ThirtyNine
ESSEX STREET

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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: December 2011

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

Introduction

Welcome to the December issue of our Court of Protection Newsletter. It includes important decisions on the detention of children, and upon costs and reporting; we are also very grateful to Martin Terrell of Thomson Snell & Passmore for his guest commentary upon the important decision in *Re HM* involving the vexed question of when is it appropriate for the Court of Protection to approve a personal injury trust as opposed to appointing a deputy.

We also cover the first change to be implemented as a result of the work of the Rules Review Committee, namely the power to allow 'routine' decisions to be taken by authorised officers, and point you to some interesting statistical work done by the indefatigable Lucy Series on the approach taken by one Judge to permission applications.

Following our invitation in our *Cheshire* special issue, a number of you provided thoughtful and interesting responses to the judgment of the Court of Appeal. We therefore delighted to include in this newsletter the most substantive of these comments, received from the MCA Implementation Lead for NHS North Lancashire, Sue Neal, which speaks for itself in terms of the issues raised on the ground by the judgment.

RK v (1) BCC (2) YB (3) AK) [2011] EWCA Civ 1305

Summary

We start with the important decision of the Court of Appeal handed down yesterday upon the appeal from the decision of Mostyn J[1] that the provision of accommodation to a child (of any age) under s.20 Children Act 1989 is not capable – in principle – of ever giving rise to a deprivation of liberty within the terms of Article 5 ECHR. That proposition was the subject of sustained criticism, and upon appeal the consensus at the Bar (endorsed by the Court of Appeal) was that the decisions of the ECtHR in *Neilson v Denmark*[2] and of the Court of Appeal in *Re K*[3] demonstrated that:

1. an adult in the exercise of parental responsibility may impose, or authorise others to impose, restrictions upon the liberty of a child; but

2. that such restrictions may not in their totality amount to a deprivation of liberty. "*Detention*

[1] [2010] EWHC 3355 (Fam), discussed in our January 2011 newsletter
[2] (1988) 11 EHRR 175
[3] [2002] 2 WLR 1141

engages the Article 5 rights of the child and a parent may not lawfully detain or authorise the detention of a child." (paragraph 14).

On the facts of the case before it, the Court of Appeal noted that (although it required some effort to establish the fact) it was clearly recorded that the parents had consented to the arrangements by which their child was placed in accommodation under s.20 Children Act 1989. The crucial point was therefore whether the restrictions authorised by the parents, individually or cumulatively, amount to detention? The Court of Appeal had no hesitation in concluding that Mostyn J's conclusion on this issue were correct, Thorpe LJ noting that the restrictions[4] were "*no more than what was reasonably required to protect RK from harming herself or others within her range*" (paragraph 27). In coming to this conclusion, Thorpe LJ noted that the parents' case was that home care for RK was impossible without an intensive support package; he noted that the purpose and effect of such a support package would be to protect RK and others from harm such that "[i]*n other words wherever RK is accommodated the same restrictions on her liberty are essential*." RK's appeal was therefore dismissed.

Comment

The first limb of the Court of Appeal's decision in this case is beyond criticism (as can be demonstrated by the fact that, ultimately, none of the parties appearing before the Court dissented from the propositions regarding the ability of parents to authorise the detention of their children). It would appear[5] that the general practice generally amongst local authorities is to regard agreements under s.20 Children Act 1989 as not creating a deprivation of liberty; if such a practice exists, it will clearly have to stop forthwith in favour of analysis of the situation of each of the children in question. If the circumstances amount to a deprivation of their liberty, then authorisation will have to be sought by the local authority (the route depending upon whether the child is aged 16/17 or below).

One curious aspect of the judgment is there was no detailed analysis of the circumstances of RK's care and residence of the nature found in other cases where there has been a debate about whether the individual is deprived of their liberty. However, the second limb of the Court of Appeal's decision (especially when read together with the decision in *Cheshire West and Chester*[6]) suggests that it is unlikely that many children placed under s.20 Children Act 1989 will, in fact, be deprived of their liberty. This aspect of the decision is rather more open to question, not least because of the emphasis in Thorpe LJ's reasoning upon the fact that the measures were aimed at the protection of RK and of others. Whilst the line between the existence of a deprivation and its justification has been blurred by the re-emergence of purpose in *Cheshire West*, it must be questionable whether it has been blurred sufficiently that protective measures, per se, can be deemed not to amount to a deprivation of liberty because they are protective.

Cheshire West and Chester Council v P [2011] EWCA Civ 1333

Summary

In this matter the Court of Appeal considered the successful appellant Council's application for costs in respect of the Court of Appeal proceedings ([2011] EWCA Civ 1257). The Official Solicitor submitted that there should be no order as to costs. In resisting the Council's application, the Official Solicitor sought to

[4] The Court of Appeal did not analyse the regime in any detail. At first instance, Mostyn J made reference to the regime in the following terms: "*At KCH she is closely supervised to prevent her harming herself or others. She compliantly takes her prescribed medicines. She has not been forced to do so, nor has she been restrained, other than on a few occasions for the purposes of preventing her from attacking others. If she behaves badly then minor sanctions have been imposed on a few occasions such as not allowing her to eat a takeaway meal or stopping her listening to music when in a car. The front door of KCH is not locked. Were RK to run out of it she would be brought back*." (paragraph 36(iii).

[5] Such being put to Mostyn J by BCC at first instance: see paragraph 7 of the judgment.

[6] To which no reference is made in the judgment.

distinguish Court of Protection proceedings from other types of civil proceedings (by analogy with family proceedings) and further also relied in part on the fact that in the Court below, Baker J had departed from the general rule that there be no order as to costs on the grounds of what he perceived to be misconduct on the part of the local authority.

Munby LJ, giving the lead judgment of the Court, held:

1. Although it is an appeal from the Court of Protection, the Court of Protection rules do not apply. The general rule on appeals from the COP to the Court of Appeal is, in accordance with CPR 44.3(2)(a), that the unsuccessful party will be ordered to pay the costs (subject, where relevant, to costs protection under s11 Access to Justice Act 1999).

2. The general rule in COP welfare cases (that there be no order as to costs) was irrelevant, as was the council's discreditable conduct at first instance.[7] The Court's primary task was to apply CPR 44.3.

Munby LJ concluded however, that, having regard to all the circumstances of the case, there should be no order as to costs. The reason for and the importance of the appeal was not really at all about how P will be dealt with. The point of major importance for the local authority, and indeed local authorities generally, was how often they have to come back to court in this and other similar cases. Whilst P did not have to resist the appeal, the fact that the appeal was opposed had assisted the Court and had it not been, they may have needed to appoint an Advocate to the Court.

Comment

Although Munby LJ stated that he is not issuing general guidance and that each case will turn on its facts, this decision is a useful reminder that if Court of Protection proceedings are appealed before the Court of Appeal, it is the ordinary costs rules in CPR 44.3 which will apply. Accordingly, whilst the fact that P is vulnerable is a factor that may be taken in to account, there is no presumption that the appropriate order should be 'no order as to costs'.

Re RB (Adult); A London Borough v RB (Adult) (No 4) [2011] EWHC 3017 (Fam)

Summary

In this case Munby LJ set out guidance in relation to the publication of judgments in cases heard under the inherent jurisdiction in the Family Division of the High Court concerning incapacitated adults.[8] The position is as follows:

1. In the absence of any relevant statutory restriction, it is not a contempt of court to publish or report a judgment (whether in whole or in part) merely because it was given or handed down in private (in chambers) and not in open court.

2. In cases involving incapacitated adults under the inherent jurisdiction, no such rubric is required as there is no relevant statutory restriction preventing publication.

The judge explained that where a judgment is handed down with the familiar rubric attached[9] any breach of those conditions will be a contempt of court. However, the rubric is only required where a statutory restriction exists which would make reporting the judgment a contempt of court, and the judge is effectively giving a conditional permission for that statutory

[7] That aspect having been dealt with by the costs order made at first instance, that aspect of the decision not being appealed.

[8] At the time of publication of this judgment, the preceding judgments were not publicly available. They have very recently become available on Bailii (many thanks to James Batey of the Court of Protection for bringing this to our attention), and we will cover them in the next issue.

[9] "*This judgment was handed down in private but the judge hereby gives leave for the judgment to be reported but on the strict understanding that in any report no person other than the advocates (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved*."

restriction to be lifted.

Comment

This decision usefully clarifies the position on reporting of inherent jurisdiction cases, and makes clear that if any party wishes a judgment in such proceedings to be anonymised or to prevent it from being reported, the onus is on that party to apply to the court for an order. In Court of Protection proceedings, the position is of course covered by the COP Rules and the caselaw dealing with the balance between Article 8 and Article 10 rights in such cases.

HN v FL and Hampshire Council [2011] EWHC 2894 (COP)

Summary

HN was the sister of FL, who suffered from multiple sclerosis and lacked capacity to make decisions about her care, residence and contact with others. There was, as the judge observed, an intractable dispute between HN and the local authority as to whether the current care home, where FL had lived for some eight years, was capable of looking after FL properly, and tensions between the care home and HN had led to restrictions being imposed on her visits and interaction with FL. There had been two previous sets of proceedings in the Court of Protection - cancelling HN's power of attorney for financial affairs, and welfare proceedings concerned with care, residence and contact which had culminated in 2009 a consent order. The disagreements between HN, the care home and the local authority had continued, despite the consent order, and when the matter was eventually returned to court by HN, DJ Ralton agreed that a fact-finding hearing was necessary. After a four-day hearing, the local authority was successful, and District Judge Ralton found that HN had undermined FL's placement at the care home and breached the 2009 Order. She had been 'so determined to ensure that her opinion prevails that she [had conducted] herself vexatiously in her sister's affairs' including by waging a campaign of 'groundless complaints'. An Order was made which provided that it was in FL's best interests to remain in the care home and for there to be restrictions on HN's contact with her, supported by penal notices. The judge noted that while the ethos of the MCA was a collaborative approach to best interests decision-making, the Court would step in to resolve disputes if necessary, ideally with as little intervention as possible.

Comment

This case is not unusual, but is a reminder that where there has been a total breakdown in the relationship between a care home or local authority and a family member, 'agreed' orders may not be effective long-term solutions, and a fact-finding hearing may be essential. The case was also of interest because the Independent was granted permission to attend and report on the proceedings, which they duly did in a very balanced and accurate manner. This was the first welfare case in which the media was permitted to attend and report on private proceedings where P's identity was not to be disclosed.

R v Heaney [2011] EWCA Crim 2682

Summary

Dawn Heaney was a senior carer in a Leicestershire care home who was convicted of ill treating two residents, contrary to section 44 of the Mental Capacity Act 2005. The first was a man in his 80s with Alzheimer's dementia who was disorientated in time, place and person and prone to becoming violent and agitated. In response to his complaint about not having enough sugar in his cup of afternoon tea, Heaney not only added 7 to 8 more spoonfuls, but also some vinegar and watched him drink it whilst others looked in horror. The second victim was a woman in her 90s with dementia who was very confused and unable to indicate her needs. Whilst sat in her wheelchair, looking out of the window, Heaney approached from behind and, for no reason, slapped her across the back of her head. When a witness asked "why?", she just laughed and walked on.

The trial judge passed consecutive prison sentences of 3 months and 6 months respectively. However, the Court of Appeal held

that the sentences should run concurrently, therefore totalling 6, rather than 9, months. Neither victim had sustained any distress or injury, the incidents were very short, and the appellant had lost, and had no realistic prospect of returning to, her chosen livelihood.

Comment

This case is interesting in two respects. First, Heaney's conviction post-dates the Court of Appeal's decision in *R v Hopkins* [2011] EWCA Crim 1513 where the legal certainty of the Mental Capacity Act offence was called into question (see our June 2011 newsletter). On that occasion, the Court would have declared that the offence was so vague as to breach Article 7 of the ECHR for failing to specify which decision the victim must lack, or be reasonably believed to lack, the mental capacity to make. However, it was bound to follow its previous decision in *R v Dunn* [2010] EWCA Crim 2395 where it held that the incapacity must relate to decisions 'about the care' they receive. Although its legal certainty was not called into question on this occasion, the statutory offence remains vulnerable to further challenge, perhaps in a trial where the degree or nature of the victim's incapacity is not so obvious.

Secondly, the judgment highlights one of the shocking peculiarities of English criminal law. At paragraph 9 Mrs Justice Thirlwall noted:

> "*Elderly people have a right to be treated with respect by everyone in the community. When they are ill and living in residential homes, they are entitled to expect, and we must demand, that they are properly cared for*. *What this appellant did was the opposite of that*."

And, yet, it is not generally a crime for health or social care professionals to ill treat or wilfully neglect the elderly. Consider, for example, the abysmal lack of care at Mid Staffordshire NHS Foundation Trust hospital which left patients in pain, humiliated and routinely neglected. One 86-year-old was admitted there due to recurring vomiting. Her daughter described the ward nurses as bullies and when patients 'were calling out for the toilet … they would just walk by them'.[10] At present, such alleged conduct would only be a criminal matter if the elder was mentally disordered or incapacitated: those who are vulnerable simply by reason of their age are not protected. One suggestion, therefore, is to criminalise the deliberate or reckless causing of unnecessary suffering by someone required by law to care.[11]

Re HM (SM v HM) Case No 11875043/01

Summary[12]

Where a person lacks capacity to manage property and affairs the usual process is for the Court of Protection to appoint a deputy. In some cases however, there is an argument that a person's estate can be dealt with more effectively through the creation of a trust. Trusts are often created for claimants in personal injury cases to protect an award from being treated as capital when assessing entitlement to means-tested benefits. Prior to the Mental Capacity Act 2005 coming into force such trusts were often created by the Court of Protection for persons who lacked capacity, often on the grounds that a trust would be cheaper and more flexible to administer compared to a receivership.

Since the new Act came into force, there has been some uncertainty as to what the approach of the Court of Protection should be on an application. This has now been considered with great thoroughness by HH Hazel Marshall QC in the case of *Re HM* (11870543 4 November 2011).

The case was heard by HHJ Marshall on an application for reconsideration under rule 89 Court of Protection Rules. The case originated in an application for a personal injury award to be placed in trust. Liability was limited on causation

10 *Independent inquiry into care provided by Mid Staffordshire NHS Foundation Trust*, January 2005-March 2009 HC375-1, vol 1, page 45.

11 N. Allen, 'Psychiatric care and criminal prosecution' in *Medicine, Crime and Society* (forthcoming) Cambridge University Press.

12 Both summary and guest commentary by Martin Terrell, Partner, Thomson Snell & Passmore, a professional deputy who gave evidence to HHJ Marshall in this case.

and therefore there was only partial recovery. It was contended by the applicant that a trust, with HM's mother and a solicitor acting as trustees would be cheaper in the long run as being in the best interests of HM. The application was refused by District Judge Gordon Ashton whose decision recorded the grounds on which a trust would not be in HM's best interests as follows:

1. the jurisdiction of the Court of Protection has been established by statute specifically for managing and administering the financial affairs of persons who lack mental capacity to do so for themselves;

2. the procedures of the Court of Protection and role of the Public Guardian are for the benefit of the incapacitated person and provide safeguards that Parliament has deemed necessary;

3. there would not necessarily be a significant reduction in overall costs in the event of a Personal Injury Trust and the involvement of the Court of Protection would be required in any event upon a change of trustees;

4. any overall financial savings that may be achieved would not justify a departure from the statutory jurisdiction;

5. there would be less supervision and diminished protection if [HM']s funds were placed in a personal injury trust;

6. any future intervention would potentially involve the Chancery Court as well as the Court of Protection and would in consequence be more protracted and expensive;

7. the principal benefit of a personal injury trust, namely ring-fencing from means-testing, is likely to be available if the fund is retained in the Court of Protection.

HHJ Marshall received representations from the Official Solicitor, who supported the original decision, as well as from solicitors specialising in both deputyships and private trusts. She concluded that while every such application had to be considered on its merits, the facts of this case would allow a trust to be created. The judge identified three factors, "*without which I would not have been prepared to authorise the creation of the relevant settlement*" (at para 172). These were:

1. the administration of a trust, based on the evidence in this case, would be cheaper than a deputyship (there would for instance be no security bond premium or Public Guardian supervision fee);

2. HM's mother was "a competent, forceful, well-educated and responsible person" (para 169) and her presence as a trustee would provide a means of monitoring legal costs (in the absence of the procedure for detailed assessment required by a deputy); and

3. the proposed professional trustee, Andrew Cusworth of Linder Myers, had agreed that his firm's costs would be limited to the guideline rates that would be allowed on detailed assessment.

Comment

The difficulty with this case is that it was decided on its very particular facts and despite the decision to approve the creation of a trust, it should not be seen as a green light for trusts to be created as a matter of course where there is a personal injury award. A party proposing a trust must complete a detailed analysis of the costs and benefits of a trust compared to a deputyship and show that the former will be more cost effective without prejudicing the safety of the trust assets. Evidence would need to be produced of the professional trustee's charges and commitment to a charging policy as well as to the lay trustee's competence. The Official Solicitor will need to be instructed and there is no guarantee the Court will agree. This process alone will add risk and cost to any application and will deter all but the most determined (and well founded) applications.

De Louville De Toucy v Bonhams Ltd [2011] All ER (D) 32 (Nov)

Summary

In this Chancery Division decision, a full transcript of which is not yet available, Vos J was asked to consider whether it was appropriate to make a bankruptcy order pursuant to the Insolvency Rules against a person who lacked capacity.

The Court held:

1. There was no inconsistency between the Insolvency Rules (defining an 'incapacitated person') and the CPR (defining a 'protected party'). 'Incapacity' for the purposes of the Insolvency Rules covered not merely those falling within the definition of protected party within the CPR, but also included those suffering from a physical disability or affliction.

2. The Registrar should not have declared the claimant bankrupt: he ought to have:

    a. been aware that the claimant was incapable;

    b. adjourned the case for a representative or litigation friend to be appointed; and

    c. heard representations from such a person.

3. On the evidence, the financial situation was complex and, without proper investigation, it was impossible to be sure that it was appropriate to make a bankruptcy order.

The order was set aside and the matter referred to the Registrar to be heard again.

Comment

As with the decision of District Judge Ashton noted in March 2011 edition, this is a clear reminder of the burden both upon parties and upon the Court in acting upon an indication that a party to bankruptcy proceedings may be incapable of engaging in the proceedings.

Court of Protection (Amendment) Rules 2011 (SI 2011/2753)

Summary

With effect from 12.12.11, a new Rule 7A has been introduced into the COPR, which enables a practice direction to specify the circumstances in which an authorised court officer is able to exercise the jurisdiction of the court.

Rule 7A is accompanied by a Practice Direction 3A, which spells out the detail of how this change will work. In material part, it provides as follows:

2.1 Subject to paragraphs 2.2, 3 and 4.2 an authorised court officer may deal with any of the following applications:

(a) applications to appoint a deputy for property and affairs;

(b) applications to vary the powers of a deputy appointed for property and affairs under an existing order;

(c) applications to discharge a deputy for property and affairs and appoint a replacement deputy;

(d) applications to appoint and discharge a trustee;

(e) applications to sell or purchase real property on behalf of P;

(f) applications to vary the security in relation to a deputy for property and affairs;

(g) applications to discharge the security when the appointment of a deputy for property and affairs comes to an end;

(h) applications for the release of funds for the maintenance of P, or P's property, or to discharge any debts incurred by P;

(i) applications to sell or otherwise deal with P's investments;

(j) *applications for authority to apply for a grant of probate or representation for the use and benefit of P;*

(k) *applications to let and manage property belonging to P;*

(l) *applications for a detailed assessment of costs;*

(m) *applications to obtain a copy of P's will;*

(n) *applications to inspect or obtain copy documents from the records of the court; and*

(o) *applications which relate to one or more of the preceding paragraphs and which a judge has directed should be dealt with by an authorised court officer.*

2.2 An authorised court officer may not conduct a hearing and must refer to a judge any application or any question arising in any application which is contentious or which, in the opinion of the officer:

(a) *is complex;*

(b) *requires a hearing; or*

(c) *for any other reason ought to be considered by a judge.*

The powers of authorised officers to exercise case management powers under Rule 25 of the COPR is circumscribed by paragraph 3 of the PD, such that they can only exercise the powers to:

(a) *extend or shorten the time for compliance with any rule, practice direction, or court order or direction pursuant to rule 25(2)(a) (even if an application for extension is made after the time for compliance has expired);*

(b) *take any step or give any direction for the purpose of managing the case and furthering the overriding objective pursuant to rule 25(2)(m);*

(c) *make any order they consider appropriate pursuant to rule 25(5) even if a party has not sought that order; and*

(d) *vary or revoke an order pursuant to rule 25(6).*

A vitally important safeguard is included in Paragraph 4, providing that:

4.1. P, any party to the proceedings or any other person affected by an order made by an authorised court officer may apply to the court, pursuant to rule 89, to have the order reconsidered by a judge.

4.2 An authorised court officer may not in any circumstances deal with an application for reconsideration of an order made by him or made by another authorised court officer.

Comment

It is unsurprising that the MOJ has chosen to implement this recommendation of the Rules Review Committee ahead of the others, as it comes at minimal cost to the public purse and is likely to have a significant impact upon speeding up consideration of complex applications by the judiciary by freeing them up from box-work.

It is perhaps appropriate, however, as one of us (Alex) sat on the Rules Review Committee, to sound a note of caution in that the powers to authorised officers by this SI and PD go significantly further than those envisaged by the members of the Committee when they had recommended a change to allow some of the burden of box work to be transferred from the judiciary to authorised officers. The Committee proposed that:

> "*Strictly defined and limited non-contentious property and affairs applications should be dealt with by court officers (e.g. applications for a property and affairs deputy by local authorities and in respect of small estates that do not include defined types of property). The provisions will also have to provide for an automatic right to*

refer any such decision to a judge and internal monitoring and review by the judges."

The powers granted to authorised officers include power to deal with all non-contentious applications to appoint a deputy for property and affairs, subject only to the discretion of the officer to refer the matter to a judge under paragraph 2.2 of the PD (and, of course, to the reconsideration provisions in paragraph 4). They are also granted wide powers to consider (e.g.) applications for the purchase and sale of P's property, or for the release of funds to discharge P's debts, both of which would potentially have significant impacts upon P's resources. The MOJ in its response to the consultation undertaken prior to the laying of the SI before Parliament indicated that authorised officers would work under the supervision of the judges and that the senior judge would issue guidance on what would be referred up; perhaps understandably, it would appear that this guidance is to be internal rather than the subject of wider consultation, but it is likely that the referring up process will, at a minimum, require some bedding in.

Furthermore, it is perhaps of some concern that neither the new Rule 7A nor the PD includes the provisions for internal monitoring and review by the judges proposed by the Rules Review Committee. Whilst, as set out above, the MOJ has set out a commitment to supervision and the circulation of (internal) guidance, which will go some considerable way to ensuring a consistency of approach, practitioners will no doubt wish to be astute to identify whether there are any trends developing in the practice of the authorised officers which should be drawn to the attention of the judiciary (for instance through the Court of Protection Users Group).

Updated Practice Directions

With effect from 24.11.11, the following Practice Directions have been the subject of minor amendment:

1. Practice Direction 10A (Deprivation of Liberty Applications)
2. Practice Direction 14B (Admissions, Evidence and Depositions)
3. Practice Direction 19A (Costs)

The amendments have been to update the relevant contact details as well as website details for forms.

Permission applications

Lucy Series has been granted access by Senior Judge Lush to the statistics that he maintains as regards the applications he considers for permission to bring CoP proceedings. The full breakdown is to be found at http://thesmallplaces.blogspot.com/2011/11/applications-for-permission-to-court-of.html, but in headline terms, the Court (or least Senior Judge Lush) would appear to take a dimmer view of applications from sons and daughters concerning their parents, than it does applications from parents concerning their sons and daughters. Most applications are about older people, in particular with dementia, but most of these are rejected. Applications are more likely to be granted, the younger 'P' is; particularly if P is male. And more applications fail that have been put in by a solicitor than those put in without legal representation!

Comment upon the *Cheshire* Judgment[13]

"*I am very grateful to Lucy Series for her enlightening commentary on the Court of Appeal ruling in Cheshire West, but cannot agree with her assertion that the judgement "will offer greater clarity as to what circumstances amount to a deprivation of liberty". In my view it makes the task of distinguishing 'deprivation of liberty' from 'restraint', which was always tricky, almost impossible, by introducing 'purpose' and 'reason' into the mix.*

Whilst the contextual details of the Cheshire West case differ significantly from my own area of practice in acute hospital settings, I am extremely worried about the general point made in the judgement that we should have regard for

[13] Sue Neal, Mental Capacity Act Implementation Lead NHS North Lancashire

the objective 'purpose' and 'reason' why someone is placed and treated as they are in determining whether or not deprivation of liberty is occurring. Realistically, non-legal professionals trying to implement this legislation in practice will struggle to understand the fine distinctions made in the judgement between objective 'reason' and 'purpose' and subjective 'motivation' and 'intent'.

As a best interests assessor, I am no longer confident that I know how to do my job – the objective 'reason' or 'purpose' of restrictions has always formed, primarily, part of the analysis of the second part of my assessment – to be considered after I have made a determination as to whether the individual is, objectively, deprived of their liberty. I'm now not sure how to make that judgement, if the benign 'purpose' of any restraint is to be weighed in the balance alongside other factors such as the intensity and frequency of the restrictions and their impact on the individual concerned. In an acute hospital setting, where the self-evident purpose of interventions is to preserve life and promote the patient's health and well-being, how severe would any restrictions need to be to warrant a DoLS authorisation? How much weight is to be given to the restraining party's benign objectives?

As a trainer of acute hospital staff, I feel that I no longer know how to explain how they are to identify cases that may amount to deprivation of liberty, when it goes without saying (assuming our hospitals are not over-run with Harold Shipmans and Beverly Allitts) that the objective 'purpose' of medical and nursing interventions is always, one would hope, to save life and limb.

The problem is that, despite their noble intentions, doctors and nurses do not always know what's best (even if they think they do!), particularly when it comes to the need to impose restrictions on a patient's liberty. For example, we had a case where a patient was confined to bed virtually 24/7, 'in her best interests', due to the risk of falls – it was only thanks to the DoLS process that the hospital were forced to accept that this restriction could be reduced (and deprivation of liberty thereby avoided) by the provision of increased staffing, to enable the patient more freedom to wander. There is a danger that such patients will no longer be afforded the protective scrutiny of the DoLS scheme, if we are to teach staff that the benign 'purpose' or 'reason' underlying restrictions may keep them out of the 'deprivation' zone.

As a non-legal professional endeavouring to keep up to date with the case law in this area of practice, I am dismayed by this judgement, which I feel throws yet more mud into waters that were already murky and difficult to navigate."

Middle Temple Dinner in aid of Mental Health Research UK

Some of you will have known John Grace QC, who was one of the Counsel in Bournewood. He co-founded a charity in 2008 called Mental Health Research UK. Sadly John passed away this July. There will be a black-tie tribute dinner for John at Middle Temple on 10 February 2012 which will raise money for a new research scholarship into schizophrenia in his name. For further details and to book a place, please see MHRUK's website: http://www.mentalhealthresearchuk.org.uk/

Court of Protection Law Reports

By way of shameless plug (and, of course, to assist with the difficult decision as to what to get the Court of Protection practitioner in your life), Tor and Alex are delighted to announce that the consolidated volume of the COPLR (covering more than 50 cases from 2008-11) has now gone to print, and is available for purchase (at http://www.jordanpublishing.co.uk/publications/private-client/-court-of-protection-law-reports-consolidated-volume-2007-2011-), purchase of this volume entitling readers to a 15% discount on the regular (quarterly) series.

Court of Protection Move

Just a reminder that, from 9 January, the Court of Protection's new address will be:

The Royal Courts of Justice
Thomas More Building
Strand
London
WC2A 2LL

DX 44450 Strand

The telephone number will stay the same: 0300 456 4600.

Our next update should be out at the start of January 2012, unless any major decisions are handed down before then which merit urgent dissemination. Please email us with any judgments and/or other items which you would like to be included: full credit is always given.

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Alex has a very busy practice before the Court of Protection. He is regularly instructed by individuals (including on behalf of the Official Solicitor), NHS bodies and local authorities. Together with Victoria, he co-edits the Court of Protection Law Reports for Jordans. He is a co-author of Jordan's Court of Protection Practice 2011, and a contributor to the third edition of the Assessment of Mental Capacity (Law Society/BMA 2009)

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