Mental Capacity Law Newsletter February 2016: Issue 62

Essex CHAMBERS

Compendium

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Introduction

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

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: Article 5, best interests and the COP; 16 and 17 year olds and deprivation of liberty; and the views of the Official Solicitor on 'using and weighing';

(2) In the Property and Affairs Newsletter: EPAs and gratuitous care; the CICA and the COP; and the perils of putting oneself forward as panel deputy;

(3) In the Practice and Procedure Newsletter: the transparency pilot and how to survive it;

(4) In the Capacity outside the COP Newsletter: the National Mental Capacity Action day and how to take part; capacity and organ donation; and legislative developments both sides of the border in Ireland;

(5) In the Scotland Newsletter: Scottish Government consults on a review of the AWI; two important MWC reports and an obituary of Ian McMurray

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

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Article 5, best interests and the COP

North Yorkshire CC v MAG & Anor [2016] EWCOP 5 (Cobb J)

Article 5 ECHR – Deprivation of liberty

Summary[1]

This appeal against the decision of District Judge Glentworth that we covered here raises important issues about the task of the court when considering whether to approve arrangements amounting to a deprivation of liberty. By way of refresher, the case concerned a 35 year old man with a number of disabilities. MAG had lived at his current placement since 2006. The property was a one bedroomed ground floor flat. He could not stand independently and the flat was too small to accommodate the use of his wheelchair. At home he mobilised by pulling himself along the floor and up on to chairs and his bed which had resulted in painful bursitis in both knees and calluses to his knees and ankles. It was agreed that MAG was deprived of his liberty for the purposes of Article 5(1).

The local authority had sought declarations and decisions relating to MAG. The case had been before the court for four years, during which time the Official Solicitor had requested the local authority to identify alternative accommodation options. Those commissioning the placement also agreed that it was in his best interests to live in a less restrictive property if one became available. NYCC sought final declarations on the basis that there were no immediate alternative residential options and it was in MAG's best interests to continue to be deprived of his liberty in his current placement. Having found culpable delay on the part of NYCC in failing to find an alternative, the District Judge refused to continue an authorisation that risked breaching MAG's Article 5 rights.

Relying on the recent Court of Appeal case of *Re MN*, the local authority and the CCG involved in MAG's case argued that the Court had no jurisdiction to require it to find another property which would not ordinarily be available to MAG. Cobb J had little hesitation in holding that District Judge Glentworth had erred, and allowed the appeal. His discussion was wide-ranging and addressed in stages below, but as an overarching observation, he indicated that he considered that the District Judge had "*uncharacteristically appear*[ed] *to have allowed her understandable concern about MAG's living circumstances, and her palpable frustration at what she saw as NYCC's tardiness in resolving his accommodation issues, to distract her from following a clear path to outcome. The result is one which I consider is unsupportable, and wrong*."

Importantly, Cobb J considered that the questions posed by the judge (framed by Counsel for the Official

[1] Neil remaining instructed on behalf of MAG, and in line with standard policy, he has not contributed to this Note.

Solicitor) had been wrong. These were: "(1) whether the elements of the care package which involve a deprivation of liberty are lawful; and, if so, (2) whether that deprivation of liberty should be authorised by the court; and, if it is; and (3) the nature and frequency of the necessary ongoing reviews of the care arrangements by the court."

Cobb J noted that:

> *23. All substantive decisions in the Court of Protection are governed by the best interests test, and yet the judge did not pose such a question for herself. She went straight to consider "whether the elements of the care package which involve a deprivation of liberty are lawful". In my judgment, there was a need to break her decision-making down into two separate questions which required consideration in this case, namely:*
>
> *i) Whether it is in MAG's best interests to live at the property, noting that although he is deprived of his liberty, there is no alternative available which offers a lesser degree of restriction;*
>
> *ii) Whether the accommodation provided to MAG was so unsuitable as to be unlawfully so provided, breaching MAG's rights under the ECHR (notably Article 5)."*

Cobb J held that "[i]*t appears that in answering her single question the judge may have avoided consideration of MAG's best interests altogether, and conflated the issues arising in relation to deprivation of liberty raised by the separate questions, causing confusion and leading her to reach the wrong conclusion. Had she asked herself the questions posed in [23] above, she would, I apprehend, have answered the first question in the affirmative, and the second in the negative. She would accordingly have gone on to grant the authorisation*." It was important in this consideration that no party before District Judge Glentworth had disagreed that it was, at that point, in MAG's best interests to reside at the property. "[t]*here was evidence that he was happy there; the judge conceded that the placement had its positives, as she made clear in her supplemental judgment on 13 July 2015, §10 ("the fact that there are positives in relation to the existing accommodation is a factor to be taken into account"). The deprivation of liberty arising on the implementation of the care package for MAG is a necessary consequence of the least restrictive available option which best promotes his needs (see also [72] of Re NRA & Others [2015] EWCOP 59)*."

As to the second question, Cobb J held that "*the judge would be required to consider the particular type of accommodation in which MAG is/was deprived of his liberty, and the purpose of the detention. Neither MAG's property, nor the manner in which his care package was delivered (imposing the deprivations of liberty identified in [7] above) was so unsuitable as to be unlawful; there was no breach of MAG's rights under the ECHR, and, significantly, the judge did not find one*" (paragraph 26, emphasis in the original). Relying in particular on the Strasbourg authorities relating to the scope of Article 5(1) reviewed in R(Idira) v Secretary of State for the Home Department [2015] EWCA Civ 1187, Cobb J noted that "[w]*hat one collects from these authorities, and indeed the others referred to, is that context is everything. The court must consider the relationship between the ground of permitted deprivation of liberty and the place and conditions of the detention; cases concerning those who lack capacity are plainly akin to* […] mental health cases [such as Ashingdane v United Kingdom (1985) 7 EHRR 528]. *In this case, deprivation of liberty of a*

person who lacks capacity in his own home, under a care plan delivered by qualified care providers, is most unlikely to breach his Article 5 rights; indeed, the MCA 2005 specifically provides statutory authorisation to deprive someone of their liberty in this way." "*It follows from what I have discussed above*," Cobb J continued, "*that the second question would have to have been answered in the negative, and the application for authorisation would therefore have been granted*."

Cobb J made clear that he considered that DJ Glentworth had erred in distinguishing Re MN which, on a proper analysis, applied across all welfare determinations, including those which involved deprivation of liberty. Although he agreed that the court could not endorse a care plan that involved or created breaches of MAG's ECHR rights, he concluded that, the judge had, in fact, not found this to be the case (at most, that there was a risk of a breach). More fundamentally, and applying *Idira*, he concluded that, given that Article 5 ECHR is concerned with the reason for detention, not the conditions of it, a high threshold would have to be crossed and a breach would only arise if there was a finding that the place and condition of detentions was "*seriously inappropriate*" (paragraph 43).

Cobb J held that DJ Glentworth had inappropriately sought by making a direction that the Council "*must take the steps necessary to ensure that there is no breach*" of statute to do that on MAG's behalf which MAG, if he had capacity, would not himself have been able to achieve in the absence of some public law remedy. "[L]*ike MAG, the Court of Protection is confined to choosing between available options: see [61] of Charles J's judgment in Re NRA & others (above: [25]) and [18] of Lady Hale's judgment in Aintree University Hospitals NHS Trust v James [2013] UKSC 67, [2014] AC 591*" (paragraph 44). In similar vein, he found that the effect of her refusal to grant authorise the deprivation of liberty was (and was intended to) require NYCC to take urgent steps to locate and provide alternative accommodation – such was, on the facts, to exert impermissible pressure.

Cobb J held that DJ Glentworth had exceeded her functions as regards her inquiry into NYCC's conduct and reached essentially unfair conclusions. He also found it "*highly regrettable*" that a case was put on MAG's behalf that Article 3 ECHR had been raised, when this was not an Article 3 case.
Cobb J concluded with two procedural points:

1. First, he noted that this was a case which illustrated the need urgently to bring about case management reforms, the case having lasted (in his view) far too long, and at estimated combined costs of more than £230,000;

2. Second, and without making a formal finding that she was wrong, he expressed his concern that DJ Glentworth had not (as she had done for some 3 ½ years prior to the hearing, and she could have done pending appeal) continued the interim authorisation. The "upshot was that MAG was unlawfully deprived of his liberty in his home. To their immense credit, the care workers continued to work on the case, with MAG, albeit that there must have been a question about the frustration of the contract, and the validity of any insurance for their activities. Ironically, by refusing the protection of the MCA 2005, MAG lost the right of review of his situation."

Comment

This case illustrates precisely why it was a fundamental error to try to 'hook' deprivation of liberty to the Mental Capacity Act. For purposes of Article 5(1)(e) ECHR, questions of best interests are – strictly speaking – irrelevant, and the only tests that apply (other than the presence of unsoundness of mind) are whether the deprivation of liberty is necessary and proportionate.

On a proper ECHR analysis, the questions posed by DJ Glentworth were therefore entirely correct. Yet, as Cobb J noted, they led her astray as regards the approach demanded by the Mental Capacity Act, which requires consideration of best interests. In a case such as the present, in which, in reality, there was only one placement on offer, it is frankly artificial to talk of a best interests decision being taken on behalf of MAG by the court. Yes, the court theoretically could have decided on behalf of MAG not to continue living at the placement and simply to live on the streets. In reality, however, no such option could have been chosen, the court itself being under a positive obligation to secure his Articles 2, 3 and 8 ECHR rights, all of which would be likely to have been breached had he simply departed the placement and lived on the streets. Further, the effect of a best interests decision being taken on his behalf that he should live at the placement in the absence of any alternative would place a serious hurdle in his way as regards the bringing of any judicial review application (unless that best interests decision was very firmly expressed as being taken on his behalf as between (1) living at an unsatisfactory placement or (2) being on the streets).

It would be far more honest if the court in a situation such as this where there is only one placement on offer were solely required to look with a critical eye at whether the deprivation of liberty was really necessary (and/or any other interference with ECHR rights was justified).

Applying the high threshold set by the authorities analysed in *Idira*, it may very well be that it is only a rare case that the court can properly find that the placement and conditions are so deficient that Article 5(1) ECHR will be breached, but at least the court would not be asking itself essentially unrealistic questions about the individual's best interests.

Absent from the judgment at first instance or that before Cobb was any reference to Article 8 ECHR (although we understand that submissions were addressed to him on this aspect). At first blush, it would appear obvious that MAG was subject to a serious interference with his rights under Article 8 ECHR, and if DJ Glentworth were to have considered the question of whether that interference was necessary and proportionate, she may (a) have had to cross a lesser threshold than that imposed by Article 5; and (b) properly been able to find such on the facts of the case. If so, then – as with Munby LJ in *A Local Authority X v MM* – she might properly have found herself in a position where she could decline to consent on his behalf of the arrangements as representing a breach of his Article 8 rights, thereby putting the local authority to the choice of amending the care plan and the arrangements for MAG or having to seek the dismissal of the proceedings (and hence leaving itself open to a claim being brought on MAG's behalf for breach of Article 8).

The dividing line between the jurisdiction of the COP and the Administrative Court – and the consequent

delicate dance required of judges[2] – is likely to remain an issue for some time come, not least as the Government has recently confirmed that the appeals (or, more strictly, review) process for the Care Act will not be introduced until 2020. In an ideal – or at least better – world, the solution to the problems thrown up by this case and that of *MN* is to secure access for all to a body which is properly able to review the decisions taken by public bodies as regards the delivery of care.

Teen *Bournewood*

Birmingham City Council v D and W [2016] EWCOP 8 (Cobb J)

Article 5 ECHR – Deprivation of liberty – children and young persons – Article 8 ECHR – residence – COP jurisdiction and powers – interface with family proceedings

Summary[3]

This is the sequel to *Trust A v X and A Local Authority* [2015] EWHC 922 (Fam), summarised here. In the first instalment, a 15-year-old boy – who had been diagnosed with ADHD, mild learning disability, Asperger's syndrome and Tourette's syndrome – was under continuous supervision and control and not free to leave a psychiatric unit. But his parents were held to be able to consent on his behalf so he was not deprived of liberty for the purposes of Article 5 ECHR. This was an appropriate exercise of parental responsibility.

Discharged from hospital and having turned 16, D now resides at a residential unit, funded by the local authority, with his parent's consent under s20 of the Children Act 1989. The main issues before the court:

(1) Whether his parents were still able to consent on his behalf;

(2) Whether the arrangements were imputable to the State.

All parties agreed that the Supreme Court's nuanced acid test was met. The placement is set within its own grounds, with a main house and 12 self-contained residential units, each with its own fenced garden. D resides in one of them, House A, with three other young people of a similar age. The educational facility he attends is on site, where he is taught in a class with 4 other young people. The following circumstances therefore amounted to continuous supervision and control, with a lack of freedom to leave:

> *"D has his own bedroom. All external doors are locked and D is not allowed to leave the premises unless it is for a planned activity. D receives one-to-one support throughout his waking day, and at night, the ratio of staff to students is 2:1. He is not initially allowed unaccompanied access to the community.*
>
> *D attends school every weekday from 8:45am to 2pm. He then eats his lunch on return to House A. He will then get changed and partake in leisure activities. Currently every Thursday afternoon D attends swimming*

[2] See in this regard in the medical context also the comment by Alex forthcoming in the *Medical Law Review* relating to the *St George's* case.
[3] Alex remaining instructed on behalf of D, and in line with standard policy, he has not contributed to this Note.

and will eat his dinner outside of House A with staff.

House A has all entrances and exits to the building locked by staff. When wishing to go out into the garden D needs to request a staff member to open the door. These doors are sometimes left open when there is a group leisure activity in the garden.

D will be having contact with his parents each Saturday for up to 5 hours. Currently his parents have been visiting for 3 hours as D does get increasingly anxious during this time. There have been no significant issues since D's move to Placement B."

Valid (parental) consent?

Despite the Official Solicitor's attempts to persuade him to reverse himself, Keehan J remained of the view that, whilst D was under 16, his parents could consent to his hospital confinement if that was an appropriate exercise of parental responsibility. Crucially, it was held that the assertion of Thorpe LJ in *RK v BCC and Others* that 'a parent may not lawfully obtain or authorise the deprivation of liberty of a child' was unsupported by authority. In particular, it was not supported by *Nielsen* (which should be confined to its facts) nor in any other ECtHR, or binding or relevant domestic, decision. What was an appropriate exercise of parental responsibility would be influenced by D's conditions:

"*109. Thus, D's diagnosed conditions, were a very material factor in determining which decisions fall within the zone or scope of parental responsibility. D's limited ability to make decisions on his own behalf was a material factor in determining the scope or zone of parental responsibility.*

110. On the facts of Trust A v X, especially the loving and caring relationships that his parents had with him and the close working relationship they enjoyed with D's medical and other professions, I considered their decision to consent to D's confinement in Hospital to be a proper exercise of parental responsibility. To have held otherwise would, in my judgment, have resulted in unwarranted and unnecessary state interference in D's and his parents' family life." (emphasis added)

However, once D turned 16, all things changed. For his parents could not consent on his behalf. Parliament had chosen to distinguish the legal status of those (a) under 16, (b) aged 16 and 17, and (c) adults (para 64 and 103). For example, incapacitous 16 and 17 year olds are within the remit of the MCA but an incapacitous person under 16 is generally excluded:

"105. In the premises, and whilst acknowledging that parents still have parental responsibility for their 16 and 17 year old children, I accept that the various international conventions and statutory provisions referred to, the UNCRC and the Human Rights Act 1998, recognise the need for a greater degree of respect for the autonomy of all young people but most especially for those who have attained the age of 16 and 17 years. Accordingly, I have come to the clear conclusion that however close the parents are to their child and however cooperative they are with treating clinicians, the parent of a 16 or 17 year old young person may not consent to their confinement which, absent a valid consent, would amount to a deprivation of that young person's liberty.

…

115. I am satisfied that young people of 16 or 17 years are entitled to the full protection of their Article 5(1) rights irrespective of their capacity to consent to their treatment or their living arrangements."

State responsibility?

The local authority contended that the effect of the parents' consent under s20 of the Children Act 1989 meant that D's placement and confinement were not imputable to the state. This was rejected by the court:

"131… this local authority identified the unit, assessed D's needs and care regime, approved the package of care proposed by the unit and the regime under which D would reside there and the fact that it pays all the costs of his placement and education at the unit.

132. In no sense at all could this set of circumstances be considered a purely private arrangement with no state involvement. The role of the local authority in establishing and maintaining D's placement is central and pivotal."

In the alternative, if the confinement was purely private, the State was indirectly responsible for it because the local authority's positive Article 5 obligations were engaged. It had to make an application to the court to determine whether D was deprived of his liberty and if so, to obtain authorisation for its continuance.

The altar of resources

The local authority stressed that the outcome of this decision had significant resource implications for this and all local authorities nationally. But the argument was rejected:

"137. The issue of the resource implications is a matter for the local authority and, ultimately, the Government; it is not, should not and, in my judgment, cannot be a relevant consideration for this court.

138. The protection of the human rights of those with disabilities or the vulnerable members of our society, most especially in respect of the protection afforded by Article 5 (1), is too important and fundamental to be sacrificed on the altar of resources."

Comment

To summarise the current state of the law:

1. Adults who are confined and lack capacity require Article 5 safeguards;

2. For 16 and 17 year olds who are confined and lack capacity (or do have capacity and refuse), those with parental responsibility cannot give valid consent: Article 5 safeguards are required;

3. For those under the age of 16 who are confined and lack capacity (or refuse to give it), parents can give

valid consent if that is an appropriate exercise of parental responsibility;

4. For all those under 18 under an interim or final care order who are confined and lack capacity, Article 5 safeguards are required (following *A Local Authority v D and others* [2015] EWHC 3125 (Fam)).

As a matter of legal principle, the fact that consenting to the confinement of someone who is 15-years-and-364-days-old can be within the scope of parental responsibility but a day later it cannot, may seem artificial. But Parliament has conferred a different legal status on the latter. So too, however, has Parliament decided that parental responsibility extends up to the age of 18. And it is instructive to note that parental responsibility pursuant to a care order cannot provide valid consent to confinement at *any* age. Moreover, even for those under 16 who are not under care orders, an inappropriate exercise of parental responsibility will not provide valid consent to confinement. But perhaps the 16th birthday aims to strike a fair balance between Articles 5 and 8. For the lower the threshold for Article 5, the greater the interference there will be with Article 8.

This exposure of the *Teen Bournewood Gap* will present similar challenges to children and transition services and guardians as that currently being felt by adult services. Where care orders or parental responsibility do not cover a child's or young person's confinement, separate legal proceedings will be required to authorise the resulting deprivation of liberty. The Court of Protection is feeling its way with *Re X* and COPDOL10 for those aged 16 and over. The inherent jurisdiction is likely to experience a similar fate as it strives to determine an Article 5 compliant procedure for those under 16.

Time and capacity

WBC v Z & Ors [2016] EWCOP 4 (Cobb J)

Mental capacity – assessing capacity – contact – residence

Summary

This case concerned a 20 year old woman with Aspergers syndrome and an IQ in the range 70-75. In June 2014 the local authority where Z lived issued proceedings in the Court of Protection seeking declarations as to Z's capacity to decide where to live, what care to receive, and what contact to have with others. The local authority's concerns for Z arose in circumstances where she had engaged in risky behaviour and there was a genuine concern about sexual exploitation. The court held a 2 day hearing to determine Z's capacity. The local authority relied on a report by an independent psychiatrist, which, by the time of the hearing, was over a year old. The psychiatrist had concluded that Z was unable to identify risks to herself from social situations and over-estimated her ability to keep herself safe. It was suggested that Z might acquire capacity if she had a period of stability in her life during which she engaged with professional support. By the time of the hearing, Z's risky behaviour had decreased. She had received some support from a care agency, although she felt that it was not needed and that the care workers talked down to her. The court heard from Z in person, and was satisfied that "*the passage of time and Z's greater maturity, coupled with some support from Dimensions and enhanced self-esteem through her music, Z appears to*

have matured, learned from her mistakes, and developed sufficiently in her capacity to make relevant decisions, and keep herself safe." The presumption of capacity was not rebutted, and the declarations sought by the local authority were refused. The judge concluded (at paragraph 70):

> *"I have conscientiously cautioned myself against considering outcome when determining Z's functional ability; I repeat this point, as I am conscious that Z is a vulnerable young person who deserves to have, and should be persuaded to receive, support from adult social services going forward. It is tempting for the court to take a paternalistic, perhaps overly risk-averse, approach to Z's future; but this would be unprincipled and wrong. I am satisfied in any event that Z currently has a reasonably fulfilling life, which enjoys; she has a loving relationship with her mother who currently cares for her well and who, I hope, could be encouraged to do so for a while longer while Z grows further in maturity and confidence."*

Comment

This case illustrates a relatively common difficulty for local authorities with safeguarding responsibilities – deciding what amounts to unwise decision-making, and what amounts to incapacity. In cases of borderline or mild learning disability and disorders such as Aspergers, the dividing line can be very hard to pin down, particularly when it is clear that the individual is repeatedly placing themselves at significant risk of harm. The court noted that just because Z had engaged in risky behaviour, this did not in itself demonstrate that she lacked capacity. In fact, evidence as to one potentially dangerous trip that Z had made to meet friends she had made online, suggested on the contrary that Z did appreciate risks, as she had been able to identify the steps she had taken to mitigate risk, even though she decided to make the trip. The court in this case was not critical of the local authority for bringing proceedings when it did, but emphasised the importance of reviewing capacity in such cases, and the value of hearing oral evidence from the individual herself.

Short note – the lesser-spotted health and welfare deputy

In *Re SH* [2016] EWCOP 2, Senior Judge Lush has reminded us that:

> *34. There is usually no need to appoint a deputy for personal welfare because of the provisions of section 5 of the Mental Capacity Act 2005, which were described by Professor Peter Bartlett, the author of Blackstone's Guide to the Mental Capacity Act 2005, as "the least formalistic and most innovative of the legal devices in the Mental Capacity Act."*
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> *35. The gist of these provisions is that people who provide care for someone who lacks capacity are protected from liability for so doing, provided they act in the best interests of the person concerned and provided they don't act negligently.*
>
> *36. In addition, section 16(4) of the Act provides that when deciding whether it is in a person's best interests to appoint a deputy,*
>
> > *"the court must have regard to the principles that:*
> > *(a) a decision of the court is to be preferred to the appointment of a deputy, and*

(b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances."

37 Generally speaking, it is impracticable to apply section 16(4) in property and affairs cases, but in personal welfare cases, the court can and does apply section 16(4) quite rigidly.

Whilst for reasons that do not need detain us, Senior Judge Lush revoked a health and welfare LPA, he declined to appoint a deputy on the basis that:

Routine decisions concerning Sybil's day-to-day care can be made by Fatima as her carer. Decisions about her medical treatment should be made by the health care professionals, who will no doubt consult Fatima and Sybil's three sons. If there is any disagreement, an application can be made to the Court of Protection. Accordingly, notwithstanding the revocation of the LPA for personal welfare, I do not propose to appoint a personal welfare deputy to replace the attorney.

Short note: permission refused on MM (capacitous consent to discharge into confinement)

We covered the decision of Charles J in *MM* at the end of last year, in which he held that a person with the requisite capacity to do so can consent to conditions imposed in a conditional discharge which amount (objectively) to a deprivation of his liberty. He has refused permission to appeal to the Secretary of State [2016] UKUT 37 (AAC), although on the basis that the application should be more properly considered by the Court of Appeal in light of the fact that the grounds of appeal raise issues going significantly further than those concerned with restricted patients. As he noted, the first ground of appeal, namely that he was wrong to find that the FTT has the power to impose conditions on a conditional discharge of a restricted patient that when implemented will create an objective deprivation of liberty, implied that (1) the Secretary of State also has no such power under s. 42 of the MHA; (2) a responsible clinician also has no such power and so has no power to include such conditions in a community treatment order (a CTO) under s. 17B of the MHA, and (3) a guardian cannot pursuant to s. 8 of the MHA require a person to live at a place when his or her care plan includes conditions that objectively deprive the person of their liberty (unless such a deprivation of liberty has been already authorised under the Mental Capacity Act 2005 (the MCA) applying different tests to those applied by MHA decision makers). He noted that the logic of this to put "*significant difficulties in the way of implementing the underlying purpose of the MHA to: (1) promote a move of a patient from detention in hospital towards him or her living in the community, whilst (2) providing the necessary protection of the public and the patient that his or her history indicates is needed*", and that it would lead "*to what many would consider to be the counter intuitive result that a breach of a patient's Convention rights thwarts the implementation of a conditional discharge or a CTO (or a direction by a guardian as to where the person should live) that: (i) is in the best interests of the relevant patient, and (ii) promotes that underlying purpose of the MHA because the implementation of the relevant conditions is or would be a breach of those Convention rights (in particular Article 5, but potentially also Article 6, 8 and 14) and so unlawful*." Charles J made a number of observations as to what he would like to happen in the event that the Court of Appeal were to be invited to grant permission:

35. In my view, if permission to appeal is given the wider implications on the day to day operation of the MHA warrant directions being given to ensure that so far as possible they are covered by the appeal. The funding and so representation difficulties for individuals like MM in arguing such wider issues are notorious.

36. If permission is given the uncertainties this will cause in the implementation of the MHA by hospitals and tribunals will be considerable. This could have a damaging impact on a number of patients and so if the Court grants permission I invite it to ensure that the appeal is expedited.

37. Also I invite the Court to raise with the parties whether any of them would seek to reserve a challenge to the decision of the Supreme Court in Cheshire West in the context of decisions made under the MHA or more generally.

Supreme Court ruling triggers 16 fold rise in deprivation of liberty cases in Wales

We were interested to read that the Supreme Court ruling in *P & Q v Cheshire West* [2014] UKSC 14 has led to a 16-fold increase in DoLS caseload in Wales last year. Figures from England showed that there had been a tenfold increase. The Care and Social Services Inspectorate for Wales has raised questions over whether services had enough staff to cope and whether delays progressing cases were impacting patients. The continuing pressure on services means that all eyes[4] are firmly fixed on forthcoming recommendations from the Law Commission to reform the legal framework for deprivations of liberty. For the full story, see the article in Community Care.

Deprivation of Liberty: Collected Guidance The Law Society (1st Edition 2016)

The Law Society has published in hard copy an updated version of its Guidance (Identifying a Deprivation of Liberty: a Practical Guide, 2014), entitled Deprivation of Liberty: Collected Guidance. I must confess to having had a hand in writing parts of the Guidance and the new case law update and what follows in therefore more by way of information than a review of the book.

The Guidance was originally commissioned by the Department of Health following the Supreme Court judgment in *Cheshire West*. The Guidance is published online.

The aim of the book is to present guidance on deprivation of liberty from a variety of sources in a single book that can be kept readily at hand. This book, like the Guidance, is designed to help professionals to understand the legislation and case law and apply it to the relevant circumstances in order to assess whether or not a person is likely to be deprived of their liberty.

The book contains not only the Law Society's Guidance on Identifying a Deprivation of Liberty (including a new case law update) but also further guidance such as:

- Mental Capacity Act 2005: Deprivation of Liberty Safeguards Code of Practice

[4] Apart from those of Alex, who is up to his eyes on working with the Law Commission on the recommendations!

- Extracts from the Mental Capacity Act 2005 Code of Practice and Mental Health Act 1983 Code of Practice
- Other relevant guidance and advice.

Beverley Taylor

"Use or Weigh? or Use and Weigh?" – a response by Alastair Pitblado, the Official Solicitor to the Senior Courts

[In the December 2015 Newsletter we published a guest commentary by Wayne Martin and Fabian Freyenhagen of the Essex Autonomy Project on the *C* case, and specifically as to whether the test is (or should be) 'use or weigh' or 'use and weigh.' The Official Solicitor, Alastair Pitblado, has sent this response which we are delighted to publish. It may well be that this dialogue is continued in a subsequent issue – and we always welcome proposals for guest commentary upon cases or issues]

I have great respect for Wayne and his colleagues at the EAP but the duty of the interpreter of a statute *"is to arrive at the legal meaning of the enactment, which is not necessarily the same as its grammatical meaning. This must be done in accordance with the rules, principles, presumptions and canons which govern statutory interpretation*".[5] This is supplemented by the need for the interpreter to have, or be advised by someone who has, the necessary legal knowledge.[6]

The Note suggests that Mr Justice MacDonald's analysis of section 3(1)(c) is incorrect as a matter of logic. I am not qualified to comment about formal logic but I suggest that the legal analysis was clearly correct. The analysis is a matter of statutory interpretation not formal logic.

First, however, there is the question, also adverted to in the Note, of why there is no "or" between section 3(1)(a) and (b) or (b) and (c). The "Office of the Parliamentary Counsel Drafting Guidance"[7] states

> *"3.7 CONJUNCTIONS BETWEEN PARAGRAPHS*
>
> *"And" and "or"*
>
> *3.7.1 Ensure that it is clear whether paragraphs are intended to operate cumulatively or instead as alternatives.*
>
> *3.7.2 Often it will be sufficient to put the appropriate conjunction at the end of the penultimate paragraph and rely on the implication (in the absence of a contrary indication) that each of the preceding paragraphs is separated by the same conjunction.*
>
> *3.7.3 However, this makes the reader wait until then to know whether the paragraphs are cumulative or*

[5] *Bennion on Statutory Interpretation*, 6th Edn at Section 2.
[6] Ibid Section 205.
[7] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454628/guidancebook_August_2015.pdf

alternative and may be unhelpful with a long list of paragraphs.

3.7.4 It is of course possible to say "and" or "or" at the end of each paragraph. That can however be cumbersome"

(my emphasis).

The list which the paragraphs of the subsection constitute is short, and no contrary indication is discernable, so I suggest that it is clear that the paragraphs of the subsection should be read as if "or" were between them, the reasons being common drafting practice and the one for not doing so given in paragraph 3.7.4. To do so would be unnecessary and cumbersome.

The Note casts doubt on the authority of the dicta of Dame Elizabeth Butler-Sloss P in *Re MB* quoted in its footnote 3. But section 3 MCA is based on the common law tests of capacity and the dicta remain good authority on this aspect of those tests. Support for these propositions can be found in:

1. *Re MM (an adult); A Local Authority v MM and another* [2007] EWHC 2003 (Fam), [2008] 3 FCR 788. Mr Justice Munby (as he then was) at para. 74 said: "*there is no relevant distinction between*" the common law and the statute in this respect.

2. *RT v LT* [2010] EWHC 1910 (Fam). Sir Nicholas Wall P at para. 51 said: "t*here will be cases in which it may be necessary to look at pre- or even post Act authority on the question of capacity*"

3. The approval by the Supreme Court in *Dunhill v Burgin (Nos 1 and 2)* [2014] 1 WLR 933 of *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2003] 1 WLR 1511.

So now to the proper legal interpretation of "*use or weigh*" in section 3(1)(c) MCA.

In another decision before the coming into force of the MCA[8], Mr Justice Charles said that the patient lacked capacity because he "*does not believe or accept a cornerstone of the factors to be taken into account in considering the information he has been given about his proposed treatment and is not able to use and weigh in the balance the relevant information as to his proposed treatment in reaching a decision to agree to it or refuse it*", (my emphasis).

The Court of Protection Practice, 2015 Edn., suggests at para. 2.80 that before the coming into force of the MCA "[t]*he courts further defined the process as the ability to weigh all relevant information in the balance as part of the process of making a decision and then to use the information in order to arrive at a decision. MCA 2005, s 3(1)(c) translates this former common law provision into statute. The focus of this element of the test is on the personal ability of the individual concerned to make a particular decision (such as the ability to weigh up any risks involved) and the processes followed by the person in arriving at a decision, and not the outcome*" (my emphasis).

[8] *R (on the application of B) v Dr SS, Dr AC and the Secretary of State for Health* [2005] EWHC 86 (Admin).

Indeed para. 4.21 of the statutory MCA Code of Practice (to which the Note refers) cites *Re MB* in a footnote and its para. 4.33 asserts "[t]*he Act's new definition of capacity is in line with the existing common law tests, and the Act does not replace them*".

The Comment to Section 364 (Composite expressions) of Bennion at "*Overlap in meaning*" pp. 1070-1071 also strongly supports the learned judge's interpretation of section 3(1)(c). The work cites at p. 1070 from the speech of Lord Roskill[9]:

> *"..the argument in the court below appears to have proceeded on the basis that the words 'repair or maintenance' are used in antithesis to one another ..The two words are not used in antithesis to one another. The phrase is a single composite phrase 'repair and maintenance' and in many cases there may well be an overlap between them".*

The Note says that "*a person must have all five abilities (i.e. be able to understand, retain, use, weigh, communicate) in order to pass the functional test for decision-making capacity*". The first point to make about the way that this is put is that a person does not have to pass any test to be treated as having decision-making capacity, see: section 1(2) MCA reinforced by sections 1(3) and (4), 2(3) and 3(2). A person must be assumed to have capacity unless it is established that they do not have capacity in accordance with the tests and applying the standard of proof set out in the MCA.

The Note continues "*What, in particular, is meant by the terms 'use' and 'weigh'? If those terms are effectively synonyms (or irredeemably ill-defined), then it does not much matter whether they are linked conjunctively or disjunctively. But if they are distinct concepts, then our interpretation of the functional test has the effect of setting the bar higher for decision-making capacity. In order to have the ability to make a decision for oneself at the material time, a person must be able to both to use and to weigh the information relevant to the decision*".

The passage just quoted needs some unpacking. It is a well-known principle of statutory construction that different words in the same statute have different meanings but that does not mean that they cannot overlap or that they must be construed as creating two separate provisions when linked disjunctively, see: Bennion's Comment to its Section 364 (Composite Expressions) referred to above. I do not think that many lawyers would regard the words as "*irredeemably ill-defined*" as suggested. The penultimate sentence of the quotation repeats the incorrect suggestion that the person concerned has a bar to jump over before being treated as having decision-making capacity whereas it is the other way round as discussed above. Even the final sentence repeats by implication the mistake – the Act, as did the common law, requires that it must be established that the person lacks decision-making capacity. Because it is that way round the expression "*use or weigh*" can entirely properly be construed and applied in the way clearly intended by Parliament. I can find no case before or after the MCA in which the court has construed "*use or weigh*" in the disjunctive way suggested in the Note as the correct interpretation of section 3(1)(c) MCA.

[9] *ACT Construction Ltd v Customs and Excise Commissioners* [1981] 1 WLR 1542, [1982] 1 All ER 84.

Attorneys and gratuitous care

Re WP and EP [2015] EWCOP 84 (Senior Judge Lush)

Deputies – Property and Financial Affairs

Summary

In this case the Senior Judge had to consider whether to give retrospective approval to attorneys (two of Ps' children) under an EPA who had paid themselves (and their sister) £150 per month for care and travel expenses in helping to look after their parents.

The Senior Judge referred to his recent decision in *Re HNL* [2015] EWCOP 77, which dealt with the remuneration of deputies and it is clear that the same principles apply to attorneys.

If the EPA (or LPA) does not provide for remuneration of the attorney, then the attorney cannot be remunerated for performing the duties of an attorney as such unless the court makes an order (see paragraph 15). In this case the Senior Judge declined to make an order for remuneration for the performance of the duties of an attorney as such (and it is not clear that such was sought). This was on the basis that when the power was created the parties did so under the assumption that the basic duties of an attorney would be performed for no remuneration (see paragraph 39).

He did, however, approve the payments that had been made to the attorneys both in the past and for the future for care and travel (see paragraphs 40-47) on the basis that the care had been rendered and at commercial care would have been much dearer. He remarked in relation to travel, however, such claims should be made on the basis of a discounted AA rate rather than the full rate (45p per mile) as that applied to commercial organisations (see paragraph 31).

He made no ruling in relation to the payments to the sister which, presumably, would have to stop.

Comment

This case underlines the need for lay deputies or attorneys who want to pay themselves or members of their families a gratuitous care allowance, to apply for approval and the need for those drafting powers to consider carefully what should be said about such allowances or remuneration as, clearly, the attorneys, who had behaved impeccably, rather resented the court's and the OPG's input.

The CICA and the COP

PVJ v CICA [2015] EWCOP 87 and [2016] EWCOP 7 (Charles J)

Deputies – Property and Financial Affairs

Summary

This was P's appeal against part of the order of Senior Judge Lush [2015] EWCOP 22 (see our earlier report here). In this case P was the victim of crime as a baby that left him seriously brain damaged. No one was prosecuted but the possible perpetrators were members of P's family (mother, brother and mother's partner).

P's mother and subsequently a local authority deputy on his behalf made an application for compensation under the criminal injuries compensation scheme. After something of a struggle the CICA made an award of approximately £3million.

The CICA, pursuant to the scheme, required that the award be held on trust that excluded as beneficiaries the possible perpetrators. The CICA took the view that such a trust had to be made by the Court of Protection as P would be the settlor of the trust and P's deputy did not have power to make a settlement because section 20 (3) MCA prevents a deputy being given power to settle P's property.

Senior Judge Lush had agreed with the CICA but Charles J allowed P's appeal (see paragraphs 63-67 and 81) on the basis that P did not become entitled to any property as the scheme required the award to go directly to trustees in such cases. Charles J remarked on his surprise that CICA had argued the contrary as its practice in relation to capacitous applicants in such circumstances was to set up trusts without the applicant being named as the settlor.

Thus, in such cases the Court of Protection is not required to approve the trust and indeed Charles J endorsed the Senior Judge's view that the Court of Protection does not have to approve the settlement of the application (see paragraphs 72-73 and 82) (although this was not the subject of the appeal).

The second of the two judgments resulted from Charles J's invitation to the parties to negotiate about various provisions in the proposed trust. In particular he was concerned that CICA appeared to have taken a somewhat inflexible approach to the total exclusion of the mother from benefit in circumstances where P had lived with and been cared for by his mother from an early age (after a brief period in care). He also invited the parties to agree standard terms for the appointment of a deputy where a CICA application is envisaged and to consider whether a *Peters* undertaking was required in the trust instrument (an undertaking not to apply for certain benefits) as the trustees would not have the power so to do.

Happily agreement was reached and the appointment and terms of the trust are annexed to the second judgment. The former made it clear that the deputy would have power to bring, negotiate and accept the award and any trust deed. The latter excluded P's mother from potentially benefiting only from a distribution if P pre deceased her. It also (in the light of the judge's comments in the first judgment at 101-103) did not contain a *Peters* undertaking.

Comment

The judgment does not make comfortable reading for the CICA as it contains some criticism of what the judge considered a somewhat inflexible approach. The approval of standard documents should make these cases easier and quicker to deal with in the future and the fact that the Court of Protection does not have to be involved will save expense.

The need to be whiter than white

Re RP Z [2016] EWCOP 1 (Senior Judge Lush)

Deputies – Property and Financial Affairs

In this case the Senior Judge had to consider who to appoint as P's deputy in circumstances where there was conflict between the children of P's first marriage (the respondents) and the child of his second marriage (the applicant).

The applicant proposed her solicitor. The respondents objected on the grounds that the applicant's solicitor would not be seen to be sufficiently independent and there was an appearance of bias. Also, P's affairs were complex and the applicant's solicitor did not have experience of investigating the financial affairs of a person with multinational business interests. The respondents, therefore, proposed a panel deputy if one of the respondents or P's accountant were found unsuitable.

The Senior Judge found that it would be inappropriate to appoint one of the respondents as there was a need to investigate their handling of P's affairs. He also rejected the appointment of the accountant as he had not been efficient in his handling of P's affairs.

Thus the issue was whether to appoint the applicant's solicitor or a panel deputy. The Senior Judge chose the latter (see paragraphs 41-45). Firstly because of the appearance of bias and the need to ensure that a deputy is and is seen to be independent referring to the judgment of Judge Cardinal in *EG v RS JS and BEN PCT* [2010] EWCOP 3073 [2010] COPLR Con Vol 350:

> "*It is just not possible to act as an honest broker on one hand and firmly on the side of one party alone on the other. It should have been clear even then to EG that she simply could not realistically pursue the application. Later on in his submissions to me Mr O'Brien posed the question what would an ordinary member of the public think? The obvious answer is that the appointee has a prejudice, a bias in favour of his/her client.*"

The second reason was that P's affairs needed the attention of a deputy from a firm experienced in investigating white collar crime and bringing proceedings for the recovery of misappropriated funds, and which has access in-house to international and corporate expertise, if necessary.

Short note: history is still with us

In *Re AC* [2016] EWCOP 3, the Senior Judge, when considering who should be P's deputy in a very long standing matter, remarked on the fact that P was probably the last person alive who had been the subject of a Lunacy Inquisition. The case also vividly illustrates the advances that have been made in the care of those with mental illness as P had been the subject of both electric shock treatment and frontal lobe surgery.

Short note: procedural differences between EPAs and LPAs – and advance notice of costs changes

In *Re KJP* [2016] EWCOP 6, Senior Judge Lush reminded practitioners that, although the court must confirm the revocation of a registered EPA, there is no need for it to confirm the revocation of a registered Lasting Power of Attorney, in respect of which section 13(2) of the Act expressly provides that "*P may at any time when he has capacity to do so, revoke the power*." As the Senior Judge recalled, this procedural difference between EPAs and LPAs came into force on 1 October 2007, and the policy considerations underlying the change in procedure are discussed in paragraphs 7.42 and 7.43 of the Law Commission's report number 231, *Mental Capacity*, published in 1995. Paragraph 7.43 concluded with the following statement: "*We therefore think it necessary to stress, by way of an explicit provision, that a donor should always retain the power to revoke his or her* [LPA]."

The Senior Judge also reminded us that, if a person has the requisite capacity to make the decision, "w*hether it was wise of him to revoke the EPA and to make an LPA in its place is irrelevant, as is the extent to which he may have been vulnerable to exploitation*." It would only have been the consequences of exploitation that would have grounded an intervention by the court if (for instance) it amounted to the exercise of fraud or undue pressure to bring about the creation of an LPA (s.22(3)(a) MCA 2005).

Senior Judge Lush also flagged up the "*concern amongst property and affairs lawyers that rule 156 encourages unnecessary litigation at P's expense, and* [that] t*hey have been lobbying for a rule change that distinguishes between costs in non-contentious cases, which account for 93% of the court's workload, and those in contentious proceedings*." A consultation on changes is very likely to be launched within the next few months and we will bring you news of this as soon as we have it.

Office of the Public Guardian: Practice Note on Local authority deputyship responsibilities

In this practice note (Practice Note no 01/2016, 14/1/16), the OPG expresses concern about the possibility of Local Authorities contracting out some of their functions as property and affairs deputies.

The OPG reminds Local Authorities that the duties of a deputy cannot be delegated and, whilst not ruling out using external providers to carry out some of the administrative functions of a deputy, counsels caution to prevent the risk of financial abuse.

The note ends with a stern warning as to the risks of reputational or financial risk to the Local Authority that did not fulfil its duties

British Bankers Association Guidance on managing a bank account for someone else

The British Bankers Association has recently published guidance (for consumers) on managing a bank account for another, including by way of an ordinary, an Enduring, or a Lasting Power of attorney. Notable by its absence is any reference to the position in relation to a foreign (which for these purposes can include a Scots) power of attorney, which remains a very thorny area.

The Transparency Pilot (and how to survive it)

On 29 January 2016 the 6 month transparency pilot kicked off. All cases listed pursuant to an order made on or after 29 January will be heard in public with the standard reporting restrictions order also made, unless any party applies with evidence and successfully argues that a different order should be made. If such applications are made after the standard order is made, notice of the application will have to be given to the press. The standard draft order is available in Word form here. Other relevant documents including details of the standard wording for listing public cases and the Practice Direction are available here. Tor has also prepared an unofficial version of the order with annotations in plain English which can be used for explaining the effect of the order to litigants in person, available here.

Initial feedback from the 39 Essex Chambers Court of Protection team is that the system broadly seems to be operating as intended. Third party disclosure orders are made more complex, because they cannot refer to P's name, but this problem can be circumvented by the addition of a schedule giving details of P's identity. The template order may also need amending to make clear that the statutory bodies involved in the application can be named (in accordance with the previous transparency guidance) – our understanding from cases heard in the initial stages of the pilot is that if they are not to be named, a formal application with supporting evidence should be made, as with any application for the hearing to be in private or for additional or different reporting restrictions to the standard provisions.

We welcome feedback from readers both as to practical issues encountered and more broadly as to their observations as to the pilot, and will report further upon this in subsequent issues. In particular, we will share practice tips to enable practitioners to navigate the pilot successfully.

In the interim, it is of note that the pilot has already been the subject of (implicitly favourable) comment by the Supreme Court in *R (C) v SSJ* [2016] UKSC 2. Holding that there is no presumption of anonymity for mental health patients conducting litigation in the civil courts, Lady Hale (giving the sole reasoned judgment) compared and contrasted the position in civil litigation with that prevailing in the Mental Health Tribunal and the Court of Protection, and at paragraph 25 commented in passing upon the transparency pilot and its effect upon the default presumptions of privacy and anonymity.

The *M* saga concludes

Re M [2015] EWCOP 45 and [2015] EWCOP 69 (Baker J)

Practice and procedure – costs

The costs judgment in [2015] EWCOP 45 follows the substantive decision in *Re M* [2014] EWCOP 33 which we reported in our November 2014 newsletter. To recap, M had autistic spectrum disorder. M's parents (E and A) gave an account that M had suffered an adverse reaction to the MMR vaccination which was fabricated. His parents also gave many other false accounts about M's health. His mother (E), who had been M's deputy, had abused her responsibility and controlled all aspects of M's life, restricted access to

him by a number of professionals and was incapable of working with the local authority social workers. E and A appealed against the substantive decision but permission to appeal was refused by McFarlane LJ who said: *"There are no arguable grounds of appeal at all" and that "[a]wfully, sadly and tragically, these parents are engaged in a perception in this case, and the reasons that have led the judge to remove their much loved son from their care, with a focus and a mindset and an understanding which is totally different from that of the local authority, the Official solicitor and the court.*

The costs incurred in the proceedings were substantial. The costs on behalf of the local authority were £150,000 and the costs on behalf of M through the Official Solicitor were over £300,000. Those were not unusually large for a case of this sort and of this complexity. Baker J remarked that in view of the serious findings made against the parents, it would have been open to the local authority and the Official Solicitor to apply for costs against E and A, notwithstanding the general principle in the Court of Protection, that the court will make no order for costs as a general rule. The local authority confined its application for costs to a more modest sum, namely a one third contribution of the costs incurred in the instruction of five experts amounting to some £13,000 which Baker J described as *"a model of restraint"*. Notwithstanding that the local authority's application was *"couched in such reasonable terms"*, Baker J decided on balance to order that E and A only contribute one third of the costs of two jointly instructed experts, as E and A had placed no part in the instruction of the other experts.

E and A also sought their costs which they estimated at £78,000. Baker J noted that E and A struggled to understand the basis upon which the court orders costs and their submissions continued to assert that, notwithstanding everything that had happened, everything that had occurred in this case was the fault of the other parties. E and A continued to believe in the conspiracy theories which pervaded their submissions at all points and it was "*wholly depressing"* to hear their submissions and see yet further evidence of their entrenched state of mind. Baker J concluded that the fault in this case lay entirely with E and A, and that the parent's application for costs was *"wholly misconceived"*. The judge also rejected an application for wasted costs against the legal representatives of the local authority and the Official Solicitor.
[2014] EWCOP 69

Following the substantive judgment in *Re M* [2014] EWCOP 33 and the costs judgment at [2015] EWCOP 45, this was the final judgment in long-running proceedings concerning M. The issues which remained to be dealt with included (1) the identity of M's deputy; (2) M's deprivation of liberty; (3) disclosure and publication of information relating to the proceedings; and (4) miscellaneous issues.

On the identity of M's deputy, there were two options for the court: one was an employee of the local authority ("Ms Y") and the other was a solicitor ("Mrs Z"). Weighing up the evidence, Baker J commented that it was a finely balanced decision but, in the end, he decided to appoint Mrs Z as M's deputy. In doing so, he made clear that he had no criticisms of Ms Y but she was employed by the same local authority which had been responsible for taking and prosecuting these proceedings. As a result, it was unlikely that she would ever have the full trust and confidence of E and A. It was essential that the new deputy was given the best opportunity to forge a good working relationship with everyone in the case, in particular E and A.

On the deprivation of liberty issue, the local authority submitted that the reality was that M was not free to leave T Road. He was under the complete supervision and control of care staff. The local authority therefore sought the authorisation of a deprivation of liberty with a further review in one year's time on paper. E and A expressed concern at the thought that their son was being looked after in circumstances that amounted to a deprivation of liberty. Baker J explained that the purpose of the court being asked to authorise a deprivation of liberty was not to imprison or stigmatise M but rather to protect him. In the court's view, the acid test identified by the Supreme Court in *P & Q v Cheshire West* was manifestly satisfied.

On the issue of disclosure, Mr Justice Baker recounted that the court must balance M's Article 8 rights against other rights, in particular the Article 10 rights of E and A, having regard to the importance attached to freedom of expression. Although Baker J decided to anonymise the names of social workers to prevent identification of M, he did not discourage E and A from publishing their experiences or views on the issues that had arisen in this case.

The court also dealt with a miscellany of other issues including an attempt by E and A to reopen substantive issues, future communication with other professionals and a request to change M's social workers.

Comment

These two judgments bring to an end these long-running and factually dense proceedings which had lasted nearly 2 years. Baker J pointed out that one particular feature of these proceedings as a whole was the difficulty that the court experienced in managing the case, caused principally by the conduct of E, M's mother. However, the court also recognized that both E and A loved their son had devoted much of their lives to his care and well-being. The court expressed its gratitude to them for engaging in the process, despite the findings made against them and the considerable difficulties in managing the case.

New fee remission form

The Court of Protection introduced a new remission form COP44A in November 2015. The Court is currently accepting any remission applications made on the old EX160 form, but from 4 April 2016 any remission applications received on the old forms will not be issued and will be returned to the applicant for them to re-submit them on the new forms. The COP44A and COP44 guidance can be found here.

Short Note: non-intervention by the appellate court

Re A (Children) [2015] EWCA Civ 1254 concerned an appeal against the decision of HHJ Heaton in respect of two placement orders made for two children, L and D. Lady Justice Black expressed the view that the decision taken by the judge was not an easy one, particularly given the age of the children, the question of their cultural heritage, and the implications of adoption for their relationship with their older sibling. However, there was no error in the decisions that he took in relation to L and D. In reaching the conclusion

that the judge was entitled to reach the conclusion that the placement for adoption would best serve the children's welfare throughout their lives, the Court Appeal emphasised that the advantage that the trial judge has over the appeal courts is enormous. Lord Justice Lewison made clear that *"an appeal court (such as this one) can only interfere with the decision of a lower court if it is wrong. It is not enough to show that different choices could have been made. Nor is it enough that the members of the appeal court would themselves have struck the balance differently."* A similar approach applies to appeals from the first instance judge in the Court of Protection: see COPR rule 179(3) and also *Aintree v James* at paragraph 42. The judge at first instance often has to weigh a litany of multi-faceted and finely balanced factors in order to reach a decision as to what is in P's best interests. As Lord Justice Lewison reminded us, *"submissions based on the weight that the decision maker gave to individual factors (whether pointing towards or away from the eventual conclusion) will rarely, if ever, succeed in demonstrating that the eventual outcome was wrong."*

Short note: the value of intermediaries

Intermediaries do not yet have a formal place in the Court of Protection, nor, indeed, in the family courts. However, they are increasingly being used in the family courts. In *Newcastle City Council v WM and Others* [2015] EWFC 42, Mr Justice Cobb (at paras 5–8) described the two intermediaries as "*excellent*", and as having performed their role "*with great skill and discretion*." He found himself to be "*indebted*" to the intermediary service for enabling the mother, who suffered from learning disabilities and spoke English as a second language, "*to participate in the process as fully and effectively as could possibly be achieved*." Similar sentiments were expressed by very recently by Sir James Munby P in *Re D (A Child) (No 3)* [2016] EWFC 1, in which the President said that "[w]*ithout the help of their lawyers and their intermediaries there is no way in which the*[…] *parents could have had a fair hearing*" (para 20). The role of intermediaries and other measures that have or will be adopted in the criminal and family courts will be explored in an article co-written by Alex and our academic associate Professor Penny Cooper in the next Elder Law Journal. We both hope and anticipate that practices and procedures in the Court of Protection will be adapted in due course better to enable all those with difficulties in participating (including, but not limited to P) to be assisted to overcome those difficulties.

Short note: how difficult it is to have no habitual residence

In *Re B* [2016] UKSC 4, the Supreme Court made clear that the 'new' conceptions of habitual residence in the family sphere (drawing in particular on jurisprudence of the CJEU) mean that it is only going to be in very limited circumstances that a child will have no habitual residence. As Lord Wilson (for the majority) held:

> *45. I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in [a limbo of having no habitual residence]. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better,*

disengagement) from it.

Court of Protection judges have been at pains to make clear that the approach to determining the habitual residence of impaired capacity should march in line with that in relation to children (see in particular the decision in *Re SW*), so it is likely that the same approach as set out in *Re B* will be adopted in relation to adults who may have been moved from their homes.

ENGLAND, WALES AND NORTHERN IRELAND

National Mental Capacity Action Day

Baroness Finlay will host a National Mental Capacity Action Day on 15 March 2016 at the Royal College of Anaesthetics. The event will:

- Profile current best practice from around England and Wales
- Identify MCA improvement priorities for the coming year
- Gather commitments from attendees for projects and work to improve MCA implementation at the front-line.

Ahead of the Action Day, Baroness Finlay would like to hear from anyone who over the last year has been involved in work to raise awareness and improve the implementation of the MCA. This does not have to be a large programme of work. There are some very small projects that are making a difference and there are others across sectors that are changing approaches nationally.

If you would like to attend the event, please express your interest when you return your submission as described above. A copy of the submission template and further details about the event are available online.

New website to make creating advance decisions and statements easier

Compassion in Dying has launched an innovative free website in response to growing concerns about the low numbers of individuals planning ahead for their treatment at the end of life should they lose capacity.

The first free website of its kind in the UK, www.mydecisions.org.uk allows a person to draft an Advance Decision or Advance Statement online.

Designed in collaboration with patients, clinicians and lawyers, the website takes users through different conditions and scenarios they may experience, such as brain injury, dementia and terminal illness. People are prompted to consider what they would want in these situations, and then get a personalised Advance Decision or Advance Statement to print, sign, witness and share.

MyDecisions.org.uk has been designed with patients for patients, to make it as straightforward as possible. It offers comprehensive guidance throughout and users can save their progress and return to it later to allow them to consider and talk to others about their wishes.

NICE Guideline: Care of dying adults in the last days of life

This Guideline was published on 16 December 2015. It responds to the need for an evidence-based approach to the care of dying people following the phasing out in 2014 of the use of the controversial Liverpool Care Pathway for the Care of the Dying Adult (LCP).

The LPC, developed in the 1990s, was widely used in the NHS and UK hospices. Although the aim of the LCP was to provide the best quality of care possible for dying patients in the last days and hours of life, whether they were in hospital, at home, in a care home or in a hospice, it met with increasing criticism from the public, healthcare professionals and the media. The independent 2013 Neuberger Review of the LCP highlighted three main areas of concern:

- the assessment that a person was dying was not always made by an experienced clinician and was not reliably reviewed
- the dying person may have been unduly sedated as a result of poor prescribing methods
- there were claims that hydration and some essential medicines may have been withheld, which may have a negative impact on the dying process

The NICE Guideline attempts to address in detail the aspects of the LCP that have been criticised. It covers the clinical care of adults (18 years and over) who are dying during the last 2 to 3 days of life. It. It is focused on the care needed when a person is judged by a multi-professional clinical team to be within a few days of death. It is intended for use by health and social care professionals who do not have specialist level training in end of life care and by people who are dying, their families, carers and other people who are important to them. The Guideline states clearly that it complements, but does not replace the healthcare professional and others' duty to comply with the Mental Capacity Act 2005.

The guideline makes a number of recommendations to help healthcare professionals to:

- recognise when a person in entering the last days of life, or may have stabilised or be improving even temporarily;
- to communicate and share decisions respectfully with the dying person and people important to them; and
- to manage hydration and commonly experienced symptoms to maintain the person's comfort and dignity without causing unacceptable side effects.

Poor communication and not recognising that people are dying were key themes identified by the parliamentary and Health Service Ombudsman's 2015 *Dying with Dignity* investigation into complaints about end of life Care.

The Guideline's emphasis on shared decision-making is to be welcomed. This includes considering the person's ability to engage and actively participate in shared decision making on their end of life care and establishing the level of involvement that the person wishes to have in those decisions. It further emphasises the need to ascertain whether the person has an advance statement or an advance decision to refuse treatment in place, or has provided details of any lasting power of attorney for health and welfare.

Improved communication, together with earlier recognition that a person is nearing the end of their life, proactive care planning and clear direction on the withdrawal of hydration, nutrition or medication should ensure that many more people experience good care at the end of their lives.

The challenge will be for the NHS to translate this Guideline into a clear and simple protocol, which not only meets the required care standards, but also allows staff the time to train and to work through these matters with the patient and other people who are important to them in the time available.

Beverley Taylor

Fix Dementia Care campaign

The Alzheimer's Society ("the Society") has launched a new campaign, Fix Dementia Care after a series of Freedom of Information requests to NHS Trusts in England and responses from over 570 people affected by dementia revealed what the Society described as "unacceptable national variation in the quality of hospital care across England". The survey found that 92% of people affected with dementia found hospital environments frightening. The FOI requests also found that in some hospitals people with dementia were being inappropriately discharged at night, that the number of falls in hospital for people over the age of 65 who had dementia varied dramatically across NHS Trusts (in one hospital 71% of people over the age of 65 who fell in hospital had dementia compared to the national average of 28%) and that in the worst performing hospitals, people with dementia were found to be staying 5 to 7 times longer than other patients over the age of 65. The Society noted that there were notable examples of excellent care across the country but that the difference between one hospital and the next was far too great and there was inconsistent understanding of the needs of people with dementia.

Over the course of 2016, Fix Dementia Care will look at the quality of care people with dementia receive in 3 key care settings: in hospital, in care homes and in the home. The campaign is making the following recommendations: (i) all hospitals to publish an annual statement of dementia care, which includes feedback from patients with dementia, helping to raise standards across the country; (ii) the regulators, Monitor and the CQC to include standards of dementia care in their assessments. The society is asking people to back the Fix Dementia Care campaign by signing up at: www.alzheimers.org.uk/fixhospitalcare.

Capacity and organ donation in Wales

The Human Transplantation Wales Act 2013 came into effect on 1 December 2015, making Wales the first

nation with the United Kingdom to introduce a soft opt-out system for organ and tissue donation. If you are 18 and over and have lived in Wales for more than 12 months you will be deemed to consent to organ and tissue donation if you die in Wales. If you wish to opt-out of the deemed consent you have to complete an online form or call 0300 123 23 23.

People who lack capacity to understand the new system will not have their consent deemed and the system does not apply to people who never had the capacity to understand deemed consent (the example given being those with severe learning disabilities). It also does not apply to those who have developed a condition that stops them understanding the system such as dementia. There is also a requirement that you live in Wales voluntarily. Hence the guidance states therefore that serving members of the armed forces or prisoners will not have their consent deemed but the exemption would also logically apply to those deprived of their liberty and placed in accommodation in Wales by an English authority.

It follows that care givers and institutions in Wales should turn their minds to whether those in their care have capacity to understand the notion of deemed consent to organ and tissue donation. It is unclear from the online guidance how decisions will be taken about capacity at the relevant (highly charged) time. Whilst in some cases it may be clear that the person lacked capacity (due to advanced dementia or other readily ascertainable factors) in other cases the issue of capacity may be contentious or simply unclear. In such cases it is likely that deemed consent would not be presumed (there is an exception where a person has not opted out but has told someone that they object prior to death). However, it may be that if a family member of a person who lacks capacity feels strongly about organ donation, a formal consideration of capacity should be carried out and where that person lacks capacity the opt out option is completed.

SCIE publishes guidance on cross-border placements

SCIE has now published guidance to assist authorities in the UK (England, Scotland, Wales and Northern Ireland) involved in cross-border placements as described in Schedule 1 to the Care Act 2014. As discussed in the December 2015 Scotland Newsletter, the issues that arise in relation to such placements are only getting more complex as the law on ordinary residence (at least as between Scotland on the one hand and England and Wales on the other) seems to become ever more divergent. This guidance is a very helpful guide to the core principles and processes, although we suspect that the issues in this area will be the subject of increasing amount of litigation.

Guidance on controlling and coercive behaviour

Statutory Guidance on Controlling or Coercive Behaviour in an Intimate or Family Relationship has now been issued to accompany the new offence created by s.76 Serious Crime Act 2015. The new offence is one that is of potential application in many safeguarding cases in which mental capacity issues arise, and the guidance provides a helpful (non-exhaustive) list of indicative behaviours associated with coercion or control, reminding practitioners that the types of behavior may or may not constitute a criminal offence in their own right. The list includes the following, many of which may well be present in safeguarding cases with which local authorities are grappling:

- isolating a person from their friends and family;
- depriving them of their basic needs;
- monitoring their time;
- monitoring a person via online communication tools or using spyware;
- taking control over aspects of their everyday life, such as where they can go, who they can see, what to wear and when they can sleep;
- depriving them of access to support services, such as specialist support or medical services;
- repeatedly putting them down such as telling them they are worthless;
- enforcing rules and activity which humiliate, degrade or dehumanise the victim;
- forcing the victim to take part in criminal activity such as shoplifting, neglect or abuse of children to encourage self-blame and prevent disclosure to authorities;
- financial abuse including control of finances, such as only allowing a person a punitive allowance;
- threats to hurt or kill;
- threats to a child;
- threats to reveal or publish private information (e.g. threatening to 'out' someone).
- assault;
- criminal damage (such as destruction of household goods);
- rape;
- preventing a person from having access to transport or from working.

Care Act Briefing

Luke Clements, now Cerebra Professor of Law at Leeds University, has updated his extremely helpful Care Act briefing, available here.

Mental Health Foundation updated mental health database

The Mental Health Foundation has recently updated its incredibly helpful mental health database, with entries ranging from alcohol and mental health to work life balance. It can be accessed here.

Law Commission, Unfitness to Plead proposal

Aspects of the Mental Capacity Act 2005 feature in the Law Commission's proposal, and draft Bill, to reform the outdated law on fitness to plead in criminal proceedings. It provides a test of capacity for effective participation in a trial which explicitly incorporates decision-making capacity. Such incapacity is established where the defendant's abilities are not, taken together, sufficient to enable the defendant to participate effectively in the proceedings on the offence or offences charged.

There are a number of abilities to consider and a statutory entitlement for a defendant to have the assistance of an intermediary, both for the giving of evidence and otherwise in trial proceedings, where such assistance is necessary for a defendant to have a fair trial. The proposal draws from the functional test

of the Mental Capacity Act 2005 (without a diagnostic criterion). Where the defendant lacks capacity to participate effectively, a judicial discretion not to proceed to a hearing is proposed if that is in the interests of justice.

A separate test of ability to plead guilty is proposed for defendants who would otherwise lack the capacity to participate effectively in trial. This would enable those defendants who would otherwise be diverted into alternative procedures to plead guilty and be sentenced in the usual way, where they are able and wish to do so. Another important proposal is that where the fact-finding hearing proceeds, the prosecution will be required to prove all elements of the offence; so not just the guilty act but also the guilty mind.

Northern Ireland Mental Capacity bill moves one stage closer to enactment

At its meeting on 25 January 2016, the Ad Hoc Joint Committee to Consider the Mental Capacity Bill agreed to publish its Report on the Bill which can be found here.

A brief refresher about some of the background and scope of the draft Bill – which came through in broad terms in the Bill now under scrutiny, can be found here.

The Bill mostly survived the review stage unscathed, the key issues identified by the Committee as problematic being the following (reproduced from the Executive Summary):

> *3. The first key issue concerned the Department's decision to recognise but not codify advance decisions within the Bill, but rather to leave the matter to common law. Stakeholders believed that an opportunity had been missed to create more clarity and certainty for both individuals and professionals as to what constitutes an effective advance decision. The Committee was concerned with the Department's approach of allowing case law to develop once the Bill is in place, rather than set the policy itself. In the Committee's view, this would leave patients and healthcare professionals in a vulnerable and uncertain position. The Committee therefore asked the Department to bring for-ward a "review and report" amendment, which would require the Department to review the law on advance decisions and to lay a report before the Assembly. The Department accepted the Committee's rationale and drafted an amendment which would require this to happen within three years of the Bill coming into operation.*
>
> *4. The second key issue related to the Department's approach to Lasting Powers of Attorney (LPA) and Enduring Powers of Attorney (EPA). The Bill will create a new system of LPAs which cover decisions relating to a person's health, welfare and finances. It will also prevent any further EPAs, which relate to a person's property and affairs, being made once the Bill comes into operation. The Committee was concerned that given the potential complexity and costs associated with making an LPA, many people would simply not make one. It was therefore of the view that the EPA system should be allowed to remain in place, to allow people a wider range of options in terms of planning for their future needs. The Committee therefore agreed to register its opposition to clause 110.*
>
> *5. The third issue related to the conditions for detention under a Public Protection Order (PPO) within the criminal justice provisions of the Bill. Public Protection Orders are being created through the Bill to deal with people who are not culpable for their actions, but cannot be released because they pose a danger to others.*

The Bill as drafted stipulated that for someone to be subject to a PPO, he or she had to pose a risk of "serious physical harm to other persons". The Committee was concerned that this criterion may not always be met, even when the crime committed would be deemed to be serious, but had not resulted in "serious physical harm" to the victim. The Department recognised that this was a potential loophole and proposed a range of amendments to the Bill, so that the risk a person poses in terms of "serious physical or psychological harm" to others must be considered in relation to PPOs.

6. The fourth issue was the Department's powers to make further provision by means of secondary legislation. As drafted, the Bill permitted the Department to amend any part of the Act by secondary legislation. The Committee was of the view that this power was too wide-ranging. The Department accepted the Committee's viewpoint and drafted amendments to limit the power to amend the Act to Part 2, and to require that powers to amend any other pieces of legislation as a consequence of the Act would be done through the draft affirmative procedure.

7. The fifth issue was that of the costs associated with the Bill, which are estimated at between £76 to £84 million for year one implementation costs, and £68 to £76 million for recurrent costs. The Committee was seriously concerned about the lack of certainty in terms of whether the monies required will be forthcoming from the Departments and the Executive, given the current financial climate."

EUROPE AND THE WIDER WORLD

Ireland passes new capacity legislation

Almost (but not quite) as long in gestation as the Northern Ireland Bill, the Irish Assisted Decision-Making (Capacity) Act was signed into law on 30 December 2015. It represents an ambitious attempt to bring the law in the Republic of Ireland out of (at best) the 19th century into the 21st century by seeking to implement many of the core tenets of the CRPD. Whether (a) it has entirely succeeded; (b) the culture change that will be required in order to translate its principles into action are both still questions that are very much open to debate.

France passes sedated dying law

Readers may be interested to note the report in the *Guardian* that France has passed a law sedated dying law as compromise on euthanasia. The law will allow patients to request "deep, continuous sedation altering consciousness until death" but only when their condition is likely to lead to a quick death. Doctors will be allowed to stop life-sustaining treatments, including artificial hydration and nutrition. Sedation and painkillers will be allowed "even if they may shorten the person's life." The *Guardian* reports that law will also apply to patients who are unable to express their will, following a process that includes consultation with family members.

Review of Council of Europe recommendation 2009(11)

The Council of Europe is undertaking a review of the implementation of Recommendation (2009)11 "on principles concerning powers of attorney and advance directives for incapacity" throughout member states as a project for the calendar years 2016 and 2017. The review is to be carried out by Adrian Ward, our Scots co-editor, and we wish him very well in this task, which represents an important opportunity both to take stock of practice as it stands and to advance proposals to reform practice for the future, including – in particular – securing better cross-border recognition of powers of attorney.

4th World Congress on Adult Guardianship Law

The 4th World Congress on Adult Guardianship will be held under the auspices of the German Federal Minister of Justice and Consumer Protection, Heiko Maas, in Erkner near Berlin between September 14 and September 17, 2016. It is hosted by the German Adult Guardianship Law Association (Betreuungsgerichtstag e.V.) in collaboration with the International Guardianship Network ('IGN'). The organizing committee consists of Prof. Dr. Volker Lipp (President of the German Adult Guardianship Law Association, Member of the IGN), Prof. Dr. Dagmar Brosey (Vice President, Member of the IGN) and Karl-Heinz Zander (Secretary, Member of the IGN). The organizing committee is supported by an International Advisory Board and by the IGN. For more information and to register, click here. Alex already has his ticket…

Amendments in prospect to Singaporean MCA

As readers may know, the Mental Capacity Act in Singapore is very closely modelled upon the MCA 2005. Amendments have been proposed to the Act in particular to allow the appointment of professional attorneys and deputies, and in light of the support received during consultation, it is likely that these will be taken forward in due course. More details can be found here.

Law Commission of Ontario interim report on legal capacity, decision-making and guardianship

On January 11, 2016, the LCO released its Interim Report on Legal Capacity, Decision-making and Guardianship for public feedback. The Interim Report includes draft recommendations designed to respond to concerns about Ontario's laws addressing situations where decisions are needed but decision-making abilities are at issue. The LCO encourages feedback until **Friday, March 4, 2016**.

Review of legislation

Scottish Government is to be commended for having launched a major review of the Adults with Incapacity (Scotland) Act 2000, also potentially extending to review of the Mental Health (Care and Treatment) Scotland Act 2003 and the Adult Support and Protection (Scotland) Act 2007. The review has been launched with a consultation on the Scottish Law Commission Report on Adults with Incapacity, which not only consults upon the proposals (and draft Bill amending the 2000 Act and the 2003 Act) in the Scottish Law Commission Report No 240 but concludes by inviting responses suggesting "two or three key areas which any future wider review of the provisions of the 2000 Act might consider". It is to be anticipated that "key areas" will include, in addition to issues of deprivation of liberty addressed in the Scottish Law Commission Report, topics as wide as everything needed to ensure compliance with the UN Convention on the Rights of Persons with Disabilities, improvement of the whole 2000 Act in all other respects, improvement of the interactions among the three statutes mentioned, and indeed the content of the 2003 and 2007 Acts. At this early stage the Newsletter can report no more than such wide-ranging intentions have been signalled, and that they do not appear, at least yet, to be seriously discouraged.

The consultation period ends on 31st March 2016.

Adrian D Ward

Shortage of mental health officers

We have previously reported (see the Newsletters of June and April 2015 and July, August, October and November 2014) on the shortage of mental health officers and consequent breaches by local authorities of their obligation under section 57(4) of the Adults with Incapacity (Scotland) Act 2000 to have a mental health officer (MHO) report prepared, where one is required, within 21 days of notice of intention to bring an application under Part 6 of the 2000 Act. We have reported on the extent to which delays beyond the statutory limit appear to be serious, widespread and in some cases institutionalised.

This matter came before Sheriff D A Brown at Hamilton Sheriff Court at a hearing on 25th September 2015, in the case *SS and MM, Applicants*. The applicants gave notice of intention to make the application on 29th May 2015. The 21-day period for preparation of the MHO report, counting from the date on which the local authority acknowledged receipt, expired on 26th June 2015. As at the hearing before Sheriff Brown on 25th September 2015, no report had been prepared, no MHO had been allocated to prepare it, and no indication had been given as to when the report might be forthcoming; despite reminders from the applicants and notification from them that a section 3 order might be sought. The sheriff ordered North Lanarkshire Council, the relevant local authority, to prepare the report within 14 days. The local authority appealed to the Sheriff Principal against that order. We report the decision at first instance now upon being advised that the local authority have abandoned their appeal.

In previous such cases of which the Newsletter is aware, a separate application had been made for an order under section 3(3) of the 2000 Act. We are not aware of such a case where the MHO report was not produced before any significant procedure in the application. The application by *SS and MM* was

different. An application for a guardianship order was submitted to court without a MHO report, and without medical reports at that stage, to avoid that cost until the first crave had been dealt with. The first crave sought an order under section 3 of the 2000 Act (founding specifically upon sections 3(1) and (2)) that the local authority be ordained to produce the MHO report.

We are informed that the local authority argued that the crave for such an order was incompetent as sections 3(1) and (2) conferred a power to make orders which was contingent on there being an application or other proceedings before the sheriff. The sheriff ruled that there plainly was an application before him. He had received it on 18th September 2015 when he made an order for intimation to the local authority and fixed the hearing for 25th September. While not essential to that finding, we understand that he did comment that the deficiency upon which the local authority founded was one caused by themselves.

We understand that it was also submitted for the local authority that on the basis of *Brown v Hamilton D C*, 1983, SC (HL) 1, only the Court of Session, and not the Sheriff Court, had jurisdiction to enforce the performance by a local authority of a statutory duty. The sheriff held that such a power was expressly conferred upon the sheriff, in relation to the performance of functions under the 2000 Act, by section 3 of that Act.

Other sheriffs in the same or other sheriffdoms may or may not be persuaded to grant a similar order upon the facts before them, and the submissions, in any other case seeking similar redress. Any such other case may or may not be appealed to the Sheriff Appeal Court, with the difference (compared with the application by *SS and MM*) that any determination by the Sheriff Appeal Court (unless and until overruled upon further appeal) would be binding upon all sheriffs sitting at first instance. However, it would appear that unless and until there be an authoritative contrary decision upon appeal, practitioners could be said to have a duty to proceed as did the applicants in the application by *SS and MM* if there be prospect of detriment to their clients in the event of delay in proceeding with the application. They could be said to be under a professional obligation to follow the method of this case in order to avoid detriment, and to be at fault in the event that they fail to do so.

We understand that the successful applicants referred extensively to the annotations to relevant provisions of the 2000 Act in Ward's "Adults with Incapacity Legislation", W Green, 2008, and the case of *Frank Stork and others*, 2004, SCLR 513 there referred to.

In this context it is relevant also to report that by Parliamentary Question (in the Scottish Parliament) lodged 18th January 2016, Jim Hume (South Scotland, Scottish Liberal Democrats) asked the Scottish Government: "How many people have (a) started studying for and (b) graduated with a Mental Health Officer Award (Post-Graduate Certificate) in each of the last five years". Jamie Hepburn (Minister for Sport, Health Improvement and Mental Health) answered on 28th January 2016 that for the five academic years September-August from 2009-10 to 2013-14 the number of admissions were 40, 58, 61, 41 and 58; and the number of completions were 28, 45, 52, 40 and 46. It is clear that if the harm to people with intellectual disabilities, and breaches of their human rights, attributable to the shortage of mental health officers is not

to be compounded by large numbers of court orders (perhaps with orders in expenses attached) against local authorities in respect of their breaches of duty, immediate and effective action to improve substantially the recruitment, training and retention of mental health officers is now immediately essential.

Adrian D Ward

Mental Welfare Commission investigation into the death of Ms MN

On 27th January 2016 the Mental Welfare Commission for Scotland published the report of its investigation into the death of Ms MN, a vulnerable 44-year old woman with an autistic spectrum diagnosis and complex needs, who took her own life in December 2012 in a care home to which she had shortly beforehand been moved from hospital. The Commission found that Ms MN had been moved to an independent care home that was experienced in caring for people with a learning disability, but not people with autism. The Commission found that the placement was not properly planned and that arrangements for managing her care, and the risk of suicide, were confused and unsafe.

Ms MN had been in contact with mental health services from 1986. She did not have a learning disability. Her prime diagnosis was of autism/Asperger syndrome. During her lifetime she had struggled with obsessional thoughts and ritualistic behaviour. She often self-harmed and regularly spoke about suicide. She had great difficulties with self-care and was vulnerable to exploitation. She had frequent admissions to a mental health hospital ward. She had become accustomed to receiving large amounts of medication, mostly for anxiety, "as required". She had spent much of 2012 in hospital and was subject to a compulsory treatment order at the time of her death. She found the move to the care home extremely difficult, and frequently talked to staff about self-harm and suicide. The home relied for medical advice on local GP services, which had not actually met her, and the home did not have full information on her case. Six weeks after the move she was found hanging in her room.

The main recommendations from the Commission included that there should be greater use of specialist assessments for people with autistic spectrum disorder and complex needs; better discharge planning, to ensure that care homes and GPs have the information and support to manage such people in community settings; and a review of the availability of specialist services for people with autistic spectrum disorders who do not fit into mental health or learning disability settings.

Colin McKay, Chief Executive of the Mental Welfare Commission, commented: "This is a desperately sad case of a vulnerable individual, who was struggling to deal with day-to-day life. Services tried, with varying levels of success, to support her. While there was certainly goodwill and a genuine caring attitude, there were also serious errors of judgement, and a lack of communication at key points. That resulted in her being in a home which was not able to meet her needs, and which did not have the appropriate support from specialist services when a crisis arose. This report is about one tragic case, but it contains lessons for all of Scotland. I hope it is read by all those involved in providing care and treatment for people with autistic spectrum disorder, and I hope all of our recommendations are acted upon."

Many practitioners will be aware of the need for lessons to be learned "for all of Scotland". It is common experience to encounter actions, or threatened actions, and attitudes by local authorities, care providers and others which simply take no account of what should be well-known characteristics and vulnerabilities of very many people with autistic spectrum disorders.

Some helpful background comment has been provided to the Newsletter by Dr Gwen Jones-Edwards, Consultant Psychiatrist and Clinical Director, Mental Health Services, South Glasgow, who has been working with the adult autism team in Glasgow for some five years. The team is the only such one in Scotland, and the post-diagnostic support group has developed its own treatment methodology. Gwen comments that: "The frequency of autistic spectrum disorder within the general adult population is estimated at 1%, but this is likely to be a significant underestimate. We know that people who suffer from mental illness have a frequency of autism of at least 5%, although often it is not picked up. Women are probably just as likely to suffer from autism, but it is not such an easy disorder to pick up in them, mostly because women tend to be more pliable and 'fit in' better. A great issue is transitioning from childhood to adulthood. There is no smooth transition: we find that children are not taught about their autism, albeit they are supported, and then they often flounder upon entering the adult world when all supports disappear."

Between providing that comment and its publication, Gwen has retired. Her contribution in her professional life has been massive, and has extended to most helpful interaction with other professions, including in her membership of the Mental Health and Disability Sub-Committee of the Law Society of Scotland (which to the delight of her colleagues on that committee, she has indicated an intention to continue). The editors wish her very well in her retirement.

Adrian D Ward

The Mental Welfare Commission for Scotland Report 'Visits to people on longer term community-based compulsory treatment orders'

The Mental Welfare Commission for Scotland published its visiting and monitoring report *Visits to people on longer term community-based compulsory treatment orders*[10] in late December 2015 ('the CCTO Report').

The Mental Health (Care and Treatment) (Scotland) Act 2003 ('the 2003 Act') introduced community-based compulsory treatment orders ('CCTOs') to allow for the longer term care of people with mental disorder in the community such arrangements not having been previously available. In 2011 the Commission made several recommendations about CCTOs[11] and its 2013/14 annual 2003 Act monitoring report noted that 41% of all compulsory treatment orders are CCTOs. Based on the 2011 report recommendations and the increase in CCTOs (in January 2015 there were 396 persons who had been subject to CCTOs for more than

[10] Mental Welfare Commission for Scotland, *Visits to people on longer term community-based compulsory treatment orders*, December 2015

[11] Mental Welfare Commission for Scotland, *Lives less restricted*, September 2011

two years[12]) the Commission therefore decided to again look at the care, treatment and support of persons who had been subject to CCTOS for more than two years. It gathered the views of 88 such persons and also obtained information from their case records and care plans, interviewed their Community Psychiatric Nurses and Mental Health Officers ('MHO's).

Principles underpinning the 2003 Act[13] emphasise informal care, patient participation, respect for carers, the least restrictive alternative and that any intervention must provide maximum benefit for the patient. Reciprocity (in terms of where an intervention is considered necessary the appropriate care, treatment and support must be provided in order to achieve this) as well as non-discrimination, equality and respect for diversity are also promoted. The Commission specifically took these into account in its study[14].

A reading of the full report itself is strongly recommended for more specific detail but, in general terms, the Commission noted from its findings that CCTOs appear to keep many people with mental disorder out of institutional care, that care plans addressed individual needs and focused on recovery and that there was evidence of good multi-disciplinary working. It also found that, broadly, practitioners carefully assessed the benefits of the requirement for a CCTO, there was patient participation in care and treatment decisions and that most named persons contributed to the care and support of their relative or friend and felt appreciated and involved.

It was also found that about 50% of the people subject to CCTOs from whom information was obtained felt the order was of some benefit to them (and that where there were issues with the order this tended to relate to medication or the requirement to accept care and support). However, very few were clear about the circumstances in which the order would be revoked and several felt they were not listened to and or allowed meaningful participation decisions concerning their care and treatment. Moreover, whilst people were generally aware, from their MHO, about their right of appeal and the availability of advocacy half had not heard of advance statements.

The Commission also noted a lack of evidence of clear revocation strategies and that the potential for risk avoidance in practice may be driving unnecessary continuance of the more restrictive compulsory treatment orders. It also noted that in a small number of cases treatment was being administered in the absence of legal authorisation. Finally, it would appear that not enough emphasis is placed on the physical health needs of such persons with few having appeared to have had either screening or regular physical health checks. Worryingly too, not one of the 88 persons on CCTOs from whom information was obtained was in full time employment and only eight were in part-time employment.

The report recommends the active promotion of advance statements and that advocacy should be available for all patients who wish to use it. This will hopefully be reinforced by changes to the 2003 Act by the Mental Health (Scotland) Act 2015 when the relevant provisions come into force. It also recommends that there must be clear evidence of both CCTO reviews and a revocation strategy in the case notes, and

[12] The CCTO Report, p 2.
[13] Mental Health (Care and Treatment)(Scotland) Act 2003, s 1.
[14] The CCTO Report, pp 2-3.

that the revocation strategy is shared with the patient and that patients should be able to participate in review meetings if they so wish. Moreover, local authorities should identify how they can more effectively discharge their duty under s26 of the 2003 Act ('Services designed to promote well-being and social development') in order to support people on CCTOs to secure and sustain employment, and to work with the Scottish Government to consider new opportunities to improve such support. The Commission also recommends that mental health services should facilitate patient physical health checks at least every 15 months as well as their access to relevant screening programmes.

The benefits, in terms of recovery and maintenance of good mental health, of community living has increasingly been acknowledged for persons with mental disorder. CCTOs, if properly implemented, should therefore enhance patient autonomy and assist with effective community integration particularly where they fulfil the requirements of the 2003 Act's principles and also relevant international human rights standards such as those found in, for example, the UN Convention on the Rights of Persons with Disabilities (UNCRPD), the European Social Charter and the European Convention on Human Rights (ECHR). When it comes to support, information provision and involvement with making decisions that impact on patients' lives there is a need to be mindful that CCTOs do not operate in a way that inadvertently violates a person's rights to liberty and to respect for private and family life (Articles 5 and 8 ECHR), which has further and particularly been brought into sharp relief by Articles 12 (equal recognition before the law) and 14 (right to liberty) UNCRPD and their radical interpretation by the UN Committee on the Rights of Persons with Disabilities[15]. Moreover, in terms of the recommendations regarding physical health, employment and local authority service provision, which are largely reinforced by socio-economic rights, we should recall the UN Committee on Economic, Social and Cultural Rights 2009[16] concluding observation criticising the UK for regarding the rights in the International Covenant on Economic, Social and Cultural Rights as being mere values and for not adequately incorporating them into domestic laws. It is therefore hoped that the Commission's recommendations in this report are fully taken on board by practitioners, local authorities and the Scottish Government.

Jill Stavert

Iain McMurray

Iain McMurray, who died on 31st December 2015 aged 84, was a former Chief Executive of Enable until he retired in 1991. He led the organisation continuously from 1968, when it was the Scottish Society for Mentally Handicapped Children. He was the rare combination of an outstanding visionary and a man who could and did fulfil his vision by delivering practical and lasting results. In his time at the helm, he transformed Enable massively, developing a network of branches and the establishment and development

[15] UN Committee on the Rights of Persons with Disabilities (1) General Comment No 1 (2014) *Article 12: Equal Recognition before the Law*, CRPD/C/GC/1, adopted 11 April 2014; and (2) *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: the right to liberty and security of persons with disabilities*, September 2015.

[16] Concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories, 22 May 2009, E/C.12/GBR/CO/5, para 13 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGBR%2fCO%2f5&Lang=en

of many relevant services, as well as projects such as funding research into the education of children with profound disabilities. He was at the forefront of the process of moving people from long-stay hospitals into supported living accommodation, in practical ways fostering the provision of such accommodation and the development by his organisation itself of associated housing providers, including for people with profound disabilities, and other services, including a trustee service. Beyond that, his work had a major positive impact upon attitudes to people with learning disabilities and understanding of them and their needs.

In the context of this Newsletter, particular tribute must be paid to his massive impact upon helpful development of the law. In the mid-1970s he became alert to Adrian's early interest in this area of law, drew him in, and persuaded him to write (for publication by Enable, then SSMH) firstly "Scots Law and the Mentally Handicapped" in 1984 and then "The Power to Act" in 1990. Shortly after publication of the second of these, he telephoned Adrian one day from a conference in Budapest, establishing links which led directly to Adrian's further work throughout Eastern Europe and the former Soviet Union. Adrian's involvement, however, part-time in conjunction with running his own practice, was not sufficient for the growing needs of the organisation itself and its membership for specialist legal services. In 1989 he recruited Colin McKay (now Chief Executive of the Mental Welfare Commission for Scotland) as the first of the Society's in-house solicitors, and the organisation subsequently published – in two editions – "The Care Maze" by Colin and Hilary Patrick. Despite its title, it was hugely helpful in navigating accurately through the maze which it described.

Iain's visionary drive was supplemented, if not at times masked, by his characteristic sense of humour. When he first acquired a fax machine, and a form of fax with a space for "subject matter", he invariably entered "pernickety lawyers" in his stream of communications to Adrian.

Adrian D Ward

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Conferences at which editors/contributors are speaking

International Protection of Adults

Alex and Adrian will be participating in a seminar at the British Institute of International and Comparative Law on 11 February on Hague 35 and cross-border matters. More details are available on the BIICL website.

VOICES project

Alex will be chairing a session at the opening conference of this innovative project launched by the Centre for Disability Law and Policy at NUI Galway entitled Voices of Individuals: Collectively Exploring Self-determination (VOICES). The opening conference is on Friday 26 February 2016 in Dublin City Civic Offices, Dublin 8. Confirmed Speakers include: Professor Gábor Gombos, Mr Rusi Stanev, The Honorable Kristin Booth Glen, Professor Michelle Anderson and Professor Christopher Slobogin. For more details of this project, and to book, see here.

Palliative Care Conference

Alex will be speaking on the practicalities and realities of DOLS within palliative care practice at the 11th Palliative Care Congress in Glasgow on 11 March. For details, and to book see here.

Safeguarding Adults in Residential Settings

Tor will be speaking about why capacity matters at this conference at the ORT House Conference Centre London on Tuesday 15 March 2016. For further details, see here.

Edge DOLS Assessors conference

Alex will be speaking at Edge Training's annual DOLS Assessors conference in London on 18 March. Other speakers include Mr Justice Peter Jackson. To details, and to book, see here.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

ESCRC seminar series on safeguarding

Alex is a member of the core research team for an-ESRC funded seminar series entitled 'Safeguarding Adults and Legal Literacy,' investigating the impact of the Care Act. The theme for the seminars in the first year of this three years series is 'Making Law'. The second and third seminars in the series will be on "New" categories of abuse and neglect' (20 May) and 'Safeguarding and devolution – UK perspectives' (22 September). For more details, see here.

Other events of interest

Peter Edwards Law Training Spring 2016

Peter has announced the spring series of his (rightly) very well-regard series of training events on matters mental capacity and mental health related. For full details, see here.

Chambers Details

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

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex is recommended as a 'star junior' in Chambers & Partners 2016 for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations and is the creator of the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment for 2016 to the Law Commission working on the replacement for DOLS. 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. 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.

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.

Annabel Lee: annabel.lee@39essex.com

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

Anna Bicarregui: anna.bicarregui@39essex.com

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

Simon Edwards: simon.edwards@39essex.com

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

Adrian Ward adw@tcyoung.co.uk

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

Jill Stavert: J.Stavert@napier.ac.uk

Professor Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.