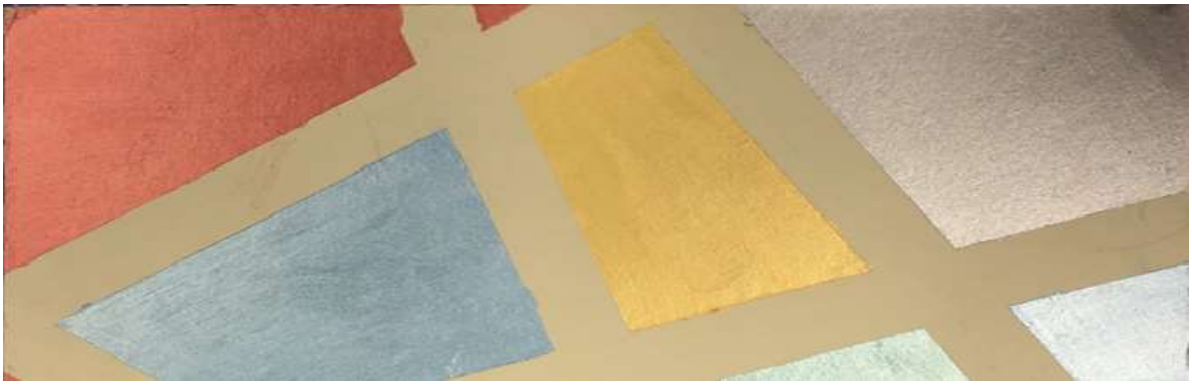

Welcome to the September 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: capacity, silos and pigeon-holes, medical treatment dilemmas, and the limits of support;

(2) In the Property and Affairs Report: LPA modernisation and help with COP1 and COP1A forms;

(3) In the Practice and Procedure Report: the Court of Protection is, in fact, a court, costs updates, and insights in the future of remote hearings;

(4) In the Wider Context Report: a policy round-up, the inherent jurisdiction and children, advocacy in restricted settings, and the limits on the duty to secure life;

(5) In the Scotland Report: Mental Welfare Commission reports on the use of the Mental Health Act during COVID-19 and advance statements, and thoughts about SIDMA.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here, and Neil a page here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

**Editors**
Alex Ruck Keene
Victoria Butler-Cole QC
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Rachel Sullivan
Stephanie David
Simon Edwards (P&A)

**Scottish Contributors**
Adrian Ward
Jill Stavert

The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

# Contents

## HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

### LPS – no news is… no news (but it is already being amended)

We had hoped to bring you news of the draft Code of Practice to the MCA by now, which is supposed to have been published for consultation. We will provide an update as soon as we can, and share the deep and growing frustration of our readers at its absence (and, almost more materially, the absence of even draft regulations setting out who can carry out material tasks).

In the interim, the Health and Care Bill published on 6 July 2021 makes clear that, even before coming into force, the Government anticipates that the LPS will have to be amended to reflect the proposed abolition of CCGs in England and their replacement with Integrated Care Boards. Paragraph 82 of Schedule 4 to the Health and Care Bill provides that:

> *Schedule AA1 to the Mental Capacity Act 2005 (deprivation of liberty: authorisation of arrangements enabling care and treatment) is amended as follows.*
>
> *In paragraph 3— (a) omit the definition of "clinical commissioning group"; (b) at the appropriate place insert— ""integrated care board" means a body established under section 14Z25 of the National Health Service Act 2006;".*
>
> *In paragraph 6(1)(d)— (a) in sub-paragraph (i), for "a clinical commissioning group" substitute "an*

*integrated care board"; (b) in the words after sub-paragraph (ii), for "clinical commissioning group" substitute "integrated care board".*

*In paragraph 11, for sub-paragraph (b) substitute— "(b) an integrated care board;".*

*In paragraph 14(1), for paragraph (b) substitute— "(b) each integrated care board;".*

The proposed amendment makes clear that the concept of NHS continuing healthcare will remain a reality. Responsibility will therefore continue to lie with the NHS (through Integrated Care Boards rather than CCGs) for arrangements giving rise to a deprivation of liberty which are carried out mainly through the provision of NHS continuing healthcare in England.

For more on the passage of the Bill, see this page on the Parliament website.

## MCA/DOLS emergency guidance withdrawn

With effect from 10 August 2021, the DHSC's emergency guidance on the MCA and DOLS has been withdrawn. Whilst it still appears on the website, the message on the page now reads:

*This publication was withdrawn on 10 August 2021*

This emergency guidance will no longer be updated.

*The care and treatment of people who may lack the relevant mental capacity must always be guided by important principles of the Mental Capacity Act 2005 (MCA) and may in some cases include the safeguards provided by the Deprivation of Liberty Safeguards (DoLS). This was and is the case, before, during and after the pandemic.*
*Some emergency coronavirus public health powers, including the Coronavirus Act 2020 and the Health Protection Regulations 2020 covering restrictions and self-isolation, are still in force and in certain circumstances these may be relevant to decision making in respect of those lacking the relevant capacity. Where decisions may need to be made in relation to COVID-19 care or treatment, for someone who may lack the relevant mental capacity, practitioners should follow their usual processes, including the best interest decision making process.*

The withdrawal of the guidance means that the urgent authorisation form (form 1B) in Annex B to it should now no longer be used and instead form 1 should be used for all requests. All the relevant forms can be found here.

Alex has also updated the COVID-19/MCA resources page on his website to take account of other recent updates to guidance. It is slimmed down from the form it took previously, but rest assured it can be bulked up again if and when (hopefully only if) it is required.

## Compulsory vaccination and care homes

As of 11 November, the Health and Social Care Act 2008 (Regulated Activities) (Amendment)

(Coronavirus) Regulations 2021 come into force. These regulations require registered persons of all CQC registered care homes (which provide accommodation together with nursing or personal care) to ensure that a person does not enter the indoor premises unless they have been vaccinated. This is subject to certain exemptions. The Regulations apply not just to care home staff, but also to those visiting care homes in a professional capacity, such as Best Interests Assessors, IMCAs and lawyers.

The operational guidance accompanying the regulations, which apply only in England, can be found here, and the impact statement here, which as at 19 July suggested that that roughly 7% (40,000) workers in CQC-registered care homes are likely to be unvaccinated by November 11.

The Government is consulting on whether to mandate vaccination for frontline health and social care staff. The consultation, to be found here, runs until 22 October 2021.

## Capacity and the limits of decision-specificity

*Liverpool City Council v CMW* [2021] EWCOP 50 (Sir Mark Hedley)

*Mental capacity – assessing capacity*

### Summary

In this case, Sir Mark Hedley had to consider whether a woman, CMW, who had recently turned 18 had capacity to make certain decisions in seven specific areas: the conduct of proceedings, the management of her affairs, her residence, her care, her contact with others, the use of social media and the internet and whether she could engage in sexual relations. CMW's childhood was identified as having been "very troubled" by Sir Mark Hedley, although the judgment was (deliberately) cagey about the details, save to identify that she had been the subject of a care order which had put in place restrictions around her contact, rolled forward upon her majority by interim orders within the Court of Protection pending the resolution of the question of her decision-making capacity in the domains identified above. She had given birth to a baby boy shortly after turning 18, the birth being identified by Sir Mark Hedley as "probably the most important event" in her life – although the baby was the subject of Children Act proceedings and at that point in foster care. The relationship with the father had been very important to her, although many had questioned whether it had been in her best interests; however, since the father had been arrested in connection with sexual offences (it not being clear whether CMW was the victim), there had been no contact between them and at the point that the case was before Sir Mark Hedley it appeared that neither desired contact with each other.

CMW had been diagnosed as having ADHD, foetal alcohol spectrum disorder as well as specific difficulties with cognition and speech and language. Her expressive language was identified as being quite good but her receptive and processing skills were said to be only those of a child aged 7 to 9. She did not, however, have a learning disability.

Taking each aspect of capacity in turn, Sir Mark's conclusions were as follows.

*Litigation capacity*

Although there was no argument advanced that CMW had capacity to litigate the Court of Protection proceedings, Sir Mark Hedley did note that she had been found to have capacity to conduct the family proceedings. He accepted the view of the expert, Dr Rippon that these two conclusions were consistent:

> *The issues in the family proceedings are clear and can be shortly stated. The issues in the Court of Protection are potentially much more complex and much longer lasting. I am quite satisfied that she lacks capacity to conduct these proceedings not only in terms of being unable to weigh the relevant issues but also of being unable to understand some of the key ingredients that would require to be weighed. Given the position of the parties, more than that does not require to be said.*

*Capacity to manage affairs*

There was no argument about this, but Sir Mark Hedley noted that he considered "*whether for example her use of money is merely illustrative of making unwise decisions but I am satisfied that viewed generally, she is unable to grasp all the key ingredients that will have to be weighed in order to make decisions as to her own affairs*."

*Residence and care*

This was identified as being "much more controversial." Sir Mark Hedley noted that he had considered with care the decision of Theis J in *LBX v K and L* [2013] EWHC 3230 (Fam), in which Theis J set out the categories of information likely to be relevant to care and residence. At paragraph 13, he observed that:

> *Generally speaking questions of care and residence are considered separately but there are cases in which they would be intimately related. If one took the example of a person with serious physical disabilities for whom the issue of residence would be inseparable from that of care, and one heard that the protected person was rejecting of care because they were unwilling or unable to recognise the necessity for it, that would inevitably impact on the question of capacity to make decisions about residence where care would be a key ingredient.*

On the facts of the case before him, he found that to be the case, Sir Mark Hedley considering that CMW was "*unable to understand that she needs the care that she has because she seriously overestimates her own ability to keep herself safe and to control her life and seriously underestimates the consequences for her welfare of independence*." Returning to his theme, he continued at paragraph 15:

> *When dealing particularly with severe emotional difficulties and deficits, it can be very artificial to assign the relevant questions to individual pigeonholes. They are deeply interrelated and have to be considered in the round. It would be artificial, and indeed wrong, in the case of CMW not consider residence and care together. It is her fundamental inability to grasp why she needs support and what would happen if she did not have it that underpins my finding that she lacks capacity in both these*

> *areas. She could not choose between packages of care because she seriously overestimates her ability to protect herself and seriously underestimates her own vulnerability.*

*Contact*

Sir Mark Hedley found that, on the evidence before him, CMW lacked the capacity to make decisions as to contact. But he sought to respond to three broader points raised on CMW's behalf by the Official Solicitor.

> *17.* […] *The first related to fluctuating capacity. Now, of course, CMW's potential capacity will fluctuate depending on the extent to which she is either calm or distressed and this may indeed be something which has to be considered in future years, as there are grounds to anticipate improvement. At present, however, I am persuaded by Dr. Rippon's view that, although potential capacity does fluctuate, even at her calmest, CMW does not achieve a level of functioning that would amount to having capacity in relation particularly to residence, care and contact.*
>
> *18. The second matter is Miss Hirst's apt reminder that CMW is only 18 and decisions about her capacity should take that into account. Of course teenagers are prone to make unwise decisions; it is often the most effective way to learn. However, in this case I am satisfied that CMW's functioning is affected by matters far more profound than teenage angst. The driving forces are the consequences of ADHD and foetal alcohol spectrum disorder all compounded by complex trauma and language processing difficulties. In coming to that conclusion I have borne in mind the third factor namely the importance and relevance of support. That is certainly currently available to her and even with the advantage of that she remains unable to understand issues of risk and danger to herself.*

*Social media and the internet*

Directing himself by reference to *Re B* [2019] EWCOP 3, Sir Mark Hedley identified that there was only one matter in the list of relevant information identified in that case which exercised him, namely "the question of understanding risk and danger to self." Here, Sir Mark Hedley made clear that he did:

> *20.* […] *not think it right simply to infer from her difficulties in appreciating safety and risk in relation to care, residence and contact that it automatically deprives her of capacity in this area. This is a much more precise and restricted area and indeed with less call on abstract thought. Whilst I appreciate Dr. Rippon's concerns, my conclusion on reflecting on this particular issue and the evidence around it is that I am not satisfied that it is been established that she lacks capacity in this area. It follows that I must conclude that she has capacity.*

*Sexual relations*

This was in effect a non-issue as no argument was advanced to the effect that she lacked capacity to decide to engage in sexual relations.

*Final observations*

Sir Mark identified that:

> *25. This case has been for me far from easy. It evokes my deepest sympathy for CMW who is essentially the victim of the doings of others over 18 years and more. I have reminded myself that I have to decide issues of capacity without regard to the welfare consequences, as required by the decision of the Court Appeal in the York case (supra). Hard though I have found that, having reminded myself of the words of Baker J (as he then was) in PH v A Local Authority* [2011] EWHC 1704 (COP) *(at paragraph 16), that is what I have sought to do.*

### Comment

This judgment is a very good example of the difference between:

1. A judgment serving, in effect, as an operational document setting out for the benefit of the parties the basis upon which the local authority should work with CMW; and
2. A judgment serving as a record for wider society as to the basis upon which those conclusions had been reached.

As an operational document, the judgment is crisp and clear, cutting out extraneous background detail with which the local authority and the Official Solicitor on CMW's behalf could be expected to be familiar, and which does not necessarily need to be more widely known. As a record for wider society, it is more challenging, lacking many of the contextual background details that might give light and shade to the contours of the picture. Some may find it useful in teasing out their thinking here to ask themselves what they consider the function of a judgment, and (if feeling particularly enthusiastic) perhaps also to have a read of this article.

Of perhaps wider interest than the facts of this case is the observation of Sir Mark Hedley about the dangers of seeking to break down interrelated decisions into pigeonholes. The Court of Appeal in *Re B* identified the danger with putting decisions into 'silos' of reaching mutually incompatible conclusions – Sir Mark goes one stage further here in identifying that there will be times when striving to achieve decision-specificity simply becomes both artificial and wrong. Of course, as so often in the field of mental capacity, it is a question of striking a balance, because being insufficiently sensitive to the nature of the decision(s) in question risks turning any analysis of capacity into a status test.

## The Court of Protection and the "most complex COVID patient in the world"

*Cambridge University Hospitals NHS Foundation Trust v AH & Ors (Serious Medical Treatment)* [2021] EWCOP 51 (Hayden J)

*Best interests – medical treatment*

### Summary

The Court of Protection braced itself when COVID-19 hit for decisions to be placed before it about the withdrawal of medical treatment, including potentially agonising decisions in the context of triage.

Although an early decision (albeit not from the Court of Protection) looked like it might herald a wave of situations being put before the courts to choose who could benefit from the last bed, this did not come to pass. There will, no doubt, continue to be examination as to why (one early stab relating to experiences at a large London hospital can be found here), but in the reported cases before the Court of Protection, the explicit focus has always been upon the individual in question. Hayden J, who has decided the two previous cases relating to treatment withdrawal in the context of COVID-19 (*Re TW* and *Re NZ*), has now decided a third, *Cambridge University Hospitals NHS Foundation Trust v AH & Ors (Serious Medical Treatment)* [2021] EWCOP 51. The case is a stark reminder of the apparently random cruelty of COVID-19, as well as a further illustration of the extent to which judgments about best interests are just that – i.e. the exercise of evaluative judgment, rather than the determination of an objective state of affairs.

The case concerned a 56 year old woman, AH, who had been an inpatient at Addenbrooke's Hospital, Cambridge, since the end of December 2020, where she was admitted, on an emergency basis, suffering with severe symptoms of Covid-19, and where she remained at the time of the judgment, September 2021. AH was currently being cared for in a critical care unit and was dependent on mechanical ventilation, continuous nursing care, nutrition and hydration delivered via a nasogastric tube, and receiving various medications.

Hayden J noted at the outset that he had been told that "in terms of the neurological impact and complications AH is *'the most complex Covid patient in the world'."* The medical evidence was detailed, complex and set out in very considerable detail in the judgment, but in very headline terms, the COVID-19 virus, whilst no longer infecting AH, had caused substantial neurological damage. Whilst how the virus had come to cause the damage might not yet be understood, Hayden J was at pains to emphasise that the consequence of the damage and likely prognosis was. Her situation was described by the lead consultant, Dr A, as follows:

> *She has* […] *significantly diminished life expectancy, which is now certainly less than 12 months and, though it is difficult to be prescriptive, perhaps somewhere around six or possibly nine months. There is no guarantee that her death might not come unexpectedly, in consequence of untreatable infection (e.g. respiratory tract infection or infected pressure sore). AH is dying. The ventilatory support here is not keeping AH alive, in order to equip her to respond to an underlying illness (for which it is designed), it is simply keeping her breathing. In a very real sense, it is not prolonging her life, it is protracting her death. Moreover, it is extending her pain at a time when her ability to feel it has increased and, sadly, whilst her enjoyment of life has remained tightly circumscribed.*

In the proceedings before him, Hayden J identified at paragraph 3, the

> *The central issue is whether AH's ventilatory support should continue. There is agreement between all the parties that AH lacks the capacity to give or withhold consent for medical treatment. AH's family members have exhibited a wide spectrum of views whilst endeavouring to advance a collective and unified response. In truth, each family member has, both knowingly and otherwise, vacillated as to the best way forward. This, I consider, is because there is no solution which is in any way*

*comforting. Equally, it is imperative that a decision be taken as to where AH's best interests lie. The family recognise this.*

Whilst Hayden J identified agreement about AH's lack of capacity to decide in relation to treatment, and must be taken to have endorsed that agreement by his lack of detailed reasoning on this point, her cognitive impairments were rather more subtle than this might suggest. As Hayden J noted:

*72. To my mind, the identified 'delicacy' of the issues in this case arise from two important aspects of it. Both are facets of AH's core humanity. AH is able to feel and show some degree of emotion. Predominately, she now reveals pain and real distress. However, she plainly sustains comfort from the presence of her children who have been the focus of her life. I have been told that AH has also been able to derive peace from prayers from the Koran and has demonstrated some enjoyment of films shown to her on her iPad. Both M and A* [two of her adult children] *consider that she has a level of awareness of and interest in her favourite soap opera which they regularly watch with her. This is doubted but not actively contested by the medical team. In many ways I do not consider that matters, what is more important is that she enjoys the comfort of her children being with her on these occasions.*

*73.* [AH's son, A] *recently recorded a Koranic call to prayer, he did so in a large warehouse which enabled his strong and clear voice to resonate and echo. He asked me to listen to it and I did, once in the court room but also, on a number of occasions, privately, out of court. I found it powerful, beautiful and an extraordinary expression of filial love. A had plainly thought about this very carefully and planned it. His sincerity was evident both from his reaction when he listened to the recording in the court room, as well as in his voice as he sang the call. I was told, and entirely accept, that his mother manifestly enjoyed listening to it. Having heard all I have about AH I can think of nothing that was more likely to penetrate through her pain than this act of love.*

*74. All this signals to me that however depleted and compromised her life may have become, AH retains the capacity to feel and receive love. This is an important facet of human autonomy and dignity.*

*75. Secondly, whilst AH cannot communicate her own self-generated thoughts she can, with some level of consistency (though not completely), respond to short and focused questions. Of necessity many of these questions are what lawyers would call "leading", in the sense that they permit only of a yes or no answer. I add that I have been repeatedly advised by the medical experts that such questions are frequently accompanied by body language and expression which communicates the desired response. Invariably, this is not deliberate, it is simply human instinct. A desperately wants his mother to live. Though he has the intelligence to absorb the impact of the medical evidence, his love for his mother causes him to retreat from the force of it. He devises questions to put to his mother in which he hopes to find evidence to support his own desire that she may continue to be ventilated.*

Hayden J, however, was clear that on the basis of the medical evidence before him that

*76. AH's treatment is futile; she is dying slowly in both physical and emotional pain; her treatment is*

> *burdensome and exhausting; her rest is of necessity frequently interrupted and she is on a small noisy mixed-gender ward which affords her minimal privacy and fails satisfactorily to respect her cultural norms (this is unavoidable at present), her dignity is preserved by the tireless efforts of her doctors, the rigorously attentive care of the nurses, the sensitive and intimate care given by her daughter M, which is focused not only on her mother's comfort but on her presentation to the world and more generally, the love of her children and family, which is fiercely strong and entirely unconditional. AH's dignity, however, hangs by a thread. The challenge for all the professionals in this case, the family and the Court is as to how it can best be protected in these last months of her life.*

Hayden J was equally clear that the option explored by the Official Solicitor of ventilation away from the ICU simply could not be regarded as medically safe, and hence that it would be a "misleading premise to identify it as an option which preserves life, even to a vestigial degree. The reality is that it runs the real risk of an avoidable, painful unexpected death, with no family in attendance" (paragraph 77). It was against this that Hayden J therefore sought to identify AH's wishes and feelings, and conducted a detailed analysis of the evidence adduced in this regard by her adult children. Having done so, Hayden J set out his decision in simple terms so that it was free from any ambiguity:

> *I do not consider that AH's best interests are presently met by ventilatory treatment in the ICU; ventilation is now both burdensome and medically futile; it is protracting avoidable physical and emotional pain. It is not in AH's best interests that ventilation be continued indefinitely. It is however in her interests that ventilation remains in place until such point as all her four children and family members can be with her. This, I am satisfied, is what she would want and be prepared to endure further pain to achieve. I am also clear that it is in her best interests to be moved to a place which protects her privacy and affords her greater rest. The details of these arrangements can be worked out between the family and the treating team. One of the children is presently outside the United Kingdom and will have to make arrangements to travel. I hope this is possible, but I make it clear that ventilation should be discontinued by the end of October 2021. Though there is an inevitable artificiality to this, it reflects the delicate balance that has been identified. It provides an important opportunity for this close and loving family to be together at the end. The treating clinicians feel able to work with and perfect this plan and recognise that it is consistent with their own professional conclusions and reflective of the central importance of family in AH's hierarchy of values and beliefs.*

It should be noted that Hayden J had been very alive to the fact that keeping AH ventilated to allow her daughter to travel would involve "some continuation of burdensome and futile" treatment, and to the risk that that this would be putting her family before her. However, at paragraph 106, he considered that

> [t]*he preponderant evidence establishes that it is what AH would want. Dr A was inclined to agree. None of the options in this case is free from risk or without ethical challenge. Ultimately, they have to be confronted as best we can, it is impossible to avoid them.*

## Comment

Hayden J recorded that the Official Solicitor, Sarah Castle, identified this case as the most troubling

and tragic of the cases of this kind with which she had been involved. She did not explain via her Counsel why this was so, although it might legitimately be speculated that this is because of the evidence relating to AH's ability both to experience pleasure (going – it appears – beyond merely instinctual) and to express some level of consistent communication.

Further, and although against a very different factual matrix to that of the case of MSP or Mr Briggs, this case raises similarly stark questions about the construction of best interests decisions. In this context, it is perhaps particularly striking that despite the fact that Hayden J identified at paragraph 79 that "*it is AH's best interests and her wishes and feelings, in so far as they can be elicited, that are in unwavering focus here*," it does not appear that he was able to reach firm conclusions as to what her wishes and feelings would have been as to the maintenance of life-sustaining treatment per se, as opposed to the maintenance of life-sustaining treatment until such point as her family could be with her. The highest he could put it was to say that he was not prepared to infer from the fact that she was Muslim that it would follow that her religious and cultural views that they would cause her to oppose withdrawal of ventilation in these circumstances:

> *93.* […] *On these difficult end of life issues there are differing views within each of the major faiths, including within Islam. There is recognition that intervention which may have a powerful effect on the body may be antagonistic to the integral well-being of the patient. Once treatment is identified as both burdensome and futile and where death becomes inevitable, the prolongation of death is recognised as disproportionate. Some faiths perceive man as having been created in 'the image of God', from which human dignity is perceived to be established. It is therefore reasoned that the protraction of death is inimical to respect for God and thus, inconsistent with belief. The assumption that AH would have taken a particular theological position on her treatment plan solely because she is a Muslim, even an observant one, is not an assumption I am prepared to make. To do so risks subverting rather than protecting AH's autonomy. I also note that there is a range of opinion, within this Muslim family, as to what is the right course to take.*

Although Hayden J reminded himself of the presumption in favour of life, it is perhaps of some interest (and consistent with his approach in other cases) that he is a judge who is willing to override that presumption even absent "sufficient[ly] certain" evidence as to what the person would have wished (the test applied by Charles J in *Briggs* at paragraph 62). Indeed, on one view, his approach in this case to the macro-question of whether ventilation should be continued on a time-unlimited basis, was not, in fact, so much a best interests decision as opposed to an acceptance of the medical evidence that this was clinically inappropriate. Dr A appears clearly to have been of the view that continued ventilatory support was clinically inappropriate, Hayden J recording his evidence as being that:

> *71.* […] *The ventilatory support here is not keeping AH alive, in order to equip her to respond to an underlying illness (for which it is designed), it is simply keeping her breathing. In a very real sense, it is not prolonging her life, it is protracting her death.*

It was no doubt with a careful eye to the fact that he was asking doctors to continue to provide

treatment which was clinically inappropriate (and which he could not, in consequence, demand on AH's behalf, as Lady Hale made clear at paragraph 18 of *Aintree*) that Hayden J was at such pains to say that his decision on AH's behalf as to what should happen in the short-term was guided by his view about what she would have wanted.

Three observations within the judgment are of note. The first is that Hayden J has now reached the clear conclusion that balance sheets do not assist in serious medical treatment case, noting at paragraph 66 that:

> *Though the attraction of such an exercise is beguiling, it is rarely, in my experience, productive. An assessment of 'best interests' must, ultimately, survey the whole landscape of a patient's medical, welfare and emotional needs. The importance of 'sanctity of life' cannot be weighed effectively, for example, against the frustration of being unable to generate communication or the unrelenting distress of an infected bed sore. They are conceptually different and therefore, to my mind, logically resistant to a balance sheet exercise.*

For those who wish to read more about the extent to which balance sheets not be the answer (even if they may sometimes provide a useful checklist to ensure that important points have not been forgotten), this article may be of interest.

The second observation is that Hayden J was at pains to detail, and praise, the thoroughness of the decision-making by the clinicians involved. It is possible, in part, that this was because of observations which had been made to the contrary at some stages by AH's family, but it also reflects the fact that he clearly took the view that this was a situation which – unlike many he has addressed – where the dilemmas were grappled with early, and the assistance of the Court of Protection sought in a timely fashion.

The third observation was in relation to the evidence of M's daughter, S, who lived in Australia, Hayden J observing that "[p]*aradoxically, I formed the impression that S's geographical distance facilitated a more objective assessment of her mother's best interests*." This observation, deep in the heart of the judgment (at paragraph 83) is perhaps telling in terms of the exercise that is required by the MCA (and would, indeed, be by any CRPD informed approach of "best interpretation" of will and preferences – even if that is framed by reference to what, objectively, constitutes the best interpretation of the person's will and preferences). When and how should evidence from those who are closest to the person be discounted because they are too close?

## Short note: medical treatment round-up

By way of round-up of other medical treatment decisions determined recently, we highlight the following:

- *Re KM* [2021] EWCOP 42 (Keehan J). This case concerned a 52 year old man who had suffered a deep vein thrombosis, pulmonary embolism and cardiac arrest following a flight, and had then

caught Covid. He was desperately unwell and had been on ECMO – a heart/lung bypass system which in lay terms could be thought of as ultra-intensive care. ECMO is a relatively new treatment which has only been recommended by NICE as a short term measure. The NICE guidance on ECMO (2014) notes that "*ECMO may need to be withdrawn for patients whose heart failure either will not recover or is not suitable for further treatment*." KM had been on ECMO for 15 weeks and was suffering from severe pressure sores and was thought by the treating clinicians to be in pain. There was no prospect of KM ever being weaned from ECMO, there having been numerous failed attempts. KM was said to hold religious beliefs which included the possibility of divine healing and rejected any withdrawal of life-sustaining treatment, whatever the circumstances. Such beliefs had not been sufficient to outweigh the medical evidence in relation to a child in *Birmingham Women's and Children's NHS Foundation Trust v JB & Anor* [2020] EWHC 2595 (Fam), and were similarly insufficient here in the case of an adult, Keehan J holding that the continued provision of treatment was futile and not in KM's best interests;

- *Re TS (Pacemaker)* [2021] EWCOP 41 (Peel J). This case concerned an 81 year old man who was detained under the MHA 1983 for treatment for a delusional disorder, and required a pacemaker. The man had previously agreed to the surgery but then withdrawn consent. If the pacemaker was fitted, he would be able to receive medication for his mental disorder, and might regain capacity. The court ordered the pacemaker to be inserted, with the use of sedation and restraint if required, noting that the medical benefits to TS were significant, and that he would likely have consented to the operation if he had capacity, since his present wishes and feelings were based on delusional beliefs and he had previously accepted medical advice and intervention.

- *Re* ZA *(Mental Capacity Act 2005)* [2021] EWCOP 39 (Cohen J), which concerned a 53 year old woman with long-standing schizophrenia who was treated in the community. She had type 2 diabetes which had led to leg ulcers and ultimately to a point where amputation of her right leg was recommended to avoid death in 6-12 months from sepsis. She had refused amputation for a long period of time – including having refused consent in 2016, when she was judged to have capacity to make that decision. Ultimately, the clarity of her choice when she had capacity persuaded the court that amputation was not in her best interests;

- *University Hospitals Dorset NHS Foundation Trust & Anor v Miss K* [2021] EWCOP 40 (Lieven J), another urgent application to authorise a caesarean section for a pregnant woman detained under the MHA 1983. The application was made the day before the operation was proposed, as there had been variation in Miss K's agreement to the proposal. The court was, unsurprisingly, unimpressed with being required to make a decision at very short notice and without the Official Solicitor having had time to carry out meaningful enquiries. Nevertheless, the operation was authorised, the judge noting that "I have no reason to believe her wishes would be anything other than to have the safest birth possible."

## Mental capacity, the internet, and when is it better to be honest about the limits of support?

*C (Capacity to Access the Internet and Social Media)* [2020] EWCOP 73 (HHJ Mark George)

*Mental capacity – assessing capacity*

### Summary

In a short judgment delivered in April 2020, but only appearing on Bailii in September 2021, HHJ Mark Rogers made two striking observations about capacity. The first was specific to the decision in question – whether the subject of the proceedings had capacity to make decisions about accessing social media and the internet. The second was of much broader application.

The case, *C (Capacity to Access the Internet and Social Media)* [2020] EWCOP 73, concerned a 28 year old woman, C, with a diagnosis of moderate intellectual disability. She lived in residential care and:

> *5. As a young woman, understandably, she has sexual needs and desires. Similarly, she is no different from the majority of her peers in gaining pleasure and fulfilment from the use of the Internet and social media. This is the context for the current issue.*
>
> *6. In 2017 a significant number of graphic sexual images were discovered on C's electronic devices. Some content was extreme and worrying. The local authority was authorised to place restrictions upon her use of electronic media. A Police investigation was launched, given the suspicion that some of the content crossed into the realm of the criminal law and C was subject to bail conditions for a protracted period. Ultimately, the Police investigation concluded that there was insufficient evidence to justify a prosecution and, in any event, that such would not be in the public interest. The Police acted entirely independently of the Court but, in my view, the decision taken was both fair and humane.*

The question of her capacity to access the internet and social media was now before the court. HHJ Rogers directed himself by reference both to the first principles derived from the statutory framework but also to the decision of Cobb J in *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2. That case, read alongside *Re B (Capacity: Social Media: Care and Contact)* [2019] EWCOP 3, was, in HHJ Rogers' view "*a very useful practical guide to the approach to cases in this category. Whilst facts vary from case to case, Cobb J provides a helpful route map through the issues likely to be in play. Although a decision at first instance, it carries the authority of a hugely experienced Tier 3 Judge.*" There was an expert report from a Dr Lilley which made clear her view that C lacked capacity in this regard. As HHJ Mark Rogers continued:

> *29. Were it simply a question of evaluating the evidence as a whole and forming a view based upon Dr Lilley's report, then this would be a relatively straightforward exercise. However, Mr Bellamy takes two separate points on behalf of the Official Solicitor which he submits go to the decision on capacity, even if I am inclined to accept the clinical findings and methodology of Dr Lilley.*

> *30. Put shortly, Mr Bellamy submits that there is the danger of an over complicated or sophisticated application of Re A, which will have the tendency to be restrictive of the autonomy of people like C because of such an overly paternalistic application of it. Linked to that he also submits that an unduly analytical approach to what might in general terms be characterised as "understanding" and the other aspects of the functionality aspect of the statutory test will lead to an undesirably restrictive approach.*

In particular, it was argued on C's behalf:

> *it is dangerous to set the bars of understanding and weighing too high as the result is likely to entail unnecessary findings of incapacity when compared to the often superficial or casual approaches of a large cohort of otherwise capacitous individuals who may not have a severe intellectual deficit but nevertheless are, comparatively speaking in the population, unsophisticated. They, he argues, frequently and without consequence make risky and poorly reasoned decisions.*

HHJ Rogers, however, whilst noting that this "*attractively presented*" argument obviously raised "*difficult legal and philosophical questions*," was not persuaded that the approach set out in the report of Dr Lilley involved "*an elaborate and unnecessarily cerebral approach which runs counter to the statutory language or the helpful route map of Re A*". He continued:

> *34. Cobb J in Re A, specifically in paragraph 27, addressed the question of the correct approach to the "relevant information" issue and set out in broad terms, in succeeding paragraphs, the key factors. The language he uses is practical and clear and directs the reader (or assessor) to the real day to day issues likely to be in play. Further, the qualifications in paragraph 29 are, in my judgment, specifically designed to ensure that an unnecessarily narrow approach is avoided.*
>
> *35. Re A was a decision on its facts and too close a comparison is dangerous. However, I am struck by the terms of paragraph 31 where Cobb J summarises the evidence of the expert in his case. That expert, rather like Dr Lilley, had explored not only the superficial engagement with the criteria but the reality for A in that case. The assessment was described by Cobb J as appropriate, revealing the "deficits" in understanding and weighing ability. It is an example of a carefully refined test without descending into the purely academic. Whilst the particular factors in Re A are irrelevant to my decision, I am quite satisfied that there is an equivalence of appropriateness in the methodology of Dr Lilley.*

On the facts of the case, therefore, HHJ Rogers found that C lacked capacity in this domain. The local authority had been careful to place the decision in its timely context, on the basis that there may come a point where, as a result of the reinforcement and education, she may have a durable ability to retain and understand the relevant information. HHJ Rogers hoped that may be so, but confessed to reservations.

HHJ Rogers, in an observation which has wider resonance, also noted that:

> *40.* […] *whilst the local authority welcomes and encourages practical strategies to assist C and recognises the benefit of support in the area of technology and its use, Mr Johnson's realistic submission was that there comes a point where support and encouragement becomes so integral to the decision making process that, in reality, the individual concerned is little more than an automaton who is simply carrying out the instruction of others rather than responding to prompts and making capacitous personal decisions. His submission was that for C, at this point in her personal development, that would be the reality as there would have to be continuous one to one supervision and support of her use of technology.*

HHJ Rogers accepted the force of this submission. Having found that C could not understand, retain and weigh the relevant information independently, he continued:

> *41.* […] *if the process could only really occur with the degree of supervision and prompting suggested then that would, in truth, be a fiction rather than a genuine exercise in autonomy. It would probably also be impractical in the care setting.*

## Comment

HHJ Rogers' ringing endorsement of the "route map" laid down by Cobb J in *Re A* should, perhaps, be read in its context. This was an avowedly brief judgment, delivered under the exigencies of the first wave of the COVID-19 pandemic. It means that we do not get a clear sense of the precise reason why the local authority was seeking to control C's access to the internet and social media, but it appears that it may well have been in order to ensure that she was not exposed again to the risk of criminal prosecution. If this were the case, the case therefore raises somewhat similar issues to that of JB, in which the Supreme Court is grappling at the time of writing (September 2021) with the fact that the MCA does not exist in isolation but rather has a very complex relationship with the criminal law with its similar, but distinct, considerations of capacity in the context of criminal responsibility. The Supreme Court in *JB* is also grappling with an underlying issue in C's case, namely that there is, in truth, an inescapable normative element to capacity. In other words, asking what information is relevant to the decision in question is, in truth, asking what information should be relevant to the decision. Cobb J had been alive to this in *Re A* in the context of social media and the internet, HHJ Rogers was alive to it in this case, and the issue in *JB*, in turn, can arguably be reduced to the question of whether society expects that people should understand that a sexual partner needs to be consenting to the sexual act in question.

As noted above, it appears that HHJ Rogers was being asked to consider questions of internet use in the context of potential criminal acts (albeit with lurking questions of whether any such acts would attract criminal responsibility on the part of C). It should be remembered that accessing the internet and/or social media may also be something that the person in question is seeking to do for quite different purposes, and it is suggested that alongside Cobb J's route map should also be read the decision (subsequent to that in *C*) of Williams J in *Re EOA*, in which the latter sought carefully to distinguish between general access to the internet, and access for purposes of seeking to make

contact with specific people.

The second observation of HHJ Rogers, about the point at which support stops and substitute decision-making takes over, is one that is pithily framed. Put in domestic MCA 2005 terms, it reminds us of an important limit to the crucial requirement in s.1(3) MA 2005 that it is legally impermissible to reach a conclusion that a person lacks capacity to take a decision unless all practicable steps have been taken to support them. Beyond a certain point, and as HHJ Rogers made clear, the provision of support runs the risk of setting up a fiction which may be superficially comforting, but in fact means that hard-edged questions about who is doing the supporting and on what basis may be dodged. His observation, in turn, then gets to the heart of debates about which much ink has been spilled in the context of the UN Convention on the Rights of Persons with Disabilities (a very helpful summary of the issues can be found in this report from the Essex Autonomy Project, especially at section 6.5): i.e. whether in pursuit of the goal of securing legal capacity for those with disabilities on an equal basis with others it is better to proceed on the basis that some people, at some points, may need "100% supported decision-making," or to proceed on the basis that some people, at some points, may need decisions to be taken by others.

## Capacity and (booster) vaccination

*Re A (Covid-19 vaccination)* [2021] EWCOP 47 (HHJ Brown)

*Best interests – medical treatment*

### Summary

In this case, HHJ Brown considered an application by a CCG to administer two doses of the Astra-Zeneca Covid-19 vaccination, and a booster in a few months' time, to a man in his thirties, AD. This application was opposed by his mother, AC. The court granted the application to administer the two doses of vaccine, but refused to grant a general authorisation to administer a booster dose without either agreement of the parties or a further application to the court.

AD had diagnoses of a moderate learning disability, Down Syndrome and autism. He was overweight, and was considered to be 'clinically extremely vulnerable' by his GP. AD also *"experience*[d] *significant health anxiety and finds health interventions distressing: he consistently refuses to engage with them.*" His learning disability nurse considered that if AD became significantly unwell with Covid-19, he was likely to refuse necessary healthcare.

AD was unable to comply with social distancing measures or wear a mask. He was described as a very sociable person who enjoyed physical contact with people he was close to, and going to social settings of interest to him. The case was heard in May 2021, and it was submitted by the CCG that as lockdown ended, the risk to AD of contracting Covid-19 was likely to increase.

Health and social care professionals involved in AD's care and AD's father supported his being

vaccinated; his mother (who had previously held AD's lasting powers of attorney in respect of both health and welfare and property and affairs, before these were revoked by the Court of Protection in 2020) opposed it. All parties involved agreed that AD lacked capacity to make a decision about being vaccinated, so the sole dispute was whether it was in his best interests to receive the vaccine (and supportive medication, such as pain relief).

In weighing up AD's best interests, the court considered:

1. AD's wishes and feelings: it was agreed that AD has always been resistant to medical intervention, and would likely find the experience of being vaccinated distressing. When staff attempted to put information about the vaccine to him, he clearly objected to it. The parties were in agreement that AD should not be informed of the proceedings, as that information was likely to cause him distress and unlikely to provide any further information about his wishes and feelings.

2. AC's objections: AC presented a number of objections to the proposal to vaccinate AD, some of which were specific to AD and some of which were more general concerns about vaccination. She argued that (inter alia):

    a. The use of force or restraint to administer the vaccine would be traumatic and cause physical or psychological damage;

    b. The trauma might cause AD to exhibit uncontrollable behaviours;

    c. The use of force would cause AD to lose trust in care staff;

    d. AD may have previously had Covid-19 with mild symptoms;

    e. AD was quite healthy despite the argument of health professionals that he was extremely clinically vulnerable;

    f. AD might have an allergic reaction to the vaccine given some of his other allergies;

    g. The risk of contracting Covid-19 is very low;

    h. The administration of the vaccine does not guarantee he would not contract the disease;

    i. The vaccination has not been proven safe and adverse side effects were very high;

    j. Alternative treatments (such as vitamins C or D) were preferable;

    k. Nearly all people recover from Covid-19.

AC clearly had grave concerns regarding the vaccine, which she supported with a mixture of materials obtained from the internet. The judgment recorded:

> *Mrs. C has made further points against the vaccine; "It is in the long term (or even as short as 5*

> *months) that we started (sic) to see all the people who have taken the vaccine to fall very sick and have organ failure and will die", and "many specialists expect even more people to experience deadly side effects after the next 'quack' dose and when they come into contact with natural virus similar to SARSCoV2, weeks or months later"*

In describing the documents produced, the judgment states:

> *This set of documents, the origin of which is unclear, include statements to the effect that the vaccine contains "nanoparticles which allow definitive control of people vaccination, thanks to 5G" and "4 fragments of HIV which give to vaccinated people: AIDs syndrome and immunodeficiency" [E24]. The diagram at [E34], duplicated at [E76], appears to demonstrate that "sensor nanoparticles" will be injected into vaccine recipients which will then interact with mobile phones in order to send information via mobile 5G networks to the "cryptocurrency system". The diagram features Bill Gates. At [E36] is a narrative concerning the intention of the "New World Order" to "fully control and enslave the world's population by monitoring and weakening it" through the Covid-19 vaccine..*

Relying on the judgment of Hayden J in *SD v Royal Borough of Kensington and Chelsea* [2021] EWCOP 14, the CCG argued that such material should be given no weight and the court must make its decision based on the credible professional evidence before it.

The court did consider AC's concerns that force would be used, and the administration of the vaccine might cause AD to distrust people working with him. The CCG confirmed that the application did not include any plan for using force to administer the vaccine. AD was to receive a mild sedative (given covertly in a drink) in advance of the medication, which would also have the effect of preventing memory formation. If the sedative did not appear to be working, the vaccination would be cancelled and rearranged. AD would receive the Astra Zeneca vaccine, which could be administered in his home and would not require him to travel to a medical setting. The person administering the vaccine would not be part of AD's care team, and would leave immediately after administering the vaccine. AD would wear a short-sleeved shirt so his arm could be easily accessed. AD could also be given paracetamol to address side effects. His care provider did not think that this plan would cause any difficulties in the relationship between AD and his care staff.

Professionals involved in AD's care considered it was strongly in his best interests to be vaccinated. His GP noted that serious side effects were very rare, and the vaccination would greatly reduce his risk from illness from Covid-19. The CCG's Deputy Director of Quality considered it would be contrary to AD's best interests to wait for further forms of treatments to be developed.

The Official Solicitor had raised a number of queries about the plan in proceedings, and by the final hearing, considered that these had been appropriately answered. The Official Solicitor also sought explicit orders that physical restraint was not authorised.

The court accepted the arguments of the CCG and Official Solicitor and approved the application, noting that if the plan was unsuccessful and a more restrictive plan was proposed, the matter should

be returned to the court. HHJ Brown explained:

> *I entirely understand why there is genuine and legitimate concern from some, about the administering of a new vaccine to combat a new virus. People legitimately and in good faith, raise questions about its efficacy and possible side effects. I approach Mrs. C's concerns with profound respect and deep compassion. I accept that she genuinely holds these concerns and is acting out of what she considers, to be the best interests of her child….*
>
> *…AD's opposition to healthcare interventions must be taken into account, in that the administration of the vaccine will be against his wishes and feelings: but his wishes and feelings are not determinative. These factors must be weighed in the balance, with all the other evidence about the risks to AD of contracting Covid-19 versus the risks to him of carrying out the vaccination in accordance with the proposed Care Plan.*
>
> *I have to look at the professional evidence and the best guidance available to the court at the current time, in the best interests of AD. I have been very impressed with the care that the professional team working with AD has taken to consider his particular case and his need for the vaccination. When the balance of evidence from all those interested in AD's welfare is considered, in my judgment it is overwhelmingly in favour of him receiving the vaccine.*

Booster: The CCG sought authorisation to administer a booster vaccination in the event that the first two vaccine doses went well and there were no serious adverse reactions. The Official Solicitor resisted the application, on the basis that AD's response to the first doses was not known, and the national position regarding booster jabs had not been determined. AC also opposed the booster.

HHJ Brown declined to give authorisation to the booster. She noted that:

> *The guidance and medical advice may have changed by the time any booster may be required. Any individual would wish to consider whether to have the booster at the time that it is available and those representing AD should be afforded the same opportunity. I respectfully accept the submission of the Official Solicitor that it would represent "overreach" to sanction administration of the booster at this time.*

## Comment

The judgment sets out a dispute which has been repeatedly seen in the Court of Protection at all levels this year: a family member, in good faith, strongly believes that receiving a Covid-19 vaccination will harm a loved one based on evidence which is not considered credible by health professionals working the person lacking capacity. In our experience, the approach taken by HHJ Brown (and in line with the *SD* case) to deal briefly with putatively medical evidence relating to vaccines which lacking in credibility or support from mainstream medical establishment has been one consistently taken by judges hearing these applications. The court did not struggle to conclude that, particularly given AD's inability to understand the risks of Covid-19 or practice social distancing, it was in his best interests to be vaccinated even if there was some risk of distress to him.

In this case, AC also raised a number of issues specific to AD that both the court and Official Solicitor found credible (specifically, those relating to the distress he may feel and the impact on his relationships with carers), and the judgment sets out that these were put to the CCG in advance of the hearing, and the plan crafted to take account of them. The court and Official Solicitor appeared to find the plan impressive in accommodating AD's particular needs, and to represent the least restrictive option in the circumstances.

## Short note: twin-tracking Court of Protection and MHA matters

In an interesting 'twin-track' case, Lieven J both determined questions of residence, care and contact as a Court of Protection judge, and an application for discharge of P's father as nearest relative under the MHA 1983: *A Local Authority v SE & Ors* [2021] EWCOP 44. As regards capacity, the issues were identified as complex, the 18 year old woman in question only engaging "very variabl[y]" with the expert, Dr O'Donovan. Dr O'Donovan's evidence was that:

> *16.* […] *SE has emerging Emotional Unstable Personality Disorders (EUPD) as opposed to a mixed personality disorder. The effect of this is that when SE is in a state of arousal and dysregulation, she lacks capacity to make decisions about her residence. It is not possible to make a clear diagnosis of EUPD, or any other Personality Disorder, because SE is only 18 and her personality is still developing.*
>
> *17. She considers that SE lacks capacity to make decisions regarding her care arrangements. She does have some insight into her need for support, but SE is unable to understand her current care needs or the risks to her if care were not available.*
>
> *18. It is her opinion that SE is able to make capacitous decisions about her general use of social media. However, SE lacks capacity to have contact with her family via social media or in person. SE has a significant degree of internal conflict between feeling angry with her family but wanting their acceptance and affection.*

Dr O'Donovan recommended that the court used the inherent jurisdiction to authorise restrictions of SE's general use of social media and the internet "because this would be in SE's best interests."

Lieven J accepted Dr O'Donovan's evidence on capacity, noting that "[a]*lthough SE has some insight into her condition, it is apparent that she finds it very difficult to weigh up the information she is given, particularly when she is stressed*." Whilst she then proceeded to make best interests determinations as a judge of the Court of Protection in relation to residence, care and contact, she did not do so in relation to the internet and social media, nor did she comment further upon whether she should use the inherent jurisdiction to do so.

As regards the nearest relative application, it should be noted that, although the judgment is silent on this, the application for discharge was heard by Lieven J in her capacity as a judge of the Queen's Bench Division, a Court of Protection judge not being able to discharge functions under the MHA 1983. In discharging P's father, Lieven J observed (at paragraph 49) that:

*ME is, in my view, unsuitable to act as SE's nearest relative. SE does not want to see or speak to her father, she has said that she wants contact with him to cease, she has made allegations of sexual, physical and emotional abuse against him and, as set out above, I have made a number of findings against ME in relation to his abusive and controlling behaviour towards SE. It necessarily follows that ME is not suitable to act as SE's nearest relative.*

## Capacity and trauma

*A Local Authority v P* [2021] EWCOP 48 (HHJ Williscroft)

*Mental capacity – assessing capacity*

### Summary[1]

A 24-year-old with learning disability, autistic traits and mood disorder was sharing a flat with two residents and at significant risks arising from contact with others. Having been sexually abused as a child, he was being sexually exploited, being drugged to have sex with random men. Despite sex and drug education, he continued to abscond so 2:1 support 24 hours a day was put in place which he opposed.

On application to the Court, he was considered to have capacity to make decisions as to sexual relations, internet and social media, but was found to lack capacity as to care, residence and contact with others. In particular, he could not understand the risks he faced when meeting people to engage in sex or drug use. He was not able to put into action even fairly minimal basics that would keep him safe. He was able to describe what dreadful things might happen, but unable to relate them to himself and so could not weigh those risks in the balance. As HHJ Williscroft identified:

*68. P is unable in my assessment to make decisions about such contacts as he is often in a state it seems to me led by compulsion or obsessive behaviour, by the complex combination of age, sexual drive and diagnoses, driven too by trauma, when he is driven to meet people for sex. Their motivation and engagement with him he cannot understand or process and their communications he cannot interpret so that not just on a rare occasion but very regularly he is so uncomfortable that he calls police or carers to get him home. Then it can appear in discussion later that in fact he has been exploited, pressured and drugged for the advantage solely of other people's pleasure and he is unable to understand that to such an extent that he continues some relationships even when people have behaved in this way to him as it is apparent his understanding of social interactions is so limited.*

*69. Social workers have obviously considered with care whether wanting and engaging in risky multiple sexual relationships might be at least not uncommon for a young gay man like P and they have wanted to enable him to have as much autonomy as possible. It is I accept rather odd that he can understand the basics of sex but not have the capacity to engage in a relationship that is based almost exclusively on the need for sexual activity but this is as a result of looking at domains of understanding separately and part of ensuring autonomy is only restricted where an analysis of lack*

[1] Note, Arianna having been involved in the case, she has not contributed to this note.

*of capacity is clear.*

Helpfully, the Judge prepared a letter to the young man to explain her decision.

### Comment

The silo-ing of sex and contact decisions continues to be of interest and will, hopefully, be considered by the Supreme Court in *JB* in due course. Providing the decision by letter to the young man was also an important step, enabling him to understand the reasons behind the significant measures that were in place.

## DoLS statistics

The DOLS statistics for England during the period of 1 April 2020 to 31 March 2021 have been published and are available here. Here are the main headlines, which should be read against the backdrop of the pandemic and thus – on one reading – show what lengths those involved went to seek to maintain 'DoLS business as usual' in the face of extraordinary challenges:

- DOLS applications plateaued: 'There were an estimated 256,610 applications for DoLS received during 2020-21. This is a small drop of approximately 3% compared to the previous year, following an average growth rate of 14% each year between 2014-15 and 2019-20.' Of these:
    - 137,515 were urgent authorisation, and 117,220 were standard authorisations
    - 79,880 were in nursing homes, 71,885 were in care homes, 66,375 were in acute hospitals, and 5,685 were in mental health hospitals. 26,685 did not contain information on the detaining authority.
    - There were 28,460 people who had more than one standard authorisation, 6,050 who had three standard authorisations, and 2,160 who had four or more standard authorisations.
    - Older people were far more likely to find themselves the subject of standard or urgent authorisations than younger ones, with 7,415 applications made per every 100,000 people over the age of 85, and only 125 per 100,000 people aged 18-64.
    - Of applications which were not granted, approximately 60% were due to the person's having had a change in circumstances.
- Roughly as many applications were completed in the year as were made: *'The number of applications completed in 2020-21 was estimated to be 246,025. The number of completed applications has increased over the last five years by an average of 19% each year.'*

- Whilst there were significant delays in considering DOLS authorisations, *'[t]he reported number of cases that were not completed as at year end was an estimated 119,740, approximately 10,000 fewer cases (8%) than the end of the previous year. This is the second consecutive year since reporting began in 2015-16 that the number of cases not completed at year end has fallen.'*

- The average length of time for completed application was 148 days. We would note that in 2015-2016, the average duration was 83 days. *'The proportion of standard applications completed within the statutory timeframe of 21 days was 24% in 2020-21, the same as the previous year.'*

- Regional variation: as in previous years, the North East has continued to have the highest number of applications per capita; despite this, the North East also had the shortest average duration of completing applications, at 73 days (with the Southwest the longest at 216 days).

# PROPERTY AND AFFAIRS

## Lasting Powers of Attorney consultation

The Ministry of Justice has launched a consultation on modernising LPAs, closing on 13 October 2021, and to be found here. The consultation proposals include amendments both to the MCA 2005 and secondary legislation centred around what the MoJ identify as seven proposals:

> *Proposal 1 considers the role and value of witnessing on LPAs and how to keep that value. We examine how we can achieve this using technology to support remote witnessing or to replace the witness. If there's no value, we consider removing the need for a witness. Our preferred option is to replace the witness with new safeguards that perform the same function.*
>
> *Proposal 2 considers the role of applying to register an LPA and who can apply. We look at how to reduce the chance of an LPA being rejected by OPG and the benefits of reducing or keeping the delay between execution and registration. Our preferred option is that LPAs are digitally checked as they are being made, and are sent for registration as soon as they are executed.*
>
> *Proposal 3 considers OPG's remit. We examine how to widen OPG's remit so it can do things such as verify people's identity, and stop or delay an LPA's registration if it has concerns about it. Our preferred option is for OPG to be able to do this by expanding the types of checks it's allowed to carry out under the MCA and supporting regulations.*
>
> *Proposal 4 considers how people can object to an LPA. We look at how to simplify the current process so people can more easily understand where to send objections and how to do so. Our preferred option is that anyone should be able to object to an LPA and that all objections are sent to OPG first.*
>
> *Proposal 5 considers when people can object. We examine at what point and for how long objections can be made before an LPA is registered and if this remains a safeguard for the donor. Our preferred option is to allow people to object to an LPA from the time the donor starts creating it to the point it is registered. We would also like to shorten the time between an LPA being sent for registration and it being placed onto the register.*
>
> *Proposal 6 considers the speed of the LPA service and whether a dedicated faster service should be introduced for people who need an LPA urgently. We look at whether an urgent service would provide additional benefits over making the service faster for everyone. We also consider whether a dedicated service could be introduced without making the process more complex for users and OPG. Our preferred option is not to introduce a dedicated service, as we do not believe it's possible to create a faster service with a high enough level of safeguards that is not also overly complex.*
>
> *Proposal 7 considers solicitors' access to the service. We look at whether this can be achieved through integrating our service with solicitor's case management systems or whether mandating part or all of the service would be necessary. Our preferred option is to provide solicitors with access to the service by integrating with their existing systems.*

See also the OPG blog about the consultation here, and video of the launch here: Modernising LPA consultation launch with Minister Chalk and Public Guardian Nick Goodwin - YouTube.

In the meantime, the OPG has published a new blog with FAQs relating to the creation of

## Sample COP1 and COP1 forms

Sample COP1 and COP1A forms have been published for applications relating to monies held in Child Trust Funds (but equally relevant for other situations where a relatively small sum of money is in issue).

## Short Note: the limits of the Golden Rule

Reinforcing the point that the so-called "Golden Rule" is not actually a legal rule, as opposed to a rule of practice designed to assist in the avoidance or minimisation of disputes, the decision of in, *Hughes v Pritchard & Ors* [2021] EWHC 1580 (Ch), even compliance with it did not suffice to save a will from a challenge based upon lack of testamentary capacity. The GP who had been approached made clear in his oral evidence had he had been was unaware of significant facts and did not therefore ask questions which would have explored the full extent of the testator's cognitive impairments.

# PRACTICE AND PROCEDURE

## The Court of Protection is in fact a court

*SM v The Court of Protection and The London Borough of Enfield* [2021] EWHC 2046 (Admin) (High Court (Administrative Court) (Mostyn J)

*COP jurisdiction and powers – interface with civil proceedings*

### Summary

This was a judicial review of a decision of the Court of Protection. The application was brought by SM, mother of RM, against a decision on 12 March 2021 of HHJ Hilder in respect of RM's residence and care arrangements. SM had applied for permission to appeal, which was refused by Keehan J on 12 April 2021, on the basis that there was no reasonable prospect of establishing HHJ Hilder's decision was wrong. Keehan J further found that the proposed appeal was totally without merit. SM had no further right of appeal to the Court of Appeal in respect of HHJ Hilder's decision.

SM then issued an application for judicial review. Mostyn J noted at the outset of his judgment that the application "*is a proxy for a prohibited appeal against the decision of Keehan J, and as such is likely to be an abuse.*" He noted that the application was in any event out of time for challenge HHJ Hilder's decision, and thus the only reviewable decision was that of Keehan J refusing permission to appeal.

Mostyn J noted *R(Cart) v Upper Tribunal (Public Law Project intervening)* [2012] 1 AC 663, which considered "*whether a decision of the Upper Tribunal to refuse permission to appeal a decision of the First-Tier Tribunal was susceptible to judicial review*" (paragraph 8). In that case, the Supreme Court found that *'the judicial review jurisdiction of the High Court over unappealable decision of the [Upper Tribunal] had not been ousted*" (paragraph 13). Mostyn J summarised the finding of the court at paragraph 14:

> *The Supreme Court went on to rule that the test for challenge in judicial review proceedings should be the same as that for a second-tier appeal under s.55 of the Access to Justice Act 1999: see [55] per Baroness Hale and [130] per Lord Dyson. Section 55 provides:*
>
> > *'Where an appeal is made to the county court, the family court or the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that:*
> >
> > *(a) the appeal would raise an important point of principle or practice, or*
> >
> > *(b) there is some other compelling reason for the Court of Appeal to hear it.'*

Mostyn J noted that this decision had led to the introduction of CPR 54.7A, but this provision applied only to a refusal of permission to appeal by the Upper Tribunal:

*CPR 54.7A(7) provides:*

> *'The court will give permission to proceed only if it considers –*
> *(a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law; and*
> *(b) that either –*
> *(i) the claim raises an important point of principle or practice;*
> *or*
> *(ii) there is some other compelling reason to hear it.'*

*And para (8) provides*

> *'If the application for permission is refused on paper without an oral hearing, rule 54.12(3) (request for reconsideration at a hearing) does not apply.'* (paragraph 16)

The court went on to note the recommendation of the Independent Review of Administrative Law Panel that *Cart* judicial reviews should be abolished, observing their strikingly low rates of success. Mostyn J considered that the reasoning of the panel, while limited to consideration of Upper Tribunal refusals of permission:

> *must apply equally to a Cart-type application seeking to challenge an unappealable refusal of permission to appeal by an appeal judge in the County Court or Family Court. If the Cart jurisdiction is to be abolished, then in my opinion it should be completely abolished* (paragraph 19)

The court asked itself: *'Does the Cart jurisdiction extend to the Court of Protection?'* (paragraph 19). The court noted that the draft Bill appended to the Law Commission report had provided for the Court of Protection in language very similar to the words to those "*very similar to those in the 2007 Act considered by the Supreme Court in Cart*" (paragraph 25). However, whilst s.45(1) of the MCA as actually enacted provides that the Court of Protection is a superior court of record, per s.50(1), Parliament provided that the Court of Protection has "*the like powers, rights, privileges and authority as the High Court.'* The court considered that:

> *In my judgment the variation of the Law Commission's language is highly significant. When defining the scope of the new court's jurisdiction Parliament spoke of "general powers" rather than supplementary powers. Further, those powers were not confined to procedural matters such as attendance of witnesses and the production of documents, nor were they confined to matters of enforcement, nor were they confined merely to matters incidental to the court's jurisdiction. Rather, the new Court of Protection was granted exactly the same powers, rights, privileges and authority as the High Court. There is no opacity of language in s.47(1). Pace Baroness Hale's para [37] the words are completely clear.* (paragraph 37)

As a result, "*the position of the Court of Protection is far removed from that of the Upper Tribunal*" (paragraph 29) as the Court of Protection was making orders which, prior to the MCA 2005, "*would have*

*been made by the High Court exercising its inherent powers*" (paragraph 34). As a result "*the Court of Protection cannot be regarded as a court inferior to the High Court, and therefore its unappealable decisions cannot be the subject of judicial review by the High Court*" (paragraph 35). Mostyn J noted that the position was not "*nearly so clear cut where a decision refusing permission to appeal is made in the Family Court*" (paragraph 36):

> *38. …the Family Court principally subsumed the family jurisdiction of the County Courts, although it was intended also to embrace some, but by no means all, of the family jurisdiction of the High Court: see the President's Guidance at paras 14 and 17.*
>
> *39. Accordingly, it seems to me that the Family Court is probably to be regarded as inferior to the High Court. Therefore, a decision by an appeal judge within the Family Court refusing permission to appeal is seemingly covered by the reasoning of the Supreme Court and is susceptible to a judicial review challenge under the second-tier appeal test, although a definitive decision must be awaited.*

Mostyn J found that even if it were incorrect in respect of the above, "'*the application nonetheless falls to be dismissed both for a procedural reason and on the merits*" (paragraph 41). It noted that the application was out of time in respect of HHJ Hilder's decision, and made no mention of Keehan J's decision. The court further found that the application did not raise any important point of principle or practice, and did not demonstrate any error in law: "*Her complaints about the decision of HHJ Hilder amount to no more than a disagreement with its merits*" (paragraph 47). Like Keehan J in respect of the appeal, Mostyn J concluded that the application was totally without merit and refused permission to apply for reconsideration at a hearing.

### Comment

The appeal itself in this case appeared to be hopeless, having been found to be totally without merit by both Keehan J and Mostyn J. The judgment is notable for being a formal authority (should one, in fact be required) that the Court of Protection is a superior court of record, on an equivalent plane to the High Court, such that a decision by a judge of the Court of Protection to refuse permission to appeal is not amenable to judicial review in the same way as (currently) certain equivalent decisions within the Tribunal system are.

## Court fees increase from 30 September 2021

Following the consultation on increasing selected court fees and Help with Fees income thresholds by inflation, the Government response to the consultation has been published and is available here.

The SI to effect these changes was laid on 6 September 2021, and the changes will come into effect on 30 September 2021. Any questions regarding this consultation response or the SI can be addressed to the Ministry of Justice Fees Policy Team (mojfeespolicy@justice.gov.uk).

The position in respect of Court of Protection fees is as follows:

## Court of Protection Fees Order 2007 No 1745

*The fees in scope from the Court of Protection Fees Order include the fee to apply for action under, a hearing under or to appeal a decision made under the Mental Capacity Act 2005.*

| SI Ref ID | Description | Current | Fee included in consultation | Final fee after remodelling | Difference between consultation and final fee | Final increase |
|---|---|---|---|---|---|---|
| 4 | Application fee (Article 4) | £365 | £377 | £371 | -£6 | £6 |
| 5 | Appeal fee (Article 5) | £230 | £237 | £234 | -£3 | £4 |
| 6 | Hearing fees (Article 6) | £485 | £500 | £494 | -£6 | £9 |

## Costs update

The Civil Justice Council has published its final report on the Guideline Hourly Rates (which can be found here). The working group was tasked with conducting am 'evidence-based review of the basis and amount of the guideline hourly rates (GHR) and to make recommendations accordingly to the Head of Civil Justice and to the Civil Justice Council'. Given that the guideline hourly rates have not been increased since 2010, this report is long overdue. The report makes a range of recommendations, most importantly increasing all the guideline hourly rates from between 6.8% - 34.8%. Guideline hourly rates are of course the starting point for the summary assessment of all legal costs in the Court of Protection (and in practice are also widely used as the starting point in detailed assessments). They are also the hourly rates that are applied by Costs Officers when assessing the costs of deputies in the Court of Protection. The report makes it clear that the rates set out by Master Whelan in the case of *Re PLK, Thakur, Chapman and Tate* [2020] Costs LR 1349 are no longer to be applied.

In other costs news:

- Cobb J has delivered a costs judgment in the case of *T & Anor v L & Ors (Inherent Jurisdiction: Costs)* [2021] EWHC 2147 (Fam). This was a case issued in the High Court pursuant to the Inherent Jurisdiction which, after four case management hearings, settled by consent. The sole issue to be determined by the Court was whether the respondents should obtain an inter partes costs order against P for their costs in the sum of over £200,000. This application was opposed both by the Official Solicitor and the applicants. Mr Justice Cobb reiterated his conclusion in the case of *Redcar & Cleveland v PR* [2019] EWHC 2800 (Fam), that it is the Civil Procedure Rules that apply to

a case brought under the Inherent Jurisdiction. However, because such proceedings have "*the same essentially welfare-oriented characteristics of proceedings under the inherent jurisdiction relating to minors……the costs principles which apply in family proceedings are likely to be highly relevant in this regard*." As such his Lordship held that "*no order for costs is likely to be the appropriate starting point in welfare-oriented proceedings under the inherent jurisdiction concerning a vulnerable adult. In this type of litigation, as with proceedings concerning children, there are generally no winners or losers, and costs orders are therefore likely to be 'unusual.*"

- Foster J has given judgment in an application that the defendant to a clinical negligence claim should pay the claimant's costs of a contested application as to who should be the claimant's litigation friend: *HR v Aneurin Bevan University Local Health Board* [2021] EWHC 2195 (Admin). That application did not concern the defendant, and arose out of the claimant's family's refusal to accept the advice of the claimant's solicitors that the Official Solicitor should be the claimant's litigation friend. Foster J held that it was 'not appropriate' for the Claimant to recover the costs of the application against the defendant in such circumstances.

## Discharging a party – the saga continues

*London Borough of Southwark v P, AA and South London and Maudsley NHS Foundation Trust* [2021] EWCOP 46 (Lieven J)

*Practice and procedure (Court of Protection) – other*

### Summary

The saga of *Re P (Discharge of a Party)* [2021] EWCA Civ 512, reported in previous issues, continued, following the Court of Appeal's overturning the decision of Hayden J to discharge AA, mother of P, from proceedings relating to P without notice or an application being made to do so.

Following the Court of Appeal decision on 16 April 2021, AA was reinstated as a party in proceedings. In a subsequent judgment as to costs (see below) the Court of Appeal considered that none of the other parties in the case had been unreasonable in arguing that Hayden J's order should be maintained – an unsurprising finding where this judgment had been handed down only a few days prior.

The substantive question of what should happen in relation to AA was then sent to Lieven J, and twice adjourned, once tragically due to the death of AA's counsel, Timothy Nesbitt QC.

The history of the case is summarised in the Court of Appeal decision; in brief, the application related to P, now 19 years old, who had diagnoses of atypical anorexia, PTSD and selective mutism. Concerns had been raised by the local authority that P had been sexually assaulted by a visitor to the family home, where she had lived with her mother, AA. By the summer of 2019, P's anorexia was quite severe, and she had a BMI of 10.9; it was also noted that she was unkempt and in a poor state of hygiene.

Welfare proceedings had commenced in June 2019 before Hayden J, who made immediate orders that P should be removed from the family home, and that her direct contact with AA was to be supervised. Proceedings had continued for over a year while additional work by way of trauma therapy was conducted with P, and further assessments were undertaken. Lieven J summarises a turning point in proceedings at paragraph 7-8:

> *7. In October 2020, P revealed for the first time that she had been subject to emotional abuse by AA through various WhatsApp messages. She also disclosed that contrary to what she and her family had previously said, AA had been aware of the abuse by the alleged abuser, SB, but had taken no action. She also alleged, for the first time, that she had been physically and sexually abused by AA's new partner and father of P's half-sister who was born in October 2020.*
> *8. In a material departure from P's previous statements, P indicated in late October 2020 that she no longer wished to live with her mother or have any contact with her mother…*

At the next hearing on 3 November 2020, Hayden J discharged AA as a party to proceedings and ordered all contact between P and AA should end. AA successfully appealed that order in the Court of Appeal, and was again a party to proceedings when the case came before Lieven J.

The court summarised the material which had originally been withheld from AA, and had been the subject of a 'gist' document. AA had since been given some of the original material, but was still relying on the gist document in part:

> *(1) There were messages between AA and P which indicated that:*
> *(a) P informed AA of abuse by AA's new partner but NM disbelieved her;*
> *(b) P believed that [P's] baby was at risk of abuse by AA's new partner;*
> *(c) P was raped and physically abused by SB. She informed AA that abuse was occurring and believed AA took no action. AA was aware P had been assaulted by SB;*
> *(d) AA told P not to disclose the abuse by SB or AA's new partner to anyone;*
> *(e) AA threatened P that both she and the baby could be harmed if she did not speak to AA's new partner;*
> *(f) AA continued to send P emotionally abusive messages after 10.12.20 until around the end of February 2021.*
> *(2) There were messages from an anonymous source to P threatening her.*
> *(3) There were exchanges between the treating team at SLAM, the Local Authority and police and updates from P's treating time at SLAM.* (Paragraph 10)

By the time of the hearing before Lieven J, AA was now aware of the information above, and P's wishes and feelings had been set out. P had been consistent in stating that she did not wish to live with AA, that she did not want any contact with AA or AA's partner, and that she did not want AA to be a party to proceedings. P had also texted her representatives that in April 2021 that if AA "*gets back in as a party I'm not being involved, I don't see why she should as she's not very supportive of me as a person*" (paragraph 13). She continued: *"you can tell the judge I wouldn't want to be part of proceedings if my Mum was a party, I wouldn't see the point in participating as I don't want a relationship with her and she doesn't want me living*

*away from home (despite me turning 20 this year)*" (paragraph 14). In discussions with other professionals working with her, P noted that communications from AA, AA's partner and her extended family had been "*abusive, threatening and deeply disturbing*" (16). P's therapist had expressed concerns for P's welfare if AA became a party to proceedings, and considered it would harm her ability to engage in trauma therapy.

AA was clear that she wished to remain on as a party to proceedings, and to give evidence regarding P's best interests. Despite having filed a witness statement, AA did not provide evidence acknowledging or engaging with the abusive and concerning text messages P had disclosed.

Lieven J directed herself to the decision of the Court of Appeal, and the overriding objective, which included "*ensuring P's interests and position"* (22). She noted that the Court of Appeal had stated that if there were 'exceptional' circumstances, the parties may apply to discharge AA as a party. However, Lieven J observed that:

> *24. It is not clear to me, nor the advocates before me, where the reference to exceptional circumstances comes from. The Rules do not require any "exceptionality" before a party is discharged.*

Lieven J therefore considered instead that the relevant principles were those in s.1(5) MCA 2005, looking also to *Aintree University Hospital NHS Foundation Trust v James* [2013] UKSC 67, *Wye Valley NHS Trust v B* [2015] EWCOP 60 and *Barnsley Hospital NHS Foundation Trust v MSP* [2020] EWCOP 26, and emphasising that the best interests test is considered from the perspective of the protected person, though the specific weigh given to P's wishes and feelings will vary on a case by case basis.

In considering balancing competing rights, Lieven J looked to *London Borough of Redbridge v G* [2014] EWCOP 1361. While noting that that case related to the Article 8 rights of a journalist, Lieven J considered the statement of principles was also applicable, citing the following passages from the judgment of Munby J in that case:

> *24. Secondly, if for whatever reason, good or bad, reasonable or unreasonable, or if indeed for no reason at all, X does not wish to have anything to do with Y, then Y cannot impose himself on X by praying in aid his own Article 8 rights. For X can pray in aid, against Y, X's own Article 8 right to decide who is to be excluded from X's 'inner circle' and in that contest, if X is a competent adult, X's Article 8 rights must trump Y's. It necessarily follows from this that, absent any issue as to X's capacity or undue influence, X's refusal to associate with Y cannot give rise to any justiciable issue as between Y and X.*
>
> *25. Thirdly, if X lacks capacity, Y's Article 8 rights can no more trump X's rights than if X had capacity. Y cannot impose himself on X by praying in aid his own Article 8rights. Y's Article 8 rights have to be weighed and assessed in the balance against X's Article 8 rights. If Y's rights and X's rights conflict, then both domestic law and the Strasbourg jurisprudence require the conflict to be resolved by*

> *reference to X's best interests. X's best interests are determinative. As I said in Re S, para 45, referring to what Sedley LJ had said in In re F (Adult: Court's Jurisdiction) [2001] Fam 38, 57:*
>
> > *"In the final analysis, as Sedley LJ put the point, it is the mentally incapacitated adult's welfare which must remain throughout the single issue (emphasis added). The court's concern must be with his safety and welfare.""*

Looking to *Re F (A Child Adjournment)* [2021] EWCA Civ 469 by analogy, AA argued that the best interests test was not the correct one to apply in case management decisions. Lieven J, however, considered that the analogy was not entirely apt:

> *…. In proceedings under the Children Act 1989 the parent has a right to be a party, not least because s/he has in law parental responsibility. However, in the Court of Protection the parent of an adult child has no rights to party status and as such the legal analysis is different. The legal relationship between a minor child and his/her parents is quite different from that of a person over 18 and their parents. Having said that, it is obvious that justice to any third party is a highly important consideration.*

Considering the judgment of Cobb J in *KK v Leeds City Council* [2020] EWCOP 64, Lieven J considered that potential harm to P of a person being joined as a party or having evidence disclosed was likely to be a relevant consideration, summarising her approach at paragraph 32-33 thus:

> *32…the whole purpose of the MCA is to protect and promote the best interests of P. Where the interests of P's parents, here AA, conflict with P's best interests then P's interests must take precedence. There is a real danger in this litigation of that fundamental principle being forgotten.*
>
> *33. However, it would be vanishingly rare in a Court of Protection case for justice to a third party to result in a decision which was contrary to the best interests of P. It is critical to be clear where one starts from in the analysis under the MCA. There are always two questions under that Act; does P have capacity and if not, what is in P's best interests? Critically, P is an adult and has the rights that go with being an adult, subject to the loss of capacity. As Hayden J put it in the Barnsley case the "whole focus of the MCA is to reassert P's autonomy and his or her right to take their own decisions." The focus in Children Act proceedings is entirely different. The principles underlying the two statutory schemes are not analogous, and they should not therefore be conflated.*

All parties except for AA took the clear position that it was in P's best interests for AA to be removed as a party. The Official Solicitor emphasised P's strong wishes to this effect, and the court noted their consistency over a period of approximately 8 months.

AA argued that she had Article 8 rights in respect of P, and had a right to be a party. Lieven J did not accept this argument:

> *Since October 2020, P has made it entirely clear that she does not want contact with her mother. In my view whatever Article 8 rights AA had in relation to P in respect of the earlier evidence (which was considered by the Court of Appeal), the weight to be accorded to any such rights has significantly*

> *diminished in light of the further evidence. We now have a position where P has been living away from family home for at least 2 years and most importantly where P is now an adult, being no longer under the age of 18 and has expressed in the clearest way that she does not want to have contact or an ongoing relationship with her mother, who she says was complicit in her abuse. In my view, that assertion of her rights must cap and seriously diminish any Article 8 rights of her mother.*

Lieven J similarly rejected arguments that AA had the right to respond to allegations made against her by P, with AA also noting that Hayden J's order discharging AA as a party appeared to have been made under the inherent jurisdiction rather than the MCA 2005. Lieven J concluded that the original orders had been made under the MCA 2005, as it had been determined on an interim basis that P lacked capacity, and capacity was not to be revisited until P's therapy had been completed. The court thus proceeded on the basis that P lacked the material decision-making capacity.

Lieven J considered that it was "*entirely open to AA to file evidence saying that she did not send the texts and to produce evidence to that effect*" (paragraph 40). She did not consider that the fact of an ongoing criminal investigation into the texts would preclude her from producing evidence that she did not send them "*if that is the true position.*" The court further could not "*see any requirement of natural justice for her to be a party in order to refute the allegations. This is not a case where without being a party she does not know the substance of the allegations*" (40).

Lieven J considered that by focusing on facilitating 'P's participation in proceedings' and having "*at the forefront of my mind her best interests*" (paragraph 41) the outcome of the application to discharge AA as a party was clear. "[T]*o put the mother's rights before P would be to entirely subvert purposes of the Mental Capacity Act. Secondly, it is very clear from evidence from Ms Dawson and most importantly, Ms X that it would be contrary to P's best interests for her mother to be a party to these proceedings*" (paragraph 42). The court considered that AA could file evidence relating to the texts and as to P's best interests, "*albeit without knowing all the evidence before the court but in circumstances where the evidential position as to best interests and wishes and feelings is so clear, in my view AA should be removed as a party*" (paragraph 44).

## Comment

The case provides what appears to be an end to the saga, with AA having effectively all relevant information to hand, an application before the court and an opportunity to put her case, Lieven J reached the same conclusion as had Hayden J in November. The discussion is notable for several reasons, not least being what Lieven J identified as the interplay between consideration of P's welfare and best interests under the MCA 2005 and the case management question before the court. The judgment is also interesting for its refutation of the suggestion by the Court of Appeal that the discharge of a party was 'exceptional,' with the court noting that no party was able to offer an argument that such a standard should be applied.

## Costs principles reviewed

*Re P (Discharge of Party: Costs of Appeal)* [2021] EWCOP 46 (Court of Appeal (Peter Jackson, Baker and Warby LJJ))

*COP jurisdiction and powers – costs*

### Summary

In *Re P (Discharge of Party: Costs of Appeal)* [2021] EWCA Civ 992, the Court of Appeal was asked to consider an application for costs following the appellant's successful appeal in *Re P (Discharge of Party).* The underlying case related to the mother of P (who was the subject of proceedings) having been discharged as a party without an application being made to the court, notice given to the mother, or an opportunity for the mother to put forward arguments until a considerable period of time after the discharge had occurred.

The appellant proposed five reasons why her costs should be paid by the respondents (paragraph 2):

> *(a) Whilst the normal rule in welfare cases in the Court of Protection is that there should be no order as to costs, it was held by this Court in Cheshire West v P [2011] EWCA Civ 1333 that this does not apply to appeals from the Court of Protection which are governed by CPR Part 44. Under r.44.2(2), the general rule is that, if the court decides to make an order about costs, the unsuccessful party will be ordered to pay the costs of the successful party. That rule should have been followed in this case.*
>
> *(b) As a result of the decision of the court below, the appellant was obliged to bring this appeal to secure fundamental rights. Although the decision to remove her as a party was taken by the judge without any prior application by any of the parties, it had been open to the respondents to propose a different order which would have protected P without infringing the appellant's fundamental rights.*
>
> *(c) Furthermore, once the appellant had filed her appeal notice, it was open to the respondents to concede the appeal and/or propose a different order, having seen the way the appeal was put.*
>
> *(d) Although the appellant was publicly funded, the appellant owed a duty to the Legal Aid Agency to seek to recover costs.*
>
> *(e) This Court should have regard to the observations of Lord Hope R (on the application of E) v Governing Body of JFS & Anor [2009] UKSC 1 at [25], in which he emphasised the importance of costs orders for those who are publicly funded in the event that they are successful.*

The court rejected the application (paragraph 3):

> *(a) As the appellant recognised in her submissions, whilst CPR 44.2 establishes the normal rule to be followed where a court decides to make a costs order, the court has a discretion under r.44.2(1) as to whether costs are payable and, under r.44.2(2), if it decides to make an order, to make a different*

*order to that described by the general rule. Under r.44(3), in deciding what order (if any) to make about costs, the court must have regard to all the circumstances.*

*(b) In the Cheshire West case, Munby LJ stressed that he was not intending to lay down any principle, save that every case had to be decided by reference to what is now CPR 44.2. He also acknowledged that, whilst an appeal from the Court of Protection fell within CPR Part 44, the fact that it concerned a vulnerable adult was one of the circumstances to be taken into account under r.44.2(2) and that in some cases it may be one of the more important circumstances.*

*(c) In the present case, the vulnerability of P was manifestly a central feature of the proceedings and of the appeal. It was P's high degree of vulnerability that led the judge to take the step of discharging the appellant as a party. The protection of P was the focus of the proceedings and of all parties thereto.*

*(d) The decision to discharge the appellant as a party was made by the judge without application from any party at a hearing which had been listed to consider different applications by the respondents which were brought because of their concerns about threats to P's safety and welfare. In our judgment when allowing the appeal (paragraph 65), we concluded that the judge would have been fully entitled to make the order which the respondents were asking for.*

*(e) Although it would have been open to the respondents to oppose the judge's proposal at the hearing, and/or to concede the appeal, we concluded that it was not unreasonable of the respondents to seek to uphold the judge's order for this Court, given their responsibilities towards P and their concerns about her safety and welfare.*

### Comment

The judgment provides a pithy summary of some of the key principles of costs applications in health and welfare cases (still relatively rarely seen in reported decisions). The Court of Appeal emphasized that there was not a default position if the court considered it was appropriate to deviate from the general rule of no order as to costs, and costs applications would turn on the facts of the particular case (and the vulnerability of the subject of proceedings would likely always be of relevance). In this case, the Court of Appeal did not consider that the parties had been unreasonable in supporting the action of Hayden J to discharge mother. The respondents maintained in further proceedings before Lieven J, who, four days before this judgment, had made the same order as had Hayden J following an application being made on notice to the mother and the mother having an opportunity to put her case forward.

## Remote hearings in the family court and Court of Protection post pandemic

The Nuffield Family Justice Observatory (NFJO) published on 22 July a report on remote hearings in the family court and Court of Protection. 50% of the 880 who answered the question "Do you think Court of Protection hearings could continue to be held remotely" said "yes," 38% said "no", and 12% said

"it depends." The findings, which are informing consideration of the post-pandemic practices of both the family court and the Court of Protection, do need to be read with some care, because the comments accompanying the "yeses" revealed caveats. Interestingly, the responses included members of the judiciary, one District Judge identifying that:

> *Subject to the caveat that short directions hearings involving lawyers only can be dealt with remotely. Remote hearings for people with impaired capacity are fundamentally unfair. The person may already have problems of orientation in relation to time, person and space and building rapport and engagement, and therefore meaningful participation, requires face-to-face contact. The problems are amplified where the person is unrepresented or their solicitor is not with them during a remote hearing. Subject to the above caveat, it is essential that we return to attended hearings as soon as practicable*

## Protocol 15 to the ECHR now in force

For anyone contemplating a challenge to the ECtHR arising out of the Court of Protection (or, more likely, from the Court of Appeal/Supreme Court after an appeal originating from the Court of Protection), it is important to note that with the entry into force of Protocol 15 to the ECHR, the time limit for making any application is 4 months with effect from 1 February. .

# THE WIDER CONTEXT

## Policy round-up

The Government has published its response to its recent public consultation on reforming the MHA 1983. Of particular relevance for those working with the MCA 2005 is that the consultation showed no significant support for the proposal set out in the White Paper that non-objecting patients would be subject to the DOLS/LPS, not the MHA 1983, nor overall agreement on what alternative changes to the interface would improve the application. In addition, the proposal to change the interface was a key concern for a number of stakeholders and organisations who responded. The Government is therefore not proposing to take forward reform of the interface at this time. Instead, the Government will seek to build the evidence base on this issue through robust data collection, to better understand the application of the interface. In addition, the Government will continue to engage with stakeholders to understand what support and guidance could help improve application of the current interface.

The DHSC has responded to CQC's "Out of Sight, Out of Mind" report on the use of restraint, seclusion and segregation in care services. It has also responded to the report and recommendations from Baroness Hollins and the Oversight Panel's review of the Independent Care (Education) and Treatment Reviews for people with a learning disability and autistic people in inpatient settings.

The Commons Health Committee has published its report on the treatment of autistic people and people with learning disabilities, recommending that "the Trieste model of care is implemented for autistic people and people with learning disabilities by the Department of Health & Social Care and NHS England & Improvement. All new long-term admissions of such people to institutions should be banned except for forensic cases."

In the context of the launch of both the National Disability Strategy and the National Strategy for autistic children, young people and adults, the Government has published "Shaping future support: the health and disability green paper," considering the options for addressing short- and medium-term issues in health and disability benefits The consultation on the green paper closes on 11 October 2021, and can be accessed here.

More broadly, the Government is pushing ahead with legislative plans to integrate health and social care in the Health and Care Bill (discussed with reference to LPS elsewhere in this report), and the well-publicised proposals in relation to funding changes, discussed in this 'rapid reaction' webinar by members of our public law team (including Arianna, one of our editors).

## The inherent jurisdiction, deprivation of liberty and children

In *Re T (A Child)* [2021] UKSC 35 Supreme Court (Black, Lloyd-Jones, Arden, Hamblen and Stephens SCJJ), through gritted teeth held that the inherent jurisdiction could be used as an "imperfect stop gap" to authorise the deprivation of liberty of children and young people in the face of a "scandalous" lack

of appropriate accommodation making use of the route of s.25 Children Act 1989 impossible. For more detail, see Alex's summary of the judgment here.

The language used by the Supreme Court justices in this case is stark, as was their reluctance to give judicial 'cover' for the failures of the state to provide adequate resources. However, through gritted teeth, they found it effectively impossible to ignore the alternative that not enabling the High Court to exercise its inherent jurisdiction to authorise deprivation of liberty in these circumstances would be worse.

It is perhaps to be regretted that the Supreme Court did not have the benefit of sight of the judgment of MacDonald J in *Wigan BC v Y (Refusal to Authorise Deprivation of Liberty)* [2021] EWHC 1982 (Fam) – arising in slightly different, but conceptually similar circumstances. However, had they done so, it is difficult to see that they would not have endorsed his conclusion that the High Court could not be asked to authorise deprivation of liberty where the arrangements were (as he described):

> *so inappropriate that they constitute a clear and continuing breach of his Art 5 rights. Within this context, the fact there is no alternative cannot by itself justify the continuation of those arrangements. All the evidence in this case points to the current placement being manifestly harmful to Y. Within that context, the absence of an alternative cannot render what is the single option available in Y' best interests and hence lawful.*

MacDonald J has continued to hand down judgments in this area. See *North Yorkshire County Council v M & Ors (Medium Secure Bed)* [2021] EWHC 2171 (Fam) where he was, in effect:

> *being required to adopt the role of mediator, or at least facilitator, between NHS England and two NHS Mental Health Trusts, in order to procure medium secure tier 4 provision that the NHS is responsible for providing and for a child who has twice been assessed as being in urgent need of that provision. As Ms Khalique QC observed on behalf of M, viewed in the context of the impact on M of the protracted nature of these proceedings, this is profoundly depressing in circumstances where each day M spends in a placement that is not able to meet her needs further compounds the difficulties under which she already labours.*

See, also *MBC v AM & Ors (DOL Orders for Children Under 16)* [2021] EWHC 2472 (Fam) , where MacDonald J, at speed, had to address the impact of the coming into force of the to force on 9 September 2021 of the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021, amending the Care Planning, Placement and Case Review (England) Regulations 2010 to prohibit the placement of a looked after child under the age of 16 in unregulated accommodation. MacDonald J concluded that:

> *in cases in which the question before the court is whether the court should authorise, under its inherent jurisdiction, the deprivation of liberty of a child under the age of 16 where the placement in which the restrictions that are the subject of that authorisation will be applied is prohibited by the terms of the Care Planning, Placement and Case Review (England) Regulations 2010 as amended, I*

*am satisfied that the following principles will apply:*

*i) It remains open to the High Court to authorise under its inherent jurisdiction the deprivation of liberty of a child under the age of 16 where the placement in which the restrictions that are the subject of that authorisation will be applied is prohibited by the terms of the Care Planning, Placement and Case Review (England) Regulations 2010 as amended.*

*ii) In deciding whether to grant a declaration authorising the deprivation of liberty, the existence or absence of conditions of imperative necessity will fall to be considered in the context of the best interests analysis that the court is required to undertake when determining the application for a declaration on the particular facts of the case.*

*iii) Whilst each case will turn on its own facts, the absence of conditions of imperative necessity will make it difficult for the court to conclude that the exercise of the inherent jurisdiction to authorise the deprivation of the liberty of a child under the age of 16 in an unregulated placement is in that child's best interests in circumstances where the regulations render such a placement unlawful.*

*iv) It is not appropriate to define what may constitute imperative considerations of necessity. Again, each case must be decided on its own facts.*

*v) The court must ensure the rigorous application of the terms of the President's Guidance, which will include the need to monitor the progress of the application for registration in accordance with the Guidance. Where registration is not achieved, the court must rigorously review its continued approval of the child's placement in an unregistered home. Ofsted should be notified immediately of the placement. Ofsted is then able to take immediate steps under the regulatory regime.*

## Independent advocacy in restricted settings

Advocates play an essential role in safeguarding the rights of those in restricted settings, but there are real concerns about the quality of advocacy, which has been described as "very variable." A group of advocacy providers and advocates therefore came together to explore the causes of this variability – the result is the Black Belt Advocacy report entitled, "Independent advocacy in restricted settings for people with a learning disability and autistic people." In summary, the key findings were that:

- Inconsistent and poor commissioning has meant that independent advocacy is not resourced and funded to the level it needs.
- Advocates' skillsets tend to be limited, particularly in relation to understanding autism and understanding the broader context (most obviously the Transforming Care programme).
- There is a reticence to work with families due to the focus on the individual and the failure to see that person in the context of their families and communities.
- Mental health providers do not give advocates sufficient support.

- The risk that advocates were not as independent from the mental health system as they should be – such independence is necessary to keep that system in check.
- Advocacy should focus on building longer term relationships with an individual rather than adopting a model of issue based advocacy.

For more detail on the importance of advocacy for those in restricted settings and the implications of the group's findings, you can read the report here.

## Dependent drinkers and legal tools

A new briefing for Alcohol Change by Mike Ward and Professor Michael Preston-Shoot outlines how professionals can use legal frameworks (including the MCA 2005) to manage and support vulnerable dependent drinkers. Full disclosure, Alex was on the expert reference group.

## Suicide and the duty to secure life (1)

*R (Morahan) v Her Majesty's Assistant Coroner for West London* [2021] EWHC 1603 (Admin) (QBD (Admin Court) (Popplewell LJ, Garnham J, and HHJ Teague QC))

*Mental Health Act 1983 – interface with MCA*

### Summary

Tanya Morahan was aged 34 when she died of cocaine and morphine toxicity. Over the preceding 10 years she experienced mental illness and was diagnosed with paranoid schizophrenia. On 25 June 2018, she was discharged from MHA s.3 and became a voluntary inpatient. Five days later, with her clinicians' agreement, she left the ward to clean up her flat to rehabilitate into the community. She was returning to the ward to take evening medication. She left the unit for the last time on 3 July and was found dead in her flat on 9 July 2018. The issue before the court was whether there was a duty to hold a *Middleton* inquest (ie enhanced Article 2 ECHR investigative duty) in such circumstances.

The court helpfully summarised the key principles regarding the positive Article 2 operational duty:

> *38. The positive operational duty arises where the state agency knows or ought reasonably to know of a real and immediate risk to an individual's life, and requires it to take such measures as could reasonably be expected of it to avoid such risk (Osman paras 115, 116). In this context:*
>
> *(1) Risk means a significant or substantial risk, rather than a remote or fanciful one. In Rabone the risk in question was one of suicide and was quantified as being 5%, 10% and 20% on successive days, which was held to be sufficient (see paras 35-38).*
>
> *(2) An immediate risk to life means one that is "present and continuing" as opposed to "imminent" (Rabone para 39).*

> *(3) The relevant risk must be to life rather than of harm, even serious harm (G4S Care and Justices Services Ltd v Kent County Council [2019] EWHC 1648 (QB), paras 74-75 and R (Kent County Council) v HM Coroner for the county of Kent [2012] EWHC 2768 (Admin) at paras 44-47).*
>
> *(4) Real focuses on what was known or ought to have been known at the time, because of the dangers of hindsight (Van Colle at para 32).*
>
> *(5) Overall, in the light of the foregoing considerations viewed cumulatively, the test is a stringent one (see Van Colle, per Lord Brown of Eaton-under Heywood at para 15; and G4S, paras 71-73). It will be harder to establish than mere negligence, but that is not because reasonableness here has a different quality to that involved in establishing negligence; rather it is because it is sufficient for negligence that the risk of damage be reasonably foreseeable, whereas the operational duty requires the risk to be real and immediate: see Rabone at paras 36-37.*
>
> *39. It is also clear that the existence and scope of the duty must not impose an impossible or disproportionate burden on state agencies in carrying out their necessary state functions and must take into account the individual's rights to liberty (article 5) and private life (article 8): see Osman at para 116, Rabone at 104 and Fernandes de Oliveira at paras 111, 125, 131.*

The duty exists in "*certain well-defined circumstances*" which have developed from prison settings to those detained under the MHA 1983 (*Savage*) to voluntary patients (*Rabone*). The issue, therefore, was whether the duty arose on the facts of Tanya Morahan's case. Having analysed the case law, the court derived the following three points of interest:

1. The existence or otherwise of the operational duty is not to be analysed solely by reference to the relationship between the state and the individual, but also, and importantly, by reference to the type of harm of which the individual is foreseeably at real and immediate risk. So there may be an operational duty to protect against some hazards but not others.

2. The foreseeable real and immediate risk of the type of harm in question is a necessary condition of the existence of the duty, not merely relevant to breach. Without identifying such foreseeable risk of the type of harm involved, it is impossible to answer the question whether there is an operational duty to take steps to prevent it.

3. In cases where vulnerable people are cared for by an institution which exercises some control over them, the question whether an operational duty is owed to protect them from a foreseeable risk of a particular type of harm is informed by whether the nature of the control is linked to the nature of the harm. Detention can increase the risk so the control is linked to it:

> *67 …The same is true of voluntary mental patients in relation to the risk of suicide where their residence at the institution is not truly voluntary if and because the mental condition for which they are being treated itself enhances the suicide risk. It does so not only as the potential result of incarceration, if not truly voluntary, but often also because, as was identified in both Rabone and Fernandes de Oliveira, the mental condition which the institution assumes control for*

> *treating impairs the patient's capacity to make a rational decision whether to take their own life. The nature of the control is again linked to the risk of harm. Where, however, there is no link between the control and the type of harm, to impose an operational duty to protect against the risk would be to divorce the duty from its underlying justification as one linked to state responsibility. It would also undermine the requirement identified in Osman that the positive obligations inherent in article 2 should not be interpreted so as to impose a disproportionate burden on a state's authorities. The control by the state could not justify the imposition of the duty by reference to state responsibility if the risk were of a type of harm which is unconnected to the control which the state has assumed over the individual. A psychiatric hospital owes no duty to protect a patient, whether voluntary or detained, from the risk of accidental death from a road traffic accident whilst on unescorted leave.*

The court concluded that no operational duty was owed to Tanya to protect her against the risk of accidental death by the recreational taking of illicit drugs. There was no real and immediate risk of death from such cause of which the Trust was or ought to have been aware. There was no history to suggest suicide risk or accidental overdose. She had abstained from taking drugs whilst on leave of absence from her s.3 detention. And there was nothing to suggest that permitting Tanya to continue her rehabilitation into the community after her absence on 30 June/1 July gave rise to a real and immediate risk of death by overdose.

Furthermore, there was no relevant assumption of responsibility. The Trust had not assumed responsibility for treatment of Tanya for drug addiction of a life threatening nature. The responsibility it assumed was for treatment of her paranoid schizophrenia and potentially exacerbating effects of substance misuse. Her mental health condition was not linked to the harm. Nor was she vulnerable to suicide: her vulnerability was unconnected to the harm. Nor was there an exceptional risk, as opposed to an "ordinary" one. It was a risk to which she was exposed in the same way as any other recreational drug user irrespective of her status as a patient at the hospital. Nor should her position be equated with that of a detained patient. Unlike *Rabone* (who was "an involuntary patient in all but form"), Tanya was a voluntary patient rehabilitating into the community and there were no grounds for MHA detention on the final day she left the ward on 3 July 2018. That she failed to return to the ward a second time and missed her medication for an increasing period as the days passed was insufficient to create the operational duty.

## Comment

The circumstances in which the State is obliged to take reasonable precautions to prevent a person's suicide continues to fascinate. The present case illustrates how fact-sensitive the elements of the operational duty are in determining legal liability. Patient status seems to continue to influence the law's development here. Melanie Rabone's status was described as that of an involuntary patient in all but form, whereas the voluntariness of Tanya's position was said to be quite different. It is argued here, based upon the *Mammadov* decision, that the operational duty is not confined to hospital detention and *could* be owed to those who are suicidal in the community *if* the *Osman* elements are proven. Much

is at stake in these cases: on the one hand the law does not want to encourage defensive practice; but, on the other, there is a need to hold public bodies to account for failing to take reasonable precautions where they know or ought to know of a real and immediate risk to life

## Suicide and the duty to secure life (2)

As noted above, the High Court in Tanya Morahan's case considered the case of *Fernandes de Olivera*, in which the European Court of Human Rights had taken a rather more nuanced approach to the obligations imposed by Article 2 ECHR than that which had been anticipated by the Supreme Court in *Rabone*. That calibration was reiterated in *Ražnatović v Montenegro* [2021] ECHR 723, a decision handed down on 2 September 2021, in which, applying the approach set down in *Fernandes*, the court found that it had not been established that the authorities in Montenegro knew or ought to known at the material time that there was an immediate risk to the life of the person who then took their own life. The court therefore found that it did not need to assess the second part of the test, namely whether the authorities had taken the measures which could reasonably have been expected of them.

In the context of these cases, questions of confidentiality and capacity often play a difficult role:

- A new guide (SHARE: consent, confidentiality and information sharing in mental healthcare and suicide prevention) builds on a DHSC consensus statement, to promote "*the lawful sharing of relevant information and the amplification of professional judgement within the current regulatory and best practice environment. This is under the precept that it is commonly better to seek consent to share information than not*;"
- Some may find useful this blog by Alex on capacity and suicide, focusing in particular upon the (mis)use of the presumption of capacity.

## Ordinary residence and s.117 MHA 1983

The DHSC has confirmed that it has been granted permission to appeal against the decision of the High Court in the Worcestershire case concerning ordinary residence in the context of s.117 MHA 1983.

## Religious opposition to withdrawal of treatment

*Fixsler & Anor v Manchester University NHS Foundation Trust & Anor* [2021] EWCA Civ 1018 (Baker, Carr and Elizabeth Laing LJJ)

*Other proceedings – family (public law)*

### Summary[2]

The Court of Appeal has reiterated the principle that the child's welfare is the paramount consideration

[2] Note, Tor having been involved in these proceedings, she has not contributed to this note.

when making a decision regarding their medical treatment – or a withdrawal of it and that no single factor takes precedence when deciding where his or her best interests lie.

Baker LJ, in a judgment with which Carr and Elizabeth Laing LJJ agreed, upheld the decision of MacDonald J that it was in the best interests of a two year old girl with catastrophic brain injuries not to continue life-sustaining treatment.

Alta Fixsler was born to Hasidic Jewish parents who moved to the UK four years prior to their daughter's birth. The family were all citizens of Israel, albeit that it was accepted that Alta was habitually resident in the UK.

Alta suffered a severe brain injury at birth with the result that at the time of the hearing in 2021 her life expectancy was limited to between six months and two years. The Court of Appeal sets out in its judgment the severity of her disabilities, which included an inability to self-ventilate, to protect her airway, to maintain body temperature or to swallow. Alta was mechanically ventilated via tracheostomy and fed via tube.

Manchester University NHS Foundation Trust, the hospital in which Alta had been born and where she had lived throughout her life, brought the application because the treating team wished to withdraw treatment and move to a palliative care regime.

All the medical experts, including a consultant paediatrician instructed by the parents independently agreed that continuing treatment was not in Alta's best interests. All, save the parents' expert, who considered Alta to be in PVS and therefore unable to experience pain or anything at all, agreed that she was in consistent pain. One expert provided evidence that ongoing treatment would result in the accumulation of deeply unpleasant and painful comorbidities including worsening respiratory function, dystonia and spasticity and associated pain, pressure sores and epileptic seizures.

Her parents did not agree with the medical consensus. They did not accept that she had no conscious awareness; rather, they contended that she was able to respond to their touch. They wished for her to be transported to Israel where she could continue her treatment and where, accepting that her life would be short, she would be buried in accordance with Jewish religious practices. Her treating clinicians contended that the journey would be painful to her and thus, not in her best interests.

The case was heard at first instance by MacDonald J. Alta's parents sought to rely on his earlier judgment in *R (Raqeeb) v Barts Hospital Foundation Trust* [2019] EWHC 2530 (Fam) in which he refused to grant an application to withdraw treatment from a profoundly brain damaged five year old from a devoutly Muslim family, to support their arguments that the court should pay particular attention to the role of Alta's Jewish heritage and the importance, in this context, of the continuation of life-sustaining treatment.

At first instance, MacDonald J made the order in May 2021, authorising a withdrawal of treatment. The parents immediately filed a notice of appeal and an oral hearing was held on 23 June 2021. The key

issue in the appeal was the extent to which substituted judgment should play a role in best interests decision-making.

At first instance the parents argued that it was not only appropriate but imperative "*that an assessment of the various dimensions of Alta's best interests must take into account particular religious, cultural and ethical context of this case provided by the fact that Alta is an Israeli citizen, the fact that the family intended to emigrate with Alta to Israel and the family's Orthodox Jewish beliefs and cultural values*". Further, that whilst the right to freedom of religion of a family under Art 9 of the ECHR may be circumscribed where it conflicts with the child's best interests, the assessment of what those best interests are in the first place must be informed by these considerations, and by a recognition that religious and ethical frameworks governing these sensitive matters differ. Accordingly, they argued that any assessment should start from the assumption that Alta would share the values of her parents, of her brother, and of her wider family and community.

Dismissing the appeal, Baker LJ reiterated the application of the s.1(3) Children Act 1989 checklist to children's cases rather than the s.4 MCA 2005 criteria (see paragraph 79). He also reiterated that no single factor can take priority over any other:

> *81. Under s.1(3)(d), the court is required to have regard to the fact that Alta is from a devout Hasidic family which has very clear beliefs and practices by which they lead their lives and that, if she had sufficient understanding, she too would very probably choose to follow the tenets of the family religion. I agree with Mr Simblet that this is a central part of her identity – of "who she is". It is unquestionably an important factor to be taken into consideration. But it does not carry pre-eminent weight. It must be balanced against all the other relevant factors.*
>
> *82. None of the factors in the checklist has any presumption of precedence. The weight to be attached to each factor depends on the circumstances of the case and the final decision is that of the court. Whilst in an individual case the child's wishes and feelings, and her background and characteristics, including the religious and cultural values of the family of which she is a member, may attract particular weight, in all cases they start with an equal value to that of all the other relevant factors.*
>
> *84. Mr Simblet's submissions come close to inviting the court to replace the best interests test with substituted judgment. He was, in effect, substantially repeating the argument put forward by counsel in Raqeeb, elevating the beliefs and values of Alta, as identified by the parents, to being the "key driver" of the court's best interests decision and giving those beliefs and values pre-eminent weight in the balancing exercise. Such an approach would be contrary to both case law and statute. The starting point must be the assumed point of view of the child, but that does not oblige the court to give the child's assumed views and beliefs pre-eminent weight in the analysis."* (emphasis added)

As to the significance of Alta's Jewish faith, the Court of Appeal noted the specific facts of the *Raqeeb* case, the age of Tafeeda Raqeeb (5) in contrast to that of Alta and the evidence put before the court as to her actual and engaged adherence to her parents' faith: holding,

> *86. In my judgment, the judge was entitled in the present case to refuse to assume that Alta would share the values of her family in circumstances where she never has had, nor ever will have, the ability to understand anything of the original culture into which she was born. As he said (at paragraph 95 of the judgment in this case) Alta is*
>
> > *"not of an age, nor in a condition to have knowledge of and to adopt her parents' values, from which she could extrapolate a position on the complex issues that arise in this case."*
>
> *In the case of a very young child in Alta's condition, the element of substituted judgment in the best interests decision is very limited and in this case is certainly outweighed by other factors, including in particular the fact that she is suffering consistent pain.*

As to the subject of pain, with which the first instance proceedings were significantly concerned, Baker LJ held at paragraph 63:

> *I do not accept that pain has to be "unbearable" or "intolerable" for an application to withdraw treatment from a child to succeed. What is required is a balancing of all factors relevant to the child's welfare. Any significant degree of pain will be a factor to be weighed in the balance. Manifestly, the greater the likely degree and intensity of pain, the greater the weight it will be likely to carry.*

Having failed to convince the judge at first instance as to their medical case, the appellant parents sought permission from the appeal court to adduce evidence from four new experts – three from the US, one from Israel. That application, including one to rely on a legal opinion regarding Israeli law, was refused on *Ladd v Marshall* grounds on the basis that none of the material could not have been obtained for use at trial and that it would not have an important influence on the result of the case (paragraph 54).

### Comment

This judgment does not break any particularly new ground but is a useful reiteration of first principles: that a child's welfare is always paramount; and a clarification as to the appropriate statutory test in cases concerning children: it is the Children Act checklist, not the MCA.

Having lost the appeal (and their application to the European Court of Human Rights having been rejected), it appears that the parents and the Trust are now in dispute about where Alta should be allowed to spend her final days,

A further judgment on the withdrawal of life-sustaining treatment from a minor was handed down by Cobb J during the summer recess. *Guy's & St Thomas' NHS Foundation Trust & Anor v M & Ors* [2021] EWHC 2377 (Fam) concerned an unopposed application by a hospital Trust and a local authority to withdraw life-sustaining treatment from a 14 year old boy, R, who, suffered a chronic respiratory collapse from which he had failed to recover as a result of a degenerative genetic condition. While in full health, R was described by Cobb J in a characteristically sensitive judgment as "*brilliant*" and "*capable of many things*"; following his collapse it was noted that he was "no longer able to do the things

he enjoyed" and had "*entirely lost the ability to actively participate in life*" (paragraph 24). His parents (for different reasons) lacked capacity both to make decisions about their son's medical treatment; the local authority, who had parental responsibility by virtue of a care order, did not thereby have authority to make decisions about life-sustaining treatment, and it appears that it was a combination of these two factors which led to the application being made to court.

Relying on and citing heavily from MacDonald J's judgment in *Fixsler,* Cobb J held:

> *31. I have looked at his welfare in the widest sense, not just medical, but social, emotional, and psychological. His best interests are of course my paramount concern, and I make this decision exercising my own independent and objective judgment, albeit greatly assisted by the wealth of medical expertise and experienced which has been marshalled in this case. I have of course started from the strong presumption in favour of taking all steps to preserve R's life because the individual human instinct to survive is strong, and must be presumed to be strong in the patient. The presumption however is not irrebuttable, and I am satisfied that in this case it is outweighed by the pain and suffering, and the other current and likely medical burdens on R, of simply sustaining his breath of life. Tragically, he has no means of recovering from his present state. In my judgement he must now be allowed an opportunity for a peaceful, dignified and calm passing surrounded by those who care most for him.*

## The CRPD and the 2000 Hague Convention on the International Protection of Adults

Alex has co-authored a report for the UN Special Rapporteur on the Rights of Persons with Disabilities on the interaction between the CRPD and the 2000 Hague Convention on the International Protection of Adults. The report can be found here, and the statement by the Special Rapporteur and the Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, can be found here.

## World Congress on Adult Capacity

The World Congress on Adult Capacity 2022 organising committee has announced that the conference to be held in Edinburgh next year will be in person – for more details, and to register interest, see the Congress website here.

## Voting and the ECtHR

Perhaps somewhat surprisingly, the Grand Chamber of the European Court of Human Rights is reported to have declined to accept the reference from the decision in *Caamaño Valle v Spain* concerning voting and mental incapacity covered here.

## Research corner

We highlight here recent research articles of interest to practitioners. If you want your article highlighted in a future edition, do please let us know – the only criterion is that it must be open access, both because many readers will not have access to material hidden behind paywalls, and on principle. This month we highlight an article from the Mental Health and Justice Project appearing in the Journal of Medical Ethics: Broad concepts and messy realities: optimising the application of mental capacity criteria. This article, building on earlier work discussed in this "in conversation" shedinar between Alex and Dr Nuala Kane, moves simple description of the types of rationales used before the Court of Protection to identify whether a person can or cannot make a decision to seek to identify how those rationales should be used in pursuit of greater transparency and accountability.

We also highlight an article appearing on the SCIE website (free, but registration required) on Resident to Resident harm in care homes and other settings: a scoping review. This provides a useful survey of an often underexamined phenomena.

# SCOTLAND

## Mental Welfare Commission for Scotland reports on the use of the MHA in Scotland during the pandemic

In July 2021, the Mental Welfare Commission for Scotland published its report *The use of the Mental Health Act in Scotland during the Covid-19 pandemic: Rising numbers, falling safeguards*. Although the Coronavirus Act 2020 did provide for the possibility of some reduced safeguards relating to psychiatric compulsion to take account of pressure on health and social care services in Scotland these did not in fact come into force.[3] All compulsory measures therefore continued to operate under the ordinary provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003 with its underpinning principles designed to ensure that any compulsion is lawful and proportionate and that the autonomy of the patient is respected. However, in emergency situations, even where ordinary legislation is used close attention must be paid to ensure that there is legal authority, proportionality and non-discrimination in relation to any measures adopted.

A brief summary of the report is provided here and a reading of the full report is highly recommended for more detail, particularly relating to different health boards and patient characteristics, but what it highlights is an overall increase in the use of compulsory measures under the Mental Health Act between 1 March 2020 and 28 February 2021.

Between 1 March 2020 and 28 February 2021, there was a rise in all types of detention, the highest rates being attributed to the larger health boards in Scotland. Emergency and short term detentions rates were constantly above average whilst Compulsory Treatment Orders tended to fluctuate around the average rates rather more. It also appears that the biggest increases were in the most deprived areas and, whilst the relevant data was incomplete, there were above average increases in compulsion amongst the BAME community in Scotland.

Obtaining Mental Health Officer (MHO) consent for emergency detentions is required, unless impracticable, under section 36 of the Act. The absence of such consent has been an ongoing issue but during the pandemic this became worse as did the granting of back-to-back Short Term Detention Certificates (STDCs). MHO consent is a potential safeguard against the unnecessary use of emergency detention which impacts on an individual's rights to liberty and autonomy (Articles 5 and 8 ECHR and Articles 14 and 12 CRPD). Moreover, as STDCs are not subject to the safeguard of tribunal or court authorisation and scrutiny, the lengthening of any period of short term detention by the immediate granting of another certificate again impacts on these rights. The Commission notes in the report that

[3] The only emergency related amendment to the Mental Health (Care and Treatment) (Scotland) Act 2003 that did come into force was under the Coronavirus (Scotland) (No 2) Act 2020 which temporarily removed the requirement for a nominated person to have their signature witnessed by a prescribed person when they consented to become a named person. This provision was largely welcomed.

constant review of a patient is, of course, good practice and thus where a STDC is in fact revoked because the patient is doing well but then a further one granted because there is a deterioration then there is unlikely to be a problem. However, where it is a case of simply replacing a certificate which is about to expire with another STDC then this is cause for concern.

Another area of concern related to Social Circumstances Reports which are an important element of mental health services meeting their obligation to respect a patient's social, economic and cultural rights. A part of this is the MHO duty under section 231 of the Act to prepare such a report. The Commission has previously indicated its unhappiness about a reduction of such reports in connection with STDCs which became worse during the pandemic.

The report, however, makes it clear that the pandemic simply exacerbated existing issues. The 'take away messages' from the report relate not only, therefore, to emergencies but also to 'normal' times and it must be remembered that the use of compulsion under the Act has been progressively rising anyway.

*Jill Stavert*

## Significantly Impaired Decision-Making Ability (SIDMA)

SIDMA is a fundamental criterion, a 'capacity test', for civil compulsory psychiatric care and treatment under the Mental Health (Care and Treatment) (Scotland) Act 2003. Its retention and/or amendment is something which is currently being considered, amongst other things, by the Scottish Mental Health Law Review which is due to report in the Autumn of 2022.

There has been very little research conducted on SIDMA and its use but in July 2021 the Mental Welfare Commission for Scotland published a very helpful Research Brief *Significantly impaired decision making ability – How well is it recorded in practice?* which builds on an earlier 2010 study and highlights an apparent lack of clarity around its use in practice. Rather than repeat the briefing's findings verbatim here readers are referred to the briefing itself. For more information on the research and background to SIDMA in Scotland you may also wish to read the excellent 2021 article by Wayne Martin et al in the *International Journal of Law and Psychiatry* entitled 'SIDMA as a criterion for psychiatric compulsion: An analysis of compulsory treatment orders in Scotland'.

*Jill Stavert*

## Advance Statements in Scotland

The Mental Health (Care and Treatment) (Scotland) Act 2003 contains provisions in sections 275-276 recognising advance statements and prescribing how they must be made. Advance statements under the Act provide a vehicle by which a person may express how they do and do not wish to be treated if they were to become unwell as a result of 'mental disorder' and have impaired decision making about medical treatment. Clinicians must have regard to the wishes expressed in the advance statement as

must the Mental Health Tribunal for Scotland. The wishes can, however, be overridden subject to various reporting requirements and safeguards.[4] Whilst concerns have been raised about the validity and currency of wishes expressed in advance statements, particularly those which have been made some time ago, they are also seen as an important means by which to ensure that a person's dignity and autonomy is respected where they are facing psychiatric compulsion. The Scottish Mental Health Law Review is looking at the role, efficacy and effectiveness of advance statements from a human rights and practice perspective.

Since 2017, as a result of an amendment to the 2003 Act by the Mental Health (Scotland) Act 2015, which also saw duties being placed on health boards to support the making of advance statements and place these in patient records, the Mental Welfare Commission for Scotland has maintained a register of advance statements (the information being collected being the existence of one, where it is kept and any overrides of it).

In July 2021, the Commission published a report *Advance Statements in Scotland* which highlights the low take up of advance statements amongst the 4,721 persons for which there was a T3 certificate between 29 June 2017 and 1 December 2020. A T3 certificate is completed by specially trained independent senior psychiatrists for those persons who are subject to compulsion under the 2003 Act. Of this June 2017-December 2020 cohort, only 6.6% had an advance statement and, compared across the three years for which the Commission had complete information from its register (2018-20), the proportion of individuals receiving treatment who had an advance statement was similar in each year, being 7.2%, 6.9% and 7.3%, respectively, so there was no real change across this period. Compared to those who did not have an advance statement, the Commission found that those who had one were younger, a slightly higher proportion were male and a slightly higher percentage were from the most deprived areas in Scotland, and, perhaps unsurprisingly, those with an advance statement tended to have experienced more previous episodes of psychiatric compulsion than those who did not have one.

36.9% had their advance statement overridden and, when compared with those whose advance statement was not in conflict with the recommended treatment, it was found that there was a higher proportion of overrides for those from the most deprived areas, for women, for those who were White Scottish or other White ethnicities, and for those who had a higher number of previous episodes.

The Commission recommends greater encouragement by health boards of the making of advance statements and commissioning of more research in order to establish the best time to contact a person to make an advance statement. Moreover, as the information required to be placed on the Commission's register makes it difficult to assess the content of advance statements and therefore the significance of overrides and other matters, it also recommends that the Scottish Mental Health

[4] There is no case law in Scotland relating to the overriding of advance statements under the 2003 Act. However, it is important to appreciate that such overrides do engage a number of human rights, namely Articles 3, 5 and 8 ECHR and 12, 14 and 17 CRPD, as well as equality and discrimination issues (see, for example, J Stavert 'Added Value: Using Human Rights to Support Psychiatric Advance Statements' (2013) 17(2) *Edinburgh Law Review* 210-223).

Law Review considers whether it would be useful to distinguish between an advance statement to refuse treatment from wishes about receiving specific treatments. In light of the implication that a more focussed intervention to increase the uptake of advance statement is required, it also requests that the Review considers whether there should be a requirement that that people are offered the opportunity to develop an advance statement after the completion of an episode of compulsory treatment.

*Jill Stavert*

# Editors and Contributors

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

Alex is recommended as a 'star junior' in Chambers & Partners 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 and the European Court of Human Rights. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

**Victoria Butler-Cole QC:** **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 contributor to 'Assessment of Mental Capacity' (Law Society/BMA), 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 ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click here.

**Annabel Lee:** **annabel.lee@39essex.com**

Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. To view full CV click here.

**Nicola Kohn:** **nicola.kohn@39essex.com**

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click here.

**Katie Scott:** **katie.scott@39essex.com**

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click here.

**Rachel Sullivan:** **rachel.sullivan@39essex.com**

Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click here.

**Stephanie David:** **stephanie.david@39essex.com**

Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click here.

**Arianna Kelly:** **arianna.kelly@39essex.com**

Arianna has a specialist practice in mental capacity, community care, mental health law and inquests. Arianna acts in a range Court of Protection matters including welfare, property and affairs, serious medical treatment and in matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a 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.

## Scotland editors

**Adrian Ward:** **adw@tcyoung.co.uk**

Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

**Jill Stavert:** **j.stavert@napier.ac.uk**

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. 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.

# Conferences

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

### 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 the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

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

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

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

Chambers UK Bar
Court of Protection: Health & Welfare
*Leading Set*

The Legal 500 UK
Court of Protection and Community Care
*Top Tier Set*

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

**LONDON**
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

**MANCHESTER**
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

**SINGAPORE**
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

**KUALA LUMPUR**
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085