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Mental Capacity Law Newsletter

Editors: Alex Ruck Keene, Victoria Butler-Cole, Josephine Norris, Neil Allen and Michelle Pratley

Introduction

Welcome to the September issue of our newsletter. Even if we cannot boast of a cover picture to rival Vogue's September issue, this is nonetheless a bumper edition covering a range of significant cases relating both to welfare and to property and affairs, as well as wider developments such as the Health Select Committee's damning criticism of the current DOLS regime. We would, perhaps, single out the decision in *DE*, the first authorisation by the Court of a male sterilisation; the decision by Charles J in *AM* on the interface between the MHA 1983 and the MCA 2005; the further guidance given by Senior Judge Lush as to gift-giving by deputies in *Re Joan Treadwell*; and the decisions in *HS* and *Surrey CC v MB*, emphasising the vital importance of undertaking a rigorous assessment of the evidence underpinning safeguarding concerns before issuing proceedings.

We are very sad to say that we are losing one of our editors, Josie, to the European Commission. We thank her very much for all her hard work on the Newsletter, and wish her all the very best in Brussels, whilst hoping that we can lure her back in due course with promises of capacity law excitements galore.

Where transcripts are publicly accessible, a hyperlink is included. As a general rule, those which are not so accessible will be in short order at www.mentalhealthlaw.co.uk. We include a QR code at the end which can be scanned to take you directly to our previous case comments on the CoP Cases Online section of our website.

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The transcript of this October 2012 case, about withholding life-sustaining treatment from a seriously ill man who was (probably) in a minimally conscious state, has only just been made available.

The case concerned an application by an NHS Trust for declarations that it would be lawful to withhold life-sustaining treatment from a 55 year old man who suffered from a number of medical problems, and had sustained a severe hypoxic brain injury following cardiac arrest. L was said by his treating doctors to be in a vegetative state at the time of the application, and to have a less than 1% chance of a meaningful recovery. It later transpired that there was some question over his diagnosis, and it was possible that he was at the lower end of the spectrum of minimal consciousness. In any event, his family was adamant that he was aware of himself and his environment, and that he would have wanted to have all possible life-sustaining treatment provided, not least in view of his religious beliefs as a practising Muslim. The treating doctors took the view that resuscitation or the use of the ventilator would be a cruel and unnecessary way of prolonging L's life. Their stance was supported by an independent expert instructed by the Official Solicitor on behalf of L, who said that his death would be characterised by a series of harmful interventions if the declarations sought were not granted. It was said that there was unlikely to be any clinician in the country who would provide the relevant life-sustaining treatments to L.

The judge accepted that it was unrealistic to imagine that L would emerge from a minimally conscious state, and that further life-sustaining interventions were unlikely to be effective - even if they were, they would at best only return L to his present level of awareness. In fact, the judge indicated that since there were no doctors willing to provide the treatment at issue, there were in fact no treatment options for the Court of Protection to make a declaration about. None of the parties had pursued the case on this basis however, so the judge carried out a balancing exercise and concluded that it was not in L's best interests for further life-sustaining treatment to be given. L's wishes could not simply be followed – the test the court had to apply was that of best interests, not substituted judgment. The administering of life-sustaining treatment would prolong L's death; it would not prolong his life in any meaningful way.

Comment

This case presents an interesting contrast to the first reported case concerning a patient in a minimally conscious state – the case of *W v M* [2011] EWHC 2443 (COP). In M's case, her family was unanimous in its view that M would not have wanted to be kept alive in that state. Yet the court decided it was in her best interests for artificial nutrition and hydration to continue. In L's case, the family was unanimous in its view that L would have wanted further treatment. Yet the court reached the opposite conclusion. In L's case, the court's decision was perhaps inevitable given that there were no doctors willing to provide treatment, but the issue of how to deal with P's likely wishes in end of life scenarios remains a difficult one. It is hoped that the Supreme Court will provide some guidance in its forthcoming decision in the appeal against the Court of Appeal in *Aintree v James,* in which it heard oral argument on 24 and 25 July 2013.

Court of Appeal rejects 'right to die' appeal

The Court of Appeal handed down its judgment on 31 July 2013 in the cases of Tony Nicklinson, Paul Lamb and 'Martin:' *R (Nicklinson) v A PCT* [2013] EWCA Civ 961. Dismissing the conjoined appeals (continued by Tony Nicklinson's widow following his death shortly after the first instance decision was handed down, the Court of Appeal held that there could be no common law defence of necessity to a charge of murder in respect of euthanasia, and there was nothing disproportionate about a blanket ban on assisting a person who wished to die but could not do so without help. However, the Court of Appeal did accept that the DPP's guidance on criminal prosecution in assisted suicide was insufficiently clear. While it was apparent that family members who, in good faith, assisted someone who wished to die to do so, would not be prosecuted, it was not sufficiently foreseeable whether the same approach would be taken for non-family members. Simply listing factors for and against prosecution was not enough – there had to be some indication of how those factors would be applied. The Lord Chief Justice, who dissented on this issue, took the view that it was apparent on the face of the policy that if a social worker acted out of compassion, he or she would not be prosecuted even if paid for providing the service. However, the helper could not be the social worker or carer who has had the responsibility for caring for the victim since he or she is in a position of trust. The other two judges noted that while this might be the correct interpretation of the policy, since it was not clear on its face, it should be spelled out. In a nutshell, the position as regards assisted suicide is now, seemingly, that no-one, whether professional or family member, will be prosecuted if they act in good faith, yet the act of assistance remain illegal, with no realistic prospect of the courts concluding otherwise. It can only be a matter of time before Parliament has to acknowledge the reality of assisted dying and deal with it through legislation.

Vasectomy approved as being in best interests of incapacitated man

Re DE [2013] EWHC 2409 (COP)

Best interests – medical treatment

Summary

This is the first reported case in which the court has found that it was in the best interests of an incapacitated learning disabled adult to have a vasectomy as a method of contraception. DE was 37 years old and had a long-term partner PQ, with whom he had fathered a child, XY. At the time the child was conceived, DE probably lacked capacity to consent to sexual relations, as his understanding of the mechanics of sexual intercourse and the risks of pregnancy and sexually transmitted infections was very limited. The pregnancy and birth of his child had been very disruptive to DE, and he consistently expressed the view that he did not want to have more children. His parents, who were very supportive of and committed to DE, and who cared for him, considered that it was in his best interests to have a vasectomy.

After an intensive programme of education, DE acquired capacity to consent to sexual relations, although it would be necessary for him to have so 'top-up' sessions to ensure that he remembered how to keep himself safe from sexually transmitted infections and diseases. DE did not gain capacity to make decisions about contraception, including a vasectomy, and he was judged to be unable to acquire such capacity even with further support.

The court held that it was in DE's best interests to have a vasectomy, notwithstanding that this would permanently remove his ability to have children (since the chances of undergoing a successful reversal, funded by the NHS, were slight). As noted by Eleanor King J at para 94 of her judgment, the factors in favour of DE having a vasectomy were the following:

> *"i) DE's private life*

a) DE's relationship with PQ is enduring and loving. It is very important to DE and he was deeply distressed when there was a break at the beginning of the year. The relationship should be respected and supported in the way all other aspects of DE's life are respected and supported.

b) The relationship has been sexual in the past and DE (and PQ) would like to, and should be permitted, to resume their sexual relationship.

c) DE is unequivocal and consistent in expressing his wish not to have any more children.

d) The only way that this can be ensured is by DE having a vasectomy. There is a high (over 18%) chance of pregnancy using condoms; DE's technique is poor and he cannot be relied upon consistently to use them.

e) If another child was born not only would DE be deeply distressed but a removal of the child from PQ would be very likely to result in the breakdown of the relationship.

ii) DE's relationship with his parents

a) DE's only other consistently held and expressed view is that he wants to live at home with his parents. He is wholly dependant upon them for his physical and emotional welfare.

b) DE's parents were deeply distressed by PQ's pregnancy and the birth of XY. Although they are, JK says, getting through it, they have obviously been traumatised by all that has gone on since PQ's pregnancy was discovered in 2010. Those events remain raw and JK exhibited an almost tangible fear of the consequences of a second pregnancy. They know their anxiety has an impact upon DE, I am sure they do their best to protect DE from it but they are only human and inevitably DE is acutely aware of their distress; this has had a significant impact upon his own emotional comfort and well being. I have no doubt that a second pregnancy would have an even greater impact upon the family particularly as FG and JK would inevitably regard such a pregnancy as having been avoidable.

c) DE's parents support and protect DE, they organise every practical aspect of his life. It is not unreasonable to expect that if they do not have reassurance that DE has the benefit of effective contraception then the level of independence they will believe it is in his best interests for him to be afforded will be compromised.

iii) DE's Independence

a) PQ's pregnancy followed by the interim declaration that DE did not have the capacity to consent to sexual relations has had very serious consequences for DE, resulting in his losing, for a period, all autonomy and his being supervised at all times. Whilst there has been some easing of supervision, his life is still very different from his life before XY was born and he is still never alone with PQ.

b) The loss to DE has been compounded by the fact that due to his learning difficulties DE cannot 'pick up where he left off'; skills which took years to acquire have, when not used, been lost, as has much of his confidence. The fact that DE has acquiesced as restrictions have been imposed upon him does not make the loss to him any less profound; it is both the entitlement and in the best interests of any person with significant disabilities, (whether learning or physical), that they be given such support as will enable them to be as much an integral part of society as can reasonably be achieved. It is simply stating the obvious to observe that DE's quality of life is incomparably better when he can go and have a coffee in town with PQ or go to the local gym with his friend. As Mr McKendrick said as a person with

learning disabilities, his successes and failures in life are measured differently to the non learning disabled population."

The only factor that was identified by any party as being against DE having a vasectomy was identified thus at para 97:

"i) The surgical procedure

a) the slender risk of DE suffering from long term scrotal pain and or discomfort, a risk further reduced by the fact that it is intended that the procedure would be carried out by a consultant urologist with a consultant anaesthetist. DE has tolerated local anaesthesia in the past and there is no reason to believe that he will not do so again. One or other of his parents will be with him throughout.

b) The procedure is non therapeutic.

c) The procedure does not protect against the transmission of STIs or STDs."

The balance sheet clearly fell in favour of DE having the procedure.

Comment

The courts have never said that the use of sterilisation of an incapacitated person as a method of contraception is not permissible, but it is clear that procedures which render a person permanently infertile will receive the most careful scrutiny by the courts, and will only be authorised as being in P's best interests in the rarest of cases. In DE's case, his clear and consistent wish not to have more children, which was informed by his actual experience of fatherhood, was of central importance. Other factors relied on may raise an eyebrow – should the distress caused to DE's parents by his unexpected fathering of a child and the disruption that a further pregnancy would cause, be taken into account? The issue of the loss of DE's independence if he did not have the vasectomy is particularly interesting. That loss of independence would be triggered by DE's parents (and others) wishing to avoid a pregnancy, and not being able to rely on DE remembering to use condoms, or using them effectively. But if DE has capacity to consent to sexual relations, can he be prevented from having sex because his contraceptive method is unreliable? In DE's case, this potentially thorny problem could be circumvented by reference to DE's clear wish not to have more children, but in another case, such consequences may not be something that can properly be taken into account, if the effect would be to subvert a wish to exercise a capacitous choice to have sexual intercourse.

One potential area of confusion highlighted by the judgment is whether a man needs to understand information about female contraceptive options in order to have capacity to make a decision about contraception. This issue was raised but not determined, as DE would have lacked capacity whichever approach was taken. Practitioners should be alert to this question and lack of guidance from the court when conducting capacity assessments. There are at least three different possible approaches – requiring men to understand only the options for them (i.e. condoms and vasectomy); requiring them to understand all the possible options for them and for any female partner (including the contraceptive pill, IUDs, the contraceptive injection and sterilisation); and requiring them to understand the male options and, if they are in a relationship, those female options which are actually a possibility and which their partner has decided, or may decide, to use.

Inherent jurisdiction could be used to authorise force-feeding of patient outside scope of MCA and MHA

An NHS Trust v Dr A [2013] EWHC 2409 (COP)

CoP jurisdiction and powers – interface with inherent jurisdiction

Summary

An Iranian doctor, Dr A, went on hunger strike to recover his passport which had been confiscated by the UK Borders Agency following his failed claims for asylum. A further refusal on 8 August led to him pulling out the nasogastric tube, with Dr A saying he wanted to die, and subsequently his detention under section 2, followed by section 3, of the Mental Health Act 1983 ('MHA'). An improvement in his condition led to his detention being rescinded. However on 5 December 2012 he stopped drinking and removed the nasogastric

tube, resisting attempts to have it reinserted. According to his specialist registrar:

> "*He is clear that he does not wish to die, although he understands that he will die if he continues with the hunger strike. His erroneous and persisting belief that the UKBA may return his passport as a result of hunger strike is impairing his ability to weigh up the reasons for and against continuing in his hunger strike…on the basis that he is unable to weigh up the pros and cons of continuing with the hunger strike, he does not have capacity to make this decision*."

The Trust sought declarations that he lacked capacity to litigate and to make decisions in respect of his nutrition and hydration and that it was lawful to administer the latter. The court was faced with three issues.

(1) Did Dr A have capacity to make decisions about nutrition and hydration?

On the basis of the common law, Baker J was clear that if Dr A had capacity, he was entitled to starve himself to death if that was his choice and the court had to be particularly careful not to him as incapable merely because the decision was extremely unwise. The court accepted the psychiatric consensus that he suffered from a delusional disorder and that, as a result of the delusional disorder, he was unable to litigate and to use and weigh the information relevant to the decision whether to accept nutrition and hydration. For the independent expert, the clearest evidence of Dr A's incapacity was his persistent belief that the UKBA would grant him a visa should he continue to refuse food.

(2) If he did not have such capacity, what approach to nutrition and hydration was in his best interests?

His Lordship held that although as a matter of strict law the principles relating to best interests and the checklist in the MCA did not apply when the court was exercising its inherent jurisdiction, "*they are manifestly applicable in those circumstances because best interests lies at the heart of the inherent jurisdiction*" (para 49). Balancing the relevant factors, the clear conclusion was that the balance came down in favour of making an order permitting forcible feeding by artificial nutrition and hydration, and "*In particular, the magnetic factor to my mind is the importance of the preservation of life*" (para 53).

(3) What power does the court have to make an order providing for the provision of nutrition and hydration given that such provision involves a deprivation of his liberty?

There was no dispute that subjecting Dr A to forcible feeding amounted to a deprivation of liberty. He would be physically restrained against his will while the tube was inserted and the restraint would continue to prevent its removal. On occasions he would be sedated. He was not allowed to leave the hospital. And staff effected complete control over his care, treatment and movements and, as a result, he lost a very significant degree of personal autonomy. The difficulty was identifying how that deprivation was to be authorised in law.

According to MCA s.16(A)(1): "*If a person is ineligible to be deprived of liberty by this Act, the court may not include in a welfare order provision which authorises the person to be deprived of his liberty*." At the initial hearing, the issue was whether he was within the scope of the MHA given that he could be detained under MHA s.3 (MCA Sch 1A, case E). By the time of the further hearing, he had been re-detained under that section (MCA Sch 1A, case A). His Lordship illustrated the new legislative gap:

> *"67. Put boldly in that way, it will be seen that this might make it impossible for someone to be treated in a way that is outwith his "treatment" under the MHA if that treatment involves a deprivation of liberty. To take a stark example: if someone detained under section 3 is suffering from gangrene so as to require an amputation in his best interests and objects to that operation, so that it could only be carried by depriving him of his liberty, that process could not prima facie be carried out either under the MHA or under the MCA. This difficulty potentially opens a gap every bit as troublesome as that identified in the Bournewood case itself."*

His Lordship analysed three possible solutions.

(i) Provide the treatment under the MHA s.63

The Official Solicitor submitted that Dr A was delusional and his refusal to eat was a manifestation of his mental disorder. But this was not accepted by the Trust. According to the responsible clinician:

> *"The purpose of the section 3 admission is so we can administer appropriate psychotropic drugs via the nasogastric tube. We do not see food as treatment for his mental illness. The administration of food via the nasogastric tube has not made a difference to his underlying mental state and indeed his mood has deteriorated. The food is administered to prevent him from dying…In my view, it is extremely difficult to disentangle how much of his hunger strike is due to underlying depression or possible delusional disorder. It is important to note that, when he was previously treated with antipsychotics and there was a marked improvement in his mental state, there was still no change in his views regarding continuing with the hunger strike. At the moment it is helpful to separate out what we see as treatment for any possible mental health disorder (i.e. psychotropic medication) from medical treatment required to keep him alive."*

There was therefore a strong feeling that the necessary treatment was for a physical disorder – starvation and dehydration – and not for the underlying mental disorder. Feeding might make Dr A feel better but it was not treating his mental disorder as it would be were he suffering from anorexia nervosa (para 75). His Lordship held:

> *"79. On this point I have found the views articulated by the treating clinicians, and in particular Dr. WJ, persuasive. She does not consider that the administration of artificial nutrition and hydration to Dr A in the circumstances of this case to be a medical treatment for his mental disorder, but rather for a physical disorder that arises from his decision to refuse food. That decision is, of course, flawed in part because his mental disorder deprives him of the capacity to use and weigh information relevant to the decision. The physical disorder is thus in part a consequence of his mental disorder, but, in my judgement, it is not obviously either a manifestation or a symptom of the mental disorder. This case is thus distinguishable from both the Croydon case and Brady.*
>
> *80. I also accept the submissions put forward by Miss Paterson, and acknowledged by the Official Solicitor, that it is generally undesirable to extend the meaning of medical treatment under the MHA too far so as to bring about deprivation of liberty in respect of sectioned or sectionable patients beyond what is properly within the ambit of the MHA. I recognise the need for identifying, where possible, a clear dividing line between what is and what is not treatment for a mental disorder within the meaning of the MHA; but I venture to suggest that in medicine, as in the law, it is not always possible to discern clear dividing lines. In case of uncertainty, where there is doubt as to whether the treatment falls within section 145 and section 63, the appropriate course is for an application to be made to the court to approve the treatment. That approach ensures that the treatment given under section 63 of the MHA will be confined to that which is properly within the definition of section 145 as amended. It would help to ensure that patients with mental disorders are, so far as possible, treated informally rather than under section. Finally, it ensures compliance with Article 8 and provides the patient with a more effective remedy than would otherwise be available, namely a forensic process to determine whether the treatment is in his best interests.*
>
> *81. I therefore decline to make a declaration that artificial nutrition and*

hydration can be administered to Dr A under the MHA."

(ii) Interpret the MCA so as to to authorise the treatment

The Official Solicitor submitted – and his Lordship accepted (at para 95) – that, following *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, the operational duty in Article 2 existed to protect Dr A against the risk of death from starvation. As to whether MCA s.16(A)(1) could be read narrowly so as to permit the court to deprive liberty, Baker J noted:

> "*87. The scheme of the amendments to the MCA, introduced in 2007, is plain. In certain circumstances defined in schedule 1A, the MHA regime takes precedence over the MCA. No argument has been advanced which has persuaded me to disagree with the assessment of Charles J in Re GJ (supra) that the MHA has primacy over the MCA and, in particular, his observation at paragraph 96 of the judgment:*
>
> > *'Case A is a clear indication of the primacy of the MHA 1983 when a person is detained in hospital under the hospital treatment regime and it would seem that when it applies P cannot be deprived of liberty under the MCA in a hospital for* ***any purpose****.'* [Baker J's emphasis]
>
> *88… Were it not for the availability of the inherent jurisdiction, I might be more inclined to adopt the course proposed above or to arrange further hearings before making a decision. Happily, however, for the reasons I will now explain, I am satisfied that the powers available to me under the inherent jurisdiction enable me to comply with my obligations under that section*."

(iii) Invoking the High Court's inherent jurisdiction

Although the MCA 2005 was intended to provide a comprehensive code for the care of mentally incapacitated adults, the court accepted that it was now firmly established that the inherent jurisdiction survived its arrival: *Westminster City Council v C* [2008] EWCA Civ 198, [54]; *DL v A Local Authority* [2012] EWCA Civ 253, [61], [70]. Noting that it might conceivably be argued that it should be confined to adults who were vulnerable, as opposed to incapacitated, his Lordship relied on Westminster as authority for the proposition that the jurisdiction benefited both incapacitated and vulnerable persons. As Parker J commented in *XCC v AA* [2012] EWHC 2183 (COP) at [54]:

> "*The protection or intervention of the inherent jurisdiction of the High Court is available to those lacking capacity within the meaning of the MCA 2005 as it is to capacitous but vulnerable adults who have had their will overborne, and on the same basis, where the remedy sought does not fall within the repertoire of remedies provided for in the MCA 2005. It would be unjustifiable and discriminatory not to grant the same relief to incapacitated adults who cannot consent as to capacitous adults whose will has been overborne*."

Baker J therefore held:

> *"96. In all the circumstances, I hold that this court has the power under its inherent jurisdiction to make a declaration and order authorising the treatment of an incapacitated adult that includes the provision for the deprivation of his liberty provided that the order complies with Article 5. Unless and until this court or another court clarifies the interpretation of section 16A of the MCA, it will therefore be necessary, in any case in which a hospital wishes to give treatment to a patient who is ineligible under section 16A, for the hospital to apply for an order under the inherent jurisdiction where the treatment (a) is outside the meaning of medical treatment of the MHA 1983 and (b) involves the deprivation of a patient's liberty*."

By way of a postscript, Dr A received artificial nutrition and hydration under restraint, as well as anti-psychotics; his mental state improved; and he was discharged from MHA detention and make a

capacitous decision to return to Iran.

Comment

This fascinating decision illustrates the flexible use of the inherent jurisdiction to plug legislative gaps. Not only can it protect the vulnerable who fall outside the scope of the MCA. It can also be invoked for those who need to be deprived of liberty but fall between the stools of the MHA and MCA. The general references to the primacy of the MHA must now be considered in the light of Charles J's decision *in AM v SLAM* (discussed below). Neither regime of detention has primacy in any general sense. However, the DoLS eligibility requirement clearly excludes the use of DoLS in certain limited circumstances, like case A.

The conclusions reached in relation to the mental v physical treatment distinction will no doubt attract attention. Distinguishing the case of *Brady* is particularly interesting. There, Ian Brady refused food in protest of the way he had been handled which was considered to be a manifestation of his personality disorder. Here Dr A refused food in the delusional belief that he would get his passport back but his starvation was a physical disorder and not a manifestation or symptom of his delusional disorder. It is not an easy distinction to draw and Trusts are clearly encouraged to make court applications in cases of uncertainty.

We note that another possible solution to the conundrum Baker J faced might have been provided by reliance on the concept of 'residual liberty' discussed in the decision of the European Court of Human Rights in *Munjaz v United Kingdom* (Bailii citation [2012] ECHR 1704). In that case, Strasbourg recognised that it is possible that a person subject to a lawful deprivation of their liberty could be subject to a deprivation of that residual part of their liberty that they had previously enjoyed. At the time Schedule 1A was drafted, residual liberty was not recognised by the English Courts; the concept could, though, potentially provide another – simpler – route through the problem of providing treatment for physical disorders in respect of Case A patients. In such circumstances, a person could be seen to have had the deprivation of their liberty authorised for one purpose (the treatment of their mental disorder), but to have retained a degree of residual liberty which would be the subject of further infringement for purposes of treatment of their physical disorder. If, as here, the treatment is for that disorder and solely for that disorder, it could properly be said that they were not ineligible to be deprived of their liberty for that purposes by virtue of the operation of Case A. We will wait and see whether this route is adopted in any future case.

In any event, we welcome comments upon this case, and that of Dr A discussed below, from mental health practitioners on the ground, because both cases raise difficult questions of principle and procedure.

When is detention under MHA 1983 'necessary' for incapacitated adults?

AM v (1) South London & Maudsley NHS Foundation Trust and (2) The Secretary of State for Health [2013] UKUT 0365 (AAC)

MHA 1983 – interface with MCA 2005

Summary

It is with some trepidation that we will seek to summarise this comprehensive decision of Charles J It is of significance to all those, including the First-tier Tribunal ('FTT'), who make admission and discharge decisions at the interface between the MHA 1983 and the MCA.

A 78 year old woman ('AM') was removed from her home in execution of a warrant under MHA s.135(1) in order to be assessed under MHA s.2. The First-tier Tribunal ('FTT') refused her application for discharge in the belief that her daughters would take her home and one of them – AM's primary carer and nearest relative – would not co-operate with medication or with the community team. Her detention under s.2 continued beyond the 28 days whilst proceedings to displace the nearest relative were underway.

A second tribunal application contended that she should be discharged from MHA s.2 on the basis that she would agree to stay in hospital on a voluntary basis and so the detention was not necessary and therefore not warranted. It was not in dispute that she lacked the relevant capacity and so, it was argued, she could be assessed and treated under MCA s.5 and if she was deprived of

liberty,that could be authorised under DOLS. All parties agreed that the purpose of her being in hospital was to receive psychiatric treatment.

Charles J considered that *"i) in the circumstances defined therein the DOLS were intended to and do provide an alternative basis to that provided by the MHA to authorise the deprivation of the liberty of an incapacitated person for a range of purposes including his or her assessment or treatment for mental or physical disorders in hospital, and so ii) a decision maker under the MHA has to consider whether that alternative is available and, if it is, whether it should be used when he or she applies the "necessity test" set by the MHA*." For decision-makers having to determine whether the MHA or DOLS should be used where the person requires assessment or treatment as an in-patient in a psychiatric hospital where they might be deprived of liberty, there were three questions to consider (which we paraphrase):

(1) Does the person have capacity to consent to admission as an informal patient?

> *"40. That question will be likely to include consideration of the person's capacity to agree (a) to the relevant admission to hospital for the relevant purpose, (b) to stay in hospital whilst its purpose is carried out and (c) to the circumstances relating to a possible deprivation of liberty that will prevail during that admission.*
>
> *41. I pause to add that it seems to me that whilst in theory distinctions between the elements of capacity described above could arise it is unlikely that they will do so with any regularity in practice. Also, it seems to me that it may well be difficult to assert that the person does not have the capacity to consent to the assessment or treatment but does have the capacity to agree to be admitted to and remain in hospital in the relevant circumstances and for the relevant period, and so whilst the assessment is carried out or the 'treatment is given that requires the person to be an in-patient."*

If they have capacity, the MCA is irrelevant. So if the person agrees, they can be informally admitted. If they disagree, the tests set by the MHA will be determinative (paragraph 43). If they lack capacity, the second question is…

(2) **Might** the hospital be able to rely on the provisions of the MCA to lawfully assess or treat the person?

This requires consideration of two matters. First, whether the person will comply with all the elements of what is being proposed, taking into account the degree of compliance, the risks of non-compliance and what might trigger them. After all, a hospital cannot rely on the MCA to lawfully assess and treat a non-compliant incapacitated mental health patient as they will generally be ineligible.

Secondly, one must consider the application of MCA/DOLS if the person *"is or is likely to be"* confined in a particular restricted space for a not negligible time (ie the objective element of a DOL). "Likely" meant there being a "real risk or possibility" rather than it being "probable" or "more likely than not". After commenting on the difficulties experienced by the courts in identifying a DOL, his Lordship went on to say: *"A decision of the Supreme Court is awaited on the subject, but it is likely that whatever analysis is given by the Supreme Court the position will remain that two decision makers applying the correct approach could lawfully reach different answers"* (paragraph 55). So, confirming an earlier judgment, Charles J held that *"… the DOLS regime … applies when it appears that judged objectively there is a risk that cannot sensibly be ignored that the relevant circumstances amount to a deprivation of liberty"* (paragraph 59). In such a case, the decision-maker must consider whether the person is eligible for DOLS and whether an authorisation would be required.

(3) If there is a choice between reliance on the MHA 1983 and the MCA 2005, which is the least restrictive way of best achieving the proposed assessment or treatment?

His Lordship accepted that *"Although an authorisation* under *the DOLS will not inevitably be less restrictive: a) the perception of many is that detention under the MHA carries a stigma and this supports the view that generally it will be more*

restrictive than an authorisation of a deprivation of liberty under DOLS, and b) an authorisation under the DOLS can where appropriate be made under conditions that would render it less restrictive (e.g. in respect of family visits or to the community).” He continued:

> *“67… as was submitted on behalf of the SSH and is recognised in paras. 1.3 and 4.22 of the MHA Code of Practice, it will generally but not always be more appropriate to rely on DOLS in such circumstances and so, when on an objective assessment, there is a risk that cannot sensibly be ignored that a compliant incapacitated person will be being deprived of his liberty in hospital in the circumstances relating to his or her assessment or treatment for the purposes set out in ss. 2 or 3 MHA.*
>
> *68… the correct position is that there may be cases in which a compliant incapacitated person may properly and lawfully be admitted, assessed or treated and detained under Part II MHA when he or she could be assessed or treated pursuant to s. 131 MHA and ss 5 and 6 MCA and be the subject of the DOLS [eg see MHA Code para 4.21 and DOLS Code para 4.48].*”

In answering this third question, Charles J emphasised that the decision-maker must “consider the actual availability of the MCA regime and then compare its impact, if it was used, with the impact of detention under the MHA” (para 72). He continued:

> “*73. This involves the FTT (and an earlier MHA decision maker) taking a fact sensitive approach, having regard to all the relevant circumstances, to the determination of the “necessity test” and thus in the search for and identification of the least restrictive way of best achieving the proposed assessment or treatment (see paragraphs 15 and 16 above). This will include:*
>
> *i) consideration of what is in the best interests of the incapacitated person in line with the best interests assessment in the DOLS process, and so for example conditions that can be imposed under the DOLS, fluctuating capacity and the comparative impact of both the independent scrutiny and review and the enforcement provisions relating to the MHA scheme on the one hand and the MCA scheme and its DOLS on the other, and possibly*
>
> *ii) as mentioned in paragraph 50 above a consideration of the likelihood of continued compliance and triggers to possible non-compliance and their effect on the suitability of the regimes, which links to the points made in paragraph 4.21 of the MHA Code of Practice and paragraph 4.48 Deprivation of Liberty Safeguards Code of Practice.*
>
> *74. Further, in my judgment it involves the decision maker having regard to the practical / actual availability of the MCA regime (see by analogy (A Local Authority v PB & P [2011] EWHC 501 (CoP) at in particular paragraphs 18 to 22). As to that, I repeat that the FTT (and earlier decision makers under the MHA) are not able to implement or compel the implementation of the MCA regime and its DOLS and so (a) the position of those who can implement it and whether they could be ordered to do so, and (b) when the MCA regime and its DOLS would be implemented, will be relevant. This was correctly recognised on behalf of the Appellant by the acceptance and acknowledgement of the point that when a discharge under the MHA of a compliant incapacitated person was warranted it should usually be deferred to enable the relevant DOLS authorisation to be sought (and I add obtained).*
>
> *75. In my judgment, the rationale for this more flexible approach, is that in certain circumstances which it has defined in the MHA and the MCA Parliament has*

provided statutory regimes which may or do provide alternatives and so choices which fall to be considered by the relevant statutory decision makers under the two schemes. This is such a situation but it is one in which the FTT only has jurisdiction (and power) to make a decision applying the MHA. This has the results that:

i) the FTT (and earlier decision makers under the MHA) have to apply the statutory tests imposed by the MHA and the possible application of the MCA and its DOLS are relevant to that exercise,

ii) the FTT (and the earlier decision makers under the MHA) have to assess whether as a result of the identified risks the relevant person ought to be detained, or kept in hospital in circumstances which on a objective assessment give rise to a risk that cannot be ignored that they amount to a deprivation of liberty (see for example paragraph 22 of Upper Tribunal Judge Jacobs decision in DN v Northumberland & Wear NHS Foundation Trust),

iii) if the answer is "yes", this triggers a value judgment applying the "necessity test" as between the choices that are or will or may become available,

iv) the search applying the MHA "necessity test" is for the alternative that best achieves the objective of assessment or treatment of the type described in ss. 2 and 3 MHA in the least restrictive way. This potentially introduces tensions and so a need to balance the impact of detention under the MCA and an authorisation under the DOLS as the means of ensuring that a deprivation of liberty to best achieve the desired objective is lawful and governed by a statutory regime, and

v) the theoretical and practical availability of the MCA regime and its DOLS is one of the factors that needs to be considered by the MHA decision maker in carrying out that search, as are their overall impact in best achieving the desired objective when compared with other available choices and so detention under ss. 2 or 3 MHA."

On the facts, AM lacked capacity but there was an arguable case that she would not be compliant throughout the proposed assessment and any later treatment. Hence the matter was remitted to differently constituted FTT to determine the compliance issue.

Comment

This decision illustrates how fact-sensitive the enquiry must be into which regime of detention is invoked. Particularly significant is the judicial recognition of the explicit role of DOLS when deciding whether detention is warranted under the MHA necessity test. All AMHPs and doctors making medical recommendations under the MHA must therefore have as good an understanding as is intellectually possible (!) of DOLS (MCA Schedule 1A case E especially).

Many, but nowhere near all, patients detained under the MHA are unable to decide whether to be admitted to a psychiatric ward (or to remain there following MHA detention). For many there is a possibility that they will be deprived of liberty given the very nature of the setting. So often the applicable regime of detention will ultimately depend upon their likely compliance and the availability of that regime.

A significant gap still remains. What happens where a person is within scope of the MHA 1983 but cannot be detained under it? For example, what happens where an AMHP considers that an application under the MHA 1983 ought not be made and a best interests assessor considers that a patient is within scope of the MHA 1983 and is objecting to the mental health treatment in question, and is hence ineligible for a DOLS authorisation? In this scenario, the patient would fall between the two regimes of detention, as he would be ineligible under the MCA 2005 but not detained under the MHA 1983. Prior to AM, decision-makers might have sought to press for the MHA regime by citing the judgment of Charles J in *J v. Foundation Trust* [2010] Fam 70:

"*58. In my judgment, the MHA 1983 has primacy in the sense that the relevant decision makers under both the MHA 1983 and the MCA should approach the questions they have to answer relating to the application of the MHA 1983 on the basis of an assumption that an alternative solution is not available under the MCA.*

59. As appears later, in my view this does not mean that the two regimes are necessarily always mutually exclusive. But it does mean, as mentioned earlier, that it is not lawful for the medical practitioners referred to in ss. 2 and 3 of the MHA 1983, decision makers under the MCA, treating doctors, social workers or anyone else to proceed on the basis that they can pick and choose between the two statutory regimes as they think fit having regard to general considerations (e.g. the preservation or promotion of a therapeutic relationship with P) that they consider render one regime preferable to the other in the circumstances of the given case."

However, in a key postscript at paragraph 78 of the judgment in *AM*, his Lordship has held that, although paragraph 59 is correct, paragraph 58 is not:

"*i) general propositions in respect of issues that arise concerning the interrelationship between the MHA and the MCA are dangerous,*

ii) as a general proposition the second part of paragraph 58 in J v Foundation Trust is not correct, as in the circumstances of this case the regimes provide relevant and available alternatives,

iii) albeit that the legislative history that the DOLS provisions were added to the MCA to fill the Bournewood gap and thus something not covered by the well established regime under the MHA and much of the definition of "ineligibility" in the MCA relates to the applicability of the MHA, any analysis that is based on or includes the concept of primacy of the MHA in the sense used in paragraph 58 of J v Foundation Trust (or any other sense) should be case specific, and

iv) I agree with the point made by the SSH to Upper Tribunal Judge Jacobs that my references to the MHA having primacy in J v Foundation Trust were made in and should be confined to the application of Case E in that case, and I add that even in that confined context they need some qualification to expand on the point I made that the two statutory schemes are not always mutually exclusive and so to acknowledge the point set out above that in defined circumstances Parliament has created alternatives that are factors for the relevant decision maker to take into account." (emphases added)

So even for those within the scope of the MHA (per MCA Schedule 1A, case E), the MHA may no longer have primacy and DOLS remains an alternative to be taken into account. Given that MHA decision-makers have no control over the outcome of MCA assessments, and that MCA decision-makers have no control over the outcome of MHA assessments, the scope for legal uncertainty remains. Insofar as tribunals are concerned, they may – as his Lordship suggests – use MHA s.72(3) to defer discharge to a future date until (or in the hope that) a DOLS authorisation is obtained. But this is a gamble. The hospital managers can request an authorisation up to 28 days in advance of the DOL, or issue themselves with an urgent authorisation, but no-one is able to guarantee the outcome of the eligibility assessment (see *A Primary Care Trust v. LDV and others* [2013] EWHC 272 (Fam)). The same gamble arises for AMHPs who have two medical recommendations for MHA detention but consider that the least restrictive way of best achieving the proposed assessment or treatment is via DOLS. What are tribunals and AMHPs to do?

There are clearly limited situations in which the MHA must be used and DOLS cannot be (eg MCA Schedule 1A case A). For case E, rather than giving primacy to the MHA the legislation is attempting to put incapacitated persons on the same footing as

those with capacity. So if they could be sectioned and object it must be assumed that treatment cannot be given under the MCA. The more 'flexible' approach advanced here by Charles J may well create as many problems and it solves. But the guiding principle – that decision-makers should strive to find the least restrictive way of best achieving the objective – is the key. There are two distinct schools of thought which will no doubt argue over which regime is less restrictive, given the respective rights of the patient that are interfered with and the corresponding safeguards that they are afforded. In the our opinion, it is impossible to say in the abstract, looking at the MHA and DOLS, which is less restrictive and it will very much depend upon the circumstances and proposed care regime of each individual patient.

Understanding the interface between the MHA and DOLS is becoming so complex for lawyers and the judiciary – let alone anyone else – that there must now be a growing concern as to whether the legislation in fact complies with the ECHR. As the Strasbourg Court held in *HL v United Kingdom* (2005) 40 E.H.R.R. 32:

> "*114… It is also recalled that, given the importance of personal liberty, the relevant national law must meet the standard of "lawfulness" set by the Convention which requires that all law be sufficiently precise to allow the citizen - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action might entail …*"

No wonder the judiciary are resorting to the High Court's inherent jurisdiction to plug the gaps.

We welcome comments upon this case, and that of Dr A discussed above, from mental health practitioners on the ground, because both cases raise difficult questions of principle and procedure.

Donor cannot appoint further replacement attorney

Re Boff CoP Case 12338771

Lasting Powers *of Attorney*

Summary

In this case, Senior Judge Lush had cause to consider a short but important point of construction of the provisions of s.10(8) MCA 2005, to answer the question of whether the donor of a LPA can appoint a replacement attorney to succeed another replacement attorney. He also took the opportunity to outline practical problems that arise with the appointment of any replacement attorney.

Section 10(8) provides that:

> *"An instrument used to create a lasting power of attorney –*
>
> *(a) cannot give the donee (or, if more than one, any of them) power to appoint a substitute or successor, but*
>
> *(b) may itself appoint a person to replace the donee (or, if more than one, any of them) on the occurrence of an event mentioned in section 13(6)(a) to (d) which has the effect of terminating the donee's appointment."*

The events mentioned in ss.13(6)(a)-(d) are disclaimer by the donee, death, bankruptcy, dissolution or annulment of a marriage or civil partnership (if the instrument does not provide that the appointment is to survive) or incapacity of the donee.

The donor, Dr Boff, sought to execute a property and affairs LPA appointing her husband to be her sole attorney, and then (in sequence), her two sons and then her niece as replacement attorneys. She sought to do so because she had been an attorney for her mother under a joint and several EPA, and wished to avoid the difficulties that she had experienced in practice with financial institutions declining to accept that she was empowered to act

individually under the power. She therefore sought to grant powers successively, and that the succession be determined according to her clearly expressed wishes.

The OPG declined to register the LPA unless the provisions relating to the appointment of replacement attorneys were severed. The Public Guardian then brought an application for an order that the offending provisions be severed under the provisions of Paragraph 11 of Schedule 1 to the MCA 2005, and to direct the Public Guardian accordingly. Dr Boff and the putative attorneys resisted the application. It would appear that this was the first time that either a donor or an attorney had ever formally objected to an application by the OPG to sever an ineffective provision from an LPA, in the context of some 1,200 such applications being brought in the year 2012 alone. After an attended hearing, Senior Judge Lush granted the OPG's application. In a careful rehearsal of the learning in the area (which, as he noted, used to be an area where angels feared to tread), he noted that s.10(8) was ambiguous because (he considered) the draft Mental Incapacity Bill that had accompanied the Law Commission's report on Mental Incapacity had failed to give effect "*to the true intention of the legislation, which was that replacement attorneys should only be available in circumstances where the original donee has ceased to act for a reason which can be established by objective evidence*" (para 44). Senior Judge Lush continued:

> "*45. What is striking is the complete absence of any reference, anywhere, to the possibility that a replacement attorney can replace a replacement attorney. Not only in its 1995 report, but also in its earlier report in 1983, the Law Commission spoke only of replacing the original donee, and there is no suggestion of the possibility that a replacement attorney might replace a replacement attorney either in the prescribed forms of LPA or in the guidance published by the OPG.*
>
> *46. Having regard to all the circumstances, therefore, and considering the LPA scheme as a whole, including the wording of section 10(8)(b), its pre-legislative history, the guidance published by the OPG and the prescribed forms of LPA, I find that a replacement attorney can only replace an original attorney and cannot replace a replacement attorney."*

Senior Judge Lush disagreed with the suggestion of the Legal Adviser to the OPG that the solution to Dr Boff's problem "*would be to appoint two or more replacement attorneys to act jointly and severally, coupled with non-binding guidance expressing a wish (not a restriction) that they should act in turn*" because this would be to defeat Dr Boff's object. Rather, Senior Judge Lush considered that "[t]*o achieve what she intended within the existing legislative framework, Dr Boff should have made two LPAs: one appointing her husband to be the sole attorney and her son Edward to be the sole replacement attorney; and the other appointing her son Arthur to be the sole attorney and her niece Sarah to the sole replacement attorney, with a condition that the second instrument will not come into effect until the first instrument has ceased to be operable for any reason. I realise that this could involve the payment of an additional 'application to register' fee, but there would be no immediate need to register the second LPA, and it may never need to be registered and used, in any event*" (para 48). He therefore directed that the ineffective provisions be severed.

Senior Judge Lush also went on – obiter – to make some observations about the complexities of the appointment of successive attorneys that he considered had never properly been addressed either by the Law Commission or by the Parliamentary draftsman formulating the MCA 2005. At paragraph 51, he noted some of the practical problems that arise with the appointment of replacement attorneys thus:

> *"(1) When the donor or an attorney makes an application to register an LPA, the named persons are not informed of the identity of any replacement attorneys on form LPA 001; they are only given the names and addresses of the original attorneys.*
>
> *(2) There is no formal registration process for replacement attorneys and no facility whereby a named person, donor or co-*

attorney can object to the appointment of a replacement attorney, either when the original application is made to register the instrument, or when an event under section 13(6) of the Mental Capacity Act 2005 activates the replacement.

(3) Replacement attorneys are really only viable where the donor appoints a sole original attorney or more than one original attorney to act jointly and severally.

(4) Although a replacement attorney can replace an original attorney who has been appointed to act jointly, the outcome is unlikely to be what the donor intended. For example, if the donor appointed A and B to act jointly, and C to act as a replacement attorney, A's bankruptcy, death or disclaimer would terminate A and B's joint appointment, and C would become the sole attorney, rather than act jointly with B. Although the OPG guidance refers to this at the foot of page 19 of LPA 112, the prescribed form itself does not warn donors of the implications of appointing a replacement attorney where they have appointed their original attorneys to act jointly, or jointly for some decisions, and jointly and severally for other decisions."

Comment

It is difficult not to have a degree of sympathy for Dr Boff and her attempts to secure against the practical difficulties that she herself had experienced as an attorney. However, the outcome of the Public Guardian's severance application was in reality never in great doubt in light of the materials drawn upon by Senior Judge Lush in reaching his conclusion. Indeed, on one view, it could have been said that he could have reached it without the need for those materials, on the basis that s.10(8) only referred to the ability of the donor to appoint a replacement for the donee appointed under the instrument (or any one of them if more than one had been appointed), which on its face stands as a reference to the original donee alone. In any event, perhaps of greater significance for practitioners advising upon LPAs are the observations made by Senior Judge Lush at paragraph 51 of his decision. The first and second points indicate what might be considered to be failures in the statutory scheme, in that they render it more difficult to challenge the appointment of a replacement attorney; the third and fourth points represent advice that we suggest must be given whenever a donor is considering the appointment of joint and several attorneys but also wishes to consider the appointment of replacement attorneys.

Severance of provision relating to replacement attorney

Re Goodwin ***(an order of the Senior Judge made on 17 June 2013)***

The donor appointed three attorneys and two replacements. Regarding the replacements, she directed that if one ceased to act the other could act alone, and added: "She should also make every effort to find one or two replacement attorneys to take over her responsibilities in the event of her own death, or if she no longer has the mental capacity to carry on, so that there is a continuing 'Lasting Power of Attorney' in place during the donor's lifetime." On the application of the Public Guardian this provision was severed on the ground that section 10(8)(a) of the MCA invalidates any provision in an LPA giving an attorney power to appoint a substitute or successor.

Deputy exceeded gift-giving authority

Re Joan Treadwell (Deceased) [2013] EWHC 2409 (COP)

Gifts

Summary

This was an application by the Public Guardian to

enforce a security bond in respect of unauthorised gifts made by the late Mrs Joan Treadwell's deputy for property and affairs, Colin Lutz. As Senior Judge Lush noted, it was the second case involving excessive gifting by deputies to have come before him during the last few months. The first was *Re GM* [2013] COPLR 290. They came before the Court because of the Public Guardian's statutory duty to supervise deputies under s.58(1)(c) MCA 2005. In the course of supervising these deputies, the Public Guardian became aware that they had exceeded their authority to make gifts, and the OPG advised them to apply to the court for retrospective approval.

Mrs Treadwell married three times; Mr Lutz was her eldest child by her first husband. After she was diagnosed with Alzheimers, she sought to appoint her third husband, William ('Bill') Treadwell as her sole attorney under an EPA; when Mr Treadwell sought to register the EPA Mr Lutz objected; those objections were dismissed, but he sought subsequently to revoke the application on the basis of various allegations of financial impropriety against his stepfather. Those objections were never determined as Mr Treadwell ultimately disclaimed his appointment on the basis of ill-health. Mr Lutz was then appointed his mother's receive under the MHA 1983 and then, after the coming into force of the MCA 2005, her property and affairs deputy. He was required to obtain and maintain security in the sum of £200,000.

Some years previously, Mrs Treadwell had made a will in which left her entire estate to her husband and appointed him to be her sole executor. In the event that he predeceased her, she (1) appointed Colin Lutz and her two stepdaughters to be her executors; (2) gave £1,000 to each of her five children; and (3) gave her residuary estate to her stepdaughters, Joanna Wildgoose and Emma Treadwell, in equal shares. Her most valuable asset was her half share of the matrimonial home.

In 2007, Mr Lutz applied for an order authorising him to execute a statutory will on his mother's behalf, disinheriting her stepdaughters and leaving the estate to her children in equal shares. A compromise was reached between the various parties, and a statutory will was executed after a consent order was endorsed, providing for the appointment of two solicitors to be her executors and trustees, the giving of her personal chattels to her children in equal shares, the giving of pecuniary legacies of £5,000 to each of her five children and her two stepdaughters, and the giving of her residuary estate to her stepdaughters in equal shares. Mrs Treadwell died in October 2012.

In his capacity as deputy, Mr Lutz gave gifts on his mother's behalf totalling some £59,375 over the period 10 April 2009 to 9 April 2012 to family members and other individuals; the primary beneficiaries were Mrs Treadwell's great grand-children (none of whom were the issue of Mr Treadwell's children). These included housewarming, christening and graduation gifts in the order of £1,800 to £2,500. The Public Guardian was concerned as to the level of gifting and advised Mr Lutz to apply for retrospective approval. Mrs Treadwell died before the application was heard.

In his judgment, Senior Judge Lush did not reiterate the detailed discussion of the law relating to the making of gifts by deputies in *Re GM*; rather, he approved on behalf of the Court certain aspects of the current practice of the OPG which were set out in a witness statement provided by the OPG's legal adviser. In particular, he approved the "*OPG's general approach to quantifying loss to the estate by identifying, first, the gifts that the deputy was authorised to make and, secondly, any additional gifts that, having regard to all the circumstances, might reasonably have been ratified by the court*" (para 62). He also endorsed the proposition that gifts made at a christening, housewarming and graduation may be regarded as gifts that are made on customary occasions, along with birthday and Christmas presents, but subject to the proviso that they are "*not unreasonable having regard to all the circumstances and, in particular, the size of* [the donor's] *estate*" (paras 64-5).

Whilst Senior Judge Lush agreed that it is not possible to lay down any general rule as to the amounts a deputy will give away, each case turning on its facts, he agreed with the OPG's submission that "*Mrs Treadwell's income was approximately £10,000 a year. As she was fully funded, it is submitted that the deputy could have made gifts to close family members each year in the total sum of £1,000 within the terms of the deputy order*" (para 72). He considered that for someone in her financial position, anything over, say, £100 for a christening or graduation gift, was unreasonable

having regard to all the circumstances, and in particular the size of her estate (para 68), and, in the case of the housewarming gifts, anything over about £50 was unreasonable. As he noted, "[o]*ne would normally expect such a gift to be either a specific item for use or ornament in the home or garden or vouchers from a high street department store that offers a wide selection of household goods*" (para 69). It did not help Mr Lutz's cause in this regard that the graduation gift made to his daughter was made some four years after she had graduated.

At para 72, Senior Judge Lush also endorsed the OPG's observations regarding the extent to which the court may have ratified gifts in excess of £1,000 over the three accounting years in question. "*In paragraph 40 of her witness statement Jill Martin said that, in the particular circumstances of this case:*

> *"'… the court would have been prepared to ratify these [customary] gifts in the sum of £12,000 on the basis that, if the deputy had applied in each of the three years for authority to make gifts to family members of £4,000 (in addition to the £1,000 a year which arguably fell within the terms of the deputy order), the court would have granted the application for the following reasons:*
>
> *(i) Mrs Treadwell's needs were being met;*
>
> *(ii) she would be left with an income of about £5,000 a year to cover unforeseen expenses; and*
>
> *(iii) the intention behind the statutory will was to preserve funds deriving from Bill Treadwell for his daughters, not to preserve Mrs Treadwell's own unspent income.'"*

Senior Judge Lush went on to consider the Court's jurisdiction after the death of the person to whom the proceedings relate. He noted that, in respect of deaths after 1 May 2010, a security bond taken out by a deputy will remain in force until the end of the period of two years beginning with the date of death or until it is discharged by the court: Lasting Power of Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, Regulation 37(3), as amended by the LPA, EPA & PG (Amendment) Regs 2010, Reg 4.

Senior Judge Lush further noted that, ordinarily, the personal representatives would make any application to call in a security bond after the death of the person to whom the proceedings related but that, because the Public Guardian had been actively involved in this matter immediately before Joan Treadwell's death, he considered that it would be appropriate for his office to make the application on this occasion. Senior Judge Lush implicitly endorsed this course of action. Whilst the Court does not have jurisdiction to ratify any gifts made by the former deputy after the death of the person to whom the proceedings relate, Senior Judge Lush agreed with the OPG that in the unusual circumstances of the case it would only be appropriate to call in Mr Lutz's security bond "*only in respect of any unauthorised gifts which the court would not have ratified had the earlier proceedings not been discontinued. It may be considered harsh to include in the estimation of loss any gifts which would have been ratified but for Mrs Treadwell's death*" (paras 78-9).

Senior Judge Lush then turned to the extent to which Mr Lutz had sought improperly to interfere with his mother's succession rights as little as possible. Having rehearsed the historical position, he found that "[i]*n the context of testate succession, at least, the principle that deputies should interfere with succession rights as little as possible is compatible with the principle set out in section 1(5) of the Act, namely, that an act done or decision made for or on behalf of a person who lacks capacity must be done or made in their best interests*" (para 85). Further, by s.4(6) MCA 2005, one of the factors that any substitute decision-maker is required to take into account is any relevant written statement made by the individual when they had capacity; "[i]*n the context of someone's property and financial affairs*," Senior Judge Lush continued, "*I can think of no written statement that is more relevant or more important than a will, and when testators make a will, they have a reasonable expectation that their wishes will be respected*" (para 88). In the instant case there was, in reality, relatively little difference between the will made by Mrs Treadwell and the statutory will executed on her behalf following the approval of the consent order put before the Court.

However:

> "*93. Although he was a party to it, Colin Lutz resented the compromise reached over the statutory will and subsequently sought to undermine it by dissipating any residuary estate his mother might leave on her death.*
>
> *94. The figures speak for themselves. Mrs Treadwell's income was approximately £10,000 a year and over a three year period Mr Lutz made gifts from her estate totalling £59,375. Having disposed of her entire income, he made inroads into her capital.*
>
> *95. I was unconvinced by his invocation of the comments of Mr Justice Lewison in Re P (Statutory Will) [2009] COPLR Con Vol 906, at paragraph 44, that his mother was 'doing the right thing.' She played no part in the process and, instead of doing the right thing as her deputy, Mr Lutz was interfering with the succession rights under her will by redirecting his stepsisters' inheritance in favour of his own family by making excessive gifts to them.*
>
> *96. In my judgment, Colin Lutz exceeded the authority conferred upon him by the court when making excessive unauthorised gifts on Mrs Treadwell's behalf, and … I calculate the loss to her estate to be £44,375. I allow the Public Guardian's application and order enforcement of the security in that sum."*

Finally, Senior Judge Lush gave his reasons for giving leave for the judgment to be reported in an unanonymised form. It is clear that one of the primary reasons for so doing was the "*educative*" role that the publication of such judgments played "*in informing the public about what deputies and attorneys can and cannot do, what happens when they misbehave, and how the Office of the Public Guardian and judges of the Court of Protection deal with such cases*" (para 100). Further, "[w]h*en a deputy or attorney exceeds their authority, or behaves in a way that is not in the best interests of a person who lacks capacity, they forfeit any right to confidentiality and there is no good reason why their identity and conduct should not be made public*" (para 101).

Comment

To use a non-technical term, Senior Judge Lush is on something of a roll at the moment in the terms of promulgation of judgments defining the scope of the obligations upon deputies and attorneys. It is to be hoped that this judgment, along with that in *Re GM* and *Re Buckley* (relating to attorneys) will serve the educative purpose that he referred to at the close of his judgment, especially given that, as he noted at the outset of the judgment, there is very much less ability to control and to sanction misconduct on the part of attorneys, there being both no statutory obligation on the part of the OPG to scrutinise attorneys, and no equivalent obligation upon attorneys to obtain and maintain security.

Sale of P's assets authorised to pay for care home fees

Re RGS No 2 COP case 11831647

Deputies – financial and property affairs

Summary

Some readers may have read the stories in the national press about the forced sale of a Pisarro owned by an incapacitated adult to pay for care home fees. The transcript of the reasons given for endorsing the relevant consent order perhaps gives a more nuanced picture than that possible within the confines of a newspaper story.

This is the follow-up to a previous decision made by District Judge Eldergill in November 2012. By way of background, RGS was being cared for in a residential home. His son RBS removed him from the home unilaterally on the grounds that he was not being adequately cared for and was deprived of his liberty. In the complex Court of Protection proceedings that followed, an order was made by consent that it was in RGS's best interests that he should continue to live at the care home, and for contact to be supervised. The Court appointed, inter alia, Essex County Council to act as deputy to manage RGS's affairs having concluded that it would not be appropriate for continue to have

access to RGS's assets as it had been shown that RBS had previously used his father's assets to his own advantage. The Council reached the conclusion that a number of RGS's paintings and artworks should be sold to meet his on-going financial liabilities and the escalating costs of his care; it applied to the Court for permission to sell the artworks to meeting these liabilities. RBS resisted this and reported the deputy's decision (and the proceedings more generally) to the media, who then wished to report on the case. He also reported the proceedings himself via Facebook and other social and local media outlets. In November 2012, District Judge Eldergill concluded that RBS did not have capacity to conduct proceedings and appointed a litigation friend to act on his behalf.

The litigation friend having been appointed to act on RBS's behalf, proceedings were then concluded, formally by consent, albeit against RBS's vigorous opposition to parts of it. Because of this opposition, and also because the press were present at the hearing (as they had been at the previous hearing), District Judge Eldergill gave full reasons for endorsing the consent order put to him. That order provided for RGS to continue to live at the care home and for contact to continue to be supervised. It also provided for RBS to vacate RGS's home, in which he was living, so that it could be sold, along with RGS's assets, most notably a painting by Pisarro (a part of the order with which RBS agreed). District Judge Eldergill noted in this regard that:

> "*In an ideal world, the Pissarro painting would be passed by father to son or daughter, and be a treasured keepsake. If his father still had capacity to appreciate the painting, I am sure that he would prefer that. However, the regulations require that the cost of RGS's care is paid for from his own assets and it is no longer possible to keep the painting. The position would be the same if he still had capacity to make that decision for himself.*"

District Judge Eldergill also approved the execution of a statutory will on behalf of RGS, notwithstanding the existence of an apparent will of questionable validity that excluded RGS's grandchildren; in his earlier decision, he had indicated that, if lack of testamentary capacity is established, his view was that it would be in RGS's best interests to make a statutory Will. Such would, in his view "*be prudent, avoid upsetting and expensive litigation later and ensure that his grandchildren's situation is considered fairly*." He accepted evidence from RGS's daughter that her father would never have made a statement that he did not wish any of his grandchildren to inherit anything, and approved the execution of a statutory will that made the usual substitutional provision for grandchildren in the event that the relevant parent predeceases.

District Judge Eldergill also authorised naming Essex County Council as the local authority, for perhaps the opposite reason to the circumstances under which local authorities have been named in other judgments. As he noted, "[t]*he local authority and its staff have stoically borne a lot of undeserved and inaccurate criticism in the past two years, and they have been unable to defend their position in reply to local press articles and internet reports initiated by RBS. Eventually, such a campaign of criticism can become demoralising for staff, and affect their performance and willingness to continue to provide care. It is in RGS's best interests that those caring for him know and can say that they have the court's support and that, after very detailed inquiries, the court is wholly satisfied that the county council has provided him with a very high level of service. Furthermore, the council could not have been more compassionate in its approach to RBS's difficulties. Naming the local authority will also help the press to give context to their reports, which will increase the interest of readers, and therefore their interest in judicial matters and the workings of the court*." He also praised the press for the way they had approached the hearings and liaised with the court.

Comment

At first blush, it might be thought that there was a tension between the duties upon a local authority acting in its capacity as P's property and affairs deputy, and the duties upon it to ensure payment of care home charges levied as a result of accommodation being provided on its behalf under the National Assistance Act 1948. This judgment does not expressly discuss this tension, but, implicitly suggests that on a proper analysis it will not necessarily arise: as District Judge Eldergill noted, it was irrelevant to the operation of the charging regulations that RGS did not have capacity

to decide upon the management of his property and affairs. If it was in RGS's best interests to reside in a care home, then it was necessary that he pay the costs of so doing (including those previously accrued); absent the sale of (inter alia) the Pisarro, he could not meet those costs, and hence there was, in reality, no choice but to sell such assets as were needed to meet those costs. In a different factual scenario, one could imagine the tension being much more acute.

The case is also of interest for the approach that was taken to the execution of a statutory will, following (albeit not citing) that of HHJ Hodge QC in *Re D (Statutory Will)* [2010] EWHC 2159 (Ch) [2010] COPLR Con Vol 302, i.e. circumventing potential later disputes about the validity of a 'will' over which substantial doubt has been cast by authorising the execution of a statutory will for P. As such, it represents a further – entirely pragmatic – inroad into the principle that the Court of Protection will not pronounce upon the validity of wills because it has no jurisdiction to make a formal ruling upon the validity of any will (see *Re M* [2011] 1 WLR 344 at paragraph 50(ii) per Munby J as he then was).

Guidance on appointment of personal welfare deputies

Re JK CoP Case 1185523T

Deputies – welfare matters

Summary

This 'classic' best interests decision on residence, which has recently been publically available, merits note because of the views expressed by District Judge Ralton as to the circumstances under which it would be appropriate to appoint a personal welfare deputy.

The facts of the case and the decision on P's residence are not for these purposes relevant (although they stand as a useful and very practical example of the application of the best interests test contained in s.4 MCA 2005). At the end of the judgment, however, District Judge Ralton gave (at the invitation of the Official Solicitor) a short judgment of the circumstances under which the court might be minded to appoint such a deputy. This was said to be for the benefit of family members in the case should any of them think about applying for such deputyship in the future (the case having, in fact, begun as an application by a family member to be appointed personal welfare deputy for P, although the application was not pursued).

At paragraphs 28ff District Judge Ralton noted as follows:

> *"28. A Deputy is a decision-maker appointed by the court. The appointment cannot be made unless the court declares that the person for whom the decisions are to be made lacks capacity to make those decisions, and it is in his or her best interests for a decision-maker to be appointed. The ethos of the Mental Capacity Act 2005 as a whole in alignment with Article 8 of the European Convention is for the State to intervene as little as possible. The least interventionist approach is immediately noted by Section 16(4) Mental Capacity Act 2005 which says:*
>
> > *'When deciding whether it is in P's best interests to appoint a Deputy, the court must have regard in addition to the matters mentioned in Section 4 to the principles that (a) a decision by the court is to be preferred to the appointment of a Deputy to make a decision, and (b) the powers conferred on a Deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.'*
>
> *So, assuming a lack of capacity is established, the first question has to be whether a Deputy is required at all.*
>
> *29. Section 5 Mental Capacity Act 2005 so far as matters of a personal welfare nature are concerned codifies what is noted as a sort of general defence, so someone has a defence to for example an allegation of assault if the act that was decided upon on P's behalf was done*

when there was reasonable belief that P lacked capacity and it was in P's best interests for that act to be done. The Code of Practice itself says at para. 8-38 that Deputies for personal welfare decisions will only be required in the most difficult cases where important and necessary actions cannot be carried out without the court's authority or there is no other way of settling the matter in the best interests of the person who lacks capacity to make particular welfare decisions. The most recent case on personal welfare Deputyships is the case of G and E v Manchester City Council and F [2010] EWHC 2512 a decision of the Honourable Mr Justice Baker, and I refer to parts of paras. 56 and 57:

> *'56. The vast majority of decisions about incapacitated adults are taken by carers and others without any formal authority. That was the position prior to the passing of the Mental Capacity Act under the principle of necessity.*
>
> *57. The Act and Code are therefore constructed on the basis that the vast majority of decisions concerning incapacitated adults are taken informally and collaboratively by individuals or groups of people consulting and working together. It is emphatically not part of the scheme underpinning the Act that there should be one individual who as a matter of course is given a special legal status to make decisions about incapacitated persons.'*

30.1n the case of JK there was a single issue to be properly determined by the court, which was where should he live, and therefore the appointment of a Deputy to resolve that issue would not have been appropriate in any event. As I read the Act and the Code and the authorities, the place of Deputyship is to fill a legal vacuum when there are a number of non-contentious decisions to be made and as a matter of law someone needs to be given a legal status to make those decisions. When I say as a matter of law, it may be as a matter of essential practicality as well. Appointment of Deputies for the property and financial affairs of incapacitated persons is common because it is difficult to find otherwise a legal status to receive the income and pay the bills. However, whilst each case must always turn on its own facts I think it would be very rare for the court to consider it right to delegate its issue-resolving function to a Deputy on any significant issue of principle such as residence, type of care, treatment and such like. The role of resolving such issues must remain with the court of justice.

31. Not mentioned in G v [E], *but I think relevant, is Article 8 of the Convention rights because I do think that putting in place a State-appointed decision- maker- which is what a Deputy is- is a considerable interference with family life and would therefore have to justify the twin requirements of legitimate aim and proportionality. One can never say never, but it is hard at the moment to envisage how in most cases a Personal Welfare Deputy could ever be so justified."*

Comment

District Judge Ralton was not, in fact, correct that the most recent decision on personal welfare deputies was G v E. In the subsequent decision in *SBC v PBA and others* [2011] EWHC 2580 (Fam), Roderic Wood J considered the words of Para 8.38 of the Code of Practice, and the Official Solicitor's submission that they supported the proposition (accepted by HHJ Turner QC in *London Borough of Havering v LD and KD* [2010] EWHC 3876 (COP)) that personal welfare deputies should only be appointed in rare cases. Roderic Wood J, however, accepted (at para 67) the rival submission that:

"… [the Court] *should look at the unvarnished words of the Statute consistent as that approach is with the contemporaneous practice of interpreting statutory provision and the law in general, but in doing so I can take account of the guidance in the Code in coming to my conclusions. I prefer the analysis of Mr McKendrick on behalf of the applicant and accordingly construe the threshold test for the appointment of a deputy, whilst not failing to keep sight in managing the appointment of the need for any deputy to engage in the collaborative approach which will include collaboration with members of the family as enjoined by Hedley J and Baker J in the cases of Re P (Vulnerable Adult: Deputies) and G v E (above) and in taking into account, as any deputy should, the guidance given in the Code of Practice. My reasons for preferring Mr McKendrick's interpretation are as follows:*

(i) the words of the statute are the essential provisions laid down by Parliament;
(ii) whatever its genesis and weight, the Code of Practice is indeed only guidance;
(iii) there is a reasonable expectation in the Code that its provisions should be followed;
(iv) departure from it, if undertaken, should require careful explanation;
(v) as I have said already, it remains essentially guidance – however weighty and significant – and is not the source of the relevant power which is to be found only in the statutory provision;
(vi) in any event, I do not interpret (if I may respectfully says so) the careful and erudite discussion of this issue by Baker J or indeed His Honour Judge Turner QC (quoted above) as advocating a contrary approach."

Whether the judgment in *SBA* does stand entirely consistently with that in *G v E* and/or that in *LD and KD* is a matter that may ultimately need to be revisited by the Courts, but on any view, it is suggested that it is clear – essentially for the reasons outlined by District Judge Ralton – that all significant decisions of principle relating to personal welfare (and, arguably, property and affairs) should be made by the Court rather than by a Deputy. That is, of course, if they should not be taken by way of an assisted decision-making or co-decision-making process of the nature suggested by the Irish Assisted Decision-Making (Capacity) Bill discussed in our August newsletter so as to be compliant with the requirements of the Convention on the Rights of Persons with Disabilities…

Best interests of autistic man dictated move into residential care

A Local Authority v WMA [2013] EWHC 2580 (COP)

Best interests – residence and contact – deprivation of liberty

Summary

A Local Authority applied for an order that it was in the best interests for WMA, a young man diagnosed with autistic spectrum disorder, to reside at a small residential unit with two other residents, in circumstances where he had lived his whole life with his mother, MA. MA attended the first day of the hearing in person and accepted that WMA lacked capacity to decide where to live and the Court accepted psychiatric that he lacked the capacity to make this decision. MA was strongly opposed to MA living away from her. When WMA met HHJ Cardinal before the hearing, he stated unequivocally that he wished to live with his mother permanently. He said that he did not like having carers visit him at home and did not like mixing with other people. He said that was his choice. HHJ Cardinal accepted that, given WMA's high level of functioning for a person with a learning disability, his wishes and feelings should be accorded greater weight than those of some, but found that "*he is unable to understand the merits of a move to B compared with his remaining with*

MA."

After hearing evidence from an independent social worker and from the local authority, HHJ Cardinal made the following findings (at paragraphs 99-105):

> "*First, the local authority social workers have been unable and will be unable to provide appropriate care for WMA and monitor it because of his refusal to accept it and because of MA's inconsistence and erratic interference with the local authority help.*
>
> *Second, there is a worrying history about MA's care for WMA that shows no sign of abating.*
>
> *Third, that the local authority has made special efforts over the last eighteen months to engage fully with both of them but there has been an unacceptable degree of conflict. I am not persuaded the local authority could have done any more and I have noted with concern the helpful evidence of CG that she has felt under threat recently.*
>
> *Fourthly, WMA lives an isolated lifestyle and is expected often to be in mother's eyes and ears. His relationship with her, however, is a frustrated one and there is clear evidence on mother's case alone that he is, at times, beyond control.*
>
> *Fifthly, the isolation is such that WMA just does not go out with any with any regularity. Dog walking and shopping appear to be virtually the limit of his outdoor activities with the exception of the few outings that were organised by Delos who he now rejects. As long ago as February 2012 he could not recall when he last went out anywhere.*
>
> *Sixthly, the home of MA and WMA continues to be kept to a very low standard of cleanliness and, whilst it is not for the court to impose respectable middle class standards of care, nonetheless, the home's condition has on occasion deteriorated. The recent evidence of CG, for example, that the fridge is kept to a low standard of cleanliness is very concerning. True enough, this has not yet made WMA ill but I am sure that it will one day,*
>
> *Seventhly, there is a plain history of neglect of WMA by his mother. She does not keep him sufficiently safe or clean or his clothes sufficiently clean to an acceptable standard. The clear point is that MA's standards are not simply lower than the norm, they are below a good enough standard.*"

HHJ Cardinal concluded that there was no doubt it was in the best interests of WMA to move to a residential unit. Further, whilst he noted that the law as to what amounts to deprivation of liberty was somewhat in flux pending the decisions of the Supreme Court, and that, for his part, "*it is not easy to follow the reasoning of the Cheshire West decision*" (para 150) he had "*no doubt that by moving to B there would be a deprivation of liberty involved and not simple restraint. WMA will have to live at B. He will be in a flat that will be his. There is no time limit for him being away from MA. Accordingly, I must not simply declare what is in his best interests but make such orders as to enable the keeping at WMA at B practicable. That said, the terms of WMA being there must be the least restrictive of his freedom of action. He is an adult, not a prisoner, albeit an adult in need of careful and kindly but firm support*" (para 150). HHJ Cardinal granted an authorisation for the deprivation of his liberty and went on to recommend that there should be power for the local authority to enter MA's home if necessary, a power to the police to restrain WMA if necessary and power to the local authority to move WMA to the residential unit and sign a tenancy agreement on his behalf (at paragraph 153). He accepted the Official Solicitor's proposal that there should be a protocol between the police and the local authority relating to the transfer, although this could not cover all eventualities.

Comment

This case is largely fact-specific but it does highlight the importance of a thorough and rigorous best-

interests analysis. The Official Solicitor was critical of the local authority for misunderstanding the decision making process required under the MCA 2005 and emphasised that it is not sufficient to decide, albeit with the best of intentions, what is best for the relevant person. There must be careful justification with reference to s.4 MCA 2005 and a proper balancing of the benefits and disadvantages of the various options.

Local authority ordered to pay substantial costs after abandonment of fact-finding process

A Local Authority v HS & Ors Cop Case COP1201711T

CoP Jurisdiction and Powers – Costs

Summary

Applications for costs were made against a local authority that withdrew, at a late stage in proceedings in the Court of Protection, allegations that one of the parties, HLS, had sexually abused the subject of the proceedings, his sister, HS. HLS and the Official Solicitor, on behalf of HS, sought orders for their costs in relation to the allegations from the time they each became involved in these proceedings, to 28 May 2012, when the local authority withdrew its allegation of sexual abuse and the scheduled 3-day fact-finding hearing became unnecessary. They also sought their costs of the costs hearing.

DJ Eldergill recalled the statement of principle in *VA v Hertfordshire* [2011] EWHC 3524 (COP) that a costs order may be justified where there has been "*substandard* practice *and a failure by the public bodies to recognise the weaknesses of their own case and the strength of the cases against them.*" DJ Eldergill stated (at paras 185 to 188):

> *"Cogent evidence never existed. It should have been obvious long before these proceedings were commenced — the allegations had been made in 2009 and 2010, giving plenty of time for analysis of whether they were likely to stand up — that there was never any cogent evidence.*
>
> *The local authority's solicitor and the senior social workers ought to have been aware of the flaws and the fact that any case based on that evidence would not get anywhere near the threshold required by the court. The local authority's case was never there.*
>
> *This is not a case of the local authority being 'damned if it does and damned if it doesn't' or of it being on the horns of a dilemma. The local authority was not expected to investigate and analyse the allegation and evidence to the same high standard later demonstrated by Mr McGuire QC. However, It had plenty of time, and took plenty of time and resources, before proceedings were commenced to come to and defend a position: this was not a case of having urgently to remove someone following an allegation of abuse at home, where a difficult and immediate decision has to be made as to what weight to give a yet-to-be investigated allegation.*
>
> *There was a prolonged failure on the local authority's part to recognise the weakness of its case. The allegations were vague and insufficiently particularised. The 'evidence' in support was manifestly inadequate. It was internally inconsistent and unreliable. The truth of what was alleged was assumed without any proper, critical, analysis."*

In light of this finding the local authority agreed to pay £53,000 to the Official Solicitor on behalf of HS and £35,000 to HS. These sums were accepted by both parties.

Comment

This case should be read together with the decision of Theis J in *Surrey County Council v M & Ors* [2013] EWHC 2400 (Fam) which follows immediately below. Both illustrate the vital importance of a critical and early rigorous analysis being undertaken by any party (but in particular a public body) of the

evidence available to support contentions advanced before the Court.

Assessment of reliability of evidence crucial in proceedings brought on the basis of safeguarding concerns

Surrey County Council v M & Ors [2013] EWHC 2400 (Fam)

Practice and procedure – other

Summary

This case from the Family Division is of no little importance for the light that it sheds by analogy on the approach that local authorities should take before instituting proceedings upon the basis of safeguarding concerns.

The child in question had been born with significant difficulties and required highly specialist care, spending the first year of her life in hospital. Her parents had been given training whilst she was in hospital in the necessary procedures required for her to be able to be cared for at home, including inflating a small 'cuff' used to support her breathing. Some eight months after the child came home, the local authority made a safeguarding referral; the child was then removed from the parents' care under a s.20 Children Act 1989 agreement, and care proceedings were instituted by the local authority. The matter was listed for a 13 day fact finding hearing to establish whether the threshold criteria were established. The local authority's case, in summary, was that the parents had put the girl at risk of significant harm by cutting the inflation cuff tube on at least two occasions and had failed to properly understand her medical needs, had unreasonably escalated her clinical presentation and had not kept professional boundaries with staff. The threshold schedule had over 50 sub-paragraphs detailing the facts relied upon. On the 9th day of the hearing, after the court had heard from 22 witnesses and before the local authority had closed its case, the local authority applied to withdraw the proceedings on the basis that it recognised that it would be unable to establish the threshold criteria on the balance of probabilities. The local authority's application was not opposed by the girl's parents or her Children's Guardian.

Theis J granted the application, but considered that it was important that she analyse how the position came about and consider the circumstances surrounding the way the girl had been removed from her parents' care. As she noted:

> *"5. It is not suggested that the issues raised in this case should not have been investigated. What is criticised is the way the information has been presented, both before and after the issue of proceedings, and the process that was used by the LA. It has graphically illustrated the dangers of not rigorously analysing the evidential foundation for and against any allegations made and not exercising a balanced judgment. Due to the complexities of the case it required strong, experienced leadership from the LA who hold primary responsibility for safeguarding issues. Put simply, that was not provided and there was no check on the structures that failed to provide what was required in this case.*
>
> *6. Mr Howe* [Counsel for the local authority] *has rightly reminded the court of the wise words of Hedley J in Re L (Care: Threshold Criteria) [2007] 1 FLR 2050 , a case where he declined to hold that the threshold was crossed and observed at paragraph 50 that 'society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent' and at paragraph 51 that 'significant harm is fact specific and must retain the breadth of meaning that human fallibility may require of it' but that 'it is clear that it must be something unusual; at least something more than the commonplace human failure or inadequacy'.*

Theis J then analysed in extensive and critical detail the decisions taken by the local authority, emphasising the failures in management and forensic analysis of assertions being made about the parents. She was particularly critical of the steps

taken to remove the child by way of an 'enforced' s.20 CA 1989 agreement, reminding herself that:

> "*61. In Re CA (A Baby) [2012] EWHC 2190 (Fam) Hedley J provided guidance as to the duty of a social worker to be satisfied that the person consenting to a section 20 accommodation of a child by the LA has capacity to do so, is fully informed and that there are reasonable grounds for removal, with a requirement that such removal should be proportionate. As he observed at paragraph 27 '...the use of Section 20 is not unrestricted and must not be compulsion in disguise. In order for such an agreement to be lawful, the parent must have the requisite capacity to make that agreement. All consents given under Section 20 must be considered in the light of Sections 1-3 of the Mental Capacity Act 2005.' He stressed even where there is capacity, it is essential that any consent so obtained is properly informed and, at least where it results in detriment to the giver's personal interest, is fairly obtained and there is due regard for the giver's rights under Articles 6 and 8 of the European Convention on Human Rights. There is little evidence in this case of any of these important considerations and safeguards being considered. Surprisingly, there is no social services record of E's removal by the NEAT, who had charge of these decisions.*"

Theis J concluded her judgment with guidance which is of sufficient wider importance to merit reproduction in full:

> "*75. Mr Howe has rightly reminded me that I should guard against 'Hindsight Bias' and 'Outcome Bias' which is described in The Department of Education's Guidance on 'Improving the Quality of Serious Case Review published in June 2013 as follows: 'Hindsight bias occurs when actions that should have been taken in the time leading up to an incident seem obvious because all the facts become clear after the event. This tends towards a focus upon blaming staff and professionals closest in time to the incident. Outcome bias occurs when the outcome of the incident influences the way it is analysed. For example when an incident leads to a death it is considered very differently from an incident that leads to no harm, even when the type of incident is exactly the same. If people are judged one way when the outcome is poor and another way when the outcome is good, accountability becomes inconsistent and unfair.'*
>
> *76. However, there is no issue between the parties that unless the LA are working in partnership with the parents and there is informed consent to section 20 accommodation (as described by Hedley J in Re C (ibid)) a proper and fair process should be invoked before a child is removed from the care of his or her parents. Police powers of protection should only be used in exceptional circumstances, where there is insufficient time to seek an EPO or for reasons relating to the immediate safety of the child. Otherwise it should be by way of EPO (in accordance with the principles and guidelines clearly laid down by McFarlane J in Re X (2006) ibid) or by way of an interim care order. Only then can the rights of all parties be properly protected and, most importantly, the parents and the child will have effective access to legal advice and representation. The route used in this case sought to circumvent those important safeguards that ensure a fair process when the State seeks to interfere in family life.*
>
> *77. This case has demonstrated the vital need to check the sources of information that form the foundation of decisions being made relating to child protection, so an assessment can be made about its reliability. The fact that a piece of information has been repeated many*

times does not enhance its reliability. In my judgment, if time allows, information to be given to a meeting by key participants, where important decisions are going to be made (such as a strategy meeting) should be reduced to writing, giving those attending the opportunity to be able to read and consider information in advance, particularly if they are new to the situation. This particularly applies where there is a gap between the request for a meeting and the meeting taking place and where the circumstances are complex, as this case was. This would allow for a process to check information, assess its reliability and strength and ensure more balanced and robust decisions are made.

78. In relation to statements for court proceedings it is essential they are based on contemporaneous records, not recollections made some months later. Repeatedly in this case witnesses when confronted with the contemporaneous records had to revise the contents of their written statements. The importance of ensuring factual information is accurate has recently been emphasised in Re C (Care: Contact) [2010] EWCA Civ 959 (at paragraphs 42 and 63). In addition, there is an obligation, particularly on public authorities who are seeking orders that interfere with Article 8 rights to family life, for a balanced picture to be presented, not just the negative information, or the facts cast only in a negative light."

Comment

This case stands together with the costs decision in *HS* discussed in this newsletter as examples of the pitfalls confronting local authorities discharging safeguarding responsibilities. Theis J recognised that she had the benefit of reaching her conclusions in the 'cold forensic environment of the court process;' it is also, inevitably, the case that (as recognised in the Department of Health's guidance) hindsight bias can serve to cast a strongly negative light on decisions that ultimately lead to a negative outcome. However, the guidance given by Theis J, in particular that at paragraphs 77 and 78, is of vital importance to local authorities as a reminder of the importance of the need to identify, as soon as properly possible, the forensic building blocks that will be required in order to move from a 'generalised' safeguarding concern to the institution and proper conduct of proceedings. Absent such clear and prompt identification, and absent strong and effective management both of the immediate management of the crisis and of the steps required to bring the matter to court (which may at times appear not just to march in step, but in fact actively to conflict), the risk is that steps will be taken which will incur significant and ultimately inappropriate financial and emotional costs.

Propounder of will unable to satisfy Court of capacity of testator

Pearce v Beverley [2013] EW Misc 10 (CC) (Bailii citation)

Testamentary capacity

Summary

This case merits brief mention as an application of the shifting evidential burden in cases concerning testamentary capacity. Ms Pearce sought to challenge a number of transactions made by her father which were said to be subject to the undue influence of the Defendant, or were otherwise voidable. She also challenged the validity of the will her father, John Pearce, purported to make on 20 June 2007, under which the Defendant was the sole beneficiary.

When it came to the validity of the will, HHJ Behrens reminded himself of the summary of the law in *Re Key* [2010] EWHC 408, and, in particular, the position in relation to the burden of proof, namely that (a) while the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity; (b) in such a case the evidential burden then shifts to the objector to raise a real doubt about capacity; and (c) if a real doubt is raised, the evidential burden

shifts back to the propounder to establish capacity nonetheless. HHJ Behrens considered that this was a case in which there was 'a real doubt about capacity,' arising out of a number of physical and mental problems from which Mr Pearce was suffering at the material time, as well as the views of the solicitor Mr Pearce attended (in the company of the Defendant) in June 2007 in a meeting where Mr Pearce was unable to speak and where the Defendant purported to speak on his behalf for purposes of giving instructions to change his will. The evidential burden therefore shifted back to the Defendant as the propounder and sole beneficiary of the will. HHJ Behrens found (para 93) that he had real concerns that Mr Pearce understood the extent of the property he was disposing and whether he comprehended and appreciated the claims of his daughter and 3 grandchildren. In particular, the judge noted, Mr Peace's belief that "Colette *Pearce was not his daughter appears to have been wholly irrational and may well have been the result the mental disorder from which he was suffering. The remarkable change in his attitude to Colette Pearce and her children appears otherwise to be inexplicable*." Whilst he noted certain evidential matters that supported the Defendant's contention that Mr Pearce had had the requisite capacity at the material time, HHJ Behrens (who had previously found that the Defendant was an unreliable witness) held that she had not satisfied him that he had capacity to make a will on 20 June 2007. He also went on to consider the question of whether there was a want of knowledge and approval, and for similar reasons found that both that there were circumstances that excited the suspicions of the Court and that the Defendant had failed to prove the requisite degree of knowledge and approval. He therefore held (at para 97) that the will was not validly executed. As Mr Pearce was therefore intestate, his estate passed to the Claimant.

HHJ Behrens also found that all the material transactions challenged by the Claimant called for an explanation on the part of the Defendant, and that, as the Defendant was unable to offer such an explanation, they stood to be set aside on the basis that they had been procured by way of the exercise of undue influence.

Comment

As discussed at rather greater length in Alex's recent paper on testamentary capacity, there is a clear distinction between the approach to the assessment of capacity that prevails at common law and the approach that prevails for purposes of the MCA 2005. The presumption of capacity in s.1(2) MCA 2005 means that the evidential burden remains at all times upon the person seeking to disprove capacity; this contrasts with the shifting burden at common law. This case provides a clear example of the (largely unspoken) policy rationale that underpins that common law position; as discussed in Alex's paper, there may in due course be a need to consider whether in the context of the retrospective assessment of testamentary capacity the Court of Protection is entitled to and should adopt the same approach.

Challenge fails to policy reducing maximum weekly expenditure upon community care

R (D) v Worcestershire County Council [2013] EWHC 2490 (Admin)

Summary and comment

Local authorities will no doubt be scrutinising the judgment in this failed judicial review with great care. We make short reference to it given its relevance to the circumstances of many adults suffering from disabilities leading to lack of relevant decision-making capacity. Worcestershire introduced a "Policy for Determining the Usual Maximum Expenditure for Non-Residential Care Packages", under which the maximum weekly expenditure on care in the community for an adult under 65 years of age would be "*no more than the net weekly cost… of a care home placement that could be commissioned to meet the individual's assessed eligible needs.*" The local authority had not, of course, ruled out the possibility of exceptional circumstances leading to a greater level of funding, but this was to be the core policy for people under 65 years of age, as it had been for some time (in practice, if not in published word) for adults over 65 years of age.

Practitioners in the Court of Protection will be very familiar with this sort of approach to the care of elderly service users, particularly those with dementia. At the point where more than 4 daily visits are required, it is very common to find the

local authority refusing to provide any additional funding. Thus, the 'option' of care at home evaporates, and the Court is left with no real alternative to residential care, because of the public law decision which it cannot influence. In the experience of the editors, this sort of approach was less commonly encountered in respect of young adults – fully-funded 24-hour care in the community is not a rarity for a brain injured or autistic 20 year old, though it is all but unheard of for an 80 year old with dementia.

Understandably, there were concerns that the formalised application of this policy to younger adults would inevitably lead to more residential placements, and fewer opportunities for community living. The weekly cost of a residential placement is unlikely to be in the same ballpark as 24-hour domiciliary care. Despite these concerns about the substance and effect of the policy, including in relation to its compatibility with the UNCRPD and the ECHR, the judicial review claim was brought on essentially procedural grounds – a failure to properly consult, and a breach of the public sector equality duty. However, those procedural challenges were clearly closely tied to an argument that if the policy was implemented, service users would be forced to move into residential care, reducing their choice and their ability to live independently. Perhaps surprisingly, the court concluded that the policy would not have that effect – relying on Worcestershire's evidence that care costs were not presently being met at the lowest possible levels, and thus that there was slack in the system which would allow for costs savings to be made without significantly undermining the independence of service users. No doubt new claims will be issued if the implementation of the policy reveals that this analysis was overly optimistic, but it may require group litigation to have a chance of counteracting the sweeping statements of public bodies about the overall situation

Purpose not determinative in deprivation of liberty

MA v Cyprus [2013] ECHR 717

Article 5 ECHR – deprivation of liberty

Summary

Regular readers of our newsletter will either have been missing or celebrating our banging of the Strasbourg drum in relation to the deprivation of liberty. This case, however, brought to our attention by Jonathan Wilson, provides a further indication that the path taken by the Court of Appeal in *Cheshire West* is at odds with that adopted by Strasbourg.

The case arises in a different context; for material purposes, the relevant part of the judgment relates to the Court's consideration of the applicant's circumstances after he had been involved with a number of others in a protest in Nicosia but prior to his detention under deportation and detention orders issued under Cypriot immigration legislation. The government contended that he had not been deprived of his liberty, but rather had been transferred to the headquarters of the Cypriot police's Emergency Response Unit 'for identification purposes and not to arrest and detain them (relying on *X. v Germany*, no. 8819/79, Commission decision of 19 March 1981, Decisions and Reports (DR) vol. 24, p. 158). They had not been kept in cells, they had not been handcuffed and they had been given food and refreshment. Those who had been identified as being lawfully resident in the Republic had gone home. The rest had been arrested. The applicant's detention commenced once he had been charged with the flagrant criminal offence of unlawful stay in the Republic and arrested on this ground' (para 180).

In a passage of some significance, which bears citation in full, the Court assessed the legal position thus:

> *"188. The Court notes that in cases examined by the Commission, the purpose of the presence of individuals at police stations, or the fact that the parties concerned had not asked to be allowed to leave, were considered to be decisive factors. Thus, children who had spent two hours at a police station in order to be questioned without being locked up were not found to have been deprived of their liberty (see X. v Germany, no 8819/79, cited above) nor was an applicant who had been taken to a police station for humanitarian reasons, but who was free to walk about on the premises and did not ask to leave (see Guenat v Switzerland*

(dec.), no. 24722/94, Commission decision of 10 April 1995). Likewise, the Commission attached decisive weight to the fact that an applicant had never intended to leave the courtroom where he was taking part in a hearing (see E.G. v Austria, no. 22715/93, Commission decision of 15 May 1996).

189. The case-law has evolved since then as the purpose of measures by the authorities depriving applicants of their liberty no longer appears decisive for the Court's assessment of whether there has in fact been a deprivation of liberty. To date, the Court has taken this into account only at a later stage of its analysis, when examining the compatibility of the measure with Article 5 § 1 of the Convention (see Creangă, § 93, cited above; Osypenko v Ukraine, no. 4634/04, §§ 51-65, 9 November 2010; Salayev v Azerbaijan, no. 40900/05, §§ 41-42, 9 November 2010; Iliya Stefanov v Bulgaria, no. 65755/01, § 71, 22 May 2008; and Soare and Others v Romania, no. 24329/02, § 234, 22 February 2011).

190. Furthermore, the Court reiterates its established case-law to the effect that Article 5 § 1 may also apply to deprivations of liberty of a very short length (see, among many authorities, Brega and Others v Moldova, no. 61485/08, § 43, 24 January 2012; Shimovolos v Russia, no. 30194/09, §§ 48-50, 21 June 2011; Iskandarov v Russia, no. 17185/05, § 140, 23 September 2010; Rantsev v Cyprus and Russia, no. 25965/04, § 317, ECHR 2010 (extracts); and Foka v Turkey, no. 28940/95, § 75, 24 June 2008)."

The Court went on to hold that the applicant's transfer to and stay in the ERU headquarters during the period prior to his detention under immigration legislation amounted to *de facto* deprivation of liberty within the meaning of Article 5(1) (para 195). It also held that the deprivation of liberty had occurred without any clear legal basis, and was therefore unlawful (paras 202-3).

Comment

In light of the Court of Appeal's decision in *Cheshire West*, the place of 'purpose' in the determination of whether there is a deprivation of liberty is a particularly vexed question. It should be clear from the subsequent decision in *Austin v UK* that questions of purpose are relevant not to the issue of whether there is a deprivation of liberty, but whether that deprivation of liberty is justified. This decision, entirely consistent with that in *Austin* (which it considered but not with regards to this specific point), is of no little significance for its review of earlier cases (not conducted in *Austin*) arising in a range of circumstances, and for its confirmation that the Strasbourg case-law has evolved in this area.

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

Following on from our previous updates on the work of the House of Lords Committee, below is a summary of the oral evidence heard since our last newsletter. It is possible to follow the progress of the Committee's work on the dedicated web page where you will find full transcripts of the uncorrected oral evidence.

On 30 July 2013, the Committee heard evidence from:

- Moira Fraser, Director of Policy and Research, Carers Trust,
- Emily Holzhausen, Director of Policy and Public Affairs, Carers UK
- Oi Mei Li, Director, National Family Carer Network

Role of Carers in the decision-making process: The witnesses agreed that the role carers play is key to decision-making in cases where a person may lack capacity or have fluctuating capacity. Emily Holzhausen made the point that carers are often family members and/or friends and that best-interest decisions are often tied up with the lives of the families themselves. However, it is a challenge to raise awareness as to the crucial role that carers

play. Moira Fraser referred to carers reporting that on occasion they have to 'fight their way in' to the decision making process. Family members are dependent on the professionals enabling their involvement. It is a question of training to ensure that professionals consult family members and bring them in to the process. Moira Fraser gave evidence that carers can find it difficult to challenge decisions.

The extent to which the Act has been embedded: The witnesses noted that the Code of Practice makes it clear that the Act applies to family members in a carer role but that it is a high bar for families to fulfil its provisions. Family members may not realise that they are 'carers' until points of crisis and difficulties arise in implementing the Act. Professionals may expect family members to have a degree of knowledge which they simply do not have. There are difficulties in ensuring that there is adequate support and advice available. The general consensus was that more and better information and support is required particularly around transitions.

General Defence: The witnesses agreed that carers may not be aware of the general defence in specific terms, nor undertake formal assessments, but they deal with best-interest decisions on a day to day basis in a practical context.

LPAs: Oi Mei Li expressed the view that family members do not know enough about LPAs and rely on solicitors. They may not understand that even if they have been granted an LPA, they will not necessarily be the decision maker. Emily Holzhausen agreed that there is insufficient information – both about LPAs and also about deputyship. Moira Fraser noted the difficulties that arise due to the time it can take for an LPA to be put in place.

[NOTE FROM THE EDITORS: Following from Nick Goodwin's evidence to the Committee in June 2013, the new online tool for applying for an LPA is now available at https://www.govuk/government/news/new-online-application-service-for-lasting-powers-of-attorney-lpa]

Reform and review: The witnesses were generally of the view that the Act is a good piece of legislation but difficulties arise with interpretation and local implementation. Emily Holzhausen identified the problems in respect of the current system (in relation to professional carers) as being structural and relating to training, contractual arrangements and commissioning mechanisms. The witnesses agreed that the mechanisms are already there to deal with abusive care. Moira Fraser expressed the view that there needs to be better read-across to community care legislation and to support the family. It was also suggested that mediation on a local level would potentially facilitate the resolution of disputes before they reach the Court of Protection. Moira Fraser identified the definition of 'deprivation of liberty' as being a matter that needs to be looked at.

Interface with the MHA 1983: Moira Fraser stressed the importance of overlaying the Mental Health Act with the Mental Capacity Act which could actually give families more rights and without needed to make further changes to the legislation itself. Emily Holzhausen and Oi Mei Li also expressed the view that more thought could be given to how the two acts sit together and supplemental guidance could be beneficial.

Use of IMCAs: The witnesses agreed that providing an IMCA to family carers would be beneficial, particularly where there is a dispute.

Health Select Committee recommends urgent review of implementation of DOLS regime

In its post-legislative scrutiny of the Mental Health Act 2007 MHA 2007 published on 14 August 2013, the House of Commons Health Select Committee considered the deprivation of liberty safeguards, and found them profoundly wanting. Evidence was received from (inter alia) the Department of Health, the Care Quality Commission and the Mental Health Alliance, and the Committee concluded thus:

> *"106. The Committee found the evidence it received about the effective application of deprivation of liberty safeguards (DOLS) for people suffering from mental incapacity profoundly depressing and*

complacent. The Department itself described the variation as "extreme". People who suffer from lack of mental capacity are among the most vulnerable members of society and they are entitled to expect that their rights are properly and effectively protected. The fact is that despite fine words in legislation they are currently widely exposed to abuse because the controls which are supposed to protect them are woefully inadequate.

107. Against this background, the Committee recommends that the Department should initiate an urgent review of the implementation of DOLS for people suffering from mental incapacity and calls for this review to be presented to Parliament, within twelve months, together with an action plan to deliver early improvement."

Rate of increase in DOLS applications starts to slow

The Health and Social Care Information Centre (incorporating from 1 April 2013, inter alia, the former NHS Information Centre) has just published its report upon DOLS assessments for the year to 31 March 2013. The report shows that the rate increase of applications has started to slow: 11,890 were made in the year to 31 March 2013 as opposed to 11,380 for the year to 30 June 2012. More than half of applications completed in 2012/3 resulted in an authorisation being granted, continuing a trend from previous years that remains well above the Department of Health's expectation that less than a quarter of applications would result in an authorisation being granted.

Langleys Court of Protection Conference

By way of shameless plug, Tor will be amongst the speakers at Langley's Fifth Annual Review of the Mental Capacity Act 2005 in York on 17 October 2013. Full details of the conference are available here.

Using a lawyer as you get older: Ten top tips

The Legal Ombudsman has recently issued a helpful and practical leaflet, *"Using a lawyer as you get older: Ten top tips"*, based on the types of issues and complaints they come across. It contains useful guidance on a range of questions such as "do I need a lawyer," "how do I choose a lawyer," "what will it cost," "what can I expect from my lawyer," "how do I agree with my lawyer about how to make decisions," "what do I need to watch out for", "what to do if I feel worried about what is going on", and "what do I do if I have a problem with my lawyer?"

Our next Newsletter will be out in 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.

CONTRIBUTORS

Alex Ruck Keene

alex.ruckkeene@39essex.com

Alex is frequently instructed before the Court of Protection by individuals (including on behalf of the Official Solicitor), NHS bodies and local authorities, in matters across the spectrum of the Court's jurisdiction. His extensive writing commitments include co-editing the Court of Protection Law Reports, and contributing to the 'Court of Protection Practice' (Jordans). He also contributed chapters to the second edition of 'Mental Capacity: Law and Practice' (Jordans 2012) and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). **To view full CV click here.**

Victoria Butler-Cole

vb@39essex.com

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

Josephine Norris

josephine.norris@39essex.com

Josephine is regularly instructed before the Court of Protection in welfare and financial matters. She acts for the Official Solicitor, family members and statutory bodies. She also practises in the related areas of Community Care, Regulatory law and Personal Injury. **To view full CV click here.**

Neil Allen

neil.allen@39essex.com

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.**

Michelle Pratley

michelle.pratley@39essex.com

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. **To view full CV click here.**

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David Barnes Chief Executive and Director of Clerking
david.barnes@39essex.com

Sheraton Doyle Practice Manager
sheraton.doyle@39essex.com

Alastair Davidson Senior Clerk
alastair.davidson@39essex.com

Peter Campbell Practice Manager
peter.campbell@39essex.com

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For further details on Chambers please visit our website: **www.39essex.com**

London	39 Essex Street, London WC2R 3AT	Tel: +44 (0)20 7832 1111	Fax: +44 (0)20 7353 3978
Manchester	82 King Street, Manchester M2 4WQ	Tel: +44 (0)161 870 0333	Fax: +44 (0)20 7353 3978
Singapore	Maxwell Chambers, 32 Maxwell Road, #02-16, Singapore 069115	Tel: +(65) 6634 1336	