of Music. For further details, and to book, see here.

Community Care Live

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Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Simon Edwards (P&A)

Guest contributor

Beverley Taylor

Scottish contributors

Adrian Ward
Jill Stavert

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.

Annabel is presenting a legal masterclass on the Mental Capacity Act 2005 and Alex will be on a panel discussion on deprivation of liberty at Community Care Live 2015 in London on 3-4 November 2015. For further details, and to register for this event, see http://www.communitycare.co.uk/live/

Other conferences and training events of interest

Our friends Empowerment Matters are hosting an IMCA conference on 12 November at the Smart Aston Court Hotel in Derby, entitled 'Interesting Times – developments for IMCAs in practice and law.' For more details and to book, see here.

The charity, Living Well Dying Well, is holding its first annual national conference, 'Doing Death Differently' in London on 7 November 2015. For more details and to book, see here.

Peter Edwards Law have released details of their autumn training courses on matters MCA and Care Act related. The full details of (very well received) courses can be found here.

Chambers Details

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

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

Alex Ruck Keene
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Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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

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Annabel appears frequently in the Court of Protection and is instructed on behalf of the Official Solicitor, individuals, local authorities, care homes and health authorities. Her COP practice covers the full range of issues in health and welfare, property and affairs, and medical treatment cases, with particular expertise in international cross-border matters. Annabel also practices in the related fields of human rights and community care. To view full CV click here.

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

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

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

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