ThirtyNine
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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: July 2013

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Introduction

Welcome to the July 2013 newsletter, in which we cover, amongst other matters, further confirmation of the 'choosing between available options' approach that the Court of Protection should adopt to best interests decision-making, clarification of the offence of wilful neglect under s.44 MCA 2005 and a perhaps surprising decision on litigation capacity. We also cover a potentially difficult decision on s.117 MHA 1983 in the context of the MCA, along with highlights from the start of the investigation by the House of Lords committee scrutinising the operation of the MCA 2005 and an important Practice Note from the Law Society on financial abuse. We also draw attention to the invaluable statistics on the operation of the MCA 2005 pulled together by Lucy Series and very kindly made available for wider use.

We are also conscious that our coverage has not to date extended to encompass the numerous decisions on Lasting Powers of Attorney reported in short form on the OPG website. We have undertaken an exercise pulling together the themes from the most important of the decisions on severance in the form of the note we attach to this newsletter, which can profitably be read together with the note we covered previously from the Legal Adviser to the OPG on avoiding invalid provisions in LPAs. We will also seek to cover covering the most important of such decisions on an ongoing basis.

As per usual, we include not only hyperlinks to publicly accessible transcripts of the judgments where they are available at the time of publication,[1] but also a QR code at the end which can be scanned to take you directly to the CoP Cases Online section of our website, which contains all of our previous case comments.

Re SK (2013, appln no. COP11950943)

Practice and procedure – other

Readers may recall the earlier decision in these proceedings reported as *Re SK* [2012] EWHC 1990 (COP), in which Bodey J was asked to decide whether P's brother and litigation friend in personal injury proceedings should be a party to Court of Protection proceedings regarding his welfare. The Defendant in the personal injury proceedings argued that it should also be joined as a party if, in effect, the Claimant's interest in those proceedings was being represented in the Court of Protection. Bodey J refused the Defendant's application, noting that "*The key point in my view is that the underlying issue in the two sets of proceedings, however similar, is not the same. The jurisdiction of the Court of Protection is as to best interests and that of the Queen's Bench Division is compensatory. The*

[1] As a general rule, those which are not so accessible will be in short order at www.mentalhealthlaw.co.uk.

tests to be applied, although very similar ('best interests' as against 'reasonable needs') are not the same…A defendant not having been a party to the Court of Protection process would not be bound at a Queen's Bench hearing as to quantum by any Court of Protection declaration as to the injured person's best interests…Whilst the judge or master would of course pay regard to the declaration of the Court of Protection, he would not be bound by it and would decide the issue before him according to the applicable principles relating to the assessment of damages [and I might have added 'and according to the evidence before him, which might well not be the same as the evidence which had previously been before the Court of Protection'.]"

In this latest decision, the Court of Protection was in a position to make best interests declarations regarding P's residence, as all parties agreed it was in his best interests to move to a particular residential placement. However, P's brother argued that this should be an interim declaration only, and that the possibility that P could move to independent living in the community should be reconsidered in 1 or 2 years' time, suggesting that if the court's declaration was final and the welfare proceedings came to an end, this would prevent P's personal injury claim being settled on the basis of a future claim for independent living: '*It is said that the quantification of damages in the Queen's Bench Division would be prejudiced by any Court of Protection order implying that community living is not on this court's agenda of possibilities. Alternatively, it is suggested that the Defendant would be likely to put forward such a well-pitched Part 36 offer in the Queen's Bench proceedings, based on that interpretation of this Court's order, that CK, as SK's Next Friend, might well feel that it would be too risky to reject it.'*

The local authority and Official Solicitor opposed this proposal, arguing that there should be no '*speculative postponement'* on the basis that P's best interests might change in the future.

Unsurprisingly, given his decision in 2012, Bodey J did not accept the submissions of P's brother, and granted final declarations. The learned judge observed:

> *"Of course there will also be cases where the court looks forward to the future as part of deciding about present best interests and where it may wish to retain a measure of oversight and control; but such an approach has to be proportionate and adopted only where there is a reasonable foreseeability of the court being able to take a further decision at a subsequent hearing within a reasonably finite period of time. Here, as submitted by Miss Butler-Cole for the local authority and Mr O'Brien for the Official Solicitor, there is no knowing at present when it may be possible to take further decisions about SK's progress. The costs of these proceedings, which have covered many areas and issues over several years, have been colossal and the proceedings should be brought to an end for everyone's sake if possible. In so saying I am satisfied from what I have heard that court proceedings as to SK's future would be more expensive than Statutory Reviews under the Mental Capacity Act."*

Although it was not strictly necessary, given the nature of a best interests declaration, Bodey J adopted a recital suggested by the Official Solicitor, so that the effect of the court's order should not be misunderstood:

> *"And upon the court recording, for the avoidance of doubt, (i) that the 'best interests' assessments at this hearing and the decision underlying the declaration at paragraph (2) below is a decision taken in circumstances where there are only two other options for SK (Unit S or Unit Y) and (ii) that community-based living is not an option for him at this time; and further recording (iii) that such direction is neither intended to nor does prejudice any decision on community-based living for SK in the future."*

Comment

This decision makes it crystal clear that a best interests decision is a choice between available options at the time, and that it cannot therefore bind P (or indeed any other party) if some different choice arises for him in the future. The judgment is also a useful example of the Court being aware of the need for proportionality in welfare proceedings, and ensuring that cases are only kept alive where there is an actual dispute which requires determination, not to monitor P's circumstances.

R v Patel [2013] EWCA Crim 965

Criminal offences - ill treatment / wilful neglect

Summary

This appeal against conviction for under s.44 MCA 2005 for wilful neglect provides a useful clarification of two aspects of this notoriously difficult offence.

The appellant was a nurse on duty in a nursing home in which an elderly man suffering from dementia was living. A nursing assistant noted that the man was becoming ill, and notified the appellant. She consulted another nurse on duty, who examined him and noted that his breathing was shallow and his pulse was faint. She did not immediately telephone for help, but first telephoned the man's son in America, receiving the (unsurprising) answer that he could not assist as he was 4,000 miles away. The appellant then dialled 999 and asked for an ambulance; which was duly dispatched. A clinical adviser telephoned back some 5 minutes later to ask how the man was doing. The appellant said that he had stopped breathing and died. Craig then asked whether anyone was doing CPR. The appellant replied no, adding that CPR was not allowed at the home. The adviser repeated his question several times. The appellant always gave the same answer. At one point the appellant said that she did not have the necessary equipment. These answers were incorrect, as there was no rule banning CPR, and on the contrary staff were required to carry out CPR when that was required. No equipment was needed to carry out CPR. The ambulance arrived shortly afterwards, but the paramedics were not able to resuscitate the man. A *post mortem* examination was then carried out, which revealed that he had been suffering from pneumonia. This had caused respiratory arrest, which in turn caused cardiac arrest. There is a very low survival rate from this kind of cardiac arrest, and CPR would probably not have saved his life. The question therefore arose as to why the nurse had not undertaken it (there was, for instance, no 'Do Not Resuscitate' notice in the man's records or sign to that effect in his room).

The appellant was charged with one count of ill-treatment or neglect of a person who lacked capacity contrary to s.44 MCA 2005; she was convicted after a Crown Court trial and sentenced to a community order for 12 months with a requirement that the appellant perform 100 hours of unpaid work.

She appealed to the Court of Appeal, founding her appeal upon two aspects of the judge's direction to the jury. The appellant obtained leave to appeal to the Court of Appeal on two separate grounds. The first ground was that the judge failed to direct the jury properly in relation to the meaning of neglect in the context of s. 44 MCA 2005. In particular, she contended that the judge wrongly directed the jury that neglect could be established even if it was unlikely that the appellant's inaction caused any adverse consequence. The second ground was that the judge failed to direct the jury properly about the meaning of 'wilfully.' In particular, she contended that the judge wrongly directed the jury that if the appellant acted out of stress or panic that would not constitute a defence.

The Court of Appeal considered the two grounds in reverse order, and did so on the basis of an agreed position that: (1) it was unlikely that, had CPR been administered, this would have prolonged the life of the man; (2) there was no DNR notice in the man's room or over his bed; (3) proper medical practice required CPR to be given in those circumstances; (4) standard practice at the nursing home required CPR to be administered in those circumstances, and the policy of the nursing home with which the appellant conceded she was familiar provided "if in doubt resuscitate."

In respect of the first ground, the Court of Appeal held (paragraph 34) that the actus reus of the offence under s.44 MCA 2005 is complete if a nurse or a medical practitioner neglects to do that which should be done in the treatment of the patient (by contrast, for instance, to the offence under s.1 Children and Young Persons Act 1933 of wilfully neglecting a child or young person under the age of 16 "*in a manner likely to cause him unnecessary suffering or injury to health*.") The Court of Appeal accepted the CPS's submission that the appellant could and did not know what the effect of the CPR would have been, and it was purely fortuitous that it turned out after the event that CPR probably would not have saved the man's life. The Court of Appeal also noted the clear distinction between the offence of neglect under s.44 MCA 2005 and the (much more serious) offence of gross negligence manslaughter, where causation would be an issue.

In respect of the second ground, the Court of Appeal noted that, whilst it could not determine whether the appellant had been in a state of stress or panic, it was perfectly clear that the evidence of neither party at the trial was suggesting that the appellant was in an hysterical state or unable to talk rationally or act in a rational way. The Court of Appeal went on to hold (paragraph 42) that

> "*neglect is wilful if a nurse or medical practitioner knows that it is necessary to administer a piece of treatment and deliberately decides not to carry out that treatment, which is within their power but which they cannot face performing. … if the appellant was acting at a time of stress, that would be a matter which the judge could take into account at the time of sentence*."

Having found that the judge's directions could not be criticised, the Court of Appeal therefore dismissed the appeal.

Comment

Section 44 MCA 2005 is notoriously badly-drafted, and has been the subject of highly critical comments from the Court of Appeal in *R v Dunn* [2010] EWCA Crim 2935, *R v Hopkins and R v Priest* [2011] EWCA Crim 1513 and *Ligaya Nursing v R* [2012] EWCA Crim 2521, the criticism focusing (in particular) upon the difficulty of mapping across the concepts of incapacity for purposes of ss.2-3 MCA 2005 onto the offence. The offence, however, remains on the books, and this decision provides useful clarification of two further elements which have yet to be the subject of judicial consideration. In particular, the emphasis upon the need to identify what was clinically required in the particular circumstances of the case seems to us to be important (and correct) for an offence whose purpose is to ensure that those caring for vulnerable adults are held to account when the care they deliver falls below an acceptable standard.

Loughlin v Singh [2013] EWHC 1641 (QB)

Mental Capacity – Finance – Litigation

Summary

This judgment concerned the assessment of damages in a personal injury claim on behalf of a young man who had sustained brain injuries in a traffic accident. An issue arose as to whether he had capacity to litigate and to manage his property and affairs (it appears from the judgment that the two matters were essentially conflated).

Kenneth Parker J cited the familiar authorities, and considered the competing medical evidence. On the one hand, various professionals expressed the view that provided the Claimant received proper advice and support, he would be able to take that advice on board in making decisions about his property and financial affairs. He would be vulnerable to exploitation or rash decision-making if he was fatigued, but provided he was given advice at times when he was well-rested, he would be able to make his own decisions. The contrasting opinion was that the Claimant's executive dysfunction went beyond the boundaries of the normal range of disorganisation that might be displayed by a 22-year old, that he was vulnerable to making a reckless decision, that he

would not seek advice when he needed it, and that he therefore lacked capacity to manage his property and financial affairs. The Claimant's family and those working with him agreed that he lacked capacity in this respect.

Kenneth Parker J acknowledged that the question of the Claimant's capacity was finely-balanced, and (at paragraph 46) noted that a particular difficulty was that:

> "*In respect of executive capacity and the ability to manage his affairs, it was intrinsically difficult to separate conduct and patterns of behaviour, that might bear upon the relevant assessment, that were wholly or mainly attributable to psychological explanation rather than wholly or mainly attributable to the organic brain injury. In simple terms many young men, who suffer no brain injury at all, are indolent, unmotivated and prone to make financial, and other, decisions that are unwise or even calamitous."*

Kenneth Parker J concluded that on the balance of probabilities, the Claimant lacked the capacity to litigate and to manage his property and affairs, accepting the evidence of a Dr O'Driscoll who concluded that the Claimant's difficulties with weighing information were due to his brain injury. In particular, Dr O'Driscoll's evidence was that the Claimant could not anticipate the consequences of his actions at either a behavioural or emotional level. Thus, although he might be able to make a decision in a '*laboratory setting'*, he would not be able to make a decision in the real world – he would be '*vulnerable in an unpredicted and unmanaged environment.'* Nor would he seek assistance of his own initiative.

Kenneth Parker J also pointed out the importance of ensuring that the Court of Protection has '*all the material which, on proper reflection, is necessary for a just and accurate decision.'* That issue arose because it transpired during the proceedings that there had been medical reports prepared which concluded that the Claimant had capacity to manage his property and financial affairs, but these were not disclosed to the Court of Protection, and a District Judge had therefore appointed a financial Deputy for the Claimant without full knowledge of the relevant evidence.

Comment

The analysis of capacity in this case is very interesting. Firstly, the judge stated that '*If the Claimant is vulnerable to exploitation or is prone to make rash or irresponsible decisions, he does not necessarily lack capacity. However, the Court in reaching its conclusion may take such matters into account.'* (paragraph 21). No further explanation of this view was given, but it is immediately obvious that it could easily violate the requirements of the MCA. It could be permissible for the court to take vulnerability to exploitation, and a propensity to make rash decisions into account, if that is limited to the analysis of whether P's mental impairment is causing P to be unable to weigh up information to make a decision. A history of exploitation or rash decisions may well flag up this issue and raise a query as to whether P is able to satisfy that part of the capacity test. However, as the Court of Appeal has recently confirmed in *PC and NC v City of York Council* [2013] EWCA Civ 478, these factors cannot be used directly to determine that P lacks capacity. People with mental impairments can make capacitous unwise decisions, and if those decisions are caused by the interplay between mental impairment and influence of other people, it is not necessarily the case that s.2 of the MCA 2005 is satisfied.

Secondly, the case raises the perennial question of whether someone who can make a decision with support, can be said to lack capacity. Article 12(3) of the UNCPRD says no. The MCA arguably says no – all practicable steps must be taken to help P make his or her own decision. If P struggles to identify the consequences of deciding in a particular way, P should be given that information and helped to use it to make a decision. P does not have to be able to identify all the relevant information to a decision himself without assistance. But of course, if P does not have a financial deputy, how will that process of supported decision-making actually occur? Perhaps the solution is that a deputy is

appointed, but that for all decisions, the deputy is required to attempt actively to assist P to make the decision himself, before making any decisions based on best interests – begging the question of whether that is a remotely realistic possibility in the world of the professional deputy.

Thirdly, the case touches on the difference between having capacity in ideal conditions – with support, not under pressure and so on – and lacking capacity 'on the ground'. In the caselaw concerning capacity to consent to sexual relations, it has been held that capacity in ideal conditions is sufficient: if one then goes on to consider capacity 'on the ground', that is to confuse the having of capacity with the exercise of capacity. Thus, someone who understands what sex is, and what the risks of it are, when asked by a psychologist, is deemed to have capacity to consent to sexual relations (in the civil jurisdiction), even though there is a wealth of evidence that none of that information will be weighed up by the person in the heat of the moment or when a particular individual is propositioning the person. In contrast, in this case, the reality of P's inability to make decisions other than in ideal conditions, was a deciding factor in the decision that P lacked capacity to manage his property and financial affairs. Are such differences in approach according to the subject matter of the decision permitted under the MCA?

Having regard to these three issues, it appears to the editors that the case may well have been decided differently had it proceeded in the Court of Protection.

Simon v Byford & Ors (Re Rose (Deceased))
[2013] EWHC 1490 (Ch)

Testamentary capacity

Summary

R brought proceedings in the Chancery Division challenging a will made by his mother, C, at her 88th birthday party in 2005. C's previous will, made in 1996, was more generous to R than his other three siblings in that, although the majority of her estate was split equally between them, R also received a flat owned by C and shares in the family company. R was not present at the birthday party but other members of the family were there, including his brother J and sister H. The will made by C at the birthday party provided for her assets (with the exception of a relatively small sum) to be divided between her children in equal parts. There was evidence that C was suffering from mild to moderate dementia at the time she made that will and R argued that she lacked testamentary capacity. This was rejected by J and H. C died in 2009.

Nicholas Strauss QC, sitting as a Deputy High Court Judge, held that although the differences in the evidence given by C's family and friends could properly be characterised as very great, it was not impossible to reconcile them, essentially on the basis that C had some good days and some days. He found that C made the disputed will on one of her good days and that she understood that the effect of the will was to leave her property to its beneficiaries on her death, that it was her wish to leave her property (with a sole exception) to her children generally, that she was not improperly influenced or persuaded, that she had been taken carefully and conscientiously through the terms of the will and understood them, that she understood that by signing the will she revoked the previous will and that she refused to see a solicitor, although J pressed her to do so (at para 142). Mr N Strauss QC considered that although C would not have been able to remember the terms of her previous will, she would have been able to ask to see that will if she wished to do so, when she was told at the time of making the 2005 will that it did not (as she believed) leave her property to her children equally (at para 143).

The judge reviewed the law on testamentary capacity and set out the established common law principles in this area, extracted from *Sharp v Adam* [2006] EWCA Civ 449, noting that the MCA 2005 had not yet come into force at the time the will was made in December 2005. (For a discussion on the interplay between common law on testamentary capacity and the principles contained in the MCA 2005, see Alex's recent paper on statutory wills and testamentary capacity). The dispute between the expert witnesses in the case was whether or not C "*was*

able to comprehend and appreciate the claims to which [s]*he ought to give effec*t". R argued that it was not sufficient that C understood she was revoking her previous will; in order to meet this requirement C needed to be able to understand what was being revoked. The judge rejected this for three reasons:

> *"156.* […] *First, it is clear from Banks v. Goodfellow and the earlier authorities, and from many subsequent decisions, that the law upholds the right of elderly people to leave their property as they choose, even if their mental faculties have declined considerably. This must include many cases in which they can no longer remember all the circumstances relevant to the division of their property between the people they wished to benefit; to make this a qualification for testamentary capacity would be inconsistent with the case law.*
>
> *157. Secondly, while I think that there may be cases in which requirement (c) can only be met if the testator is capable of understanding, and possibly only if she does understand, the different provisions of an earlier will, this is not such a case. It must be a matter of degree, and in this case the previous will was 9 years earlier, and the differences were slight; the beneficiaries under both wills were the obvious ones, and all received substantial gifts under both wills. Nobody was omitted. It would be different if the testator was unable to remember the identity of the beneficiaries under a previous will, whom she would still be likely, if reminded, to wish to benefit: see Abbott v. Richardson [2006] EWHC 1291 (Ch) at paragraphs 187, 190.*
>
> *158. Thirdly, I think that, in any event, on a proper analysis of the facts, [C] was capable of understanding the provisions of her previous will … "*

The judge concluded that C knew and approved of the provisions of the will made in 2005 and that it was her last and valid will.

Comment

This case is highly fact-specific (the judgment running to some 79 pages) but is nonetheless of note for the consideration given to the question of the degree of knowledge required of the terms of a previous will as part of the assessment of testamentary capacity. In line with other recent decisions, most notably *Hawes v Burgess* [2013] EWCA Civ 74, it also reinforces the difficulty of challenging testamentary capacity many years after the relevant events took place.

R (Afework) v London Borough of Camden [2013] EWHC 1637 (Admin)

COP jurisdiction and powers - Interface with public law jurisdiction

Summary

Mr Afework had been discharged from detention under the Mental Health Act 1983 ('MHA') in July 1993 and had since then been living in Council tenancies, receiving housing benefit. A criminal injury in 2000 led to a move into specialist accommodation. With the Criminal Injuries Compensation Authority due to pay out for the injury, and Mostyn J was asked to determine whether such accommodation amounted to after-care services in s.117 of the MHA. If it was, Afework would not have to pay the fees. If it was not, the accommodation would be provided under the National Assistance Act 1948 and would therefore be means-tested.

Noting the lack of any statutory definition of "after-care services", and the recognised distinction between specialist enhanced accommodation ("accommodation-plus") and ordinary, or bare, accommodation, his Lordship observed:

> *"The hyphenated linking of the word "after" with "care" within the first component shows that the services in question must be consequential to the detention in hospital. The services must relate to the reason, and only to*

> *the reason, for the detention in hospital. In my opinion that is the only possible logical interpretation that can be given to the qualification of the component "services" by the hyphenated component "after-care".”* (emphasis in the original)

In *R (Mwanza) v Greenwich London Borough Council* [2011] PTSR 965, Hickinbottom J did not agree that, as a matter of legal principle, ordinary accommodation could never fall within s.117, although it was difficult to envisage such circumstances arising. In the present case, Mostyn J noted:

> *“16. I too have racked my brain to think of “circumstances in which a mere roof over the head would, on the facts of a particular case, be necessary to meet a need arising from a person’s mental disorder” and I too have drawn a blank. I think the reason that blanks have been drawn by two judges is because in truth there are no such circumstances. Further, I maintain my view that the literal and natural meaning of the words in s117(2), coupled with the legislative policy of the 1948 Act, is that basic or pure or ordinary accommodation does not come within the concept of after-care services, and so to that small extent I respectfully disagree with my brother.”*

His Lordship went on to state:

> *“19. I therefore hold that as a matter of law s117(2) is only engaged vis-à-vis accommodation if:*
>
> *(i). The need for accommodation is a direct result of the reason that the ex-patient was detained in the first place (“the original condition”);*
>
> *(ii). The requirement is for enhanced specialised accommodation to meet needs directly arising from the original condition; and*
>
> *(iii). The ex-patient is being placed in the accommodation on an involuntary (in the sense of being incapacitated) basis arising as a result of the original condition.”* (our emphasis)

Afework’s need for accommodation arose overwhelmingly from the assault in 2000 and not from the original condition which led to his detention under the MHA many years before. He therefore fell at the first hurdle and the specialised accommodation did not amount to after-care services.

Comment

This is a significant decision because, contrary to *Mwanza,* Mostyn J decided that *as a matter of law* ordinary accommodation can never be a free after-care service under MHA s.117: everyone needs a roof over their head. Of more potential relevance to the MCA 2005 is the third requirement; that the person is placed “on an involuntary (in the sense of being incapacitated) basis”. This appears to us to be a novel, and somewhat concerning, requirement. It is not clear what is meant by “involuntary” and “incapacitated”. A literal reading would tend to suggest that a person with the mental capacity to decide where to be accommodated post-discharge would not have their need for enhanced specialised accommodation met by s.117. We wonder whether this requirement has been over-influenced by a passage in *DM v Doncaster Metropolitan Borough Council* [2011] EWHC 3652 (Admin). There, at paragraph 66, Langstaff J refers to the fact that *“the local authority does not have a choice whether to accommodate under section 117 or under section 21, or, as it may be, to authorise detention under the Mental Capacity Act with the consequences that follow. Statute applies, and provides no choice.”* The lack of choice or involuntariness refers to the legislation and not to the ex-patient. Still less does it refer to their mental capacity to decide where to be accommodated.

In our opinion, s.117 is aimed at meeting a particular psychiatric need. It is not aimed at countermanding coercion or incapacity. Whether a person agrees to their specialist placement or not, whether with or without capacity, should therefore be irrelevant to their entitlement. If someone detained for treatment under the MHA needs enhanced specialised accommodation to

meet needs directly arising from their original condition, such accommodation should fall within s.117. Whether they are able to decide at the point of discharge whether to live there and, if unable, whether such inability arises as a result of the original condition, should have no role to play. The MCA requirement to assume capacity unless proven otherwise makes this all the more important. Given the significance of the extent to which accommodation falls within after-care services in these times of austerity, no doubt the reference to "incapacitated" will fall to be considered again in due course.

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

We reported in our June 2013 newsletter that a Committee had been appointed to "consider and report on" the MCA 2005. A formal call for evidence was published on 26 June 2013 by the Chairman of the Committee Lord Hardie, in the form of 27 questions. Written evidence should be submitted to arrive no later than 2 September 2013 to holmentalcapacityco@parliament.uk or to Judith Brooke, Clerk, Committee on the Mental Capacity Act 2005, Committee Office, House of Lords, London SW1A 0PW.

It is possible to follow the progress of the Committee's work on the dedicated web page. Below is an overview of the key aspects of the evidence to date and the general directions in which the Committee have been focusing their questioning. Of necessity, it can serve as a sample only: the full (uncorrected) transcripts of evidence are available online.

On 18 June 2013, the Committee heard evidence from:

- John Hall, Deputy Director of Family Justice, MoJ
- Nick Goodwin, Deputy Director of Court Tribunal Fees, MoJ
- Anne-Marie Hamilton, Director of the Social Care Quality and Safety Branch, Department of Health
- Claire Crawley, Senior Policy Manager, Adult Safeguarding, DoH

On 25 June 2013, the Committee heard evidence from:

- Nicola Mackintosh, Principal Solicitor at Mackintosh Law and member of the Law Society's Mental Health and Disability Committee
- Katie Johnston, Liberty
- Professor Richard Jones, Cardiff Law School
- Kirsty Keywood, University of Manchester

The extent to which the Act has been embedded: The general consensus from the government officials giving evidence on 18 June 2013 was that the MCA 2005 has been a success and that, while there remains work to be done to implement and embed the Act across the system, progress has been made. For example, Claire Crawley acknowledged that some front line staff may need more assistance in understanding the concept behind the Act given the cultural shift the Act represents, but described awareness among relevant professionals as variable but growing.

It was quite clear that the government officials' perspective as to the extent to which the Act had been successfully embedded was more optimistic than that held by the practitioner/academic witnesses who followed with their evidence of 25 June 2013. Professor Richard Jones, for example, stated that the Act places unrealistic expectations on lay and professional carers which results in non-implementation. Nicola Mackintosh described the Act as "a good start" but expressed concerns as to the way in which it had been implemented.

Reform and review: Nick Goodwin stated that the overall view in Government is that there is no need to fundamentally alter the Act. Changes are being contemplated in respect of the lasting power of attorney provisions but in the context of facilitating the OPG to deal with lasting power of attorney in a way that customers want, rather than to "*fundamentally unpick what is behind the Act in respect of LPA."* The Code of Practice is due to be reviewed at the same time as the OPG reforms are considered. It was acknowledged by the DoH that there may be a need to review the

Code after the Supreme Court decisions due this autumn as well as in light of the report of the House of Lords Committee itself.

This prompted a series of questions from Baroness Browning and Baroness McIntosh who noted that the MoJ did not appear to consider there to be any particular urgency to review the Code. When pressed, Claire Crawley emphasised that energies were being focused on putting the Code into practice rather than revising it. This was met with some scepticism by the practitioner/ academic witnesses - Katie Johnston (Liberty) stated in her evidence that there is a problem both with the implementation and with the Code itself. Further questions were put to the MoJ seeking clarification as to how the view that no changes were needed to the Act was to be reconciled with the recent high profile cases. The response from John Hall was that the DoH and MoJ are talking to each other and the advice that is being given to Ministers is "joined up".

John Hall also confirmed that there will be a further review this year to ensure that the MCA 2005 is compliant with the United Nations Convention on the Rights of Persons with Disabilities which entered into force in May 2008. This follows from concerns which have been articulated by senior members of the Judiciary.

Use of IMCA's: Baroness Browning queried the "patchy" use of IMCAs as identified in the most recent DoH report on the IMCA service. Claire Crawley attributed this phenomenon to the more general need to embed the Act and the fact that people often have friends or family who they prefer to use as representatives. Nicola Mackintosh expressed the view that there should be an IMCA in every single case where the person is assessed as lacking capacity and Kirsty Keywood indicated that she would support the use of IMCAs in a wider range of cases.

Lessons from high profile cases: A number of members of the Committee referred to Winterborne View and the lessons that should be derived from it. Claire Crawley expressed her absolute confidence that the CQC was getting the issue of training inspectors to identify issues in hand. Anne Marie Hamilton, also from the DoH, expressed the view that one thing that should be learned from Winterborne view was the issues that arise as a result of the management culture and the failure to put the individual at the heart of the decision making process. When asked who within the Department had responsibility for deciding that steps needed to be taken, the answer was that it lay with Ministers. When pushed as to whether guidance would be received from officials, Claire Crawley responded that with Winterborne View, no such guidance was required but accepted that in other cases officials would be involved.

Subsequent witnesses were more cautious as to the extent to which lessons had been taken on board. Nicola Mackintosh described Winterborne View as "*the tip of the iceberg."*

Training: The DoH witnesses were pressed on the extent to which the training requirements in the Code are being complied with. The Committee made it clear that they wished to have a note on the extent to which new practitioners are receiving MCA 2005 training. When asked as to how Trusts are being monitored to ensure that the Act is embedded, Claire Crawley stated that the monitoring would be through the CQC rather than through the DoH. In relation to training in local authorities, Claire Crawley acknowledged that there is *"no way of getting the evidence"* that local authorities have appropriate training in place and that the CQC does not monitor local authorities or inspect them anymore.

Informal care: The DoH confirmed that there is no system for maintaining records of informal carers. Kirsty Keywood identified individuals who are self-funding in care homes as being particularly vulnerable and expressed the view that access to justice for informal care-givers is a real problem. It is clear that this is an area the Committee will explore further.

DOLs: Claire Crawley stated that it is not the Government's view that Dols should be regarded as an "add on" to the Act. The Dols provisions should be regarded as empowering: *"people concentrate on saying "deprivation of liberty" when what they should be concentrating on is*

the word "safeguards". Anne Marie Hamilton for the DoH opined that everybody operating the safeguards is using the same safeguards but there are regional variations as to the extent to which they are being applied for and used. The broad consensus of the practitioner/academic witnesses was that DoLs are more problematic that the government officials appear to be acknowledging, not least because they are often not applied in light of the narrow construction given to the phrase "deprivation of liberty" by the caselaw. Professor Jones expressed the view that DoLs had not been subjected to adequate Parliamentary scrutiny when passed.

When the DoH was pressed as to how it was addressing the issues identified by the CQC in its annual reports, the response was that it was the role of the CQC to share its findings but that the DoH continues to fund best practice guidance and brings together different system partners. As with training, the responses relating to the situation with local authorities was that they have statutory obligations which they should be complying with.

Interface with the MHA 1983: It was acknowledged by the witnesses that people do not understand the interface between the MCA 2005 and the MHA 1983. The DoH indicated that it has commissioned research to ascertain the understanding of the provisions and will be reviewing this, but there have been no discussions with Ministers about consolidating the Acts.

LPAs: Nick Goodwin gave evidence that slightly under 750,000 LPAs have been registered since October 2007 (or 2000 per month at current volumes). The Committee indicated that they would be seeking further evidence as to whether LPAs are working in practice (e.g. in view of the cost) and for data on the use of advance decisions. Baroness Andrews queried whether the process for applying for an LPA could be simplified – Nick Goodwin indicated that this is a work in progress and that an online tool is being developed and will be available in a few weeks' time.

Legal Aid: When asked about the impact of LAPSO and the consultation on legal aid, the MoJ official John Hall stated that there have been no changes to the way that legal aid is available for cases in the Court of Protection. From a practitioner's perspective, Nicola Mackintosh highlighted the difficulties with legal aid reforms in relation to the means test thresholds as well as the issues arising when a s.21A application falls subject to the effect of s.16 MCA 2005 after the DOL is authorised by the Court.

The Committee will continue to hear evidence on Tuesday 2 July 2013, and we will provide a further summary in next month's issue.

We would urge our readers to respond to the call for evidence so that the Committee can receive as broad a picture as possible of the operation of the Act on the ground.

Statistics upon the MCA 2005

Many congratulations to Lucy Series on submitting her doctoral thesis on the MCA 2005 and the DOLS safeguards. She has very kindly agreed to share the statistical analysis that she has conducted for purposes of that thesis: it is available here, and is an absolutely invaluable snapshot of the system, drawing together information from across a whole range of sources. The data is provided in Word form so that it can be used freely, subject (of course) to acknowledgment of it source.

As Lucy notes:

> "[t]*he overall picture painted by these data is of an Act whose primary mechanisms are informal – the vast majority of decisions are made under the general defence, and so are not picked up by data on the deprivation of liberty safeguards or the Court of Protection. The statistics show that referrals to Independent Mental Capacity Advocates (IMCA) have been lower than expected, and the number of complaints and litigation resulting from IMCA referrals is concerning low, suggesting they are only infrequently challenging decision makers or assisting P to do so. Use of the*

deprivation of liberty safeguards has been underwhelming and extremely variable – it appears there is a postcode lottery in the Article 5 protections offered by the safeguards, both in terms of when they are applied, and how effectively people's rights to advocacy and challenge are upheld. Despite fairly limited, but growing, use of the Court of Protection under the MCA for welfare decisions and the deprivation of liberty safeguards, it is clear from the comments of the judiciary and the Official Solicitor that these cases are causing a significant strain on resources.

Law Society Practice Note on Financial Abuse

With thanks to Caroline Bielanska for drawing this to our attention, the Law Society has just published a Practice Note on Financial Abuse. It highlights important matters such as the identification of those at risk of abuse and necessary steps in the assessment of capacity. It also (and in timely fashion given the recent decisions of Senior Judge Lush in cases such as Re GM) highlights the potential for abuse by attorneys and deputies. Whilst, strictly, only applicable as good practice for solicitors, the Practice Note provides a clear and comprehensive guide which makes important reading for other professionals dealing with adults at risk of such abuse.

Compassion in Dying

Finally, a plug for the charity Compassion in Dying. Tor has recently been appointed a trustee and is looking forward to working with the charity in improving awareness of the benefits of making health and welfare LPAs and advance decisions to refuse treatment.

Our next update will be out in July unless any major decisions are handed down before then which merit urgent dissemination.

Please email us with any judgments and/or other items which you would like to be included: credit is always given.

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

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

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