Thirty Nine Essex Street
Court of Protection Case Law

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

CHAMBERS' COURT OF PROTECTION TEAM

"Thirty Nine Essex Street is the unquestionable leader on health and welfare matters in the Court of Protection, and commands respect from peers and clients alike. One source commented that "it dominates for very good reasons. It has both the commitment and the personnel to deal with these cases." The set has a strong background in public and mental health law, making it a natural choice for Court of Protection matters. Members are instructed by a range of parties, including the Official Solicitor, private individuals, and public and private health organisations." Chambers and Partners, 2013.

Alison Foster QC: [redacted]
Alison's practice consists of public and administrative law and human rights with particular expertise and interests in mental health. Her appearances include R v C [2009] UKHL 42 and R (B) v Haddock [2006] EWCA Civ 961.

Lisa Giovanetti QC: [redacted]
Lisa has a broad public law practice, undertaking advisory work and advocacy before a wide range of courts and tribunals, including the Supreme Court and European Court of Human Rights. She has appeared before the Court of Protection and High Court in a number of cases involving mental capacity/best interests, notably Re HM [2010] EWHC 1579 (Fam), [2010] Fam Law 1072, [2011] 1 FLR 97, in which she was instructed by the Official Solicitor on behalf of P.

Jenni Richards QC: [redacted]
Jenni specialises in public and administrative law; regulatory and disciplinary law and mental incapacity cases. She is regularly instructed in more complex Court of Protection cases by the Official Solicitor, local authorities, NHS Trusts and individuals. Recent COP cases include: A Local Authority v H [2012] EWHC 49, Cheshire West and Chester Council v P [2011] EWCA Civ 1257, AH v Hertfordshire Partnership NHS Foundation Trust [2011] EWHC 276, JE v DE and Surrey CC [2006] EWHC 3459.

Fenella Morris QC: [redacted]
Fenella appears regularly in the Court of Protection instructed by the Official Solicitor, local authorities, NHS bodies and individuals in cases involving health, welfare, finance and deprivation of liberty. She has appeared in a number of leading cases in this area, including P v Independent Print Ltd [2011] EWCA Civ 756, PH v A Local Authority [2011] EWHC 1704, P and Q v Surrey CC [2011] EWCA Civ 190, AVS v NHS Foundation Trust [2010] EWHC 2746, BB v AM [2010] EWHC 1916, A PCT v H [2008] EWHC 1403, Surrey CC v MB [2007] EWHC 3085, JE v DE and Surrey CC [2006] EWHC 3459. She is a co-author of The Mental Capacity Act 2005, A Guide to the New Law 2nd Edition (Law Society). Fenella's practice also includes public, human rights and regulatory law, and she is experienced in mediating health and social care disputes.

Note: Individual email addresses were removed by MHLO at request of the senior practice manager, who requests that you use plc@39essex.com instead.

Parishil Patel: [redacted]
Parishil advises upon and appears in best interests cases on a very regular basis, instructed by individuals (including on behalf of the Official Solicitor), NHS bodies and local authorities. His recent COP cases include DH NHS Foundation Trust v PS [2010] EWHC 1217.

Kate Grange: [redacted]
She has experience in all levels and types of courts and tribunals and regularly appears in the appellate courts. She has particular expertise in the fields of human rights, mental health and community care. She has conducted a number of mental incapacity cases involving medical treatment and social care.

Vikram Sachdeva: [redacted]
Vikram is dual qualified in medicine and in law, and taught public law for several years at Cambridge University. He practices in a wide range of medico-legal cases, both in private and public law. Recent COP cases include W v M [2011] EWHC 2443, D Borough Council v AB [2011] EWHC 101.

Nicola Greaney: [redacted]
Nicola appears regularly in the Court of Protection instructed by the Official Solicitor, local authorities, NHS bodies and individuals in cases involving health, welfare, finance and deprivation of liberty. She is a co-author of The Mental Capacity Act 2005, A Guide to the New Law 2nd Edition (Law Society). She also practises in the areas of personal injury and clinical negligence and often undertakes work involving capacity issues. Recent COP include A Local Authority v H [2012] EWHC 49, BB v AM [2010] EWHC 1916, D County Council v LS [2010] EWHC 1544.

Katharine Scott: [redacted]
Katie has a busy Court of Protection and best interests practice. She has represented local authorities, the Official Solicitor and family members in disputes concerning both health, welfare and marriage. She has been involved in a number of interesting cases, including PH v A Local Authority [2011] EWHC 1704, C v A Local Authority [2011] EWHC 1539, HN v FL and Hampshire Council [2011] EWHC 2894, LLBG v TG, JG and KR [2007] EWHC 2640.

Neil Allen: [redacted]
Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Recent COP cases include Cheshire West and Chester Council v P [2011] EWCA Civ 1257, FP v GM and A Health Board [2011] EWHC 2778, Re MB [2010] EWHC 2508, G v E and Manchester CC and F [2010] EWHC 2512, [2010] EWHC 2042, [2010] EWCA Civ 822, [2010] EWHC 621.

Jonathan Auburn: [redacted]
Jonathan practises in public law, with a particular emphasis on community care, healthcare and mental capacity. In the Court of Protection he acts for applicants, local authorities, health authorities and the Official Solicitor. Recent cases include GJ v Foundation Trust [2010] Fam 70 (Court of Protection) (relationship between MHA and MCA); R (KM) v Cambridgeshire CC [2012] UKSC 23, [2012] 3 All ER 1218, 126 BMLR 186 (Supreme Court) (personal budgets and Resource Allocation Schemes); Westminster CC v SL (Supreme Court, January 2013) (whether mild mental illness within scope of community care obligations, whether needs must be "accommodation-related").

Alex Ruck Keene: [redacted]
Alex was described as a "leading light" in mental capacity work in the Legal 500 2011. He is frequently instructed before the Court of Protection by individuals (including on behalf of the Official Solicitor), NHS bodies and local authorities. Together with Victoria, he co-edits the Court of Protection Law Reports for Jordans. He is a co-author of Jordan's annual Court of Protection Practice textbook, and a contributor to the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Clayton and Tomlinson 'The Law of Human Rights.' He is one of the few health and welfare specialists before the Court of Protection also to be a member of the Society of Trust and Estates Practitioners. His significant cases include Munjaz v United Kingdom (Application No. 2913/06; ECtHR, 17 July 2012), HSE Ireland v SF [2012] EWHC 1640 (Fam), A Local Authority v PB [2011] EWHC 2675, LG v DK [2011] EWHC 2453, Re MN [2010] EWHC 1926 and W PCT v B [2009] EWHC 1737, R (Sessay) v SLAM and Commissioner of the Police for the Metropolis [2011] EWHC 2617 (QB) and TTM v Hackney LBC [2011] EWCA Civ 4.

Anna Bicarregui: [redacted]
Anna has a busy public law practice specialising in education, community care and Court of Protection cases. She is often instructed by local authorities but also acts for and advises individuals and companies in the public and private sector.

Mungo Wenban-smith: [redacted]
Mungo's public law practice encompasses a broad range of areas, with particular expertise in cases relating to mental health, mental capacity and community care. He frequently acts for local authorities and individuals (including on behalf of the Official Solicitor) in a variety of proceedings before the Court of Protection.

Victoria Butler-Cole: [redacted]
Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). Recent COP cases include K v A Local Authority [2012] EWCA Civ 79, W v M [2011] EWHC 2443, A v A Local Authority [2011] EWHC 727, WCC v GS, RS and J [2011] EWHC 2244, HN v FL and Hampshire Council [2011] EWHC 2894, Re LD [2010] 1 FLR 1393, Dorset CC v EH [2009] EWHC 784.

Alexis Hearnden: [redacted]
Alexis regularly represents local authorities, the Official Solicitor and family members in court of protection matters. Court of protection work dovetails with the balance of Alexis' practice which includes public law, healthcare regulation and clinical negligence.

Peter Mant: [redacted]
Peter has a busy Court of Protection practice, acting on behalf of the Official Solicitor, individuals and local authorities. His practice also covers the related fields of mental health, community care and human rights.

Michelle Pratley: [redacted]
Michelle's experience in MCA 2005 matters includes cases concerning deprivation of liberty, residence and contact arrangements, forced marriage, capacity to consent to marriage and capacity to consent to sexual relations. She is recommended as a "formidable presence" in the Court of Protection in Chambers and Partners 2013.

Jack Anderson: [redacted]
Jack is instructed in the Court of Protection by local authorities, NHS bodies, individuals and deputies in relation to welfare and property and financial affairs matters including disputes as to capacity, best interests and in relation to lasting powers of attorney. He has particular experience in safeguarding matters. He also maintains a broad public law practice with a particular focus on education and community care and has experience in mental health matters.

Ellen Wiles: [redacted]
Ellen has experience across the public law and human rights spectrum, acting for solicitors, local authorities and other organisations, on matters including Court of Protection cases, including DOLS authorisations and other best interests decisions, and mental health law, including a judicial review of care planning, and an Article 2 inquest into the death of a detained person detained.

Thomas Amraoui: [redacted]
Tom regularly acts for individuals and public authorities in the fields of community care, homelessness applications, support for those subject to immigration control, human rights and mental health.

Josephine Norris: [redacted]
Josephine is regularly instructed before the Court of Protection. She also practises in the related areas of Community Care, Regulatory law and Personal Injury.

Catherine Dobson: [redacted]
Catherine takes instructions in all the main areas of Chambers' practice. She has a particular interest in public law and human rights.

Angela Rainey: [redacted]
Angela takes instructions across the range of public law, with a particular interest in court of protection, mental health and community care work. She also practices in the related area of personal injury, regularly appearing on behalf of public authorities in public liability cases.

Rose Grogan: [redacted]
Rose has recently joined chambers following successful completion of her pupillage. As a pupil, Rose was involved in a number of Court of Protection cases relating to residence, contact and medical treatment. She is a contributor to the Case Summaries section of Jordan's annual Court of Protection Practice textbook and has co-authored an article with Fenella Morris QC on media access to the Court of Protection.

Annabel Lee: [redacted]
Annabel takes instructions in all the main areas of Chambers' practice. She has a broad practice in public law and is particularly interested in community care and human rights issues.

David Barnes Chief Executive and Director of Clerking [redacted]

Sheraton Doyle Practice Manager [redacted]

Alastair Davidson Senior Clerk [redacted]

Peter Campbell Practice Manager [redacted]

Gemma Goodwin Assistant Practice Manager [redacted]

London 39 Essex Street London WC2R 3AT
Tel: +44 (020) 7832 1111 Fax: +44 (020) 7353 3978

Manchester 82 King Street Manchester M2 4WQ Tel: +44 (0) 161 870 0333 Fax: +44 (020) 7353 3978

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

TABLE OF CONTENTS

Here you will find the COP case law with keywords. Click on the page number to be taken to the case. Hyperlinks will take you to those judgments that are available on Bailii.

RE P [2010] EWHC 1592 (FAM)

Deputies – financial and welfare

Guidance in respect of applications for the appointment of deputies was provided in this judgment by Hedley J. The judge noted that s.16(4) of the MCA might at first glance suggest that the appointment of deputies was a rarity, since the provision states that a decision of the court is to be preferred. But, the judge found that this would be inconsistent with the aim of the MCA and said that, insofar as applications by family members are concerned, the courts should be sympathetic to their requests provided the family members are not embroiled in disputes with one another and appear able to carry out the functions of a deputy appropriately.

Hedley J stated that 'it must be appreciated that Section 16(4) has to be read in the context of the fact that, ordinarily, the court will appoint deputies where it feels confident that it can. It is perhaps important to take one step further back even than that, and for the court to remind itself that in a society structured as is ours, it is not the State, whether through the agency of an authority or the court, which is primarily responsible for individuals who are subjects or citizens of the State. It is for those who naturally have their care and wellbeing at heart, that is to say, members of the family, where they are willing and able to do so, to take first place in the care and upbringing, not only of children, but of those whose needs, because of disability, extend far into adulthood.

Comment

It is not clear how this might apply in cases where there is a dispute between family members (which, we suggest, is likely to be a substantial proportion of cases heard in the Court of Protection). Nor is it clear how this approach might be applied to deputyship applications by local authorities.

RT V LT AND ANOTHER [2010] EWHC 1910

Capacity; Best interests; Contact; Residence

Comment

This case of is of note because of the comments of the President regarding the role of caselaw given the existence of the MCA. The submission was made in the proceedings that the pre-Act learning was now all obsolete, and that all that was required was an examination of the terms of the Act. This rather extreme submission was, perhaps unsurprisingly, rejected. The President stated that wherever possible, the plain words of the Act should be directly applied to the facts of the case in hand, and that complicating factors should, if possible, be avoided. However, there would obviously be cases where pre-or post-Act authority would be relevant, for example the issue of what the appropriate test is for capacity to consent to sexual relations.

BB V AM & ORS [2010] EWHC 1916 (FAM)

DOLS authorisation; Ineligibility (Case E)

In this case, Baker J was concerned with a thirty-one year old Bangladeshi woman known as BB. She was said to have very complex needs, being profoundly deaf and with a diagnosis of schizoaffective disorder and probable learning difficulties. It was accepted by all parties to these proceedings that for material purposes BB lacked the capacity to decide where she should live.

On 19 April 2010, BB was removed from the family home by support workers employed by Tower Hamlets Community Mental Health Team following reports that BB had been assaulted by her parents. She was admitted to the Roman Ward at Mile End Hospital which is managed by the East London NHS Trust. On 29 April, the Official Solicitor filed an application in respect of BB in the Court of Protection. On 6 May, NHS Tower Hamlets (formerly Tower Hamlets PCT) authorised BB's deprivation of liberty under a standard authorisation under the Mental Capacity Act 2005. On 28 May, BB was transferred to the Old Church Hospital in Balham, managed by the South West London and St George's Mental Health NHS Trust. On 7 June, BB's, deprivation of liberty was authorised by that Trust under an urgent authorisation under the 2005 Act.

Following a sequence of events that are not relevant here, on 5 July, the Official Solicitor wrote to the other parties indicating that it appeared that there was no longer any lawful authorisation for BB's deprivation of liberty and that in the circumstances it would be necessary to restore the matter to court pursuant to the President's order. The matter came before Baker J on 7 July. At that hearing, a number of matters were resolved by consent, including residence and contact. Baker J was, however, asked to make a declaration that BB was currently being deprived of her liberty at Old Church. As he identified (paragraph 6), that was a necessary preliminary step because, if a person is ineligible to be deprived of liberty, a court may not include in a welfare order any provision which authorises that deprivation of liberty. Plainly this issue only arises if the circumstances in which the person is being accommodated amount to a deprivation of liberty.

Baker J held (at paragraph 12) that the statutory provisions contained in the MCA 2005 do not appear on their face appear to extend to making declarations as to whether or not circumstances amount to a deprivation of liberty. He concluded that it might be that the court's power to make such a declaration arose under its inherent jurisdiction, and noted both that no party sought to persuade me in this case that he had no power and clearly it was necessary to make a decision on the question whether circumstances amount to a deprivation of liberty and to recite that decision in the order seemed eminently sensible.

Baker J summarised the statutory provisions contained in the MCA, and in particular those in Schedule 1A relating to eligibility to be deprived of one's liberty, endorsing in the process the approach taken by Charles J in *GJ v Foundation Trust* [2009] EWHC 2972 (Fam). Having done so, he drew the points together as raising the following questions (paragraph 25):

> "(1) Are the criteria in sections 2 or 3 of the Mental Health Act met in BB's case and if so would the hospital admit her under the Mental Health Act if an application was made? In other words, is she suffering from a mental disorder warranting assessment or medical treatment? If yes, BB is ineligible to be deprived of her liberty. If not,
> (2) Do the circumstances of her detention considered together amount to a deprivation of liberty having regard to the guidance set out in the DOLS Code of Practice?"

On the facts of the case, Baker J that the medical evidence was that BB was not "detainable under the Mental Health Act because she is happy to stay in hospital and take medication. She has made no attempts to leave. She reports being happy. She changes the subject when asked about her home and family but she does so without showing any negative emotion or particular interest… if she said she wished to be discharged or to return home, we would assess her mental state and assess for detention under the Mental

Health Act. It might be she would be easily persuaded to stay; it might be she would be detainable". In the circumstances, he found (paragraph 27) that she was not ineligible to be deprived of her liberty within the meaning of the eligibility requirement in Schedule 1A of the Mental Capacity Act, and as a result the Court was not prevented from including in a welfare order provision which authorises deprivation of her liberty.

Baker J then concluded as follows on the question of whether BB was deprived of her liberty:

> "30. In considering the submissions, I have, as recommended in the guidance in the DOLS Code of Practice, had regard to the rapidly expanding case law in this field, including not only the decision of Charles J in *GJ v Foundation Trust* (supra), and my own decision in *G v E, A Local Authority and F* (also supra), but also the recent decision of Parker J in *Re MIG and MEG* [2010] EWHC 785 (Fam) and the very recent decision of Munby LJ (sitting at first instance) in *Re A, A Local Authority v A* [2010] EWHC 978 (Fam). It is necessary to have regard to these authorities because, whilst all cases turn on their own facts, it is important that there should be consistency in the interpretation and the implementation of these complex provisions.
> 31. Furthermore, it should be borne in mind that I am only deciding this case at an initial stage, on the basis of limited evidence, and with limited opportunities to consider the details of BB's circumstances. There is of course a danger that such an assessment will be somewhat superficial. It is, however, important to take a proportionate response to these matters. The courts simply do not have the time and resources to spend lengthy periods of time considering arguments at an interim stage as to whether or not detention amounts to a deprivation of liberty. The court has to make a quick and effective assessment at the interim stage on the best available evidence.
> 32. To my mind, having regard to all the factors identified in the DOLS Code of Practice and the circumstances of BB's current accommodation at Old Church Hospital as set out in the evidence before me, I conclude that she is being deprived of her liberty. She is away from her family, in an institution under sedation in circumstances in which her contact with the outside world is strictly controlled, her capacity to have free access to her family is limited, now by court order, and her movements under the strict control and supervision of hospital staff. Taking these factors altogether, the cumulative effect in my judgment is that BB is currently being deprived of her liberty and I so declare."

Comment

This case is of some importance both for its confirmation of the approach taken by Charles J to the interaction of the MHA and the MCA in GJ, and also for the clarification regarding the approach to be taken to assessments of the deprivation of liberty. The comments made by Baker J as to the need for consistency of approach is welcome although does, again, raise the stark issue of the difficulty of dissemination of judgments. Somewhat more troubling, perhaps, is the indication that the courts will take a robust approach to determinations of deprivation of liberty questions on an interim basis. Whilst limited judicial resources available (adverted to by the Court of Appeal in *G v E* [2010] EWCA Civ 822, discussed in our previous update) mean that this is a reality, in many cases, an interim conclusion as to whether or not a situation constitutes a deprivation of liberty is likely to hold sway for many months, with significant consequences in terms of the obligations upon the relevant local authority/PCT to review the position.

RE MN [2010] EWHC 1926 (FAM)
International jurisdiction; MCA Schedule 3

This case is the first in which the complex provisions of Schedule 3 to the MCA 2005 have been considered. These provisions relate, inter alia, to the recognition and enforcement of protective measures taken in foreign courts, and give rise to difficult problems of statutory interpretation.

The facts of the case are complex. However, in broad terms, Hedley J was faced with the question as to whether and, if so, according to what criteria, should the Court of Protection recognise and enforce an order of a court of competent jurisdiction in California requiring the return of an elderly lady with dementia, MN, to that State. She had been removed from California by her niece, PLH, to whom certain authority had been granted under the terms of an Advance Healthcare Directive. MN lacked capacity to make all relevant decisions and the Californian court had control of her property. Whilst the facts of the particular case meant that the order was not, in fact, capable of enforcement, Hedley J took the opportunity to consider the issues and given a reasoned judgment so that both the parties and the Californian courts would be aware of the approach which would be adopted by the Court of Protection.

Hedley J reviewed the provisions of Schedule 3. He found that the starting point was to ask where MN was habitually resident, as it was only if she was habitually resident in England and Wales or that the Court would exercise its 'full original jurisdiction' under the Act (paragraph 20 -finding there also that this was not a case where her habitual residence could not be determined, an alternative route to the exercise of such full jurisdiction under paragraph 7(2)(a)). He then considered how the question of habitual residence was to be determined, holding as follows:

> "22. ...Habitual residence is an undefined term and in English authorities it is regarded as a question of fact to be determined in the individual circumstances of the case. It is well recognised in English law that the removal of a child from one jurisdiction to another by one parent without the consent of the other is wrongful and is not effective to change habitual residence — see e.g. RE PJ [2009) 2 FLR 1051 (CA). It seems to me that the wrongful removal (in this case without authority under the Directive whether because Part 3 is not engaged or the decision was not made in good faith) of an incapacitated adult should have the same consequence and should leave the courts of the country from which she was taken free to take protective measures. Thus in this case were the removal 'wrongful', I would hold that MN was habitually resident in California at the date of [the Californian] orders.
> 23. If, however the removal were a proper and lawful exercise of authority under the Directive, different considerations arise. The position in April 2010 was that MN had been living with her niece in England and Wales on the basis that the niece was providing her with a permanent home. There is no evidence other than that MN is content and well cared for there and indeed may lose or even have lost any clear recollection of living on her own in California. In those circumstances it seems to me most probable that MN will have become habitually resident in England and Wales and this court will be required to accept and exercise a full welfare jurisdiction under the Act pursuant to paragraph 7(l)(a) of Schedule 3. Hence my view that authority to remove is the key consideration."

In light of the approach outlined above, Hedley J was unable to proceed further without the issues of the construction of the Directive and the extent of the authority conferred

and indeed the validity of its exercise (all matters to be determined under Californian) law either being determined in the California proceedings, or upon the basis of a single joint expert being instructed to advise the Court on the point.

In large part so as to assist the California court, Hedley J nonetheless went on to consider the position in the event that MN was found to be habitually resident in California, such that he was required to consider whether to recognise and enforce the protective measures taken in California. He noted that the starting point was that Paragraph 19(1) made recognition mandatory unless that paragraph was disapplied in cases (other than those falling under the 2000 Hague Convention on the International Protection of Adults) by either Paragraphs 19(3) or (4). He identified that the only relevant subparagraphs could be Paragraph 19(4)(a) (i.e. that recognition of the measure would be manifestly contrary to public policy) or Paragraph 19(4)(b) (b) (i.e., that the measure would be inconsistent with a mandatory provision of the law of England and Wales). At paragraph 26 of his judgment he had little hesitation in dismissing Paragraph 19(4)(a) as being a relevant consideration on the facts of this case, noting that "[a] decision of an experienced court with a sophisticated family and capacity system would be most unlikely ever to give rise to a consideration of 4(a); the use of the word 'manifestly' suggests circumstances in which recognition of an order would be repellent to the judicial conscience of the court."

That left sub-paragraph 19(4)(b), which, as Hedley J, recognised, raised a matter both of importance and difficulty, namely the extent to which the court should takes best interests into account in recognition and enforcement proceedings. The submission of PLH, MN's niece, was that if recognition of an order was not in the best interests of MN then to recognise (and enforce) such an order would be contrary to a mandatory provision of the law namely Section 1(5) of the Act. Thus a best interests exercise must always be undertaken to ensure that Section 1(5) is not contravened.

However, as Hedley J recognised, if such an argument were right, it would drive "a coach and four through the summary and mandatory nature of Part 4 of Schedule 3," because, in essence, it would require a full consideration of whether the recognition and enforcement of the protective measure would be in the best interests of P. As he noted at paragraph 29, the problem was particularly stark on the facts of the case before him, because he would be required (by Paragraph 12 of Schedule 3) to consider MN's best interests in implementing any protective measure recognised and enforced by the Court of Protection. In so doing, he noted he had evidence before him that "might well persuade" him that a journey back to California could be undertaken consistent with MN's best interests. However, he then asked himself, rhetorically, how far ahead should he then look in determining whether a journey was in her best interests? To look too far would, in his view, come very close to a full best interests inquiry.

Hedley J therefore asked himself whether s.1(5) in fact applied. Section 1 provides in material part that "(l) The following principles apply for the purposes of this Act (5) An act done, or a decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests..." In his view, the words of s.1(5) gave rise to the question of whether a decision to recognise and/or enforce an order was a decision made for or on behalf of MN.

In the end, Hedley J concluded at paragraph 31 that "a decision to recognise under paragraph 19(1) or to enforce under paragraph 22(2) is not a decision governed by the best interests of MN and that those paragraphs are not disapplied thereby by paragraph I 9(4)(b) and Section 1(5) of the Act. My reasons are really threefold. First, I do not think

that a decision to recognise or enforce can be properly described as a decision for and on behalf of' MN. She is clearly affected by the decision but it is a decision in respect of an order and not a person. Secondly, this rather technical reason is justified as reflecting the policy of the Schedule and of Part 4 namely ensuring that persons who lack capacity have their best interests and their affairs dealt with in the country of habitual residence; to decide otherwise would be to defeat that purpose. Thirdly, best interests in the implementation of an order clearly are relevant and are dealt with by paragraph 12 which would otherwise not really be necessary."

Hedley J recognised (at paragraph 32) that on the fact of this particular case his construction "may lead both to hardship and artificiality. In cases involving abducted children the hardship of sending a child back for the parent to make a relocation application is (if the application succeeds) real but is probably no greater than a major inconvenience. Here, however, the position is different. MN may survive the return journey. PLH may have the right to submit to the Californian court that it is in MN's best interests to live with her in England. It may, however, be that she could not survive another trip and so any welfare enquiry in California would be rendered nugatory."

The remainder of his judgment is conveniently summarised at paragraph 38 as follows:

> "The basis of jurisdiction is habitual residence. In this case the key to that decision is whether PLH'S authority as agent permitted this removal to England. If it did not, MN remains habitually resident in California and the courts of that State should exercise primary jurisdiction. If, however, it did, I am likely to conclude that MN is now habitually resident in England and Wales and jurisdiction belongs to this court. If that is so, I could not enforce the order of the Californian court unless, having conducted a full best interests enquiry on evidence, I concluded that her best interests required a return to California. On the other hand if jurisdiction belongs to California, I am likely to recognise and enforce the Californian order (if un-amended and there is no stay) and to give directions for implementation unless either the carrier or Dr. Jefferys [the psychiatric expert instructed before the Court of Protection] were to advise otherwise. My best interests enquiry would essentially be confined to the journey essentially. However this court could adopt a full best interests jurisdiction at the invitation of the Californian court."

Comment

Schedule 3 to the MCA 2005 is, on any view, a very odd piece of legislation. It was the subject of negligible debate in Parliament; no guidance or subordinate legislation has been issued to support it, and yet, on its face opens a very substantial can of worms. In particular, by Part 4 it mandates (subject to exceptions, some of which are outlined in the judgment in MN) recognition of protective measures taken in respect of adults abroad who may not, in fact, lack capacity within the meaning of the MCA 2005 (see Paragraph 4, which defines 'adult' as a person who "as a result of impairment or sufficiency of his personal faculties, cannot protect his interests," and who has reached 16). "Protective measures" are very broadly defined, and may well include measures taken following procedures that would not necessarily be followed in the Court of Protection (and could be taken by a court of any jurisdiction – it is another oddity of the Schedule that it brings into effect a unilateral regime of recognition of such protective measures even where they have not been taken in countries who have signed the 2000 Hague Convention).

Hedley J's judgment answers a number of important questions relating to Schedule 3, perhaps the most important of which is whether – inadvertently – a situation had arisen

in which, in any application for recognition and enforcement was before the Court, the Court would be required to conduct a full best interests inquiry. Such a result would have been palpably at odds with the purpose of the Schedule that it is perhaps unsurprising that Hedley came to the conclusion that he did, but his decision in this regard is of considerable assistance.

Nonetheless, as he recognised, difficult questions will continue to arise as to the depth and width of any best interests analysis engaged in for purposes of implementation of a protective measure to recognised and enforced. It may be further judgments in this matter will shed light on this question; it may on the other hand be that we need to await the (inevitable) appearance of other cases posing these dilemmas before further judicial guidance is given.

G v E, Manchester City Council and F [2010] EWHC 2042 (Fam)
Anonymity; Judgments and orders; Private hearings; Reporting restrictions

In a judgment that will be of particular interest to local authority solicitors, Baker J decided that it was appropriate to make public the name of the local authority involved in ongoing proceedings, which had been criticised in an earlier judgment. The judge concluded that he should name Manchester City Council in the spirit of openness and accountability, and because there was no significant risk that E or members of his family might be identified as a result, Manchester being a large city. He said 'it is important that the residents and council tax payers of the city of Manchester know what has happened so that the local authority can be held responsible. And it is to be hoped that the publicity given to this case will highlight the very significant reforms of the law implemented by the MCA and in particular the DOLS in schedule A1, and the consequent very considerable obligations imposed on local authorities and others by the complex procedures set out in those reforms'.

The judge refused to make public the names of individual social workers because the criticisms he had made referred to failures higher up the chain of command, and refused to identify the company responsible for running the placement at which E had resided, since the company and its director had not been present at the hearing which resulted in criticisms being made, and since the concerns identified could properly be raised by the Official Solicitor with the Care Quality Commission instead.

London Borough of Havering v LD [2010] EWHC 3876
Welfare Deputies

This case, decided by HHJ Turner QC (sitting as a Judge of the High Court), provides useful guidance as to the appointment of a welfare deputy has recently been provided. The court heard extensive submissions on the need for a welfare deputy in a case where a dispute about residence and care for a learning disabled adult had been determined by the court, but where the local authority contended that it should be appointed welfare deputy to deal with ongoing issues such as medical treatment and contact. There was a history of non-engagement by P's mother, who herself had mental health problems. Two social work experts had recommended the appointment of a welfare deputy on the basis of these mental health problems and the need to provide a stable and reliable decision-making framework for P. The experts' view was that a welfare deputy should extend to decisions about medical treatment and social care interventions, and should be indefinite, subject to improvements in the mental health of P's mother.

The court disagreed, and accepted the submissions of the Official Solicitor. It was held that a welfare deputy would be appointed only in extreme circumstances, and that 'mere convenience to a local authority in a legitimate desire to avoid having to come to court' was not relevant. In the instant case, the matters it was proposed the welfare deputy would deal with were either routine and could be dealt with under s.5 MCA 2005, or were serious and would require the court's involvement.

The judge concluded that the evidence was not persuasive that an order appointing the local authority as welfare deputy was needed to ensure that proper and conscientious care was afforded to P.

RE RC (CASE NUMBER 11639140; 5.8.10)
Costs; Welfare proceedings; Lasting Powers of Attorney

The judgment was given in unusual circumstances, in the context of an appeal by P (RC)'s niece, SC, against a costs order made in favour of the London Borough of Hackney following proceedings, very shortly after which RC died. However, as Senior Judge Lush made clear in his judgment, he heard the appeal by RC's niece in significant part because he wished to give guidance as to whether the general rule in personal welfare proceedings necessarily applies to proceedings in which the applicant is asking the Court to direct the Public Guardian to cancel the registration of an LPA for health and welfare.

In broad terms, the proceedings, before DJ Marin, were on two tracks: one for cancellation of the registration of a health and welfare LPA in favour of SC, and the second for declarations and orders regarding RC's future placement. An order was made in these terms following a hearing extending over three days in May 2009. LBH sought an order that SC pay its costs of the second and third days of the hearing; the charity Jewish Care (JC) (in whose care home RC resided) sought an order that SC pay the entirety of its costs. DJ Marin approached the question of costs on the basis that the proceedings relating to the cancellation of the LPA should be considered as if they were health and welfare proceedings, and hence that the general rule for such proceedings (rule 157) applied. Having regard as to SC's conduct, DJ Marin ordered that she pay the costs of LBH of the second and third days of the hearing, and 50% of the costs of JC from the date that it was served with notice of the proceedings.

Prior to the matter coming before Senior Judge Lush on appeal, JC and SC reached an out of court settlement, such that the only issue before him regarding costs was whether DJ Marin's order regarding the costs of LBH should be upheld.

Having conducted a review of the authorities, Senior Judge Lush confirmed that he had a residual jurisdiction to consider SC's appeal on costs, notwithstanding the death of her aunt, but that her other appeals against orders made by DJ Marin fell away because the jurisdiction of the Court of Protection lapsed upon the death of RC.

Senior Judge Lush concluded that DJ Marin was wrong to conclude that, because the LPA was a personal welfare LPA, consideration of issues of costs in proceedings relating to it should be approached by reference to Rule 157 (i.e. the general rule in welfare proceedings, namely that there be no order as to costs). Senior Judge Lush held that "because the format, the procedures for both execution and registration, and the grounds of objection are identical in relation to both types of instrument, as a general rule, the incidence of costs in cases where there is an LPA for health and welfare should not necessarily differ from the general rule in property and affairs cases, subject of

course to the provisions of rule 159, which allows the court to depart from the general rule if the circumstances so justify."

Senior Judge Lush then went to explain why he thought the original decision on costs was unjust. He expressed concerns as to:

1. The fact that Hackney had not given any warning to SC that it might seek its costs. In the process, he expressed some disquiet with the reliance by Hackney on the case of *Orchard v. South Eastern Electricity Board* [1987] 2 W.L.R 102, [1987] 1 All E.R. 95, in which the Court of Appeal suggested that it is improper to threaten to seek an order for costs against someone in order to browbeat them into dropping a case or pursuing a particular line of argument. He held in this regard:

   > "[o]f course, the threat of an adverse costs order should never be used as a means of intimidation. However, if the London Borough of Hackney and Jewish Care genuinely believed that SC's conduct was improper or unreasonable, and that it was likely to result in a waste of costs, it may very well have saved time if they had alerted her to the risk that there was a possibility that the judge could award costs against her."

2. The fact that the judge below had not considered SC's ability to pay the costs awarded against her, noting in this regard the guidance given in the case of *Cathcart* [1892] 1 Ch 549, at page 561, in which Lord Justice Lindley held as follows:

   > "The respective means of the parties and the amount of the costs cannot, in my opinion, be disregarded. If the Petitioner could well afford to pay the costs, and the alleged lunatic would be ruined if ordered to pay them, the Court would not, I apprehend, order him to pay them, whilst there might be no such reluctance if the reverse were the case. The Court ought to endeavour to do what is fair and just in each particular case. Even the amount of costs is not immaterial. Moreover, in considering these matters regard must be paid not only to the expenses incurred, but to the necessity for them, which will very often depend on the course taken by the Petitioner or by the alleged lunatic. Either party may by his conduct render an inquiry much more expensive than it might otherwise have been."

3. The fact that he was not satisfied when awarding costs against SC, the judge fully considered the nature of the relationship between her and her aunt, and whether she was acting in RC's best interests. Senior Judge Lush pointed again to Cathcart, at page 560, where Lord Justice Lindley made the following comments, in which he emphasised the importance of acting in good faith, bona fide, as well as in P's best interests, in cases of this kind:

   > "The relation in which the Petitioner stands to the alleged lunatic and the Petitioner's objects and conduct are the last matters to which I will refer. It is plain that these matters, although not relevant to the inquiry into the state of mind of the alleged lunatic, are very important in considering the question of costs. An unsuccessful inquiry promoted by a stranger for purposes of his own, perhaps mainly in the hope of getting costs, ought to be regarded very differently from an unsuccessful inquiry promoted, perhaps most reluctantly, by a husband or wife or some kind relative or intimate friend acting bona fide in the interest of the alleged lunatic and for the protection of himself and his property. Between these extremes there is room for many differences of degree; but it would be

hopeless for the promoter of an inquiry which resulted in a verdict of sanity to ask the Court to order his costs to be paid by the alleged lunatic, unless there were reasonable grounds for the inquiry; that the inquiry was really desirable; that the Petitioner was under the circumstances a proper person to ask for it; and that he acted bona fide in the interest of the alleged lunatic."

4. The fact that it appeared that the District Judge might have allowed the fact that SC was a litigant in person whose conduct was infuriating to sway him into considering that the case before him was exceptional when the reality was "SC is not untypical of many of the litigants in person who appear on a regular basis in health and welfare proceedings in the Court of Protection and, despite what District Judge Marin and Bryan McGuire QC have said about this being an exceptional case, it is not. It could almost be said that this aspect of the court's jurisdiction was created to deal with situations of this kind, where a local authority, NHS Trust or private care home is experiencing problems with a particularly difficult and vociferous relative."

Senior Judge Lush concluded his judgment as follows:

> "Accordingly, the general rule (rule 157) should apply, and the court should only depart from the general rule where the circumstances so justify. Without being prescriptive, such circumstances would include conduct where the person against whom it is proposed to award costs is clearly acting in bad faith. Even then, there should be a carefully worded warning that costs could be awarded against them, and a consideration of their ability to pay. If one were to depart from rule 157 in all the cases involving litigants whom Mr Sinclair has described as "extreme product champions", the court would be overwhelmed by satellite litigation on costs, enforcement orders, and committal proceedings.
> I have an advantage over District Judge Marin. I can reflect on this case quietly and calmly, with the benefit of hindsight, and without the pressure and overwhelming sense of urgency with which he had to adjudicate at first instance. However, for the reasons given above, I consider that his decision to award costs against SC was partly wrong and partly unjust. Accordingly, I allow this appeal and set aside the original order insofar as it related to the London Borough of Hackney's costs, and in its place I make no order for costs."

Comment

Whilst it is perhaps not entirely clear from the face of the judgment, it is clear that the logic of Senior Judge Lush's decision was that: (1) the general rule in disputes regarding LPAs is that the aspect of the dispute concerning the LPA should be approached on the basis that the general rule regarding costs is Rule 156 (i.e. that P should pay for such proceedings), rather than Rule 157; and (2) that, on the facts of this case, there was insufficient evidence to depart from that general rule (which does not provide for an objector's costs to be paid) as regards the dispute regarding the LPA or from the general rule (Rule 157) regarding the remainder of the dispute, relating to P's residence and contact arrangements.

In any event, the general guidance given by Senior Judge Lush is of assistance in clarifying the costs position regarding disputes concerning personal welfare LPAs, and also in making clear the circumstances under which the general rule in personal welfare proceedings other than those concerning LPAs will be displaced. The need for giving a clear costs warning is one that is particularly significant, as is the consideration that needs to be given both to the ability of the person in question to pay and to their motives in so acting: it is clear that the latitude that will be given to litigants in person (at least) is likely

to continue to be significantly greater in Court of Protection proceedings than before the remainder of the civil courts.

VAC v JAD & Ors [2010] EWHC 2159 (Ch)
Statutory wills; Validity; Best interests

In brief, and summarizing the procedural history wildly, the matter came before HHJ Hodge QC so that he could consider whether it would be appropriate for the Court of Protection to authorise a statutory Will for an incapacitated adult on the ground that this is in his or her best interests where there is a dispute or uncertainty as to the validity of a recent Will which departs from the terms of an earlier Will. DJ Ashton had earlier refused permission to the JAD's deputy apply for a statutory will, but upon reconsideration transferred the matter to one of Chancery Circuit Judges in Manchester (sitting as a nominated judge of the Court of Protection) for consideration of this point. In so doing, he had indicated that to exercise the jurisdiction in these circumstances "would encourage many applications where the substantive issue is the validity of a new will made when there was doubt as to testamentary capacity or concern as to undue influence and this Court would be ill-equipped to resolve these disputes."

After a careful examination of *Re P (Statutory Will)* [2009] EWHC 163 (Ch); [2010] Ch 33, and *Re M* [2009] EWHC 2525 (Fam), HHJ Hodge QC determined as follows upon the issues of principle:

> "15. As recorded […] above, DJ Ashton was concerned that one consequence of exercising the jurisdiction to direct the execution of a statutory will in any case where there was a dispute or uncertainty as to the validity of a recent will due to concerns about a possible lack of testamentary capacity (or want of knowledge and approval) or the possible exercise of undue influence might be to encourage many applications to the Court of Protection raising issues which that Court would be ill-equipped to resolve. Given DJ Ashton OBE's unrivalled experience of the work of the Court of Protection outside London, that is a concern that cannot lightly be dismissed. Indeed, one of the points made by Munby J in *Re M* (cited above) at [50] was that the Court of Protection has no jurisdiction to rule on the validity of any will. It may well be impractical, and inappropriate, for that Court to embark upon a detailed investigation of all the evidence necessary to resolve a dispute as to the validity of a will made by a protected person. Nevertheless, as with the exercise of any jurisdiction under the 2005 Act, the overarching consideration, when deciding whether to direct the execution of a statutory will, must be a judicial evaluation of what is in the protected person's "best interests", having considered "all the relevant circumstances".
> 16. It would seem to me that the concerns outlined by the district judge are factors which the Court may take into account when deciding whether to order the execution of a statutory will; and they might, in an appropriate case, lead the Court to conclude that it should not exercise its power to do so. But, in my judgment, there can be no presumption, still less any principle of general application, that the Court should not direct the execution of a statutory will in any case where there is a dispute or uncertainty about the validity of a recent will, the terms of which depart from those of an earlier, apparently valid, will. The adoption of such an approach would tend to elevate one factor over all others, contrary to the structured decision-making process required by the 2005 Act. Like Lewison J in *Re P* (at [41]), I would prefer not to speak in terms of presumptions. Under section 4 (6) (a), one of the relevant factors to be considered by the Court in determining the protected person's best interests are

> that person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity). A previous will is obviously a relevant written statement which falls to be taken into account by the Court. But the weight to be given to it will depend upon the circumstances under which it was prepared; and if it were clearly to be demonstrated that it was made at a time when the protected person lacked capacity, no weight at all should be accorded to it. Moreover, Parliament has rejected the "substituted judgment" test in favour of the objective test as to what would be in the protected person's best interests. Given the importance attached by the Court to the protected person being remembered for having done the "right thing" by his will, it is open to the Court, in an appropriate case, to decide that the "right thing" to do, in the protected person's best interests, is to order the execution of a statutory will, rather than to leave him to be remembered for having bequeathed a contentious probate dispute to his relatives and the beneficiaries named in a disputed will. I therefore hold that the Court of Protection should not refrain, as a matter of principle, from directing the execution of a statutory will in any case where the validity of an earlier will is in dispute. However, the existence and nature of the dispute, and the ability of the Court of Protection to investigate the issues which underlie it, are clearly relevant factors to be taken into account when deciding whether, overall, it is in the protected person's best interests to order the execution of a statutory will."

On the facts of the case, HHJ Hodge QC considered (at paragraph 21) that "sufficient doubts have been raised as to the validity of each of those Wills to lead me to conclude, on the specific facts of this case, that the best interests of Mrs D dictate that I should, here and now, set to rest all concerns about her true testamentary wishes by ordering the execution of a statutory will, rather than leaving her estate to be eroded by the costs of litigation after her death, and her memory to be tainted by the bitterness of a contested probate dispute between her children (which may extend to members of the next generation)." A draft had, in fact, been agreed by Mrs D's deputy, the OS and all three of Mrs D's children.

Comment

This case provides further evidence, if such is needed, of the sea change that has been brought about in the approach to property and affairs by the MCA 2005, and, in particular, of the primacy that is required to be given to the best interests of P in all acts done or decisions made for on P's behalf. It is to be hoped that the very real concerns expressed by DJ Ashton as to the potential expansion in scope of the role of the CoP in the realm of statutory wills (which, in the authors' view, remain real notwithstanding the correctness of the principled decision taken by HHJ Hodge QC) are not borne out by an expansion in the number of applications for statutory wills.

COP RULES REVIEW

The recommendations of the Committee set up to review of the Court of Protection Rules 2007 and the practice directions and forms which accompany them have now been published, and accepted in full by the President of the Court of Protection - see:

http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/committee-report-court-protection-29072010.pdf

Highlights include:

1. Recognition that the practice of the court should reflect the differences in the nature of the following categories of its work, namely (a) non-contentious property and affairs applications, (b) contentious property and affairs applications and (c) health and welfare applications.
2. Recommendations for substantial reworking of the forms in order to cater for this recognition and also to cut down on the amount of duplication required (including the abolition of separate forms for applications for permission, such applications being incorporated into the main form);
3. A recommendation that strictly defined and limited non-contentious property and affairs applications should be dealt with by court officers (e.g. applications for a property and affairs deputy by local authorities and in respect of small estates that do not include defined types of property). The provisions will also have to provide for an automatic right to refer any such decision to a judge and internal monitoring and review by the judges.
4. A considerable number of amendments to PDs and Rules in order to cater for problems encountered during the first three years of the CoP's new life, to include reworking of PDs associated with health and welfare applications to give clearer guidance as to (inter alia) when applications should be brought, whom should be parties to such applications and the role of experts.

ISSUE 2 OCTOBER 2010 COURT OF PROTECTION UPDATE

RE MIG AND MEG [2010] EWHC 785 (FAM)

Young Persons; Foster care; Residential care; "Deprivation of liberty"; Right to liberty and security

One might have been forgiven for thinking that deprivations of liberty were the norm in care homes and supported living placements for incapacitated people who require assistance with most activities and access the community unaided. Certainly, in the authors' experience, in the great majority of cases, the parties and often the court have erred on the side of caution and sought declarations authorising placements even if they amount to a deprivation of liberty. Generic declarations of that sort avoid dealing with the prior question of whether there is in fact a deprivation of liberty in the particular case. Re MIG and MEG looked in detail at this issue in respect of two sisters, one living with a foster family and one living in a small residential unit:

MEG was "incapable of independent living. She is largely dependent on others. She needs to be looked after save for basic care needs. She lacks capacity to make decisions as to her care, education, social and family contacts and health care. She cannot go out on her own. She shows no wish to go out on her own. She can communicate her wants and wishes in a limited manner. There are no restrictions on her social contacts save by way of court declaration. She goes to college. She is transported to and from college. Whilst there she is not under the control of JW or the Applicant and there are no restraints on her social contacts. She has a lively social life both in the home and at college and outside the home accompanied by staff and other residents."

MIG was "a young woman of 18... She has a severe learning disability with the cognitive ability of a 2-3 year old and has hearing, visual and speech impediments. She is incapable of independent living. She is largely dependent on others. She needs to be looked after save for basic care needs. She lacks capacity to make decisions as to her care, education, social and family contacts and health care. She cannot go out on her own. She shows no wish to go out on her own. She can communicate her wants and wishes in a limited

manner. MIG is living in an ordinary domestic environment which she regards as home. She is not restrained in any way. She is not locked in in any way, (although she does refuse to keep her bedroom door open, causing some concern to her foster parents). She does not wish to leave. She wants to stay with JW. She loves JW and regards JW as her "Mummy". Continuous supervision and control is exercised so as to meet her care needs. Limitations on movement are generally dictated by limitations in MIG's ability, or her lack of awareness of danger. She has never sought to leave the home. If she were to try to leave she would be restrained for her own immediate safety." Contrary to the submissions of the Official Solicitor on behalf of both sisters, Parker J held that there was no deprivation of liberty in either case.

Comment

The judge applied the decision in *Austin (FC) & another v Commissioner of Police of the Metropolis* [2009] UKHL 5, in which the House of Lords held that cordoning protestors for a period of hours and preventing them from leaving the cordoned area was not a breach of Article 5. Some elements of the judgments in *Austin* are susceptible to criticism (see for example the surprising statement by Lord Hope that "there is room, even in the case of fundamental rights, for a pragmatic approach to be taken which takes full account of all the circumstances where the interests of public safety have to be balanced against the rights of the individual"). Parker J seems to have taken from *Austin* that a relevant factor in determining whether there is a deprivation of liberty is the reason for P's detention. Thus she held that "it does seem to me to be realistic to put into the equation...that both girls were placed in their respective placements are children in need, because they need homes, rather than because they require restraint or treatment. It is also relevant in my view to consider the reasons why they are under continuous supervision and control." However, in many previous cases where a deprivation of liberty has been found, the reason for the detention was similarly that P needed care and/or treatment. It appears to the authors that there were two key factors in the judge's decision:

(a) First, no-one was objecting to the sisters' placements. They were not "free to leave", but no-one was seeking to move them.
(b) Second, because of their cognitive limitations, they would have been subject to similar constraints in any placement and even if they were living with their own family. Again, the latter point applies with equal force to many cases in which a deprivation of liberty has been found, which tends to suggest that perhaps the most important factor is whether there is a dispute about where P should live, and in particular, whether P herself is expressing a desire to leave.

The case has been appealed by the Official Solicitor and will be heard by the Court of Appeal in November 2010.

PCT v P, AH and a Local Authority ([2009] EW Misc 10 (EWCOP); COP Case No: 11531312)

Assessing capacity; Best Interests; Residence; P's wishes and feelings

Although this case was, in fact, decided some time ago (21.12.09), the judgment of Hedley J has only recently been made public. In this case (which was, in fact, one of the very first ever issued in the newly constituted COP, and the subject of one of the first directions hearings), Hedley J had to determine two central issues:

(a) a "fairly routine" (paragraph 1) issue relating to P's capacity in relation to his medical treatment, his best interest, residence, what kind of contact he has and the ability to conduct litigation; and
(b) a determination of his best interests and, in particular, in relation to where he should live, which posed "an essential conflict between representatives of the State who owe statutory duties to P on the one hand, and the view of his carer of 18-plus years standing on the other. Furthermore, it raises issues of significance in relation both to Articles 8 and 5 of the European Convention of Human Rights."

P, aged 24, lived for the majority of his life with a lady called AH. He suffers from a severe form of uncontrolled epilepsy. Hedley J accepted that there was evidence in relation to him of a mild learning disability, although he noted that AH did not necessarily accept that. Having been born into a severely dysfunctional family, and having had a substantial number of foster placements, he was ultimately placed with AH, who adopted him in October 1993. Although it was unclear precisely when his epilepsy started to manifest itself, by March 1996 Hedley J noted that there was there the first clearly recorded disputes over the medical treatment that he ought to be receiving in relation to his epilepsy. These disputes escalated, to encapsulate a dispute as to whether P suffered from ME and on 7.7.07, P was admitted as an emergency to hospital with what was accepted to be life-threatening and prolonged epileptic seizures in circumstances where AH had without medical advice withdrawn all his anti-epileptic medication some few days before. Proceedings were issued in the Court of Protection on the 15th November 2007. The matter came on before the President on the 4th and 5th of June 2008 ([2008] EWHC 1403 (Fam)) when amongst other things, the President made an Order that P should be admitted to Dr Chaudhuri's clinic in Romford for the purposes of a full assessment as to whether or not he suffered from ME and what was required by way of his treatment.

By the time the matter came before Hedley J, the position had boiled down to two conflicting proposals (paragraph 23 of the judgment). On the one hand, the Primary Care Trust supported by the Local Authority and the Official Solicitor, wished to provide P with independent living accommodation with limited contact with his mother. On the other hand, AH wanted to resume the care of P on a full time basis although accepting in theory at least, a need for a gradual move to independence at a pace which he can accommodate. A further complicating factor was that AH was, as is not infrequently the case in proceedings such as this, a complex character who, whilst single-mindedly devoted and committed to the care of P, had become enmeshed into a vicious spiral of mutual interdependence which has resulted in each of them fulfilling the fantasies of the other, and, further, held bizarre beliefs about the motives of the professionals involved in P's care.

In addressing the question of capacity, Hedley noted (paragraph 31) that he had tried wherever possible, to confine himself to a consideration of the MCA 2005 without importing into it glosses from earlier decided cases under the inherent jurisdiction. At paragraphs 34-5, he cited s.3(1) of MCA 2005 before noting that "[g]enerally, it can be observed that cases where a) [P is unable to understand the information relevant to the decision], b) [P is unable to retain that information] and d) [P is unable to communicate his decision whether by talking using sign language or any other means] are clearly made out, are usually cases that are beyond argument. The really difficult cases, and this is an example of one, is where the attention is principally on sub-section c), that is to say the capacity actually to engage in the decision-making process itself and to be able to see the various parts of the argument and to relate the one to another."

Having reviewed the evidence, Hedley J concluded (at paragraphs 36-8) that P does indeed lack capacity in relation to the litigation, in relation to making decisions about his assessment of his health and current social care needs, about the ability to make decisions about the care and treatment, to make decisions as to where and in what sort of accommodation he should reside, to make decisions as to the social, education or other activities he should undertake, and to make decisions about the nature, extent and frequency and location of his contact with AH. He found this on the basis of a cumulative series of factors, including (a) P's epilepsy and its impact on his functioning, (b) P's learning disability which is at the lower end of mild, (c) the enmeshed relationship that he has with AH which severely restricts his perspective in terms of being able to think about his future, (d) P's inability, frequently articulated by him to those who have interviewed him, to visualise any prospect of having a different view to his mother on any subject that matters and his inability to understand what the other aspects of the argument may be in relation to his expressed wishes simply to return and live undisturbed with his mother. He further noted a certain disparity that had emerged between his words and his actions and attitudes in dealings with staff.

Hedley J therefore found that he was required to make a decision as to P's best interests on his behalf. In so doing, he expressed (at paragraph 44) his "respectful and fulsome agreement" with the approach outlined by Munby J (as he then was) to the weight to be placed upon P's wishes in *ITW v Z & M* [2009] EWHC 2525 (Fam), and used that approach when considering P"s wishes. Importantly, he found (at paragraph 58) that:

> "It is very important in this case that the Court should be alert to the danger of using P's wishes to return to AH as itself continuing evidence of incapacity. That is of course, wholly impermissible. It is of the essence of a free society that people who have capacity, can choose lifestyles of which those with health or care responsibilities for them do not approve without on that basis alone being at risk of forfeiting capacity, that is the essence of the Article 8 protection."

He then continued:

> "It is right to observe that the Article 8 rights of AH and P are fully engaged in this case, and it is right also to observe that the Order sought by the PCT is a manifest breach of Article 8(1) of the Convention. However, Article 8(1) is a qualified right and its breach can always be justified under Article 8(2) and in particular, it can be justified where the interference with that right is in accordance with the law, that is to say the Mental Capacity Act, 2005 and is a proportionate response to the problem presented.
> In my view, that can only arise where as here, P lacks capacity and will only be proportionate where the best interests of P compellingly require a placement away from AH. Thus, I consider the best interests."

Having reviewed the evidence, Hedley J noted that the decisive factors for him in preferring the position of the PCT (supported by the Official Solicitor) were twofold: "[f]irst, given that P may have to live many years in this world without AH, that the need to experience so much more than has ever been on offer in the past is crucial and secondly, I feel that a return to AH will on the balance lead to the return of the pre-July 2007 position, with P being required to become a sick, weak and wholly dependent human being, to be protected at all costs from an intrusive and misguided state, in the shape of medical and care professionals, and to his being treated as AH and she alone thinks best."

In the circumstances, he considered (at paragraphs 68-9) that the combination provided the compelling requirement that is required in order to justify under Article 8(2) what is undoubtedly a major incursion under the Article 8(1) rights of the parties, and also an action which appeared contrary to the expressed wishes of P (noting in this regard that those expressed wishes did not, in fact, necessarily square with the action and attitude he manifested towards staff at the accommodation at which he had been placed).

Finally, Hedley J noted (at paragraph 71) that:

> "[his] conclusions on the one hand that his best interests lie in an alternative independent living arrangement and on the other hand, that his expressed view is of a desire to return to his mother, give rise for the need to consider whether a deprivation of liberty is involved as contemplated by Section 4(A) of the Mental Capacity Act, 2005."

Hedley J considered (at paragraph 73) that five factors were present such that the case should be treated as a deprivation of liberty: (a) the degree of control to be exercised by staff; (b) the constraint on P leaving if it is his intention to go back to AH; (c) the power of the staff to refuse a request of AH for the discharge of P to her care; (d) necessary restraints on contact between P and AH; and (e) it involved a fairly high degree of supervision and control within the placement. Whilst he accepted (at paragraph 74) that "independent living in a flat is not a usual expression of deprivation of liberty, yet the presence of the facts as set out above does in my view have just that effect. That is the more so since that proposal which the Court has it in mind to approve, is indefinite in its duration and thus the consequences are indefinite too. I think that approach is confirmed by a consideration of some of the questions raised in paragraph 2(6) of the relevant code of practice."

Although he considered (at paragraph 75) that, whilst the conclusion might initially appear odd, the conclusion that the PCT's proposed placement was in P's best interests in effect compelled the conclusion that the deprivation of liberty inherent therein was in his best interests. He noted, though, that the real deprivation of liberty was in respect of P's dealings with AH (paragraph 76), the restrictions on P's general freedom being modest. He continued at paragraph 77:

> "That raises questions of review. This is likely to be a long-term placement and that is certainly its intention. It raises rather different problems to the medical or social crises type of case which is rather more common. It must take into account the significance of a deprivation of liberty, the rather specific nature of it in this case and the practicalities of Court capacity and litigation generally. In particular, it must ensure that in effect, the same ground is not argued over and over again."

In the circumstances, Hedley J concluded (at paragraph 78) that there the Court should review the case nine months after actual placement in independent living, or 12 months from the date of his judgment, whichever is the earlier. He did not anticipate that oral evidence would be required, and proposed a two hour time-marking. Thereafter, he proposed an annual review that should initially be on paper with evidence of continuing incapacity and prognosis as to capacity with proposals for future care and contact, and with a statement from AH and on behalf of P from the Official Solicitor. He provided (at paragraph 79) that any application made under the general liberty to apply provisions made otherwise than in an emergency or by agreement should initially be made without

notice to other parties so that the Court can satisfy itself that there exists a matter with which it ought to be concerned; he further provided that all hearings should initially go to a local nominated District Judge who may of course, transfer the case if he or she thinks it appropriate, save that the first review and any interim application pending the first review should be reserved to himself.

In concluding his judgment Hedley J indicated a number of provisional views as to contact, on the basis that he was prepared to deal with it by way of a separate order once AH had had an opportunity to indicate whether, and if so which, of requested undertakings she was willing to give, since she could not be ordered to give them. These provisional views are entirely fact specific and do not need to be set out here.

Comment

This case of some considerable interest for three reasons: (a) Hedley J's comments about the assessment of capacity and the particular difficulty in the case of those falling under s.3(1)(c); (b) his clear statement that it is only where the best interests of P compellingly require placement away from the family environment that such placement can be justified as a proportionate interference with the rights of both P and the relevant family members under Article 8(1) ECHR; and (c) his comments upon the deprivation of liberty in this case, and, in particular, his willingness to identify restrictions upon contact as giving rise to a situation of a deprivation of liberty. As to (b), it would appear that, whilst couched in terms of a reference to the particular facts of this case, Hedley J's statement should in fact be read as a wider statement of principle: it is certainly one that is in line with the consistent statements of Munby LJ as to the circumstances under which it is appropriate for the state to interfere in the private and family lives of incapacitated persons: see, for instance, *Re MM; Local Authority X v MM and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443.

IN THE MATTER OF MARK REEVES (COP CASE NUMBER 99328848)

Deputyship; Personal injury

In another case that was determined some time ago (5.1.10) but which, again, has only recently come to the attention of the authors, Senior Judge Lush had cause to consider the consequences of the decision of the Court of Appeal in *Peters v East Midland SHA & Ors* [2009] EWCA Civ 145, and, in particular, the observations of Dyson LJ regarding double recovery in personal injury proceedings, where (at paragraphs 64 and 65), he stated that:

> "Mrs Miles has offered an undertaking to this court in her capacity as Deputy for the claimant that she would (i) notify the senior judge of the Court of Protection of the outcome of these proceedings and supply to him copies of the judgment of this court and that of Butterfield J; and (ii) seek from the Court of Protection (a) a limit on the authority of the claimant's Deputy whereby no application for public funding of the claimant's care under section 21 of the NAA can be made without further order, direction or authority from the Court of Protection and (b) provision for the defendants to be notified of any application to obtain authority to apply for public finding of the claimant's care under section 21 of the NAA and be given the opportunity to make representations in relation thereto.
>
> In our judgment, this is an effective way of dealing with the risk of double recovery in cases where the affairs of the claimant are being administered by the Court of Protection. It places the control over the Deputy's ability to make an

> application for the provision of a claimant's care and accommodation at public expense in the hands of a court. If a Deputy wishes to apply for public provision even where damages have been awarded on the basis that no public provision will be sought, the requirement that the defendant is to be notified of any such application will enable a defendant who wishes to do so to seek to persuade that the Court of Protection should not allow the application to be made because it is unnecessary and contrary to the intendment of the assessment of damages. The court accordingly accepts the undertaking that has been offered."

The matter came before Senior Judge Lush in the following circumstances. Mr Reeves had obtained a substantial judgment at trial in 2003 for personal injuries sustained in an accident during which he had suffered a traumatic brain injury. The Court had concluded that his future care would be best met at a rehabilitation unit, TRU, rather than in his own home, and an award was made in respect of future care. In December 2006, Mr Reeves' property and affairs Deputy approached the relevant local authority, St Helen's Council, to ascertain whether it was potentially liable to contribute towards the costs of Mr Reeves' care at TRU. In July 2009, St Helen's wrote to the Deputy, noting that Mr Reeves had been awarded a personal injury award on the basis that he would be paying for future care himself, and formally requesting (on the basis of Peters), that the Deputy apply to the Court of Protection for authority to make a request of St Helen's Council to make a request for public funding for future care. The Deputy did so.

Having set out the rival submissions, Senior Judge Lush concluded that the application was misconceived in seeking to apply the Peters decision retrospectively to a personal injury claim resolved some six years before Peters.

Senior Judge Lush noted that Mr Reeves' Deputy had a duty to act in his best interests, including "claiming all state benefits to which Mr Reeves may entitled and, if appropriate to do so, applying to a local authority under the National Assistance Act 1948." He found that, in most cases, the order appointing a Deputy would give sufficient general authority to them to allow them to apply for social security benefits and to a local authority for a care needs assessment without having to obtain specific authorisation; he noted that he considered that it was implicit in the judgment in Peters that the Deputy had such authority – the purpose of the undertaking given in Peters was therefore to remove this authority from the Deputy and give it to the Court. Senior Judge Lush considered that the Peters undertaking was specific to that case, and noted that no such undertaking had been given in Mr Reeves' case; further "there is no obligation upon the Court of Protection to adjudicate as between the claimant and defendant, or the claimant and local authority on the issue of double recovery."

Senior Judge Lush then outlined his views as to the general position regarding such undertakings and the consideration of double recovery as follows:

> "Notwithstanding the undertaking that was approved in Peters and other undertakings of a similar nature, I am of the view that the Court of Protection is no longer really the appropriate forum to adjudicate on matters of this kind. Its primary function is to act in the best interests of a protected beneficiary and, even though it would strive to be impartial, there may be a perception of bias for this reason. Furthermore, the close links which the court had with personal injury litigants generally were effectively severed when the Mental Capacity Act 2005 came into force on 1 October 2007, and the court's approval was no longer required in cases involving settlements out of court on behalf of incapacitated

claimants. Additionally, the court no longer supervises deputies: that is one of the functions of the Office of the Public Guardian.

In the absence of any order of the Court of Protection restricting the authority of a claimant's deputy from applying for public funding of the claimant's care under section 21 of the National Assistance Act, the correct procedure would seem to be for the deputy to apply to the local authority and, if he is dissatisfied with the response he receives, to consider the merits of an application for judicial review."

Senior Judge Lush ordered that there be a departure from the ordinary costs rules because the Deputy was compelled to make the application by St Helen's Council on a misconceived basis. In view of the Council's conduct before as well as during the proceedings, he ordered that the costs of both parties be paid by the Council.

Comment

This judgment reinforces the OPG guidance that was already in place to the effect that *Peters* undertakings are not retrospective. It further reiterates the obligations upon property and affairs Deputies to ensure the maximisation of P's assets by drawing upon the resources of the state where appropriate – creating tensions that are already apparent in cases before the Court of Protection and are only likely to increase as public funding is squeezed.

Furthermore, the question of the validity of so-called Peters undertakings and of the appropriate forum to adjudicate upon issues of double recovery is a fraught one, and this judgment provides some welcome clarification as to the nature of disputes upon which Court of Protection will not adjudicate in this regard. In the views of the authors, serious questions arise about the extent to which the undertaking given in *Peters* was one that was properly accepted by the Court of Appeal. Those concerns go beyond the scope of this newsletter, but can be explained upon application; in summary, they relate to the extent to which the Court of Appeal had fully in mind both the complexities of the legislation governing community care provision and the role of Deputies under the MCA 2005. However, for present purposes, it is clear that the forum in which disputes as to how to prevent double recovery in future should be conducted is the civil court in which the personal injury claim is being advanced, rather than before the Court of Protection on any subsequent application by the deputy in line with a *Peters* undertaking.

EG v RS, JS AND BEN PCT [2010] EWHC 3073

Costs; Welfare deputyship

In this judgment, delivered on 29.6.10, HHJ Cardinal heard an appeal by a solicitor (EG) against an order made that she pay the costs of her failed application for permission to apply to be appointed the health and welfare deputy of RS. She was ordered to pay the costs of JS, the sister of RS, BEN PCT (the Primary Care Trust involved) and the OS representing RS as litigation friend.

The case arose out a complex and acrimonious dispute regarding the welfare and finances of RS, a man severely injured in a road traffic accident and brain damaged as a result. In addition to those identified above, CH, the brother in law of RS and estranged husband of JS, was a key player, as property and affairs deputy of RS. At the material time, EG was CH's solicitor. In February 2009, she applied for permission to be appointed health and welfare deputy for RS. By her application, EG sought permission to apply to be Deputy and in that application raised the potential conflict arising out of

her role as CH's solicitor. That application was considered by District Judge Owen initially at a directions hearing in May 2009, at which the Official Solicitor queried the need for a health and welfare to be appointed at all. The hearing was adjourned for EG to set out why an appointment was appropriate and why she considered she was the suitable applicant. EG filed a witness statement setting out these matters in August 2009. The response of JS's solicitors was that she was open though undecided as to the suggestion that a Deputy should be appointed but that EG was not suitable because of a conflict of interest. Their skeleton argument invited the court to dismiss EG's application. BEN PCT indicated it did not take a position as to whether or not a Deputy should be appointed or whether it should be JS or EG or another. The OPG filed a position statement as to its application only and was not concerned with welfare matters.

At the hearing on 25.8.09, District Judge Owen refused the application for permission of EG to be appointed and ordered her to pay costs of JS, Official Solicitor and BEN PCT. HHJ Cardinal, having directed himself as to the appropriate test regarding appeals set down in Rules 173 and 179 of the Court of Protection Rules 2007 and costs set down in Rules 157 and 159, set out the competing submissions of EG on the one hand RS and JS on the other (the appeal against BEN PCT having been conceded by consent; furthermore, JS limited herself upon appeal to seeking her costs of the hearing on 25.8.09). In setting out the submissions of EG, HHJ Cardinal made a number of pertinent comments, including (at paragraph 27) that he had been caused the gravest concern by the statement in the permission form she completed that she had advised CH and would like the "court to determine whether in its opinion this causes any conflict of interest for me due to the current application. I believe my duties in advising CH and in acting as health and welfare deputy would not conflict but would ask the court to give specific consideration to this issue."

HHJ Cardinal noted that "[i]t is just not possible to act as honest broker on one hand and firmly on the side of one party alone on the other. It should have been clear even then to EG that she simply could not realistically pursue the application. Later on in his submissions to me Mr O'Brien [for RS] posed the question what would an ordinary member of the public think? The obvious answer is that the appointee has a prejudice, a bias, in favour of his/her client. I am disappointed that EG did not see this at the outset".

HHJ Cardinal further noted (at paragraph 28) that he considered that EG had been naïve to apply, because it was or should have been obvious "that she simply could not be seen by the family of RS as an impartial Deputy in the light of past events and of the current litigation." His concerns as to her ability to act impartially were only further heightened by a letter that she had sent (as CH's solicitor) on 17.8.07, in which she set out contact arrangements between JS and RS that would be acceptable to CH. Indeed, he noted (at paragraph 35) that he could not think of a case "where the involvement of the solicitor had hitherto been more clearly on one side only." Whilst HHJ Cardinal (at paragraph 37) acquitted EG of acting in bad faith, he found that she was naïve and "pressed on with an application which she ought to have known was doomed to fail."

In the circumstances, HHJ Cardinal found (at paragraph 38(iii)) that he could not see how District Judge Owen had strayed outside the terms of the Rules or the dicta in *Re Cathcart* [1893] 1 Chan 466, long regarded as the touchstone for applications for costs in cases involving those without capacity. Importantly, whilst he accepted (at paragraph 38(iv)) that as a matter of public policy the Courts should not discourage professionals from seeking appointments as Deputies by way of costs sanctions, he noted that there should be a limit to such applications "where there is clear opposition and acrimony

given the role of the would-be Deputy hitherto. It seems to be that such an applicant ought to ask him or herself am I in any way compromised by my intervention to date? Is there any evidence of my taking sides too strongly? Can I be sure that all parties will indeed regard me as a neutral arbitrator? Am I really suitable given the history of conflict with my client and my support of him? Would my appointment mean more conflict?" HHJ Cardinal endorsed the comments of the District Judge that the application had been an "unfortunate" one and declined even to grant permission to appeal his decision (save in respect of BEN PCT, and in respect of whether EG or her firm should pay, it having been conceded by the respondents that it should be her firm).

Comment

As HHJ Cardinal noted at the outset, the appeal was "a cautionary tale for all those who put themselves forward as professional deputies when too closely associated with one party in a dispute before the Court of Protection." It is in retrospect more than a little surprising that EG chose to advance her application at all, let alone that she persisted with it beyond the directions hearing in May 2009, and the facts of the case illustrate clearly how careful professionals must be in ensuring that they both are and seen to be independent and impartial when advancing themselves as deputies. It is not beyond the bounds of possibility that a solicitor who has provided advice to one party could then advance themselves as a professional deputy; however, this judgment makes it very clear that they do so at their peril where there could be any suggestion that they were "tainted" by their prior association, especially where (as so often) they put themselves forward in the context of a dispute between family members. Merely being a professional is not, in such a circumstance, enough.

D COUNTY COUNCIL V LS [2010] EWHC 1544 (FAM)

Capacity; Consent; Marriage; Sexual relations

This case is the first the authors are aware of to consider the test for capacity to have sexual relations following *R v C* [2009] 1WLR 1786, in which doubt was cast on the earlier decisions of Munby J (as he then was) in *X City Council v MB, NB and MAB* [2006] 2 FLR 968 ("MAB") and *MM v Local Authority X* [2007] EWHC 2003 Fam ("MM"), both of which set out a very low threshold. In order to understand the decision in LS, it is necessary first to summarise briefly the ratio of these three cases.

In *MAB*, Munby J defined the test as follows:

> "Does the person have sufficient knowledge and understanding of the nature and character – the sexual nature and character – of the act of sexual intercourse, and of the reasonably foreseeable consequences of sexual intercourse, to have the capacity to choose whether or not to engage in it, the capacity to decide whether to give or withhold consent to sexual intercourse (and, where relevant, to communicate their choice to their spouse)?"

In *MM* Munby J explained further that in his view, capacity to consent to sexual relations was act-specific, not person-specific, saying that:

> "A woman either has capacity, for example, to consent to 'normal' penetrative vaginal intercourse, or she does not. It is difficult to see how it can sensibly be said that she has capacity to consent to a particular sexual act with Y whilst at the same time lacking capacity to consent to precisely the same sexual act with Z."

R v C was a criminal case, and thus the decisions in *MM* and *MAB* did not fall directly to be considered. However, in those cases and in *R v C*, it has consistently been said by the courts that the tests should be the same in both criminal and civil contexts. In *R v C*, Baroness Hale criticised the approach of Munby J in the civil cases, saying that:

> "I am far from persuaded that those views were correct, because the case law on capacity has for some time recognised that, to be able to make a decision, the person concerned must not only be able to understand the information relevant to making it but also be able to "weigh [that information]" in the balance to arrive at [a] choice."

And further:

> "it is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so."

In *LS*, Wood J considered the effect of *R v C* on the earlier decisions and concluded that "it is impossible for me to come to any other conclusion than that the approach adopted in those paragraphs of *R v C* apply to questions of the capacity, or lack of it, to make decisions on the issue of sexual relations (and indeed of marriage), in both the civil and the criminal arena and, in particular, are, in my judgment, wholly consistent with the statutory requirements of section 3 of the 2005 Act." In other words, he accepted that to the extent the judgments in *MM* and *MAB* might be seen to have ignored the third requirement under s.3 MCA – the ability to use or weigh information – they were not correct.

Roderick Wood J went on to consider in what circumstances there might be a lack of capacity and to emphasise the importance of separating "best interests" considerations from the issue of capacity. He said:

> "What is necessary is that the particular sexual partner [...] impedes or undermines or has the effect of impeding or undermining the mental functioning of a person when that person makes their decisions, so as to render them incapacitous."

Comment

The position, it appears to the authors, is that the test for capacity to consent to sexual relations is that set out in *MM* and *MAB*, with the added requirement that the individual be able to use or weigh relevant information, and in particular should not be prevented from such using or weighing of relevant information by the particular influence of their partner.

The judgment in *LS* does not completely demystify the issue, and the authors are aware of at least one case presently before the court in which the matter will be considered further. One difficulty with *LS, MM* and *MAB* is that they concern what might be thought the more simple cases. When complicating factors such as exploitative relationships, allegations of abuse, simultaneous criminal proceedings, and infection with sexually transmitted diseases exist, the "low threshold approach" may not be thought to give adequate protection to vulnerable adults.

FA v MR A & ORS [2010] EWCA CIV 1128

Practice and procedure; Delay

This case (unusually a reported decision of an application for permission to appeal to the Court of Appeal) merits a brief mention because of the trenchant comments by Munby LJ (the first in his formal capacity as a Court of Appeal judge) as to the problems posed by multiple judges having conduct of cases. The case had a particularly difficult and complex procedural history (having originally started out under the inherent jurisdiction), prompting Munby LJ to comment at paragraphs 31-2 as follows:

> "31. It is a striking feature that, when Eleanor King J directed on 17 December 2009 that this litigation should be transferred from the Family Division to the Court of Protection, she -- and, if I may say so, entirely appropriately -- directed that the proceedings "shall be allocated to a High Court judge nominated to sit in the Court of Protection". That was a direction that the case should be allocated to an identified judge. The direction has simply been ignored and, I regret to say, ignored by the court. The litigation since SA became an adult (I do not refer to the earlier wardship proceedings) was first before Macur J; it was then before Roderic Wood J; it was then before Eleanor King J; it was then before Roderic Wood J again; and, most recently, before Parker J. Unsurprisingly, with that complete lack of judicial continuity, the litigation has been allowed to drift in the most deplorable fashion.
>
> 32. It is now, or will at the end of this long vacation be, seven years since the Family Division accepted, in the context of care proceedings relating to children, that the previous delays in the system required as at least part of their solution a process of judicial continuity and judicial case management. Unhappily, and not for want concerns expressed by judges, no similar system of either judicial continuity or judicial case management yet seems to have been applied to the significant number of cases in the adult jurisdiction, whether in the Family Division or in the Court of Protection, which are of the scale and complexity which, as in the present case, requires the use of a judge of the High Court. And the consequence -- and the present case, I regret to say, is a classic if shocking example of the phenomenon -- is that all the vices which we were familiar with before 2003 in relation to the child jurisdiction are still too frequently to be found in the adult jurisdiction. The problem is systemic; the problem is fundamentally one for the court to grapple with, although, that said, there are many cases (and I do not speak with the present case in mind) where a more active stance adopted by the parties might facilitate the process."

It was against the background of this concern that Munby LJ took the perhaps unusual step of (effectively) converting a permission application into a directions hearing addressing matters going forward before the Court of Protection.

Comment

The authors anticipate that many of the readers of this newsletter will be all too familiar with cases coming on for direction before a series of different judges, and with the consequent problems that this can throw up. Unfortunately, anecdotal evidence suggests that, at present, the systemic problem identified by Munby LJ is only worsening.

D v R (Deputy of S) and S [2010] EWHC 2405 (COP)

Civil proceedings; Deputies; Gifts; Mental capacity; Undue influence; Experts

In this case, Henderson J had to decide whether a Mr S had capacity to decide whether Chancery proceedings started in his name and on his behalf by his daughter and deputy, R, should be discontinued or compromised. By the proceedings, R sought declarations that gifts of money made by Mr S to a Mrs D (previously a legal secretary employed by his solicitors) in 2006 and 2007 totalling over £500,000 were procured by undue influence and should be set aside.

The facts of the case were relatively complex, but for present purposes the following matters were of importance to the decision:

1. It was common ground that Mr S had testamentary capacity as at April 2008;
2. There was an unbridgeable division of opinion between the (very eminent) experts instructed on both sides.

Henderson J adopted the analysis of and approach to the MCA set down by Lewison J in *Re P (Statutory Will)* [2010] Ch 33, but added a useful gloss on the terms of s.1(4) as follows:

> "39… the fact that the decision is an unwise one does not, of itself, justify a conclusion of lack of capacity: see section 1(4). Just as a testator has always had the freedom (subject now to the constraints of the Inheritance (Provision for Family and Dependants) Act 1975) to make testamentary dispositions which are unreasonable, foolish or contrary to generally accepted standards of morality, so too a person in his lifetime has the freedom to act in a manner which is (for example) unwise, capricious, or designed to spite his relations. The pages of English fiction and of the law reports alike bear ample testimony to the exercise of this basic human right, even if it is not one enshrined in so many words in the European Convention on Human Rights (although Articles 8, 9 and 10 are, of course, all relevant in this context).
> 40. The significance of section 1(4) must not, however, be exaggerated. The fact that a decision is unwise or foolish may not, without more, be treated as conclusive, but it remains in my judgment a relevant consideration for the court to take into account in considering whether the criteria of inability to make a decision for oneself in section 3(1) are satisfied. This will particularly be the case where there is a marked contrast between the unwise nature of the impugned decision and the person's former attitude to the conduct of his affairs at a time when his capacity was not in question."

He then turned to the question of the decision in issue, commenting as follows:

> "43. At a superficial level, the nature of the decision may be simply stated. As I have already said more than once, it is whether to discontinue, or to continue to prosecute, the Chancery proceedings. But that decision cannot be taken, it seems to me, without at least a basic understanding of the nature of the claim, of the legal issues involved, and of the circumstances which have given rise to the claim. It would be an over-simplification to say that the claim is just a claim to set aside or reverse the gifts which Mr S made to Mrs D, because in the ordinary way a gift is irrevocable once it has been made and perfected by delivery or transfer of the relevant assets. If a gift is to be set aside or recovered, some vitiating factor such as fraud, misrepresentation or undue influence has to be established; and if the donor is to decide whether or not to pursue a claim, he needs to understand, at

least in general terms, the nature of the vitiating factor upon which he may be able to rely, and to weigh up the arguments for and against pursuing the claim. Provided that the donor is equipped with this information, and provided that he understands it and takes it into account in reaching his decision, it will not matter if his decision is an imprudent one, or one which would fail to satisfy the "best interests" test in section 4. But if the donor is unable to assimilate, retain and evaluate the relevant information, he lacks the capacity to make the decision, however clearly he may articulate it.

44. The need for an understanding of the nature of the claim is particularly pronounced, in my view, where the claim is founded on a rebuttable presumption of undue influence, and where the relationship which arguably gave rise to the claim is still in existence. One would naturally not expect a lay person to have the same understanding as a lawyer of the principles expounded by the Court of Appeal in *Allcard v Skinner* (1887) 36 Ch D 145 and by the House of Lords in *Royal Bank of Scotland Plc v Etridge (No.2)* [2001] UKHL 44, [2002] 2 AC 773. But if a donor is to decide whether or not to pursue such a claim, he must in my view understand (at least in the simple terms envisaged by section 3(2)):

(a) the nature and extent of the relationship of trust and confidence arguably reposed by him in the donee;
(b) the extent to which it may be said that the gifts cannot readily be accounted for by the ordinary motives of ordinary people in such a relationship; and
(c) the nature of the evidential burden resting on the donee to rebut any presumption of undue influence (traditionally described as proof that the gifts were made only after full, free and informed thought about their nature and consequences: see *Hammond v Osborn* [2002] EWCA Civ 885, [2002] WTLR 1125, at paragraphs [26] to [27] per Sir Martin Nourse).

45. It is only with the benefit of this minimum level of information that a donor in the position of Mr S can begin to reach a decision whether or not to pursue the claim, or (just as important) whether to attempt to settle it, and (if so) on what terms. Furthermore, where (as in the present case) the relationship with the donee which gave rise to the potential claim is apparently still subsisting, the court will in my judgment need to scrutinise with particular care whether the donor can stand back from the impugned transactions with sufficient detachment truly to understand the nature of the claim. By way of contrast, the necessary degree of understanding is likely to be far easier to establish where the donor was under an influence at the time of the gift (e.g. by a religious sect or guru) which has subsequently come to an end."

Henderson J then conducted a detailed analysis of the evidence of the various experts. These included a Court appointed visitor, the terms of whose appointment are of some note:

"76. At a directions hearing on 20 October 2009 I ordered that a report should be prepared by a Special Visitor of the Court of Protection under section 49 of the 2005 Act, on the issues whether Mr S had capacity to decide whether the Chancery proceedings should be continued and whether he had capacity to enter into a compromise of the claim (and, if so, on what terms). Among my concerns in making this order were, first, that Mr S should be examined by an expert who was independent of the parties, and, secondly, that when the examination took place Mr S should be free from immediate influence by either Mrs D or R. The order therefore contained provisions that for 14 clear days before the

examination took place Mrs D should not contact Mr S in any form or manner, and that during the same period R should not speak to him about the Chancery proceedings or any of the issues relating to them."

Having conducted his analysis, he came to the clear conclusion that Mr S lacked the relevant capacity because he was unable to understand the information relevant to the decision, unable to retain it, and unable to use or weigh it as part of the process of making the decision. In the circumstances, and to his evident unhappiness (given the very clearly expressed wishes of Mr S that the proceedings not continue), he found himself compelled to a conclusion that R was entitled to continue to prosecute them.

Comment

This decision is, on one view, slightly odd, because it does not seem that any consideration was given by Henderson J as to whether continuing the proceedings was, in fact, in Mr S's best interests given his very clearly stated wishes that they not continue and that his gifts to Mrs D stand untroubled. It may well be that, because the nature of the claim was such that the presumption of undue influence had been raised, Henderson J considered that it was in Mr S's best interests for the proceedings to continue notwithstanding his views, but one would perhaps have expected an express statement of this in the judgment.

Henderson J's comments in respect of s.1(4) are of considerable interest, because there has been little judicial commentary on this section. It is, however, somewhat difficult to avoid the conclusion that the weight that can be placed upon the apparent lack of wisdom of the decision must be very little if the terms of s.1(4) are to be respected.

The decision is of note for one further reason, namely as a case study in the need for experts properly to be instructed. It is clear from the judgment that Mrs D's expert had been instructed in a very much less than satisfactory fashion, something which troubled the judge considerably (and was material in leading him to prefer the evidence of both R's expert and that of the Court of Protection Visitor). The paragraphs from his judgment in which he sets out his concerns are worth repeating in full as they identify a series of ultimately costly errors:

> "146. Before I leave the question of Mr S's understanding of the relevant information, I need to say a little more about Professor Howard's reports. In his second report, he addressed the question whether the Chancery proceedings should have been issued. As a preliminary comment, it should be noted that this is not quite the same as the question whether they should now be continued, although rather surprisingly Professor Howard seemed unable to appreciate the distinction between the two questions when it was put to him in cross-examination. In that report, he expressed the opinion that, although Mr S's memory was extremely poor, if prompted "he quickly recognises the facts and issues involved". Professor Howard went on to say that, with prompting, Mr S could recall the gifts and his reasons for making them, the fact that R was trying to recover the money, and the existence of the Chancery proceedings. However, it emerged from Mr Marshall's skilful cross-examination that this opinion was based on only a superficial acquaintance with the case on the part of Professor Howard, which he readily acknowledged. I have already referred to the relevant passages in his cross-examination, and I will not repeat them. It is, in my judgment, a fair criticism to say that Professor Howard should not have expressed a clear opinion in these terms without also making clear the limited nature of his own understanding of the facts and issues, and the precise steps

which he had taken to remind or inform Mr S about them. A related, and equally valid, criticism is that he failed to comply with the mandatory requirement in the Practice Direction to Part 15 of the Court of Protection Rules 2005 to include in his report "a statement setting out the substance of all facts and instructions given to [him] which are material to the opinions expressed in the report or upon which those opinions are based". An acceptable alternative, as the Practice Direction makes clear, would have been to annex his instructions in so far as they were in writing. None of these elementary steps was taken, and the result (unintended I am sure, but nevertheless potentially very worrying) is that the report rests on a much flimsier foundation than a reading of it would naturally suggest. The rules are there for a good reason, and if they are not complied with a report, even from the most eminent of experts, is likely to lack the transparency and objectivity which the court rightly insists upon in expert evidence. I do not wish to be too critical, because the report appears to have been produced under some time pressure (although I must say it is not clear to me what the urgency was), and because Professor Howard and Hunters may have thought of it essentially as a supplement to the first report which he had produced in April 2008. Nevertheless, I have to say that there is substance in at least some of the severe criticisms of this report which Mr Marshall advanced in his closing submissions.

147. I am afraid that Professor Howard's third and fourth reports are also open to some criticisms of a similar nature. I have already referred to the unsatisfactory way in which they were produced, apparently on the basis of oral instructions given at conferences with counsel, and without prior authority from the court. As before, there is only a most perfunctory statement of the nature of those instructions in the body of the reports, and no proper statement of the materials upon which they were based. The overall result of these deficiencies is that I have had to treat Professor Howard's evidence with considerably more reserve than would normally be the case."

RE MB [2010] EWHC 2508 (COP)

Detained residents; Deprivation of liberty safeguards; Standard authorisations; Urgent authorisations; MCA s.4B; Best interests; Lawfulness of detention

Extensive guidance concerning implementation of DOLS has been given by Charles J in the case of *Re MB* [2010] EWHC 2508 (COP).

The facts of the case are interesting because they illustrate the problems faced by local authorities when a best interests assessor concludes that a deprivation of liberty is not in P's best interests, but where there appears to be no suitable alternative to P's placement, at least in the short term.

Mrs B had been admitted to a care home following concerns about physical assaults by her husband. An urgent authorisation was granted and then a standard authorisation lasting for one month. Prior to the expiry of the standard authorisation, a further standard authorisation was sought, but the best interests assessor concluded that the best interests requirement was no longer met. This was because Mrs B had displayed emotional and physical signs of distress at having been removed from her home. The local authority sought advice as to what they should do, and following some confusion due to difficulty in contacting the Court of Protection urgently, they issued a second urgent authorisation. Charles J found that this was not lawful. Once an urgent authorisation has been given, detention can only lawfully be extended by a standard authorisation or by court order.

Charles J went on to give useful guidance about the duties of managing and supervisory authorities. Where a problem arose such as had occurred with Mrs B, the best interests assessor should carefully consider whether even if the continued deprivation of liberty is not ideal, there are viable alternatives for P's short term residence. If not, it may be appropriate to continue a standard authorisation for a short period while changes to the arrangements are made, or in order to seek the court's assistance. Where the issue is that a further authorisation cannot be given under DOLS then it will not be correct to issue an application under s.21A MCA (challenge to an authorisation) as the relief that can be granted by the court will not be adequate. 'Standard' COP proceedings will be required. If necessary, pending application to the court, it may be possible to rely on s.4B MCA (defence to a deprivation of liberty where it is necessary to perform a vital act or give life-sustaining treatment) but only if a decision is made with express reference to s.4 and recorded with full reasons in writing.

The court granted a declaration that Mrs B had been unlawfully deprived of her liberty from the expiry of the standard authorisation until the court declared the deprivation of liberty lawful at a subsequent hearing. This declaration was granted notwithstanding the fact that there was no criticism of the local authority or the best interests assessor, although the judge did say that he thought it was right that the Official Solicitor had not also sought damages for the breach of Article 5. It was also granted even though it appears that the judge considered the deprivation of liberty had been in Mrs B's best interests, as there was no suitable alternative accommodation that it would have been appropriate for her to move to at short notice that would have been a better option. While DOLS requires a deprivation to be in P's best interests to be lawful, the converse is not true: a deprivation of liberty which is in P's best interests is not thereby lawful, if there is no lawful authorisation or court order in place.

Comment
The judgment is essential reading for all best interests assessors and those involved in administering DOLS, and includes other pieces of advice, such as recording the time that authorisations start and end, in order that there is no risk of a gap or any confusion about the position.

G v E [2010] EWHC 2512 (COP) (FAM)
Financial and Welfare deputies; Litigation friends; Official Solicitor

There have been two recent judgments concerning the appointment of welfare deputies which expressed different views as to their appropriateness (*Re P* [2010] EWHC 1592 (Fam) and *Havering LBC v LD and KD* (unreported, 25 June 2010)) (both covered in previous updates).

The issue has been considered again by Baker J in the ongoing case of *G v E*. The judge agreed with the decision in *LBC v LD and KD* and found that the scheme of the MCA 2005 was such that decisions should ordinarily be taken by those looking after and responsible for incapacitated adults, with particularly grave decisions or issues which are the subject of dispute being resolved by the courts. The appointment of a deputy, which entailed giving one person a protected position regarding decision-making, was not appropriate except in limited circumstances, notably those identified in the MCA Code of Practice. These include cases where P is at risk of harm from family members or there is a long history of disputes, or where P has substantial financial assets which require regular management.

On the facts of the case, Baker J refused to appoint E's carers as either welfare deputy or property and financial affairs deputy. Routine decisions about E's care and treatment would be taken by his carer. If disagreement on significant issues arose, such as who should care for E in the event F was no longer able to, decisions would have to be taken collaboratively, or with the court's assistance if necessary:

On the facts of this case, Baker J found the application for the appointment of F and G as personal welfare deputies to be misconceived. The routine decisions concerning E's day-to-day care, including decisions about holidays and respite care could be taken by F as his carer. Decisions about his education should be taken collaboratively by F, G, his teacher, and other relevant professionals. Decisions about possible medical treatment should be taken by his treating clinicians, who will doubtless consult both F and G and others as appropriate. He found that, were there to be any disagreement about any of these matters, an application could be made to the Court of Protection. Decisions about who should look after E in the event that F is no longer able to do so should equally be considered (when the need arises) in a collaborative way and only referred to the court for endorsement if required or if there is any disagreement. Baker J concluded that that issue was for the very long term and it would be wholly inappropriate to appoint a deputy or deputies now to make that decision.

Comment

The upshot of this decision, and that in *LBC v LD and KD* is that the appointment of welfare deputies is likely to be very rare, and local authorities or family members who wish to seek such an appointment will have to consider their positions very carefully.

It is important, in the view of the authors, that one of the central reasons a welfare deputy was not required in *G v E* was that the judge considered that E's carers could make routine decisions about such matters as holidays and respite care. Often the motivation for an application to be welfare deputy, whether by a local authority or a family member, is the belief that the other is obstructive or is likely to make the wrong decision. It is only when the court clarifies the identity of the 'lead' decision maker, as Baker J did in this case, that such concerns can be dealt with. It seems to the authors that it can be drawn from the judgment of Baker J that where P is not at risk of harm from his family members, the assumption is that his family will take the lead in routine decision-making, albeit collaboratively with relevant professionals. Where there is a risk of harm because of the decisions made by P's carers or family, it may be that the local authority has to take the lead to protect P. In this case, the court's approval of particular decisions will be required and is likely to be preferred to the granting of a welfare deputyship.

The case also dealt with G's application to be made litigation friend for E in place of the Official Solicitor. The application was refused, since G's criticisms of the OS's conduct were without merit, G herself was not sufficiently objective, and the Official Solicitor was not litigation friend of last resort. It remains to be seen whether the Official Solicitor will agree with the last of those reasons.

A v DL, RL and ML [2010] EWHC 2675 (Fam)

Inherent jurisdiction; Vulnerable adults; Local authorities' powers and duties; Without notice applications

The President has very recently given interesting and useful guidance for local authorities as to what steps might be appropriate where safeguarding concerns exist in relation to adults who have capacity but are thought to be subject to undue influence.

The case concerned an elderly couple who the local authority considered to be at risk of physical, emotional and financial abuse from their son, who lived with them. The local authority took the view that the couple did not lack capacity. The local authority had therefore rejected making an application under the MCA. It had also considered and rejected the possibility of an ASBO, or an order under s.153A of the Housing Act 1996. That left two possibilities for obtaining the court's assistance to protect the parents: an order under the inherent jurisdiction, or an order under s.222 Local Government Act 1972. The President concluded that an order was warranted and could be made under either.

The court's inherent jurisdiction was defined broadly in *Re SA (Vulnerable Adult with capacity: Marriage)* [2005] EWHC 2942) Fam [2006] 1 FLR 867 as extending to individuals with capacity who are prevented from making free choices due to undue influence, coercion or for some other reason. In the authors' experience, the Official Solicitor and the courts have not been keen to invoke the inherent jurisdiction in cases outside those of arranged marriage (as in *SA*). The President, however, was satisfied that on the evidence provided by the local authority, it was appropriate to make an order requiring the Official Solicitor to carry out an investigation to inform the court about the situation and whether the protective orders sought by the local authority were for the benefit of the parents, a procedure first created in *Harbin v Masterman* [1896] 1 Ch. 351. An order was also made at the without notice hearing preventing the son from acting unlawfully. No details of the order were given, but no doubt they related to his matters of concern identified by the local authority including attempting to transfer ownership of the house to the son, persuading his mother to enter a care home, and preventing carers from visiting.

Comment

The President noted that the case was 'highly unusual', which in the view of the authors, is a surprising comment. There are many safeguarding cases involving adults with capacity in which local authorities wish they had the power to take further steps to protect people, and confirmation that the decision in *SA* and the LGA 1972 can be relied on may well lead to further applications of this sought in the near future. The as yet unanswered interesting (and difficult) question is the extent and nature of the relief the court will grant in relation to a capacitated adult under the inherent jurisdiction once full details of the case are known and the son has been given the opportunity to present his case. It is suggested by the authors that the court is likely to tread very carefully in making orders that go beyond assisting the vulnerable adults to assert their capacity.

AVS v NHS Trust [2010] EWHC 2746 (COP)

Best interests; Medical treatment; Experts; Litigation friend

This case very recently decided by the President is interesting as an example of the court's approach to limiting expert and lay evidence, and to the removal of a family member as a litigation friend.

The case concerned a dispute as to whether AVS, a patient with vCJD, should have a particular type of treatment re-started. The court held that AVS's brother, CS, who was a solicitor, had not demonstrated the necessary objectivity to act as a litigation friend in circumstances where CS's relationship with the NHS Trust had completely broken down. As matters stood before the President, there was no medical evidence to support the particular course of action proposed by CS on his brother's behalf. All the medical evidence (advanced by the Trust) was the other way. There was a suggestion that a Dr P

(from another NHS Trust) would come forward to take over AVS's case and would continue with the procedure advocated by CS: in which case, it would be likely that the proceedings would terminate. Catering for the possibility that the proceedings would continue, however, the President provided as follows:

> "22. In these circumstances, I must give directions on the basis that the case remains in court and that the lis potentially identified by Dr P remains. At the same time, it seems to me that both the court and the trust are entitled to know what Dr P's opinion is. I therefore came to the view that the proper course was to direct that the current proceedings should stand dismissed at the expiration of 14 days from the date on which this judgment is handed down unless within on that time CS files a report from Dr P in answer to the reports by Dr DH, Professor K and Dr. MR identifying a proper issue for the court's determination.
> 23. I take this robust view of the case for one quite simple reason. On 14 October 2010 it was argued on CS's behalf that clinical opinion was not necessarily determinative of a "best interests" enquiry by the court. As a broad generalisation, I do not disagree with that proposition, and I certainly accept that the court's "best interests" analysis embraces all the circumstances of the case, of which clinical opinion is but one part.
> 24. At the same time, it strikes me as unlikely in the extreme that the court would order a clinician to undertake a medical intervention which he, the clinician, did not believe to be in the best interests of the patient. Absent a clinical opinion that the continued administration of PPS would be in the best interests of the patient, therefore, it seems to me that the current proceedings would be doomed to failure. In my judgment, therefore, these proceedings should stand dismissed unless Dr P provides a report properly identifying the lis upon which the court is being asked to adjudicate."

The President then set down a series of directions relating to disclosure and witnesses in the event that the proceedings were to continue. He made it clear that he had in mind in respect of both that he was "dealing with matters of life and death, and that strong emotions have been aroused. I have a duty under ECHR Article 6 to legislate for a fair hearing, and in particular, whatever I decide, I do not want the unsuccessful party to leave the court feeling that he or it has not had a fair hearing. In addition, I must remember that I am dealing in large measure with professionals, who lead busy lives and have many calls on their time" (paragraph 29). In the circumstances, the President limited the medical evidence to 3 witnesses for each side.

Comment

The case provides a clear indication of the pragmatic and robust stance that the current President is taking towards those medical cases coming before him, not least by virtue of an unless order being made in respect of the filing of further medical opinion by CS. The only quibble that the authors would have with the approach taken in this case is that they find it impossible to imagine any circumstance under which the Court would order a clinician to carry out a procedure against his professional judgment as to the best interests of the patient, as this would be to go so directly against the professional codes applying to clinicians.

YA (F) v A Local Authority & Ors [2010] EWHC 2770 (Fam)

Court of Protection jurisdiction; Declaratory orders; Human rights; Victims; Article 8 right to respect for private and family life; Striking out

The question of whether the Court of Protection has jurisdiction to award damages for breaches of the ECHR rights of P (or a family member of P) has been considered in depth by Charles J in this important decision. It arose upon an application by two public authorities (ultimately supported by the Official Solicitor) for claims under the Human Rights Act 1998 ('HRA') brought by the mother of P and P himself to be struck out for want of jurisdiction.

Whilst the judgment itself is likely to the subject of considerable commentary in the weeks and months ahead, at this stage, we highlight the key paragraphs in the decision, namely:

> "17. I start with the common ground that the Court of Protection has jurisdiction to deal with the son's claim based on Convention rights, and that, in reliance on his Convention rights, the son can seek relief by way of a declaration in these proceedings. The route to that conclusion is found in sections 7(1)(b) and 8(1) of the Human Rights Act and section 15(1)(c) of the Mental Capacity Act. These sections identify what has become a well trodden path that is, for example, identified and explained by Munby J (as he then was) in *Re L (Care Proceedings) Human Rights Claims* [2003] 2 FLR 160. That path also reflects a number of commentaries and comments relating to the impact of the Human Rights Act, to the effect that individuals and others will be able to rely on, and seek relief in respect of, Convention rights in proceedings which are not confined to a claim to enforce or deal with Convention rights.
> 18. I agree with that common ground. Should it be necessary to do so, the point that the Court of Protection has jurisdiction to deal with arguments and claims based on Convention rights is to my mind confirmed by paragraph 43 of Schedule 6 to the Mental Capacity Act because it makes express provision relating to declarations of incompatibility and reflects section 4 of the Human Rights Act.
> 19. It follows that the Court of Protection has jurisdiction (a) to deal with arguments raised on behalf of the son (and so, in general Court of Protection terms, P), which rely on breaches of Convention rights of which he (P) is a victim, and (b) to grant declaratory relief in respect of them.
> 20. But it is argued that that jurisdiction does not apply to the mother's claims because it is said that the jurisdiction and powers of the Court of Protection (a) do not enable it to grant her any remedy under section 8(1) of the Human Rights Act, and (b) do not enable the court to deal with, or the mother to rely on, her Convention rights as the victim of any breach thereof.
> 21. The core of this argument is that the purposes of the Mental Capacity Act are confined to, and directed to, considering only the best interests of somebody who is found to lack capacity, (i.e. P, in this case the son), and to make decisions, orders and declarations applying statutory tests in respect of either matters relating to P's welfare, (i.e. where he should live, medical treatment etcetera) or, and an important or, in respect of his property or affairs. So it is said that as the mother's claims do not relate to such matters they should be struck out. And I pause to confirm that no incompatibility argument is properly before me in these proceedings.
> 22. The focus of this argument is on s. 15(1)(c) of the Mental Capacity Act which is set out above and provides that:
>
> > 'The court may make declarations as to the lawfulness or otherwise of any act done, or yet to be done, in relation to that person (i.e. the person who lacks capacity, P and thus here the son).'

It is argued that the declaratory relief sought by the mother (in contrast to that sought by the son), is not a declaration as to the lawfulness or otherwise of any act done or yet to be done in relation to "that person" namely the son (P). Rather, it is said that she complains of an act done to her or advances her claims as the victim of breaches of Convention rights.

23. The argument goes that s. 15(1)(c), in the context of the Act, should be interpreted as confining the act or acts done effectively, as I understand it, to ones of which P is the victim and therefore the court is only concerned with (and can only be concerned with) P as a victim. As a matter of ordinary English, it does not seem to me that the language needs to be or is so confined. I ask myself whether in this case the mother is seeking a declaration as to the lawfulness or otherwise of any act done in relation to her son. The answer to my mind is plainly yes, she is. The relevant acts were directed to the son. He was the person who was in hospital. He was the person who was placed elsewhere in circumstances that are complained of. I do not dispute the point made on behalf of the Defendants by reference to the relevant primary purpose, namely the creation of a new statutory court which is given jurisdiction to consider and deal with issues concerning the best interests of P. But, in taking both a literal and a purposive approach to legislation, secondary purposes can also be taken into account.

24. Standing back from the Mental Capacity Act, it seems to me that Parliament must have been well aware that people without capacity for whom decisions have to be made by the Court of Protection, if they cannot be made elsewhere, do not live in isolation. They often have families who are directly involved in decision making concerning, them and in their day to day care. There is no doubt that the mother is a necessary party to the best interests decisions that are made in respect of, and on behalf of, her son. Article 8 rights relate to and introduce a consideration of the impact of events on and between the members of a family and their relationships (see for example in the context of immigration *Beuko Betts v SSHD* [2008] UKHL 39, and cases in the Family courts often raise points in the context of Article 8 that relate to the interplay between the relevant rights and interests of the members of a family). Can it therefore be said that Parliament was intending that if a set of events occurs that impact the Article 8 rights of the members of the family of a person who lacks capacity, and those events are properly described as being an act or acts done in relation to the person who lacks capacity (P), the Court of Protection should not have jurisdiction to make declarations as to the lawfulness of such acts by reference to the Convention rights of, and on the application of, those members of the family? To my mind the answer to that question "No", and that consideration of this question indicates that an ability (and thus a jurisdiction) to deal with such issues is within a secondary purpose of the legislation.

25. I have reached that conclusion within the four walls of the Mental Capacity Act. But, in my view, it is fortified by section 3 of the Human Rights Act and by (a) the underlying purposes and impact of the Human Rights Act, as expressed in *Re L (Care Proceedings) Human Rights Claims* [2003] 2 FLR 160, in textbooks, and in statements by those who introduced the legislation, and (b) the point that I have already made that it seems to me that the intention of Parliament, in enacting section 7(1)(b) of the Human Rights Act, was to enable any proper party to proceedings before a court to raise for consideration by that court claims based on Convention rights. A similar approach can be found in the ability of parties to raise public law points in private law proceedings.

26. Other points were raised in the course of argument which it seems to me on analysis take the matter little further....

30. That analysis and reasoning leads me to the conclusion as a matter of construction and application of the Mental Capacity Act, the Court of Protection has jurisdiction (a) to hear argument on behalf of the mother that acts done "in relation to that person (i.e. the son)" constitute breaches of her Convention rights, and (b) to make declarations as to the lawfulness of those acts on her application and in respect of breaches of her Convention rights as a result of such acts (i.e. acts done in relation to the son).

...

32. My analysis has now reached the stage that the Court of Protection has jurisdiction to deal with the claims of both the mother and the son in the sense of considering points they advance under section 7(1)(b) of the Human Rights Act and granting a remedy by way of a declaration. Can this court also grant damages under the Human Rights Act? The crucial sections here are sections 8(1) and (2) of the Human Rights Act. Section 8(1) limits the remedies and relief that can be granted to those within the powers of the relevant court. Section 8(2) also focuses on the relevant court and provides that damages may be awarded only by a court which itself (I stress itself) has power to award damages, or to order the payment of compensation in civil proceedings.

...

37. So one has to turn to the provisions relating to the relief that the Court of Protection can grant to determine whether or not it has the power to award damages and, so, whether or not the provisions of section 8(2) of the Human Rights Act are satisfied. The Court of Protection is a court created by statute and therefore its powers are limited by the statute. A feature, it seems to me, of section 8(2) of the Human Rights Act is that it is looking at the general powers of the relevant English court and, in the context of the Human Rights Act, it would be circular to argue that as a court has power under the Human Rights Act to award damages section 8(2) is satisfied.

38. Section 8(2) directs one to consider, for example, whether the High Court or a County Court, has a power to award damages. The powers of those courts flow from provisions of now the Senior Courts Act, the County Courts Act and, in the case of the High Court, the assimilation of earlier jurisdiction and indeed an inherent jurisdiction. In broad terms, it seems to me, that the jurisdiction and power to award damages in those courts derives from the subject matter of cases that the court has jurisdiction to deal with. Examples are contract, tort, trespass and there are many others, all of which are civil claims. So, in my view, when applying section 8(2) one is looking at the general ability of the court to award damages excluding the power to so conferred by the Human Rights Act itself.

39. I turn to the crucial section in the Mental Capacity Act; it is section 47(1). I have mentioned it earlier, it provides that:

> 'The court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court.'

It is argued on behalf of the Defendants, and this was at the forefront of the argument put before me on behalf of the Official Solicitor on behalf of the son (P), that section 47(1) is an ancillary provision and/or a provision that facilitates the exercise of the jurisdiction of the Court of Protection.

40. It was then said that a power to award damages is not ancillary to the making of a declaration or facilitative of the making of a declaration. I would not quarrel with that, but first it seems to me that "the making of a declaration" is not an accurate description of the jurisdiction of the Court of Protection. The Court of Protection's relevant jurisdiction in this case is jurisdiction under the Human Rights Act. It seems do me that the natural reading of section 47(1) in that context is that in exercising its jurisdiction (under the Human Rights Act or

indeed the Mental Capacity Act) the Court of Protection has the same powers, rights, privileges and authority as the High Court would have when it is exercising its jurisdiction (under the Human Rights Act and generally) and, therefore, the Court of Protection has an ability to award damages under the Human Rights Act because the High Court can do so under s. 8(2) thereof because of its jurisdiction to award damages in civil claims.

41. In my view, that argument does not have the circularity of an argument that section 8(2) is satisfied because a court has jurisdiction under the Human Rights Act and thus the power under that Act to award damages. This is because the argument looks outside the Human Rights Act and asks the "what if" question set by s. 47 of the Mental Capacity Act namely what could the High Court do if it was exercising the jurisdiction conferred on the Court of Protection by the Mental Capacity Act and the Human Rights Act.

42. But if that argument is wrong, in my view, an alternative route to the same answer is to consider whether the Court of Protection, by section 47, is given a power to award damages in respect of something other than a breach of a Convention right. In my view it does. For example, to my mind, in reliance upon section 47, the Court of Protection could award damages pursuant to an undertaking in damages given to it when an injunction was granted. Also, by reason of section 50 of the Senior Courts Act, it would have a power which, probably, would never be exercised in the welfare jurisdiction, and which might only be exercised rarely in the property jurisdiction, to award damages in lieu of an injunction. That is one of the specific powers of the High Court that listed in the relevant provisions in the Senior Courts Act.

43. So this alternative analysis and reasoning for the result that section 8(2) of the Human Rights Act is satisfied looks to, and relies on, powers of the Court of Protection (in connection with its jurisdiction and by reference to the powers of the High Court) to award damages other than under the Human Rights Act.

...

45. It therefore seems to me, and I conclude, that both linguistically and purposively, albeit possibly against the instinct of a number of lawyers dealing with a welfare jurisdiction, the Court of Protection does have jurisdiction and thus power to award damages under the Human Rights Act."

Charles J therefore dismissed the application to strike out the HRA claims, although he directed that when the matter came back before him, he would treat both the claim of the mother and of the son as being proceedings in the Queen's Bench Division on the basis that, were the decision on jurisdiction to be successfully appealed, or in future in another case his conclusion was found to be wrong, any award made in the proceedings before him would have jurisdictional base.

Charles J then ordered the two public authorities to pay one half of the costs of the Claimant mother incurred and occasioned by the application to strike out the mother's Human Rights Act claim. The other half should be reserved; this recognises that the arguments raised jurisdictional issues. In coming to this decision, he was (un)impressed by the fact that the public authorities had taken a stance that this claim should be struck out on a preliminary basis without any apparent consideration whatsoever of what would then happen and how the relevant issues would be case managed if the applications succeeded.

Comment

This decision is of very considerable importance, because it had not been clear whether the jurisdiction of the Court of Protection extended as far as the grant of damages for

breaches of the ECHR. It is clear that one of the primary reasons that Charles J expressed himself 'relieved' to have come to this decision (and, potentially, one of the reasons why he sought to reach the decision in the first place) was that the immediate consequence of a decision to the contrary would be that proceedings would then have to take place in the Queen's Bench Division in parallel with those in the Court of Protection, which would have the consequence of escalating costs. However, since the issue is likely to be the subject of further judicial consideration, it may be that damages claims should continue to be issued in the Queen's Bench Division for the time being, as a protective measure.

Charles J expressed himself confident that the Court of Protection will be robust in its use of the grant or refusal of permission to ensure that the recourse to the damages jurisdiction of the Court does not lead either to the eyes of the parties and the Court being taken off the "welfare ball," or for family members to use welfare proceedings as a stick to beat public authorities with. It is very likely, however, that the stick is one that family members (and especially litigant in person family members) will seek to wave enthusiastically in light of this decision.

ISSUE 4 DECEMBER 2010 COURT OF PROTECTION UPDATE

Tenancy agreements

In this issue, in addition to our usual case-law update, we thought it might be helpful to share our experiences relating to tenancy agreements, because we are aware (not least from the frequency with which we asked to advise on the subject) that more and more cases are coming before the Court of Protection concerning the signing of tenancy agreements on behalf of people who lack capacity. The experience of the Court of Protection team at 39 Essex Street is that the following procedure should be adopted, where there is no dispute that requires the court's intervention. An application should be issued, not for a financial deputy to be appointed, but simply for a declaration that it is in P's best interests that a named person sign a tenancy agreement for X property on P's behalf. The tenancy agreement needs to be filed, along with evidence that all relevant parties including the local authority and family members or carers agree that the proposed arrangement is in P's best interests. A capacity assessment that specifically deals with the tenancy agreement is also essential. Our experience is that it may then be possible to have the relevant order and declaration made by consent without the need for a hearing, if no other issues (such as deprivation of liberty) arise.

UNREPORTED CASE (MOSTYN J)

Scope of MCA Schedule A1; Implied power to convey

Robert Eckford of the Official Solicitor's office has recently kindly brought to our attention an important decision of Mostyn J of June 2010 regarding the scope of the powers that are granted by a standard authorisation under Schedule A1 to the MCA 2005. The authors understand that there is no transcript of the judgment, but that no problems will be caused by the dissemination of the gist of the judgment in an entirely anonymised form.

Mostyn J was considering the extent of the powers granted to a local authority and a care home under existing (and any renewed) standard authorisations. He noted that it was common cause that these powers extended to a power to restrain P if he tried to leave the care home. The question for him was whether within those powers there was a power to coerce P to return if he refused to return to the care home from a period of leave. Mostyn J noted that it was understandably in P's interests that he should have access to

society in the community and "escape" the confines of the care home, and that the relevant PCT had agreed to fund "befrienders" to encourage access to the community.

Mostyn J therefore asked himself whether the powers under the existing standard authorisation extend to coercing P back to the nursing home if P refused to return. He noted that it would be little short of absurd if the local authority and care home had powers to restrain P from leaving but not to compel him to return, and that the greater power must include the lesser. Mostyn J therefore declared that the power was implicit in the current and any future standard authorisation.

Comment

This decision is of some importance as a companion piece to and/or re-affirmation of the decision of *DCC v KH* (2009) COP 11729380, in which DJ O'Regan held that a DOLS standard authorisation was sufficient to return P on the long journey from contact sessions to his residential placement. Notwithstanding the conclusions expressed in these two cases, however, the authors' clear view (and one accepted in at least one case in which they have appeared in Archway) remains that standard authorisations are not apt to cover any deprivation of liberty arising whilst P is being taken to the placement covered by the standard authorisation.

CITY OF SUNDERLAND V MM & ORS [2009] COPLR CON VOL 881

Contact; Breach of Article 8; Delay in assessing capacity

This judgment is of some importance because, on the very specific facts of the case, HHJ Moir declared that the Article 8 rights of a person other than P had been breached by the denial of contact between P and a person with whom they enjoyed family life for a period between August 2006 until a period of observed contact directed by the Court took place in July 2008. RS and MM were both 80 and had cohabited for roughly 4 years, having rekindled a childhood acquaintance following the deaths of their respective partners. HHJ Moir found (at paragraph 7) that they enjoyed an intimate personal relationship giving rise to an obligation upon and on behalf of the local authority to respect their private and family life. The local authority justified the interference with that right on the basis that it was necessary to protect MM.

HHJ Moir set out in some detail the chronology following the decision to terminate contact between the two (which appears to have been taken, in the first instance, by the care home at which MM was then residing following an admission to hospital and a subsequent transfer to that facility). In very brief terms, that decision was taken in large part because of concerns raised by MM's daughters and that, to a very large extent, the dispute as to contact was one between private individuals.

HHJ Moir noted that, without apportioning blame, the history made sorry reading and that the reality of the situation was that for 10 months the whole issue of contact between the two was put on hold (paragraph 18). She accepted the proposition advanced by the OS that administrative difficulties such as had occurred in the case before her did not render the continued and extended infringement of ECHR rights necessary and proportionate (reliant on a ECtHR case of *Olsson v Sweden* [1998] 11 EHRR 259). She therefore found (paragraph 18) that there was a necessity that "any issue in relation to the upholding of rights must be determined expeditiously as delay in the decision-making process may itself amount to an infringement of rights." On the facts, she found that there was unacceptable delay, and she also found (paragraph 22) that it was not an adequate answer to the question of whether there was a breach of Article 8 ECHR that the local authority was attempting to monitor a dispute between private individuals.

Whilst she held (paragraph 23) that there could be no argument that the local authority had acted with anything other than good faith and a proper motive, this, again, was not relevant to the question of proportionality and necessity. In the circumstances, she held (paragraph 31) that the local authority could and should have made an application to the Court of Protection (which resulted in the period of court-directed contact) much sooner. As damages were not sought, HHJ Moir did not have to rule upon whether she had the jurisdiction to award them.

Comment
This case is of some importance in three respects: (1) the recognition given to the rights of those other than P; (2) the recognition that administrative difficulties alone cannot justify extended interference with Article 8 rights; and (3) the recognition of the positive obligation imposed upon the local authority to secure the private and family life of P and those with whom they enjoy such private and family life (i.e. an obligation going beyond the more frequently found negative obligation imposed on public authorities not to interfere with those rights).

LBL v RYJ AND VJ [2010] EWHC 2665 (COP)
Assessing capacity; Welfare and financial deputy; Appointeeship; Scope of inherent jurisdiction

This case represents something of a cautionary tale regarding the requirement to ensure that evidence as to capacity is cogent, and also further clarification upon the scope of the inherent jurisdiction. Although it was decided before the case of *A v DL, RL and ML* [2010] EWHC 2675 (Fam) reported in our last issue, it only came to our attention subsequent to that issue, and, more pertinently, does not seem to have been before the President in that latter case.

Applications were before Macur J by the local authority, LBL, seeking declarations that RYJ lacked capacity to make day-to-day decisions concerning her daily life and to appoint an appropriate officer of the local authority to be made Health and Welfare and Finance Deputy. In the alternative, if RYJ was determined to have capacity, LBL sought to invoke the inherent jurisdiction of the court, initially seeking those orders commonly following decisions as to "best interests" of an incapacitated person and amounting to empowering the local authority to direct where she should reside, be educated and with whom she had contact and appointing the local authority to receive benefits payable to her.

LBL's position changed in the course of the hearing; by the end, they conceded that they were unable to disprove the presumption of capacity to the relevant standard. Macur J recorded (paragraph 5) that they sought to preserve RYJ's position by way of recitals and preambles to an order ensuring that her decisions were facilitated and articulated with appropriate support. Macur J noted that no argument had been advanced by LBL asserting her jurisdiction to dismiss the mother as "appointee" for the purpose of receipt and management of benefits and appoint the local authority in her place in the face of the written arguments made by the OS and on behalf of VJ (RYJ's mother) denying the same. She accepted the latter arguments and noted (at paragraph 5) that the appointment of an "appointee" in this regard was in the discretion of the Secretary of State for Works and Pensions.

VJ denied that her daughter had capacity to make decisions as to care, residence and education but, it appears Macur J, she acknowledged that RYJ has capacity in decisions as to contact. It was common ground that she lacked litigation capacity.

The OS took issue on RYJ's behalf with the assertion that she lacked capacity in other than financial matters. He argued against the use of the inherent jurisdiction to make orders which subvert the intention of the MCA 2005 to preserve the autonomy of the individual subject to lack of capacity.

Macur J noted that the diagnostic test provided for in s.2 MCA 2005 was met, but that the second was in dispute. At paragraph 25, she held that: "[s]ignificantly, as I indicate below, I read the phrase "to a matter if at the material time he is unable to make a decision for himself in relation to the matter" in section 2 to mean that capacity is to be assessed in relation to the particular type of decision at the time the decision needs to be made and not the person's ability to make decisions generally or in abstract. This, it appears to me, is an important distinction lost in the case of VJ and, to some extent, LBL."

Macur J went through the evidence before her in considerable detail and, perhaps significantly, indicated that she was prepared to place significant weight upon the evidence as to capacity given by Stewart Sinclair, an experienced independent social worker. The sections of the judgment setting out the evidence and her comments thereupon bear close attention because of the nuanced approach that she indicated was necessary to adopt in the case of a teenager, commenting (at paragraph 33) that she considered that there had been "inadequate regard paid by LBL and VJ to RYJ's potential tendency to teenage ennui, manipulation and fickleness which are traits not confined to those lacking capacity."

Macur J then turned to consideration of the Court under the inherent jurisdiction, holding as follows at paragraphs 61 ff:

> "61. I turn to consider LBL's application to invoke the inherent jurisdiction. As I have indicated, by the conclusion of the proceedings LBL seemed to suggest that their concerns could be met by appropriate recitals. But it is necessary that I deal, at least in brief, with the application that they within the inherent jurisdiction of the court.
> 62. I do not doubt the availability of the inherent jurisdiction to supplement the protection afforded by the Mental Capacity Act 2005 for those who, whilst "capacitous" for the purposes of the Act, are "incapacitated" by external forces – whatever they may be-outside their control from reaching a decision. (See *SA (A Vulnerable Adult)* [2005] EWHC 2942, at para 79; *A Local Authority v Mrs A* [2010] EWHC 1549, at para 79). However, I reject what appears to have been the initial contention of this local authority that the inherent jurisdiction of the court may be used in the case of a capacitous adult to impose a decision upon him/her whether as to welfare or finance. I adopt the arguments made on behalf of RYJ and VJ that the relevant case law establishes the ability of the court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-making by those who they have determined have capacity free of external pressure or physical restraint in making those decisions.
> 63. RYJ's vulnerability is assessed by Mr. Sinclair as that which is associated with her age and limited intellectual functioning. I am not satisfied that it has been established before me that she is unable to recognise and withstand external pressure to appropriate degree nor that she is or is likely to be subject to physical constraint or behaviour that will impact upon her free will and ability and capacity to reach decisions concerning residence, care and contact. All the evidence in the papers before me suggests that even during her minority she was able to withstand the external desires of others by her physical resistance to the

same; that she has been able to withstand decisions enforced upon her and that she has been able to verbalise her wishes. The difficulty, as I apprehend it to be, arising from the approach of others to the expression of those wishes.

64. If I were to have found that her vulnerability was exceptional/greater by reason of her limited intellectual functioning and age, these factors would need to have been considered in reaching my decision concerning capacity. If she is unable to withstand external pressure of "normal/everyday" degree, whether emotional or physical, it seems to me that it would necessarily inform the answer to the question posed at section 3(1)(c) of the Act.

65. In that I have not found that she is so exceptionally vulnerable for the purpose of my consideration under the Mental Capacity Act 2005, it seems to me that there is little that LBL can rely upon in hoping to invoke the inherent jurisdiction of the court. What is necessary in this case, quite clearly, is that the established network already available to RYJ is consolidated with co-operation of LBL, VJ and other family members."

Comment

Macur J's comments at paragraph 64 of her judgment are of particular significance, and no little difficulty. In the authors' view, they come close to denying any real space for the inherent jurisdiction at all, because they imply that the factors that would point towards a person falling within the inherent jurisdiction are, on a proper analysis, factors that fall for consideration in answering the question as to whether they lack the relevant capacity for purposes.

Macur J's comments also make it clear that – at least from her perspective – the inherent jurisdiction of the Court is considerably more limited than some have advocated and that it can only properly be exercised so as to secure unencumbered decision-making (rather than, for instance, allowing decisions to be taken on behalf of the vulnerable adult). As noted above, however, Macur J's judgment was not before the President in the *A v DL, RL and ML* case, and it is perhaps not immediately obvious how to square her restrictive view of the inherent jurisdiction with the rather more expansive view taken by the President.

RE G (TJ) [2010] EWHC 3005 (COP)

Property and financial affairs; Court's approach to best interests; P's wishes and feelings; Gift; Role of substituted judgment

In this case, Morgan J had cause to consider whether a Deputy could be required to make payments from the funds administered on behalf of a Mrs G to her adult daughter, C, by way of maintenance of C. It was common ground between the parties that he could only make an order in those terms if he was satisfied in accordance with the 2005 Act that such an order was in the best interests of Mrs G. Although the parties were agreed between themselves that he had power to make the order, and no one proposed to make submissions to the effect that he should not make the order, Morgan J recorded (at paragraph 9), that he felt that he would benefit from a detailed investigation of the matter and that he had invited counsel to assist him with their submissions as to why this part of the proposed order was in the best interests of Mrs G, within the meaning of the 2005 Act. Having considered those submissions, he reached his conclusion that it was in Mrs G's best interests so to do, although he acknowledged that he had not had the benefit of adversarial argument on the point.

For present purposes, the decision is of particular importance for Morgan J's consideration of what "best interests" means in the context of a lifetime gift. At paragraphs 34 ff, he held as follows:

> "34. The phrase "best interests" is not defined. That might suggest that it was intended that the application of the phrase would be responsive to the particular issue which arises and the facts of the individual case.
> 35. The context in which issues as to "best interests" arise in the present case concerns the property and affairs of Mrs G, rather than her welfare and healthcare. As I have explained, the court is given power to make a lifetime gift of P's property and to make a lifetime settlement of P's property for the benefit of others: see section 18(1)(b) and (h). The court can also make a will for P: see section 18(1)(i). Further, I note that under section 12, the donee of a lasting power of attorney may make certain gifts and by section 9(4), the authority conferred by a lasting power of attorney is subject to the requirement that the donee acts in the best interests of the donor of the power. These various references to gifts, lifetime and testamentary, and settlements for the benefit of others, suggest to me that the word "interests" in the phrase "best interests" is not confined to matters of self interest or, putting it another way, a court could conclude in an appropriate case that it is in the interests of P for P to act altruistically. It seems unlikely that the legislature thought that the power to make gifts should be confined to gifts which were not altruistic or where the gift would confer a benefit on P (or the donor of the lasting power of attorney) by reason of that person's emotional response to knowing of the gift.
> 36. Further help as to what is meant by "best interests" can be derived from section 4(6). Section 4(6)(a) refers to the past and present wishes and feelings of P. That suggests that giving effect to P's actual wishes can be relevant to assessing P's best interests. Section 4(6)(b) refers to the beliefs and values which would be likely to influence P's decision if he had capacity. I regard section 4(6)(b) as considerably widening the matters which fall to be considered. The width of the relevant matters is further extended by section 4(6)(c) which refers to the other factors which P would be likely to consider if he were able to do so.
> 37. The provisions of section 4(6)(b) and (c) extend beyond the actual wishes of P. They refer to the matters which P would be likely to consider if he were able to make the relevant decision. P would be likely to consider any relevant beliefs and values and all other relevant factors. Therefore, the matters which the court must consider under these paragraphs of section 4(6) involve the court in drawing up the balance sheet of factors which P would be likely to draw up if he were able to do so. Of course, the ultimate question for the court is: what is in the best interests of P? The court will necessarily draw up its own balance sheet of factors and that may differ from P's notional balance sheet. The court is not obliged to give effect to the decision which P would have arrived at, if he had capacity to make the decision for himself. Indeed, section 4(6) does not expressly require the court to reconstruct the decision which P, acting reasonably or otherwise, would have reached. Nonetheless, if the court considers the balance sheet of factors which would be likely to influence P, if P had capacity, the court is likely to be able to say what decision P would be likely to have reached. The court is not obliged to give effect to the decision which P, acting reasonably, would have made (the test of "substituted judgment") but section 4(6) appears to require the court to consider what P would have decided (or, at least, the balance sheet of factors which P would be likely to have considered). My provisional view is that, in an appropriate case, a court could conclude that it is in the best

interests of P for the court to give effect to the wishes which P would have formed on the relevant point, if he had capacity."

Morgan J then considered the law as it stood prior to the enactment of the MCA 2005, and also the decisions in *In re S (Protected Persons)* [2009] WTLR 315, *In re P (Statutory Will)* [2010] Ch 33 and *In re M* [2010] 3 All ER 682 (aka *ITW v Z*). He held (at paragraph 52) that "the discussion in these three cases is of great help to me in identifying the general approach which I should adopt in the present case. However, those cases did not need to focus upon a matter which is of importance in the present case, namely, whether in the absence of any other competing consideration, a court could decide that it is in the best interests of P to give effect to the wishes which P would have formed (but had not in fact formed) on the relevant topic."

He then concluded:

> "55. The best interests test involves identifying a number of relevant factors. The actual wishes of P can be a relevant factor: section 4(6)(a) says so. The beliefs and values which would be likely to influence P's decision, if he had capacity to make the relevant decision, are a relevant factor: section 4(6)(b) says so. The other factors which P would be likely to consider, if he had the capacity to consider them, are a relevant factor: section 4(6)(c) says so. Accordingly, the balance sheet of factors which P would draw up, if he had capacity to make the decision, is a relevant factor for the court's decision. Further, in most cases the court will be able to determine what decision it is likely that P would have made, if he had capacity. In such a case, in my judgment, P's balance sheet of factors and P's likely decision can be taken into account by the court. This involves an element of substituted judgment being taken into account, together with anything else which is relevant. However, it is absolutely clear that the ultimate test for the court is the test of best interests and not the test of substituted judgment. Nonetheless, the substituted judgment can be relevant and is not excluded from consideration. As Hoffmann LJ said in the Bland case, the substituted judgment can be subsumed within the concept of best interests. That appeared to be the view of the Law Commission also.
> 56. Further, the word "interest" in the best interests test does not confine the court to considering the self interest of P. The actual wishes of P, which are altruistic and not in any way, directly or indirectly self-interested, can be a relevant factor. Further, the wishes which P would have formed, if P had capacity, which may be altruistic wishes, can be a relevant factor. It is not necessary to establish that P would have been aware of the fact that P's wishes were carried into effect. Respect for P's wishes, actual or putative, can be a relevant factor even where P has no awareness of, and no reaction to, the fact that such wishes are being respected."

Having gone through the various items set down in the checklist at s.4 MCA 2005, Morgan J concluded on the facts of this case (at paragraph 65) that:

> "Having identified the factors as best I can, it emerges that the principal justification, so far as Mrs G is concerned, for making the order for maintenance payments in favour of C, is that those payments would be what Mrs G would have wanted if she had capacity to make the decision for herself. I recognise that this consideration is essentially a "substituted judgment" for Mrs G. I am also very aware that the test laid down by the 2005 Act is the test of best interests and not of substituted judgment. However, for the reasons which I have tried to set

out earlier, the test of best interests does not exclude respect for what would have been the wishes of Mrs G. A substituted judgment can be subsumed into the consideration of best interests. Accordingly, in this case, respect for what would have been Mrs G's wishes will define what is in her best interests, in the absence of any countervailing factors. There are no such countervailing factors here. I therefore conclude that an order which provides for the continuation of maintenance payments to C is in the best interests of Mrs G."

Comment
In the views of the authors, this decision is one that must be read with very considerable care and, in particular, is not authority for a return to the substituted judgment test (albeit that, on one view, it could be seen as a significant rowing back from the very clear statement in *Re P* that – at least in the context of statutory wills – this test is now entirely inappropriate). Rather, on a proper analysis, it is authority for the fact an element of substituted judgment can be subsumed into the consideration of best interests, and that, absent any countervailing factors, respect for what the Court can identify to have been P's wishes can define what would be in her best interests.

ISSUE 5 JANUARY 2011 COURT OF PROTECTION UPDATE

RE KS (UNREPORTED, 17 MAY 2010)

Paid carer; Welfare deputy; Application withdrawn; Costs

This case concerned welfare proceedings issued by a private carer who made allegations of abuse against P's family. The carer brought the matter to court and applied to be made welfare deputy. The Official Solicitor was instructed for P and the local authority became involved, having previously had little to do with P whose care was privately funded.

The carer subsequently withdrew from the case, before any findings of fact had been made about the allegations he made against the family. The Official Solicitor and the local authority were apparently satisfied with the care plan in place for P, and the proceedings ended with little change in the position on the ground, save that the carer was no longer employed to provide care for P.

The carer sought his costs of bringing proceedings but his application was refused at first instance. On appeal to HHJ Cardinal, he argued that as a whistle-blower, he ought to have his costs paid from P's estate, as he had acted in P's interests by bringing the matter to the court's attention. The judge refused to interfere with the decision not to award the carer his costs. In circumstances where no findings of fact were made, it was impossible for the carer to say that the proceedings had been required or that he was entitled to his costs. The carer had withdrawn from the case at a stage at which it could not be certain that his allegations were made out, or that P's care was likely to be altered, which made it very difficult for him to say that he should have his costs.

Comment
The case is important for any carer, relative or IMCA considering bringing proceedings in the Court of Protection. The general rule is that no order for costs will be made in welfare applications, but one can sympathise with the view of a whistle-blower that unless costs orders are made, individuals may not feel in a position to bring important matters before the court. The lesson from this case is that third parties will have to be very sure of their ground and must see the case through to its conclusion if they are to

have any realistic chance of recovering their costs. It may be that the better course of action for such individuals is to inform the Official Solicitor of the case and request that the Official Solicitor initiate proceedings.

AN NHS FOUNDATION TRUST V D [2010] EWHC 2535 (COP)
Medical treatment; Best interests; Deprivation of liberty

This case concerned the medical best interests of a woman D, with longstanding schizophrenia, who was suffering from a prolapsed uterus, but believed 'that there is a conspiracy on the part of medical personnel to subjugate and experiment upon her, if not kill her' and that her physical condition was a normal part of the aging process. The court was told that left untreated, it would severely restrict D's everyday life and could prove fatal due to complications including kidney disease. However, the treatment required sedation, surgery and a period of recovery in hospital, and it was necessary for D to be sedated before, during and after the surgical intervention for there to be a realistic prospect of treatment being successfully delivered. Mrs Justice Macur accepted the unanimous expert evidence and concluded that it was in D's best interests for the court to 'sanction the deprivation of her liberty in so far as it is required to remove her to and retain her in hospital to conduct necessary medical investigations into and thereafter administer the appropriate treatment of her procidentia with all such necessary restraint, physical or chemical, to achieve the same -consistent so far as possible with maintaining D's dignity throughout.'

Comment
The case was heard in public and there is an unsurprising contrast between the sensitivity of the judgment and the manner in which the 'story' was reported: the Daily Mail headline shrieked 'Judge rules mentally ill woman can be sedated for SIX days so doctors can perform life-saving surgery she doesn't want'.

G V E [2010] EWHC 3385 (FAM)
Costs; Welfare; Deprivation of liberty; Standard or Indemnity basis

The long-running case of *G v E* continues, this time with a decision by Baker J concerning costs. After the naming and shaming of Manchester City Council in a previous hearing, it will come as no surprise that the Council was made the subject of a costs order in favour of the Official Solicitor, G, and E's carer, F. The hearing concerned the costs of the initial phases of the proceedings, up until the point at which G was returned to F's care by order of the court. In deciding to depart from the general rule in welfare applications that there should be no order as to costs, Baker J observed that 'local authorities and others who carry out their work professionally have no reason to fear that a costs order will be made... The Court is not going to impose a costs burden on a local authority simply because hindsight demonstrates that it got [difficult] judgments wrong'. However, in the present case, there had been a 'blatant disregard of the processes of the MCA and their obligation to respect E's rights under the ECHR' which amounted to misconduct sufficient to justify imposing a costs order.

Baker J rejected the Council's reliance on the ignorance of its staff, stating that notwithstanding the complexity of the MCA and DOLS, 'Given the enormous responsibilities put upon local authorities under the MCA, it was surely incumbent on the management team to ensure that their staff were fully trained and properly informed about the new provisions.' Importantly, Baker J confirmed that 'If a local authority is uncertain whether its proposed actions amount to a deprivation of liberty, it must apply to the Court.' The same applies, as is evident from cases discussed in previous editions of

this newsletter, where not only staff but also assessors under the DOLS regime conclude that there is no deprivation of liberty but where doubt or disagreement remains.

The Council was duly ordered to pay the costs of G, F and the Official Solicitor, and for part of the time period in question on an indemnity basis.

Comment
Perhaps the only mildly surprising element of the judgment was the imposition of costs on an indemnity basis for a period of time; in light of his previous findings as to the conduct of the Council, though, such an approach was, perhaps, all but inevitable. The judgment does provide a salutary lesson in the importance both of adherence to the statutory provisions of the Act and also of adequate training.

Passing reference is made to the problem which the authors know has arisen in numerous other cases, caused by the operation of the statutory charge in respect of publicly funded litigants. Baker J expressed the view that it could not be a proper reading of the relevant legislation that a litigant might have to use his damages to pay the statutory charge in a case where not all of his costs were recovered from the other side, but he heard no argument on the issue and the issue remains.

RE RK [2010] EWHC 3355
Young person; Children Act 1989 s.20; "Deprivation of liberty"

This case concerned RK, a 17 year old woman who suffered from autism, ADHD, severe learning disability and epilepsy, and displayed aggressive and self-harming behaviours. RK was moved to care home placements by the local authority under s.20 Children Act 1989 after her family became unable to care for her at home. The issue for the court was whether RK was deprived of her liberty in the care home placements. If she was, then being under 18, the DOLS regime would not apply, and the local authority would have to apply to the court for declarations authorising the placement, with the consequent reviews.

Mostyn J held that there was no deprivation of liberty, either on the facts, or as a matter of law. He held that where a child is placed under s.20 CA 1989 and the parents have a right under s.20(8) CA 1989 to refuse consent to the placement, there can be no deprivation of liberty. Any restriction on RK's freedom was the result of RK's parents exercising parental responsibility by consenting to the placement, and thus the 'subjective' limb of the test for a deprivation of liberty could not be met. Nor was the objective test met, according to the judge, because RK's care came nowhere near involving depriving her of her liberty. RK lived at the residential placement from Monday to Friday but attended school each day. She returned to her parents' home every weekend. While at the placement, she was allowed unrestricted contact with her parents, and was subject to close supervision at all times, but was apparently not restrained or subject to a particularly strict behavioural management regime. The door to the placement was not locked, although if RK had tried to leave, she would have been brought back. In response to a submission that these arrangements amounted to confinement because they restricted PRKs autonomy, the judge said 'I am not sure that the notion of autonomy is meaningful for a person in RK's position.' He concluded:

> 'I find it impossible to say, quite apart from s20(8) Children Act 1989, that these factual circumstances amount to a "deprivation of liberty". Indeed it is an abuse of language to suggest it. To suggest that taking steps to prevent RK attacking others amounts to "restraint" signifying confinement is untenable. Equally, to

> suggest that the petty sanctions I have identified signifies confinement is untenable. The supervision that is supplied is understandably necessary to keep RK safe and to discharge the duty of care. The same is true of the need to ensure that RK takes her medicine. None of these things whether taken individually or collectively comes remotely close to crossing the line marked "deprivation of liberty".'

Further, the local authority was not detaining RK under any 'formal powers', as would be the case if, for example, a care order was in place. RK's parents could remove her from the placement if they chose to withdraw their consent to it (even though on the facts of the case, there was no practical possibility of RK's parents doing any such thing without the local authority's assistance and provision of an alternative care package). If RK's parents have decided not to remove her from the placement, the judge found it difficult to see how the State could be said to be responsible for her detention.

Comment

This decision is interesting and potentially problematic. It seems to represent part of a growing unwillingness on the part of the High Court to recognise deprivations of liberty on the objective test. One is reminded of the submission on behalf of the government in the *Bournewood* case when it reached the ECtHR that HL could not be deprived of his liberty, because if he was, then so were most residents of care homes and hospitals in England. The courts seem keen to ensure that that prediction is not fulfilled, even though *HL* was indeed found to have been deprived of his liberty.

On the subjective limb, it seems surprising that parents can consent to a placement that entails a deprivation of liberty for any child under 18 who is incapacitated by reason of a mental health problem, with no recognition of the obvious differences between infants and a young adult. The trick is to find a distinction which though artificial is not arbitrary: in this case, the authors fear that adhering to a 'bright line' categorisation sits uneasily with the more nuanced treatment of young adults in other areas of law, not least the MCA itself.

The judge's analysis of the question of State responsibility is also questionable. It does not appear that relevant caselaw was cited which shows that the State does not have to be directly responsible for a deprivation of liberty to be liable under Article 5. The authors find it difficult to understand how the concept of 'formal powers' for detention being necessary to engage Article 5 fits with *HL v UK* - the very reason the deprivation of liberty safeguards were introduced was that there was a breach of Article 5 where detention occurred without any formal basis or power.

The authors also note that the judge's comment about autonomy not being a meaningful concept for someone in RK's position is likely to raise hackles amongst those who work towards achieving greater independence for mentally disabled adults and young people. Clearly, RK will never achieve the sort of autonomy someone without her disabilities might enjoy. But there are no doubt many ways in which her autonomy can be promoted, and she can be helped to direct the course of her life, even if only in relation to expressing preferences and making choices about simple or immediate matters.

PM v KH AND HM [2010] EWHC 3279 (FAM)

Contempt of Court; Imprisonment

This case represents a further iteration in a sequence of judgments that rivals, if not exceeds, those in *G v E* for the breadth of issues covered. We have already covered

judgments in this case in previous editions of this newsletter; this judgment is of particular significance for reiterating the Court's powers to imprison and fine for contempt of Court. On the particular facts of the case, the incapacitated adult (HM)'s father was sentenced to a total of four month's imprisonment for (1) failing to make arrangements to return her to the country as soon as possible after service of a Court order requiring him to do so; (2) failing to inform the Official Solicitor's solicitor of the address at which he was living with HM; and (3) failing to inform the Official Solicitor's solicitor of his assets.

Comment
Whilst these powers were exercised by the Court under its inherent jurisdiction, there is no reason to suggest that they could not be exercised by the Court of Protection, because s.47(1) MCA 2005, imbues it in connection with its jurisdiction "the same powers, rights, privileges and authority as the High Court." The case also serves as a salutary reminder of the Court's ability to take steps to enforce its injunctions, something that (especially) litigants in person either do not or cannot always fully appreciate.

RE J (UNREPORTED DECISION OF HHJ MARSHALL QC ON 6.12.10)
Lasting power of attorney; Suitability; Revocation; Best interests

This case merits highlighting for a short but important exercise of statutory construction carried out by HHJ Marshall QC. In factual circumstances that were not relevant to the point of principle, the Court had to determine the proper interpretation of s.22(3)(b) MCA 2005, which provides that a Court has the power to revoke an LPA where the donee "(i) has behaved in a way which contravenes his authority or is not in P's best interests, or (ii) proposes to behave in a way which contravenes his authority or would not be in P's best interests." In essence, the proposition advanced by the applicant was that s.22, taken as a whole, embodied a broad concept of "unsuitability." The judge did not accept this proposition, taking the view that s.22 was more narrowly focussed by reference to s.22(3)(b). The Respondent donee contended that the only conduct that the Court could take into account for purposes of s.22(3)(b) was that of the donee in his capacity as donee. The judge rejected this submission, too, taking the view (at paragraph 11) that:

> "In my judgment, the key to giving proper effect to the distinction between an attorney's behaviour as attorney and his behaviour in any other capacity lies in considering the matter in stages. First, one must identify the allegedly offending behaviour or prospective behaviour. Second, one looks at all the circumstances and context and decides whether, taking everything into account, it really does amount to behaviour which is not in P's best interests, or can fairly be characterised as such. Finally, one must decide whether, taking everything into account including the fact that it is behaviour in some other capacity, it also gives good reason to take the very serious step of revoking the LPA."

At paragraph 13, she concluded that "noting the court's powers with regard to directing an attorney under s 23 of the Act... on a proper construction of s 22(3), the Court can consider any past behaviour or apparent prospective behaviour by the attorney, but that, depending on the circumstances and apparent gravity of any offending behaviour found, it can then take whatever steps it regards as appropriate in P's best interests (this only arises if P lacks capacity), to deal with the situation, whether by revoking the power or by taking some other course."

Comment
This decision provides helpful, if not entirely surprisingly, clarification of the approach that the Court is likely to take in cases of alleged unsuitability on the part of the donee of an LPA, and, in particular, where allegations are made of unsuitability on the basis of behaviour by the donee which is unconnected with the discharge of their obligations under the LPA.

AVS v NHS Foundation Trust and B PCT [2010] EWCA Civ 7
Medical treatment; Best interests; Case management; Evidence

The Court of Appeal has very recently upheld the robust case management decision of the President in *AVS v NHS Trust* [2010] EWHC 2746 (COP), reported in our November newsletter. In short, the President had given an 'unless' order that medical treatment proceedings concerning a patient with vCJD should come to an end within 14 days unless AVS's brother was able to produce a report from a doctor identifying a proper issue for the Court's determination.

The Court of Appeal had little hesitation disposing of the brother's appeal. Ward LJ, giving the sole reasoned judgment, identified the essential futility of proceedings continuing where no medical practitioner was ready and willing and able to provide the medical treatment AVS' brother considered should be given to him. He made clear the Court's reluctance to decide hypothetical questions, citing *R v Home Secretary ex parte Wynne* [1993] 1 WLR 115, *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, *R (Burke) v General Medical Council* [2006] QB 273 and *Gawler v Raettig* [2007] EWCA Civ 1560, before noting (at paragraph 35) that the case in question raised exactly the sort of academic or hypothetical appeal the Court should decline to entertain. He continued at paragraph 34:

> "... The relief being sought is that the court grant declarations: '(ii) that it is in the best interests of [the patient] for the infusion pump necessary for the administration of intraventricular PPS to be replaced, (iii) that it is in the best interests of [the patient's] for the administration of intraventricular PPS to continue.' One has to ask, therefore, what purpose will be served by such declarations. A finding, not necessarily a declaration, that a course of treatment is, or is not, in a patient's best interest is usually the essential gateway to a declaration that such treatment would, or would not, be lawful. It is trite that the court will not order medical treatment to be carried out if the treating physician/ surgeon is unwilling to offer that treatment for clinical reasons conscientiously held by that medical practitioner. The court's intervention is sought and is necessary to overcome a reluctance or reticence to undertake the treatment for fear that doing so would be unlawful and render him or her open to criminal or tortious sanction. It is significant that the court's power to make declarations under the Mental Capacity Act 2005 is conferred by section 15 of the Act in these terms:
>
> > "(1) The court may make declarations as to – …
> > (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.
> > (2) "Act" includes an omission and a course of conduct."
>
> 35. Section 1(5) of the Act sets out the principles underpinning the Act and provides: "1(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interest."
> 36. Even if, as the applicant contends, there is a sufficient dispute about whether or not the continued infusion of PPS is in the best interests of the patient and

whether, therefore, the pump should or should not be replaced, there is no question of the respondent hospital hindering or preventing the transfer of the patient to the care of any physician or surgeon who, contrary to their own views, sincerely believes that the procedure is in the interests of this patient and is willing to provide it. If Mr NT is prepared to operate and can find a hospital where the operation can take place, the respondent hospital will co-operate in the transfer of the patient. If Dr P can provide the treatment, the hospital will discharge the patient from their care to his. The fact that the respondent hospital does not believe that the placement of the pump and the continuation of infusion are in the patient's best interest simply does not matter if a medical practitioner who takes the other view will accept responsibility for the patient. The transfer of the patient to another's care would take place co-operatively and no approval from the court is required to enable that transfer to take place.

37. The harsh fact is that, although Mr NT and Professor R are willing to replace the pump, there is no evidence of their present ability to do so. No hospital has been identified where that surgery can be undertaken. Without a new pump being inserted, there is nothing Dr P can do. This litigation is going nowhere. What the court is being invited to do is no more nor less than to declare that if a medical practitioner is ready, willing and able to operate and if a medical practitioner is willing, ready and able to replenish the supply of PPS, then it would be in the best interests of the patient to do so. The President was correct to identify the need for evidence from Dr P to plug this gap in the claimant's case. Without that evidence that someone is "able and willing to take over the care of [the patient] and treat him with PPS", we are dealing with a purely hypothetical matter. A declaration of the kind sought will not force the respondent hospital to provide treatment against their clinicians' clinical judgment. To use a declaration of the court to twist the arm of some other clinician, as yet unidentified, to carry out these procedures or to put pressure upon the Secretary of State to provide a hospital where these procedures may be undertaken is an abuse of the process of the court and should not be tolerated."

Ward LJ concluded at paragraph 39 that, "[i]f there are clinicians out there prepared to treat the patient then the patient will be discharged into their care and there would be no need for court intervention. If there is no-one available to undertake the necessary operation the question of whether or not it would be in the patient's best interests for that to happen is wholly academic and the process should be called to a halt here and now."

Comment

The passages above have been cited at some length because, despite the fact-specific nature of the judgment, it is clear that the Court of Appeal intended that this judgment (upon a permission application) should be cited in the future, and that they intended to make a statement of principle as to the boundaries of the Court's willingness to become involved in clinical decision-making. We await a decision of equal robustness and clarity as to the Court's willingness to become involved in public law decision-making following the implementation of the MCA.

UNREPORTED CASE

Challenge to a DOLS standard authorisation

Victoria Butler-Cole appeared for P's daughter in a challenge to a standard authorisation under s.21A MCA 2005. The case concerned P, an elderly gentleman with moderate dementia, who had been kept against his wishes in a care home since early November

2010. The local authority had prevented him returning home after a stay in hospital due to concerns raised by P's general practitioner.

At an interim hearing before Mostyn J on 23 December 2010, it was held that P should return home notwithstanding that it was accepted that better care would be provided in the care home, that there were risks to P of returning home, and in the face of opposition from the local authority and the Official Solicitor. The Official Solicitor did not express a view as to the merits of the original grounds of challenge to the SA but argued that P ought to remain in the care home until, at the very least, better evidence was available to satisfy him and the Court that it was in P 's best interests to return home. The judge accepted evidence from P's family that P was 'desperately unhappy' and wanted to leave the care home. He held that there was effectively a presumption against deprivation of liberty (pursuant to s.1(6) MCA 2005), and on the facts, the balance tilted in favour of P returning home pending a final hearing at which full evidence could be considered.

TTM v LB Hackney & Ors [2011] EWCA Civ 4
Mental Health Act 1983; Unlawful detention; Damages

By way of brief reference only, as it is a case concerning obligations under the MHA 1983, the recently decided case of TTM in which Alex Ruck Keene was involved contains important clarification as to liabilities for compensation for breaches of Article 5 ECHR. The reasoning of the Court of Appeal is, we suggest, equally applicable to cater for circumstances where a deprivation of liberty occurs in the MCA field where the relevant authority is not, in fact, itself the detainer, but where it has a causative role in the deprivation of liberty. It is also certainly consistent with approach adopted by Munby LJ in *Re A and Re C* regarding the positive obligations imposed by Article 5(1) ECHR upon public authorities to act where they are aware of a deprivation of liberty occurring.

In other news
In December 2010, the High Court issued 'Guidance in cases involving protected parties in which the Official Solicitor is being invited to act as guardian ad litem or litigation friend' which contains the following text relevant to COP welfare cases (including medical cases):
"6. The number of welfare cases brought under the provisions of the Mental Capacity Act 2005 is rising exponentially with concomitant resource implications for the Official Solicitor.
7. Judges should be alert to the problems the Official Solicitor may have in attending at each and every preliminary hearing. Consideration should be given, in appropriate cases, to dispensing with the requirement that he should be present at a time when he is unable to contribute meaningfully to the process. In circumstances where his position has been / will be communicated in writing it may be particularly appropriate for the judge to indicate that the Official Solicitor's attendance at the next directions' hearing is unnecessary.
8. The Court of Protection Rules make clear that the judge is under a duty to restrict expert evidence to that which is reasonably required to resolve the proceedings. The explanatory note to r.121 states that the court will consider what 'added value' expert evidence will give to the case. Unnecessary expert assessments must be avoided. It will be rare indeed for the court to sanction the instruction of more than one expert to advise in relation to the same issue.
9. The Practice Direction – Experts (PD15A) specifies that the expert should assist by "providing objective, unbiased opinion on matters within his expertise, and should not assume the role of advocate". The form and content of the expert's report are

prescribed, in detail, by paragraph 9 of the Practice Direction. It is no part of the expert's function to analyse or summarise the evidence. Focussed brevity in report writing is to be preferred over discussion".

The authors are interested to note the final comment about the content of expert reports, having seen many in which the evidence is summarised, often in considerable detail. Such summaries can often prove very useful, particularly where evidence from statutory agencies is not comprehensive or is not laid out in an accessible manner, but they can also lead experts into difficulties when their reporting of the evidence creates an impression that they have formed a view as to whether allegations or criticisms are made out, thereby usurping the court's function and undermining their objectivity and independence.

Report from Department of Health

Finally, the following report published by the Department of Health in November 2010, 'Nothing Ventured, Nothing Gained: Risk management for people with dementia' (http://tinyurl.com/232r66v) may be of interest to practitioners dealing with cases involving people with dementia, particularly where there are disputes as to the degree of risk-taking that should be tolerated.

ISSUE 6 FEBRUARY 2011 COURT OF PROTECTION UPDATE

D BOROUGH COUNCIL V AB [2011] EWHC 101 (COP)

Capacity; Consent; Sexual relations; Sex education; Learning disabled persons

The case, which received considerable publicity, concerned A, who had a moderate learning disability and had developed a homosexual relationship with a fellow service user, K. There was no evidence of an exploitative relationship, but the local authority had in addition been alerted to two incidents in which members of the public had raised concerns about A's behaviour in public. The local authority sought a declaration that A did not have capacity to consent to sexual relations and that he should not have sexual contact with K.

The jointly-instructed expert advised that the following factors needed to be understood for someone to have capacity to consent to sexual relations: For capacity to consent to sex to be present the following factors must be understood: (a) the mechanics of the act, (b) that only adults over the age of 16 should do it (and therefore participants need to be able to distinguish accurately between adults and children), (c) that both (or all) parties to the act need to consent to it, (d) that there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections, (e) that sex between a man and a woman may result in the woman becoming pregnant, and (f) that sex is part of having relationships with people and may have emotional consequences.

The judge rejected this analysis, and the local authority's submission that the personality and characteristics of the sexual partner were relevant factors. He adopted the approach set out by Munby J in the cases of *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam), [2006] 2 FLR 968 and *Local Authority X v MM and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, that consent to sexual relations is act-specific, not person- or situation-specific. He concluded (at paragraph 42) that the only information relevant to giving consent which the person must understand and retain is (a) the mechanics of the act, (b) that there are health risks involved including STIs, and (c), for heterosexual relations only, that sex between a man and a woman may result in pregnancy.

On the facts, the judge found that A lacked capacity because he had a very limited and faulty understanding of sexually transmitted infections, believing that sex could give you spots or measles. Clearly, A understood the mechanics of the act, because he had already engaged in sexual activity.

However, the judge refused to grant a final declaration and said that the local authority must put in place educational measures to assist A to acquire capacity. This went against the recommendation of the expert, who considered that it would not be in A's best interests to undergo such education. A might become confused and anxious and exhibit challenging behaviour which would jeopardise his placement.

Comment: Victoria Butler Cole

The law on capacity to consent to sexual relations is in disarray. This decision conflicts with the recent decision of Wood J in *D County Council v LS* [2010] EWHC 1544 and it is difficult to see how the two judgments can be reconciled (or how this judgment can be reconciled with that of the House of Lords in *R v Cooper* [2009] 1 WLR 1786).

Permission to appeal was granted to the local authority but it is unlikely that an appeal will be pursued given the current economic climate, and that the local authority agreed with the Official Solicitor that A lacked capacity to consent to sexual relations (albeit that they differed over the test that generated that conclusion). In the view of the authors, A's case would not be well suited to becoming a test case, since there was no concern about exploitation of A, and the reasons for proposing a person-and situation-specific test were far from clear. One of the difficulties with cases on capacity to consent to sexual relations is that the particular circumstances of the individual concern necessarily limit the scope of the court's deliberations - decisions are made in the absence of sufficient information about the circumstances in which the test may need to be applied. Thus, in this case, the lowest degree of knowledge possible was found to be needed to consent to sex. Had, for example, the judge been considering heterosexual relations, he may well have concluded that understanding not just the risk of becoming pregnant but that pregnancy itself may carry risks, was necessary. Had, for example, there been an exploitative relationship, the judge may have been more inclined to prefer a test that does not impose a blanket ban on sexual relations, but only within an exploitative relationship.

If this decision is correct, it is clear that the criminal test for capacity under s.30 of the Sexual Offences Act 2003 and the civil test are not the same; a point which was not acknowledged in A's case. It may also, counter-intuitively, impose more restrictions on people with learning disabilities rather than promote their sexual freedom, since where an exploitative or abusive relationship exists, the inclination may well be to 'fail' the individual on the test for capacity (as there is inevitably a degree of flexibility about how much knowledge of, for example, STIs, is required). This could then result in a global declaration preventing sexual contact for the individual in other, non-exploitative contexts. Local authorities and those working in this area can only hope that the issue does receive consideration by the Court of Appeal in the near future.

Comment: Vikram Sachdeva, 39 Essex Street

The correct test for capacity to consent to sexual relations is a highly controversial topic. The answer depends on an examination of the philosophical basis underlying incapacity law – specifically whether it is justified (on a utilitarian basis) to prevent significant sections of the population from indulging in sexual activity in order to prevent abuse in a small number of cases, or whether fewer should be barred from sexual activity, but with a risk of abuse in a small number of cases which would have otherwise been avoided.

This issue underlies another conceptual question: whether capacity to consent to sexual relations should be situation – (and therefore person -) specific, within *Re MB* [1997] 2 FLR 426, or whether it is not (as with marriage: see *Sheffield County Council v E* [2005] Fam 326). Or is the capacity to consent to marriage also situation-specific?

Further, is it essential (rather than merely desirable) for the test for capacity to consent to be identical in the criminal and the civil law? This again will depend on the purpose served by incapacity in the criminal and civil law, which may not be the same.

Although a number of first instance judges have valiantly tried to square the circle (Munby J (as he then was) in *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam) and in *Local Authority X v MM and KM* [2007] EWHC 2003 (Fam); Roderic Wood J in *D County Council v LS* [2010] EWHC 1544 (Fam); Mostyn J in *D Borough Council v AB* [2011] EWHC 101 (COP), and the House of Lords has expressed a view in passing (*R v Cooper* [2009] UKHL 42 [2009] 1 LR 1786)), ultimately the answer is a question of policy for the Supreme Court. Its judgment will certainly make interesting reading…

RUDYARD KIPLING THORPE (AS LITIGATION FRIEND TO MRS LEONIE LEANTHIE HILL) V FELLOWES SOLICITORS LLP [2011] EWHC 61 (QB)

Litigation capacity

This wonderfully-named case arises in a context relatively far removed from the Court of Protection, namely a professional negligence action against a firm of solicitors involved in the sale of home of Mrs Hill (the mother of Mr Thorpe). It does, however, provide a useful restatement of the principles governing the circumstances under which solicitors should take steps to confirm whether their clients lack capacity to give instructions.

For present purposes, the material contention on the part of the Claimant was that the solicitors had acted on the sale of the house without proper instructions because Mrs Hill was suffering from dementia. The evidence of the jointly instructed neurological expert, accepted by Sharp J (in the face of attempts by the Claimant to seek to undermine that evidence that the judge deprecated in strong terms) was that in Mrs Hill was suffering from mixed degenerative and vascular dementia. He concluded it was likely that this would have caused Mrs Hill cognitive difficulties. However, in his view:

> "cognitive function can be quite impaired and yet a patient can still have free will and sense of what they want and what they do not want. It would be egregious to deny patients with dementia a say in their own care and a say in the disposal of their possessions. Just because their intellectual capacity is reduced it does not mean that they do not have the right to still make decisions. It is impossible ever to know exactly when the capacity to make decisions is completely lost, but when assessing this medically one would question the patient about how she understands the effect of her decision on other people and if the patient does understand this, even if there is profound cognitive compromise, then I would suggest that capacity is retained.
>
> There is evidence from the solicitors that they met the client and she did understand the instructions and was, in fact, quite vehement in her direction to make a sale of the house and she understood the implications of this. Therefore my conclusion is that although she had cognitive problems that may have interfered with her decision making [s]he still had capacity in the sense that this was her opinion at the time and this was the expression of her free will."

The expert concluded it was unlikely that Mrs Hill's dementia would have been apparent to a competent solicitor: "Many patients with dementia actually come across as quite sociable and engaging and are able to … answer a number of questions reasonably coherently. This all depends on what type of dementia is occurring but I think it would be entirely plausible that someone with mild to moderate dementia, as Mrs Hill, was suffering from, would not be apparent to a solicitor who engages her in conversation for the first time."

It was only if a solicitor perceived that there might be medical issues that a doctor's report would be obtained: "but as far as I understand it the medical circumstances surrounding Mrs Hill were never discussed with the solicitor and one would not expect them to be discussed."

He said that overall, he shared some disquiet about this case and the sense that Mrs Hill's intellectual function was definitely impaired at the time she made these decisions. Nevertheless, his conclusion was that: "… there is no reason to suppose that actually [Mrs Hill] was not acting with capacity at the time and this was not the expression of her free will."

In further written responses, the expert said there had been no change in the tests applied to assess cognitive function over the relevant period; and "Patients with dementia can be vulnerable to influence by other people. The dementia may impact on the understanding of particular matters. However, even patients with quite severe dementia could still have formed and reasonable opinion" (sic).

Sharp J concluded (at paragraph 74) that there was no evidence that the solicitor in question knew at the material time that Mrs Hill was suffering from dementia, or ought to have appreciated that this was the position during the course of the retainer (indeed, this was apparently not put to the solicitor in cross-examination). She continued (at paragraphs 75 ff):

> "A solicitor is generally only required to make inquiries as to a person's capacity to contract if there are circumstances such as to raise doubt as to this in the mind of a reasonably competent practitioner; see, Jackson & Powell at 11-221 and by analogy *Hall v Estate of Bruce Bennett* [2003] WTLR 827. This position is reflected in the guidance given to solicitors in The Guide to the Professional Conduct of Solicitors (8th edition, 1999) which was in force at the relevant time, where it is said that there is a presumption of capacity, and that only if this is called into question should a solicitor seek a doctor's report (with the client's consent) "However, you should also make your own assessment and not rely solely upon the doctor's assessment" (at 24.04).
>
> 76. In opening, the Claimant's case was put on the basis that [the solicitors] ought to have been "more careful" with regard to the sale of the Property because Mrs Hill was suffering from dementia and did not really know what she was doing. The relevant test where professional negligence is alleged however is not whether someone should have been more careful. The standard of care is not that of a particularly meticulous and conscientious practitioner. The test is what a reasonably competent practitioner would do having regard to the standards normally adopted in his profession: see *Midland Bank Trust Co Ltd v Hett Stubbs and Kemp* [1979] Ch 384 at 403 per Oliver J at 403.
>
> 77. I should add (since at least part of the Claimant's case seemed to have suggested, at least implicitly, that this was the case) that there is plainly no duty upon solicitors in general to obtain medical evidence on every occasion upon

which they are instructed by an elderly client just in case they lack capacity. Such a requirement would be insulting and unnecessary."

Comment
The reiteration by Sharp J as to the duties imposed upon solicitors is a helpful summary of the position, and we would strongly endorse the statement at paragraph 77 of her judgment.

As a side note, we have reproduced the full extracts of the evidence of the consultant neurologist from the judgment partly because they would appear in our respectful submission to be rather curious. Whilst the decision in question was taken prior to the coming into force of the MCA 2005, the material underlying principles were essentially identical, and it would seem to us that it would have been possible to dissect the evidence of the neurologist forensically as failing to address the necessary issues. Sharp J does not seem to have considered these issues (or indeed whether the MCA 2005 applied). However, we would entirely share the sentiments the neurologist expressed about the need to ensure that assumptions are not made about those with dementia and about the need to ensure that their wishes are respected. We would also note the – related – exhortation to this end given to both of us in a recent directions hearing before Hedley J, where he bemoaned (without reference to the specific case before him) what he perceived as a seeming trend in the Court of Protection to place safety above all considerations.

HAWORTH V CARTMEL & COMMISSIONERS FOR HMRC [2011] EWHC 36 (CH)
Bankruptcy; Capacity; Statutory Demand

This fascinating case shows the reach of the MCA 2005. It came before HHJ Pelling QC (sitting as a Judge of the High Court) as an application for a bankruptcy order to be annulled or rescinded. The application was made on the basis that either the applicant lacked relevant capacity on 2.5.08 (in relation to the purported service upon her by HMRC of a Statutory Demand) and/or during the period between 8.7.08 and 29.8.08 (in relation to the purported service by HMRC on the applicant of a bankruptcy Petition and hearing of that Petition) or that in serving the Statutory Demand and/or the Petition and/or inviting the Court to make a bankruptcy order HMRC acted in unlawful breach of the duties HMRC owed to the applicant under the Disability Discrimination Act 1995 ("DDA"). The applicant lacked litigation capacity, and was represented by the Official Solicitor as litigation friend.

The judge conducted an extremely extensive reconstruction exercise to seek to determine whether the applicant had the relevant capacity at the material times, reminding himself by reference to the MCA 2005 that it was issue and situation specific. As regards the Statutory Demand, the issue was whether the Claimant had established that she lacked the capacity to respond to the Demand on or after 2.5.08. The judge found (at paragraph 56) that:

> "The decisions and the steps that the applicant would have to have taken when she was served with the Statutory Demand was whether to open the envelope, understand the contents, retain the information long enough to take a decision as to what to do and then communicate that decision or decide to seek assistance from a third party. As I have already found, the applicant did not open the envelope containing the Statutory Demand. At the time that the applicant was served with the Statutory Demand it is common ground between the experts that the applicant was suffering from an impairment of the mind. The issue is

whether the failure to open the letter was a consequence of this disorder as to which [the Claimant's expert] maintains that it was but [the expert instructed by HMRC] apparently does not."

Having set out the respective evidence of the experts in some detail, HHJ Pelling QC concluded (at paragraph 69) that:

> "the Claimant has established the existence of a condition that prevented her from opening mail at the time the Statutory Demand was served. Put simply at that time she could not and did not open the envelope containing the Statutory Demand."

He continued, however:

> "Since capacity is concerned with the ability to understand retain and evaluate information, and since the information that I am here concerned with is the information contained in the Statutory Demand and the importance of that document, an issue arises as to whether an irrational inability to access the information is relevant at all. The applicant's submission was that without opening the envelope containing the Statutory Demand she could not make a decision to respond because she could not understand or evaluate the contents of the Statutory Demand or its overall importance. I have concluded that the applicant was unable to open the envelope because she suffered from a phobia which irrationally precluded her from taking that action. If, therefore, the true decision I am concerned with is not the evaluation of the contents of the Statutory Demand or its importance but the decision whether to open the envelope then the decision not to open the envelope is not a true decision at all because the applicant's judgment has been so distorted by the phobia so as to render it an invalid [sic]."

HHJ Pelling therefore concluded that the applicant did not have the mental capacity to respond to the Statutory Demand either when it was served on her or thereafter down to the date when the bankruptcy order was made.

He therefore turned to consider whether the applicant had established that she lacked at the material time the capacity to understand the importance of the Bankruptcy Petition and act upon it. He noted (at paragraph 75) that the questions were more difficult than those in relation to the Statutory Demand, largely because there was evidence which appeared to point towards the applicant having at least had some understanding of its importance. However, having reviewed the totality of the evidence, he declared himself satisfied (at paragraph 84) that it was more probable than not that (a) at the date the applicant was served with the Petition she was suffering from an acute anxiety episode and (b) the effect of that episode was to deprive her of the capacity to understand the contents or significance to her of the Petition or the need for her to seek help from others or to retain that information for sufficiently long to seek the assistance of others.

Whilst not strictly relevant for readers of this Newsletter, it is perhaps also worth noting that the Judge further concluded that, were he to be wrong as to the conclusions on capacity, he would have found that HMRC had breached their obligations under the (then) DDA in essence by failing to have any or any sufficient regard to the fact that the applicant could not respond or was impaired from responding by reason of her inability to respond to postal communications or otherwise manage her own affairs either adequately or at all. Not the least of the failings of HMRC identified was the failure to

bring to the Court's attention as at the date the Petition came on for hearing the information available to them as to the applicant's disability.

Comment
The facts of this case are extremely unusual, and it is in the authors' view very unlikely that many individuals will successfully defend claims against them on the basis that Ms Haworth did. It is, however, noteworthy as a case study in careful forensic analysis by experts and, in particular, the Court, of the capacity of a particular individual to take particular decisions and particular steps at specific times. It is also noteworthy as a reminder of the fact that practitioners and professionals must always be alert to the fact that incapacity to make decisions can manifest itself in unusual ways and in unexpected circumstances.

RE DAVIES DECISION OF THE GENERAL SOCIAL CARE COUNCIL CONDUCT COMMITTEE 10.12.10
Social worker; Failure to make COP application; Suspended

This case (brought to our attention by the editor of Mentalhealthlaw) merits brief mention as a cautionary tale. One of the grounds upon which the social worker in question was suspended for 12 months for misconduct was because the Conduct Committee was satisfied that he had failed to ensure that an application for a Court of Protection order in respect of a service user was made expeditiously or at all for a period of a period of some 17 months. As the social worker admitted the charge, there is no further detail to be found on the GSCC website as to the circumstances of Mr Z and/or as to what order should have been sought.

ISSUE 7 MARCH 2011 COURT OF PROTECTION UPDATE

P AND Q V SURREY COUNTY COUNCIL [2011] EWCA CIV 190
"Deprivation of liberty"

This case, which had previously been known as MiG and MeG, is the first decision of the Court of Appeal as to what constitutes a deprivation of liberty. The two incapacitated adults were sisters, aged 18 and 19 years old, who both suffered from a learning disability. P had a moderate to severe learning disability and found it difficult to communicate. Q had better cognitive functioning but exhibited challenging behaviours. At the time of the first instance hearing before Parker J, P was living with a foster family where she had her own bedroom, and where the house was not locked, although if P had tried to leave on her own, her foster mother would have restrained her. P attended college each day and went out on trips and holidays. Q was living in a small residential placement which did not qualify as a care home. She had her own bedroom and was not locked in, but was always accompanied when she left. She also attended college. She sometimes required physical restraint when she attacked other residents, and required continuous supervision and control (to meet her care needs). She was in receipt of medication for controlling her anxiety. Did either arrangement constitute a deprivation of liberty?

Under the ECtHR caselaw, three elements must be satisfied for a deprivation of liberty to exist: an objective confinement, attributable to the State, to which the individual has not validly given consent. The only issue before the Court of Appeal was whether there was an objective confinement: the existence of the other two elements was not disputed.

The first issue dealt with was the status of any objection to the alleged confinement by the individual. The Official Solicitor for P and Q submitted that this was irrelevant to whether there was objectively a confinement. The Court of Appeal disagreed, concluding that where there is an objection, this may well generate further restrictions (for example preventing the person from leaving, or forcibly returning them), and that where there is no objection, there may be a 'peaceful life' which is equally relevant to whether there is a confinement.

The second issue examined by the Court was the use of medication. Again, the conclusion was reached that the use of tranquilising medication was a pointer in favour of objective confinement, and the absence of medication a pointer the other way.

The third issue considered was the purpose of the restrictions. At first Instance, Parker J had appeared to suggest that a benign or benevolent purpose (ie. to provide care and a safe environment) might mean that restrictions were not to be viewed as contributing to a deprivation of liberty. The Court of Appeal, in somewhat unclear terms, said that it was wrong to attach significance to the fact that restrictions were imposed in a person's best interests. It did however consider it relevant whether the person was in a 'normal' environment, for example whether one had social contacts, was living in a family or in an institution, and so forth.

One member of the Court of Appeal expressly rejected the suggestion made by the local authority that it was relevant to compare the alternative, historic arrangements for P and Q, which had been much worse for both, as they had been subject to neglect and abuse. However, no concluded view was expressed on this issue by Wilson LJ, and Mummery LJ simply recorded that he had initially found the argument attractive but could see the danger that it risked conflating whether there was a deprivation of liberty with whether such deprivation of liberty was in the person's best interests.

Wilson LJ concluded that P was clearly not subject to an objective confinement, and that Q's case, although more borderline, also fell outside Article 5 due to Q's 'attendance at an educational unit, her good contact with such members of her family as were significant for her, and her other, fairly active social life'. The other members of the Court of Appeal agreed with his analysis and conclusions.

Comment

The wait by practitioners for clear guidance from the courts about how to identify a deprivation of liberty appears set to continue for the foreseeable future: the Court of Appeal's decision may be appealed to the Supreme Court, and, in the view of the authors, still leaves a number of questions unanswered.

First, it is not clear whether the Court of Appeal considered that the absence of factors that would point towards a deprivation of liberty (such as medication and attempts to leave a placement) actively weigh against other factors, or are simply an indication that the case falls towards one end of the spectrum. Secondly, it is unclear how a lack of objection by an incapacitated individual can be said to be relevant to the question of whether there is an objective confinement. While it is obviously true that where P objects to confinement, additional restraint and restrictions may well be needed, and that this will be relevant in determining whether there is a deprivation of liberty, it is far from clear that the reverse is true. Is deprivation of liberty about supervision, control, and absence of choice, or is it about locked doors, sedation, and physical restraint? The authors tend to the view that in relation to people without capacity, it is the former, although the court appears to have concluded that supervision and control are likely to give rise to a

deprivation of liberty only when they are exercised in an institutional setting. A locked door, or use of physical restraint may be a sufficient factor to demonstrate an objective confinement, but are they necessary components when considering the situation of people who do not have a normal capacity to assert their own independence? It might be said that the safeguards put in place by Article 5 ought to apply not just to those who have the capacity and/or temperament to cause a fuss. There are likely to be many examples where individuals without capacity may be oblivious to their circumstances, or unhappy but too miserable or too incapacitated to object. It is perhaps unsurprising that there is a reluctance to think that the concept of a deprivation of liberty could apply where individuals appear to be living relatively normal lives in the community, particularly when large and isolated institutions are a thing of the past. However, the importance of the procedural safeguards imposed by Article 5, whether through the court or through DOLS, is that they require proper thought to be given to less restrictive solutions, and provide a mechanism for independent scrutiny. It is arguable that accepting that an incapacitated adult is deprived of his or her liberty does not necessarily mean adopting a paternalistic or old-fashioned approach, but may in fact give substance to the person's apparent autonomy.

The Court of Appeal said expressly that the decision was not influenced by 'floodgates' arguments and the risk that the courts would be inundated with applications requiring declarations sanctioning deprivations of liberty and the subsequent reviews required by Article 5(4), but it is easy to imagine such considerations being in play. A concern expressed by the government in the seminal *Bournewood* case was that if HL was deprived of his liberty, then so were many thousands of people in care homes and hospitals up and down the country. The end result was the introduction of Schedule A1, and it may yet be that the Supreme Court adopts a position which requires similar legislation to be introduced in respect of supported living placements.

B LOCAL AUTHORITY V RM, MM AND AM [2010] EWHC 3802 (FAM)
Young persons; Transfer of proceedings; Family Division to Court of Protection

This case, decided by Hedley J in October last year but only reported on Lawtel in March, provides useful guidance as to the circumstances under which the Court will transfer an application for a care order in respect of a 16 or 17 year old to the Court of Protection. Such applications are, as Hedley J noted, likely to be rare, but raise some difficult questions.

The expert evidence was that the child in question, AM (who was nearly 17 at the time that the matter came before Hedley J), suffered from severe learning disability, autism and Tourette Syndrome. Her disability was lifelong, she would never be able to live independently and would require a high level of support from the adults around her in order to ensure that her day-to-day needs were met. The local authority sought a care order on the basis that AM's mother had never really appreciated or accepted the difficulties caused by these profound disabilities and, despite all the evidence, the mother adhered to the belief that this child could be cared for at home.

The s.31(2) Children Act 1989 threshold was conceded; the question for the Court was therefore what order (if any) should be made. The mother contended for no order on the basis that she was prepared to cooperate with the local authority; the local authority contended for a care order (supported in this by the Guardian). Hedley J confessed his doubts as to both approaches, and then (at paragraph 24) identified as a source of further concern the fact that the issues in the case (which boiled down the quality of care AM was receiving at a specific unit, and the speed at which a move to another was

planned or carried into effect) would not be resolved by the time AM turned 18. As he noted "[h]er disabilities are both grave and permanent, the demands made by her needs will be no less as she becomes an adult. Indeed, she may present even greater challenges to carers. The period of 12 months [to her 18th birthday] is wholly arbitrary in her life and in dealing with the needs that she has." Hedley J therefore ventured the view that the case should be transferred to the Court of Protection, a question which he noted that the Counsel before him did not understand had been considered before by the Court.

Hedley J set out the statutory framework, and, in particular, Article 3 of the Mental Capacity Act 2005 Transfer of Proceedings Order, SI2007/1899, which provides in material part (Article 3(3)) that a Court deciding whether to transfer proceedings to the Court of Protection from those under the Children Act 1989 must have regard to: (a) whether the proceedings should be heard together with other proceedings that are pending in the Court of Protection; (b) whether any order that may be made by the Court of Protection is likely to be a more appropriate way of dealing with the proceedings; (c) the extent to which any order made as respects a person who lacks capacity is likely to continue to have effect when that person reaches 18; and (d) any other matters that the Court considers relevant.

Hedley J noted at paragraph 28 that

> "[t]hat raises the question particularly under Article 3(3)(d) as to what matters the Court should take into account in deciding whether to exercise these powers and to adopt this approach. An ex tempore judgment in a case on its own facts is no basis for attempting an exhaustive analysis of these issues; nevertheless, a number of matters suggest themselves, matters which may often be relevant in the relatively small number of cases in which this issue is likely to arise. One, is the child over 16? Otherwise of course, there is no power. Two, does the child manifestly lack capacity in respect of the principal decisions which are to be made in the Children Act proceedings? Three, are the disabilities which give rise to lack of capacity lifelong or at least long-term? Four, can the decisions which arise in respect of the child's welfare all be taken and all issues resolved during the child's minority? Five, does the Court of Protection have powers or procedures more appropriate to the resolution of outstanding issues than are available under the Children Act? Six, can the child's welfare needs be fully met by the exercise of Court of Protection powers? These provisional thoughts are intended to put some flesh on to the provisions of Article 3(3); no doubt, other issues will arise in other cases. The essential thrust, however, is whether looking at the individual needs of the specific young person, it can be said that their welfare will be better safeguarded within the Court of Protection than it would be under the Children Act."

On the particular facts of the case before him, Hedley J concluded that he was "wholly satisfied" (paragraph 29) that AM's welfare would be better protected within the Court of Protection; he therefore transferred the case under Article 3(4)(a) to the Court Protection, reconstituted himself as a judge of the Court of Protection, and dedicated the remainder of his judgment to giving effect to his conclusions within the framework of the MCA 2005.

Comment

The parallel jurisdiction of the Court under the Children Act 1989 and the MCA 2005 in respect of children aged between 16 and 17 has proved in the authors' experience to be the source of some difficulties in practice, and this guidance is welcome in terms of

setting out the framework both for transfer and also for when proceedings should be issued within the Court of Protection, rather than for orders under the Children Act 1989.

The judgment does throw into relief one interesting question of principle, however, namely the difference in approach between the CA 1989 and the MCA 2005. The CA 1989 enshrines a protective jurisdiction; the MCA 2005 enshrines both this jurisdiction, but also the enabling jurisdiction of the Court to promote the autonomy of P. Where a 16 or 17 year old suffers from life-long disabilities rendering them effectively permanently incapable of making welfare decision, which approach should prevail? Should it make a difference that proceedings have been brought under the CA 1989 or the MCA 2005? Should it, in turn, make a difference as to whether the Court should transfer proceedings from one to the other? Hedley's judgment might suggest that it should – but, as he noted, it is likely that these issues will have to be fleshed out further in future judgments.

RE C [2010] EWHC 3448

Medical treatment; Withdrawal; Permanent vegetative state; Best interests

This case concerned the best interests of a 21 year old man who had been seriously injured in a car accident when he was 16 years old. There was a consensus of medical opinion that C was in a persistent vegetative state. C's family, including his twin brother, his treating consultant, his general practitioner and two independent experts agreed that it was in C's best interests for his artificial nutrition and hydration to be withheld because it was futile. The staff who cared for C at the unit where he was placed, however, did not support the application. They considered that he had shown some behaviours that suggested some level of awareness. The medical evidence was that these behaviours were non-cognitive reflexive behaviours.

The court considered the established approach to cases involving patients in PVS and concluded that C's situation was indistinguishable from that of Anthony Bland in *Airedale NHS Trust v Bland* [1993] AC 789. It was in his best interests for ANH to be withheld, and C would be moved to a new unit for this to take place, given the staff at his current placement did not agree to the withdrawal of ANH. The court confirmed that no issue under Article 2 or Article 3 ECHR arose.

Comment

This decision is a clear and comprehensive exposition of the factors the court will take into account in a PVS case and demonstrates that the advent of the MCA 2005 has not altered the approach to be taken.

AH V (1) HERTFORDSHIRE PARTNERSHIP NHS FOUNDATION TRUST (2) EALING PRIMARY CARE TRUST [2011] EWHC 276 (COP)

Welfare; Transfer from residential service into community placement; Best interests

This case arose out of proposals by a number of commissioning authorities to move twelve residents of a specialist residential service ('SRS') into facilities within the community. Each of these residents suffered from lifelong disabilities, typically a combination of childhood autism and severe learning difficulties, and spent most of their lives in large hospitals before they were closed down; as their needs could not be met in any other way, the SRS had been designed and built for them, where they had been resident since 2001.

Each proposal (depending on the stage it had reached) was either before the Court or was to be before the Court for a decision from the Court as to whether the move would be in the relevant service user's best interests. This judgment reflected an attempt on the part of Jackson J to bring about a streamlining of the process of determining the twelve decisions. Whilst expressed in terms of a "firm provisional decision" (paragraph 4) in relation to one service user alone, expressly stated not to binding on any actual or potential parties, AH, Jackson J expressed the hope that it would assist the parties in the actual or potential cases to reach conclusions.

In his careful judgment, Jackson J analysed the national context and, in particular, the campus closure programme that has formed an integral part of moves away from institutional care towards care in the community. He noted that the programme fell some way short of representing an absolute policy (let alone that there was an arguable case that campus living was unlawful). He then turned to the specifics of AH's case, noting, and clearly being struck by, the quality of care given by SRS and the extent to which AH and his fellow service users benefited from living on the campus. He noted that the motives of the commissioning authority in seeking to move AH were laudable; in particular, there was no question that SRS was to close (in any event, as he commented in passing in paragraph 2), were the real issue to be the discontinuance of SRS, then the appropriate forum would be judicial review, not the Court of Protection). Rather, the commissioning authority genuinely believed that a move to a residential facility within the community would benefit AH, on the basis (it would appear) in significant part on the basis that such a move would be in accordance with best practice and moves in similar circumstances had benefited others who suffering from similar conditions. Jackson J, however, concluded that it was not possible to identify a single dependable benefit arising from the proposed move (paragraph 77), and had little hesitation in concluding that a move would not be in AH's best interests. His concluding remarks in paragraph 80 are telling:

> "This case illustrates the obvious point that guideline policies cannot be treated as universal solutions, nor should initiatives designed to personalise care and promote choice be applied to the opposite effect. The very existence of SRS, after most of the institutional population had been resettled in the community, is perhaps the exception that proves this rule. These residents are not an anomaly simply because they are among the few remaining recipients of this style of social care. They might better be seen as a good example of the kind of personal planning that lies at the heart of the philosophy of care in the community. Otherwise, an unintended consequence of national policy may be to sacrifice the interests of vulnerable and unusual people like Alan."

Comment

This judgment is of no little interest, not least as a clear reminder of the necessity of identifying the risks and benefits to the individual the subject matter of the proceedings by reference to factors specific to the individual, not just to questions of general policy or best practice. It is also of interest as one of the first examples of the Court wrestling with what is an increasing phenomenon, namely 'group' cases arising where there is a proposal to move a number of service users from one location to another (or to multiple locations). In this regard, it is not surprising that Jackson J in giving his firm provisional view also directed that the costs figures of all parties should be disclosed by the time of the hearing "so that minds are focused on that very relevant question" (paragraph 6). Balancing the needs of case management with the need to focus on the individual is no easy task; but this judgment provides one useful model.

LONDON BOROUGH OF HILLINGDON V STEVEN NEARY [2011] EWHC 413 (COP)
Freedom of expression; Hearings in open court; Publicity; Reporting restrictions; Right to respect for private and family life

This case concerned an application by journalists from a range of organisations to report details of the case of Steven Neary, a young autistic and learning disabled man who had been prevented from living with his father in circumstances which the Official Solicitor and his father contended were unlawful.

It will be evident from this summary that the journalists' application was successful, and that reporting restrictions were lifted. The judge repeated the established principles governing such applications and found that since there was no concrete evidence that Steven Neary would be damaged by being identified, his details had already been published in a number of places including Private Eye and online, and there was a genuine public interest in the work of the Court of Protection not being kept secret, it was appropriate to allow the names of the parties to be published at the outset of the proceedings.

Comment
This case provides a useful illustration of the principles concerning publication of the identities of protected parties in the Court of Protection. It will be interesting to see whether some of the judge's assumptions are borne out, for example that journalists will not behave irresponsibly towards Steven Neary, and that there would most likely be a positive reaction to his situation rather than a hostile one.

A LOCAL AUTHORITY V PB AND P [2011] EWHC 502 (COP)
Jurisdictional interface with public law proceedings; Preparatory directions; Best interests

This decision relates to a relatively 'standard' best interests case concerning the residence and care arrangements for P, a man suffering life-long learning disability who had been cared for by his mother for the majority of his life, but had then been removed to be cared for by the local authority. It is of wider interest because Charles J set out in it in a reportable judgment for the first time that these authors are aware of his views as to the interaction between the MCA 2005 and judicial review proceedings. His comments, although expressed in provisional form, are of some considerable utility in clarifying the issues in a debate which has become increasingly vigorous: namely, what is the Court of Protection to do where a local authority declines to put an option before it for consideration?

Charles J repeated views expressed (in relation to the inherent jurisdiction) by him in *Re S (Vulnerable Adult)* [2007] FLR 1095 and Munby J (as he then was) in *A v A Health Authority* [2002] Fam 13, and by the House of Lords (in relation to the Children Act 1989) in *Holmes-Moorhouse v Richmond-upon-Thames Borough Council* [2009] 1 WLR 413, to the effect, in essence, that the Court in exercising its best interests jurisdiction is "choosing between available options" (paragraph 22). He noted that jurisdictional questions then arose as to the approach that was to be taken if someone wished to challenge the refusal of the local authority to place a particular option on the table by way of judicial review, not least as to the approach to be taken to findings of fact. At the time of writing, it would appear that the hearing listed specifically to consider those jurisdictional questions may not be effective, but the outcome of any such hearing will be covered in a subsequent edition of this newsletter.

Charles J also took the opportunity in this judgment to set out his views as to the cardinal importance of identifying the point in best interests proceedings at which it is no longer possible to proceed down the consensual route (which militates against the seeking of findings of fact adverse to a family member) and it becomes instead necessary to deploy the full panoply of the Court's forensic mechanisms. In the instant case, and with the benefit of hindsight, it had become clear that that point had not been identified in time, such that all parties (including the Official Solicitor) had appeared before him for a final hearing in circumstances where he did not consider that the issues had been sufficiently delineated to allow that final hearing to be proceed. To this end, and with a view to giving general guidance, he suggested (at paragraph 46) that at an appropriate stage, sufficiently prior to the final hearing, a direction should be given to the effect that each party should serve on the other a document setting out:

> (1) (a) the facts that he/she/it is asking the court to find, (b) the disputed facts that he/she/it asserts the Court need not determine, and (c) the findings that he/she/it invites the Court to make by reference to the facts identified in (a);
> (2) With sufficient particularity the investigations he/she/it has made of the alternatives for the care of P and as a result thereof the alternatives for the care of P that he/she/it asserts should be considered by the Court and in respect of each of them how and by whom the relevant support and services are to be provided;
> (3) By reference to (1) and (2) the factors that he/she/it asserts the Court should take into account in reaching its conclusions;
> (4) The relief sought by that party and by reference to the relevant factors the reasons why he/she/it asserts that those factors, or the balance between them, support the granting of that relief; and
> (5) The relevant issues of law.

Comment

Even if only provisional, the comments of Charles J in relation to the CoP/judicial review divide are of importance, as it will only become a more regular feature of best interests proceedings going forward that cash-strapped local authorities will simply decline to put on the table particular options. Quite where and how such decisions are to be challenged is a matter that will no doubt be the subject of further judicial consideration but Charles J has laid his cards out clearly on the table.

The procedural comments made by Charles J are also of significance, but no little difficulty. Those who regularly appear before the Court of Protection will know both that there is not complete unanimity between the judiciary as to the merits of conducting fact-findings hearings, and also that identifying the point at which it is necessary to abandon attempts to find consensus (with all the benefits that that brings for the maintenance of a working relationship with members of the family) and instead to segue into adversarial mode is a uniquely tricky exercise. Doing so too early can be just as damaging as doing so too late.

A v A Local Authority, A Care Home Manager and S [2011] EWHC 727

Standard DOLS authorisation; Section 21A challenge where only P objects; Court of Protection Visitor; Best interests

The President of the Family Division recently gave a useful indication of the approach to be taken by the Court of Protection in s.21A DOLS challenges where the only person objecting to a standard (or urgent) authorisation is P him or herself. The case concerned an elderly man suffering from dementia and other mental health issues, who was

deprived of his liberty in a care home, and wished to leave. All professionals working with P and P's son, who visited him regularly, agreed that it was in P's best interests to remain in the care home. However, the President observed that since P's rights under Article 5 ECHR were at stake, it was important that the court did not simply 'rubber stamp' the standard authorisation. It was proportionate to require a Court Visitor to prepare a report on P's capacity and best interests, and, in the event that the report concluded that it was in P's best interests to remain in the care home, for the matter to be concluded by way of a draft consent order and statement of reasons being considered by the court on the papers.

Comment
The decision is of interest because in many DOLS cases, it is only P who objects to the deprivation of liberty. The President's approach suggests that even where P's prospects of showing that the deprivation of liberty is not in his or her best interests, P is entitled to have the matter brought to court and examined. It is not clear how this fits with the LSC guidance on non-means tested funding for s.21A challenges which require borderline prospects if the issue is of overwhelming importance to P. The authors suspect that in a great number of DOLS cases, P's prospects may be below borderline, yet the safeguard of requiring the court's intervention is required in order to protect P's right to review by a court under Article 5(4). Nor is it clear the extent to which the Court Visitors will be able to deal with such cases in the event that there is an increase in the number of DOLS challenges that are brought.

DUNHILL V BURGIN [2011] EWHC 464 (QB)
Litigation capacity; Compromise agreement

This case concerned an application by the Claimant to have a compromise agreement into which she had entered declared void due to her having lacked litigation capacity at the time it was agreed. The Claimant had suffered a brain injury in a car accident and had instructed solicitors to bring a claim for personal injury. The claim was settled for £12,500 on the first day of trial, but it had subsequently transpired that if properly pleaded, the claim would have been worth at least £790,000, and possibly as much as several million pounds.

The court held that the Claimant had not lacked capacity at the time the consent order was agreed, and had been given a sufficiently clear explanation of the terms of the order, which she had understood. In reaching this conclusion, the court first had to grapple with the question whether the Claimant's capacity to agree to the consent order was the material issue, or whether it should consider her capacity to deal with the litigation had it been conducted effectively. It may have been that while the Claimant had litigation capacity in respect of a relatively low-value claim (as reflected by the consent order), she did not have capacity in respect of a very high-value claim. The court determined however that this was not relevant. It was required to consider the decision that had actually been taken by the Claimant, not hypothetical possibilities and counterfactuals.

Comment
It is likely to be rare that a court has to assess litigation capacity retrospectively, but this case provides a clear answer to the approach that must be adopted in such circumstances. It also reinforces the view that in assessing litigation capacity, one must look at the actual decisions that are likely to be required of the prospective litigant. As the court noted, the Claimant will no doubt pursue her original solicitors for the lost chance to secure a substantial sum in damages as a result of her accident, having failed to persuade the court that a broader approach to capacity should be taken.

R (W) v LB Croydon [2011] EWHC 696 (Admin)

Public law; Best interests; Consultation

This was a judicial review challenge on behalf of an autistic and learning disabled young adult whose care and residence was funded by the LB Croydon. It was argued on W's behalf that Croydon had failed to consult adequately with W's parents and the staff at W's current placement before making a decision to move him. The cost of the placement was high and it was clear that this was a motivating factor in the decision. While the local authority was entitled to have regard to cost when making its decision, it was required by the National Assistance Act 1948 (Choice of Accommodation) Directions 1992, the Community Care Assessment Directions 2004 and the MCA Code of Practice to consult W, his carers, his family and, in the circumstances, his care providers, before making a final decision. The court found that LB Croydon had not complied with these obligations, and that by the time information from the parents and the care providers was given to LB Croydon, it was too late to affect its decision.

Comment

This case is of particular interest in light of the increased focus on saving costs which will inevitably be part of local authority decision-making in coming months. The judgment confirms that 'the council is entitled to terminate a placement because of the greater cost' but makes clear that before making such a decision, proper consultation must take place. In the case of a service user who lacks capacity, the MCA 2005 imposes a particular burden in relation to consultation, because, the judge held, it requires not only P's wishes to be considered, but, under s.4(7), the views of anyone engaged in caring for the person, which includes not just family members but also professional care providers. This is so even though a current care provider will often have a particular interest in preserving the status quo. The case says that a best interests decision about an incapacitated adult is still required, and the proper processes must be followed, even where there is a strong provisional view that a particular option is not financially viable. It does not grapple with the more difficult question (see also the PB case above) whether, if it was not in W's best interests to move, but the cost of the placement was too high, the local authority would have been acting lawfully in moving W to a new placement.

Re Hunt [No.86 of 2007; 12.6.08]

Litigation capacity; Insolvency proceedings

Finally, and by way of coda to the decision in *Haworth v Cartmel & Commissioners for HM Revenue & Customs* [2011] EWHC 36 (Ch) reported in last month's edition, District Judge Ashton has kindly brought to our attention a decision of his from 2008 (reported in the Insolvency Law Reports), in which he annulled a bankruptcy order made upon the petition of a Borough Council in respect of a reclusive individual suffering from Huntington's disease who had failed to pay Council tax. He found, inter alia, that the individual was incapable of engaging in the insolvency proceedings by virtue of his mental disorder (and also by virtue of his physical affliction or disability arising out of his Huntington's disease which essentially prevented him from attending Court). In ordering a further hearing of the petition to be conducted on the basis that Mr Hunt was an incapacitated adult, DJ Ashton was highly critical of the approach taken by the local authority both in pursuing the petition and in questioning whether the Court was (in essence) being over-zealous in investigating his capacity to participate in the proceedings.

LBB v JM, BK AND CM [2010] COPLR CON VOL 779

Safeguarding; Article 8; Contact

This case, a transcript of which has only recently been made available, is a judgment of Mr Justice Hedley in a case concerning allegations of sexual abuse against the step-father of an incapacitated young adult. It is of interest because of general comments made about cases in which a public authority seeks to interfere with the Article 8 rights of family members by preventing or imposing restrictions on contact, on the basis of safeguarding concerns.

The judge said this:

> "The local authority took the view that since the intervention of the court would engage a potential breach of the Article 8 rights of the parties, that it may be incumbent upon them to establish on a factual basis why it was that the court's jurisdiction should be exercised. Broadly speaking, I would endorse that approach and recognise that where an Article 8.2 justification is required then the case should not be dealt with purely as a welfare case if there are significant factual issues between the parties which might bear on the outcome of the consideration under Article 8.2 as to whether state intervention was justified.
> The Mental Capacity Act does not contain provisions equivalent to the threshold provisions under s.31.2 of the Children Act. Nor should any such provisions be imported in it as clearly Parliament intended that they should not be, but an intervention with parties' rights under Article 8 is a serious intervention by the state which requires to be justified under Article 8.2. If there is a contested factual basis it may often be right, as undoubtedly it was in this case, that that should investigated and determined by the court."

The judge also confirmed that the burden of proof in establishing factual allegations lies on the public authority, and that the standard of proof is the balance of probabilities.

On the facts of the case, the judge found that there was unacceptable physical contact, though not sexual abuse. It did not follow from this that there should be no contact with P. Indeed, the judge considered in some detail methods of indirect contact and arrangements that might be made to enable P to have supervised contact with her step-father in the future, even though P was presently saying that she did not want to see him.

Comment

The judgment will be of particular interest to local authorities, as it demonstrates the gap between safeguarding concerns being raised, and obtaining findings of fact within the court that provide a sufficient basis for substantial restrictions on contact.

In the authors' experience, it can be easy for a local authority to assume that a history of suspicious incidents and safeguarding alerts will translate easily into declarations restricting or banning contact, when in reality the process is much more complicated. Common difficulties include a lack of direct witness evidence due to the circumstances of the suspected abuse or simply the lapse of time and the movement of staff, and by the absence of consistent or sometimes of any evidence from P him or herself.

The decision also ties in with the recent exhortation of Mr Justice Charles in the case of *A Local Authority v PB and P* [2011] EWHC 502 (COP), the parties should work to ensure

that fundamental disputes of fact are resolved at an appropriate (and often early) stage in proceedings.

A LOCAL AUTHORITY V DL [2011] EWHC 1022 (FAM)
Inherent jurisdiction; Interface with MCA; Abuse

This is the second decision in the case of DL, which readers may recall concerned an ex parte application by a local authority under the inherent jurisdiction seeking orders preventing the son of an elderly couple from committing an unlawful acts against them. The orders were granted by the President of the Family Division in October 2010. This hearing, before Mrs Justice Theis, considered whether there was any proper lawful basis for the use of the inherent jurisdiction on the basis of certain assumed facts (many of which were disputed by the son and his mother (who remained the only other parties to the proceedings, as the father had subsequently been found to lack capacity and was therefore subject to the MCA 2005).

In short, the judge found that the inherent jurisdiction had survived the introduction of the MCA 2005 and could be used in certain limited circumstances:

> "22. Having considered the detailed written and oral submissions, I have come to the conclusion that the inherent jurisdiction can still be invoked in cases such as this and that what has been termed the SA jurisdiction does survive the MCA and the Code. I have reached this conclusion for the following reasons:
> (1) It is accepted prior to the implementation of the MCA that the inherent jurisdiction extended to cases that went beyond issues relating to mental capacity. In appropriate cases, having balanced the competing considerations, the jurisdiction was invoked and exercised with the court making declarations and protective orders (SA supra).
> (2) It is accepted that the essence of this jurisdiction is to be flexible and to be able to respond to social needs.
> (3) The Parliamentary consideration, prior to the passing of the MCA, did not expressly seek to exclude the court's inherent jurisdiction that had developed at the time. The consideration it did give to adults found to have capacity (sometimes after investigation) did not expressly exclude the court exercising its inherent jurisdiction in relation to adults as described in SA. The SA inherent jurisdiction is a protective jurisdiction that extends beyond dealing with issues on mental incapacity.
> (4) Each case will, of course, have to be carefully considered on its own facts, but if there is evidence to suggest that an adult who does not suffer from any kind of mental incapacity that comes within the MCA but who is, or reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors they may be entitled to the protection of the inherent jurisdiction (see: *SA* (supra) para [79]). This may, or may not, include a vulnerable adult. I respectfully agree with Munby J in *SA* at para [83] "The inherent jurisdiction is not confined to those who are vulnerable adults, however that expression is understood, nor is a vulnerable adult amenable as such to the jurisdiction. The significance in this context of the concept of a vulnerable adult is pragmatic and evidential: it is simply that an adult who is vulnerable is more likely to fall into the category of the incapacitated in relation to whom the inherent jurisdiction is exercisable than an adult who is not vulnerable. So it is likely to be easier to persuade the court that there is a case calling for investigation where the adult is apparently vulnerable than where the adult is not on the face of it vulnerable." In the cases I have been referred to the

term „vulnerable adult" appears to have been used to include the SA definition, whether the adult in question is vulnerable or not. Obviously the facts in *SA* were very different to the case I am concerned with. For example, in this case ML and DL have capacity to litigate but that does not, in my judgment, mean that the inherent jurisdiction should not be available to protect ML, once the court has undertaken the correct balancing exercise.

(5) The continued existence of the SA jurisdiction, following implementation of the MCA, has been re-stated in a number of decisions. Whilst some of the observations may be regarded as obiter (in particular *A Local Authority v A* (supra) at para [68]) they have consistently re-affirmed the existence of the jurisdiction. In particular the observations made by Bodey J in *A Local Authority v Mrs A* (supra) at para [79], Macur J in *LBL v RYJ* (supra) para [62] and Wood J in *LB of Ealing v KS* (supra) para [148] […]

(6) I agree with the submissions of Mr Bowen, that the obligations on the State under the Convention and the HRA require the court to retain the inherent jurisdiction, as by refusing to exercise it in principle the court is, in effect, creating a new "Bournewood gap". Whilst it is correct that the cases to date regarding any positive obligation on the State (including the LA) arising under Article 8 have concerned cases involving children or adults who lack mental capacity that does not mean, in principle, such positive duties cannot arise in other circumstances. There may be a heightened positive duty in cases concerning children and adults who have mental incapacity. Much will depend on the circumstances of each case and what the proportionate response is considered to be by the LA.

(7) I agree with the submissions of Miss Lieven Q.C. (as supported by the observations of Bodey J in *A Local Authority v Mrs A* supra para 79 and Macur J in *LBL v RYJ* supra para 62) that in the event that I found that the jurisdiction does exist that its primary purpose is to create a situation where the person concerned can receive outside help free of coercion, to enable him or her to weigh things up and decide freely what he or she wishes to do. That is precisely what Munby J ordered in SA. There obviously needs to be flexibility as to how that is achieved, dependent on the facts of each case. That does not mean it can be covered by s 48 MCA, as Miss Lieven Q.C. sought to suggest at one stage in her oral submissions as, in my judgment, s 48 by its express terms is only intended to cover the interim position pending determination of an application. As Munby J observed in *SA* (para [137]) in some circumstances it will be necessary to make orders without limit of time.

(8) The mere existence of the jurisdiction does not mean it will always be exercised. Each case will have to be considered on its own facts and a careful balance undertaken by the court of the competing (often powerful) considerations as to whether declarations or other orders should be made. As Miss Lieven Q.C. points out the assumed facts in this case are not accepted by DL and even if they are one of the important considerations for the court to consider are the views of adults concerned; they do not support the orders being sought by the LA. In addition, the terms of the orders being sought in this case are likely to require very careful scrutiny.

Comment

This decision was not, in the view of the authors, a surprising one, in light of the various recent cases cited by Mrs Justice Theis in which a similar conclusion has been reached. It does however provide a useful and thorough summary of the relevant authorities and some insight into the way applications under the inherent jurisdiction are likely to be approached by the courts.

Practice direction on the preparation of bundles

The draft practice direction is heavily based on a similar practice direction used in the Family Division, and it is likely that the various Court of Protection judges will be very keen to ensure it is followed, as the problems of unwieldy, incomplete or non-existent bundles are very common.

The full text of the draft practice direction is reproduced below, and we have highlighted in bold text the parts that are likely to be of particular interest. When the final version has been approved, it will be issued by the President of the Family Division, but it would be prudent to start following its requirements immediately.

1 The President of the Court of Protection has issued this practice direction to achieve consistency across the country in the preparation of court bundles and in respect of other related matters in the Court of Protection.

Application of the practice direction

2.1 Except as specified in paragraph 2.4, and subject to a direction under paragraph 2.5 or specific directions given in any particular case, the following practice applies to:

(a) all hearings in the Court of Protection before the President of the Family Division, the Chancellor or a High Court judge sitting as a judge of the Court of Protection wherever the court may be sitting;

(b) all hearings in the Court of Protection relating in whole or in part to personal welfare, health or deprivation of liberty that are listed for a hearing of one hour or more before another judge of that court

(c) all hearings in the Court of Protection relating solely to property and affairs that are listed for a hearing of three hours or more before another judge of that court

2.2 "Hearings" includes all appearances before a judge whether with or without notice to other parties and whether for directions or for substantive relief.

2.3 This practice direction applies whether a bundle is being lodged for the first time or is being re-lodged for a further hearing.

2.4 This practice direction does not apply to the hearing of any urgent application if and to the extent that it is impossible to comply with it.

2.5 The President of the Court of Protection may, after such consultation as is appropriate direct that this practice direction shall apply to such hearings as he may specify that are not before a judge of the High Court irrespective of the length of hearing.

Responsibility for the preparation of the bundle

3.1 A bundle for the use of the court at the hearing shall be provided by the party in the position of applicant at the hearing (or, if there are cross-applications, by the party whose application was first in time) or, if that person is a litigant in person, by the first listed respondent who is not a litigant in person

3.2 The party preparing the bundle shall paginate it. If possible the contents of the bundle shall be agreed by all parties.

Contents of the bundle

4.1 The bundle shall contain copies of all documents relevant to the hearing, in chronological order from the front of the bundle, paginated and indexed, and divided into separate sections (each section being separately paginated) as follows:

(a) preliminary documents (see paragraph 4.2) and any other case management documents required by any other practice direction;

(b) applications and orders including all CoP forms;

(c) statements and affidavits (which must be dated in the top right corner of the front page);
(d) care plans (where appropriate);
(e) experts' reports and other reports; and
(f) other documents, divided into further sections as may be appropriate.
4.2 At the commencement of the bundle there shall be inserted the following documents ("the preliminary documents"):
(i) an up to date summary of the background to the hearing confined to those matters which are relevant to the hearing and the management of the case and limited, if practicable, to one A4 page;
(ii) a statement of the issue or issues to be determined (1) at that hearing and (2) at the final hearing;
(iii) a position statement by each party including a summary of the order or directions sought by that party (1) at that hearing and (2) at the final hearing;
(iv) an up to date chronology, if it is a final hearing or if the summary under (i) is insufficient;
(v) skeleton arguments, if appropriate, with copies of all authorities relied on; and
(vi) a list of essential reading for that hearing.
4.3 Each of the preliminary documents shall state on the front page immediately below the heading the date when it was prepared and the date of the hearing for which it was prepared.
4.4 The summary of the background, statement of issues, chronology, position statement and any skeleton arguments shall be cross-referenced to the relevant pages of the bundle.
4.5 Where the nature of the hearing is such that a complete bundle of all documents is unnecessary, the bundle (which need not be repaginated) may comprise only those documents necessary for the hearing, but
(i) the summary (paragraph 4.2(i)) must commence with a statement that the bundle is limited or incomplete; and
(ii) the bundle shall if reasonably practicable be in a form agreed by all parties.
4.6 Where the bundle is re-lodged in accordance with paragraph 9.2, before it is re-lodged:
(a) the bundle shall be updated as appropriate; and
(b) all superseded documents (and in particular all outdated summaries, statements of issues, chronologies, skeleton arguments and similar documents) shall be removed from the bundle.

Format of the bundle
5.1 The bundle shall be contained in one or more A4 size ring binders or lever arch files (each lever arch file being limited to 350 pages).
5.2 All ring binders and lever arch files shall have clearly marked on the front and the spine:
(a) the title and number of the case;
(b) the court where the case has been listed;
(c) the hearing date and time;
(d) if known, the name of the judge hearing the case; and
(e) where there is more than one ring binder or lever arch file, a distinguishing letter (A, B, C etc).

Timetable for preparing and lodging the bundle
6.1 The party preparing the bundle shall, whether or not the bundle has been agreed, provide a paginated index to all other parties not less than 4 working days before the hearing.

6.2 Where counsel is to be instructed at any hearing, a paginated bundle shall (if not already in counsel's possession) be delivered to counsel by the person instructing that counsel not less than 3 working days before the hearing.
6.3 The bundle (with the exception of the preliminary documents, if and insofar as they are not then available) shall be lodged with the court not less than 2 working days before the hearing, or at such other time as may be specified by the judge.
6.4 The preliminary documents shall be lodged with the court no later than 11 am on the day before the hearing and, where the hearing is before a judge of the High Court and the name of the judge is known, shall at the same time be sent by e-mail to the judge's clerk.

Lodging the bundle
7.1 The bundle shall be lodged at the appropriate office. If the bundle is lodged in the wrong place the judge may:
(a) treat the bundle as having not been lodged; and
(b) take the steps referred to in paragraph 12.
7.2 Unless the judge has given some other direction as to where the bundle in any particular case is to be lodged (for example a direction that the bundle is to be lodged with the judge's clerk) the bundle shall be lodged:
(a) for hearings in the RCJ, in the office of the Clerk of the Rules, 1st Mezzanine, Queen's Building, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44450 Strand) or, as appropriate, in the office of the Chancery Judges' Listing Officer, Room WG 4, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44450 Strand);
(b) for hearings at the Court of Protection in Archway, North London, with the Listing & Appeals team, Level 9, Archway Tower, 2 Junction Road, London, N19 5SZ (DX 141150 Archway 2)
(c) for hearings in the PRFD at First Avenue House, at the List Office counter, 3rd floor, First Avenue House, 42/49 High Holborn, London, WC1V 6NP (DX 396 Chancery Lane); and
(d) for hearings at any other court, including regional courts where a Court of Protection judge is sitting, at such place as may be designated and in default of any such designation, at the court office or Court of Protection section of the court where the hearing is to take place.
7.3 Any bundle sent to the court by post, DX or courier shall be clearly addressed to the appropriate office and shall show the date and place of the hearing on the outside of any packaging as well as on the bundle itself. It must in particular expressly and prominently state that it relates to Court of Protection business.

Lodging the bundle – additional requirements for cases being heard at First Avenue House or at the RCJ
8.1 In the case of hearings at the RCJ or PRFD, parties shall:
(a) if the bundle or preliminary documents are delivered personally, ensure that they obtain a receipt from the clerk accepting it or them; and
(b) if the bundle or preliminary documents are sent by post or DX, ensure that they obtain proof of posting or despatch.

The receipt (or proof of posting or despatch, as the case may be) shall be brought to court on the day of the hearing and must be produced to the court if requested. If the receipt (or proof of posting or despatch) cannot be produced to the court the judge may (i) treat the bundle as having not been lodged and (ii) take the steps referred to in paragraph 12.

8.2 For hearings at the RCJ:

(a) bundles or preliminary documents delivered after11 am on the day before the hearing will not be accepted by the Clerk of the Rules or Chancery Judges' Listing Officer and shall be delivered, in a case where the hearing is before a judge of the High Court, directly to the clerk of the judge hearing the case;
(b) upon learning before which judge a hearing is to take place, the clerk to counsel, or other advocate, representing the party in the position of applicant shall no later than 3pm the day before the hearing, in a case where the hearing is before a judge of the High Court, telephone the clerk of the judge hearing the case to ascertain whether the judge has received the bundle (including the preliminary documents) and, if not, shall organise prompt delivery by the applicant's solicitor.

Removing and re-lodging the bundle
9.1 Following completion of the hearing the party responsible for the bundle shall retrieve it from the court immediately or, if that is not practicable, shall collect it from the court within five working days.
Bundles which are not collected in due time may be destroyed.
9.2 The bundle shall be re-lodged for the next and any further hearings in accordance with the provisions of this practice direction and in a form which complies with paragraph 4.6.

Time estimates
10.1 In every case a time estimate (which shall be inserted at the front of the bundle) shall be prepared which shall so far as practicable be agreed by all parties and shall:
(a) specify separately (i) the time estimated to be required for judicial pre-reading (ii) the time required for hearing all evidence and submissions and (iii) the time estimated to be required for preparing and delivering judgment; and
(b) be prepared on the basis that before they give evidence all witnesses will have read all relevant filed statements and reports.

10.2 Once a case has been listed, any change in time estimates shall be notified immediately by telephone (and then immediately confirmed in writing):
(a) in the case of hearings in the RCJ, to the Clerk of the Rules or the Chancery Judges' Listing Officer as appropriate;
(b) in the case of hearings in the Court of Protection at Archway Tower, North London, to the Diary Manager in the Listing & Appeals team
(c) in the case of hearings in the PRFD at First Avenue House, to the List Officer at First Avenue House; and
(d) in the case of hearings elsewhere, to the relevant listing officer.

Taking cases out of the list
11 As soon as it becomes known that a hearing will no longer be effective, whether as a result of the parties reaching agreement or for any other reason, the parties and their representatives shall immediately notify the court by telephone and by letter. The letter, which shall wherever possible be a joint letter sent on behalf of all parties with their signatures applied or appended, shall include:
(a) a short background summary of the case;
(b) the written consent of each party who consents and, where a party does not consent, details of the steps which have been taken to obtain that party's consent and, where known, an explanation of why that consent has not been given;
(c) a draft of the order being sought; and
(d) enough information to enable the court to decide (i) whether to take the case out of the list and
(ii) whether to make the proposed order.

Penalties for failure to comply with this practice direction
12 Failure to comply with any part of this practice direction may result in the judge removing the case from the list or putting the case further back in the list and may also result in a "wasted costs" order in accordance with CPR Part 48.7 or some other adverse costs order.

Commencement of this practice direction and application of other practice directions
13 This practice direction shall have effect from the date of this practice direction
14 This practice direction is issued by the President of the Court of Protection, as the nominee of the Lord Chief Justice, with the agreement of the Lord Chancellor.

ISSUE 9 MAY 2011 COURT OF PROTECTION UPDATE

Introduction
Welcome to the May 2011 edition of our Newsletter. A particular highlight discussed this month is *W v M, S, an NHS Trust and Times Newspapers Limited* [2011] EWHC 1197 (COP), in which Baker J addressed for the first time the power of the Court of Protection to make restricted reporting orders. We are very grateful to Vikram Sachdeva, also of 39 Essex Street, who appeared for the Applicant W, for his contribution by way of guest commentary upon the decision. Coupled with the decision in *Neary* reported in our March edition, very welcome clarity has now been given as to publicity and reporting of health and welfare cases proceeding before the CoP.

We are also very happy to welcome Josephine Norris of 39 Essex Street as a co-editor of the Newsletter for this and forthcoming editions.

Thank you to those of you who were able to attend our seminar on 10.5.11, which covered a number of (complicated) issues concerning both deprivation of liberty and capacity to consent to sexual relations. For those of you who were unable to make it, copies of the papers are available on application to our marketing team at marketing@39essex.com.

Practice – DOLS cases
The President has recently confirmed (by way of communication with the judiciary, rather than by way of formal Practice Direction) that "Deprivation of Liberty Safeguarding cases in the Court of Protection should continue for the time being and until further notice to be heard in the High Court." This is useful clarification, because it had been unclear whether the previous President's initial diktat in April 2009 (on the coming into force of Schedule A1) that such cases should be listed before a High Court Judge had expired. This does not mean, for the avoidance of doubt, the DOLS cases should be issued in the High Court, only that they should then be listed before a puisne judge of the High Court sitting as a judge in the Court of Protection.

R v DUNN [2010] EWCA CRIM 2935
Criminal offences; Ill treatment and wilful neglect

This case, which we should perhaps have noted previously, was decided by the Court of Appeal (Criminal Division) last year, and sheds some useful light on the provisions of s. 44 MCA 2005, provides that:

> "(1) Subsection (2) applies if a person ('D') –

(a) has the care of a person ('P') who lacks, or whom D reasonably believes to lack capacity,
(b) is the donee of a lasting power of attorney, or an enduring power of attorney (within the meaning of Schedule 4), created by P, or
(c) is a deputy appointed by the court for P.
(2) D is guilty of an offence if he ill-treats or wilfully neglects P."

Ms Dunn was charged with three counts of ill-treatment of persons falling within the scope of s.44(1) whilst the manageress of a residential care home. She was convicted, and appealed on the basis that the directions given by the Recorder to the jury about the constituent elements of the offence created by section 44 and in particular the concept of the absence of capacity for the purposes of this offence.

The 'preliminary question' the subject of appeal was formulated by the Recorder (with the assistance of Counsel) as follows:

> "What is 'a person without capacity'? A person 'lacks capacity' within the meaning of the Act of Parliament if he is unable to make decisions for himself because of some impairment or disturbance of the function of the mind or brain. The key phrase is, 'unable to make decisions for himself'. A diagnosis of dementia on its own is not enough. The impairment or disturbance may be permanent or temporary."

The Recorder continued in his summing up that:

> "You always assume to start with that a person has capacity and then you look at the evidence as a whole including the medical evidence and you ask yourselves this question: 'Did he probably lack capacity?' To put it another way, 'Is it more probable than not that he lacked capacity?'"

The central criticism of the Recorder's summing up was that it did not make express reference to the issue and time-specific nature of questions of capacity, as required by the provisions of ss.2 and 3 MCA 2005.

The Court of Appeal (in a single judgment delivered by the Lord Chief Justice) noted (at paragraph 19), that:

> "… At first blush, and indeed on more mature reflection, [ss.2 and 3] do not appear to be entirely appropriate to defining the constituent elements of the criminal offence of ill-treatment of a person without capacity. By the time sections 2 and 3 are analysed and related to an individual case, they become convoluted and complex when, certainly in relation to a criminal offence, they should be simple."

They continued, though, that they would:

> "… pause to remember the purpose of section 44 and the creation of the offence; and bear in mind that everyone, who for whatever reason but in particular the natural consequences of age, has ceased to be able to live an independent life and is a vulnerable individual living in a residential home, is entitled to be protected from ill-treatment if he or she lacks "capacity" as defined in the Act."

At paragraph 22, therefore, they took the view that, notwithstanding the fact that there was something of a "disconnection" between the simple criminal offence created by s.44 and the elaborate provisions contained in ss.2-3:

> "nevertheless the stark reality is that it was open to the jury to conclude that the decisions about the care of each of these residents at the time when they were subjected to ill-treatment were being made for them by others, including the appellant, just because they lacked the capacity to make these decisions for themselves. For the purposes of section 2, this was "the matter" envisaged in the legislation. On this basis the Recorder's direction properly expressed the issues which the jury was required to address and resolve by putting the direction clearly within the ambit of the language used in section 2.
> 23. In the context of long-term residential care, and on the facts of this particular case, it was unnecessary for the Recorder further to amplify his directions and complicate the position for the jury by referring in this part of his summing-up to any of the provisions of section 3, or for them to be incorporated into his directions…"

The Court of Appeal therefore dismissed the appeal.

Comment
Section 44 MCA 2005 provides an important tool by which the wider protections afforded by the Act could be enforced. The Court of Appeal's criticisms of its drafting are on view well-founded, and, indeed, it is slightly ironic that s.44 requires consideration of a question which the balance of the Act and of the Code makes clear is analytically meaningless, i.e. "does/did X lack capacity?"

However, as the Court of Appeal noted, the underlying principle of s.44 is clear, and the approach adopted at paragraph 22 of their judgment represents an appropriate reading in of words into its provisions. Had it acceded to the thrust of the appeal, it would have made it even more difficult than it is at present to bring a successful prosecution.

V HACKETT V CPS AND D HACKETT [2011] EWHC 1170 (ADMIN)
Undue influence; Whether transaction should be set aside

This case is included not because it is a decision of the Court of Protection, but rather because it represents a very useful summary of the law of undue influence in the context of the very vulnerable.

The facts are somewhat complex, but the issue for determination arose, ultimately, out of a confiscation order made in 2007 against the second defendant, who had been illegally importing goods without paying the prescribed duties. His mother, the claimant, had, in 2004, transferred to him for no consideration a house. In the application before Silber J, the claimant contended that the transfer to the second defendant should be set aside on the grounds of presumed undue influence of the second defendant and/or non est factum on the basis that when the claimant signed the transfer of the house, she did not know what the document was. The second defendant supported the application, but it was vigorously resisted by the CPS on the basis that (1) that the house was purchased with the proceeds of the second defendant's criminal activities and second, that the claims of presumed undue influence and/or non est factum could not succeed.

The claimant (aged 83 at the date of judgment) was profoundly deaf from birth, did not learn to speak, and was unable to read or write, understanding only some basic signs of

sign language, able to do some lip-reading, and able to communicate with her hands. In 2003, her husband having died some years previously, she appointed her son as her attorney with general authority to act on her behalf in respect of her property and affairs.

In 1998 she purchased a house, she contended with her late husband's savings (the CPS contending that it was with the proceeds of her son's crimes). She transferred the house to her son in 2004 by way of a transfer deed prepared by a solicitor (arranged by her son) and purportedly signed by her.

Silber J admitted the evidence of the claimant under the provisions of the Civil Evidence Act, but noted that she had not been subject to cross-examination and was clearly somebody of very limited memory, and therefore declined to attach any weight to it unless corroborated by other evidence. For reasons given in some detail in his judgment, he was prepared, however, to accept that (despite his conviction for dishonesty) the son's evidence was reliable. He was also prepared to accept a somewhat Dickensian story as to how it was that the claimant's late husband had come to accumulate sufficient sums to allow her to purchase the house.

He therefore proceeded to consider whether the transaction by which it was transferred to her son should nonetheless be set aside upon the basis of presumed undue influence. Summarising the case-law (*Royal Bank of Scotland v Etridge* (No 2) [2002] 2 AC 773; *Smith v Cooper* [2010] EWCA Civ 722.), Silber J held (at paragraph 53) that three questions had to be asked:

> "(i) Was there a relationship between the claimant and the second defendant such that a potential claim of presumed undue influence arises? The burden is on the claimant to establish this relationship;
> (ii) If there is such a relationship, is there a transaction arising out of the relationship that calls for evidence of the free exercise of the will of the claimant as a result of full, free and informed thought? The burden is on the claimant to prove the existence of such a transaction; and
> (iii) If there is such a transaction that requires evidence of the full exercise of the will of the claimant as a result of full, free and informed thought, then can the CPS (as the party seeking to counter the inference of undue influence) discharge the evidential burden and provide a satisfactory explanation?"

In relation to the first question, the CPS accepted (and Silber J indicated he would have found) that the fact of the signing of the Power of Attorney gave rise to a relationship of presumed influence. He also noted (at paragraph 54) that "the claimant was deaf, dumb, barely educated and illiterate and …, since the death of her husband, she had become reliant on the second defendant to manage her affairs and to physically care for her. There was clear evidence from, for example, the claimant's sister Mrs Savage that the claimant went "downhill" after her husband's death in 1997 so that in consequence she was reliant on the second defendant to deal with these matters on her behalf."

In relation to the second question, Silber J declined to accept the contention of the CPS that the transfer of the house could be reasonably accounted for (essentially because it alleviated the risk that inheritance tax would fall to be paid upon it upon her death). Amongst the reasons he gave for concluding that it was a transaction requiring explanation was (perhaps unsurprisingly) that "any transaction by which the donee of a Power of Attorney obtains a gift of a substantial asset from the donor of the Power of

Attorney calls for some form of justification, especially if, as in this case, the donor is old, infirm, deaf and dumb and the donee himself organises the transaction."

In relation to the third question and, unusually, the CPS found itself in the position of seeking to establish (as against the contentions of the claimant and her son) that, nonetheless, the transaction had been entered into as a result of full, free and informed thought on the part of the claimant. The CPS sought to draw assistance from the fact that the claimant's own evidence was to the effect that her son would not cheat her and was a good man, but Silber J noted that "it is not determinative of the issue that the person presumed to exert undue influence did not act wrongfully as it is not an ingredient of undue influence that the wrongdoer cheated the victim (citing Mummery LJ in *Niersmans v Pesticcio* [2004] EWCA Civ 37). Silber J was also unimpressed by the submission that, notwithstanding the claimant's severe communication problems, it did not follow she was unable to make up her own mind as to matters. None of points advanced by the CPS, in his view, assisted with establishing that the claimant had entered into the transaction as a result of 'full, free and informed thought.' Having reviewed the case-law, and in particular those cases involving consideration of whether it could properly be said that the individual had received independent advice, he concluded (at paragraph 74) that

> "In my view, in cases where a donor is suffering from a mental impairment or a learning difficulty, the court is obliged to look with special care to see if the decision taken by a donor is really based on full, free and informed thought. Snell on Equity (32nd Edition page 272) quotes the case of *Williams v Williams* [2003] WTLR 1371, where the presumption was not rebutted in the case of a claimant suffering from severe mental impairment and who was dependent on the defendant even though it was accepted that the claimant had been "independently advised and that advice would have brought to an ordinary person the implications of what he was doing". The claimant in the present case was not suffering from a medical impairment but she was deaf, dumb and barely educated and this required especially careful advice before the CPS would have discharged the burden of showing that the claimant disposed of the house as a result of full, free and informed thought."

Although the solicitor in question who was said to have given the claimant the necessary independent advice did not give evidence, an attendance note recording a conference and a letter from the solicitor were both before the Court, and Silber J had no hesitation (at paragraph 80) of making a number of relatively severe criticisms of the steps taken by the solicitor, and hence of the independence of the advice he could give; not the least of these was that he did not see her in the absence of her son, and that the letter in which advice was given was sent to someone who could not read, and it appeared that the solicitor took no steps to ensure that she had the letter read to her in terms she could understand.

Silber J therefore declared himself satisfied that the transaction was to be set aside because the presumption of undue influence could not be disproved by the CPS. Although he did not then need to go on to consider the claim of non est factum, he noted that the plea enabled a party to avoid an agreement if that party was permanently or temporarily unable, through no fault of its own, to have any real understanding of the purport of the document, irrespective of whether this inability arises from defective education or any incapacity (*Saunders v Anglia Building Society* [1971] AC 1004, 1015-1016). The judge noted the reluctance of the Courts to allow people to avoid transactions under this head, and, on the basis of the evidence before him concluded (at paragraph 90) that

> "In this case there is no evidence as to what the claimant thought she was signing. She might well have realised that she was transferring the house to the second defendant. In other words, she has failed to discharge the burden on her and for that reason, this claim must fail."

Comment
As noted at the outset, this is not strictly a case involving lack of capacity (and, indeed, the judge was careful not to make a finding that the claimant, notwithstanding her evident disabilities, did not have capacity to take the relevant decision at the relevant time). However, it serves both as a useful summary (albeit on rather odd facts) of the case-law on presumed influence, and also an object lesson in the steps that are necessary for those advising the vulnerable to take when they are engaged in a transaction involving anyone potentially capable of overbearing their will.

W v M and Ors [2011] EWHC 1197 (COP)
Publicity; Anonymity; Freedom of expression; Reporting restrictions; Right to respect for private and family life

In this case, Baker J had to consider the power of the Court of Protection to impose reporting restrictions and the factors that it should take in to account when doing so.

M has been in a minimally conscious state for several years. Members of her family, including her mother, W, reached the conclusion that she would not wish to continue living in her current state. They started proceedings in the Court of Protection seeking a declaration that she lacks capacity to make decisions as to her future medical treatment and for the Court's approval of the withdrawal of artificial nutrition and hydration. The final hearing is listed for 18 July 2011.

When the case first came before Baker J in November 2010, he ordered that all further proceedings should be heard in open court but indicated that it was open to any party to apply for an injunction preventing publication of the identity of the parties and other information concerning the proceedings. In April 2011, the applicant sought an Order imposing reporting restrictions which would restrain publication of information likely to lead to the identification of M, family members, and care staff and further restrain the media from contacting or communicating with any person. The scope of the order sought was contested. By the time the application was heard before Baker J, the parties had narrowed the issues considerably and a draft order was agreed save for one point of dispute.

In granting the orders, Baker J gave guidance as to the considerations that apply when the Court of Protection imposes reporting restrictions on the media and in particular, the balancing exercise that must be undertaken between competing Convention Rights:

- The general rule is that Court of Protection proceedings should usually be held in private. When granting an order containing reporting restrictions, careful consideration must always be given to the precise terms to be included in the order which will always be determined by the specific facts of the individual case.
- Orders for the restriction of publication of information must be founded on rights arising under the ECHR. Practice Direction 13A, following the House of Lords authorities, makes it clear that in the Court of Protection neither article 8 nor article 10 has automatic precedence over the other: *Re S (A Child) (Identification: Restriction on Publication)* [2004] UKHL 47, [2005] 1 AC 593 as emerging from the opinions of the

House of Lords in the earlier case of *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

- A number of further points arise about the balancing of Convention rights in these applications in the Court of Protection.

1 Whilst the rights engaged will normally be confined to articles 8 and 10, there may be cases where article 6 is engaged, where for example it is asserted that the publication of information relating to proceedings, or attempts by the media to contact litigants, would affect the capacity or willingness of a party to participate in the litigation.

2 A decision whether or not to allow publication of information in such cases may well engage the article 8 rights of not only the incapacitated adult but also other members of her family. Under s.6(3) of the Human Rights Act 1998, the Court of Protection is a public authority and must not act in any way that is incompatible with Convention rights. Accordingly, the balancing exercise that has to be undertaken may, in appropriate circumstances, include consideration of the article 8 rights of other family members.

3 When focusing on the article 8 rights of P and any other relevant person, the court should consider the nature and strength of the evidence of the risk of harm. There must, as Peter Jackson J observed in *Hillingdon LBC v Neary* [2011] EWHC 413 (COP) at paragraph 15(3), be a proper, factual basis for such concerns.

4 Whilst there may be cases in which the Court of Protection allows details and even the name of the adult who is the subject of the proceedings to be reported, the public interest in freedom of expression arising in serious medical cases will usually lie in the general issues arising on an application for an order that might have the effect of leading, directly or indirectly, to the shortening of the life of an incapacitated adult, as opposed to the identity and personal circumstances of the incapacitated adult.

5 When conducting the balancing exercise, the Court must bear in mind that it is in the public interest for the practices and procedures of the Court of Protection to be more widely understood.

6 Judges and practitioners in the Court of Protection – as in the Family Division – must be on their guard to ensure that their naturally protective instincts, developed through years of giving paramount consideration to the welfare of children and the best interests of vulnerable adults, do not lead them to underestimate the importance of article 10 when carrying out the balancing exercise.

7 It is of course the case that the Court of Protection hearing an application for a reporting restriction order under rule 92 is considering the same human rights as usually arise in the so-called 'super injunction' cases in the Queen's Bench Division, in which celebrities and others seek to restrain publication concerning their private lives. Both jurisdictions are applying the same statute, namely the Human Rights Act, and will continue to do so unless and until Parliament passes a new privacy law. Both jurisdictions involve the balancing exercise, usually of articles 8 and 10. But the conduct of that balancing exercise will invariably be very different in the Court of Protection because of the circumstances of those whom the court is seeking to protect. As Maurice Kay LJ observed in *Ntuli v Donald* [2010] EWCA 1276 at paragraph 54, "this is an essentially case-sensitive subject". Decisions on the conduct of the balancing exercise between competing Convention rights in celebrity cases are unlikely to be of any relevance to decisions in the Court of Protection or vice versa.

When applying this approach to the facts of this case, Baker J emphasised that the Court has determined that issues in this case are sufficiently important to justify public hearing, and the press must be allowed to report the proceedings as far as possible. Nevertheless, the balance fell manifestly in favour of granting the orders sought by the applicant and the Official Solicitor. The Article 8 rights of both M and her family members are engaged. The terms of the order will ensure that the article 8 rights of family members are properly protected. The freedom of expression enjoyed by the press will be restricted, but the extent of that restriction will not prevent the press from reporting the issues, evidence (including expert evidence) and arguments at the hearing in July.

Guest Comment – Vikram Sachdeva
This impressive judgment from Mr. Justice Baker is important for four reasons.

First, it clarifies the procedure which must be followed in serious medical treatment cases where reporting restrictions orders (and possibly further injunctions, such as non communication orders) are sought. This will happen in virtually every serious medical treatment case, for (per Practice Direction 9E) such cases are, unlike other CoP cases, presumptively heard in public.

Second, it rejected an attempt by The Times to apply a dictum in a case about a well-known sportsman's sexual indiscretions to this sensitive field, which would have given primacy to the media's article 10 rights over the article 8 rights of the protected party and his or her family.

Third, it suggests that the balancing process can take into account both the parties' Article 6 rights, and the Article 8 rights of parties and (if appropriate) of non-parties such as family members.

Fourth, it provides a very useful standard order which can be modified to the facts of individual cases, which is currently lacking in the CoP Rules and Practice Directions.

WYCHAVON DISTRICT COUNCIL V EM (HB) [2011] UKUT 144 (AAC)
Capacity; Tenancy; Housing benefit

This was a decision of the Upper Tribunal in respect of a claim for housing benefit. The claimant lived and was cared for in a home that had been specially constructed for her. She was (apparently) party to a tenancy agreement with her father as landlord. The tenancy agreement was for an indefinite term. In the space for the claimant's signature the agreement simply said that she was 'profoundly disabled and cannot communicate at all'.

The Upper Tribunal found that there was no agreement as the claimant had not agreed to the arrangements (regardless of whether or not she had capacity to do so). There could not be a voidable agreement as the claimant's father must have known that she was of unsound mind and could not have entered into a contract. It could not be said that she had taken the benefit of the contract and should therefore pay the rent as she had no understanding of the basis on which she was staying at her home. She had no liability to pay rent and until such time as a lawful agreement was entered into on her behalf, there was no entitlement to apply for housing benefit.

Comment
This case is of interest because it addresses, from outside the Court of Protection, the question of the validity of tenancy agreements entered into with people who lack

capacity. This is a subject which it is anticipated the Court of Protection is likely to have to grapple with in the near future.

ISSUE 10 JUNE 2011 COURT OF PROTECTION UPDATE

LONDON BOROUGH OF HILLINGDON V STEVEN NEARY AND ORS [2011] EWHC 1377

Article 8 right to respect for private and family life; Article 5 right to liberty and security; Best interests; Deprivation of liberty safeguards; Lawfulness of detention; Local authorities' powers and duties; Residential care

This well-publicised judgment addresses the responsibilities of public authorities who decide that incapacitated adults should be removed from their families. The London Borough of Hillingdon had determined that Steven Neary, a young autistic man, should not be returned to the care of his father from a respite service.

Steven initially went to a respite facility a little earlier than planned because his father was unwell and exhausted from caring for Steven over the Christmas period. His father wanted him to stay for a couple of days, but agreed to an extension of a couple of weeks; however, he expected that Steven would then return home. In fact, the local authority started a process of assessment of Steven's needs and decided that he needed to stay in the unit for longer, apparently primarily based on concern as to whether Steven's needs could be met at home even with support due to his behaviour, and on the fact that he had gained a considerable amount of weight while in the care of his father, most likely due to the use of food as a mechanism for managing Steven's behaviour.

The evidence before the court was that the local authority did not properly discuss its concerns or its plans for Steven with his father, and that Steven himself expressed a consistent desire to return home.

No DOLS authorisations were granted until some four months after Steven had been kept at the respite unit. The DOLS process was triggered because Steven wandered out of the unit and was involved in an incident with a member of public. The first DOLS best interests assessment determined that it was in Steven's best interests to remain at the respite unit but did not look in any detail at the possibility of a return home, nor did it suggest as a condition of the authorisation that an application be made to the Court of Protection. The court found that Hillingdon had breached Steven Neary's rights under Article 8 ECHR by preventing him from living with his father, and had breached his rights under Article 5(1) ECHR by unlawfully depriving him of his liberty, even during periods where there was a standard authorisation in place under Schedule A1. Hillingdon further breached Steven Neary's rights under Article 5(4) by failing to bring the dispute to court, failing to appoint an IMCA at a suitable juncture, and failing to conduct an effective review of the DOLS best interests assessments under Part 8 of Schedule A1.

The judge, Mr Justice Peter Jackson, identified three areas of practical guidance to practitioners:

(1) The purpose of DOL authorisations and of the Court of Protection:
Significant welfare issues that cannot be resolved by discussion should be placed before the Court of Protection, where decisions can be taken as a matter of urgency where necessary. The DOL scheme is an important safeguard against arbitrary detention. Where stringent conditions are met, it allows a managing authority to

deprive a person of liberty at a particular place. It is not to be used by a local authority as a means of getting its own way on the question of whether it is in the person's best interests to be in the place at all. Using the DOL regime in that way turns the spirit of the Mental Capacity Act 2005 on its head, with a code designed to protect the liberty of vulnerable people being used instead as an instrument of confinement. In this case, far from being a safeguard, the way in which the DOL process was used masked the real deprivation of liberty, which was the refusal to allow Steven to go home.

(2) Decision-making:
Poor decision-making processes often lead to bad decisions. Where a local authority wears a number of hats, it should be clear about who is responsible for its direction. Here, one sub-department of Hillingdon's adult social services provides social work support and another is responsible for running facilities such as the support unit. At the same time, senior social workers represent the supervisory body that determines whether or not a DOL authorisation should be granted. In that situation, welfare planning should be directed by the team to which the allocated social worker belongs, although there will of course be the closest liaison with those who run the support facilities. The tail of service provision, however expert and specialised, should not wag the dog of welfare planning.

(3) The responsibilities of the supervisory body:
The granting of DOL standard authorisations is a matter for the local authority in its role as a supervisory body. The responsibilities of a supervisory body, correctly understood, require it to scrutinise the assessment it receives with independence and a degree of care that is appropriate to the seriousness of the decision and to the circumstances of the individual case that are or should be known to it. Where, as here, a supervisory body grants authorisations on the basis of perfunctory scrutiny of superficial best interests assessments, it cannot expect the authorisations to be legally valid.

The judge found that the local authority had never carried out a proper best interests assessment which gave proper regard to the importance of living with one's family:

> "Nowhere in their very full records of Steven's year in care is there any mention of the supposition that he should be at home, other things being equal, or the disadvantages to him of living away from his family, still less an attempt to weigh those disadvantages against the supposed advantages of care elsewhere. No acknowledgement ever appears of the unique bond between Steven and his father, or of the priceless importance to a dependent person of the personal element in care by a parent rather than a stranger, however committed. No attempt was made at the outset to carry out a genuinely balanced best interests assessment, nor was one attempted subsequently."

The importance of the best interests assessments carried out under the DOLS system was highlighted:

> "Although the framework of the Act requires the supervising body to commission a number of paper assessments before granting a standard authorisation, the best interests assessment is anything but a routine piece of paperwork. Properly viewed, it should be seen as a cornerstone of the protection that the DOL safeguards offer to people facing deprivation of liberty if they are to be effective as safeguards at all.

> The corollary of this, in my view, is that the supervisory body that receives the best interests assessment must actively supervise the process by scrutinising the assessment with independence and with a degree of care that is appropriate to the seriousness of the decision and the circumstances of the individual case that are or should be known to it."

The judge found that even if the BI assessment is positive, and even though Schedule A1 says that the supervisory body MUST grant an authorisation if all the assessments are positive, the situation is not so clear cut:

> "This obligation must be read in the light of the overall scheme of the schedule, which cannot be to require the supervisory body to grant an authorisation where it is not or should not be satisfied that the best interests assessment is a thorough piece of work that adequately analyses the four necessary conditions.
> ... where a supervisory body knows or ought to know that a best interests assessment is inadequate, it is not obliged to follow the recommendation. On the contrary it is obliged to take all necessary steps to remedy the inadequacy, and if necessary bring the deprivation of liberty to an end, including by conducting a review under Part 8 or by applying to the court.
> ... A standard authorisation has the same effect as a court order and there is no reason why it should receive lesser scrutiny."

In relation to Article 5(4) – the right to speedy review of any deprivation of liberty – the court found that there had been an unwarranted violation of Steven's rights:

> "Lastly, I have already indicated that the protracted delay in applying to court in this case was highly unfortunate. There are repeated references, particularly by the service manager, to the burden being on Mr Neary to take the matter to court if he wished to challenge what was happening. That approach cannot be right. I have already referred to the decision in *Re S*, which rightly observes that the practical and evidential burden is on a local authority to demonstrate that its arrangements are better than those that can be achieved within the family. It will discharge the practical burden by ensuring that there is a proper forum for decision. It will not do so by allowing the situation it has brought about to continue by default. Nor is it an answer to say, as Hillingdon has done, that Mr Neary could always have gone to court himself, and that it had told him so. It was Steven's rights, and not those of his father, that were in issue. Moreover, local authorities have the advantage over individuals both in terms of experience and, even nowadays, depth of pocket. The fact that an individual does not bring a matter to court does not relieve the local authority of the obligation to act, it redoubles it.
> Taking these three matters together – no IMCA, no effective review, and no timely issue of proceedings – I agree with the Official Solicitor and with the team manager that had these steps being taken in a timely way, it is more likely than not that Steven would have returned home very much earlier than he did."

Furthermore:

> "... there is an obligation on the State to ensure that a person deprived of liberty is not only entitled but enabled to have the lawfulness of his detention reviewed speedily by a court. The nature of the obligation will depend upon the circumstances, which may not readily be transferable from one context to another."

Comment

This decision answers a number of crucial questions about the operation of DOLS and the correlation between a breach of Schedule A1 and a breach of Articles 5 and 8 ECHR. It highlights the importance of a comprehensive best interests assessment (whether or not within the context of a DOLS authorisation) and the need for public bodies to have regard to all relevant information when forming a view as to best interests. It repeats the court's often-expressed view that removing an incapacitated adult from his or her family home is a major step and not one that can be justified on the basis of generalised assumptions about, for example, the benefits of independent living or the provision of care by skilled professionals rather than family members. The judge said that 'The burden is always on the State to show that an incapacitated person's welfare cannot be sustained by living with and being looked after by his or her family, with or without outside support.' There is an interesting question whether this approach is in conflict with some aspects of current social care (including DH guidance) which appears, to the authors, to take a different starting point; namely that learning disabled and autistic adults should be assisted to live independently, as their non-disabled counterparts generally do.

The case will cast a certain amount of fear into the hearts of local authorities who, in the authors' experience, commonly adopt without further consideration the recommendations of Best Interest Assessors in their decision to grant a standard authorisation. This practice illustrates the problems caused by the dual role played by local authorities under DOLS, of both independent assessor, and decision-maker, and reflects the inherent tension caused by appointing the body ultimately responsible for a deprivation of liberty as the body able to authorise it. Following this judgment, local authorities will have to do better at separating their assessment functions from their decision-making functions, and can no longer assume that reliance on the views of a Best Interest Assessor is sufficient. This is likely to be particularly so where, for example, a relative or P himself seeks to criticise or have reviewed a DOLS authorisation, thereby putting the local authority on notice that the decision already reached may not be the right one.

Best Interests Assessors will also need to beware of the overuse of 'cut and paste', and the need to justify periods of detention that are proposed, as being lawful and proportionate, rather than for reasons of administrative practicality.

The judgment does not, in the view of the authors, settle the question whether a breach of Schedule A1 necessarily gives rise to a breach of Article 5. The court found that since the best interests decisions about Steven were made with 'insufficient scrutiny of inadequate information', the resulting DOLS authorisations were not lawful, even though the processes envisaged by Schedule A1 had been followed. It is not clear whether the court found that there had been a breach of Article 5 on procedural grounds (such as a failure to complete a lawful best interests assessment), or on substantive grounds (that since the deprivation of Steven's liberty was not in fact in his best interests and/or proportionate, it was therefore unlawful). The distinction was probably irrelevant in this case, as Hillingdon appeared to have violated both aspects, but in other cases, where there is a real issue as to whether the deprivation of liberty is in P's best interests (for example because there is no alternative placement available, even though the existing placement is far from ideal), it could be very important. The judgment at the very least suggests that even where the best interests issue is not clear cut, there may nevertheless be violations of Article 5 if the processes followed, including information-gathering, are deficient.

CHESHIRE WEST AND CHESTER COUNCIL V P AND M [2011] EWHC 1330 (FAM)

Article 5; "Deprivation of liberty"; Restraint; Costs

P was a 38-year-old man, born with cerebral palsy and Down's syndrome with a history of cerebral vascular dementia. Throughout his life he had been cared for by his mother, M. But with her health deteriorating, the local authority brought proceedings in the Court of Protection to authorise an alternative placement. Since November 2009 P has been living in a large, spacious bungalow ('Z House') with other residents, receiving a high level of care. The central issue related to Article 5 of the ECHR. The local authority contended that P's liberty was restricted; M and the Official Solicitor on behalf of P submitted that it was deprived. No human rights violation was alleged.

After outlining the well-known legal principles, Mr Justice Baker referred to the guidance given in *P and Q v Surrey County Council* [2011] EWCA Civ 190. There the Court of Appeal had recognised sedative medication, relative normality, and objections to confinement as being characteristic of the objective element of a deprivation of liberty. The specific factors identified by the parties as relevant to the restriction/deprivation dilemma were listed at paras 54-56. His Lordship accepted that the local authority had taken 'very great care to ensure that P's life [was] as normal as possible'. The bungalow was not designed for compulsory detention. P was encouraged to have regular contact with his family, attended a day centre every weekday and had a good social life. These features 'help to give his life a strong degree of normality' (para 58). However, his life was completely under the control of the staff as he could not go anywhere or do anything without their support and assistance. In particular, P's occasionally aggressive behaviour and habit of touching and eating his incontinence products required a range of measures, including physical intervention at times.

The Court concluded that the steps required to deal with P's challenging behaviour, looked at overall, amounted to a deprivation of liberty. Mr Justice Baker went on to hold at para 61:

> "In my judgment, it is almost inevitable that, even after he has been supplied with a bodysuit, P will on occasions gain access to his pads and seek to ingest pieces of padding and faeces in a manner that will call for urgent and firm intervention. Those actions will be in his best interests and therefore justifiable, but they will, as a matter of concrete fact and legal principle, involve a deprivation of his liberty." (emphasis added)

The consequences were twofold. First, 'those working with P are under a clear obligation to ensure that the measures taken are the least interventionist possible'. This required regular reassessments to consider alternative management strategies, such as the bodysuit and educating P not to behave in ways that required restraint (para 62). Secondly, the Court would have to conduct regular reviews, which the local authority had requested in any event (para 63).

Departing from the general rule, the Court ordered the local authority to pay a proportion of the other parties' costs because an employee, who was subsequently dismissed, had misled the Court and tampered with P's daily care records. Such misconduct was also held to justify the naming of the local authority, after the Court balanced the Article 10 public interest considerations with the Article 8 right to respect for privacy of P and others.

Comment

This is the first reported decision to apply *P and Q v Surrey County Council* [2011] EWCA Civ 190 in the context of a supported living arrangement. There was no breach of Article 5 as the Court had authorised the placement. Given that the circumstances are not particularly unique for those presenting with P's significant level of physical and learning disabilities, the current implications of the decision are far-reaching. Similar community living arrangements with liberty restrictions of analogous intensity or degree will have to be authorised by the Court of Protection.

The effects of the judgment may also be felt in other settings where urgent and firm intrusive intervention is used in respect of those lacking capacity to consent. For the time being, using restraint to insert fingers into an incapacitated person's mouth in their best interests is a deprivation of their liberty if imputable to the state. Such a procedure is unlikely to be a rare occurrence in some hospitals and care homes (or even NHS dental surgeries). Other similar forms of bodily intrusion may also fall within the scope of Article 5, using restraint to anaesthetise a person lacking capacity to administer electroconvulsive therapy being but one example. Indeed, many life-saving medical interventions require proportionate restraint in urgent circumstances where the person lacks capacity.

A COUNCIL V X (BY HER LITIGATION FRIEND THE OFFICIAL SOLICITOR), Y AND Z [2011] EWHC B10 (COP)

Best interests; Contact; Article 8 right to respect for private and family life

This decision is the sequel to that reported as *HBCC v LG (by her Litigation Friend the Official Solicitor), JG and SG* [2010] EWHC 1527 (Fam), concerning the best interests of an elderly lady (now referred to as X) who suffered advanced dementia. At that earlier hearing, Eleanor King J had determined inter alia that it was in X's best interests that she reside at a care home ('QM') and that contact between X and her daughter, now known as Y, be limited and supervised. The judge had accepted that there had been problems with the contact between X and Y and that it often led to X becoming distressed. However, the judge expressed the hope that contact would improve.

Y had continued to attend QM for supervised contact visits with X. In July 2010, there was a further incident during the course of one such visit in which it was contended that Y had become physically abusive to staff. The police were required to attend as Y refused to leave the premises. This incident led the Council to inform Y that contact was suspended and to ban her from attending QM. The Council then made an application that a declaration that contact between X and Z, was no longer in X's best interests. An interim declaration was made by the Court in August 2010 that contact was not in X's best interests but the Council were required to consider what contact could take place away from QM. A further expert report was prepared directly addressing the issue of contact.

Y was unrepresented at the contact hearing but was assisted by a McKenzie friend. Y refused to cross-examine the Council's witnesses, and when giving evidence herself, responded consistently with "no comment". Eleanor King J noted that although it was regrettable that the evidence of the Council was untested, having heard the witnesses and seen the documentation concerning the contact visits, she accepted it. X was now immobile and no longer recognised Y, her dementia had advanced and moving her to a location other than QM would be potentially confusing and distressing aside from posing significant physical difficulties. The Local Authority had been unable to identify any other location where contact could take place, either because the venue itself was unsuitable or

because they had declined to have Y on the premises due to her behaviour. Eleanor King J held that if she believed X could make the journey or that contact was otherwise in her best interests, she would not have let the practicalities deter her and would have held the matter over for other options to be explored by the Local Authority.
As noted above, the Judge had the benefit of an expert report prepared by a Miss S expressly to consider the question of contact. Miss S had concluded on the basis of Y's behaviour that direct contact was not in X's best interests. Eleanor King J was not satisfied that if the person supervising contact were to be altered, Y's behaviour would change. In reaching her conclusion, she made it clear that she had considered the Article 8 rights of both Y and X.

Comment
This case is of interest as a rare example of the court deciding that a total prohibition on direct contact was in P's best interests, due in large part to the conduct of a relative. In the authors' experience, the courts will go to great lengths to attempt to preserve contact even where statutory bodies and care providers have long since given up. The total breakdown in relationships in this case, and the apparently inability of Y to behave appropriately not just with X but generally, was sufficient for the court to accept that further attempts to resolve the impasse had no prospect of success.

KY v DD [2011] EWHC 1277 (FAM)
Without notice applications

In this important case (in the Family Division), Theis J gave guidance on the principles practitioners should adhere to when making without notice applications.

Theis J had been the Applications Judge in the Family Division who had dealt with a without notice application in April 2011 in relation to prospective wardship proceedings concerning a five year old child residing with his mother. The mother sought an order that the child be made a ward of the Court, that the Father be prohibited from removing the ward of the Court from her care, that a passport order be imposed on the father and that an inter partes hearing be listed in two weeks time. The Child's mother had provided a sworn affidavit in support of her application stating that 9 weeks earlier the Defendant father had threatened to take the child away from her. When questioned as to why the application was proceeding on a without notice basis, Counsel for the plaintiff had informed the Judge that he had been instructed that there had been further threats by the Defendant Father in the past week that he would remove the child from the jurisdiction. On this basis, Theis J granted the Order in the terms sought. Counsel for the plaintiff subsequently contacted the Judge indicating that there had, in fact, been no subsequent threats to remove the child from the jurisdiction and that the Passport Order could not be justified. The instructions which Counsel had relayed to the Court in fact related to another matter. The Passport Order was not made. When the matter came back before Theis J in May 2011, she made a prohibited steps order and discharged the wardship.

Theis J endorsed the guidance on without notice applications previously given by Munby J in *Re W (Ex Parte Orders)* [2000] 2 FLR 927 and *Re S (Ex Parte Orders)* [2001] 1 FLR 308 and by Mr Justice Charles in *B Borough Council v S & Anor* [2006] EWHC 2584 (Fam), emphasising the duties on applicants to give full and frank disclosure. She made the following additional comments:

(1) If information is put before the court to substantiate a without notice order, it should be the subject of the closest scrutiny and, if the applicant is not present in person to verify it, be substantiated by production of a contemporaneous note

of the instructions. If that is not available, there may need to be a short adjournment to enable steps to be taken to verify the information relied upon.

(2) If additional information is put before the court orally, there must be a direction for the filing of sworn evidence to confirm the information within a very short period of time. If that direction had not been made in this case, the passport order would have been executed when the grounds for obtaining it were simply not there. That would have involved a gross breach of the defendant's rights, quite apart from the court having been given misleading information.

(3) Lastly, leaving the scrutiny that the court should give to without notice applications to one side, it is incumbent on those advising whether such an application is justified to consider rigorously whether an application is justified and be clear as to the evidential basis for it.

Comment

This case is a useful reminder of the obligations on all legal representatives when making without notice applications and in particular the requirement that applicants effectively summarise the likely case that they would have to meet had the application been opposed, and the requirement that a contemporaneous note of the applicant's instructions should be produced.

SMBC, WMP, RC AND GG (BY THEIR LITIGATION FRIEND THE OFFICIAL SOLICITOR) V HSG, SK AND SKG [2011] EWHC B13 (COP)

Forced marriages; Mental capacity to marry; MCA s.48 interim orders; Procedural matters relating to expert evidence; Confidentiality

HHJ Cardinal was asked to consider an application by the Local Authority for a declaration as to the capacity of HSG to marry and to make complex financial decisions. HSG sought a declaration that he be discharged from the proceedings on the grounds that he was not appropriately before the Court of Protection in the absence of the diagnostic functional tests under the 2005 Mental Capacity Act being met. It was his second such application, the first having been refused in December 2010.

The background to the proceedings was that in the autumn of 2010, HHJ Cardinal had been asked by the police to grant forced marriage injunctions in respect of three brothers in the G family, of which HSG was one. All three were said to have varying degrees of learning difficulty and had been or were under threat, it was said, of forced marriage. The cases were subsequently transferred to the Court of Protection and listed together.

HSG was married in 2007 and was seeking a divorce. The decree nisi had been stayed pending the outcome of the proceedings, one question being whether HSG had had the capacity to enter in to a contract of marriage. The expert psychiatrist instructed to consider HSG's case, Dr X, was unable to reach a diagnostic conclusion on the grounds that in order to do so he required further investigations and the disclosure of past records. HSG was refusing to undertake further tests, and contended vigorously before the Court (supported in this by his mother, SK) that the evidence before the Court was such it did not justify the case proceeding any further. The argument was also advanced to the Court that in such circumstances it would be a "serious breach" of HSG's common law right to confidentiality were disclosure of "deeply personal and sensitive documents" to be ordered.

HHJ Cardinal considered the law applicable to the question of capacity under the MCA 2005 and held the following:

- The presumption is that a person has capacity unless the contrary is shown (section 1 (2) of the MCA 2005).
- It was only right that HSG be assessed when in the best state to be so assessed.
- The Court could not make the declaration sought by the Council unless he was satisfied that the diagnostic and functional tests were met.
- The test for granting an interim order under section 48 of the MCA is lower than that required for a declaration that a person lacks capacity under section 15 of the MCA: What is required is "simply evidence to justify a reasonable belief that [the individual] may lack capacity in the relevant regard." *Re F* [2010] 2 FLR 28 per Marshall J cited with approval.
- Likewise, when determining capacity, what is necessary is for the person being reviewed to comprehend and weigh up the salient details relevant to the decision to be made: *LBL v RYJ and others* [2010] EWHC 2664 per Macur J. In the instant case, the salient details were those going to the factors identified as relevant to the question of capacity to marry by Munby J [as he then was] in *Sheffield CC v E & S* [2004] EWHC 2808 (Fam)

On the facts, HHJ Cardinal found that the information available as yet to the court established the Court's jurisdiction. There was a substantial body of evidence which gave good cause to believe that HSG may lack capacity - the test for making interim orders was accordingly made out. It would be irresponsible and premature for the court to discharge HSG when the inquiries of Dr X were not complete in circumstances where at least some of his inquiries could be completed without forcing HSG to undergo tests he was declining to undertake.

The case is of some importance because of a number of procedural difficulties that arose during the course of the application, not least the fact that a social worker employed by the Council (acting without taking legal advice) when invited to file a further statement addressing HSG's capacity to marry chose to re-interview HSG at Court and then by telephone without consulting HSG's solicitor. As a result, HHJ Cardinal identified at paragraph 57 of the judgment the following lessons that he considered should be learnt from the "difficult" application:

> "i. An expert as a matter of good practice ought in my judgement to seek clarifications and raise questions under Rule 129 Court of Protection Rules 2007 before completing a report referring to lacunae in the information before him.
> ii. A social worker investigating capacity ought to keep a party's solicitor informed of his intention to interview that party and not just proceed.
> iii. It is right to conclude that a party may lack capacity [and thus the test in *Re F* is met] if there are significant and important gaps in the history and therefore the knowledge of the expert examining that party and there is evidence which may well point to incapacity in the relevant regard.
> iv. It is unhelpful for a doctor [in this case a GP] to descend to vague expressions such as mental health issues in a report he/she knows is to go to the court.
> v. It is not in my judgement an improper interference with the human or common law rights of a party for a medical expert to be provided with educational health and other records to enable him to complete his inquiries.
> vi. I do not accept that psychometric testing is so intrusive as to be an improper test to apply to someone on the borderline of capacity even where he is reluctant to undertake them.
> vii. If a solicitor acting for the Official Solicitor discusses the case with a joint expert orally or in writing the instructing parties should be provided with a copy of that communication or attendance note of that conversation."

Comment

This case is of interest because it suggests that the threshold for making an interim declaration as to lack of capacity under s.48 MCA 2005 is very low, notwithstanding the presumption in favour of capacity contained in s.1 MCA 2005. In this case, HSG's experienced solicitor considered that his client had capacity, and the test in question (capacity to consent to marriage) was a very low one. Yet, having been seized of the matter, the court was reluctant to forego jurisdiction until the expert evidence was complete.

R (C) v A Local Authority and Ors [2011] EWHC 1539 (Admin)

Article 5; "Deprivation of liberty"; Residential school; Seclusion; Codes of Practice; Best interests

Ryder J has recently handed down judgment in a judicial review claim and Court of Protection proceedings that were being heard together. The judgment focuses in large part on the reasoning behind the very detailed best interest declarations that the Court made regulating the deprivation of C's liberty including his seclusion in a residential school.

C is an 18 year old boy who had been resident in a school for some years. He has autism and severe learning disability with extremely challenging behaviour. His behaviour was managed in large part by the use of a padded blue room in which he was secluded when he exhibited challenging behaviour. He had developed a number of behaviours that were particularly prevalent when in the 'blue room' including defecating, smearing and eating his own urine and faeces, and stripping naked. He was prevented from leaving the blue room for reasons of aggression and nakedness. The blue room was also used as a room to which C had been encouraged to withdraw as a safe place.

It was common ground that the DOLS regime under the MCA does not apply to residential schools. It was also common ground that when C was secluded in the blue room he had been deprived of his liberty. The court gave detailed consideration to these matters. The judgment can be summarised as follows:

(i). Since at least C's 16th birthday the approach of the MCA 2005 was more relevant to his situation than the Children Act 1989, but this approach was not applied to C.

(ii). As the DOLS code of practice and schedule A1 of the MCA did not apply to C, an application should have been made to the COP before any deprivation of liberty occurred. In this case the application should have been made on C's 16th birthday.

(iii). Since at least C's 16th birthday there has been no lawful authority to deprive C of his liberty.

(iv). The Court was unable to make even interim declarations as to whether the conditions in which C was being deprived of his liberty were in his best interests until it had heard oral evidence from a number of those caring for C and from instructed experts.

(v). The application of good practice in the COP in any determination of best interests will of necessity have regard to the same material as that contained in the DOLS Code of Practice because inter alia the DOLS Code of Practice is overtly informed by decisions of this Court and the ECHR.

(vi). The Mental Health Code of Practice 1983 reflects best practice in relation to seclusion. It applies to the care, treatment, and in particular seclusion and

restraint of C, who is a severely learning disabled child who is resident in a special school and whose condition prima facie falls within the definition of mental disorder in the MHA.

(vii). While the issue of whether the MHA Code of Practice would apply to children and young persons in children's homes but whose learning disability does not fall within the definition of a mental disorder was not argued, but the Judge held that it should be applied as a matter of good practice.

The court gave detailed consideration to the situations in which secluding C was lawful and in his best interests. The Court's view was that it could be used as follows:

(i). When used to control aggressive behaviour, but only so long as was necessary and proportionate and it had to be the least restrictive option. It had to be exercised in accordance with an intervention and prevention plan designed to safeguard C's psychological and physical health. That plan, together with guidance for use of the blue room, had to be written up into a protocol forming C's care plan and all staff had to be trained in a manner that was specific to C.

(ii). It was not lawful to seclude C used solely for nakedness, such seclusion is little more than an amateur attempt at behaviour modification which is not proportionate to any risk or the least restrictive option. Staff must be aware of and be trained in strategies to allow C to be naked.

(iii). It was not lawful to seclude C as a punishment, as part of behaviour management plan.

(iv). It was not lawful to seclude C solely for reason of him self-harming. It could be used where C's self-harm was coupled with aggressive behaviour which of itself necessitated the use of seclusion.

Guest Comment from Katie Scott (Counsel for C)
This judgment will have wide repercussions for those who care for young people with challenging behaviour for two reasons:

First it makes it clear that where a young person of 16 is to be deprived of their liberty within a children's home or residential school, an application for lawful authority must be made prior to the deprivation of liberty taking place. While the DOLS code of practice does not strictly apply to deprivations outside schedule A1, the guidance will be applied by the Courts in such situations.

Secondly it makes it clear that where the young person has a mental disorder within the meaning of the MHA 1983 then the MHA Code of Practice applies to their seclusion. Even where a young person does not have a mental disorder within the meaning of the MHA as a matter of good practice the MHA Code of Practice should be applied.

The procedure adopted by the Court for the taking of expert evidence is also worthy of note. The Court heard oral evidence from 9 expert witnesses. Seven of them were sworn in together and taken through a list of issues, giving their views and commenting on the views of others as each issue was addressed in turn. In this way the Court was able to hear evidence from 8 of the 9 witnesses in one afternoon.

R v Hopkins; R v Priest [2011] EWCA Crim 1513
MCA s.44; Wilful neglect

This case provides further clarification as to the constituent elements of the offence of wilful neglect of a person lacking capacity created by s.44 MCA 2005; as such, it provides

a useful sequel to the earlier decision of *R v Dunn* [2010] EWCA Crim 2395, reported in our May issue.

The effective owner and manager, respectively, of a care home appealed against convictions returned in June 2010. During the course of the trial before the Crown Court, the two had sought to argue that s.44(1)(a) (providing that s.44 applies if D has the care of a person who lacks, or D reasonably believes to lack) capacity was so vague that no prosecution could hope to succeed. This was repeated as a ground of appeal. The Court of Appeal made it clear that they had substantial doubts as to what it was that the matter in respect of which a judgment of capacity had to be made, such that, unconstrained by authority, they would have been minded to accede to the submission that s.44(1)(a) (read together with s.2(1)) MCA 2005) was so vague as to fail the test of sufficient certainty at common law and under Article 7(1) ECHR. However, and whilst expressing some reservations about the judgment in Dunn, they considered that the ratio of the earlier decision was conclusive as to the question of the relevant capacity – i.e. namely the person's ability to make decisions concerning his or her own care. They therefore found that this ground of appeal was not made out.

The Court then went on to consider the interaction between s.44 and s.2(4) MCA 2005; and held (importantly) that s.2(4) – providing that the question of capacity in proceedings is to be determined on the balance of probability – was binding even in criminal cases, such that the prosecution must prove (1) to the criminal standard that the defendant ill treated or wilfully neglected a person in his care, and (2) that on a balance of probability that person was a person who at the material time lacked capacity.

Finally, the Court turned to the question of the judge's handling of the issues of wilful neglect. They made it clear that they considered that, given the wording of s.44 MCA 2005, the critical requirement is that each juror is sure that during the indictment period the defendant was guilty of wilful neglect; it did not matter whether they were agreed upon each failure of care relied upon by the prosecution. The Court had some, frankly, withering remarks to make as to the adequacy of the judge's summing up of the evidence and of the issues, which, cumulatively, led them to the conclusion that the verdicts could not be sustained. Those remarks were specific to the cases before the Court; for present purposes, it suffices to note that the Court did identify that, where the defendants were persons whose primary responsibility was supervision and management, "[t]he jury needed to ask in respect of each [alleged failing on their part] (1) are we sure lack of care is proved?; (2) if so, are we sure that it amounted to neglect?; (3) if so, are we sure either (i) that the defendant knew of the lack of care and deliberately or recklessly neglected to act, or (ii) that the defendant was unaware of the lack of care and deliberately or recklessly closed her mind to the obvious?" (paragraph 58).

Comment

It is perhaps not facetious to suggest that it is fortunate for the Government that the appeal in *Dunn* was heard before the appeals in *Hopkins* and *Priest*, because it is quite clear that, but for the earlier decision, this panel of the Court of Appeal would have had little hesitation in holding that s.44 was sufficiently poorly worded that it cannot ground an offence. Section 44 did, though, survive, and the clarification given as to the requisite standard of proof regarding the vulnerable adult's lack of capacity is an important one. Had the bar been set to the criminal standard, it would have rendered it substantially more difficult to bring prosecutions – especially where, as is frequently the case, the adult has died before the matter actually comes to Court.

MINISTRY OF JUSTICE CONSULTATIONS:

(1) European Regulation on mutual recognition of protection measures in civil matters
The Ministry of Justice is inviting views on a proposal for a European Regulation on mutual recognition of protection measures in civil matters. The Regulation aims to ensure that a protection measure (for example a non-molestation order) provided to a person in one Member State is recognised and maintained when that person travels or moves to another Member State. The United Kingdom has three months to decide whether or not to "opt in" to negotiations on the proposal. The Ministry of Justice is gathering evidence from interested parties and the deadline for responses is Friday 8 July 2011. Details of the consultation (including the address for responses) have been circulated with this newsletter.

The consultation is particularly pertinent to the making of orders restricting or prohibiting contact between parties and the cross-border enforcement of such orders.

Consultation: (1) some COP decisions to be taken by authorised court officers
The MOJ has just published a consultation paper on proposals for decisions on some straightforward applications to the Court of Protection to be taken by "authorised" court officers.

The consultation runs until 20 September 2011 and can be found at:
- http://www.justice.gov.uk/consultations/decisions -court-protection.htm

New SCIE guidance on IMCA/RPR roles
The Social Care Institute for Excellence has just published (with ADASS endorsement) new guidance on "IMCA and paid relevant person's representative roles in the Mental Capacity Act Deprivation of Liberty Safeguards," available at
- http://www.scie.org.uk/publications/guides/guide 41/

ISSUE 11 JULY 2011 COURT OF PROTECTION UPDATE

PH V A LOCAL AUTHORITY AND Z LIMITED AND R [2011] EWHC 1704 (FAM)
Standard DOLS authorisation; Mental capacity as to residence, care and treatment

The Court was asked to decide whether a man suffering from Huntingdon's Disease ('HD') had the capacity to make decisions about his residence, care and treatment. The matter came before the Court by way of an application under s.21A MCA 2005 seeking a termination of a standard authorisation made by the local authority permitting Z Limited to keep PH at a care home. The application challenged the conclusion of the local authority (as supervising body) that PH met two of the qualifying requirements for a standard authorisation, namely the capacity requirement and the best interests requirement. PH (acting by his litigation friend, the Official Solicitor) further challenged the purposes and conditions of the standard authorisation. It was agreed that the question of capacity would be determined as a preliminary issue. A jointly-instructed consultant neuro-psychiatrist (with a particular expertise in well respected as an expert in HD) concluded that PH had the capacity to decide the question of residence. This view was accepted by the Official Solicitor and shared by P's former partner, R, with whom he had continued to live until he was placed at the care home, and to whom PH wished to return. However, the view was contrary to the conclusions of the medical professionals treating PH, and both the local authority and Z Limited sought to challenge the conclusions of the expert.

Following a two-day hearing in which he heard evidence from the treating professionals, PH's social worker and R, Baker J concluded that PH lacked the relevant capacity. Before assessing the evidence, Baker J set out in his judgment (at paragraph 16) a summary of the principles to be adopted by a Court assessing capacity which are of sufficiently general application to all those required to assess capacity that they merit setting out in full:

> "16. When addressing questions of capacity, the Court must apply the following principles.
> i) A person must be assumed to have capacity unless it is established that he lacks capacity: section 1(2). The burden of proof therefore lies on the party asserting that P does not have capacity.
> ii) The standard of proof is the balance of probabilities: section 2(4).
> iii) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success: section 1(3). As paragraph 4.46 of the Mental Capacity Act 2005 Code of Practice makes clear, "it is important to assess people when they are in the best state to make the decision, if possible".
> iv) A person is not to be treated as unable to make a decision merely because he makes an unwise decision: section 1(4).
> v) A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or disturbance in the functioning of, the mind or brain: section 2(1). This first question is sometimes called the "diagnostic test".
> vi) For the purposes of section 2, a person is unable to make a decision for himself if he is unable to (a) to understand the information relevant to the decision; (b) to retain that information; (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision whether by talking, using sign language or any other means: section 3(1). These four factors comprise the second question which is sometimes called the "functional test".
> vii) The Code of Practice gives guidance as to the meaning of the four factors in the functional test. Thus, so far as the first factor is concerned - understanding information about the decision to be made – paragraph 4.16 provides: "It is important not to assess someone's understanding before they have been given relevant information about a decision. Every effort must be made to provide information in a way that is most appropriate to help the person understand".
> viii) The Code also gives guidance concerning the third of the four factors – using or weighing information as part of the decision-making process. Paragraph 4.21 provides "for someone to have capacity, they must have the ability to weigh up information and use it to arrive at a decision. Sometimes people can understand information, but an impairment or a disturbance stops them using it. In other cases, the impairment or disturbance leads to a person making a specific decision without understanding or using the information they have been given."
> ix) Further helpful guidance as to the interpretation of the functional test is given by Macur J in *LBL v RYJ* [2010] EWHC 2664 (Fam). At paragraph 24 of the judgment, the learned judge said:
>
> > "I read section 3 to convey, amongst other detail, that it is envisaged that it may be necessary to use a variety of means to communicate relevant information, that it is not always necessary for a person to comprehend all peripheral detail and that it is recognised that different individuals may give different weight to different factors."

x) Later, at paragraph 58 of the judgment, the learned judge indicated that she agreed with the interpretation of the section 3 test advanced by the expert in that case (which, coincidentally, was Dr Rickards) namely that it is "to the effect that the person under review must comprehend and weigh the salient details relevant to the decision to be made".

xi) In *Sheffield City Council v E* [2004] EWHC 2808 (Fam) (a case concerning the capacity to marry decided before the implementation of the 2005 Act) Munby J (as he then was) said (at paragraph 144):

> "We must be careful not to set the test of capacity to marry too high, lest it operate as an unfair, unnecessary and indeed discriminatory bar against the mentally disabled".

Although that observation concerned the capacity to marry, I agree with the submission made by Miss Morris on behalf of the Official Solicitor in this case that it should be applied to other questions of capacity. In other words, courts must guard against imposing too high a test of capacity to decide issues such as residence because to do so would run the risk of discriminating against persons suffering from a mental disability. In my judgement, the carefully-drafted detailed provisions of the 2005 Act and the Code of Practice are consistent with this approach.

xii) The 2005 Act generally, and the DOLS in particular, are compliant with Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms – see my earlier decision in *G v E* [2010] EWHC 621 upheld by the Court of Appeal at [2010] EWCA Civ 822 and in particular paragraphs 24-25 and 57 of the judgment of Sir Nicholas Wall P in the Court of Appeal. Just as there is no justification for imposing any threshold conditions before a best interests assessment under the DOLS can be carried out (the point taken up unsuccessfully by the appellants in *G v E*) so in my judgment there is no reason for adopting the approach advocated by Miss Morris on behalf of the Official Solicitor in this case, namely that a finding of a lack of capacity should only be made where the quality of the evidence in support of such a finding is "compelling". Equally, it is unnecessary for the court to adopt an approach, also advanced by Miss Morris on behalf of the Official Solicitor, that the statutory test should be construed "narrowly". The statutory scheme is, as I have already observed, carefully crafted. I agree with the submission made on behalf of Z Limited (in written submissions by Mr Vikram Sachdeva who did not appear at the hearing) that the question of incapacity must be construed in accordance with the statutory test – "no more and no less".

xiii) In assessing the question of capacity, the court must consider all the relevant evidence. Clearly, the opinion of an independently-instructed expert will be likely to be of very considerable importance, but in many cases the evidence of other clinicians and professionals who have experience of treating and working with P will be just as important and in some cases more important. In assessing that evidence, the court must be aware of the difficulties which may arise as a result of the close professional relationship between the clinicians treating, and the key professionals working with, P. In Oldham *MBC v GW and PW* [2007] EWHC 136 (Fam) [2007] 2 FLR 597, a case brought under Part IV of the Children Act 1989, Ryder J referred to a "child protection imperative", meaning "the need to protect a vulnerable child" that for perfectly understandable reasons may lead to a lack of objectivity on the part of a treating clinician or other professional involved in caring for the child. Equally, in cases of vulnerable adults, there is a risk that all professionals involved with treating and helping that person – including, of course, a judge in the Court of Protection – may feel drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to

> carry out an assessment of capacity that is detached and objective. Having identified that hypothetical risk, however, I add that I have seen no evidence of any lack of objectivity on the part of the treating clinicians and social worker who gave evidence in this case."

In concluding that he preferred the evidence of the treating medical professionals and the social worker, Baker J was "struck by the fact that [the] report [of the jointly instructed expert], and the answers to the supplementary questions posed by the other parties, seemed somewhat superficial. This may have been a reflection of the fact that he was basing his opinion on a single interview of ninety minutes. It would be an over-simplification to describe it as a snapshot but it is, to my mind, a disadvantage that the assessment was based on a single visit" (paragraph 56).

Comment
This judgment is of some considerable importance for the following reasons:

(1) endorsing the conclusion of Macur J *in LBL v RYJ* [2010] EWHC 2664 (Fam) that attention must be given to whether the person must comprehend the salient details relevant to the decision to be taken (i.e. not every detail);
(2) emphasising that courts must guard against imposing too high a test of capacity to decide issues such as residence because to do so would run the risk of discriminating against persons suffering from a mental disability;
(3) for its careful analysis of the relevant weight to be placed upon the evidence of a jointly instructed expert versus treating professionals (including the dangers of a lack of objectivity on the part of the latter);
(4) as an example of the practical difficulties that can be caused by the fact that it is likely in many cases that the jointly instructed expert will only have the opportunity to make one visit and undertake one interview with P, and will, inevitably, only be able to give a snapshot.

MCDONALD V RB KENSINGTON AND CHELSEA [2011] UKSC 33
Article 8; Community care; Funding challenge

We draw your attention to this important community care case because, in it, their Lordships (with a powerful dissent from Baroness Hale) make it clear that the scope for challenges to funding decisions based upon Article 8 ECHR is likely to be very limited. Lord Brown JSC made a particular point of noting that a local authority can choose between appropriate care packages upon the basis of cost – see paragraph 22:

> "I add only that, even if such an interference [with the Claimant's Article 8(1) ECHR rights] were established, it would be clearly justified under article 8(2)… on the grounds that it is necessary for the economic well-being of the respondents and the interests of their other service-users and is a proportionate response to the appellant's needs because it affords her the maximum protection from injury, greater privacy and independence, and results in a substantial costs saving."

Comment
We anticipate that it may well be the case that the approach adopted by the Supreme Court in this would feed through into any 'collateral' judicial review challenge that may be brought to a decision by a public authority not to put before the Court of Protection a particular option for consideration. It is one that has already been picked up by the

Court of Appeal in rejecting an Article 8 ECHR challenge to a PCT's funding decision (*R (Condliff) v North Staffordshire PCT* [2011] EWCA Civ 910).

In other words, we anticipate that, so long as it remains the case that such a decision by a local authority is only challengeable by way of judicial review, it is likely that, so long as a local authority can demonstrate that the option(s) that is/are before the Court of Protection from its end can meet the needs of P, it is likely that the Administrative Court will be very slow to find its decision flawed on the basis that a more "Rolls-Royce" package would be better.

DEPRIVATION OF LIBERTY: STATISTICS AND A MAP

With many thanks to Caroline Hurst of Langleys for drawing this to our attention, you may find the following link of interest:

- http://carlplant.me/mental-capacity-act-2005-deprivation-of-liberty. It is a map putting into graphical form the information on DOLS applications contained in the Second Report on Annual Data for 2010/11, which is itself important reading and is to be found at http://www.ic.nhs.uk/pubs/mentalcapacity1011annual.

The key findings of this Report (covering the period April 2010-March 2011) are as follows:

- The total number of applications made was still much lower than expected for the second year (8,982 in England compared with the number predicted for in England and Wales1 which was around 18,600). This compares to the 7,157 applications made in 2009/10; just over 34 per cent of the predicted number for that year.
- The number of successful applications resulting in an authorisation to deprive a person of their liberty was about the expected number (4,951 in England compared to the 5,000 predicted for in England and Wales1), though a much higher percentage of applications than expected were successful (55% compared with the predicted 25%). In the previous year 3,297 applications were approved – a 46% approval rate compared to the 25% expected.
- About 2% of applications that were not authorised involved situations where the person was nevertheless judged as being in a situation that amounted to a deprivation of liberty. In these cases the hospitals and care homes could be acting illegally, if that person was not swiftly cared for or treated in less restrictive circumstances. This is half the percentage in 2009/10 (4%).
- Of those authorisations that were granted, more then half (55%) were for a person who lacked capacity because of dementia.
- 57% of those applications made to a Local Authority were granted when applying for a deprivation of liberty compared to 50% in Primary Care Trusts.
- Authorisations granted for people in care homes were generally for longer periods than for people in hospitals (62% of authorisations granted by Local Authorities were for more than 90 days compared with 23% of Primary Care Trust authorisations).
- There is a big difference in the number and rate of applications in different parts of England, with the highest number and rate of applications being made in the East Midlands (1,644 applications and 46 applications per 100,000 population) compared to the England rate (22 applications per 100,000 population) and the lowest number of applications made in the North East (579) with the lowest rate being in the East of England with just 13 applications per 100,000 population."

APPOINTMENT OF QB JUDGES TO HEAR COP CASES IN AN EMERGENCY

With immediate effect from 28.7.11, all Queen's Bench Division Judges have been nominated for purposes of s.46 MCA 2005 to exercise the jurisdiction of the Court of Protection.

It is envisaged that they will only be required to hear Court of Protection applications on an emergency basis in the unlikely event that it has not been possible to identify a High Court Judge of the Family Division to hear the matter.

However, a nomination is a nomination, and it will be of interest to see whether any enterprising souls seek to contend – say – that an Admin Court Judge hearing a judicial review relating to an incapacitated adult should don the cap of a CoP judge to make best interests declarations regarding that person…

COURT OF PROTECTION USER SURVEY

Finally, we attach to this newsletter a letter (and accompanying questionnaire) from the new Court Manager at the Court of Protection. Please do take the time to read it and respond to the questionnaire, especially those regular users to whom it is specifically aimed.

ISSUE 12 AUGUST 2011 COURT OF PROTECTION UPDATE

MANCHESTER CITY COUNCIL V G AND OTHERS [2011] EWCA CIV 939

Costs

The Court of Appeal considered an appeal from a judgment of Baker J ([2010] EWHC 3385 (Fam)) making an award of costs against Manchester City Council. We have discussed this judgment previously, but summarise it again here for ease of reference.

E, who suffers from tuberous sclerosis and learning difficulties, had been accommodated with F pursuant to s.20 of Children Act 1989 in 1999. F then looked after E throughout his childhood. In April 2009 the Appellant removed E from F's care and placed him in a residential unit. No DOLS authorisation was in place and no Order was sought from the Court of Protection. Following E's removal from her care, F was not involved in the decision making process and was not allowed to see E until 5 months later. In November 2009, E's sister, G, made an application to the Court of Protection with the assistance of legal aid. It was not until the first day of the final hearing that the Appellant formally conceded that the circumstances of E's removal from F's care had been unlawful and that E had been deprived of his liberty.

In relation to the costs of this aspect of the proceedings, Baker J departed from Rule 157 of the Court of Protection Rules which provides that where the proceedings concern P's personal welfare, the general rule is that there will be no order as to the costs of the proceedings or of that part of the proceedings that concerns P's personal welfare. Baker J held that whilst the Court should follow the general rule where appropriate, the Local Authority's blatant disregard of the MCA on the facts of this case justified a departure from it. The Order was made in the following terms:

"(1) That the local authority [the appellant, Manchester City Council] should pay the costs of G, F and E, including pre-litigation costs, up to and including the first day of the hearing before me on 14th January 2010 on an indemnity basis.
(2) The local authority shall pay one third of the costs of G, F and E from that date up to and including the hearing on 6 May 2010 on a standard basis.
(3) All costs will be subject to a detailed assessment, if not agreed."

Manchester City Council brought the appeal on the ground that the Judge had erred in departing from Rule 157 and should not have apportioned the costs or alternatively, that the only order that should have been made was a limited order against the Appellant in respect of the costs incurred by the Respondents up to and including the first day of the hearing on 14 January.

In upholding the Order of Baker J, the Court of Appeal reiterated that the appeal could only succeed in the event that Baker J made an error of law or if his conclusions are conclusions which no reasonable judge could reach. In so far as costs decisions are concerned, it is well established that: "[t]he judge has the feel of a case after a trial which the Court of Appeal cannot hope to replicate and the judge must have gone seriously wrong if this court is to interfere." (*Straker v Tudor Rose* [2007] EWCA Civ 368, [2007] C.P. Rep. 32, para 2)

On the facts, Hooper LJ held that Baker J had rightly concluded that this was not a paradigm best interests case such that the general rule should be applied. Baker J had been driven to find that the conduct of the Appellant had increased the complexity of the case. Ignorance of the legislation or its complexity did not afford the Local Authority a defence. Even though the Respondents had not sought costs on an indemnity basis, Hooper LJ held that Baker J had been entitled to order that they paid on this basis. Equally, whilst Hooper LJ noted that it was correct that the Appellant had technically succeeded on one part of the case in that no Order to return E to F had been made at the conclusion of the interim hearing (although this order was then made on 6 May 2010), that did not prevent Baker J from ordering that the Appellants pay one third of G, F and E's costs from 14 January until 6 May 2010 on a standard basis.

Comment
This case is a useful reminder that although generally a Local Authority will not face an adverse costs award in welfare proceedings the Court of Protection has a discretion to disapply Rule 157 if the circumstances of the case justify it. Such circumstances include a failure to adhere to the basic principles of the MCA regime.

One point of regret is that the Court of Appeal did not take the opportunity (as we understood had at one point been envisaged) to give general guidance as to the circumstances under which departure from the general rule under Rule 157 will be likely. Senior Judge Lush has given some guidance to this effect (*Re RC (deceased)* [2010] EWHC B29 (COP)), and it is perhaps unfortunate that the guidance given in that case was not referred to by the Court of Appeal, whether with approval or otherwise. All we are left with is the somewhat terse reference by Hooper LJ to his agreement with Baker that this was not a "typical" CoP case.

That having been said, it would seem clear that, as Baker J had emphasised at first instance, it is likely that it is only those Local Authorities who act unlawfully who need fear any order as to costs. It further seems likely that the threshold of misconduct justifying such an award (on any basis, let alone an indemnity costs basis) will be relatively high.

P v Independent Print Ltd and Ors [2011] EWCA Civ 756

Media; Anonymity; Reporting restrictions; Articles 8 and 10

The Official Solicitor appealed on behalf of P against an order made by Hedley J permitting the Independent newspaper to attend hearings in a welfare case in the Court of Protection. The application by the Independent was sprung on the parties on the day of a directions hearing, as a result of the newspaper's erroneous belief that simply emailing an application to Archway would result in that application being issued and copies served on all parties. The Official Solicitor and the statutory bodies responsible for P were therefore disadvantaged by not having been able to obtain evidence about the effect on P of his case being reported by the press. By the time of the Court of Appeal hearing, an expert report had been obtained which said – materially – that P would be unlikely to recognise himself if he read the anonymised account of the hearing that had already been published by the Independent, but that the more press coverage that was given, the greater chance of P becoming aware that details of his personal life were being shared with the media, which would in turn contribute to a sense of distrust and seriously undermine his care plan and the developing of therapeutic relationships.

The Court of Appeal upheld the ex tempore judgment of Hedley J, saying that the judge had correctly applied the two stage test (whether there is good reason for the media's application, and if so, whether the public interest in freedom of expression outweighed P's interest in maintaining the privacy of his personal affairs) and had reached the right conclusion.

The Court of Appeal expressly declined to give any general guidance about media applications to attend and report on Court of Protection hearings, but did say that in P's case:

- since there had been a previous anonymised judgment published,[1] there was already material in the public domain and therefore continuing public interest in the eventual outcome.
- even though the issues raised in P's case were said not to be particularly unusual, there was no risk that the decision would lead to media access in many or all cases: each case had to be decided on its own merits.
- the judge's decision was not caught by s.1(5) MCA 2005 because it was not a decision made on P's behalf. P's best interests were therefore not determinative, although of course any negative effect on P of media involvement would be relevant to the balancing process that had to be carried out.
- the judge had used his powers under Rule 91(3) to impose restrictions on the publication of any information which would identify P and had accepted that the local authority would instruct members of staff providing care for P that P must not be made aware of the fact or content of any reporting of his case. An injunction had been made against P's mother preventing her from alerting P to the involvement of the press. There was therefore a limited risk of there being an adverse effect on P.

Comment

This decision is important because, notwithstanding the Court of Appeal's statement that they had not opened the floodgates to media involvement in welfare cases, it is difficult to see how (given this approach) the Article 8 rights of P in any case could outweigh the Article 10 considerations provided that reporting restrictions and injunctions can be drafted which, if complied with, greatly reduce the risk of any adverse effect on P. If it is

[1] In fact, there have been two, sub nom *A Primary Care Trust v AH and P* [2008] EWHC 1403 (Fam) and *A Primary Care Trust v P* [2009] EW Misc 10 (EWCOP) (the latter being the Bailii classification)

right to allow press attendance and anonymised press coverage in a case where the expert evidence is that P's care will be seriously undermined should he become aware of the media's involvement, what would have to be shown to tip the balance in the other direction? Perhaps in any case where there is a chance of media interest (for example because of the strong views of a family member, the questionable conduct of a statutory body, or the circumstances of the case itself) those concerned for P's welfare should come to every hearing armed with expert evidence about not only the impact on P of media coverage of the case, but also the prospects of restrictive reporting requirements and injunctions being implemented and adhered to. Certainly, it appears from this judgment that the Court of Appeal is keen to leave the decisions to the High Court judges. Acquiring expert evidence after the event, as occurred here due to the lack of advance warning of the press application, is far from ideal, and as soon as any press coverage is given, it becomes harder to argue that future hearings should be in private.

While it is obviously a good thing for perceptions of the Court of Protection as a secretive court to be addressed through increased media involvement, and while Hedley J was surely right that well-informed press reporting is better than ill-informed coverage, the authors cannot shake off a faint feeling that something may have gone wrong when the price of press involvement in this particular case is the imposition of extensive and serious measures (including an injunction against his mother) to make sure that P is kept completely in the dark.

Furthermore, the authors also note that this case is another in the line suggesting a shift in approach from those cases decided regarding media reporting prior to the enactment of the MCA, when the Courts appeared to be more concerned about P's inherent interest (whether under Article 8 ECHR or otherwise) about securing the privacy of sensitive material regarding him (e.g. medical records). On one view, it would appear somewhat odd that journalists would have access to (or knowledge of the contents of) these very sensitive documents simply because P is before the Court of Protection. Put another way, in 'conventional' litigation, P will have a degree of choice as to whether (1) to bring or defend such litigation; and (2) whether to disclose such sensitive documents. This would inevitably then act as a further filter upon reporting of such material. In proceedings relating to P's best interests, P almost invariably will not have had the capacity to exercise any choice as to the bringing/defending of the litigating or the disclosure of the documents; the further filter/safeguard for P regarding reporting of sensitive material relating to him is therefore removed.

WCC v GS, RS AND J [2011] EWHC 2244 (COP)
Declaratory relief; Contact; Fact finding

This is a decision of District Judge Marin upon an application by a local authority for declaratory relief regarding an elderly lady's residence and contact with one of her children. It merits note not for the substance of the decision, but rather for the approach taken by the District Judge to the question of whether it was necessary to hold a fact-finding hearing before making declarations as to contact between the elderly lady, GS, and her son, RS.

The relevant paragraphs of the judgment are as follows:

> "30. There are many cases in the Court of Protection where large numbers of allegations are made by a care home, a local authority or a family member against another family member (usually a child as in this case) which relate to the family member's conduct during visits to a care home or at home. The difficulty that is

often faced by the court in these cases is whether or not a fact finding hearing is necessary in order to establish the veracity of the allegations first before the court proceeds to impose a final order in a case.

31. The obvious problem with fact finding hearings is that they can be lengthy, they eat up the court's pressed resources and they are expensive not only because of legal costs but in terms of the cost of social workers and other professionals involved who need to attend court to give evidence. In this case, both judges who managed this case prior to the final hearing clearly took the view that no fact finding hearing was necessary presumably because they believed that the court would be able to make its own decision after hearing the evidence at the final hearing.

32. It should be said in RS's favour that he has accepted some of the allegations such that I have taken the view in agreement with all the parties that there is no need for me to embark on a long fact finding exercise in respect of every event that is found in the papers. I believe this is a proportionate way of dealing with matters.

…[the Judge then recorded what RS had accepted]

35. Given these admissions I do not need to make any further investigation into the various allegations made against RS because the admissions on their own in my view demonstrate that the concerns raised by WCC about RS' behaviour are genuine."

Comment

The necessity for and scope of fact-finding hearings is a perennial difficulty for practitioners before the Court of Protection. There are decisions which suggest which one is always required before the Court makes a decision which involves a serious intervention in P's family life where the factual basis for that intervention is contested – see, for instance, *LBB v JM, BK and CM*. However, the authors have collective experience of numerous cases, including this one, in which what might be said to be a more pragmatic approach is taken. This case represents a useful, and rare, example of the reasoning process being recorded in a judgment approved for publication (even if, strictly, it can have no precedent value given that it was determined by a District Judge).

COURT OF PROTECTION ANNUAL REPORT

With thanks to James Batey, and apologies for failing to include it last month, we should draw your attention to the Court of Protection's report for 2010, available at

- http://www.judiciary.gov.uk/NR/rdonlyres/2EE702F5-5C39-4311-8B32-E7BCB31EDBDC/0/courtofprotectionreport2010.pdf

Amongst other things, it includes a very helpful summary of some of the major cases decided in 2010.

ISSUE 13 SEPTEMBER 2011 COURT OF PROTECTION UPDATE

R (ON THE APPLICATION OF O) V LONDON BOROUGH OF HAMMERSMITH AND FULHAM [2011] EWCA CIV 925

Child; Residence; Judicial review; Article 8

O was a child with complex care needs due in part to his severe autism. O's parents considered that O needed to reside and be educated in one location due to the difficulties he experiences with transitions from one environment to another. They identified an

appropriate establishment, namely Purbeck View School in Dorset, but were prepared to consider similar alternatives. The Local Authority decided that O should attend a school near his home, Queensmill, and reside in a separate location. The residential placement initially proposed would be available for 38 weeks a year.

Proceedings for Judicial Review of the Local Authority's decision as to O's placement were issued on 11 February 2011. The decision was challenged on various grounds, including the ground that the only rational option was to accommodate O at Purbeck View School. A mandatory Order requiring the Local Authority to accommodate O at Purbeck View was sought. At first instance, the matter came before Blair J ([2011] EWHC 679 Admin). Mr Justice Blair accepted the submission put by Counsel for O that the standard of Wednesbury review was variable and that the case warranted an intense degree of review. On this basis, Blair J concluded that the decision was irrational as the Local Authority had placed too much weight on a decision relating to O's education taken by the First Tier Tribunal two years previously and had placed insufficient weight on the conclusion of its own core assessment that there was a need to minimise transitions. However, Blair J declined to grant the mandatory order on the basis that there were other options lawfully open to the authority. Blair J rejected an argument that local authority's decision was a disproportionate and unlawful interference with O's Article 8 ECHR rights or that in the alternative, the local authority was in breach of its positive obligations to promote the fulfilment of his Article 8 rights.

Both parties appealed this decision. In May 2011, prior to the appeal being heard, the Local Authority took a fresh decision and proposed a placement at Queensmill School with a residential placement at a children's home in Croydon 9 miles away which would be available 52 weeks per year. This was rejected by the parents. Rather than issuing proceedings for judicial review of the fresh decision, O's legal representatives indicated that they would leave it to the Court of Appeal to resolve the issues, a procedural course which the Defendant opposed.

The matter came before the Court of Appeal for consideration of both permission and the substantive hearing if appropriate.

<u>O's appeal</u>

Black LJ held that in essence O's case was that the only way O's needs could lawfully be met was through a placement at Purbeck View. If that were not accepted, all the grounds of challenge would fail. O had presented a powerful case supported by expert evidence. The Local Authority did not challenge the suitability of Purbeck View School but did not consider that it was the best way to meet O's needs at present.

Black LJ concluded that "the difference of opinion between the local authority on the one hand and O's parents and their advisors on the other as to what is required to meet O's needs results from a different weighting of the various factors that must be considered. O's parents give priority to avoiding anything other than the inevitable moves each day between living accommodation and educational provision and to the complete integration of care that can occur when a single establishment is responsible for a child. The local authority gives priority to maintaining O's links with his locality and reducing the obstacles (non-existent in the family's view) that geography might present to contact with his family." Accordingly she was not persuaded that Purbeck View was the only placement currently available that would meet O's needs. The local authority's proposal was another way of meeting his needs. Neither proposal could be rejected as misguided, impractical or inappropriate. The choice between the two proposals depended on how one weighed the various factors.

Further, where a local authority simply chose one way of meeting a child's needs rather than another, it could not be said to have interfered with the exercise by the child or the parents of their right to respect for their private or family life. There was no breach of Article 8.

The Local Authority's Appeal

The Local Authority had sought permission to challenge the decision of Blair J on the ground that he had erred in holding that the decision under challenge was subject to a greater intensity of review (*The Queen on the Application of L v Leeds City Council* [2010] EWHC 3324 (Admin)). Black LJ refused permission to appeal. Whilst this was a difficult issue, it had not been fully explored and should be left until another day. The remaining issues were purely of academic interest.

Comment

Although this is not a Court of Protection case, it is a useful reminder of the breadth of a Local Authority's discretion when proposing a placement pursuant to its duties to accommodate a child in need under the Children Act – a principle which is of wider relevance in the exercise of a Local Authority's discretionary powers. It further highlights the difficulties parties will encounter when arguing that there is only one rational option open to a Local Authority, even where there is substantial expert evidence in support of the preferred option, in cases where the Local Authority refuses to fund the preferred option, thereby circumventing the ability of the Court of Protection to influence its decision. Local Authorities will no doubt be comforted by Blake LJ's explicit recognition that in-house social services teams have important expertise in assessing the needs of children with disabilities.

W v M [2011] EWHC 2443 (FAM)

Brain damage; Encephalitis; Life-sustaining treatment; Medical treatment; Right to life; Withdrawal of treatment

M had suffered a non-traumatic brain injury some eight years ago, following which she was diagnosed as being in a vegetative state. On further examination, it transpired that M did not meet the criteria for vegetative state and was in a 'minimally conscious state' ('MCS'). M was severely disabled and dependent on others for all aspects of her care. She had no functional communication and only intermittent awareness of herself and her environment. So far as it was possible to tell, M was capable of experiencing pain, and did experience pain though not constantly. She was apparently able to have pleasurable experiences for example hearing music and being massaged. She was kept alive through artificial nutrition and hydration. M's sister and partner were adamant that M would not have wanted to be kept alive in this condition. She had been very independent and had expressed views about not wanting to end up in a care home or dependent on others. There was no realistic prospect of M recovering, and it was estimated that her life expectancy was a further 10 years. The family sought a declaration under the MCA 2005 that it was in M's best interests for ANH to be withdrawn. The application was opposed by the PCT responsible for commissioning M's care and by the Official Solicitor on behalf of M, who argued that M's quality of life was not so burdensome to her she should be allowed to die, and that her previously expressed wishes and likely views were too uncertain to be given significant weight.

The Official Solicitor further submitted that the court could not carry out a balancing exercise at all in the case of patient in MCS who was clinically stable, because to do so would be to make impermissible value judgments about another person's quality of life.

Mr Justice Baker found against the Official Solicitor on the question of what approach the court should take to the application, holding that a best interests decision had to be made, and that there was no rationale for extending the approach set out in *Bland* (whereby there was no balancing exercise to perform in respect of someone who was permanently insensate) to patients in MCS.

In M's particular case, the judge found that M's life was not overly burdensome, saying in his summary that 'M does experience pain and discomfort, and her disability severely restricts what she can do. Having considered all the evidence, however, I find that she does have some positive experiences and importantly that there is a reasonable prospect that those experiences can be extended by a planned programme of increased stimulation.' The preservation of life was a fundamental principle, and the views of M's family about her likely wishes were not to be given significant weight.

Comment
It is unsurprising that a court will be extremely reluctant to sanction steps which result in the death of an incapacitated person, and is likely to err on the side of choosing life over death, given the gravity and irreversibility of the decision to withdraw ANH.

However, it is interesting to note that in any other case, the previously expressed views of a now-incapacitated person, and their likely view of their present circumstances, would be paid considerably more attention.

Perhaps the most important lesson to draw from the judgment is that given the inherent cautiousness about refusing medical treatment on the part of an incapacitated person, there should be much greater use of advance decisions about medical treatment, for those people who are uneasy about the prospect of a court making decisions on their behalf if they should lose capacity.

OTHER NEWS

We have just discovered that we have been described in the new edition of the Legal 500 as 'Undoubtedly the leading set in Court of Protection work' – thank you to our many instructing solicitors who read this newsletter, some of whom were no doubt interrogated by the Legal 500 publishers as part of their research and thus helped us to receive this accolade!

ISSUE 14 OCTOBER/NOVEMBER 2011

D v R (DEPUTY OF S) AND S [2010] EWHC 3748 (COP)

Deputy; Costs; Property and financial affairs

We start with a decision from last year which has only just been made publicly available. It is a (still relatively rare) example of a costs judgment, in this case following on from the important decision of Henderson J ([2010] EWHC 2405 (CoP)) reported in an earlier edition of this newsletter upon the capacity of an elderly man, S, to bring proceedings in the Chancery division for recovery of monies allegedly given to his former legal secretary following the exercise of undue influence on part. In that judgment, Henderson J had a number of critical comments to make about the expert evidence, and, in particular, as to the basis upon which D had instructed an expert to report upon S's capacity.

Upon judgment, the Deputy sought that D pay all of the costs upon an indemnity basis; D sought that the usual rule in property and affairs proceedings be followed and that the costs of both parties be paid out of the estate of Mr S. Henderson J conducted an analysis of the statutory provisions (in particular of Rule 159, setting down the 'usual rule'), and of the pre-MCA authorities (*In re Cathcart* [1892] 1 Ch 549; *in re William Frederick Windham* (1862) 4 D. F. & J. 53), which he noted could be of only limited assistance in light of the new statutory regime (paragraph 9). That statutory regime contained as a central rule the general rule, which "is the starting point and a good case has to be made out for departing from it. It is not the case that the court has an entirely unfettered discretion. On the contrary, there is a prescribed starting point and a discretion to depart from it in appropriate circumstances" (paragraph 9).

On the facts, Henderson J decided that the general rule should apply down to and including a hearing which took place before him on 8 December 2009, but that D should bear all of her own costs from 9 December 2009 onwards and should also pay 75% of the costs of the Deputy for the same period, on the standard basis. In coming to this conclusion, he placed particular emphasis upon the deficiencies in approach adopted to the obtaining of expert evidence, an approach which made the final hearing substantially longer and more complicated than it need have been.

Comment
Reported decisions considering costs in property and affairs cases are still rare; whilst the result of this case is entirely fact specific, the case is still of importance for (1) emphasising the centrality of the general rule; and (2) the risks run by professional advisers when they do not properly address their minds to the preparation of expert evidence.

SHARMA AND JUDKINS V HUNTERS [2011] EWHC 2546 (COP)
Wasted costs application

Following on the decision above, the matter returned to Court in a different guise. Mr S died in late 2010; the Deputy (the first Applicant) and her solicitor (Mr Judkins) then made an application to the Court for a wasted costs order against Mrs Duke's (the 'D' of the previous decision) solicitors, Hunters, in respect of the period after 8 December 2009 (i.e. the period in which Henderson J had found that the general rule no longer applied). The solicitor with conduct of the matter on Mrs Duke's behalf were unable to disclose any privileged information to the Court, as she had not waived her legal professional privilege. Two objections were taken by Counsel for Hunters: (1) the application was made too late; and (2) the terms of a consent order entered into the Chancery proceedings brought by the Deputy precluded the application being made.

Henderson J started by analysing the applicable principles which he confirmed were (by virtue of Rule 160(1) of the Rules) in practice the same as in the High Court. This meant that the relevant rules were to be found in CPR r.48.7 and Paragraph 53 of the Costs Practice Direction,[2] as amplified by a number of standard authorities (*Ridehalgh v Horsefield* [1994] Ch. 205; *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120). Given the fact that Mrs Duke had not waived her privilege, the effect of *Medcalf v Mardell* is that:

> "it is only in extremely rare cases that a wasted costs order should be made against a legal representative who is prevented by legal professional privilege

[2] Itself applicable in the Court of Protection by virtue of Practice Direction A supplementing Part 19 of the Court of Protection Rules.

from giving his full answer to the application. The court should make an order only if, proceeding "with extreme care", it is satisfied that there is nothing (my emphasis) the practitioner could say to resist the order, had privileged been waived, and, in addition, that it is in all the circumstances fair to make the order. As Lord Hobhouse put it, the lawyer must be given the benefit of every reasonably conceivable doubt that might be raised by privileged material which might possibly exist. The House also emphasised the need to prevent the jurisdiction from generating "a new and costly form of satellite litigation", and the need for an application against the lawyers acting for an opposing party to be apt for summary determination at a hearing the length of which should be measured in hours rather than days." (paragraph 20)

For reasons that are immaterial for purposes of this Newsletter, Henderson J found that the second objection taken by Hunters (relating to the consent order) was not made out, but that the first objection (timing) was valid. He went on, *obiter*, to make a number of comments about the conduct of the solicitors in the instruction of the expert whose evidence was the subject of such criticism in the substantive judgment. Whilst he was critical of the approach taken, he found that the stringent test set down in *Medcalf v Mardell* was not met, such that he would not have made a wasted costs order against Hunters given that they were unable to respond properly to the application.

Comment
Again, although this judgment is fact specific, it is of some wider importance for confirming (if confirmation were needed) the direct read-across of the principles applicable in wasted costs matters from the High Court to the Court of Protection.

FP v GM and A Health Board [2011] EWHC 2778 (COP)
Standard DOLS authorisation; Best interests; Care homes; Life expectancy; Oral evidence; Article 8; Time management

Although this case was decided at the start of this year, it has only just been made available for wider circulation.

GM was a 79 year-old man with mixed vascular dementia provoked by alcohol damage who lived with his partner, FP, and her son. Having been detained for assessment under section 2 of the Mental Health Act 1983, FP used her nearest relative powers to trigger his discharge. Before the necessary 72 hours written notice had expired, GM was discharged from section and made subject to an urgent, followed by a standard, DOLS authorisation which FP then challenged. Whilst expert evidence was being obtained, the authorisation expired and was replaced by a Court Order. By the time of the hearing, GM was ready for discharge but lacked residential capacity. So the central issue before the Court was whether he should return home on a trial basis or whether he should be, in effect permanently, admitted into EMI care.

In an extempore judgment, the starting point for Mr Justice Hedley was that GM should not be deprived of the opportunity to return home unless it was so contrary to his interests that the Court must not even seriously contemplate it (paragraph 25). This reflected GM's right not to be deprived of family life unless such deprivation could be justified under Article 8(2) of the ECHR. His health and care needs, as well as his need for physical care and consistency were amongst the factors relevant to the best interests balancing exercise but:

> "21. … There is, of course, more to human life than that, there is fundamentally the emotional dimension, the importance of relationships, the importance of a sense of belonging in the place in which you are living, and the sense of belonging to a specific group in respect of which you are a particularly important person."

On the one hand, EMI care would attend to all his physical and medical needs. But GM would be one of perhaps many residents, possibly cared for by transitory staff, where the emotional component could not begin to be met in the same way as in a family setting. On the other hand, a family placement would result in a lesser quality of physical care because of the enormous caring demands, with the attendant risk of breakdown and conflict. However:

> "24. … such a placement contains a formidable emotional component which GM for over 20 years has clearly regarded as being of profound importance to him. These are the single most important relationships in his life. This is the place where he belongs, and where he matters in a sense that he could never matter in an institutional care setting."

In the context of trying to compare apples with pears, the Court had to strike the best interests balance "with as broad a view of those interests as it is possible to do". GM was thought to have one or two years of life left to him and, where possible, people should be allowed "to spend their end time within the family rather than in an institution, even if there are shortcomings in terms of care which an institution could address" (paragraph 34). Moreover:

> "33. If there is a placement in a care home, we will probably never know whether that was right or not. If there is a placement at home, we most certainly will discover whether it was right or wrong, and I specifically acknowledge that the court may be shown to have been wrong in the decision that it takes."

In all the circumstances, the Court order was discontinued and GM was returned home on a conditional basis.

Comment

This judgment represents a master class in best interests decision-making. Determining the residence issue through an Article 8 lens ensured that the significant emotional component of the best interests analysis was not overshadowed by its physical counterpart. Indeed, the need to recognise the strength of family ties is a consistent judicial message being relayed by the Court of Protection. Notable, also, is the fact that the Court did not have any regard for the welfare of FP or her son, except insofar as it impacted upon GM's welfare. This was because they had capacity to make (un)wise decisions in relation to the risks GM presented upon his return home.

The proceedings themselves demonstrate what can be achieved: expert evidence was obtained and a determination of the Court was reached within 8 weeks of the initial application having been filed. A life-changing decision had to be made on the basis of the best available evidence; the same task routinely expected of DOLS best interests assessors. His Lordship recognised the pressure upon the Court system and observed:

> "12. … [I]t seems to me that it is absolutely essential that the Court of Protection establishes a practice that these interim cases must be dealt with quickly, and

> having regard to the demands on the system generally, proportionately, that is to say almost certainly without detailed oral evidence…"

The conditional nature of the Order also illustrates one of the many advantages of using the judicial process, particularly where there has been a history of non-engagement with social care services. In this case, GM's return home was conditional upon his family accepting four one-hour calls per day and regular reviews, with FP also being expected to seek help promptly if necessary, comply with medical advice, and recognise that any failure to co-operate may result in the placement ending (paragraph 31).

A further point of interest, albeit one that did not fall for determination on the facts of this particular case (as the Court did not need to consider the legality of the steps taken in this regard7) is the tension between para 1.14 of the DOLS Code of Practice and *A County Council v MB & Ors* [2010] EWHC 2508 (COP). The former says:

> "Deprivation of liberty should not be extended due to delays in moving people between care or treatment settings, for example when somebody awaits discharge after completing a period of hospital treatment."

In the latter, Mr Justice Charles stated at paragraph 96:

> "Further, in my view, like the court, the best interests assessors should be considering available alternatives and thus solutions that are, or might in practice become or be made available. This will involve a consideration of the impact, difficulties and timings involved in a move and/or a change by reference to the actual alternatives available if P can no longer be lawfully deprived of his liberty at his existing placement …"

This tension will no doubt fall for further consideration in an appropriate case.

LG v DK [2011] EWHC 2453 (FAM)
Financial deputy; DNA tests; Parentage; Statutory wills

This case provides at least a partial answer to a question that will rarely arise but poses some acute dilemmas when it does: if a person lacks capacity to decide whether to consent to a test to determine whether they are another's parent, what can (and should) the Court do?

LG was the Property and Affairs Deputy for an elderly man, DK. During the course of looking after his affairs, she came across a reference to a daughter. She therefore made an application to the Court of Protection for a decision whether or not it would be in DK's best interests to provide a bodily sample for DNA purposes in order to decide whether or not the woman, BJ, was his daughter. Her reason for so doing was primarily because DK was intestate, such that the Deputy considered it important to determine whether BJ was DK's biological daughter: if she was, his estate would go to her, but it would not do otherwise. DK in correspondence with BJ prior to his loss of capacity had made it clear that he did not wish to undergo a DNA test to establish whether he was her father.

The matter came before the President because it had become clear that it raised a number of difficult issues; by the time of the hearing before him, the most difficult of them had crystallised as being the jurisdictional basis for the Court. Ultimately, the parties were agreed, and the President endorsed the position that – unusually – the power of the Court of Protection to consent to a test being carried out on P's behalf does not

derive from ss.15-6 MCA 2005, but rather from the provisions of ss.20-1 Family Law Reform Act 1969.[3] In exercising that power, however, the President held that the Court would approach the matter by reference to whether the course of action was in P's best interests.[4] Whilst, in the case of children, it is necessary that there be proceedings on foot in which the parentage of that child has to be determined for the Court to have any power under ss.20-1 of the 1969 Act[5] the President considered that, as a matter of jurisdiction, the Court of Protection did have the power to give the requisite consent on a 'freestanding' basis (Paragraph 43).

As the matter had also been raised by the Official Solicitor, the President also (obiter) made it clear (Paragraph 53) that he considered that 'standalone' parentage decisions where the putative parent lacks the capacity to participate should be sought by way of an application to the Court of Protection, rather than (as is the case with the capacitous) by way of an application under s. 55A of the Family Law Act 1986, which allowed any person to apply to the High Court, a county court or a magistrates' court (but not to the COP) for a declaration as to whether or not a person named in the application is or was the parent of another person so named.

As was common ground that the application was not to be pursued before the President in the form it had been issued, but was to be pursued in the context of an application (to be issued) for a statutory will, the President did not decide whether to authorise the taking of a sample, reserving the decision for a future occasion. He did comment, however, that it would "require unusual facts for DK's best interests to depart from the ascertainment of the truth or the interests of justice." (Paragraph 54)

Comment
This case is interesting at a number of levels, not least because of the 'trumping' of the apparently untrammelled powers of the Court under ss.15-6 MCA 2005 by the pre-existing provisions of s.20-1 of the 1969 Act. It also raises (albeit does not determine) the fascinating question of the extent to which pre-existing wishes as to parentage tests are to be honoured when there is no realistic prospect that P will regain capacity and there are clear and compelling grounds upon which to justify the carrying out of such a test by reference to the best interests of the putative child.

The case is also of note for providing confirmation (if such is needed) of a point which had never previously been determined squarely, namely that proceedings before the Court of Protection are civil proceedings (Paragraph 36).

A LOCAL AUTHORITY V PB AND P [2011] EWHC 2675 (COP)
"Deprivation of liberty"; Best interests; Residence and contact; "What if?"

This case is the sequel to the decision of Mr Justice Charles ([2011] EWHC 501 (CoP)) reported in an earlier edition, in which he addressed both general case management decisions in the CoP and the powers of the CoP to address public law decisions taken by

[3] The reason for this being that the President had previously determined that the High Court's inherent jurisdiction to order such tests in the case of children had been removed by the enactment of these provisions: (*Re O (A Minor) (Blood Tests: Constraint)* [2000] Fam 139), which provided a complete statutory code for such tests. The same logic applied by analogy to adults without capacity: paragraph 38.

[4] Paragraph 26. He also made it clear that it was necessary to have regard to whether the purpose for which the test is needed can be as effectively achieved in a way that is less restrictive of P's rights and freedom of action.

[5] Re E (A Minor) (Parental Responsibility) [1994] 2 FCR 709.

local authorities. This decision is of particular interest for the comments made upon the question of deprivation of liberty, which are sufficiently important to reproduce in full:

> "63. I had the benefit of hearing helpful argument on the problems posed for courts and decision makers under DOLS (a) in respect of the determination of the question whether there is or is not a deprivation of liberty or likely to be one if certain events provided for in a regime of care were to arise, and (b) by the decision of the Court of Appeal in *P & Q v Surrey CC & Others* [2011] EWCA Civ 190, which the arguments before me demonstrated causes as many problems as it solves. During that argument I was told that the Court of Appeal was reconsidering the issue in an appeal from the decision of Baker J in *Cheshire West and Cheshire Council v P & M* [2011] EWHC 1330 (COP). That appeal has been heard and judgment is awaited.
> 64. In those circumstances, I have concluded that it is not necessary or appropriate for me to address this issue in this judgment on a basis that may well be overtaken by the reserved judgment of the Court of Appeal, because:
> i) I am quite satisfied that the proposed care plan and regime for D promotes his best interests and such aspects, if any, of it that mean that he is being deprived of his liberty by its implementation should be authorised. Correctly, in my view, no less restrictive regime was suggested.
> ii) There is to be a review and until then I consider that a continuation of the present regime, that is an order under s. 16(2)(a) MCA that insofar as there is a deprivation of D's liberty under the present care plan/regime it is authorised in his best interests is appropriate in this case because of its history, the position now reached in it and the state of flux in the authorities. (In other cases, and to the same effect, orders authorised any deprivation of P's liberty under an identified care plan as being in P's best interests).
> iii) I have reached this conclusion notwithstanding that my present view is that if the DOLS regime applies, or would apply if there was a deprivation of liberty, it should be used in preference to authorisation and review by the court. That view is based on the points made below.
> iv) At present, it seems to me that in the exercise of the welfare jurisdiction and approach under the MCA the most important issue is whether consent or authorisation should be given to a care regime on behalf of a person who does not have the capacity to give consent himself. That question is not determined by whether or not the person is being deprived of his liberty but by an assessment of whether the care regime is in his best interests. This will necessarily include a determination of whether a less restrictive regime would promote P's best interests and when reviews should take place.
> v) I naturally acknowledge that the DOLS regime is predicated on there being a detained resident and thus a person who is "being deprived of his liberty" (paragraph 6 of Schedule A1 to the MCA) and that for other reasons under the MCA the determination of that question is or can be said to be relevant or something that should be decided. But the approach of s. 4A (3) and (4) which refer to "giving effect to an order made under s. 16(2)(a)" recognises that the crucial issue is the best interests issue and not the question whether there is, or is not, a deprivation of liberty.
> vi) Absent argument and knowledge of the approach that the Court of Appeal will take in its reserved judgment in the Cheshire case it seems to me at present that:
>
> a) there will always be borderline cases on the question whether a person is being deprived of his liberty, and cases in which there will be a deprivation of liberty if identified contingency planning is implemented

(involving say restraint) but until this occurs P will not be being deprived of his liberty,

b) in those cases it would be prudent and in accordance with a best interests approach for P, a self interest approach for the care provider and an approach that has regard to the relevant Convention rights to ensure that (i) there is no breach of Article 5, and (ii) the regime of care is reviewed to check that it remains in P's best interests and is the least restrictive available regime to bring about that result,

c) the DOLS regime can be applied in such cases of doubt and thus to cover those cases and so the "what if situation" that a court may differ from the view of the relevant assessors on the application of Article 5 and thus whether there is a deprivation of liberty and there was a need to apply the DOLS regime. Section 3 of the HRA 1998 supports that view,

d) all the qualifying requirements in the DOLS regime (see paragraph 12 of Schedule A1 to the MCA) would be appropriate, or at least not inappropriate or preliminary, matters to consider in a best interests consideration and review of a doubtful or "what if" case, or one in which if certain events occur in an emergency there would be a deprivation of liberty,

e) those requirements, and a best interests consideration within or outside them, will necessarily include a need to consider that the least restrictive available regime is put in place, and they are much easier concepts for assessors and the courts to apply, and

f) those requirements can be applied without the assessor or the court getting tied down in the difficult, time consuming and essentially unnecessary task of deciding whether or not (and if so when) the implementation of the care regime constitutes a deprivation of liberty, and so

vii) there is much to be said for an approach under DOLS and by the court that focuses on best interests and the other qualifying requirements and provides authorisation of a (or any) deprivation liberty under an identified care regime that is so identified as the least restrictive available regime to best promote P's best interests."

Comment

The arguments referred to by Charles J ran for the best part of two days; that he chose not then to come to a concluded view as to whether D was deprived of his liberty is an indication, perhaps, of a degree of judicial frustration at the extent to which questions of deprivation of liberty are being addressed before the Courts with an every finer degree of refinement without – sadly – an equivalent degree of clarity. It is also a useful reminder that one must not in debates regarding deprivation of liberty lose sight of the twin – linked – questions of whether circumstances are the least restrictive possible and in P's best interests. It is, however, of note that the logical (if not necessarily unwelcome, albeit costly) consequence of this decision is that very many more individuals should be made subject to the DOLS regime on a 'precautionary' basis.

R (SESSAY) V SLAM AND COMMISSIONER OF THE POLICE FOR THE METROPOLIS [2011] EWHC 2617 (QB)

"Deprivation of liberty"; Article 5; Conveyance; Mental Health Act; Place of safety

This decision of the Divisional Court is of importance as (1) a rare decision upon the scope of ss.5-6 MCA 2005; and (2) the first decision as to the power of Trusts to detain the mentally disordered pending their admission under the MHA 1983, where the

individual in question lacks the capacity to decide whether to remain at hospital pending the completion of the admission process.

On 7 August 2010 two police officers entered the private accommodation of, the Claimant, following a complaint from a neighbour that the Claimant had not been caring properly for her child. The officers formed the view that the Claimant was mentally disordered and were concerned for her welfare and that of her child.

The officers reasonably formed the view that it was in the Claimant's best interests that she be taken to hospital for the purposes of being assessed and receiving help in relation to her mental health. They drove the Claimant and her child to Peckham police station, where the child was taken into police protection. Then they drove the Claimant on to the Maudsley Hospital, where she was admitted to the Hospital's 's.136 suite.'

The police purported to use ss.5 MCA 2005 as their justification for taking the Claimant from her home to the hospital. Before the matter came to a hearing, the police conceded that in so doing they had acted unlawfully, and the Claimant and the police agreed the following declaration (subsequently endorsed by the court):

> "1. Sections 135 and 136 of the Mental Health Act 1983 are the exclusive powers available to police officers to remove persons who appear to be mentally disordered to a place of safety. Sections 5 and 6 of the Mental Capacity Act 2005 do not confer on police officers authority to remove persons to hospital or other places of safety for the purposes set out in sections 135 and 136 of the Mental Health Act 1983.
> 2. The Claimant's removal to hospital by the Second Defendant's officers on 7th August 2010 was unlawful and breached her rights under Article 5 and Article 8 ECHR."

The Claimant arrived at the hospital at 09.20 on 7 August 2010. The application to admit her under s.2 MHA was not received by the Hospital Managers until 22.20, thirteen hours later. The Claimant's case was that her treatment in the hospital amounted to detention and/or deprivation of liberty, which was not lawful and in breach of Article 5 ECHR. Further the Claimant sought a declaration that the general practice and policy of the Trust for holding persons awaiting assessment for admission for up to eight hours (or longer) is unlawful.

The Trust contended that there was a lacuna in the MHA 1983, such that what would otherwise be false imprisonment at common law and/or – potentially[6] – a deprivation of liberty for purposes of Article 5 ECHR required justification, such justification being found in the doctrine of necessity.

The Divisional Court concluded that there was no lacuna, and that the MHA 1983 provided a complete statutory code for six reasons (paragraphs 35-40):

1) Part II MHA contains a procedure for compulsory hospital admissions;
2) Parliament has expressly provided (in s.4 MHA 1983) for the situation where the application is one of urgent necessity;

---

[6] The Trust also argued that the Article 5 jurisprudence allowed a principled conclusion that there was in fact no deprivation of liberty at all, relying in particular upon the line of cases summarised in *Foka v Turkey* (Application No. 28940/95; decision of 26 January 2009). See paragraph 51 of the judgment. Submissions were also made as to the extent to which purpose is relevant in this regard; see further below in the comment section.

3) The Code of Practice provides guidance in relation to emergency applications under s.4, and also that local social services authorities are responsible for ensuring that sufficient AMHPs are available to carry out their roles under the Act, including assessing patients to decide whether an application for detention should be made, a responsibility giving rise to a requirement that a service be available 24 hours a day.
4) The Trust's own policy provided for the use of s.4, and there was no evidence of any time delays when applications were made under s.4;
5) If a patient evidences an intention to leave the hospital before the s.4 application is completed, hospital staff may contact the police who have the power to detain the patient under s.136. The Court clarified (a point that had previously been unclear) that the Accident & Emergency Department of a hospital is a place to which the public have access and accordingly it is a public place for the purposes of s.136.
6) The decision of the House of Lords in *B v Forsey* [1988] SLT 572 was authority for the proposition that the powers available to hospitals under MHA may not be supplemented by reliance on the common law, and could not be distinguished.

The Court also found (paragraph 45) that, if the MHA was supplemented by the common law, the same problem would arise as had arisen in the Bournewood case of ensuring that there were sufficient safeguards in place to comply with Article 5 ECHR.

However, the Divisional Court then went on to conclude that, whilst:

> "[e]ach case necessarily turns on its own facts... in our view it is unlikely in the ordinary case that there will be a false imprisonment at common law or deprivation of liberty for the purposes of Article 5(1) ECHR if there is no undue delay during the processing of an application under ss.2 or 4 MHA for admission." (paragraph 57)

On the facts of the case, the Divisional Court concluded that the detention of the Claimant could not be justified, in large part because the Trust staff had proceeded on the (mistaken) impression that she had been brought in under s.135 MHA 1983. The Divisional Court did, however, upheld the Trust's policy as lawful (paragraph 58), largely upon the basis of the reasoning in the paragraph cited above.

Comment

It is perhaps odd that no one had ever thought to ask what powers hospitals had in the circumstances prevailing on 7 August 2010. Even if there may be question marks as to the steps by which it they were reached, the wider conclusion of the Court is, it is suggested, entirely correct, not least because of the chaos that would otherwise ensue if hospitals were unable to take steps to require mentally disordered people who had arrived at their premises to remain their pending assessment and admission under the MHA 1983.

The Court's decision is also important for the clear endorsement of the limited scope of s.5 MCA 2005 and the fact that it cannot be used to justify steps amounting to a deprivation of liberty, no matter how well meaning those steps.

Finally, the Court's decision is of note because it would appear to allow back in purpose in determining whether there is a deprivation of liberty: the Court cited (paragraph 52) with apparent approval the dicta of Lord Hope to this end in *Austin v Metropolitan Police Commissioner* [2009] AC 564, and then in reaching the general conclusion cited above as to when there will be a deprivation of liberty referred back to this citation. There will no

doubt be argument upon another day as to the extent to which this decision (and, indeed, *Austin*) can be squared with *P and Q v Surrey County Council* [2011] EWCA Civ 190.

DN v Northumberland Tyne and Wear NHS Foundation Trust [2011] UKUT 327 (AAC)

Mental Health Act detention; Application for discharge to care home; Standard DOLS authorisation; Eligibility; "Primacy" of the MHA; DoH letter

This case was briefly mentioned in the last edition; as promised it is now the subject of fuller consideration.

The Upper Tribunal considered what the approach should be of a First Tier Tribunal presented with an application for the discharge of a patient into the community where it was anticipated that he would be cared for under the auspices of a DOLS standard authorisation. The Upper Tribunal was required to examine whether there was any reason that such an arrangement could not be looked at as a possibility, in light of the comments made by Charles J in *GJ v The Foundation Trust* [2010] Fam 70 as to the primacy of the MHA over the MCA.

The Upper Tribunal held that the case did not fall within the category of persons ineligible to be deprived of their liberty under Schedule 1A which had been the subject of Mr Justice Charles' decision, and accepted the approach set out by the Department of Health in a letter to the Tribunal which said the following (which serves as a sufficiently important guide to the DoH's general thinking we think it should be set out in full):

> "In general, the possibility that a person's needs for care and treatment could be met by relying on the MCA – with or without an authorisation under the MCA DOLS – relevant to decisions that have to be made under the MHA in the same way as all alternative possibilities.
> Decision-makers under the MHA must, inevitably, consider what other options are available when deciding whether it is right for compulsory measures under the MHA to be used, or continue to be used. The use of the MCA (with or without an authorisation under MCA DOLS) may be one of those options.
> All such alternative options must be considered on their merits. The fact that someone could be deprived of their liberty and given treatment under the MCA does not automatically mean that it is inappropriate to detain them under the MHA, any more than (say) the possibility that someone with capacity may consent to continuing treatment for their mental disorder automatically makes their continued detention under the MHA improper.
> There are, however, specific circumstances in which the fact that someone is, or could be made, subject to compulsory measures under the MHA means that they cannot also be deprived of their liberty under the MCA.
> Those circumstances are set out in the "eligibility requirement" in paragraph 17 of Schedule A1 to the MCA, the meaning of which is defined by Schedule 1A to the same Act. A person who is ineligible as determined in accordance with Schedule 1A cannot be deprived of their liberty under the MCA and therefore cannot be the subject of any authorisation under the MCA DOLS. Schedule 1A sets out five cases in which a person is ineligible.
> Case A is (in summary) where a person is currently detained in hospital under the MHA. That person cannot simultaneously be subject to an authorisation under the MCA depriving them of their liberty either in that hospital or anywhere else.
> However, that is not to say that a person cannot (in effect) be discharged from one regime to the other. There is nothing to prevent a prospective application

being made for an MCA DOLS authorisation in anticipation of, or the expectation that, the person concerned will be discharged from detention under the MHA. Paragraph 12(3) of Schedule A1 to the MCA says, in effect, that when deciding whether the qualifying requirements for an authorisation are met, it is the circumstances which are expected to apply at the time the authorisation is expected to come into effect which are to be considered.

The main effect of Cases B, C and D is that a person who is subject to compulsory measures under the MHA which fall short of actual detention cannot be deprived of their liberty under the MCA if that would conflict with a requirement imposed on them under the MHA. So, a person who is on leave of absence from detention in hospital under the MHA can, in general, be the subject of an MCA DOLS authorisation – but not if (for example) that authorisation envisages them living in one care home when it is a condition of their leave of absence that they live in a different care home.

Cases B and C also, in effect, prevent people being made the subject of a MCA DOLS authorisation detaining them in a hospital for the purpose of mental health treatment where the same could be achieved by recalling them to hospital from leave of absence, supervised community treatment or conditional discharge under the MHA (as the case may be).

Case E concerns people who are "within the scope" of the MHA, but not so far actually liable to be detained under it. In broad terms (and subject to certain caveats), it means that the MCA cannot be used to deprive someone of their liberty in a hospital for the purposes of mental health treatment if they are objecting to that course of action and they could instead be detained under the MHA.

It is important to note that case E only applies to detention in hospital, and only where the purpose of the proposed deprivation of liberty is treatment for mental disorder within the meaning of the MHA. It is not relevant to deprivation of liberty in other settings (eg care homes) or for other purposes (eg treatment for physical health problems, or for substance dependence by itself separately from treatment for mental disorder with the meaning of the MHA).

The Government's policy intention was that people who lack capacity to consent to being admitted to hospital, but who are clearly objecting to it, should generally be treated like people who have capacity and are refusing to consent to mental health treatment. If it is considered necessary to detain them in hospital, and they would have been detained under the MHA if they had the capacity to refuse treatment, then as a matter of policy it was thought right that the MHA should be used in preference to the MCA.

It was specifically in the context of the interpretation of Case E that Mr Justice Charles talked in J about the MHA having "primacy". Outside that context, the Department does not understand him to have been making a more general statement about the relationship between the two Acts. Indeed, as set out above, the Department does not think it would actually be possible to say, in general, which has primacy over the other."

Comment

This case is of importance because it clarifies that there is no statutory bar under the MCA to, or any other conceptual difficulty with, a currently detained patient moving to a community placement under DOLS. The reasoning in the judgment is somewhat

convoluted:[7] the key point, it appears to the authors, is that a person who may be deprived of their liberty in a community placement does not fall within the ineligibility categories in Schedule 1A, so no problem arises about the interplay between the MHA and MCA or whether the patient would be 'within the scope' of the MHA on discharge.

Nothing is said specifically about the timing of the DOLS authorisation in the judgment. In the authors' view, any application to a Tribunal for discharge on the basis of a community placement with a standard authorisation, must of necessity have already obtained the standard authorisation. Otherwise, the Tribunal is being invited to discharge conditional on a decision yet to be taken by the supervisory body whether to grant an authorisation. The potential for disagreement about capacity, best interests, proportionality and the least restrictive option between the DOLS assessors, the supervisory body, the patient and the Tribunal is obvious. The authors note that the letter submitted by the Department of Health referred to a 'prospective' DOLS assessment being conducted, prior to the Tribunal decision.

The authors also note that there may be very real questions in any given case about whether the community placement plus DOLS is actually less restrictive than continuing to be detained in hospital. While that may sound counterintuitive, it is not necessarily the case that being in the community is less restrictive if, for example, less skilled behavioural interventions are available, or if additional measures are required to prevent access to harmful situations (for example in Mr N's case access to alcohol) that would not be so frequently encountered in hospital. There is potential for disagreements to arise about capacity, best interests, proportionality and risk between the DOLS assessors, the patient, the supervisory body, and the Tribunal itself.

OTHER NEWS

Law Commission Consultation

With thanks to Helen Clift of the Official Solicitor's Office for pointing us to this, you may be interested in the most recent consultation paper issued by the Law Commission, upon the reform of the common law offence of kidnapping.

http://www.justice.gov.uk/lawcommission/consultations/1674.htm

The paper includes an interesting discussion of the case of *HM (Vulnerable Adult: Abduction)* [2010] EWHC 870 (Fam); [2010] 2 FLR 1057 in the context of particular problems relating to children and the mentally incapacitated.

Court of Protection administration

We have also been asked by James Batey at the Court of Protection to thanks all those who responded to the questionnaire we circulated earlier this year on his behalf seeking feedback from Court users; we understand that at least one result of the feedback received is likely to be improvements in the information provided at different stages of proceedings. You may also be interested to know that the Court of Protection's moves to the Thomas More Building in the Royal Courts of Justice should be complete by 9 January 2012.

---

[7] In this regard, it is perhaps fair to point out that the Upper Tribunal noted with regret that there was only one party – the applicant – represented before it (the letter from the Department of Health cited above was provided to assist the Tribunal, but the Department did not formally appear, nor did any of the statutory bodies involved. Had other parties appeared, the Tribunal might well have had cited to it not just J but also the much more relevant case of *W Primary Care Trust v TB* [2009] EWHC 1737 (Fam) which would have made it clear that Schedule 1A Case E could not in any event have been applicable because the proposed placement was in a care home, not a hospital

ISSUE 15 NOVEMBER 2011 COURT OF PROTECTION UPDATE

Introduction

Those of you concerned with deprivation of liberty matters will no doubt by now have gleaned that the Court of Appeal handed down judgment on 9 November 2011 in the Cheshire West and Chester case. The judgment is one of sufficient importance that we consider that it merits a stand-alone newsletter.

We have no doubt that the judgment will be picked over by practitioners for many months to come; we thought, though, that it would be of interest to have a comment from outside the Counsel bubble. To that end, we are delighted that Lucy Series has agreed to provide a summary and commentary of this case. Lucy is researching mental capacity in community care settings for her doctorate in law at the University of Exeter. She studied Psychology and Philosophy at St Anne's College, Oxford and Bristol University. She has worked in social care in a wide variety of roles. She writes a blog (which the editors strongly recommend!) on human rights and community care at: http://thesmallplaces.blogspot.com.

As you will see, Lucy raises a number of important points of concern as to the implications of the judgment. As part of our self-imposed remit of stimulating debate in this difficult area, we would welcome responses from our readers to her commentary, and undertake (in good newspaper fashion) to publish a selection in our next newsletter.

CHESHIRE WEST AND CHESTER COUNCIL V P [2011] EWCA CIV 1257

"Deprivation of liberty"; Restraint

This case was an appeal by Cheshire West and Chester Council against a ruling that P, a man with cerebral palsy and Down's syndrome who lacked capacity to make decisions about care and residence, was deprived of his liberty ([2011] EWHC 1330 (Fam)). P lived in a small group home that was not a care home, and hence not subject to the deprivation of liberty safeguards (DoLS) authorisation regime. Consequently, any deprivation of liberty found to be occurring by the court would have required authorisation directly from the Court of Protection itself, and annual reviews by the court (*Salford City Council v BJ* [2009] EWHC 3310 (Fam)).

The case was heard by Munby LJ, Lloyd LJ and Pill LJ, who considered under what circumstances the care of an incapacitated adult might satisfy the 'objective element'[8] of deprivation of liberty under Article 5 ECHR.

P required a high level of care and received one-to-one close personal supervision during the daytime in order to manage risks associated with certain behaviours. In particular, P had developed a habit of pulling apart his continence pads and putting soiled pieces into his mouth; when this occurred he was subject to physical intervention by two staff members to remove the pieces and clean his hands. P's care plan also included the wearing of a body suit, designed to limit his access to his pads.

At first instance, Baker J considered that although those caring for P had taken great care to ensure he had as normal a life as possible, the fact he was 'completely under the control of members of staff', and the steps required to deal with his challenging

[8] See *JE v DE & Ors* [2006] EWHC 3459 (Fam); (2007) 10 CCL Rep 149 at para [77] for a description of the tripartite analysis of deprivation of liberty by the ECtHR.

behaviour, led to the conclusion he was deprived of his liberty ([2011] EWHC 1330 (COP) at paras [58] – [60]). Their Lordships allowed the appeal against this ruling, and in doing so reaffirmed and refined the principles the Court of Appeal set out in *P & Q v Surrey County Council* [2011] EWCA Civ 190.

In *P and Q* Wilson LJ had said that an inquiry into whether or not a person is deprived of their liberty must consider the relative normality of their situation, with certain settings more likely than others to amount to a deprivation of liberty (paras [28] – [29]). In *Cheshire West*, Munby LJ offered a 'rough and ready' classification of which kinds of placements along the spectrum of 'normality' had amounted to a deprivation of liberty in the case law (paras [98] – [101]). Typically care of children or vulnerable adults in a domestic setting, a foster placement or small specialist services like those occupied by MEG will not amount to a deprivation of liberty. He found that two cases lay "towards the other end of the spectrum" (para [100]), those of *HL v United Kingdom* (2004) 40 EHRR 761 and *DE v JE and Surrey County Council* [2006] EWHC 3459 (Fam).

Munby LJ stressed that when interpreting the 'normality' of a setting, the relevant comparator is:

> "... not with the previous life led by X (nor with some future life that X might lead), nor with the life of the able-bodied man or woman on the Clapham omnibus, but with the kind of lives that people like X would normally expect to lead. The comparator, in other words, is an adult of similar age with the same capabilities as X, affected by the same condition or suffering the same inherent mental and physical disabilities and limitations (call them what you will) as X. Likewise, in the case of a child the comparator is a child of the same age and development as X." (para [97])

Because of his disabilities, P's life was "inherently restricted" (para [35]), and he would be subject to similar restrictions by those caring for him wherever he lived. The "fundamental problem" with Baker J's approach was that he had not compared P's life with the restrictions a person with his disabilities and difficulties would be subject to in a "normal family setting" (para [110]). Only in extreme cases is restraint likely to be so pervasive as to constitute a deprivation of liberty (para [112]).

The judgment did, however, distinguish those situations "where a person has somewhere else to go and wants to live there but is prevented from doing so by a coercive exercise of public authority" (para [58]) as in *HL v UK, DE v JE and Surrey County Council and London Borough of Hillingdon v Neary*. These cases remain a deprivation of liberty.

Munby LJ also found that when determining whether deprivation of liberty was occurring it was legitimate to have regard to the 'objective' reason and purpose underlying the restrictions. In some limited circumstances, like those considered in *Austin & Anor v Commissioner of Police of the Metropolis* [2009] 1 AC 564 (the 'kettling' case), improper motives or intentions could render what would otherwise not be a deprivation of liberty into one. However, a good motive or intention "cannot render innocuous what would otherwise be a deprivation of liberty" (para [76]). Deprivation of liberty in a domestic context could occur, but such cases would be atypical. Munby LJ gave as an example of deprivation of liberty in a domestic setting a husband who confined his wife to the house in order to enjoy his 'conjugal rights'. This was contrasted with a husband who confines his wife to the house unless he is with her because she suffers from dementia and might wander in front of a car; this situation would not typically be a deprivation of liberty. The crucial distinction between these cases was the husband's

reasons, purpose and motives for the restrictions (paras [44] -[47]). The other members of the Court of Appeal agreed with Munby LJ's judgment and reasons, although Lloyd LJ commented that the discussion of motive, purpose and intentions "may occasion further debate in future cases" (para [119]).

Comment

The Court of Appeal ruling in Cheshire will offer greater clarity as to what circumstances amount to a deprivation of liberty, as Baker J's ruling in the High Court was rather difficult to fit into the schema proposed in P&Q. Given research showing poor agreement among professionals and lawyers over the meaning of deprivation of liberty,[9] and wide regional variation in DoLS applications from care providers,[10] a clearer definition was very much needed. However, both of these Court of Appeal judgments will almost certainly have the effect of restricting the availability of deprivation of liberty safeguards to many vulnerable adults in institutional care settings in England and Wales. As a socio-legal researcher with a background working in social care, I feel disappointed by this aspect of the judgment. Although some may consider it illegitimate to take a 'policy' approach to the scope of Article 5, I think there is a strong case for regarding deprivation of liberty to be closely connected to the degree of control a person is subject to.

By focusing upon the restrictions on liberty another person with similar disabilities would ordinarily be subject to, the ruling means that a disabled or older person may be subject to a very high level of control indeed before they are eligible for procedural safeguards. If the Mental Capacity Act 2005 (MCA) only permits restrictions on liberty that are proportionate and necessitated by their disabilities, it is difficult to see under what circumstances restrictions could legitimately breach this threshold and yet Schedule A1 still apply.[11] It seems counterintuitive, and potentially discriminatory, that a more disabled person may be subject to greater interferences with their liberty than a less disabled person before the law offers them an accessible means to challenge those restrictions.

Beyond the minority of cases that reach the courtroom, it is worth recalling the nature of the safeguards that the DoLS offer. The framework contains two vital elements for protecting the rights of vulnerable citizens: external scrutiny, free – in theory – from conflict of interest, and the ability to invoke the force of law to rectify the arbitrary or illegitimate exercise of power. In their quasi-judicial role, highly trained and experienced independent assessors scrutinise an individual's care plan to ensure that restrictions are necessary, proportionate and promote their best interests. Representatives and advocates have an oversight role, ensuring that where assessors' recommendations are disputed, or not complied with, the force of law can be brought to bear. Without the DoLS, social care settings have very few such checks and balances for very restricted, highly vulnerable, citizens.

---

[9] CAIRNS, R., BROWN, P., GRANT-PETERKIN, H., KHONDOKER, M. R., OWEN, G. S., RICHARDSON, G., SZMUKLER, G. & HOTOPF, M. (2011) 'Judgements about deprivation of liberty made by various professionals: comparison study'. The Psychiatrist, 35(9), 344-349. CAIRNS, R., BROWN, P., GRANT-PETERKIN, H., OWEN, G. S., RICHARDSON, G., SZMUKLER, G. & HOTOPF, M. (2011) 'Mired in confusion: Making sense of the deprivation of liberty safeguards'. Medicine, Science and the Law, 51(4), 228-236.

[10] NHS INFORMATION CENTRE FOR HEALTH AND SOCIAL CARE (2011) 'Mental Capacity Act 2005, Deprivation of Liberty Safeguards Assessments (England) - Second report on annual data, 2010/11'.

[11] A similar point has also been made by TROKE, B. & WARD, N. (2011) 'The death of DoLS?' in *Browne-Jacobson Solicitors Bulletin* [Blog post]. Available: http://www.brownejacobson.com/resources/bulletins/death_of_dols.aspx [accessed 11 November 2011].

From the sounds of things P's own care plan was, in the end, very good. The same could be said of many service users in England and Wales, and it is important not to construct social care as universally poor. However, it is also important not to be complacent. A variety of national reports have raised serious concerns about the human rights of elderly and incapacitated patients in health and social care.[12] In the care of adults with learning disabilities we have had a succession of high profile institutional abuse scandals. One such scandal in Cornwall affected over 165 adults, most of them living in small supported living services just like those occupied by P and MEG.[13] National audits of learning disabilities services by the regulator concluded that there was a 'lack of external scrutiny', and they could not be sure people's human rights were being upheld.[14]

In a recent study on the DoLS, a lawyer was quoted as suggesting that 'An alternative approach to widespread use of DoLS might involve better inspection and regulatory regimes'.[15] The idea that an inspector visiting for an afternoon could detect any inappropriate or excessive restrictions in the care plans of all its service users belongs to the realm of fantasy. It is not the role the regulator has ever played, and it is certainly not one the new regulator is resourced, mandated or keen to adopt.[16] We should also recall that Castlebeck services Winterbourne View,[17] Rose Villa[18] and Arden Vale[19] all received glowing reports from the Care Quality Commission, despite being found only months later to have excessively restrictive and often abusive regimes.[20] Supported living services like those P and MEG live in are not subject to site visits at all under the current regulatory regime. The level of protection offered by regulatory visits and DoLS to ensure human rights and the MCA are complied with bears no comparison.

Like a Rorschach test, we all read into the DoLS a framework for the ills we perceived needed fixing. For some lawyers, the 'real ills' are cases like those of HL, Steven Neary and DE, people whisked away from loving family homes by interfering and overbearing

---

[12] CARE QUALITY COMMISSION (2011) 'Dignity and nutrition inspection programme: National overview'. London. ROYAL COLLEGE OF PHYSICIANS & BRITISH SOCIETY OF GASTROENTEROLOGY (2010) 'Oral feeding difficulties and dilemmas: A guide to practical care, particularly towards the end of life'. Report of a Working Party. London. [NB: This report found evidence of elderly patients who lacked capacity having feeding tubes fitted unnecessarily, for the convenience of care home staff]. BANERJEE, S. (2009) 'The use of antipsychotic medication for people with dementia: Time for action'. A report for the Minister of State for Care Services London, Department of Health. JOINT COMMITTEE ON HUMAN RIGHTS (2007) 'The Human Rights of Older People in Healthcare'. Eighteenth Report of Session. 2006-2007.

[13] COMMISSION FOR SOCIAL CARE INSPECTION & HEALTHCARE COMMISSION (2006) 'Joint Investigation into the Provision of Services for People with Learning Disabilities at Cornwall Partnership NHS Trust'.

[14] HEALTHCARE COMMISSION (2007) 'A life like no other: A national audit of specialist inpatient healthcare services for people with learning difficulties in England'. Commission for Healthcare Audit and Inspection. CARE QUALITY COMMISSION (2009) 'National study: Specialist inpatient learning disability services'.

[15] CAIRNS, R., BROWN, P., GRANT-PETERKIN, H., OWEN, G. S., RICHARDSON, G., SZMUKLER, G. & HOTOPF, M. (2011) 'Mired in confusion: Making sense of the deprivation of liberty safeguards'. *Medicine, Science and the Law,* 51(4), 228-236.

[16] A freedom of information request I put in found that in 2010-11 any given care home had only a one in five chance of being inspected. Inspection levels in 2010-11 stand at 9% the levels in 2003-2007 when care inspections began. The CQC have pledged to inspect care homes annually, against fewer standards, subject to resources. However, the Health Select Committee has refused to endorse their request to the Department of Health for increased funding.

[17] CARE QUALITY COMMISSION (2011) 'Mental Health Act Annual Statement January 2011: Winterbourne View (Castlebeck)'.

[18] CARE QUALITY COMMISSION (2010) 'Key inspection report: Rose Villa 31 March 2010'.

[19] CARE QUALITY COMMISSION (2011) 'Mental Health Act Annual Statement January 2011: Arden Vale'.

[20] CARE QUALITY COMMISSION (2011) 'CQC review of Castlebeck Group Services'.

public authorities. For some of us working in social care, concerns around liberty of the person could be conceived more broadly than disputes with family. By defining deprivation of liberty primarily in terms of disputes between family and practitioners, we remove from many what will be the only serious source of scrutiny of restrictive care plans, and the only realistic means of challenge. It seems to me a just principle that those whom we commit to the complete and effective control of others enjoy safeguards to ensure it is exercised in a legitimate and proportionate fashion.

ISSUE 16 DECEMBER 2011 COURT OF PROTECTION UPDATE

Introduction

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

We also cover the first change to be implemented as a result of the work of the Rules Review Committee, namely the power to allow 'routine' decisions to be taken by authorised officers, and point you to some interesting statistical work done by the indefatigable Lucy Series on the approach taken by one Judge to permission applications. Following our invitation in our Cheshire special issue, a number of you provided thoughtful and interesting responses to the judgment of the Court of Appeal. We therefore delighted to include in this newsletter the most substantive of these comments, received from the MCA Implementation Lead for NHS North Lancashire, Sue Neal, which speaks for itself in terms of the issues raised on the ground by the judgment.

RK V BCC, YB AND AK [2011] EWCA CIV 1305

Children and young persons; "Deprivation of liberty"

We start with the important decision of the Court of Appeal handed down yesterday upon the appeal from the decision of Mostyn J ([2010] EWHC 3355 (Fam)), that the provision of accommodation to a child (of any age) under s.20 Children Act 1989 is not capable – in principle – of ever giving rise to a deprivation of liberty within the terms of Article 5 ECHR. That proposition was the subject of sustained criticism, and upon appeal the consensus at the Bar (endorsed by the Court of Appeal) was that the decisions of the ECtHR in *Nielson v Denmark* (1988) 11 EHRR 175 and of the Court of Appeal in *Re K* [2002] 2 WLR 1141 demonstrated that:

1) an adult in the exercise of parental responsibility may impose, or authorise others to impose, restrictions upon the liberty of a child; but
2) that such restrictions may not in their totality amount to a deprivation of liberty. "Detention engages the Article 5 rights of the child and a parent may not lawfully detain or authorise the detention of a child." (paragraph 14).

On the facts of the case before it, the Court of Appeal noted that (although it required some effort to establish the fact) it was clearly recorded that the parents had consented to the arrangements by which their child was placed in accommodation under s.20 Children Act 1989. The crucial point was therefore whether the restrictions authorised by the parents, individually or cumulatively, amount to detention? The Court of Appeal had no hesitation in concluding that Mostyn J's conclusion on this issue were correct, Thorpe

LJ noting that the restrictions[21] were "no more than what was reasonably required to protect RK from harming herself or others within her range" (paragraph 27). In coming to this conclusion, Thorpe LJ noted that the parents' case was that home care for RK was impossible without an intensive support package; he noted that the purpose and effect of such a support package would be to protect RK and others from harm such that "[i]n other words wherever RK is accommodated the same restrictions on her liberty are essential." RK's appeal was therefore dismissed.

Comment

The first limb of the Court of Appeal's decision in this case is beyond criticism (as can be demonstrated by the fact that, ultimately, none of the parties appearing before the Court dissented from the propositions regarding the ability of parents to authorise the detention of their children). It would appear[22] that the general practice generally amongst local authorities is to regard agreements under s.20 Children Act 1989 as not creating a deprivation of liberty; if such a practice exists, it will clearly have to stop forthwith in favour of analysis of the situation of each of the children in question. If the circumstances amount to a deprivation of their liberty, then authorisation will have to be sought by the local authority (the route depending upon whether the child is aged 16/17 or below).

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

CHESHIRE WEST AND CHESTER COUNCIL V P [2011] EWCA CIV 1333

Court of Appeal; Costs

In this matter the Court of Appeal considered the successful appellant Council's application for costs in respect of the Court of Appeal proceedings ([2011] EWCA Civ 1257). The Official Solicitor submitted that there should be no order as to costs. In resisting the Council's application, the Official Solicitor sought to distinguish Court of Protection proceedings from other types of civil proceedings (by analogy with family proceedings) and further also relied in part on the fact that in the Court below, Baker J had departed from the general rule that there be no order as to costs on the grounds of what he perceived to be misconduct on the part of the local authority.

---

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

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

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

1. Although it is an appeal from the Court of Protection, the Court of Protection rules do not apply. The general rule on appeals from the COP to the Court of Appeal is, in accordance with CPR 44.3(2)(a), that the unsuccessful party will be ordered to pay the costs (subject, where relevant, to costs protection under s11 Access to Justice Act 1999).
2. The general rule in COP welfare cases (that there be no order as to costs) was irrelevant, as was the council's discreditable conduct at first instance. The Court's primary task was to apply CPR 44.3.

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

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

RE RB (ADULT); A LONDON BOROUGH V RB (ADULT) (NO 4) [2011] EWHC 3017 (FAM)
Inherent jurisdiction; Reporting restrictions

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

1. In the absence of any relevant statutory restriction, it is not a contempt of court to publish or report a judgment (whether in whole or in part) merely because it was given or handed down in private (in chambers) and not in open court.
2. In cases involving incapacitated adults under the inherent jurisdiction, no such rubric is required as there is no relevant statutory restriction preventing publication.

The judge explained that where a judgment is handed down with the familiar rubric attached[23] any breach of those conditions will be a contempt of court. However, the rubric is only required where a statutory restriction exists which would make reporting the judgment a contempt of court, and the judge is effectively giving a conditional permission for that statutory restriction to be lifted.

Comment

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

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

HN v FL and Hampshire Council [2011] EWHC 2894 (COP)
Best interests; Residence and contact; Fact finding; Penal notice

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

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

R v Heaney [2011] EWCA Crim 2682
Crime; Ill treatment

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

The trial judge passed consecutive prison sentences of 3 months and 6 months respectively. However, the Court of Appeal held that the sentences should run concurrently, therefore totalling 6, rather than 9, months. Neither victim had sustained any distress or injury, the incidents were very short, and the appellant had lost, and had no realistic prospect of returning to, her chosen livelihood.

Comment

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

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

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

And, yet, it is not generally a crime for health or social care professionals to ill treat or wilfully neglect the elderly. Consider, for example, the abysmal lack of care at Mid Staffordshire NHS Foundation Trust hospital which left patients in pain, humiliated and routinely neglected. One 86-year-old was admitted there due to recurring vomiting. Her daughter described the ward nurses as bullies and when patients 'were calling out for the toilet … they would just walk by them' (*Independent inquiry into care provided by Mid Staffordshire NHS Foundation Trust*, January 2005-March 2009 HC375-1, vol 1, page 45). At present, such alleged conduct would only be a criminal matter if the elder was mentally disordered or incapacitated: those who are vulnerable simply by reason of their age are not protected. One suggestion, therefore, is to criminalise the deliberate or reckless causing of unnecessary suffering by someone required by law to care (N. Allen, 'Psychiatric care and criminal prosecution' in *Medicine, Crime and Society* (forthcoming) Cambridge University Press).

RE HM (SM V HM) CASE NO 11875043/01

Property and financial affairs; Personal injury trusts

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

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

The case was heard by HHJ Marshall on an application for reconsideration under rule 89 Court of Protection Rules. The case originated in an application for a personal injury award to be placed in trust. Liability was limited on causation and therefore there was only partial recovery. It was contended by the applicant that a trust, with HM's mother and a solicitor acting as trustees would be cheaper in the long run as being in the best interests of HM. The application was refused by District Judge Gordon Ashton whose decision recorded the grounds on which a trust would not be in HM's best interests as follows:

1. the jurisdiction of the Court of Protection has been established by statute specifically for managing and administering the financial affairs of persons who lack mental capacity to do so for themselves;
2. the procedures of the Court of Protection and role of the Public Guardian are for the benefit of the incapacitated person and provide safeguards that Parliament has deemed necessary;
3. there would not necessarily be a significant reduction in overall costs in the event of a Personal Injury Trust and the involvement of the Court of Protection would be required in any event upon a change of trustees;
4. any overall financial savings that may be achieved would not justify a departure from the statutory jurisdiction;
5. there would be less supervision and diminished protection if [HM']s funds were placed in a personal injury trust;
6. any future intervention would potentially involve the Chancery Court as well as the Court of Protection and would in consequence be more protracted and expensive;
7. the principal benefit of a personal injury trust, namely ring-fencing from means-testing, is likely to be available if the fund is retained in the Court of Protection.

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

1. the administration of a trust, based on the evidence in this case, would be cheaper than a deputyship (there would for instance be no security bond premium or Public Guardian supervision fee);
2. HM's mother was "a competent, forceful, well-educated and responsible person" (para 169) and her presence as a trustee would provide a means of monitoring legal costs (in the absence of the procedure for detailed assessment required by a deputy); and
3. the proposed professional trustee, Andrew Cusworth of Linder Myers, had agreed that his firm's costs would be limited to the guideline rates that would be allowed on detailed assessment.

Guest Comment: Martin Terrell

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

DE LOUVILLE DE TOUCY V BONHAMS LTD [2011] ALL ER (D) 32 (NOV)
Incapacity; Bankruptcy

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

The Court held:

1. There was no inconsistency between the Insolvency Rules (defining an 'incapacitated person') and the CPR (defining a 'protected party'). 'Incapacity' for the purposes of the Insolvency Rules covered not merely those falling within the definition of protected party within the CPR, but also included those suffering from a physical disability or affliction.
2. The Registrar should not have declared the claimant bankrupt: he ought to have:
    a. been aware that the claimant was incapable;
    b. adjourned the case for a representative or litigation friend to be appointed; and
    c. heard representations from such a person.
3. On the evidence, the financial situation was complex and, without proper investigation, it was impossible to be sure that it was appropriate to make a bankruptcy order.

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

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

COURT OF PROTECTION (AMENDMENT) RULES 2011 (SI 2011/2753)

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

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

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

(a) applications to appoint a deputy for property and affairs;
(b) applications to vary the powers of a deputy appointed for property and affairs under an existing order;
(d) applications to appoint and discharge a trustee;
(e) applications to sell or purchase real property on behalf of P;
(f) applications to vary the security in relation to a deputy for property and affairs;
(g) applications to discharge the security when the appointment of a deputy for property and affairs comes to an end;
(h) applications for the release of funds for the maintenance of P, or P's property, or to discharge any debts incurred by P;
(i) applications to sell or otherwise deal with P's investments;
(j) applications for authority to apply for a grant of probate or representation for the use and benefit of P;
(k) applications to let and manage property belonging to P;
(l) applications for a detailed assessment of costs;
(m) applications to obtain a copy of P's will;
(n) applications to inspect or obtain copy documents from the records of the court; and
(o) applications which relate to one or more of the preceding paragraphs and which a judge has directed should be dealt with by an authorised court officer.

2.2 An authorised court officer may not conduct a hearing and must refer to a judge any application or any question arising in any application which is contentious or which, in the opinion of the officer:
(a) is complex;
(b) requires a hearing; or
(c) for any other reason ought to be considered by a judge.

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

(a) extend or shorten the time for compliance with any rule, practice direction, or court order or direction pursuant to rule 25(2)(a) (even if an application for extension is made after the time for compliance has expired);
(b) take any step or give any direction for the purpose of managing the case and furthering the overriding objective pursuant to rule 25(2)(m);
(c) make any order they consider appropriate pursuant to rule 25(5) even if a party has not sought that order; and
(d) vary or revoke an order pursuant to rule 25(6).

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

4.1. P, any party to the proceedings or any other person affected by an order made by an authorised court officer may apply to the court, pursuant to rule 89, to have the order reconsidered by a judge.
4.2 An authorised court officer may not in any circumstances deal with an application for reconsideration of an order made by him or made by another authorised court officer.

Comment

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

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

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

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

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

UPDATED PRACTICE DIRECTIONS

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

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

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

PERMISSION APPLICATIONS

Lucy Series has been granted access by Senior Judge Lush to the statistics that he maintains as regards the applications he considers for permission to bring CoP proceedings. The full breakdown is to be found at

- http://thesmallplaces.blogspot.com/2011/11/applications-for-permission-to-court-of.html

But in headline terms, the Court (or least Senior Judge Lush) would appear to take a dimmer view of applications from sons and daughters concerning their parents, than it does applications from parents concerning their sons and daughters. Most applications are about older people, in particular with dementia, but most of these are rejected. Applications are more likely to be granted, the younger 'P' is, particularly if P is male. And more applications fail that have been put in by a solicitor than those put in without legal representation!

COMMENT UPON THE CHESHIRE JUDGMENT

By Sue Neal, Mental Capacity Act Implementation Lead NHS North Lancashire:

> "I am very grateful to Lucy Series for her enlightening commentary on the Court of Appeal ruling in Cheshire West, but cannot agree with her assertion that the judgement "will offer greater clarity as to what circumstances amount to a deprivation of liberty". In my view it makes the task of distinguishing 'deprivation of liberty' from 'restraint', which was always tricky, almost impossible, by introducing 'purpose' and 'reason' into the mix.
> Whilst the contextual details of the Cheshire West case differ significantly from my own area of practice in acute hospital settings, I am extremely worried about the general point made in the judgement that we should have regard for the objective 'purpose' and 'reason' why someone is placed and treated as they are in determining whether or not deprivation of liberty is occurring. Realistically, non-legal professionals trying to implement this legislation in practice will struggle to understand the fine distinctions made in the judgement between objective 'reason' and 'purpose' and subjective 'motivation' and 'intent'.
> As a best interests assessor, I am no longer confident that I know how to do my job – the objective 'reason' or 'purpose' of restrictions has always formed, primarily, part of the analysis of the second part of my assessment – to be considered after I have made a determination as to whether the individual is, objectively, deprived of their liberty. I'm now not sure how to make that judgement, if the benign 'purpose' of any restraint is to be weighed in the balance alongside other factors such as the intensity and frequency of the restrictions and their impact on the individual concerned. In an acute hospital setting, where the self-evident purpose of interventions is to preserve life and promote the patient's health and well-being, how severe would any restrictions need to be to warrant a DoLS authorisation? How much weight is to be given to the restraining party's benign objectives?
> As a trainer of acute hospital staff, I feel that I no longer know how to explain how they are to identify cases that may amount to deprivation of liberty, when it goes without saying (assuming our hospitals are not over-run with Harold Shipmans and Beverly Allitts) that the objective 'purpose' of medical and nursing interventions is always, one would hope, to save life and limb.
> The problem is that, despite their noble intentions, doctors and nurses do not always know what's best (even if they think they do!), particularly when it comes

to the need to impose restrictions on a patient's liberty. For example, we had a case where a patient was confined to bed virtually 24/7, 'in her best interests', due to the risk of falls – it was only thanks to the DoLS process that the hospital were forced to accept that this restriction could be reduced (and deprivation of liberty thereby avoided) by the provision of increased staffing, to enable the patient more freedom to wander. There is a danger that such patients will no longer be afforded the protective scrutiny of the DoLS scheme, if we are to teach staff that the benign 'purpose' or 'reason' underlying restrictions may keep them out of the 'deprivation' zone.

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

COURT OF PROTECTION LAW REPORTS

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

COURT OF PROTECTION MOVE

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

The Royal Courts of Justice Thomas More Building Strand London WC2A 2LL
DX 44450 Strand
The telephone number will stay the same: 0300 456 4600.

ISSUE 17 JANUARY 2012 COURT OF PROTECTION UPDATE

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

Concurring judgments

The keen-eyed will have noted an oddity about the decision of the Court of Appeal in this case (discussed in our previous edition), namely that it only appeared to contain one judgment, that of Thorpe LJ. That was, it appears, an error, and a further iteration has now been handed down which contains two concurring judgments, from Gross LJ and Baron J. The latter merely relates the concurrence; during the course of the former, Gross LJ commented that he was:

> "particularly and respectfully struck by the force of Lord Hope of Craighead's observation in *Austin v Metropolitan Police* [2009] UKHL 5; [2009] 1 AC 564, at [34]:
>
> > 'I would hold therefore that there is room, even in the case of fundamental rights as to whose application no restriction or limitation is permitted by the Convention, for a pragmatic approach to be taken which takes full account of all the circumstances.'
>
> 35. Once such a "pragmatic approach" taking "full account of all the circumstances" is adopted, the conclusion follows, as explained by Thorpe LJ... [t]he restrictions in question did not amount to a deprivation of liberty."

Given the repeated references to *Austin* in Court of Protection cases, it would now seem increasingly difficult to argue that it is to be limited to its own specific facts (far removed from Article 5(1)(e) and the care of those without capacity).

SECRETARY OF STATE FOR JUSTICE V RB [2011] EWCA CIV 1608
Restricted MHA patient; Conditional discharge; "Deprivation of liberty"

This case concerned a life-long 75-year-old paedophile who was attracted to boys, typically aged between 9 and 13 years old, which led to his conviction for indecent assault in 1999. An indefinite restricted hospital order followed, with a diagnosis of 'persistent delusional disorder', pursuant to sections 37 and 41 of the Mental Health Act 1983. For a number of years both RB and his care team, but not the Secretary of State, agreed that he could be cared for in a registered care home, provided he was escorted in the community.

At first instance the tribunal decided to discharge RB, subject to the following conditions:
1. That he resides at the care home
2. That he abides by the rules of that institution
3. That he does not leave the grounds of the care home except when supervised
4. That he accepts his prescribed medication
5. That he engages with social supervision
6. That he engages with medical supervision.

On appeal, the Upper Tribunal concluded that 'discharge' simply meant 'release from the state there mentioned, that is from "detention in a hospital for treatment"'. It held that the conditions amounted to a deprivation of liberty to which RB had not given valid and unfettered consent but, because the proposed detention related to a care home, it was lawful and in his best interests. The Secretary of State challenged this decision.

The Court of Appeal was therefore asked to consider whether there was any statutory authority to deprive him of his liberty once an order for his conditional discharge had been made. Focusing solely on the 1983 Act, the answer was an emphatic 'no'. After emphasising the fundamental nature of the right to liberty, by reference to clause 39 of the Magna Carta, Article 9 of the Universal Declaration of Human Rights, and Article 5 of the ECHR, the Court concluded that Parliament had not intended to create a new species of detention post-discharge. Section 73 of the 1983 Act did not prescribe any continuing detention criteria; the rights of conditionally discharged patients were inferior to those of detained patients and threatened Article 14 ECHR; and the decision under challenge would have authorised detention for the purposes of containment rather than treatment which contradicted the policy of the MHA. As a result, RB could not be conditionally discharged to a care home in circumstances where he would be deprived of his liberty.

Comment
This decision illustrates how the deprivation of liberty concept can impact negatively upon MHA patients. The Court acknowledged the irony that, by embracing human rights arguments intended to safeguard patients from arbitrary detention, the ultimate result was less liberal towards the patient. If forensic patients cannot be conditionally discharged into care home detention (MHA s.73), civil patients may experience similar problems in seeking discharge from hospital detention into guardianship (MHA s.7) or supervised community treatment (MHA s.17A) if their circumstances engage Article 5.

It appears that RB had the mental capacity to consent to the conditions and so his detention could not have been authorised under Schedule A1 of the Mental Capacity Act 2005 ('DOLS'). However, his consent was invalid because, in effect, he had no choice. The second irony, therefore, is that had he lacked capacity, he could presumably have been conditionally discharged from MHA-detention into MCA-detention as this provides distinct statutory authority to deprive liberty. In *DN v Northumberland Tyne & Wear NHS Foundation Trust* [2011] UKUT 327 (AAC), for example, the Upper Tribunal envisaged that a patient detained for treatment under MHA s.3 would be discharged and detained in a care home under a DOLS authorisation (see our October/November 2011 newsletter for further details).

Another potentially significant aspect of the judgment relates to Article 14 ECHR. The Court held that the words "other status" would 'cover a patient's status when detained in an institution which is not a hospital following their conditional discharge' (para [64]). It may well be, therefore, that in addition to 'disability' (see *Glor v Switzerland* (Application no. 13444/04, 30 April 2009)), being subject to a DOLS authorisation might similarly amount to a status protected against discrimination. The Secretary of State may then shoulder the burden of showing why, for example, there are differences between the substantive and procedural rights given to those detained under DOLS as compared with the MHA and vice versa.

AB v LCC [2011] EWHC 3151 (COP)

DOLS authorisations; Litigation friends; Official Solicitor; Relevant Person's Representative; Residential care

In this decision, Mostyn J gave general guidance on the circumstances in which P's Relevant Person's Representative ("RPR") may be appointed as a litigation friend in the context of a challenge to the deprivation of his liberty pursuant to section 21A Mental Capacity Act 2005.

The substantive dispute concerned AB, an 81 year old man who was said to suffer from dementia and cognitive impairment and who sought to challenge his deprivation of liberty in a Care Home under s.21A MCA 2005. On 12 October 2011, the Court ordered that the Official Solicitor be appointed to act as his litigation friend subject to his consent. No consent was initially forthcoming and on 4 November 2011, AB's solicitors applied to the Court for his RPR to be appointed as his litigation friend. The Official Solicitor's position was that he was a litigation friend of last resort and if another individual (namely the RPR) was willing to act, he would decline the invitation to do so. Mostyn J duly appointed AB's RPR as AB's litigation friend. In his judgment, Mostyn J considered the relevant statutory provisions, rules and regulations. The Judge held that P is required to have a litigation friend and that there is only one process by which a litigation friend may be appointed (as defined in Part 17 of the Court of Protection Rules). The Judge noted that an RPR is a creation of Schedule A1 MCA 2005 and accepted the applicant's submissions that a crucial role of an RPR in the DOLS process is to provide the relevant person with representation and support that is independent of the commissioners and providers of the services they receive.

At paragraph 34 of his judgment Mostyn J further held that it is plain that Parliament has intended that the RPR should play a central role in challenges pursuant to s21A MCA 2005. The Judge noted that RPRs do not require the permission of the court to bring a challenge under s.21A. The RPR may be a party to an application under s21A in his own right and, properly understood, the Court should not automatically appoint the detained person as the Applicant.

Accordingly, as to whether an RPR can act as a litigation friend, Mostyn J held:

> "37. The role of the RPR is to meet with the relevant person and to represent him in matters relating to his deprivation of liberty. As I have shown, the 2005 Act lays down certain specific examples of obligations on supervisory bodies to inform the RPR and the Act permits the RPR to seek reviews of standard authorisations. The Code of Practice (which must be taken into account by the Court if a provision of the Code is relevant to the question arising in the proceedings: see s42(5) MCA 2005) states that the RPR should represent and support the relevant person in 'making an application to the Court of Protection'.
> 38. I conclude therefore that there is no impediment to a RPR acting as a litigation friend to P in a s21A application provided that:
> i) the RPR is not already a party to the proceedings;
> ii) the RPR fulfils the COP rule 140 conditions;
> iii) the RPR can and is willing to act as litigation friend in P's best interests; and
> iv) the procedure as set out in COP rule 143 is complied with."

Mostyn J then went on to consider whether the normal or usual litigation friend should be the Official Solicitor. The Judge concluded:

> "There is no good reason why the Court cannot of its own motion appoint the RPR as a litigation friend in accordance with its powers under rule 143;
> At the initial directions hearing, the Court should try to determine whether there is a suitable litigation friend, and in many cases (like this one) the RPR can well fulfil that role.
> There appear in practice to be few cases where the RPR acts as the applicant in s21A applications. Should the applicant be a paid RPR appointed by the supervisory body it may be the Court would want to encourage such RPRs remaining as such, as envisaged by the statutory scheme. If, however, the RPR is a family member, the Court will need to consider whether P's interests are properly represented before the Court. In circumstances where a family member RPR is the applicant, the Court may feel it necessary to make P a respondent and to appoint the Official Solicitor (or another person) as the litigation friend."

Comment

This judgment was handed down to give general guidance on the potential role of an RPR as a litigation friend in the specific context of challenges under s21A MCA 2005. It is a useful reminder that whilst in practice, the Official Solicitor is often appointed as P's litigation friend, the applicant should consider whether there is another individual who is willing and capable of fulfilling this role.[24] It also emphasises the scope of the functions which an RPR may properly perform.

The authors have experience of RPRs acting as litigation friends in s21A challenges, and have found this approach to be a more satisfactory way of implementing the court review than by expecting local authorities to issue proceedings to challenge their own decisions, as suggested in *Neary***,** not least because it ensures that the s.21A procedure is used and P's entitlement to non-means-tested legal aid is triggered.

---

[24] The authors are aware that the Official Solicitor's office, which is considerably over-stretched, is of its own motion taking the point increasingly often that he is the Litigation Friend of last resort and other avenues need to be exhausted first.

C v Blackburn with Darwen Borough Council [2011] EWHC 3321 (COP)
Guardianship; Standard DOLS authorisation; "Deprivation of liberty"; Ineligibility; Jurisdiction; Best interests

This case concerned a 45 year old man with an acquired brain injury who suffered from mental health problems as well as lacking capacity to make decisions about his residence. He was the subject of a guardianship order under s.7 MHA 1983, and was also the subject of a standard authorisation.

Mr C was required by the local authority (as guardian) to reside at a care home, which had locked doors. He was subject to 1:1 supervision inside and outside the home, including when on trips to his family (this at their request). If Mr C tried to leave the home unescorted, he would be distracted, but restraint was apparently not used. Mr C gave oral evidence at the hearing and said that he was stressed by the guardianship and DOLS regimes and wanted both the order and the authorisation lifted. He did not like the care home or his fellow residents and wanted to live somewhere else.

The judge found that Mr C was not ineligible to be deprived of his liberty under Schedule A1, notwithstanding the guardianship order. However, he found on the facts that Mr C was not deprived of his liberty, saying:

> 'I accept that Mr C is acutely anxious about the restraints upon him, being more aware of his predicament than the subjects of previous reported cases. On the other hand, the restraints upon him within and outside the care home are relatively lighter. The existence of locked doors and a requirement of supervision are not in themselves a deprivation of liberty, where their purpose is to protect a resident from the consequence of an epileptic fit, or harm caused by a lack of awareness of risk, or from self-harm. The limit on the number of outings as a consequence of staffing levels does not tip the balance, when Mr C in fact has quite regular access to the community and to his family.'

The judge relied on the decision of the Court of Appeal in the *Chester West* case, noting that 'in the present case Mr C undoubtedly wants to live somewhere else, but this is a reflection of his unhappiness with the care home. He would like to be able to live an unconfined life in the community, but this is not realistically possible due to the extent of his difficulties. I distinguish his situation from those where a person has been removed from a home that is still realistically available.' The judge did not accept that a proposed rehabilitation placement, identified by the independent social worker who had been instructed in the proceedings, counted as an option that was actually available. The independent social worker had concluded that the present arrangement was not in Mr C's best interests and that his care plan and place of residence should change.

The judge also considered whether the guardianship order would have been sufficient to authorise a deprivation of liberty, if the same had existed. He found that it did not,

relying on paragraph 13.16 of the MCA Code of Practice,[25] and saying that guardianship does not include the power to prevent a person from leaving their place of residence.

The judge also interpreted the decision of Charles J in *GJ v The Foundation Trust and others* [2009] EWHC (Fam) 2972 as meaning that the MHA has primacy over the MCA as a general principle, not just in the specific circumstances with which GJ was concerned. He said 'there are good reasons why the provisions of the MHA should prevail where they apply. It is a self-contained system with inbuilt checks and balances and it is well understood by professionals working in the field. It is cheaper than the Court of Protection.' However, where a guardianship order is not working, because the subject of the order disagrees with the requirements imposed by the guardian, it would be appropriate for that dispute to be determined by the Court of Protection (assuming the person lacks capacity). But, the Court of Protection could not do so while the guardianship order was in place because it would have no jurisdiction, by virtue of s.8 MHA 1983. The judge envisaged that in such cases, the guardianship order should be discharged, so that the Court of Protection could determine the fundamental 'best interests' dispute.

Comment

This case is of interest from a number of angles. First, it appears to the authors, that as feared, the Court of Appeal's decision in *Chester West* has led to the wrong approach being taken to the question of whether there is a deprivation of liberty. It is somewhat surprising to the authors that a person who objects to living in a care home, but who is required to live there against his wishes, is not being deprived of his liberty. The fact that Mr C could go on frequent outings, and the possibility that 1:1 supervision may have been required in any setting due to his care needs,[26] do not seem to alter the fundamental reality of Mr C's position. The judge's decision appears to have turned on the fact that there was no 'actual' alternative placement available to Mr C. The danger of this approach is that where, as here, the local authority has not investigated or put forward any alternative placement (because they believe that the present placement is best), someone in Mr C's position has no meaningful way of presenting an alternative option to the court.[27] Mr C's lack of capacity and lack of ability to control and manage his own affairs effectively works against him by preventing him from accessing the safeguards of the DOLS regime.

It seems to the authors that Mr C was deprived of his liberty, albeit that the deprivation of liberty may have been proportionate and in his best interests given the (possible) lack of a better alternative – and that Mr C may have been deprived of his liberty in any placement, because resistance to care was said to be an intrinsic part of his condition.

Although Mr C was stressed by the DOLS authorisation, without its protection, how is he to require the local authority to continue to monitor his placement, and to consider alternatives? The guardianship order had been renewed despite his opposition to the

---

[25] 13.16 Guardianship gives someone (usually a local authority social services department) the exclusive right to decide where a person should live – but in doing this they cannot deprive the person of their liberty. The guardian can also require the person to attend for treatment, work, training or education at specific times and places, and they can demand that a doctor, approved social worker or another relevant person have access to the person wherever they live. Guardianship can apply whether or not the person has the capacity to make decisions about care and treatment. It does not give anyone the right to treat the person without their permission or to consent to treatment on their behalf.

[26] Which was said in *Chester West* to be a 'relevant' factor, not a determinative one (paragraph 102 per Munby LJ).

[27] It is also interesting to ask why the absence of an actual alternative is relevant in the first place – imagine a homeless person who is detained under s.3 MHA 1983, or a person whose home is repossessed while they are serving a prison sentence.

placement, and there was thus no incentive for the local authority to think creatively about alternative placements such as the one recommended by the independent social worker. Although the MHA may well have the advantages identified by the judge, it appears that in Mr C's case, it had not worked to promote a comprehensive review of his situation or the identification of alternative arrangements for his care and residence which may have been more acceptable to him.[28]

The judgment is also of interest for its conclusion that a guardianship order cannot also authorise a deprivation of liberty. Although the Code of Practice asserts this to be the case, there are a number of commentators (and other judges) who take a different view. The issue does not appear to have been argued fully, and no detailed reasons for the judge's conclusion are given. No doubt it will be raised again in the future, as this part of the judgment was obiter.

Finally, we note that there appears to be a difference of opinion between the court and the Department of Health as to whether the analysis of Charles J in the GJ case should be read as laying down a general principle of the primacy of the MHA over the MCA, or whether that principle was tied to the 'Case E' scenario under Schedule 1A. In the case of *DN v Northumberland Tyne and Wear NHS Foundation Trust* [2011] UKUT 327 (AAC), a letter from the DH to the court was reproduced, which stated that 'it was specifically in the context of the interpretation of Case E that Mr Justice Charles talked in J about the MHA having "primacy". Outside that context, the Department does not understand him to have been making a more general statement about the relationship between the two Acts. Indeed, as set out above, the Department does not think it would actually be possible to say, in general, which has primacy over the other.' Yet further complication in what Mr Justice Peter Jackson observed in this case to be a complex and inaccessible area of law.

CARDIFF COUNCIL V PEGGY ROSS (2011) COP 28/10/11
DOLS authorisation; Cruise ships; Capacity; Best interests

This case concerned an 82 year old woman with a diagnosis of dementia, who had decided with her partner of 20 years to go on a cruise ship holiday, something they had both done together on many previous occasions. Mrs Ross had moved to a care home a few months before the planned cruise following medical problems, but spent weekends with her partner Mr Davies at his home.

The local authority formed the view that Mrs Ross lacked capacity to decide to go on the cruise, and that it was not in her best interests. The critical issue from the local authority's perspective was that Mrs Ross was not able to appreciate the potential risks to her wellbeing of going on the cruise.

The court was required to make a decision at short notice and without oral evidence from expert witnesses on capacity. However, the judge felt that the decision in question was fairly straightforward – 'It is a choice of whether to go on holiday or not, in familiar circumstances, with one's companion of the past two decades' – and that despite the views of the social worker and a psychiatrist who had assessed Mrs Ross that she lacked capacity, there was insufficient evidence to rebut the presumption in favour of capacity.

The judge went on to hold that even if Mrs Ross lacked capacity, it was not contrary to her best interests to go on the holiday. The judge felt that the Council's approach to the

[28] See the latest posts by Lucy Series on http://thesmallplaces.blogspot.com/ for a comprehensive comparison of guardianship and DOLS and their respective advantages and disadvantages.

best interests decision was too risk averse and failed to take proper account of the potential benefits to Mrs Ross: it 'smacked of saying that her best interests were best served by taking every precaution to avoid any possible danger without carrying out the balancing exercise of considering the benefit to Mrs Ross of what, sadly, may be her last opportunity to enjoy such a holiday with Mr Davies. This led, in my view, to trying to find reasons why Mrs Ross should not go on this holiday rather than finding reasons why she should.' The judge was satisfied that Mr Davies would be able to care for Mrs Ross, as he did when she stayed with him at weekends, and was strongly influenced by the fact that this was likely to be her last cruise ship holiday.

The Council had put in place a DOLS authorisation to prevent Mrs Ross going on the holiday, and had then made an application to the court very shortly before the cruise was due to start. Although the issue was not fully argued or decided, the judge indicated that this was not the correct procedural route, and that an application should have been made to the court rather than the use of the DOLS regime.

Comment
This case provides another example of a tendency among local authorities to focus on risk prevention at the expense of emotional wellbeing. The opposite approach is often taken by the court, particularly in cases involving elderly people, who, even though they may have impaired capacity, would rather take the riskier option for care, residence or holidaying, rather than losing their remaining autonomy. It may be that judgments of this sort will persuade statutory bodies to take a broader view of best interests and to give proper weight to the wishes and feelings of the individual concerned, and to the need to promote emotional wellbeing as well as physical safety.

RE HM (SM V HM) CASE NO 11875043/01
Property and financial affairs; Personal injury trusts

Last month's issue contained an illuminating summary and commentary by Martin Terrell on this important case. By way of our own comment, we would perhaps add that the judgment of HHJ Marshall QC also emphasised the extent to which that the degree of benefit to HM ('P') in that case which could be achieved by only a modest saving in costs was significant, because she had under-recovered in her damages claim. In other words, although the saving was a slight one in monetary terms, it was (in context) a very valuable one; the case is therefore not authority for the proposition (which may previously had held sway) that any little saving can justify the endorsement of a trust.

NK V VW (CASE NO. 11744555; 27 OCTOBER 2010)
Welfare proceedings; Permission refused

This case was determined well over a year ago, but anonymisation has taken a considerable period of time. It merits attention, though, because it is a very rare example of a reported case in which reasons have been given for refusal to bring welfare proceedings.

NK sought permission to bring proceedings in relation to the welfare of his elderly mother, VW. He expressed concern as to her welfare and that his relationship with her had been alienated by the method and nature of the care which she received. The purpose of his application was said primarily to be to remove her from the care home where was resident (situated a long distance from where he lived) to one located in another part of the country. He was in a position to fund such care, and wished by removing his mother to another care home to exercise more frequent contact with her

than were currently imposed within a standard authorisation granted by LCC, the relevant local authority, upon the recommendations of the care home at which VW was resident. The son also wished to be appointed his mother's deputy in respect both of property and affairs and health and welfare. There was before the Court an unchallenged psychiatric report from a Dr A, who had concluded unequivocally that it was in the mother's best interests to remain resident where she was. Dr A also concluded that it was in the mother's best interests that there be no restrictions to visits taking place outside the home with independent monitors.

In determining the application, Macur J reminded herself (at paragraph 3) that, in deciding whether to grant permission where such is required by s.50 MCA 2005 and Rule 50 of the Court of Protection Rules 2007, the Court must in particular have regard to (a) the Applicant's connection with the person to whom the application relates; (b) the reasons for the application; (c) the benefit to the person to whom the application relates or the proposed order or directions, and (d) whether the benefit can be achieved in any other way.

Having directed herself thus and outlined the evidence, Macur J concluded that, considering the overall objective of the MCA and unchallenged opinion of Dr A, the proposed order and directions sought by NK if permission were to be granted were not capable of being perceived to be to the benefit of VW. The disadvantages to her in removing her from the care home in which she was residing home outweighed every benefit suggested that the move would bring. She continued:

> "In those circumstances, I refuse NK permission to make application pursuant to the MCA 2005 in relation to his mother. In doing so I obviously consider that section 50 (3) and the associated Rules require the Court to prevent not only the frivolous and abusive applications but those which have no realistic prospect of success or bear any sense of proportional response to the problem that is envisaged by NK in this case." (paragraph 16)

Comment
Whilst many applicants are refused permission to bring welfare applications (see the discussion in the last issue of the valuable statistical work done in this regard by Lucy Series), reasons for the refusal of permission are rare, largely because the decisions are usually made at (what was) Archway and are not reported. This judgment is therefore of assistance in reminding practitioners as to the tests to be applied; that of proportionality between problem and response set out by Macur J may not find its express place in the MCA but – it is respectfully suggested – is clearly correct.

A LONDON BOROUGH V (1) BB (BY HER LITIGATION FRIEND THE OFFICIAL SOLICITOR) (2) AM (3) SB AND (4) EL TRUST [2011] EWHC 2853 (FAM)
Capacity; Marriage; Residence; "Deprivation of liberty"

This judgment, determined by Ryder J in the summer, but not available until recently, is a further judgment in the proceedings concerning BB, a woman suffering a number of disabilities, including deafness and a learning disability, who was initially removed from her home following an allegation of assault upon by her mother. An earlier judgment, relating to deprivation of liberty and the interaction with the MHA 1983 was discussed in our August 2010 edition (*BB v AM* (2010) EWHC 1916 (Fam)).

At this juncture, the Court was asked to make decisions as to (1) BB's marriage to her husband, MM; and (2) as to her residence (and, related, whether the care arrangements at the placement at which she was living amounted to a deprivation of liberty).

As regards marriage, Ryder J endorsed the agreement of all the parties that it was in BB's best interests for her marriage with MA to be annulled pursuant to s 12(c) of the Matrimonial Causes Act 1973 on the ground that she did not validly consent to the marriage as she lacked capacity to consent at the relevant time. Ryder J noted that MA had agreed through solicitors to an annulment and accordingly, Ryder J dismissed the prayer in his petition for divorce and allowed the petition to proceed on the basis that the marriage was to be annulled. BB was given leave to issue an application for an annulment pursuant to section 13(4) of the 1973 Act and in exercise of its powers under Part 18 Family Procedure Rules 2010 dispensed with the procedural steps to be taken before the grant of such leave by agreement and in furtherance of the over-riding objective as set out in the Rules. Having regard to requirements of Part 7 of the 2010 Rules, Ryder J directed that the application be listed before a District Judge of the Principal Registry for pronouncement of a decree nisi and that the hearing should be in private pursuant to rule 7.16(3)(d) of the Rules. With the agreement of the parties, Ryder J further gave leave for the proceedings to be treated as an application for a forced marriage protection order and made such an order as being in BB's best interests.

As regards residence, Ryder J noted, with some asperity, that the allegation of assault could not be proved on the balance of probabilities, and that the material necessary to come to this conclusion had been available almost immediately. He noted (at paragraph 18) that the fact that steps had not been taken to address this situation meant that the allegation had been hanging over the family like a cloud, and that they had in consequence been placed in an adversarial position as regards the more important welfare issues which related to BB.

Ryder J noted that the full evidence was not before the Court (in particular as to whether residence back with BB's family was an option);[29] however, holding that the arrangements at her placement amounted to a deprivation of liberty, he held that they were justified and residence at the placement was in her best interests on an interim basis pending a further review in 6 months' time. He set out a detailed exegesis of the further investigations that he required to be carried out in the interim.

Comment

Whilst not the subject of controversy, as it was agreed as between the parties, the approach adopted to the annulling of the marriage between BB and MA was a pragmatic one which it is useful to have set out in full as a template for similar cases in future.

One further point of interest is the short shrift given to the evidence of a cultural expert jointly instructed by the parties. Ryder J expressed no difficulty with the expert's evidence as to the cultural implications of BB's marriage and the ways in which that ought to be brought to an end; or BB's cultural and religious background and the importance of the same to her identity. However, Ryder J expressed difficulty as to the hypotheses proffered by the expert about BB's family and the community in which they lived. He noted that the evidence given in this regard was well within the knowledge of the court (and that this "might of course have suggested to the parties that the evidence was neither necessary nor admissible" (para 23); it was not cross referenced to the attitudes and

[29] He noted in this regard (paragraph 47) that it was the role of the local authority where welfare proceedings are necessary to bring all of the relevant materials to the Court so that a best interests decision can be made.

practices of this particular family or the community in which they lived because the expert was not instructed to perform that task). In the absence of any instruction to the expert to undertake that work, Ryder J found that that evidence remained purely hypothetical.

AH v Hertfordshire Partnership NHS Foundation Trust & another [2011] EWHC 276
Welfare proceedings; Costs

The costs decision in this previously reported case which concerned plans to move a number of residents from an NHS campus facility has been handed down. The court ordered the statutory bodies involved to contribute to the costs incurred by the litigation friends of the residents involved, including in cases where the statutory bodies had agreed to consent orders that it was in the best interests of the residents not to be moved, and thus no substantive hearing had occurred.

Peter Jackson J reiterated the familiar principle that decisions to depart from the general rule that there should be no order for costs in welfare proceedings are fact-specific. In these cases, he found that 50% of the residents' costs should be paid by the statutory bodies to reflect the following features of the litigation:

- There had been difficulties in getting information from the statutory bodies about their planning and about the financial circumstances of the residents.
- The costs of the residents were increased by virtue of their having to act as Applicants in each set of proceedings.
- The best interests assessments that had been carried out were inadequate.
- There had been a lack of clarity about whether the campus facility was being closed, and a lack of effective communication and consultation about the proposal to move the residents.
- The residents had succeeded in obtaining the outcome sought by their litigation friends, and accept the views of the experts were unreasonable.
- No warning of a costs application is necessary when the party against whom costs are sought is a public body.

Comment
It would be dangerous to attempt to read across from this judgment to other cases, but the judgment is worth noting as an example of costs being ordered even where there is no bad faith or flagrant misconduct. The judgment should give pause for thought to litigants, whether individuals or public bodies, who seek to dispute the recommendations of jointly-instructed experts where the bulk of the evidence points in one direction.

The London Borough of Hillingdon v Steven Neary (by his Official Solicitor) and Mark Neary [2011] EWHC 3522 (COP)
Costs; Conduct

Peter Jackson J has been busy recently. In addition to the costs judgment in the AH case discussed above, he has also handed down his costs judgment in the Neary case. In sum, he departed from the general rule contained in rule 157, and ordered Hillingdon to pay the costs of the Official Solicitor costs from the date of issue to the conclusion of the main hearing. He declined to order that it pay the OS's costs thereafter, because Hillingdon had sought to cooperate in the securing of successful future care arrangements. He also declined to order costs in relation to the question of whether the

press should be entitled to attend the hearing, primarily because it raised issues of general public importance.

This judgment is perhaps unsurprising, but is valuable for two dicta. Having reviewed five Court of Protection decisions on costs,[30] he commented (at paragraphs 7-8) as follows:

> "I find that these decisions do not purport to give guidance over and above the words of the Rules themselves – had such guidance been needed the Court of Appeal would no doubt have given it in Manchester City Council v G. Where there is a general rule from which one can depart where the circumstances justify, it adds nothing definitional to describe a case as exceptional or atypical. Instead, the decisions represent useful examples of the manner in which the court has exercised its powers.
> 8. Each application for costs must therefore be considered on its own merit or lack of merit with the clear appreciation that there must be a good reason before the court will contemplate departure from the general rule. Beyond that, as MCA s. 55(3) – cited above – makes plain, the court has "full power" to make the appropriate order."

Finally, at the very end of his judgment (paragraph 18(9), he noted that:

> "... there is nothing in this decision to deter public authorities or others from issuing proceedings in a timely way in appropriate cases. Far from increasing the risk of costs orders being made, or their being made with effect from an earlier date, the greater likelihood is that matters would not reach the stage where such orders were in prospect at all."

Schedule 3

By way of a 'watch this space,' a judgment will be forthcoming in short order as to the circumstances under which a foreign 'protective measure' requiring the detention and treatment of an incapacitated adult in an English psychiatric institution will be recognised and enforced.

Training DVD

The Court of Protection team are in the process of producing a training DVD on the MCA, which will cover capacity assessments, best interests decision-making, the role of the Court of Protection, and deprivation of liberty. The target audience is social workers, best interests assessors and other employees of statutory agencies who work in this area. If you would like to find out more, please email Beth Williams – beth.williams@39essex.com.

ISSUE 18 FEBRUARY 2012 COURT OF PROTECTION UPDATE

THE OFFICIAL SOLICITOR AND HEALTH AND WELFARE CASES

[30] *SC v London Borough of Hackney* [2010] EWHC B29 (COP), a decision of Senior Judge Lush; *G v E & Ors* [2010] EWHC 3385 (Fam), a decision of Baker J, upheld on appeal in *Manchester City Council v G & Ors* [2011] EWCA Civ 939; *D v R (the Deputy of S) and S* [2010] EWHC 3748, a decision of Henderson J in a property and affairs case; and (discussed above) *AH v Hertfordshire Partnership NHS Foundation Trust & Anor (including costs)* [2011] EWHC 276 (COP) and 2011 [EWHC] 3524 (COP). The judgments were usefully summarised in an appendix.

We start, however, with a development of very considerable significance for those concerned with health and welfare matters.

The Official Solicitor wrote to the President of the Court of Protection on 15 December 2011 to inform him that he had reached the limit of his resources with regard to Court of Protection healthcare and welfare cases.

As a result of this development, we understand that the Official Solicitor's position is that he is unable to accept invitations to act in any except the most urgent cases, namely serious medical treatment cases and section 21A appeals, other than those brought by the relevant person's representative. Section 21A appeals may be subject to a delay until a lawyer/case manager becomes available.

All other cases, even where his acceptance criteria are met, are being placed on a waiting list. These cases will be accepted in accordance with the best estimate that can be given to their weighting and priority when a case manager becomes available to manage the case.

We further understand that this policy will remain in place until the volume of new cases reduces, or the Official Solicitor's resources for Court of Protection healthcare and welfare cases can be increased, or both, to enable him to revert to the previous acceptance policy.

A LOCAL AUTHORITY V H [2012] EWHC 49 (COP)
Capacity to consent to sexual relations; Marriage; Deprivation of liberty safeguards

H was 29 years old and had mild learning difficulties and atypical autism. She attended special school from aged 5 to 17, Community College until aged 19 and then led an itinerant lifestyle until admitted to a psychiatric hospital (initially as an informal patient) in 2009. H's history demonstrated both a very early and a very deep degree of sexualisation. She was highly vulnerable and exhibited dis-inhibition including a willingness to engage in sexual activities with strangers. By the time of her admission to hospital in 2009, at least one man had been convicted of a sexual offence against her. H's admission to hospital became compulsory under s.3 Mental Health Act 1983 on 20 November 2009 and thereafter authorisation was renewed until her ultimate discharge in August 2011. Her behaviour in hospital often displayed highly sexualised and bizarre features. Attempts were made both to ascertain what she understood about sexual relations and to give some education in issues of self-protection. Proceedings were started in the Court of Protection on 16 October 2010. The Official Solicitor acted as H's litigation friend throughout those proceedings.

On 15 December 2011, Hedley J made a number of orders that were uncontroversial on the evidence. Namely, that H lacked capacity to litigate, to determine her residence, her care and support arrangements, contact and her finances. Hedley J also held that H lacked capacity to consent to sexual relations. In light of this finding he made a consequential order in her best interests authorising a restrictive regime, including 1:1 supervision at all times - a regime which was expressly designed to prevent H from engaging in sexual relations which she would otherwise willingly do. Hedley J noted that this regime undoubtedly amounted to a deprivation of her liberty but that the parties accepted that in light of Hedley J's finding as to H's capacity to consent to sexual relations, the best interests judgment was sound.

In reaching his judgment on this issue, Hedley J noted that on the facts of the case, given that H had no difficulty communicating, the question of her capacity to consent to sexual relations turned on the factors set out in section 3(1)(a)–(c) MCA 2005. He was referred by the parties to five reported decisions:

(i). *XCC v MB, NB & MAB* [2006] 2 FLR 968 (Munby J);
(ii). *Local Authority X v MM* [2007] EWHC 2003 Fam (Munby J);
(iii). *R v C* [2009] UKHL 42;
(iv). *DCC v LS* [2010] EWHC 1544 Fam (Roderick Wood J);
(v). *DBC v AB* [2011] EWHC 101 COP (Mostyn J).

Hedley J held that none of these decisions were binding on the High Court (as it related to the Sexual Offences Act 2003, the decision of the House of Lords in *R v C* was obiter) and recorded that it was accepted by all counsel that the decisions could not be reconciled with one another. The Judge indicated that rather than subject each decision to critical analysis, his approach was to acknowledge those decisions, and then attempt an analysis of his own from first principles, guided by the statute, and then (and only then) to compare (and no doubt contrast) his conclusions with those reached in the five cases.

At paragraphs 20 to 21 of his judgment Hedley J held that a sexual act between humans is a complex process which has "not just a physical but an emotional and moral component as well." He further emphasised that it is "important to remember that possession of capacity is quite distinct from the exercise of it by the giving or withholding of consent. Experience in the family courts tend to suggest that in the exercise of capacity humanity is all too often capable of misguided decision making and even downright folly. That of itself tells one nothing of capacity itself which requires a quite separate consideration." Hedley J noted that whilst these issues arise both under the criminal and the civil law, and it would be desirable for there to be no unnecessary inconsistency in approach, capacity does arise in different contexts and, in a case such as the present, capacity has to be decided in isolation from any specific circumstances of sexual activity as the purpose of the capacity enquiry is to justify the prevention of any such circumstances arising.

In terms of the analysis to be carried out under section 3(1) MCA 2005, at paragraphs 23-26, Hedley J held the following:

> "23. First comes the question of understanding the relevant information, but what is that? Clearly a person must have a basic understanding of the mechanics of the physical act and clearly must have an understanding that vaginal intercourse may lead to pregnancy. Moreover it seems to me that capacity requires some grasp of issues of sexual health. However, given that that is linked to the knowledge of developments in medicine, it seems to me that the knowledge required is fairly rudimentary. In my view it should suffice if a person understands that sexual relations may lead to significant ill-health and that those risks can be reduced by precautions like a condom. I do not think more can be required.
> 24. The greater problem for me is whether capacity needs in some way to reflect or encompass the moral and emotional aspect of human sexual relationships. I have reflected long and carefully on this given Miss Jenni Richards Q.C.'s challenge to formulate and articulate a workable test. In relation to the moral aspect, I do not think it can be done. Of itself that does not alarm me for two reasons: first, I think the standard for capacity would be very modest not really going beyond an awareness of 'right' and 'wrong' behaviour as factors in making

a choice; and secondly, the truly amoral human is a rarity and other issues would then come into play. Accordingly, although in my judgment it is an important component in sexual relations it can have no specific role in a test of capacity.

25. And so one turns to the emotional component. It remains in my view an important, some might argue the most important, component; certainly it is the source of the greatest damage when sexual relations are abused. The act of intercourse is often understood as having an element of self-giving qualitatively different from any other human contact. Nevertheless, the challenge remains: can it be articulated into a workable test? Again I have thought long and hard about this and acknowledge the difficulty inherent in the task. In my judgment one can do no more than this: does the person whose capacity is in question understand that they do have a choice and that they can refuse? That seems to me an important aspect of capacity and is as far as it is really possible to go over and above an understanding of the physical component.

26. That then would be my analysis of the requirements for capacity to consent to sexual relations. Whilst I accept of course that human sexual relations are particularly person as well as situation specific, I would be disposed to view that in terms of whether any specific consent was (or in these circumstances) could be given. The difficulty in the Court of Protection is the need to determine capacity apart from specific persons or situations: H is in one sense a classic illustration of the problem. On the other hand one can see as a criminal lawyer the difficulties raised by a general finding in relation to a person who without knowledge of it embarks on what he thinks is consensual sexual activity. The focus of the criminal law must inevitably be both act and person and situation sensitive; the essential protective jurisdiction of this Court, however, has to be effective to work on a wider canvas. It is in those circumstances that I find myself closer to the views expressed by Munby J. (as he then was) and Mostyn J. although I have reached that position by a more tortuous route."

On the facts, Hedley J considered that H lacked capacity to consent to sexual relations on two specific bases: first, that she did not understand the health implications of sexual relations, a matter made more serious in this case by her history of multiple partners indiscriminately accommodated; and secondly, that she could not deploy the information she had effectively into the decision making process. Those matters were evidenced both by the history of the case and the expert psychiatric assessment that had been undertaken.

Two further issues fell for consideration:

(i). H's capacity to marry; and
(ii). H's capacity in relation to contraception.

As to H's capacity to marry, Hedley J noted that this raised more complex issues than capacity to consent to sexual relations but for so long as marriage requires sexual intercourse for its consummation, it must follow that the person who lacks capacity to consent to sexual relations (as H did) must lack capacity to marry. However, as H showed no present disposition to marry there was no purpose in making a formal declaration as to her capacity in this regard.

Hedley J also considered it premature to make a declaration as to H's capacity in respect of contraception but noted that she had some basic understanding and could learn more. He therefore considered that the present focus should be on improving her education in this regard.

Guest Commentary by Jenni Richards QC

The uncertainty over the correct legal test for capacity to consent to sexual relations continues. In *A Local Authority v H* both the applicant local authority and the Official Solicitor agreed that the correct approach was that set out by, amongst others, Mostyn J in *DBC v AB* [2011] EWHC 101 COP, namely that the capacity to consent to sex remains act-specific and requires an understanding and awareness (1) of the mechanics of the act, (2) that there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections and (3) that sex between a man and a woman may result in the woman becoming pregnant.

The parties acknowledged, however, that neither the decision of Mostyn J nor any of the other authorities addressing this issue were binding on a High Court Judge sitting as a nominated judge of the Court of Protection. It was Hedley J who identified for debate at the hearing the question of whether the test for capacity should encompass an emotional and/or moral component. Both the local authority and the Official Solicitor argued against this proposition, and contended that a workable test encompassing the moral and/or emotional elements of human sexual relationships could not be formulated.

In a characteristically thoughtful judgment Hedley J concluded that the moral dimension, although an important component in sexual relations, can have no specific role in assessing capacity. Likewise he acknowledged the difficulty in articulating a workable test that could embrace the emotional consequences of human sexual relations. However, his judgment identifies an important additional factor, namely that P must be able to understand that they have a choice and that they can refuse. Whether this additional factor will lead to different outcomes than would be obtained from simply applying the three criteria identified in Mostyn J's judgment remains to be seen.

Hedley J's judgment usefully addresses the extent of understanding of the health risks of sexual relations that is required in order for P to have capacity. To expect P to have an understanding of the precise health risks associated with different forms of sexual activity and different sexually transmitted diseases might require more of P than many adults without any impairment of, or disturbance in the functioning of, the mind or brain. Sensibly Hedley J has concluded that the knowledge required is fairly rudimentary. It should suffice if the person understands that sexual relations may lead to significant ill-health and that those risks can be reduced by precautions like a condom.

Ultimately, however, Hedley J's judgment reinforces the need for this issue to be considered at appellate level. Otherwise it is inevitable that in every case involving sexual capacity the Court of Protection Judge will have to consider the competing arguments and authorities and form their own view of the correct approach, thereby adding to the abundance of conflicting High Court authority on the point.

RE M [2011] EWHC 3590 (COP)

Deprivation of liberty safeguards; Ineligibility; MCA Schedule 3; Recognition of foreign judgments

As presaged in last month's edition, Mostyn J determined just before Christmas an unprecedented application under Schedule 3 MCA 2005 for recognition and enforcement of an Order of the High Court of the Irish Republic placing a young man, NM, in an English psychiatric institution. The application (in which Alex appeared on behalf of the applicant Irish Health Services Executive) raised a number of stark issues. The Irish

order in question (made under the inherent jurisdiction of the High Court in the ROI) required the transport to and treatment of NM at an English psychiatric institution in circumstances where: (1) such would be overwhelmingly likely to amount to a deprivation of his liberty; and (2) he satisfied the clinical criteria for detention under the MHA 1983. A significant question for the Court, therefore, was whether it was barred from recognising and declaring to be enforceable the order of the Irish High Court by virtue of the prohibitions in s.16A of and Schedule 1A to the MCA 2005. Mostyn J had little hesitation in holding that it was not, at paragraph 6 noting that:

> "Mr. Ruck Keene in his skeleton argument has responsibly drawn my attention to the fact that under s. 16A of the Mental Capacity Act, the court may not include in a welfare order a provision which authorises the person to be deprived of his liberty [if he is ineligible to be deprived of his liberty by virtue of Schedule 1A]. The reference to a welfare order is to an order under s. 16(2)(a). However, an order made by me under paragraph 19 of Schedule 3 is not a welfare order under s. 16(2)(a). The whole point of s. 16A is to ensure that courts do not outflank the mandatory provisions of s. 4A and Schedule A1 by making, in effect, deprivation of liberty orders under s. 16(2)(a), but that is not connected at all to the freestanding power to recognise a foreign order of this nature under paragraph 19 of Schedule 3, and so whilst Mr. Ruck Keene has fairly and responsibly drawn my attention to that, it is not something that impacts on any possible exercise of discretion under paragraph 19(4)."

It is perhaps to be noted, as it is not immediately obvious from the judgment, that the terms of the Irish Order sought to provide NM with safeguards to ensure his position was kept under appropriate review, not least by including within it provisions mirroring, to the greatest extent possible, those of the MHA 1983.

Comment

Schedule 3 to the MCA 2005 is an extremely powerful piece of legislation. Quite whether Parliament understood how powerful it would be is an interesting question, especially given the frankly curious decision to enact it in such a way as to implement in English law the provisions of the 2000 Hague Convention on the International Protection of Adults on a unilateral basis. That it is a very powerful piece of legislation has only been reinforced both by this decision and by the decision of Hedley J in *Re MN* [2010] EWHC 1926 (Fam); [2010] COPLR Con Vol 893. The former decision confirmed that the Court in deciding whether to recognise and enforce a foreign protective measure was not required to consider whether such was in the person's best interests;[31] this decision confirms that the Court can recognise and enforce a foreign order detaining a person habitually resident overseas in an English psychiatric institution, and that the threshold for declining such recognition and enforcement will be a high one.

Whilst this decision may raise eyebrows it is perhaps to be noted that the framers of the 2000 Hague Convention had had specifically in mind cross-border psychiatric placements,[32] including those without the consent of the individual in question and against their will. Whether those drafting Schedule 3 had in mind either these

---

[31] Albeit that implementation would require such consideration by virtue of the operation of Paragraph 12 of Schedule 3. For a further discussion of *Re MN*, see the case note prepared by Alex and Josie in *Trusts & Trustees*, Vol. 17, No. 10, November 2011, pp. 959–962 and, as regards Schedule 3 more widely, Alex's article, *An International Can of Worms: Schedule 3 to the Mental Capacity Act 2005* (2011) 1 Elder Law Journal 77.

[32] See, in particular, the Explanatory Report which accompanies the Convention, available at http://www.hcch.net/upload/expl35e.pdf. Such placements were, of course, envisaged as between Convention countries, and subject to the procedures thereunder for consultation with the authorities in the receiving state.

deliberations or that English Courts would be asked to recognise and declare enforceable applications of the nature brought before Mostyn J is, again, a nice question. However, we suggest that the approach adopted by Mostyn J both to the nature of the exercise required under Paragraphs 19 and 20 and to the interaction of s.16A, Schedule 1A and Schedule 3 is plainly correct. The fact that this gives rise to difficult questions as to how to ensure that the Article 5 ECHR rights of the individual in question (in particular their Article 5(4) rights) are secured is a consequence of the framing of Schedule 3, rather than standing as a necessary bar to recognition and enforcement of an order which complies with the (rather minimalist) requirements of the Schedule.

RE JDS (COP NO: 10334473, 19.1.12)
Gift; Damages for personal injury; Deputy for financial affairs; Best interests; Costs

Senior Judge Lush has recently handed down an important decision upon an application for a gift to be made to the parents of a young man awarded damages for clinical negligence for purposes of reducing the amount of Inheritance Tax that they may have to pay on his death.

The young man in question, born in 1991, had a life expectancy of another 20-25 years (at which point his parents would be in their mid to late 60s). He had been awarded a very significant sum by way of damages for clinical negligence arising out of the circumstances of his birth. His (professional) deputy submitted an application which (in the form that ultimately came before the Court for consideration) was for:

> "Permission to transfer £325,000 of the patient's funds into a flexible power of appointment trust with the intent that substantial Inheritance Tax will be saved (at today's rates £130,000) provided he lives 7 years."

As noted above, the intent was that the trust would be for the benefit of the young man's parents. The Official Solicitor opposed the application.

Senior Judge Lush (whilst noting at para 30 that he had had some reservations in the past as to its utility in all property and affairs cases) applied the balance-sheet analysis derived from *Re A*. His consideration of the various factors identified 9 in favour and 14 against, but noted that this was not necessarily conclusive before discussing whether there was any factor of 'magnetic importance'. At paragraphs 34 ff, he noted as follows:

> "34. In paragraph 22 of her skeleton argument Georgia Bedworth, counsel for the applicant, stated that 'there is no statutory or other justification for the presumption that the court should not direct a settlement where P's capital derives from a damages award.' I agree that there is no such presumption, but, in my judgment, in most cases where an individual's assets derive exclusively from a damages award for personal injury, when determining whether making an inter vivos gift is in his or her best interests, the factor of magnetic importance is likely to be the purpose for which the compensation was awarded and the assumptions upon which it was based. This is not confined to the multiplicands and multipliers that have been applied in a specific case, but extends to the fundamental principles that underlie personal injury and clinical negligence litigation generally.
> …
> 36. In very simple terms, if the calculation for James's future care costs was correct back in 2001 when his claim settled, then, on the last day of his life, he should be in the process of spending the last pound of that head of damages.

> There should be nothing left over after his death. If the sum awarded runs out before then, it could be said that his parents and his deputy have been extravagant and imprudent. Conversely, if there are substantial funds left over, it could be argued that they have been parsimonious and may have denied him the care, attention and quality of life to which he was entitled.
> …
> 39. As I have said, the court is generally sympathetic towards family members who take on a caring role and dedicate their lives to looking after an injured relative. It seeks to support them so far as is possible and practicable and in the best interests of the person concerned, and it does so in a variety of ways. However, it is not the function of the court to anticipate, ring-fence or maximise any potential inheritance for the benefit of family members on the death of a protected party, because this is not the purpose for which the compensation for personal injury was intended. The position would be different, of course, if the individual concerned had substantial funds surplus to his requirements that were derived from another source, such as an inheritance or a lottery win. For the sake of the record, each year between 300 and 400 claimants who have been awarded damages for personal injury or clinical negligence come within the court's jurisdiction. Speaking from personal experience, over the last fifteen years the number of applications of this kind does not extend into double figures."

Senior Judge Lush therefore dismissed the application as not being in JDS's best interests, having regard to all the circumstances including the purpose for which the damages were awarded and the preponderance of disadvantages over benefits. Noting that his parents were de facto, if not de jure, the applicants and that they were more or less entirely dependent on his damages award, he declined to depart from the general rule regarding costs in property and affairs cases by ordering them to pay the costs of the proceedings personally.

Comment
This is the second important decision on the approach to be taken to compensation received by way of damages for personal injury to have been handed down recently (first being *Re HM (SM v HM)* Case No 11875043/01), and is of particular importance in emphasising the – relatively – limited room for manoeuvre before the Court of Protection as regards the management of the property and affairs of the recipients of such awards.

STANEV V BULGARIA [2012] ECHR 46
"Deprivation of liberty"; Residential care home; *Winterwerp;* Violation of Articles 3, 5(1), 5(4), 5(5), 6

Deprivation of liberty cases before the ECtHR which shed any light upon the considerations applying under the DOLS regime are very rare, and the recent decision of the Grand Chamber in *Stanev* is therefore of some considerable importance (albeit that it arose in the context of a rather different regime for the provision of residential care, as will become apparent). We therefore make no apology for including significant extracts from the judgment of the Court in our note upon the case.

The Applicant in this case had a diagnosis of schizophrenia and had been living in the community. None of his relatives were willing to act as his guardian, and he therefore met the domestic criteria for admission to a social care home. The authorities decided he should be moved to a care home and he was taken then without any explanation or advance warning and placed under partial guardianship, or trusteeship. His state benefits

were paid to the care home. The care home was in an isolated area, 8km from the nearest village. It housed 73 residents with differing degrees of mental illness. The Applicant shared a small room with four other residents. The physical conditions of the home were poor and there was little access to the community or to activities.

The Applicant argued that he had been deprived of his liberty under Article 5:

> "102. ... the applicant submitted that living in a social care home in a remote mountain location amounted to physical isolation from society. He could not have chosen to leave on his own initiative since, having no identity papers or money, he would soon have faced the risk of being stopped by the police for a routine check, a widespread practice in Bulgaria.
> 103. Absences from the social care home were subject to permission. The distance of approximately 420 km between the institution and his home town and the fact that he had no access to his invalidity pension had made it impossible for him to travel to Ruse any more than three times. The applicant further submitted that he had been denied permission to travel on many other occasions by the home's management. He added that, in accordance with a practice with no legal basis, residents who left the premises for longer than the authorised period were treated as fugitives and were searched for by the police. He stated in that connection that on one occasion the police had arrested him in Ruse and that, although they had not taken him back to the home, the fact that the director had asked for him to be located and transferred back had amounted to a decisive restriction on his right to personal liberty. He stated that he had been arrested and detained by the police pending the arrival of staff from the home to collect him, without having been informed of the grounds for depriving him of his liberty. Since he had been transferred back under duress, it was immaterial that those involved had been employees of the home.
> 104. The applicant further noted that his placement in the home had already lasted more than eight years and that his hopes of leaving one day were futile, as the decision had to be approved by his guardian.
> 105. As to the consequences of his placement, the applicant highlighted the severity of the regime to which he was subject. His occupational activities, treatment and movements had been subject to thorough and practical supervision by the home's employees. He had been required to follow a strict daily routine, getting up, going to bed and eating at set times. He had had no free choice as to his clothing, the preparation of his meals, participation in cultural events or the development of relations with other people, including intimate relationships as the home's residents were all men. He had been allowed to watch television in the morning only. Accordingly, his stay in the home had caused a perceptible deterioration in his well-being and the onset of institutionalisation syndrome, in other words the inability to reintegrate into the community and lead a normal life."

The Government argued that "the applicant's placement in the home was simply a protective measure taken in his interests alone and constituted an appropriate response to a social and medical emergency."

The Court held that the national authorities had been responsible for the Applicant's removal to the care home and that he had been deprived of his liberty:

> "124. With regard to the objective aspect, the Court observes that the applicant was housed in a block which he was able to leave, but emphasises that the

question whether the building was locked is not decisive.... While it is true that the applicant was able to go to the nearest village, he needed express permission to do so. Moreover, the time he spent away from the home and the places where he could go were always subject to controls and restrictions.

125. The Court further notes that between 2002 and 2009 the applicant was granted leave of absence for three short visits (of about ten days) to Ruse. It cannot speculate as to whether he could have made more frequent visits had he asked to do so. Nevertheless, it observes that such leave of absence was entirely at the discretion of the home's management, who kept the applicant's identity papers and administered his finances, including transport costs. Furthermore, it would appear to the Court that the home's location in a mountain region far away from Ruse (some 400 km) made any journey difficult and expensive for the applicant in view of his income and his ability to make his own travel arrangements.

126. The Court considers that this system of leave of absence and the fact that the papers placed significant restrictions on his personal liberty.

127. Moreover, it is not disputed that when the applicant did not return from leave of absence in 2006, the home's management asked the Ruse police to search for and return him. The Court can accept that such steps form part of the responsibilities assumed by the management of a home for people with mental disorders towards its residents. It further notes that the police did not escort the applicant back and that he has not proved that he was arrested pending the arrival of staff from the home. Nevertheless, since his authorised period of leave had expired, the staff returned him to the home without regard for his wishes.

128. Accordingly, although the applicant was able to undertake certain journeys, the factors outlined above lead the Court to consider that, contrary to what the Government maintained, he was under constant supervision and was not free to leave the home without permission whenever he wished. With reference to the *Dodov* case [*Dodov v. Bulgaria* (Application No. 59548/00, 17 January 2008)], the Government maintained that the restrictions in issue had been necessary in view of the authorities' positive obligations to protect the applicant's life and health. The Court notes that in the above-mentioned case, the applicant's mother suffered from Alzheimer's disease and that, as a result, her memory and other mental capacities had progressively deteriorated, to the extent that the nursing home staff had been instructed not to leave her unattended. In the present case, however, the Government have not shown that the applicant's state of health was such as to put him at immediate risk, or to require the imposition of any special restrictions to protect his life and limb.

129. As regards the duration of the measure, the Court observes that it was not specified and was thus indefinite since the applicant was listed in the municipal registers as having his permanent address at the home, where he still remains (having lived there for more than eight years). This period is sufficiently lengthy for him to have felt the full adverse effects of the restrictions imposed on him.

130. As to the subjective aspect of the measure, it should be noted that, contrary to the requirements of domestic law, the applicant was not asked to give his opinion on his placement in the home and never explicitly consented to it. Instead, he was taken to Pastra by ambulance and placed in the home without being informed of the reasons for or duration of that measure, which had been taken by his officially assigned guardian. The Court observes in this connection that there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned. However, the Court has already

held that the fact that a person lacks legal capacity does not necessarily mean that he is unable to comprehend his situation. In the present case, domestic law attached a certain weight to the applicant's wishes and it appears that he was well aware of his situation. The Court notes that, at least from 2004, the applicant explicitly expressed his desire to leave the Pastra social care home, both to psychiatrists and through his applications to the authorities to have his legal capacity restored and to be released from guardianship.

131. These factors set the present case apart from *H.M. v. Switzerland* (cited above), in which the Court found that there had been no deprivation of liberty as the applicant had been placed in a nursing home purely in her own interests and, after her arrival there, had agreed to stay. In that connection the Government have not shown that in the present case, on arrival at the Pastra social care home or at any later date, the applicant agreed to stay there. That being so, the Court is not convinced that the applicant consented to the placement or accepted it tacitly at a later stage and throughout his stay.

132. Having regard to the particular circumstances of the present case, especially the involvement of the authorities in the decision to place the applicant in the home and its implementation, the rules on leave of absence, the duration of the placement and the applicant's lack of consent, the Court concludes that the situation under examination amounts to a deprivation of liberty within the meaning of Article 5 § 1 of the Convention. Accordingly, that provision is applicable."

The Court found that the deprivation of liberty was unlawful because there was no proper evidence that the *Winterwerp* criteria (*Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33) were satisfied, which meant that Article 5(1)(e) could not be relied on. The court reiterated (at paragraph) that "[a]s regards the deprivation of liberty of mentally disordered persons, an individual cannot be deprived of his liberty as being of 'unsound mind' unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder."

The Court also concluded that there had also been a breach of Article 5(4) (review by a court), Article 5(5) (right to compensation), Article 3 (inhuman and degrading treatment by virtue of the poor living conditions in the home) and Article 6. The Applicant was awarded EUR15,000 in damages.

Comment

Frustratingly, although there were considerable hopes that this case would shed some useful light on the extremely vexed question of precisely what is and is not a deprivation of liberty, this decision promised much but ultimately offered rather less.

The ECtHR clearly rejected the idea that doing something in someone's best interests means that it cannot be a deprivation of liberty, but accepted that measures demonstrated to be necessary to protect life and limb (as in the *Dodov* case) may not amount to a deprivation of liberty. Both concepts seem consistent with the recent judgment of the Court of Appeal in *Cheshire West*; how easy they are to apply in practice is another question.

However, what is underlined by the judgment in *Stanev* is the crucial importance of having regard to the wishes of a person who is deemed to lack capacity. While the court's comments on this issue were made in the context of a system where a person can be

deemed to lack 'legal capacity' (rather than one where capacity decisions are made on an issue-specific basis as under the MCA 2005), they do highlight the need to appreciate what P wants, and the heavy burden that is placed on anyone seeking to go against P's wishes.

The judgment is also of interest because of its clear statement that the *Winterwerp* criteria must be met for a deprivation of liberty under Art.5(1)(e) to be lawful, and the application of this established principle in the context of detention in a care home rather than a psychiatric institution. It is not obvious to the authors that this decision is consistent with the decision of the Court of Appeal in *G v E* [2010] EWCA Civ 822, in which the court stated 'we do not think that ECHR Article 5 imposes any threshold conditions which have to be satisfied before a best interests assessment under DOLS can be carried out.'

DM v Doncaster MBC and Secretary of State for Health [2011] EWHC 3652 (Admin)

DOLS authorisation; Power to accommodate; Charging care home fees; National Assistance Act 1948 s.21-22; Article 1 of Protocol 1 (deprivation of property) and Article 14 (discrimination)

This case is not a Court of Protection case, but is of importance because of the detailed analysis conducted by Langstaff J of the provisions of the MCA 2005 relating to deprivation of liberty.

Both husband (FM) and wife (DM) were in their 80s and had been married for 63 years. He had dementia and was being detained in a care home pursuant to a DOLS authorisation; she wanted him back home. The care home fees were being paid out of his limited income and their joint savings. His wife brought a claim to recover the fees, drawing an analogy with *R (on the application of Stennett) v Manchester City Council* [2002] 2 AC 1127 and by relying upon human rights arguments. In summary, Langstaff J held:

1. The MCA 2005 did not create either a duty or power to accommodate FM.
2. FM fell within the terms of s.21 of the National Assistance Act 1948 and was not excluded from its scope by the operation of s.21(8).
3. Section 3 of the Human Rights Act 1998 gave no reason to read down s.21(8) to reach any other conclusion.
4. FM's accommodation at the care home therefore had to be paid for by him or on his behalf, in accordance with s.22 of the National Assistance Act 1948 and regulations made under it.
5. This was not discriminatory upon an application of Article 14 ECHR read with Article 1 of Protocol 1. FM was not materially in the same position as those who receive aftercare under the provisions of s.117 of the Mental Health Act 1983 and the State would in any event have offered sufficient justification for the result.
6. Domestic legislation requires this result and it was not suggested that this legislation was incompatible with European obligations.

The claimant contended that, by virtue of the DOLS authorisation, the local authority was under a duty to accommodate him under the MCA 2005 (no power to charge) rather than under s.21 of the National Assistance Act 1948 (duty to charge in s.22, subject to means testing). Rejecting the argument, Langstaff J held that the MCA 2005 did not impose a duty or power on local authorities to accommodate detained care home residents. As the DOLS supervisory body, they were obliged to ensure that the DOLS assessments were carried out, to check whether the six qualifying requirements were

made out and, if they were, to grant the requested standard authorisation. They were not obliged to accommodate the person, to arrange for their accommodation, or to pay for it:

> "The whole structure of the Act is designed not to provide for the accommodation of those who lack capacity and who are likely to suffer harm if not detained but to ensure that those who do detain such a person are free from liability for doing so." (para. 35)

The MCA 2005 authorised detention; it did not require it. As a result, it was lawful to charge incapacitated individuals for their own detention if they fell within the National Assistance Act 1948 s.21. This required local authorities to provide accommodation for those who "by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them". The claimant argued that this duty related to those who wanted accommodation to meet their needs, rather than to those who were accommodated through compulsion. But this was rejected: the test was objective and related to whether the person was in "need" of care rather than whether they desired accommodation for their needs:

> "As a matter of interpretation the scope of section 21 is wide enough to cover those who do not necessarily wish to be accommodated by the local authority or who, as in FM's case, are incapable of deciding for themselves whether they wish it." (para 47)

Human rights arguments did not avail the claimant. An argument of statutory interpretation, based upon the presumption against the deprivation of property in Article 1 of the First Protocol, was rejected as "contrived and free aftercare under s.117 of the Mental Health Act 1983, it was contended that to require the former but not the latter to pay their care home fees was discriminatory, contrary to Article 14 ECHR, and could not be justified. Again, this was rejected:

> "[I]n my view, those receiving after-care are not in the same material circumstances. They are different, in my view, because all of them necessarily (because of the statutory provision) have been detained earlier under section 3 or other provisions of the Mental Health Act. Those provisions require not only that the detention of the individual is in, and is proportionate to, his own interests in protecting him from harm, as in the case of FM, but also in the public interest as protecting them from harm, which is not the case with FM.[33] The public has a distinct interest in the detention of those who have been released into aftercare, under section 117, in a way which it does not in the case of someone whose detention is authorised by the Mental Capacity Act." (para 65)

The second material difference, it was said, related to the change of national policy which sought to transfer the treatment of mental patients from institutions into the community. Free aftercare was thereby part of the scheme designed to bridge the gap between the incarcerating institution and an unsupported return to the community (para 66). FM, on the other hand, was not detained under the MHA, was not a danger to others and, given the primacy of the MHA, the MCA was not an alternative choice for a decision maker where the individual came within the scope of the MHA (para 67).

---

[33] The authors struggle to reconcile this view with the actual wording of the Mental Health Act s.3 whereby detention may be necessary either for the health or safety of the patient or for the protection of other persons.

The true comparison to be made was therefore held to be between those with mental capacity and those lacking capacity who were accommodated under National Assistance Act 1948 s.21. The former paid for their fees so there was no disadvantageous difference in treatment if the latter were similarly required to do so.

Finally, Langstaff J held, in the alternative, that even if those receiving free aftercare were the proper comparator, requiring the husband to pay for his fees would have been justified and therefore not contrary to Article 14:

> "If a person wishes it, it is not unfair that he should pay. If he is incapable of forming a wish whether for or against accommodation then others may have to do that for him. Providing it is in his best interests to be in such a home, it is not unreasonable to suppose that if he had capacity, he would see that for himself and would wish to be in such accommodation. He would be in precisely the same position as the true volunteer. It is not inherently unreasonable for the State, in making its general provisions, to require a charge be paid by such a person." (para 72)

Comment

This decision will disappoint those who consider it to be unconscionable for an incapacitated person to be made to pay for their detention by the State. Unlike the National Health Service, accommodation provided under Part 3 of the National Assistance Act 1948 has never been free. A proposed amendment to the Mental Health Bill 2006 would have ensured that the provision of accommodation for detained residents was free of charge but this was abandoned in the face of government opposition. DOLS was about best interests, not punishment, and there was a concern that the safeguards might not be used if the authorities knew that they would have to pay for the person's detention. It might also provide a perverse incentive for relatives to ensure that their incapacitated family member came under DOLS in order to avoid care home fees.

However, those subject to DOLS are unable to choose to be detained and cannot choose their place of detention.[34] Nor do they choose to spend their income and savings on a place from which they are not free to leave. Being forced to pay in these circumstances must be somewhat unique; it is difficult to conceive of any other situation in which the State can compel a citizen to pay for their own State detention. The claimant's purported analogy with *Stennett* – the judicial bedrock for free MHA aftercare – was therefore interesting in a number of respects. There, Lord Steyn observed:

> "It can hardly be said that the mentally ill patient freely chooses such accommodation. Charging them in these circumstances may be surprising … If the argument of the authorities is accepted that there is a power to charge these patients such a view of the law would not be testimony to our society attaching a high value to the need to care after the exceptionally vulnerable."

Indeed, these moral arguments have even more persuasive force in respect of DOLS, not least because the person remains in detention whereas MHA s.117 applies once patients have regained their freedom. However, Lord Steyn's observations, Langstaff J held, were "not statements of legal principle, however compelling they may be socially and morally" (para 73).

---

[34] Compare with the National Assistance Act 1948 (Choice of Accommodation) Directions 1992.

Insofar as freedom to choose is concerned, the judge's comparison between those with capacity with those without may give cause for concern. After all, a person with capacity who is in need of care and attention not otherwise available to them is entitled to refuse a local authority's attempt to fulfil its s.21 duty. *In R v Kensington and Chelsea RLBC, ex parte Kujtim* [1999] 4 All ER 161 it was held that the duty is discharged if the person:

> "… Either unreasonably refuses to accept the accommodation provided or if, following its provision, by his conduct he manifests a persistent and unequivocal refusal to observe the reasonable requirements of the local authority in relation to the occupation of such accommodation."

So in *R v Southwark LBC, ex parte Khana and Karim* [2001] EWCA Civ 999, for example, the duty to accommodate would have been discharged for as long as Mrs Khana was unreasonably refusing the offer of a residential care home placement which was considered necessary by the local authority to meet her assessed needs. Those, like FM, who lack capacity are denied that choice and may not therefore be in the same position as "the true volunteer"; a person who, provided they have capacity, is entitled to make an unwise residential decision. Had FM appointed his wife under a personal welfare Lasting Power of Attorney whilst he had capacity, she could have refused what was being proposed and prevented the DOLS authorisation taking place, subject to a Court of Protection challenge.

Finally, all parties in this case accepted that if s.21 of the National Assistance Act 1948 applied, the local authority was compelled by s.22 to means test and charge FM for the fees. This rule appears wholly arbitrary with its complete absence of any discretion to waive or disapply the charges. Future challenges may well question whether such an arbitrary legislative rule is compatible in such Article 5 and 8 situations.

VA v HERTFORDSHIRE PCT AND ORS [2011] EWHC 3524 (COP)
Welfare; Costs; Departure from general rule; Not recognising weaknesses of own case

This case is a further judgment on costs from Peter Jackson J, in litigation related to the previously reported case of *AH v Hertfordshire Partnership NHS Foundation Trust* [2011] EWHC 352.

In this case, costs applications had been made by the Official Solicitor as litigation friend to a number of residents of an NHS campus facility who had been the subject of best interests proceedings similar to those in the AH case. The cases other than AH all settled without a hearing as the statutory bodies involved agreed not to pursue their plans to move the residents into community placements. Costs were awarded in favour of the residents against the statutory bodies in varying proportions, and the judge stated:

> "The conclusion I have reached in this case represents a partial departure from the general rule that there should be no order for costs. It is a case where there has been no bad faith or flagrant misconduct, but there has been substandard practice and a failure by the public bodies to recognise the weakness of their own cases and the strength of the cases against them. In such circumstances they cannot invoke Rule 157 at the expense of others."

Comment
As ever, it would be dangerous to try to extract from a fact-specific decision on costs any general principles. However, the judge's comment that the statutory bodies had failed to

recognise the strength of the case against them is of some interest, since that is, in the authors' experience, by no means an uncommon feature of litigation in the Court of Protection – expert opinions are often disputed by one or more parties and substantive hearings held where the outcome is predictable. In many cases, the intransigent party is an impecunious litigant in person or is publicly-funded, and so costs orders are rarely sought or made.

SBC v PBA and Others [2011] EWHC 2580 (Fam) [2011] COPLR Con Vol 1095
Appointment of deputy; Welfare and financial matters

Finally, a reason – if you needed one – to purchase the COPLR Consolidated Volume is that that is the only place in which you can find the relevant extracts from the judgment of Roderic Wood J in this case (decided last year) as to the test to apply when the Court is considering whether to appoint a deputy (whether property and affairs or health and welfare). The judgment was only approved for reporting on a partial basis, containing as it did significant amounts of discussion and consideration of matters relating to the specific circumstances of PBA which did not need to be the subject of wider reporting.

However, in material part (paragraph 67), Roderic Wood J confirmed that the 'unvarnished' words of s.16 MCA 2005 set down the test for appointment of a deputy, and that the Code of Practice (with its reference to 'most difficult' health and welfare cases) did not compel the Court to be satisfied that the circumstances were difficult or unusual before a deputy could be appointed.

ISSUE 19 MARCH 2012 Court of Protection update

K v LBX & Ors [2012] EWCA Civ 79
Article 8; Private life and family life; Best interests; Residence; No starting point to checklist

The Court of Appeal was asked to determine whether ECHR Art 8 respect for family life requires the court in determining issues under the inherent jurisdiction or the Mental Capacity Act 2005 to afford a priority to placement of an incapacitated adult in their family or whether family life is simply one of "*all the relevant circumstances*" which under MCA 2005 s.4 the court must consider. The question arose in the context of a case in which the local authority, supported by the Official Solicitor, considered that it was in the best interests of a learning disabled young adult to move for a trial period into supported living. The father strongly objected to the proposal (despite agreeing that independent living was a goal for the future) and argued that since there was no issue of neglect, abuse or other harm, the existing family life which L shared with his father and brother should not be disrupted.

The father relied on the oft-quoted comments of Munby J (as he then was) in the case of *Re S* [2003] 1 FLR 292, as demonstrating that the court's starting point should be that L would be better off remaining with his family:

> "48. I am not saying that there is in law any presumption that mentally incapacitated adults are better off with their families: often they will be; sometimes they will not be. But respect for our human condition, regard for the realities of our society and the common sense to which Lord Oliver of Aylemerton referred in In re KD, surely indicate that the starting point should be the normal assumption that mentally incapacitated adults will be better off if they live with a family rather than in an institution – however benign and

enlightened the institution may be, and however well integrated into the community – and that mentally incapacitated adults who have been looked after within their family will be better off if they continue to be looked after within the family rather than by the State.

49. We have to be conscious of the limited ability of public authorities to improve on nature. We need to be careful, as Mr Wallwork correctly cautions me, not to embark upon 'social engineering'. And I agree with him when he submits that we should not lightly interfere with family life. If the State – typically, as here, in the guise of a local authority – is to say that it is the more appropriate person to look after a mentally incapacitated adult than his own family, it assumes, as it seems to me, the burden – not the legal burden but the practical and evidential burden – of establishing that this is indeed so. And common sense surely indicates that the longer the family have looked after their mentally incapacitated relative without the State having perceived the need for its intervention the more carefully must any proposals for intervention be scrutinised and the more cautious the court should be before accepting too readily the assertion that the State can do better than the family. Other things being equal, the parent, if he is willing and able, is the most appropriate person to look after a mentally incapacitated adult; not some public authority, however well meaning and seemingly well equipped to do so. Moreover, the devoted parent who – like DS here – has spent years caring for a disabled child is likely to be much better able to 'read' his child, to understand his personality and to interpret the wishes and feelings which he lacks the ability to express. This is not to ignore or devalue the welfare principle; this common sense approach is in no way inconsistent with proper adherence to the unqualified principle that the welfare of the incapacitated person is, from beginning to end, the paramount consideration."

The local authority and Official Solicitor argued that there was no starting point or other gloss on the clear words of the MCA 2005 which simply required decision-makers, including the court, to assess all relevant considerations.

The Court of Appeal (Thorpe, Black and Davis LLJ) rejected the father's appeal. Thorpe LJ observed (para 31) that "whether in cases involving children or cases involving vulnerable adults principles and generalisation can rarely be stated since each case is so much fact dependent." The right approach under the MCA 2005 was to "ascertain the best interests of the incapacitated adult on the application of the section 4 checklist. The judge should then ask whether the resulting conclusion amounts to a violation of Article 8 rights and whether that violation is nonetheless necessary and proportionate." Black LJ pointed out that giving priority to family life under Article 8 by way of a starting point or assumption "risks deflecting the decision maker's attention from one aspect of Article 8 (private life) by focussing his attention on another (family life)... there is a danger that it contains within it an inherent conflict, for elements of private life, such as the right to personal development and the right to establish relationships with other human beings and the outside world, may not always be entirely compatible with existing family life and particularly not with family life in the sense of continuing to live within the existing family home."

Comment

This important decision clarifies the role of the court in MCA proceedings and confirms that starting points or other generalised approaches are not appropriate. In every case the particular facts must be scrutinised with care, and proper regard given to considerations under Article 8 ECHR. It remains the case that if any person proposes to

interfere with a person's family life, they will need to show good reason for doing so, but decision-making should not be fettered by the adoption of assumptions which are not reflected in the MCA.

The decision is to be welcomed for a number of reasons. It should ensure that proper recognition is given to the right to private life of adults who lack capacity. Concepts of autonomy and self-determination have not, for obvious reasons, featured strongly in cases involving children, and there can be a tendency to rely on the approach taken in family proceedings even though the MCA concerns adults. Promoting autonomy and self-determination are clearly of much greater significance in relation to incapacitated adults. While there are no doubt similarities between the functions of a judge in family proceedings and in MCA welfare proceedings, adults are not children, and caution is required in drawing analogies between the two groups, or assuming that approaches relevant to one group can be translated to the other.

WYCHAVON DISTRICT COUNCIL V EM [2012] UKUT 12 (AAC) – RE-DECIDING [2011] UKUT 144 (AAC)

Capacity; Tenancy agreements; Housing benefit; MCA s.7; Common law; Necessaries

Avid housing benefit lawyers will recall that this case concerned a 20 year old woman, with profound physical and mental disabilities from birth, whose parents had converted an annex to their property in order to provide a specially constructed dwelling to meet her complex needs. This included round the clock sleep-in carers. An indefinite tenancy agreement was signed by her father as landlord and, in place of her signature as the tenant was written "profoundly disabled and cannot communicate at all". Indeed, she had no knowledge or understanding of the purported basis of her living arrangements. The parents' understanding was that these arrangements would enable her to get housing benefit. Rent was therefore charged at £694.98 per month to cover the cost of the additional mortgage and a claim for housing benefit was made.

The 2011 decision had held that, regardless of her capacity to consent, the daughter could not and did not communicate any agreement to the tenancy. So there was no agreement and no liability to pay rent and therefore no housing benefit payable. However, it soon became apparent that both the parties and the Upper Tribunal had overlooked the law relating to necessaries and this omission justified a review of that previous decision. Section 7 MCA 2005 provides:

> "(1) If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them.
> (2) 'Necessary' means suitable to a person's condition in life and to his actual requirements when the goods or services are supplied."

This time round the Upper Tribunal stuck to its guns in holding that there was a manifest absence of agreement:

> "11. I conclude therefore that she had no liability to pay rent by reason of a document to which she was not a party and of which she had no knowledge or means of knowledge, any more than a person of full mental capacity would be bound by such a document."

However, departing from its earlier decision, she was liable to pay because the accommodation was necessary for her and the obligation arose either by implication at common law or under s.7 MCA 2005:

> "28. I am in some doubt whether "services" in section 7 of the Mental Capacity Act 2005 is wide enough to cover the provision of accommodation, but I have no doubt that insofar as it is not wide enough, the common law rules as to necessaries survive and that the provision of accommodation is an obvious necessary."

Comment
This second attempt to deal with what is clearly a difficult issue remains problematic. It departs from what has previously been suggested by Social Security Commissioner Mesher (CH/2121/2006) that:

> "My provisional understanding of the authorities on the law of England and Wales is that even if a party to a contract does lack sufficient understanding to have capacity and the other party knows that, the contract is not void, but is merely voidable at the option of the affected party."

It would then follow that the contract in the present case between father and daughter should have been voidable (as the tribunal at first instance originally held). This is also the position taken in the Explanatory Notes to section 7 of the 2005 Act which state:

> "In general, a contract entered into by a person who lacks capacity to contract is voidable if the other person knew or must be taken to have known of the lack of capacity."

The Court of Protection issued guidance in 2011 on tenancy agreements to enable single orders to be made to sign the agreement for those lacking capacity. Whether the agreement was void or voidable, admirers of *Street v Mountford* [1985] 1 AC 809 will have spotted that there was no tenancy in law because the daughter did not have exclusive possession of the dwelling. Her complex needs required carers throughout the day and night whom, it seems clear, would have required unrestricted access to her.

In relation to the law of necessaries, the Explanatory Notes confirm that delivering milk can be a "necessary" good or service under section 7. Thus a milkman can expect to be paid for delivering to the house of someone with progressive dementia (see also MCA Code of Practice at paras 6.56-6.66). The fact that the provision of accommodation may also arise under s.7, and in any event certainly at the common law, adds an interesting perspective to the decision in *DM v Doncaster MBC and Secretary of State for Health* [2011] EWHC 3652 which we covered last month. If a person lacking capacity is able to be accommodated under s.7 MCA 2005 that would mean that they would not be accommodated under Part 3 of the National Assistance Act 1948 and the charging requirement in section 22 would not bite. However, whilst the route may differ, the destination may remain the same given that s.7 MCA 2005 requires a reasonable sum to be paid. Thus, it would seem, those deprived of their liberty may still have to pay.

CRAWFORD & ANOR V SUFFOLK MENTAL HEALTH PARTNERSHIP NHS TRUST [2012] EWCA CIV 138
Adult safeguarding; Restraint; Unfair dismissal

We bring this case to your attention not because it is a COP case (it is a decision of the Court of Appeal in the context of proceedings relating to unfair dismissal), but for two comments made by Elias LJ (endorsed by the other members of the Court of Appeal) which are of relevance to the safeguarding of adults with dementia in institutional

settings.

The allegation which led to the dismissal of the two nurses in question was that they had abused patients suffering from dementia. The material allegations were that two nurses had restrained an elderly patient suffering from dementia by way of tying him to a chair which was (in turn) tied to a table. The police had been involved within days of the allegation having been made (by another nurse), but having investigated, confirmed that they would be taking no further action.

In a footnote to his judgment, Elias J commented as follows:

> "71. This case raises a matter which causes me some concern. It appears to be the almost automatic response of many employers to allegations of this kind to suspend the employees concerned, and to forbid them from contacting anyone, as soon as a complaint is made, and quite irrespective of the likelihood of the complaint being established. As Lady Justice Hale, as she was, pointed out in *Gogay v Herfordshire County Council* [2000] IRLR 703, even where there is evidence supporting an investigation, that does not mean that suspension is automatically justified. It should not be a knee jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is. I appreciate that suspension is often said to be in the employee's best interests; but many employees would question that, and in my view they would often be right to do so. They will frequently feel belittled and demoralised by the total exclusion from work and the enforced removal from their work colleagues, many of whom will be friends. This can be psychologically very damaging. Even if they are subsequently cleared of the charges, the suspicions are likely to linger, not least I suspect because the suspension appears to add credence to them. It would be an interesting piece of social research to discover to what extent those conducting disciplinary hearings subconsciously start from the assumption that the employee suspended in this way is guilty and look for evidence to confirm it. It was partly to correct that danger that the courts have imposed an obligation on the employers to ensure that they focus as much on evidence which exculpates the employee as on that which inculpates him.
> 72. I am not suggesting that the decision to suspend in this case was a knee jerk reaction. The evidence about it, such as we have, suggests that there was some consideration given to that issue. I do, however, find it difficult to believe that the relevant body could have thought that there was any real risk of treatment of this kind being repeated, given that it had resulted in these charges. Moreover, I would expect the committee to have paid close attention to the unblemished service of the relevant staff when assessing future risk; and perhaps they did.
> 73. However, whatever the justification for the suspension, I confess that I do find it little short of astonishing that it could ever have been thought appropriate to refer this matter to the police. In my view it almost defies belief that anyone who gave proper consideration to all the circumstances of this case could have thought that they were under any obligation to take that step. I recognise that it is important that hospitals in this situation must be seen to be acting transparently and not concealing wrongdoing; but they also owe duties to their long serving staff, and defensive management responses which focus solely on their own interests do them little credit. Being under the cloud of possible criminal proceedings is a very heavy burden for an employee to face. Employers should not subject employees to that burden without the most careful consideration and a genuine and reasonable belief that the case, if established, might justify the epithet "criminal" being applied to the employee's conduct. I do not think that

requirement was satisfied here. No-one suggested that the appellants were acting other than in the best interests of JE and the other patients. The restriction was not essentially different to the physical restraint which had been carried out in the day shift. I can only assume that the relevant committee was influenced, as I suspect Mr Mansfield was, by the fact that technically tying JE to the chair was an assault, with the implication that this is a grave matter. But so is it an assault when nurses physically restrain a patient, or compel him to wear a mask when he is spitting at people, as happened with JE. There was obvious justification for restraining this patient, even if the appropriate procedures for doing so were not employed, and in my view the police should never have been involved."

Comment

The first comment of Elias LJ within this passage which may raise eyebrows is the analysis of the nature of the restraint undertaken upon the patient. As Lucy Series has pointed out, the Court of Appeal did not make any reference at this point to the MCA 2005 or (for instance) to the detailed discussion in *R(C) v a Local Authority* as to the circumstances under which restraint of the incapacitated can be justified (and the requirement that it be in accordance with best practice). The Court of Appeal did not, of course, have to make specific reference to these matters, but the apparently casual dismissal of the matter as a 'technical' nature of the assault might be thought to sit oddly with the approach taken in other jurisdictions.

The second element of the footnote worthy of comment is the discussion of the circumstances under which it is appropriate to involve the police. Some of our readers may well see the comments of Elias LJ as a welcome dose of common sense; others may well not be quite so sure.

BROADWAY CARE V CAERPHILLY CBC [2012] EWHC 37 (ADMIN)

Care home provider acting on behalf of service users; Termination of framework contract; Article 8; "Victim" status

We note this case (one of a string of recent cases arising out of attempts by local authorities either to cancel or vary the terms of contracts with residential care providers) because of a number of comments made as to the extent to which care home providers are entitled to act on behalf of the residents of their homes when seeking to bring public law challenges.

The claimant care home specialised in the provision of care to sufferers of dementia. It had 23 residents, of whom 19 were funded by the Defendant local authority. By a decision dated 12 December 2011, Caerphilly CBC sought to terminate the framework contract for the provision of care services which the parties had entered in to in 2006 on the basis of concerns as to the quality of the care provision.

Upon the care home's (rolled up) application for judicial review of the decision, HHJ Seys Llewellyn QC held that the Court should be willing to entertain applications for interim relief brought by a care home in a very unusual case, during such period as might be necessary to preserve the status quo until individual residents or their representatives can themselves pursue applications, if at all they choose to do so. Once there is time and opportunity for them to do so, there is plain risk of a conflict of interest between the care home and the residents and insufficient reason why the care home should purportedly act on their behalf.

However, the Judge accepted the defendant's submission that to acquire 'victim' status

one must be 'directly affected' by the act or omission.[35] Those "indirectly affected" can only bring proceedings where, exceptionally, it is "impossible" for those directly affected to do so. On the facts, the claimant was precluded from pursuing the proceedings in defence of the Article 8 rights of its residents because it was not the victim of a breach of those rights.

The Judge further rejected the claimant's submission that the defendant was under a public law duty to consult with relatives before terminating the contract and reiterated that in the absence of a right to rely on the residents' article 8 rights, there should be no public law remedy for termination of the contract.

Comment
This case is of note for the restrictive approach that the Court adopted to the circumstances in which a care home could pursue proceedings on behalf of its residents, even where on the facts the residents may be unlikely to bring proceedings in their own right. However, it does leave open the possibility of urgent relief being sought in an appropriate case so as to allow for individual residents to take their own steps to seek to safeguard their position and, as such, recognises the (limited) common cause that care home providers and their residents may have in securing the continuation of placement contracts.

SALISBURY INDEPENDENT LIVING LTD V WIRRAL METROPOLITAN BOROUGH COUNCIL [2012] EWCA CIV 84
Supported living provider acting for service users; Housing benefit appeals

We note this case for essentially the same reason as the preceding case, by way of indication of the circumstances under which bodies providing accommodation to service users are able to challenge public law decisions affecting those service users.

This case concerned an appeal from the Upper Tribunal in which the central issue was whether Regulation 3 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (SI 2001 No. 1002) exhaustively sets out who are "persons affected" by a decision of a local authority with responsibility for administering housing benefit and are thus entitled to bring an appeal against a housing benefits decision.

Salisbury Independent Living ('SIL') was a provider of supported living accommodation. Wirral MBC ('WMBC') made a number of decisions which affected the quantum of housing benefit awarded to various of SIL's residents. SIL sought to challenge those decisions by bringing proceedings in the First Tier Tribunal on behalf of the residents who were affected. They had no express or apparent authority to do so.

The Upper Tribunal held that SIL was entitled to bring proceeding challenging the housing benefit decisions in their own right as they were a "person affected" within the meaning of regulation 3.

The Court of Appeal allowed WMBC's appeal. Hughes LJ, with whom Kay and Lewison LJJ agreed, held that the ordinary meaning of the legislation was that the Act, in providing a right of appeal to "persons affected", anticipates that the term would be defined in the Regulations. Regulation 3 should be construed as an exhaustive list of who can appeal against a local authority's determination and in what circumstances. Accordingly, SIL had no independent right of appeal.

---

[35] See e.g. *Klass v Germany* Application 5029/71, 6 September 1978.

Comment
The decision brings clarity as to who will be able to bring an appeal against housing benefit decisions. It is also interesting in so far as the Court of Appeal rejected the reasoning of the Upper Tribunal which had focused on the injustice to SIL if no independent right of appeal were found to exist. Although Supported Living providers may encounter practical difficulties in persuading resident to appeal unfavourable decisions, they will require authority from the individual residents to pursue challenges against such decisions on their behalf.

ISSUE 20 APRIL 2012 COURT OF PROTECTION UPDATE

AUSTIN V UNITED KINGDOM [2012] ECHR 459
"Deprivation of liberty"; Purpose and context

This is the long-awaited decision of the Grand Chamber of the ECtHR in the case of the May Day protester and three innocent bystanders who were 'kettled' at Oxford Circus for around 7 hours in May 2001. The House of Lords held that they were not deprived of their liberty, and so Article 5 ECHR was not engaged, relying on a 'pragmatic approach which takes account of all the circumstances' (per Lord Hope) and the balancing of the interests of the individuals against those of the community where there is a risk of violence and disorder. The claimants argued that such considerations were not relevant to the question of whether the objective element of a deprivation of liberty was satisfied. The purpose or aim of the restrictions could not be taken into account other than in determining whether a deprivation of liberty that fell within the categories provided for in Article 5(1) was proportionate.

The Government argued that the cordon was no more than a restriction on the claimants' freedom and that the court could look at the context in which the restrictions were imposed, which included the reason for their implementation and the fact that there were no other less restrictive alternatives.

The ECtHR summarised the applicable principles drawn from its caselaw, including the following:

(a) Although the Convention is a living instrument, new exceptions or justifications which are not expressly recognised in the Convention cannot be added by the court.
(b) In other cases not involving Article 5, the court had taken into account the difficulties involved in policing modern societies, and the police were to be afforded a degree of discretion in taking operational decisions. Article 5 could not be interpreted in such a way as to make it impracticable for the police to fulfil their duties, provided the individual is protected from arbitrariness.
(c) In determining whether someone has been deprived of his liberty, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is one of degree or intensity, and not of nature or substance.

The court stated that the purpose behind a measure and an underlying public interest motive has no bearing on whether the person is deprived of their liberty, although it may be relevant to whether a deprivation of liberty was justified. The same applies where the object is to protect, treat or care for a person who has not validly consented to a

deprivation of liberty. However, in taking into account the 'type' and 'manner of implementation' of a restrictive measure, the court was able to 'have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell'. Further, "The context in which action is taken is an important factor to be taken into account, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good."

Thus, temporary restrictions on liberty which the public generally accept (such as travel by public transport or attendance at a football match) would not entail a deprivation of liberty provided they were 'rendered unavoidable as a result of circumstances beyond the control of the authorities and are necessary to avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose.' There could be a breach of Article 5 in a crowd control case, but all would depend on the specific context. On the facts of the particular case, there was no deprivation of liberty because the police had no alternative, the measures they adopted were the least intrusive and most effective, and there was no obvious point at which the restriction on movement became a deprivation of liberty. The measures were 'necessary' on the 'specific and exceptional facts' of the case.

Comment

The importance of this decision from the perspective of practitioners in the Court of Protection is of course whether it affects the decision of the Court of Appeal in *Cheshire West and Chester v* P [2011] EWCA Civ 1257. In the Court of Appeal case, it was held that although good intentions were not relevant to the question of whether there was an objective deprivation of liberty, the reason, purpose or aim of the placement was relevant. In reaching that conclusion, express reliance was placed on the House of Lords decision in Austin.

The ECtHR did not adopt the same language used by the House of Lords, and in particular, did not say that 'purpose' was a relevant factor. However, the ECtHR did say that context and circumstances are relevant, when considering the type and manner of implementation of restrictive measures. Is there any difference between these approaches, and does it matter if there is?

In the view of the author, there is a difference. 'Purpose' is much more closely elided to the impermissible consideration of subjective intention, and can too easily sweep up everything in its path. The purpose of providing 24 hour one-to-one support in a locked placement is to protect P from harm. Once that has been stated, what more is there to consider? 'Purpose' is generic, and diverts attention from the specific circumstances of the situation. If purpose had been the deciding factor for the ECtHR, then it would surely not have concluded that there could be breaches of Article 5 in crowd control cases – if the police could say 'our purpose was to prevent violent disorder', that would stifle any further argument that a deprivation of liberty had arisen.

The ECtHR held instead that circumstances and context could be looked at, as part of the exercise of considering the type and manner of implementation of restrictive measure. How can the court's express rejection of purpose both in the kettling context and in the context of community care be reconciled with its taking into account of wider circumstances and its reliance on the measures adopted by the police being necessary and proportionate? The short answer is that it cannot, and that the dissenting judges were right when they said that allowing the context and the wider responsibilities of the police

to be taken into account is "dangerous in that it leaves the way open for carte blanche and sends out a bad message to police authorities."

Be that as it may, the building blocks of the ECtHR's reasoning in *Austin* do not in any event apply to cases involving the care of incapacitated patients. There is no concern that by finding that P was deprived of his liberty in the *Cheshire* case, it would be impracticable for local authorities to fulfil their duties in providing community care, because, unlike in *Austin*, where the acts of the police did not fall within one of the exhaustive categories in Article 5 and therefore could not be justified if Article 5 was engaged, the deprivation of P's liberty could be warranted as being proportionate and in P's best interests. Even if the result of *Austin* is that it is proper to have regard to context and to the reason for restrictive measures being imposed in the community care context, the decision does not go so far as supporting the Court of Appeal's use of the comparator approach, or reliance on the fact that restrictive measures are said (often by the detaining authority) to be necessary to meet P's needs.

In practical terms, where does this leave best interests assessors and statutory bodies trying to decide whether a particular case involves a deprivation of liberty? Unfortunately, it remains the case that the more judgments that are published, the more confusing the guidance. In the author's experience, many social workers find the *Cheshire West* judgment difficult to understand and are concerned that it blurs the distinction between whether there is a deprivation of liberty, and whether that deprivation of liberty is in P's best interests. Unless and until the Supreme Court grants permission in the *Cheshire West* case and clarifies the approach to be taken, this unhelpful situation will continue. In the meantime, perhaps the most useful advice that can be given is to avoid thinking in terms of 'purpose', to look carefully at the restrictive measures in the particular case and to query whether they really are necessary and the least restrictive option, to remember that considerations of 'reason' are not determinative, and if in any doubt, to err on the side of caution and find that there is a deprivation of liberty, so as to protect the vulnerable adult while the uncertainty persists.

DD v Lithuania [2012] ECHR 254

Social care home; "Deprivation of liberty"; *Winterwerp*; Guardianship; Articles 2, 3, 5, 6, 8, 9, 10, and 13

DD had suffered from mental disorder since the age of 16 when she discovered she was adopted. More than 20 hospital admissions had resulted in various diagnoses, the most recent being episodic paranoid schizophrenia. Her adoptive father was granted a declaration that DD was legally incapacitated and a legal guardian was appointed. Initially this was her psychiatrist and friend, DG; then her adoptive father; and ultimately a care home director.

Described as unable to care for herself, not understanding the value of money, and hungrily wandering the city streets, she was admitted to a psychiatric hospital for treatment. At the request of her father as guardian, she was then transferred to the Kėdainiai care home for those with learning disabilities. From there she battled with the State authorities on a number of fronts. She sought to reopen the guardianship proceedings. A criminal inquiry was conducted into whether the circumstances surrounding the care home placement and the treatment she received there was unlawful. And she complained to various other authorities which led to further inquiries being undertaken.

With little progress made, DD's last stand was to apply with DG's assistance to the European Court of Human Rights ('ECtHR') alleging violations of Articles 2, 3, 5, 6, 8, 9, 10, and 13, claiming 300,000 Euros in compensation. In the end, the Court found violations of Articles 5(4) and 6(1) and ordered the State to pay 8000 Euros plus legal costs. Although the judgment deals with a broad range of issues, the following will focus on its discussion of Article 5.

1. Article 5(1) - "Deprivation of liberty"

DD contended that her involuntary admission to the social care home amounted to a "deprivation of liberty", which the Government denied. They argued that the care home was providing social services, not compulsory psychiatric treatment, and that the restrictions on DD were necessary due to the severity of her mental illness, were in her interests and were no more than the normal requirements associated with the responsibilities of a social care institution taking care of inhabitants suffering mental health problems.

The factual basis upon which this DOL issue had to be determined was in dispute but, perhaps reminiscent of HL v UK, the Court held:

> "146… As concerns the circumstances of the present case, the Court considers that the key factor in determining whether Article 5 § 1 applies to the applicant's situation is that the Kėdainiai Home's management has exercised complete and effective control by medication and supervision over her assessment, treatment, care, residence and movement from 2 August 2004, when she was admitted to that institution, to this day (ibid., § 91). As transpires from the rules of the Kėdainiai Home, a patient therein is not free to leave the institution without the management's permission. In particular, … on at least one occasion the applicant left the institution without informing its management, only to be brought back by the police (see paragraph 29 above). Moreover, the director of the Kėdainiai Home has full control over whom the applicant may see and from whom she may receive telephone calls (see paragraph 81 above). Accordingly, the specific situation in the present case is that the applicant is under continuous supervision and control and is not free to leave (see *Storck v. Germany*, no. 61603/00, § 73, ECHR 2005-V). Any suggestion to the contrary would be stretching credulity to breaking point.
>
> 147. Considerable reliance was placed by the Government on the Court's judgment in H.M. (cited above), in which it was held that the placing of an elderly applicant in a foster home in order to ensure necessary medical care as well as satisfactory living conditions and hygiene did not amount to a deprivation of liberty within the meaning of Article 5 of the Convention. However, each case has to be decided on its own particular "range of factors" and, while there may be similarities between the present case and H.M., there are also distinguishing features. In particular, it was not established that H.M. was legally incapable of expressing a view on her position. She had often stated that she was willing to enter the nursing home and, within weeks of being there, she had agreed to stay, in plain contrast to the applicant in the instant case. Further, a number of safeguards – including judicial scrutiny – were in place in order to ensure that the placement in the nursing home was justified under domestic and international law. This led to the conclusion that the facts in H.M. were not of a "degree" or "intensity" sufficiently serious to justify a finding that H.M. was detained (see *Guzzardi*, cited above, § 93). By contrast, in the present case the applicant was admitted to the institution upon the request of her guardian without any involvement of the courts.

148. As to the facts in Nielsen, the other case relied on by the Government, the applicant in that case was a child, hospitalised for a strictly limited period of time of only five and a half months, on his mother's request and for therapeutic purposes. The applicant in the present case is a functional adult who has already spent more than seven years in the Kėdainiai Home, with negligible prospects of leaving it. Furthermore, in contrast to this case, the therapy in Nielsen consisted of regular talks and environmental therapy and did not involve medication. Lastly, as the Court found in Nielsen, the assistance rendered by the authorities when deciding to hospitalise the applicant was "of a limited and subsidiary nature" (§ 63), whereas in the instant case the authorities contributed substantially to the applicant's admission to and continued residence in the Kėdainiai Home.

149. Assessing further, the Court draws attention to the incident of 25 January 2005, when the applicant was restrained by the Kėdainiai Home staff. Although the applicant was placed in a secure ward, given drugs and tied down for a period of only fifteen to thirty minutes, the Court notes the particularly serious nature of the measure of restraint and observes that where the facts indicate a deprivation of liberty within the meaning of Article 5 § 1, the relatively short duration of the detention does not affect this conclusion ...

150. The Court next turns to the "subjective" element … the applicant subjectively perceived her compulsory admission to the Kėdainiai Home as a deprivation of liberty. Contrary to what the Government suggested, she has never regarded her admission to the facility as consensual and has unequivocally objected to it throughout the entire duration of her stay in the institution. On a number of occasions the applicant requested her discharge … She even twice attempted to escape from the Kėdainiai facility … In sum, even though the applicant had been deprived of her legal capacity, she was still able to express an opinion on her situation, and in the present circumstances the Court finds that the applicant had never agreed to her continued residence at the Kėdainiai Home.

151. Lastly, the Court notes that although the applicant's admission was requested by the applicant's guardian, a private individual, it was implemented by a State-run institution – the Kėdainiai Home. Therefore, the responsibility of the authorities for the situation complained of was engaged …"

Accordingly the Court found that there was a deprivation of liberty.

2. Article 5(1)(e) – Justification

With Article 5(1) engaged, DD contended that the DOL was unlawful because the authorities had failed to consider whether less restrictive community-based arrangements would have been more suitable and because she had been excluded from the decision-making process. The Government, on the other hand, argued that her detention was lawful because her admission conformed to domestic law which enabled a person to be admitted at the request of their guardian, provided they suffered from mental disorder.

Significantly, the ECtHR applied the *Winterwerp* conditions to determine the legality of the placement:

> "156. The Court also recalls that in *Winterwerp* … it set out three minimum conditions which have to be satisfied in order for there to be "the lawful detention of a person of unsound mind" within the meaning of Article 5 § 1 (e): except in emergency cases, the individual concerned must be reliably shown to be

> of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder."

It found, at para 157, that DD satisfied these criteria, that no alternative measures were appropriate, and that accordingly it was lawful to confine her to the care home.

3. Article 5(4) – Review

The Court noted the following emerging principles at para 163:

> (a) A person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention;
> (b) Article 5 § 4 requires that the procedure followed have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place;
> (c) The judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. Special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves.

The last principle was all the more true when, as here, the placement was carried out without any involvement on the part of the courts. The forms of judicial review may vary from one domain to another and may depend on the type of the deprivation liberty at issue but the Court held:

> "165… It appears that, in situations such as the applicant's, Lithuanian law does not provide for automatic judicial review of the lawfulness of admitting a person to and keeping him in an institution like the Kėdainiai Home. In addition, a review cannot be initiated by the person concerned if that person has been deprived of his legal capacity. In sum, the applicant was prevented from independently pursuing any legal remedy of a judicial character to challenge her continued involuntary institutionalisation.
> 166. The Government claimed that the applicant could have initiated legal proceedings through her guardians. However, that remedy was not directly accessible to her: the applicant fully depended on her legal guardian, her adoptive father, who had requested her placement in the Kėdainiai Home in the first place. The Court also observes that the applicant's current legal guardian is the Kėdainiai Home – the same social care institution which is responsible for her treatment and, furthermore, the same institution which the applicant had complained against on many occasions, including in court proceedings. In this context the Court considers that where a person capable of expressing a view, despite having been deprived of legal capacity, is deprived of his liberty at the

request of his guardian, he must be accorded an opportunity of contesting that confinement before a court, with separate legal representation…
167. In the light of the above, the Court … holds that there has also been a violation of Article 5 § 4 of the Convention."

Comment
The facts of this particular case are clearly extreme but it is interesting to note that, in deciding that DD was deprived of her liberty, the key factor for the Court was the exercise of "complete and effective control by medication and supervision over her assessment, treatment, care, residence and movement" for over 7 years. Moreover, DD clearly felt the effects of the measures and unequivocally objected to them throughout her entire stay. One particular matter worth highlighting is the reference made at para 147 to the adequacy of safeguards, including judicial scrutiny, when determining whether restrictions are of a sufficient "degree" or "intensity" to engage Article 5(1). The implication being that the more safeguards that are in place – particularly the involvement of the court – the less intense will be the restrictions on the individual.

Unlike English law, which in *RK v BCC* [2011] EWCA Civ 1305, paras 14-15 confirms that a parent may not lawfully authorise the deprivation of their child's liberty, the ECtHR has yet to confine its decision in Nielsen v Denmark (1988) 11 EHRR 175 to history. Rather, at para 148, it continues to try to distinguish it on the basis that (a) Nielsen was a child and DD a 'functional' adult, (b) Nielsen was hospitalised for a limited period of time whereas DD had negligible prospects of ever leaving, (c) DD, but not Nielsen, was medicated, and (d) the State was far more involved in DD's placement. It remains to be seen whether such distinctions are capable of standing up to scrutiny in the context of the restriction/deprivation dilemma.

Reiterating its approach in *Stanev v Bulgaria* (Application no. 36760/06), the Court once again employed the *Winterwerp* threshold in a social care context to determine the legality of the person's detention. This calls into question whether the Court of Appeal was right to reject such an approach as a "fallacy" in *G v E and others* [2010] EWCA Civ 822. Whether a person of unsound mind is detained in a psychiatric hospital or a community facility, *Stanev* and *DD* confirm that *Winterwerp* should be used. The crux of the matter, therefore, is whether depriving someone of their liberty because it is "best" for them (the English approach) provides more or less protection of their Article 5 rights than requiring their mental disorder to justify their detention (the Strasbourg approach).

DL v A Local Authority and others [2012] EWCA Civ 253
Interface with inherent jurisdiction; Undue influence

The Court of Appeal had to decide whether a 'jurisdictional hinterland' existed outside the borders of the Mental Capacity Act 2005 ('MCA') to deal with 'vulnerable adults'. The assumed – but mainly disputed – facts were that, whilst living with his elderly parents, DL was physical and verbally aggressive to them. He was alleged to have controlled their contact with others, including health and social care professionals, and to have sought to coerce his father into transferring ownership of the house into his name, whilst placing considerable pressure on both parents to have his mother moved into a care home against her wishes.

At first instance, both parents were assumed to have capacity to make decisions regarding their residence and contact with others for the purposes of the MCA. However, the local authority had initiated proceedings under the High Court's inherent jurisdiction on the basis that DL's parents lacked capacity, not because their mind or brain was impaired or

disturbed, but as a result of the undue influence and duress that he brought to bear upon them. An interim injunction restrained DL from misbehaving.

DL argued that the MCA provided a comprehensive statutory code for those lacking capacity and that to recognise a jurisdiction beyond it would undermine a person's right to autonomy. The fact that someone with capacity chose to live in a risky or exploitative situation did not give the court any right to intervene. The local authority, on the other hand, contended that such an approach would create a new "Bournewood gap" in respect of those who fell outside the protection of the MCA but whose capacity was overborne by non-MCA circumstances, such as undue influence.

The Court of Appeal retraced the pre-MCA case law and Parliament's response to the Law Commission's paper. One key issue was whether Parliament's silence on the matter meant that the prior jurisdiction was thereby ousted or respected. MacFarlane LJ held:

> "61… In the absence of any express provision, the clear implication is that if there are matters outside the statutory scheme to which the inherent jurisdiction applies then that jurisdiction continues to be available to continue to act as the 'great safety net'…"

It was therefore unanimously held that the inherent jurisdiction survived and was "targeted solely at those adults whose ability to make decisions for themselves has been compromised by matters other than those covered by the MCA 2005" (para 53). A person's right to autonomy was in fact a strong argument in favour of retaining the jurisdiction which, endorsing *Re SA (Vulnerable adult with capacity: marriage)* [2005] EWHC 2941 (Fam):

> "… is in part aimed at enhancing or liberating the autonomy of a vulnerable adult whose autonomy has been compromised by a reason other than mental incapacity because they are … (a) under constraint; or (b) subject to coercion or undue influence; or (c) for some other reason deprived of the capacity to make the relevant decision or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent". (para 54).

Public policy also justified its survival: "the will of a vulnerable adult of any age may, in certain circumstances, be overborne. Where the facts justify it, such individuals require and deserve the protection of the authorities and the law so that they may regain the very autonomy that the appellant rightly prizes" (para 63). It was not easy to define and delineate the 'vulnerable adult', "nor is it wise or helpful to place a finite limit on those who may, or may not, attract the court's protection in this regard" (para 64). Instead, it was better for the law to develop and adapt on a case-by-case basis. However, Davis LJ issued a note of caution to local authorities:

> "76… It is, of course, of the essence of humanity that adults are entitled to be eccentric, entitled to be unorthodox, entitled to be obstinate, entitled to be irrational. Many are. But the decided authorities show that there can be no power of public intervention simply because an adult proposes to make a decision, or to tolerate a state of affairs, which most would consider neither wise nor sensible. There has to be much more than simply that for any intervention to be justified: and any such intervention will indeed need to be justified as necessary and proportionate. I am sure local authorities, as much as the courts, appreciate that."

Having recognised the jurisdictional hinterland, what powers could it exercise? Only those orders that were "*necessary and proportionate to the facts*" were permitted (para 66). Most significantly, the Court expressly commended the approach taken in *LBL v RYJ and VJ* [2010] EWHC 2665 (COP) where Macur J. had rejected the contention that it could be used to impose a decision upon a capacitous adult as to whether or finance and instead focused on "the ability of the court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-making…" (emphasis added). MacFarlane LJ held:

> "67. The facilitative, rather than dictatorial, approach of the court that is described there would seem to me to be entirely on all fours with the re-establishment of the individual's autonomy of decision-making in a manner which enhances, rather than breaches, their ECHR Article 8 rights."

However:

> "68… I reject the idea that, if it exists, the exercise of the inherent jurisdiction in these cases is limited to providing interim relief designed to permit the vulnerable individual the 'space' to make decisions for themselves, removed from any alleged source of undue influence. Whilst such interim provision may be of benefit in any given case, it does not represent the totality of the High Court's inherent powers."

Comment

For an alleged abuser to argue that the law lacked the jurisdiction to protect the alleged abusee was always going to be a hard sell. Nonetheless, the Court of Appeal's affirmation of the inherent jurisdiction and its facilitative approach is hugely significant and no doubt controversial. It comes at a time when the Government is presently deciding the extent to which adult safeguarding processes should be put onto a statutory footing on the back of the recent work of the Law Commission. The 'great safety net' is but one of many tools available to safeguard vulnerable adults and its recognition is not much of a surprise. What is perhaps of more importance is the inherent jurisdiction's scope, approach and powers.

Whilst the Court's reluctance to exhaustively define the 'vulnerable adult' is entirely understandable, it does leave uncertain the boundaries of this jurisdictional hinterland. Numerous definitions exist in various judicial, legislative and policy guises. The term 'adult at risk' is currently preferred as it focuses less on the person's inherent vulnerability and more on their objective circumstances; what might be called 'situational' or 'circumstantial' vulnerability to which all of us may at some point succumb.

To illustrate the issues with a trivial example, imagine the following. The authors decide to dine at an authentic Japanese restaurant. Our decision may seem unwise to others as not one Japanese word can be uttered amongst us. The menu is in Japanese and the staff do not speak English. The specific decision we need to make is what to eat. Our inability to make that decision results, not from an impairment or disturbance affecting the functioning of the mind or brain, but from our inability to speak Japanese. We therefore lack capacity for a non-MCA reason. We are situationally vulnerable.

With its 'theoretically limitless' powers, how should the inherent jurisdiction protect these vulnerable adults? The goal of the jurisdiction, as Kirsty Keywood suggests, "is to safeguard decision making, rather than to safeguard wellbeing per se" ((2011) 19(2) *Medical Law Review* 326). This is reflected in the Court of Appeal's insistence on taking a facilitative, rather than dictatorial, approach. A High Court judge would thereby facilitate

our ability to make the culinary decision, perhaps by requiring an interpreter, rather than choosing the dish for us. Unlike the MCA, the inherent jurisdiction would not therefore permit proxy judicial decision-making. However, the distinction between the facilitative and dictatorial approaches is not always easy to draw where injunctive and declaratory powers are concerned.

RE RODMAN [2012] EWHC 347 (Ch)
Deputies; Property and financial affairs

This case concerned an application for removal of the a property and affairs deputy appointed in 2010 on behalf of a Mrs Rodman, an elderly lady suffering from Alzheimer's disease.

Mrs Rodman had previously fallen under the aegis of the Court of Protection as she had been resident in the England and Wales, and had substantial assets here. A property and affairs deputy, a Mr Long, was appointed. By order of the Court of Protection, Mrs Rodman was then moved to the United States; those concerned understood at the time that it would be to New York. That order also recorded an undertaking by her four daughters that they would apply to be appointed as her welfare guardians and take appropriate steps to bring about the appointment of a financial guardian or conservator.

In circumstances that would appear to be unclear even to Newey J, Mrs Rodman either did not go to New York or was moved from New York to Nevada after her arrival.

The proposal that Mr Long be replaced was then made by the 'general guardian' of her estate, appointed as such under an order by the District Court of Clark County, Nevada. In May 2011, the guardian, Mr Shafer, issued an application in the Court of Protection seeking (inter alia) Mr Long, be replaced as Mrs Rodman's deputy. In July 2011, Mr Shafer proceedings in the Chancery Division for (a) Mr Long to be replaced as Mr Rodman's representative and (b) bills which Charles Russell had rendered to Mr Long for work in connection with the deputyship and Mr Rodman's estate to be assessed pursuant to s.71 Solicitors Act 1974. By September 2011, Mr Shafer was also relying upon matters relating to the assessment of costs incurred by Charles Russell as justification for Mr Long's removal as deputy.

The application for removal was transferred from the Court of Protection to be heard before Newey J in the Chancery Division of the High Court.

In analysing the relevant legal framework, Newey J noted (at paragraph 17) that the relevant power was that contained in s.16(7) MCA 2005, and that the exercise of the power was a decision covered by s.1(5) MCA 2005. He further noted that, as such, he had to take into account the views of anyone engaged in caring for the person or interested in her welfare which, here, included her four daughters.

Newey J then went on to set out, at some length, why he was "entirely unpersuaded" that that it was in Mrs Rodman's best interests that Mr Long be removed as deputy. He noted, in particular: (1) Mr Long's greater expertise as regards the specifically British aspects of the case; (2) the fact that Mr Shafer's 'hostile' approach to date did not inspire confidence that he would be a suitable candidate; (3) that it could prove inconvenient and expensive to have different individuals handling her affairs and Mr Rodman's estate; (4) that, whilst it would be possible for Mr Long to be replaced as administrator of Mr Rodman's estate, this would, itself, cause its own problems and additional expense; (5) the

costs incurred by Charles Russell were large, but not obviously excessive[36]; (6) whether or not it was correct that Mr Shafer upon being appointed deputy could require an assessment of costs pursuant to s.71 Solicitors Act 1974, Charles Russell had confirmed that they would take no point upon limitation, such that there was no risk that any right would be lost by the fact that Mr Long was not being replaced as deputy; (7) whilst the daughters had all signed a letter in August of 2011 to the effect that they had lost confidence in Mr Long and wished him to be replaced both as Mrs Rodman's deputy and personal representative, Newey J noted that the letter lacked any explanation as to why this should be so and that he had not heard evidence from them, such that he did not think that their views helped very much.

Comment

There is a paucity of case-law upon the test to be applied when considering whether to remove a deputy. Indeed, to the best of our knowledge, there have been no reported cases upon the exercise of s.16(7).[37] Whilst Newey J did not engage in a detailed analysis of s.16(7) (and did not refer at all to s.16(8)), it is perhaps of interest to note that he assumed that any decision taken alternative line of argument could be advanced by analogy to the case of *Re H* [2009] COPLR Con Vol 606, in which HHJ Marshall QC doubted whether the decision under s.19(9) as to the level of security that a deputy is required to post und was one to which s.1(5) applied.[7] Had this approach been adopted, we note, Newey J would not need to have to taken into account (even if to dismiss) the views of the daughters.

This case does raise an interesting question as to the power of the Court of Protection to control matters outside the borders of the United Kingdom. As noted by Newey J, the order endorsed by the Court in the earlier best interests proceedings specifically provided that it was in Mrs Rodman's best interests to be transferred from her current location to an identified location in New York; it would appear from the judgment of Newey J that she may, in fact, never have stepped foot in the door of that placement. It would have been interesting to note what, if any, steps the Court of Protection would have taken had this fact been identified to it in the immediate aftermath of the transfer.

ZH v Commissioner of the Police for the Metropolis [2012] EWHC 604 (Admin)

"Deprivation of liberty"; Restraint; False imprisonment; Assault; Disability discrimination; Articles 3, 5 and 8; Damages

This is an extremely important case, primarily because of its consideration of the scope (and construction) of ss.5 and 6 MCA 2005, and also for its further contribution to the debate as to the circumstances under which a person can be said to be deprived of their liberty.

ZH was a severely autistic, epileptic nineteen year old young man who suffered from learning disabilities and could not communicate by speech. In September 2008, he was taken by the specialist school he attended to a swimming pool for a familiarisation visit. Matters went very badly awry during the course of that visit, in particular following the

---

[36] Whilst Mr Long acted as a consultant to Charles Russell (where he was formerly a partner), the judge did not consider that his evidence that he had reviewed their costs and considered them reasonable at each stage was thereby deprived of all weight, especially as his remuneration was not linked to Charles Russell's profits.

[37] The – relatively recent – decision of HHJ Marshall QC in *Re J* [2011] COPLR Con Vol 716 related to the removal of an attorney under an LPA, the relevant factors identified under s.22(3)(b) MCA 2005 being very similar to those in s. 16(8) MCA 2005. *Re J* was not cited in *Re Rodman*. We are aware that Senior Judge Lush determined an application for removal of a deputy in August 2011, an anonymised copy of his judgment is anticipated.

decision of the manager of the pool to ring the Police when difficulties were experienced in persuading ZH to move away from the side of the pool. The arrival of the police gave rise to an escalating series of events which culminated in ZH first jumping into the pool, being forcibly removed from it, being handcuffed, put in leg restraints and placed in a cage in the back of a police van for a period of around 40 minutes. As a result of this, ZH suffered consequential psychological trauma as and an exacerbation of his epileptic seizures.

ZH claimed (by his father as litigation friend) damages against the Commissioner of the Police for the Metropolis for damages, for assault and battery, false imprisonment, unlawful disability discrimination under the Disability Discrimination Act 1995, under the Human Rights Act 1998 alleging breaches of Articles 3, 5 and/or 8 of the ECHR and for declaratory relief.

The police contested the claim almost in its entirety. For our purposes, the most relevant aspects of the judgment are those dealing with claims for assault and battery, as well for false imprisonment/breach of Article 5 ECHR. Helpfully, Sir Robert Nelson analysed the legal framework in detail before then making findings of fact and considering questions of liability and quantum.

In considering the claims for assault and battery and false imprisonment, Sir Robert Nelson noted that it was accepted by the Commissioner that, once it was established that force was used upon ZH, or that he was imprisoned, the onus shifted to them to establish a lawful basis for the use of such force or imprisonment. Importantly, Sir Robert Nelson noted that "[t]o achieve this the Defendant has to demonstrate that his officers complied with the relevant provisions of the Mental Capacity Act." Relying upon *R (Sessay) v SLAM* [2011] EWHC 2617 (at paragraph 47)[38] Sir Robert Nelson held (paragraph 34) that it was insufficient for the Commissioner to establish simply that an officer acted honestly and in good faith. Having set out the relevant provisions of the MCA 2005 (i.e. 1(5); 1(6), 4(2), 4(7), 5 and 6), which he considered to establish a number of pre-conditions which "if satisfied permit certain acts to be undertaken in respect of those lacking mental capacity, without legal liability being incurred," (paragraph 35) Sir Robert Nelson considered the position of the officers in question, four of whom it was clear were not aware of s.5 MCA 2005 at the time that they acted and did not have it in mind. These officers said that they relied upon the common law power of necessity (paragraph 37). Having considered rival submissions as to whether or not knowledge of the provisions of the MCA 2005 is an essential pre-requisite to the operation of the Act, Sir Robert Nelson held as follows:

> "40. Whilst it is correct that the officers have to have the prescribed state of mind at the material time under sections 5 and 6, it is not necessary in my judgment, for them to have in mind the specific sections, or indeed even the Act, at the material time. What they must reasonably believe at the material time are the facts which determine the applicability of the Mental Capacity Act. Thus, at the material time they need to believe that the claimant lacked capacity to deal with and make decisions about his safety at the swimming pool, that when they carried out the acts that they did, they believed that the claimant so lacked capacity, and that they believed that it was in the claimant's best interests for them to act as they did. A belief that the situation created a need for them to act in order to protect the claimant's safety and prevent him from severely injuring

[38] This paragraph, in which the Divisional Court cited the well-known authority of *R v Governor of Brockhill Prison Ex p Evans (No.2)* [2001] 2 AC 19, in fact only addressed the position in relation to a claim of false imprisonment.

himself would in my judgment be sufficient to satisfy the Act, provided of course that the belief was reasonable under sections 5 and 6 and a proportionate response under section 6 of the Act. It is also necessary for the Police to have considered whether there might be a less restrictive way of dealing with the matter under section 1(6) and, if practicable and appropriate to consult the carers, to take into account their views. These are not only matters which they must have in mind when they carry out the acts of touching, grabbing or restraint but are matters which they must have had regard to before carrying out such acts."

Sir Robert Nelson therefore found (paragraph 41) that it would therefore be theoretically possible for the police to have satisfied the conditions of ss.5-6 MCA 2005 even if some of their number were not aware of the terms of the Act itself. In light of his conclusion, he noted that he was not then bound to go on to consider whether or not the common law defence of necessity could apply in circumstances where the MCA 2005 applied. He chose to do so, however. Relying, in particular, on *Sessay*, ZH submitted that the defence of necessity had no place; the Commissioner submitted to the contrary. Sir Robert Nelson held as follows in this regard:

> "44. For my part I am satisfied that where the provisions of the Mental Capacity Act apply, the common law defence of necessity has no application. The Mental Capacity Act requires not only the best interests test but also specific regard to whether there might be a less restrictive way of dealing with the matter before the act is done, and, an obligation, where practicable and appropriate to consult them, to take into account the views of the carers. It cannot have been the intention of Parliament that the defence of necessity could override the provisions of the Mental Capacity Act which is specifically designed to provide specific and express pre-conditions for those dealing with people who lack capacity."

Having considered the law relating to the DDA 1995 and Article 3 ECHR, Sir Robert Nelson came on to consider Article 5. Perhaps unsurprisingly, in advancing the contention that ZH was not deprived of his liberty, the Commissioner placed heavy reliance upon the dicta from previous authorities[39] suggesting that it was appropriate to take into account the purpose (or reason) for the restriction in question being imposed. Sir Robert Nelson noted that the decision of the Strasbourg Court in *Austin* was awaited; his conclusions in this regard must therefore be read subject to the fact that the decision has now been handed down, but are of sufficient interest as to merit being reproduced in full:

> "63. It is right to say that there is no reference to 'purpose' in Article 5 save in relation to the specific exceptions (a) to (f). The cases however clearly establish that all relevant factors relating to the applicant have to be considered. If the applicant has a need for measures to be taken in order to protect his own safety, such a need should be taken into account otherwise the court is not considering the full circumstances relating to the applicant when the ambit of Article 5(1) is being considered. The court is not therefore considering the matter from the point of view of the person carrying out the measure, but from the point of view of the applicant who needs the measure to be carried out. This, it seems to me, is a similar approach to that adopted by Mrs Justice Parker [in MIG and

[39] *Secretary of State for the Home Department v JJ* [2008] 1 AC 385; *Surrey County Council v CA, LA MIG and MEG* [2010] EWHC 785 (Fam) and *Austin and another v Commission of Police for the Metropolis* [2009] 1 AC 564.

MEG] when taking into account the "reasons" for the applicants before her living where they did.

64. There may be policy reasons why the ambit of Article 5 should only involve consideration of the actual effect upon the applicant, so that the scope of Article 5 is not unnecessarily diminished by "purpose" or "need". The matter was not argued in depth before me however, and I am only able to express a tentative view on the basis of the material before me. On that material I conclude that the purpose of, or the need for a measure to be taken on the part of an applicant is one of the factors which should be taken into account in considering whether there has been an infringement of Article 5. It seems to me that if the consent of the applicant is relevant, which is not part of the concrete effect upon him, then need can also be said to be relevant."

On the facts, Sir Robert Nelson found that ZH had made out all aspects of his claim (and also that, even had been available, the defence of necessity to the common law claims would not have been applicable at any of the stages of the police's involvement). Interestingly, he found the police to have breached the DDA by failing to make a significant number of reasonable adjustments in their approach to him, such adjustments including consulting with his carers, allowing ZH opportunities to communicate with his carer during restraint and when in the van, giving ZH the opportunity to move away from the poolside at his own pace, recognising that force should have been the option of last resort, recognising that a calm, controlled and patient approach should have been taken at all times in their dealings with ZH, and considering any alternative strategies to that adopted. As Sir Robert Nelson noted at paragraph 139, "[t]he need for a calm assessment of the situation and the acquisition of knowledge of how to deal with the autistic young man before taking any precipitate action, was essential."

As regards Article 5, Sir Robert Nelson's conclusions were as follows:

> "145. The nature and duration of the restraint lead me to the conclusion that there was a deprivation of liberty, not merely a restriction on movement on the facts of this case. Furthermore, even though I am of the view that the purpose and intention of the police (namely at least in part to protect ZH's safety) is relevant to the consideration of the application of Article 5, I am nevertheless satisfied that even when that is taken into account, a deprivation of liberty has occurred. The actions of the police were in general well intentioned but they involved the application of forcible restraint for a significant period of time of an autistic epileptic young man when such restraint was in the circumstances hasty, ill-informed and damaging to ZH. I have found that the restraint was neither lawful nor justified. Even though the period may have been shorter than that in Gillan v United Kingdom 2010 APP No 4158/05, it was in my judgment sufficient in the circumstances to amount to a deprivation of liberty under Article 5."

Sir Robert Nelson awarded the following damages to ZH (no award being made for aggravated or exemplary damages at common law or for the breaches of the ECHR):

- Post traumatic stress disorder: £10,000
- Exacerbation of epilepsy: £12,500
- Disability Discrimination Act damages: £5,000
- Trespass to the person: loss of liberty £500
- Trespass to the person: pain and distress from the assault £250
- Total: £28,250

Sir Robert Nelson also granted declaratory relief (the precise scope of which was not set out in the body of the judgment), concluding as follows:

> "162. This case is another example of the difficult role the police are often called upon to play. None of them were fully aware of the features of autism, what problems it presented and how it should best be dealt with in a situation such as occurred at the Acton swimming baths. They were called to the scene by a misleading message about ZH's behaviour, and on arrival perceived the need to take control and be seen to be taking steps to deal with the situation. What was called for was for one officer to take charge and inform herself of the situation, as fully as the circumstances permitted so as to be able to decide on the best course of action to take. That did not happen: their responses were over-hasty and ill-informed, and after ZH had gone into the pool matters escalated to the point where a wholly inappropriate restraint of an epileptic autistic boy took place. They did not consult properly with the carer who was present when they arrived, even if he was not as proactive as he might have been in informing them of what was happening, what needed to be done and what needed to be avoided.
> 163. The opportunities to take stock, before ZH went into the pool and whilst he was in it, were not taken. All of those involved in this incident were acting as they genuinely thought best, whether pool staff, carers or police, and it is clear to me, having listened to their evidence, that all have been to some extent emotionally affected by the events of that day. Whilst I am clear in my conclusion that the case against the police is established, I am equally clear in concluding that no one involved was at any time acting in an ill intentioned way towards a disabled person.
> 164. The case highlights the need for there to be an awareness of the disability of autism within the public services. It is to be hoped that this sad case will help bring that about."

Comment

This case warranted setting out in some detail as (whilst not a COP case) it is the first in which ss.5-6 MCA 2005 have been subject to detailed judicial consideration. It is of particular significance that, whilst Sir Robert Nelson concluded that it is not necessary that a person have before them all relevant provisions of the Act (or, indeed, have knowledge of them), they must both reasonably believe the facts which determine the applicability of ss.5-6 and also – importantly – have considered all the relevant matters which the Act prescribes. It is respectfully suggested that this approach must be correct as it focuses upon the substantive protections afforded to P by the MCA 2005 so as to ensure that steps are taken in his best interests, whilst at the same time enabling those who are in fact taking those steps not to be affixed with legal liability on 'procedural' grounds.

Sir Robert Nelson's conclusions as to the vexed question of purpose/reason must now be read in light of the decision in *Austin*, but to the extent that they address themselves to the actual needs of P (rather than the views of the restrainer of those needs) they are consistent with that decision.

As the judge noted, the case is also an object lesson in how quickly situations can escalate if well-intentioned but uninformed (even if uniformed) individuals seek to intervene without taking the necessary steps to appraise themselves of the particular needs of the particular individual at the particular time. It also stands, we might note, as a rather interesting counterpoint to *Crawford & Anor v Suffolk Mental Health Partnership NHS Trust*

[2012] EWCA Civ 138 (discussed in our March newsletter) and the (one might possibly think rather cavalier) approach taken there to the restraint of the challenging.

DENIS MICHAEL SEATON AND OTHERS V ANTHONY SEDDON AND OTHERS [2012] EWHC 735 (CH)

Mental Health Act 1983; Fluctuating capacity

In this matter Roth J had to consider a complex claim arising out of a dispute in relation to licencing rights over a song. The first four claimants, were members of a band, MY ("the MY claimants"). The fourth claimant, FW, is mentally ill and brought his action by his litigation friend, the corporate receiver of Birmingham City Council who had been appointed as his "receiver" by the Court of Protection.

In the 1980s, MY had a hit single, "Duchie". In 1984 the MY claimants entered in to a contract ("the Sparta Florida Agreement") which made provision for the licencing of rights to a song ("Kouchie") on which the contract asserted MY's hit single "Duchie" had been based. They were represented in the negotiations by the firm of Solicitors Woolf Seddon of which the First Defendant was a partner. The claim as framed before Roth J was not issued until 2010. It challenged the conduct of Woolf Seddon who had acted both for the MY claimants and for another party to the Sparta Florida Agreement (whose interests conflicted with those of the MY claimants). Woolf Seddon applied to the Court for summary judgment against the claimants by way of strike out on grounds that it amounted to an abuse of process. The claimants also applied for permission to amend their Particulars of Claim.

Rather than plead the claim in negligence or for breach of the solicitor's contract of retainer, the claim had been pleaded on the grounds that Woolf Seddon stood in a fiduciary position in respect of the MY claimants. Roth J noted that the obvious reason for this was that any claim in negligence would be long out of time. The central issue was whether there was any basis on which the effect of the Limitation Act 1980 could be avoided.

The claim as pleaded effectively included allegations of fraud but such allegations had not been fully pleaded. Roth J summarised the principles applicable to a pleading of fraud at paragraphs 39 to 41 of the Judgment. He rejected a submission made on behalf of the claimants that the CPR had introduced more stringent requirements in this regard. On the facts, Roth J considered the allegations of fraud had no realistic prospect of success.

Roth J then considered the claimants' claim that there had been a breach of fiduciary trust. Roth J set out a number of authorities on this issue including *Paragon Finance plc v Thakerar & Co* [1999] 1 All ER 400 *and Cia de Seguros Imperio v Heath (REBX) Ltd* [2001] 1 WLR 112 in which the Court had drawn a distinction between class 1 and class 2 types of constructive trust. On the facts, he considered that any trust that was in place fell in to the second category to which the exception provided for in the Limitation Act 1980 would not apply. Properly considered, the claims were claims in tort and subject to the application of s32 of the Limitation Act 1980 (which allows for the postponement of a limitation period) limitation would have expired after 6 years.

The Judge then turned to the issue of whether the particular circumstances of the fourth claimant could form a basis for prolonging or otherwise disapplying the limitation period. He noted that the relevant legislation had altered over the period in question and

that s.28 of the Limitation Act had been amended to include a reference to the MCA 2005.

The fourth claimant was born on 23 May 1967. Accordingly, at the date of accrual of the causes of action he was under a disability by reason of his age ("the first disability"). He ceased to be under that disability on becoming 18 on 23 May 1985. Any disability arising as a result of the fourth claimant's capacity was a "secondary disability." The parties agreed that once time had started to run nothing could stop it: *Purnell v Roche* [1927] 2 Ch 142.

Two issues crystallised:

(i). If the second disability commenced before the termination of the first disability, did that extend the limitation period? More specifically, if the fourth claimant came to lack mental capacity before his 18th birthday, would that stop time from running?

(ii). Was the determination of whether or not the fourth claimant was of unsound mind or lacking in mental capacity to be made pursuant to the 1980 Act as it was at the time of the facts being considered or in its amended form? More specifically, was the relevant test whether the fourth claimant was incapable of managing and administering his property and affairs by reason of a mental disorder under the terms of the Mental Health Act 1983 ("the 1983 Act"), or whether he lacked capacity within the meaning of the 2005 Act to conduct legal proceedings?

Subsequent overlapping disability

For the fourth claimant, it was submitted that so long as a claimant is continually under "disability", time does not begin to run, even if the second, overlapping disability is of a different nature to the first disability. For Woolf Seddon, it was argued that time began to run on the fourth claimant attaining his majority regardless of whether he can establish that he was under the second disability as at that date.

The Judge preferred the fourth claimant's submission and accepted that there was scope for a second overlapping disability:

> "The thrust of section 28(1) is that so long as a person is under a disability, the limitation period should not start to run so that he is not potentially compelled to commence proceedings. Since that applies to a child until he reaches the age of 18, if on his eighteenth birthday he is still under a disability, albeit a different disability from that which applied when the cause of action accrued, it would be inconsistent with the statutory purpose for the running of the limitation period to commence nonetheless. As I have already mentioned, the rule that a second disability which starts only after the cessation of the first disability will not cause an extension or suspension of the limitation period is capable of harshness. For a cause of action which accrues to a child, the limitation period will run from his eighteenth birthday even if he is involved in an accident the next day that causes brain damage such that he thereafter lacks mental capacity. But I see no reason to interpret section 28(1) so as to increase its potential harshness by imposing the same result if he developed a mental illness before – and possibly long before – his eighteenth birthday. The fact that mental incapacity can be long-lasting and that therefore time may not run for a long time is inherent in the existing statutory scheme and not the result of this construction. I note that the Law Commission's recommendation that there should be a long-stop limitation

> period, but also that if a claimant develops lack of capacity after a limitation period has commenced then the running of time should be suspended, has so far not been adopted: Limitation of Actions (Law Com no. 270, 2001), paras 3.126-3.133…"

Applicable law

As to the second issue, Roth J concluded that the appropriate law to apply was that applicable at the time of the accrual of the cause of action (1984). He therefore proceeded to consider whether the fourth claimant was by reason of mental disorder within the meaning of the Mental Health Act 1983 "incapable of managing or administering his property and affairs": s.38(3).

The evidence before the Court was that, by 1987, the fourth claimant was suffering from acute schizophrenia. However, the Judge noted that this was a progressive illness and could provide evidence as to his mental state at the relevant time (some 2 years earlier). There was, however, additional evidence from the claimant's GP dating to 1985. The Judge was satisfied on this basis that the claimant was suffering from a relevant mental disorder at the material time. However, in line with the decision in *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, [2003] 1 WLR 1511, the question of capacity is issue specific. The claimant was required to show that he would not have been able to understand, with an appropriate explanation, that he may have a claim against MY's solicitors related to a failure to get the band publishing royalties for Kouchie, and to decide whether to make such a claim. The evidence fell short of establishing this. Further and in any event, the evidence was insufficient to show that the fourth claimant had been under a continuous disability until 2004.

Notwithstanding his finding that the relevant law to be applied was that applicable in 1984, Roth J went on to consider the alternative scenario where the applicable law was that in 2010 (at the date of issue) and by which time the Limitation Act 1980 had been amended to refer to the MCA 2005. Roth J noted that under the MCA 2005 capacity is issue specific and that, in accordance with the statutory guidance, it is expressly recognised that capacity may fluctuate and it is to be assessed at the relevant time. Accordingly, for the purposes of preventing the limitation period from running, the fourth claimant would still have to show that his lack of capacity had been continuous from the 1980s until 2004. Roth J that the claimant could not establish this so as to avoid the application of the Limitation Act. He further held:

> "In my judgment, it is not adequate for the fourth claimant to say that his mental capacity is a matter for expert evidence which he would wish to call at trial. Where he seeks to rely on his incapacity to rebut an obvious limitation defence and the case comes before the court on a summary judgment application, particularly where that application was issued on 8 October 2010 and, for various reasons, came on for full argument over a year later, it is incumbent upon the fourth claimant to place before the court sufficient evidence to support his claim of mental incapacity. This is obviously not an issue that will be affected by disclosure from the defendants. I consider that it would be wholly wrong to permit the fourth claimant's claim to go to trial on all the substantive issues that are otherwise statute barred, on the speculative basis that he might by then be in a better position to establish his own mental incapacity that would overcome the limitation defence."

The application for summary judgment succeeded. The claimants were refused permission to amend the Particulars of Claim as against Woolf Seddon.

Comment
This decision effectively establishes that for the purposes of preventing a limitation period from running, claimants will have to establish both that they lacked capacity at the time at which the cause of action should have accrued and that they suffered a continuous lack of relevant capacity throughout the period in which they contend limitation should not run.

For those who have fluctuating capacity, such as the fourth claimant in this case, this is potentially an extremely difficult burden to meet. In this specific context, the decision illustrates the harshness of the rule that once limitation has started to run, it cannot be stopped and raises the question as to whether section 28 of the Limitation Act 1980 offers individuals with fluctuating capacity adequate protection.

It is also interesting that Roth J concluded that both the MCA 2005 and the Mental Health Act 1983 would have yielded the same result. In effect, his decision was that because the claimant had failed to satisfy the evidential burden under the MHA 1983, he could not meet the evidential burden under the MCA 2005.

Practitioners will note the Judge's finding as to when the fourth claimant should have produced the expert evidence (at the summary judgment hearing). Admittedly, on the facts, there was more than a year between the application for summary judgment and the hearing. However, in other cases, time frames could be considerably more compressed. Claimants who intend to rely on a lack of capacity to defeat a limitation point may wish to ensure that they have expert evidence available prior to or shortly after the issue of proceedings.

COOMBS V DORSET NHS PCT AND ANOTHER [2012] EWHC 521 (QB)
Mental Health Act 1983 s.117 aftercare; Capacity and insight; Deputyship

Although this case relates to the Mental Health Act 1983 ('MHA'), it merits a mention, albeit briefly because permission to appeal has been given. It was common ground between the parties that an 'ordinary' patient was entitled to free hospital care but could choose to arrange and pay for their own. The issue was whether the fact that they were detained under the MHA deprived them of this 'right'. In deciding that such a patient was not prevented from paying for his own care and treatment, HHJ Platts held:

> "63. … Decisions as to where he is treated would remain with the managers of the hospital; decisions about treatment with the responsible clinician. All he is choosing to do is provide the money to facilitate placement or treatment, which is deemed appropriate by the detaining authority, and I see no difficulty with that. 64. I do not categorise this as charging for the provision. The detaining authority would always have to be in the position to provide suitable and appropriate care and treatment without the patient contributing. If the patient however chooses to pay for that, or for any other option, and the detaining authority agree, then why should he not be able to?"

It did not make a difference whether the patient had the mental capacity to make such a decision or whether, as here, they had a deputy appointed under the Mental Capacity Act 2005 to do so.

Comment
Whether this preliminary issue was correctly decided will be determined on appeal. The implications certainly at first blush seem significant, with wealthier detained patients being afforded greater access to treatment options and placements. But aside from the central issues, it is interesting to note that the Judge recognised the distinction between having 'capacity' and having 'insight', before stating at para 54: "This lack of insight and vulnerability will undoubtedly make any decision as to whether or not to offer to fund treatment very difficult for a patient."

CQC REPORT ON DOLS

The second annual report from CQC on DOLS has been published. The report refers to recent 'high profile investigations into failures in health and social care' which 'reinforce the need for and value of a system to safeguard the rights of people who lack capacity and are deprived of their liberty'. The report also unsurprisingly finds that further training and guidance is required, and that the complexity of the DOLS system continues to cause problems.

LISTING DEPRIVATION OF LIBERTY SAFEGUARDING CASES

We are grateful to both James Batey at the Court of Protection and Beverley Taylor at the Official Solicitor for (independently) bringing the following significant announcement from the President and Charles J to our attention:

> "The President and the Judge in Charge of the Court of Protection have determined that it is no longer necessary for all cases where the issue of Deprivation of Liberty Safeguarding is raised to be heard by a High Court Judge. The judges at the issuing court based in the Thomas More building of the Royal Courts of Justice will consider whether the issues raised in the case appear to require the consideration of a High Court Judge and allocate the case to the appropriate level of judge accordingly. The question of allocation may be reconsidered if and when further information relevant to the issue arises.
>
> If the judges at Thomas More, or their colleagues in any court on reconsideration of the appropriate level of judge to hear the case, are unclear on whether the case should be heard by a High Court judge, they should seek guidance from the Family Division Liaison Judge for the circuit which will be hearing the case.
>
> This change regarding the listing of Deprivation of Liberty Safeguarding cases has immediate effect.
>
> Date 15th March 2012."

ISSUE 21 MAY 2012 COURT OF PROTECTION UPDATE

B V B [2010] EWHC 543 (FAM)

Costs; Litigation friend; Official Solicitor

We are grateful to Simon Edwards for bringing this case to our attention; whilst it was decided some time ago, the point that it establishes remains of significance.

Mrs B divorced her husband. There then followed ancillary relief proceedings, in relation to their assets and liabilities, and contact proceedings with regard to their six children. Mr B lacked litigation capacity due to a delusional thought disorder and the Official Solicitor agreed to act for him as his guardian ad litem (now litigation friend). The legal bill incurred by the Official Solicitor was around £100,000. After regaining capacity, Mr B contested his liability to pay these costs on various grounds. These included the Official Solicitor's apparent failure to seek public funding.

Bennett J held that an application for public funding could not have sensibly been made because of Mr B's hostility and lack of cooperation with the Official Solicitor. The second avenue of funding, namely obtaining from Mr B's assets, would also have been inappropriate because he was still a patient. As a result, all of the litigation costs had to be funded by the Official Solicitor out of public revenue. In the absence of unreasonable conduct, Bennett J. held that the Official Solicitor was entitled to be reimbursed for his costs on an indemnity basis from the person in whose best interests he had acted as guardian ad litem.

Comment
Although these were family proceedings involving the Official Solicitor as guardian ad litem, the principles are equally applicable to litigation friends acting in Court of Protection proceedings. The Court endorsed the view expressed in Re E (mental health patient) [1984] 1 All ER 309 at 312, that the main function of litigation friends is to carry on the litigation on behalf of the incapacitated person in their best interests. They must make all the decisions that the person would have made had he been able to. Importantly, litigation friends are not litigants: their functions were described as "essentially vicarious" and they are responsible to the Court for the propriety and the progress of the proceedings.

Insofar as costs are concerned, the Court noted that by acting, litigation friends render themselves personally liable to the other parties for the costs of unsuccessful proceedings. However, they are entitled to be indemnified out of the incapacitated person's estate "if it was proper to institute the proceedings, and they have been conducted with propriety".

The Court of Protection Rules 2007 contain wide-ranging powers to fund the Official Solicitor's costs. Rule 163 provides, inter alia, that they "shall be paid by such persons or out of such funds as the court may direct". Funding the litigation friend of last resort is becoming increasingly important. Given the incapacity of the litigant, it raises access to justice issues which bear upon Article 6 ECHR. This case shows that where the Court requests the Official Solicitor to act as litigation friend for a person lacking litigation capacity and the Official Solicitor accepts the appointment, that person will be liable for the Official Solicitor's costs even if he objects to the appointment so long as the Official Solicitor acts properly.

LB HARINGEY V FG & ORS (NO.1) [2011] EWHC 3932 (COP)
Mental capacity; Contact; Education; Litigation; Residence; Tenancy Agreements; Practice and Procedure

Proceedings were brought by the LB Haringey regarding the welfare of a young woman, HG. As a preliminary issue, Hedley J had to decide whether HG had the capacity to litigate, and also whether she had the capacity to decide where she should live; where she should be educated; decide on the extent of the contact and relationship she should have with her natural family; to deal with her financial affairs, and to enter into what was

described as a tenancy agreement. Hedley J conducted a detailed analysis of the evidence as it related to HG's capacity in each of these domains, and concluded that she lacked capacity in each regard. For present purposes, perhaps of most significance is what he then said by way of conclusion at paragraph 21, where he noted by of a final comment:

> "I have been referred to the decision of Mr Justice Baker in *PH v A Local Authority* [2011] EWHC 1704 (Fam). This is a considered decision on capacity, and one that is undoubtedly helpful, particularly in relation to its analysis of the law between paragraphs 13 and 16. I have deliberately not referred to it in this judgment, not because it is unhelpful or because I disagree with it, but because it seems to me that unless and until there is any binding authority available, courts may be safest in an approach to this case by ascertaining the facts, applying the statutory principles and reasoning a conclusion from that, and treating each case as one to be decided on its own facts. I say that so as to avoid a multiplicity of first instance judgments being cited as a matter of course in these cases. It may be that parties and advisors and those who have to operate this system will find the individual expressions of judges helpful, but debates in proceedings about saying the same thing in many different ways does not seem to me helpful, particularly, where, as here, no doubt increasingly so in the future, the question of capacity will be determined summarily as a preliminary issue prior to the determination of welfare which is probably, in most of these cases, what is going to be upper most in the minds of all those who engage in them."

Comment

Whilst we do not set out here the detail of Hedley J's assessment of HG's capacity to take the decisions in question, they stand (a little ironically, given his comments in paragraph 21) as a model of the exercise which we would commend to our readers.

His comments at paragraph 21 chime with those that he has subsequently made in *A Local Authority v H* [2012] EWHC 49 (COP), in which he expressly decided to return to first principles in considering the question of whether H had the capacity to consent to sexual relations, only turning to previous first-instance authorities in essence by way of a cross-check. They also stand as a salutary reminder against over-burdening already groaning Court bundles with authorities in circumstances, where, as the President reminded us in *RT v LT and Anor* [2010] EWHC 1910, [2010] COPLR Con Vol 1061, "what we now have is the Act (as amended) and the essential judicial task is to apply the plain words of the statute to the facts of the case before the court."

LB HARINGEY V FG & ORS (NO.2) [2011] EWHC 3933 (COP)

Best interests; Residence; Contact

Having determined that the relevant individual, HG, lacked the capacity to litigate and take relevant decisions as a preliminary issue in *LB Haringey v FG & Ors (No.1)*, Hedley J went on to make a series of decisions as to what lay in her best interests, in particular whether she should continue to be accommodated by the local authority or to return home to live with her mother. With no disrespect to Hedley J or, indeed, to HG, there are no features in his judgment which call for specific comment save perhaps, two, namely:

1. As with *B v M* [2010] EWHC 3802 (Fam), [2010] COPLR Con Vol 247, this was a case which had started out as proceedings under the Children Act 1989 but were then transferred to continue under the MCA 2005 given HG's age;

2. Hedley J met HG before evidence was given, meeting with her in the company of the solicitor instructed by the Official Solicitor and the Official Solicitor's representative, and reporting in open court the conversation he had had with her. Hedley J did not give any specific reason for having taken this step, but it is one that, in our respectful submission, could fruitfully be adopted in many more cases where the nature of P's particular disability allows.

DUNHILL V BURGIN [2012] EWCA CIV 397
Litigation capacity; Compromise agreement

We covered the first instance decision in this case in our March 2011 newsletter. The Claimant sought to have a compromise agreement into which she had entered declared void due to her having lacked litigation capacity at the time it was agreed. The Claimant had suffered a brain injury in a car accident and had instructed solicitors to bring a claim for personal injury. The claim was settled for £12,500 on the first day of trial, but it had subsequently transpired that if properly pleaded, the claim would have been worth at least £790,000, and possibly as much as several million pounds.

At first instance, the Court held that the Claimant had not lacked capacity at the time the consent order was agreed, and had been given a sufficiently clear explanation of the terms of the order, which she had understood. Silber J made it clear that he reached his decision by asking himself whether the Claimant had had capacity to enter into the consent agreement, rather than whether she had the capacity to conduct the proceedings as a whole.

The Claimant appealed. The Court of Appeal allowed her appeal. Giving the sole reasoned judgment (with which Lewison LJ and Sir Mark Potter agreed), Ward LJ noted that the case raised the same broad issue as in the pre-MCA cases of *Masterman-Lister*, and *Bailey*, namely whether a previous compromise/order could be set aside for want of capacity. Those cases had established that the proper question is whether the individual in question "ha[s] the necessary capacity to conduct the proceedings or, to put it another way, to litigate." In the circumstances, Ward LJ considered that Silber J had fallen into error because he had approached matters too narrowly by treating the relevant transaction as the actual compromise negotiated outside court which led to the consent order in question because:

> "[s]ince the compromise [was] not a self-contained transaction but inseparably part and parcel of the proceedings as a whole, the question is not the narrow one of whether [the Claimant] had capacity to enter into that compromise but the broad one whether she had the capacity to conduct the proceedings."

In the circumstances, Ward LJ had no hesitation in concluding (at paragraph 29) that:

> "[w]ith proper advice (proper explanation being a part of Chadwick LJ's test in [75] of his judgment [in *Masterman-Lister*] this claim would never have been advanced for the limited sums pleaded. Since capacity to conduct proceedings includes, per Arden LJ at [126] [of *Bailey*], the capacity to give proper instructions for and to approve the particulars of claim, the claimant lacked that capacity. For her to have capacity to approve a compromise she needed to know, again per Arden LJ at [126], what she was giving up and, as is conceded, she did not have the faintest idea that she was giving up a minor fortune without which her mental disabilities were likely to increase. If the litigation had been conducted properly, it would have been conducted differently. Given that scale of award and the

claimant's limited understanding of the implications arising from a claim of that size, a litigation friend should and would have been appointed for her if not when the proceedings commenced, as I believe should have been the case, then at least certainly when the compromise was under discussion. Had she been recognised to be a patient, the compromise she in fact entered into would never have been approved by the court."

Comment
Whilst (as Silber J noted) the injustice that the Claimant undoubtedly suffered as a result of the entry into the compromise agreement could have been remedied, at least in part, by the bringing of an action for professional negligence against the Claimant's former advisers, the robust approach adopted by the Court of Appeal provided a very much more direct route to setting matters aright.

More broadly, this case is a useful – if unsurprising – ringing endorsement of the continuing relevance of the principles established in *Masterman-Lister* and *Bailey* regarding the determination of litigation capacity. The case also stands as an interesting example of how it is possible to fall into error when assessing capacity not just by defining the relevant issue too broadly, but also by defining it too narrowly.

D v JC & Others Case No. 11757467 (Senior Judge Lush, 26 March 2012)
Statutory will; Doubts about efficacy of balance sheet approach; Factor of magnetic importance

This case concerned an application for an Order authorising the execution of a new statutory will for JC.

JC was born in 1922 and has an estate worth approximately £3.5 million. He has mixed dementia. In 2010, JG was appointed as JC's deputy following an application by Reading Borough Council. JC did not have testamentary capacity.

JC has four biological children, A, B, C and D. Two of the children, B and C were born in wedlock but had limited contact with JC. JC disputed his paternity of A (and always has done) but tests authorised by the Court in 2011 confirmed JC is A's biological father. D, the sister of B and C was put up for adoption at birth and has never met or had contact with JC.

In August 2010, the Court authorised JC's deputy to execute a statutory will on JC's behalf leaving £50,000 to the Jehovah's Witnesses and the remainder to be divided in three equal parts between A, B and C. Following the execution of the statutory will, B produced an earlier will dated December 2008 which named B, C and B's daughter Q as beneficiaries. JC subsequently indicated that this did not represent his wishes (although the expert evidence reiterated that he did not have testamentary capacity at the time this was asserted).

In January 2011, the Court authorised a further statutory will in favour of A, B and C in the event that paternity tests concluded A was JC's son. D subsequently challenged this on the grounds that the will should make provision for her, notwithstanding that she had been adopted. D acknowledged that she had no right as a matter of law to a share of JC's estate in the event he died intestate, but asserted what was essentially a moral claim to be recognised in his will on the basis that her birth was the result of the violent rape of her mother and that JC had not had a relationship with his other children either. A

contested D's application. The Official Solicitor and the Deputy contended that D did not have a valid claim in law (whereas the other biological children did).

Senior Judge Lush considered the law concerning the authority of a judge to authorise a statutory will and at paragraph 48 noted that it had been easier for a judge prior to the entry in to force of the MCA 2005. He held that the decisions in *Re P* and *Re M* indicated that it is no longer good law for a judge to simply substitute his judgment; rather, the judge must act in P's best interests. Senior Judge Lush went on to state (at paragraph 51) that when adjudicating on a statutory will application the judge must have regard to:

1. The check list of factors for best interests' decisions;
2. The possible application of the "balance sheet" approach as set out by Lewison J in *Re P*; and
3. The jurisprudence on applications of this nature.

At paragraph 53, Senior Judge Lush expressed doubts as to the efficacy of the balance sheet approach in the context of these proceedings because of the difficulty of identifying factors of actual benefit, counterbalancing dis-benefits, risks of possibility of loss or possibilities of gain, all of which were expressions used in the *Re A* case in which the balance sheet was first advocated. He did, though, note that there will usually be at least one factor of magnetic importance to assist the judge in reaching in this decision.

At paragraph 54, Senior Judge Lush expressed doubt as to whether the idea of being remembered for doing the right thing (a factor identified as of importance in *Re P* and *Re M*) was of any assistance in the case before him, because of JC's "appalling track record," of spending a lifetime doing entirely the wrong thing in his relationships with others. At paragraph 55, he expressed his conclusion that, if JC had had testamentary capacity, he would have chosen to die intestate which was the effect that the existing statutory will sought to achieve.

At paragraph 58, having examined (insofar as he was able) JC's past and present wishes and feelings, Senior Judge Lush noted that the case presented a combination of best interests and substituted judgment: JC would have chosen to die intestate but it was in his best interests that the will was made in order to appoint independent executors familiar with the background who could provide continuity in the administration of his estate before and after his death.

Given that by operation of law, in the event that JC were to have died intestate, there would have been no provision for D and further, and given that there had been no interaction at all between JC and D (a factor of "magnetic importance"), he dismissed D's application. He allowed A's application to determine what should happen to his share of the estate in the event that he predeceases JC and extended that to B and C.

Comment

This is an extreme case on the facts. It is, however, of some interest for Senior Judge Lush's scepticism of the value of the balance sheet exercise in statutory will cases, and also a case in which there would have been a clearly different outcome based upon substituted judgment to that which prevailed under the best interests test enshrined in ss. 1 and 4 of the MCA 2005.

AN NHS TRUST V D [2012] EWHC 885 (COP) AND [2012] EWHC 886 (COP)
Life-sustaining treatment withdrawal; Permanent vegetative state; Invalid advance decision; Best interests; Delay; Costs of Official Solicitor

This case concerned an application for a declaration that it was in D's best interests to have life-sustaining medical treatment, in the form of artificial nutrition and hydration, withdrawn. D had fallen into a vegetative state following surgery during which he suffered a cardiac arrest and associated hypoxia. Prior to the surgery, he had given his sister-in-law G a signed letter which said:

> "To whom it may concern: I authorise [and then G's name and address] to act on my behalf in the event of me being unable to make decisions for whatever reason. In particular, I authorise the above to liaise with the medical profession in making decisions regarding any further medical treatment. More specifically, I refuse any medical treatment of an invasive nature (including but not restrictive to placing a feeding tube in my stomach) if said procedure is only for the purpose of extending a reduced quality of life. By reduced quality of life, I mean one where my life would be one of a significantly reduced quality, with little or no hope of any meaningful recovery, where I would be in a nursing home/care home with little or no independence. Similarly, I would not want to be resuscitated if only to lead to a significantly reduced quality of life."

Unfortunately, D had not been aware of the provisions in the Mental Capacity Act 2005 relating to advance decisions to refuse treatment, and in particular the requirement that an advance decision to refuse life-sustaining treatment must be witnessed (s.25 MCA 2005). The letter was therefore not binding, and the court's assessment of D's best interests was required.

As the diagnosis of permanent vegetative state had been confirmed, the court's conclusion that it was in D's best interests for artificial nutrition and hydration was inevitable, following the House of Lords' decision in *Airedale NHS Trust v Bland* [1993] 1 AC 789 which held that continued futile medical treatment for a patient in a vegetative state was not in the patient's best interests. However, the judge commented that "had there been anything to put in the balance against the other evidence, D's wishes would have carried very great weight with me. He was a very private man before his incapacity, who would have been horrified at the prospect of being kept alive in this condition, with the total loss of privacy that his dependency entails."

The court was also asked to determine whether the pre-MCA 2005 convention, under which NHS bodies bringing applications for withdrawal of treatment were required, as a starting point, to pay 50% of the costs of the Official Solicitor, was still applicable. In the second judgment, the judge held at paragraph 15 that the MCA 2005 and the Court of Protection Rules had not changed the earlier position, continuing:

> "I accept that to exercise discretion in this way in effect displaces the 'general rule' in cases in which the Official Solicitor acts, but the pragmatic basis for this compromise is as strong now as it ever was. To disturb long-standing practice would introduce uncertainty into every case, and foster costs arguments between public bodies. It would make it very difficult for public bodies to budget in individual cases and for the Official Solicitor to budget generally."

However, the judge commented that "there is much to be said for a rationalisation of the underlying arrangements, with the Official Solicitor's budget being set in such a way that

he does not depend upon the recovery of costs from other public bodies. That, however, requires a change by Government to the financial rules of the game. It is not a change that can be brought about by decisions of individual referees."

Comment
The pain and distress caused to D's family by the failure of his advance decision to comply with the requirements of the MCA 2005, and the subsequent court proceedings, cannot be underestimated. D's clear wishes were known, but the treating clinicians were unable to act on them for some 9 months while the court process took place. The case is a reminder of the importance of increasing public awareness about the statutory requirements for advance decisions, as well as for its related decision on costs which clarifies that the existing practice of sharing the Official Solicitor's costs across the public bodies involved in medical treatment cases will continue, unless and until the Government provides full funding to the Official Solicitor to carry out his duties.

VERLANDER V RAHMAN [2012] EWHC 1026 (QB)
Mental capacity; Finance

We make brief note of this quantum-only personal injury judgment for the approach adopted by Sir Robert Nelson (sitting as a High Court Judge) to the question of whether the Claimant (who had been moderately brain injured when struck by a car) had the capacity to manage her property and affairs.

The main factor pointing towards the Claimant's incapacity in this regard was her impulsivity, which had led her to spend substantial sums (including a significant portion of a sum paid to her by way of interim payment) upon gambling and online gaming before her mother took control of her daughter's finances and provided her with limited sums of pocket money.

The experts instructed on behalf of the two parties agreed that the Claimant's impulsivity was the potential cause of her inability to weigh properly the necessary information in order to make a decision. However, whilst the Defendant's consultant neuropsychiatric expert accepted in evidence that if the Claimant were to be given access to her bank account into which her pension money was paid, and then provided with her cash card there was a substantial risk that she would spend the money inappropriately, he nevertheless expressed the view that the Claimant did have financial capacity and that a Trust should be put in place in order to protect her from herself.

Sir Robert Nelson concluded, however, that it could not properly be said that the Claimant was at the date of the hearing managing her own money. She was only doing that, and making decisions in relation to it, with the substantial assistance of her mother. He noted that, even if it were to be the case that she participated in the decision to pay individual bills and then carried that out and obtained the receipts, the guiding person in making the decision was her mother. Sir Robert Nelson accepted the Defendant's submission that it would be possible for the Claimant's mother to exercise yet further control over the situation by advising the Claimant to make payments by direct debit, by obtaining copies of the bank statements herself, and by becoming a co-signatory. However, the judge noted that the difficulty remained that the Claimant had demonstrated an inability to take appropriate care of her money, and along with noting the evidence of the experts found it to be "telling" that she had given evidence that she would probably "blow" the cash were she to have access to it by herself without the constraints of the system set in place by her mother for collecting and delivering her pension, are telling. At paragraph 95, Sir Robert Nelson therefore concluded that the

Claimant, as at the time of delivering judgment, did not have financial capacity because she was unable to weigh the necessary information as part of the process of making a decision and, were she to have access to substantial funds through an award of the court, there was a serious risk that she would spend large amounts of it inappropriately without others necessarily knowing what she had in fact done. Sir Robert Nelson did not consider that a Trust would provide adequate protection for the Claimant in such circumstances and, accepted the point made by the Claimant's counsel that if the trust's only purpose was to stop inappropriate spending then it suggested financial incapacity.

At paragraph 96, Sir Robert Nelson concluded on this point that:

> "96. I emphasise however that whilst I have firmly in mind that impulsivity may remain, it is not inconceivable that the Claimant's condition in the years to come may demonstrate that she has in fact gained financial capacity. I am not prepared to make any ruling, even if I were able to do so at this stage, which finds that the Claimant is permanently incapable of managing her own property or affairs. It would be perfectly reasonable for the Court of Protection itself to reconsider her situation some time after two years following the conclusion of the litigation. If the decision then was that at that time she had financial capacity, consideration could be given as to whether a Trust ought to be set up to provide guidance and assistance in the management of her money."

Comment

Whilst elements of the deliberation summarised above would on one view seem to conflate the wisdom of the decisions taken by the Claimant regarding her finances and the question of whether they were made with capacity, the end result (on the evidence as summarised in the judgment) would seem to be unimpeachable. The judgment is also of note for the ringing endorsement of the possibility of recovery from incapacity; whilst we have some reservations as to whether a judge sitting in the Queen's Bench Division has the power to direct the Court of Protection to review the Claimant's capacity, one would anticipate that Sir Robert's exhortation would be incorporated into the consequential order that one would anticipate seeing in that latter Court for the management of the Claimant's property and affairs.

PRACTICE DIRECTION 13B - COURT BUNDLES

This practice direction supplements Part 13 of the Court of Protection Rules 2007

Introduction

1. This practice direction is issued to achieve consistency in the preparation of court bundles in the Court of Protection.

Application of the practice direction

2.1 Except as specified in paragraph 2.4, and subject to a direction under paragraph 2.5 or specific directions given in any particular case, this practice direction applies to all hearings in the Court of Protection:

(a) before the President of the Family Division, the Chancellor or a puisne judge of the High Court;

(b) relating in whole or in part to personal welfare, health or deprivation of liberty that are listed for a hearing of one hour or more before a judge other than a judge specified at sub-paragraph (a);

(c) relating solely to property and affairs that are listed before a judge other than a judge specified at sub-paragraph (a) for:

(i) a final hearing; or
(ii) an interim hearing of one hour or more.
2.2 "Hearings" includes all appearances before a judge whether with or without notice to other parties and whether for directions or for substantive relief.
2.3 This practice direction applies whether a bundle is being lodged for the first time or is being re-lodged for a further hearing.
2.4 This practice direction does not apply to the hearing of any urgent application if and to the extent that it is impractical to comply with it.
2.5 The President may, after such consultation as is appropriate, direct that this practice direction will apply to such other hearings as he may specify irrespective of the length of hearing.

Responsibility for the preparation of the bundle
3.1 A bundle for the use of the court at the hearing must be provided by the party in the position of applicant at the hearing (or, if there are cross-applications, by the party whose application was first in time) or, if that person is a litigant in person, then (and subject to any direction by the court) by the first listed respondent who is not a litigant in person or P.
3.2 Where the first named respondent is P and he or she is represented by the Official Solicitor, the responsibility for preparing the bundle will fall to the next named respondent who is represented.
3.3 The party preparing the bundle must paginate it. If possible the contents of the bundle must be agreed by all parties.

Contents of the bundle
4.1 The bundle must contain copies of all documents relevant to the hearing, in chronological order from the front of the bundle, paginated (either in separate sections or sequentially), indexed and divided into separate sections as follows:
(a) preliminary documents (see paragraphs 4.2 to 4.7);
(b) any other case management documents required by any other practice direction;
(c) a time estimate (see paragraph 10.1);
(d) applications and orders including all Court of Protection forms filed with the application;
(e) any registered enduring or lasting power of attorney;
(f) any urgent or standard authorisation given under Schedule A1 of the Mental Capacity Act 2005
(g) statements and affidavits (which must state on the top right corner of the front page the date when it was signed or sworn);
(h) care plans (where appropriate);
(i) experts' reports and other reports; and
(j) other documents, divided into further sections as may be appropriate.

Preliminary Documents for Directions and Interim Hearings
4.2 At the start of the bundle there must be inserted a document or documents prepared by each party ("the preliminary documents for a directions or interim hearing") which should set out (either within the preliminary documents themselves or by cross-reference to what is set out in another document that is in, or is to be put in the bundle):
(a) a case summary;
(b) a chronology of relevant events;
(c) the issues for determination at the hearing;
(d) an outline of the likely factual and legal issues at the trial of the case;
(e) the relief sought at the hearing; and
(f) a list of essential reading.

4.3 Where appropriate, the preliminary documents for a directions or interim hearing should include:
(a) a description of relevant family members and other persons who may be affected by or interested in the relief sought;
(b) a particularised account of the issues in the case;
(c) the legal propositions relied on, and in particular whether it is asserted that any issue is not governed by the Mental Capacity Act 2005;
(d) any directions sought concerning the identification and determination of the facts that are agreed, the facts the court will be invited to find and the factors it will be invited to take into account based on such agreed facts or findings of facts;
(e) any directions sought concerning the alternatives the court will be invited to consider in determining what is in P's best interests;
(f) any directions sought relating to expert evidence;
(g) any other directions sought; and
(h) a skeleton argument.

Preliminary Documents for Fact Finding Hearings
4.4 At the start of the bundle there must be inserted a document or documents prepared by each party ("the preliminary documents for a fact finding hearing") which should set out (either within the preliminary documents themselves, or by cross-reference to what is set out in another document that is in, or is to be put in the bundle):
(a) the findings of fact that the court is being asked to make; and
(b) cross references to the evidence relied on to found those findings.
4.5 Where appropriate, the preliminary documents for a fact finding hearing should include:
(a) a chronology;
(b) a skeleton argument; and
(c) a description of relevant family members and other persons who may be affected by or interested in the relief sought.

Preliminary Documents for Final Hearings
4.6 At the start of the bundle there must be inserted a document or documents prepared by each party ("the preliminary documents for a final hearing") which should set out (either within the preliminary documents themselves, or by cross-reference to what is set out in another document that is in, or is to be put in the bundle):
(a) the relief sought;
(b) a skeleton argument.
4.7 Where appropriate, the preliminary documents for a final hearing should include:
(a) a chronology;
(b) the findings of fact that the court is being invited to make and the factors based on such findings or agreed facts that the court is being invited to take into account;
(c) an appropriately particularised description of the alternatives the court is being invited to consider; and
(d) a description of relevant family members and other persons who may be affected by or interested in the relief sought.
4.8 Each of the preliminary documents must state on the front page immediately below the heading the date when it was prepared and the date of the hearing for which it was prepared.
4.9 All case summaries, chronologies and skeleton arguments contained in the preliminary documents must be cross-referenced to the relevant pages of the bundle.
4.10 Where the nature of the hearing is such that a complete bundle of all documents is unnecessary, the bundle (which need not be repaginated) may comprise only those documents necessary for the hearing, but

(a) the preliminary documents must state that the bundle is limited or incomplete; and
(b) the bundle must if reasonably practicable be in a form agreed by all parties.
4.9 Where the bundle is re-lodged in accordance with paragraph 9.2, before it is re-lodged:
(a) the bundle must be updated as appropriate; and
(b) all superseded documents must be removed from the bundle.

Format of the bundle
5.1 The bundle must be contained in one or more A4 size ring binders or lever arch files (each lever arch file being limited to 350 pages).
5.2 All ring binders and lever arch files must have clearly marked on the front and the spine:
(a) the title and number of the case;
(b) the court where the case has been listed;
(c) the hearing date and time;
(d) if known, the name of the judge hearing the case; and
(e) where there is more than one ring binder or lever arch file, a distinguishing letter (A, B, C etc.) or number and confirmation of the total number of binders or files (1 of 3 etc.).

Timetable for preparing and lodging the bundle
6.1 The party preparing the bundle must, whether or not the bundle has been agreed, provide a paginated index and, when practicable, paginated copies of updating material to all other parties not less than 5 working days before the hearing.
6.2 Where counsel is to be instructed at any hearing, a paginated bundle must (if not already in counsel's possession) be delivered to counsel by the person instructing that counsel not less than 4 working days before the hearing.
6.3 The bundle (with the exception of the preliminary documents, if and insofar as they are not then available) must be lodged with the court not less than 3 working days before the hearing, or at such other time as may be specified by the judge.
6.4 The preliminary documents (and where appropriate any documents referred to therein that are not in the bundle) must be lodged with the court no later than 11 am on the day before the hearing and, where the hearing is before a judge of the High Court and the name of the judge is known, must at the same time be sent by email to the judge's clerk.

Lodging the bundle
7.1 The bundle must be lodged at the appropriate office as detailed at paragraph 7.2. If the bundle is lodged in the wrong place the judge may:
(a) treat the bundle as having not been lodged; and
(b) take the steps referred to in paragraph 12.
7.2 Unless the judge has given some other direction as to where the bundle in any particular case is to be lodged (for example a direction that the bundle is to be lodged with the judge's clerk) the bundle must be lodged:
(a) for hearings before a judge of the Family Division, in the office of the Clerk of the Rules, 1st Mezzanine, Queen's Building, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44450 Strand);
(b) for hearings before a judge of the Chancery Division, in the office of the Chancery Judges' Listing Officer, Room WG 4, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44450 Strand);
(c) for hearings at the central registry of the Court of Protection in the office of the Listing & Appeals team, Court of Protection, Royal Courts of Justice, Thomas More Building, Strand, London, WC2A 2LL (DX 44450 Strand);

(d) for hearings in the Principal Registry of the Family Division at First Avenue House, at the List Office counter, 3rd floor, First Avenue House, 42/49 High Holborn, London, WC1V 6NP (DX 396 Chancery Lane); and
(e) for hearings at any other court, including regional courts where a Court of Protection judge is sitting, at such place as may be designated and in default of any such designation, at the court office or Court of Protection section of the court where the hearing is to take place.
7.3 Any bundle sent to the court by post, DX or courier must be clearly addressed to the appropriate office and must show the date and place of the hearing on the outside of any packaging as well as on the bundle itself. It must in particular expressly and prominently state that it relates to Court of Protection business.

Lodging the bundle – additional requirements for cases being heard at the Principal Registry of the Family Division or before a judge of the High Court at the RCJ

8.1 In the case of hearings at the Principal Registry of the Family Division or before a High Court judge at the RCJ, parties must:
(a) if the bundle or preliminary and other documents are delivered personally, ensure that they obtain a receipt from the clerk accepting it or them; and
(b) if the bundle or preliminary and other documents are sent by post or DX, ensure that they obtain proof of posting or despatch.
8.2 The receipt (or proof of posting or despatch, as the case may be) must be brought to court on the day of the hearing and must be produced to the court if requested. If the receipt (or proof of posting or despatch) cannot be produced to the court the judge may:
(a) treat the bundle as having not been lodged; and
(b) take the steps referred to in paragraph 12.
8.3 For hearings at the RCJ before a judge of the High Court:
(a) bundles or preliminary and other documents delivered after 11 am on the day before the hearing will not be accepted by the Clerk of the Rules or Chancery Judges' Listing Officer and must be delivered directly to the clerk of the judge hearing the case;
(b) upon learning before which judge a hearing is to take place, the clerk to counsel, or other advocate, representing the party responsible for the bundle must, no later than 3pm the day before the hearing, telephone the clerk of the judge hearing the case to ascertain whether the judge has received the bundle (including the preliminary and other documents), and, if not, must organise prompt delivery.

Removing and re-lodging the bundle

9.1 Following completion of the hearing the party responsible for the bundle must retrieve it from the court immediately or, if that is not practicable, must collect it from the court within five working days. Bundles which are not collected within the stipulated time may be destroyed.
9.2 The bundle must be re-lodged for the next (and for any further hearings of whatever type) in accordance with the provisions of this practice direction and in a form, which complies with paragraphs 5.1 and 5.2.

Time estimates

10.1 In every case a time estimate for the hearing must be prepared which must so far as practicable be agreed by all parties and must:
(a) specify separately:
    (i) the time estimated to be required for judicial pre-reading;
    (ii) the time required for hearing all evidence and submissions; and
    (iii) the time estimated to be required for preparing and delivering judgment; and

(b) be prepared on the basis that before they give evidence all witnesses will have read all relevant filed statements and reports.
10.2 Once a case has been listed, any change in time estimates must be notified immediately by telephone (and then immediately confirmed in writing):
(a) in the case of hearings in the RCJ, to the Clerk of the Rules or the Chancery Judges' Listing Officer as appropriate;
(b) in the case of hearings in the central Registry of the Court of Protection, to the Diary Manager in the Listing & Appeals team at the Court of Protection, Thomas more Building, RCJ;
(c) in the case of hearings in the Principal Registry of the Family Division at First Avenue House, to the List Officer at First Avenue House; and
(d) in the case of hearings elsewhere, to the relevant listing officer.

Taking cases out of the list
11. As soon as it becomes known that a hearing will no longer be effective, whether as a result of the parties reaching agreement or for any other reason, the parties or their representatives must immediately notify the court by telephone and by letter. The letter, which must wherever possible be a joint letter sent on behalf of all parties with their signatures applied or appended, must include:
(a) a short background summary of the case;
(b) the written consent of each party who consents and, where a party does not consent, details of the steps which have been taken to obtain that party's consent and, where known, an explanation of why that consent has not been given;
(c) a draft of the order being sought; and
(d) enough information to enable the court to decide:
    (i) whether to take the case out of the list; and
    (ii) whether to make the proposed order.

Penalties for failure to comply with this practice direction
12. Failure to comply with any part of this practice direction may result in the judge removing the case from the list or putting the case further back in the list and may also result in a "wasted costs" order in accordance with CPR Part 48.7 or some other adverse costs order.

CAPACITY AND TENANCIES / LICENCES

By Simon Edwards

1. How should a tenancy or licence of supported accommodation be created in favour of a person who lacks or may lack the mental capacity to enter into such an agreement?

Capacity
2. In relation to the ability to contract, capacity is still determined pursuant to the common law rules (not that they differ much if at all from statutory rules).
3. The common law rule is set out at paragraph 8-069 of Chitty on Contracts (30th Edition) as follows:

> "At common law, the understanding and competence required to uphold the validity of a transaction depend on the nature of the transaction. There is no fixed standard of mental capacity which is requisite for all transactions. What is required in relation to each particular matter or piece of business transacted, is that the party in question should have an understanding of the general nature of what he is doing."

4. Thus, the more straightforward the transaction, the more readily will a court hold that a person has the capacity to make the contract.
5. A basic licence agreement might provide for the right to occupy subject to either party being able to give specified notice, a provision as to the conduct of the occupant (that might include a requirement that the occupant takes recommended medical treatment or follows a care plan). Such an agreement might also contain provisions for reviewing the licence fee payable from time to time.
6. Such an agreement need not be complex because in such cases there will ordinarily be a further agreement between the relevant local authority and the provider of the accommodation and, if different, the provider of care services. The Contracts (Rights of Third Parties) Act 1999 provides two circumstances in which a third party can enforce a term of a contract to which he is not a party. Under section 1(1)(a) of the Act, the third party can enforce the term of the contract if the contract expressly provides that he may. In those circumstances, there is no further need that the particular term must have been made for the third party's benefit.
7. Section 1(1)(b) of the Act entitles a third party to enforce a term of a contract if the term purports to confer a benefit on him subject to section 1(2) that provides that the third party has no such right if on a proper construction of the contract it appears that the parties thereto do not intend the term to be enforceable by the third party.
8. So far as remedies are concerned, section 1(5) of the Act provides that for the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of the contract if he had been a party to the contract. Thus, the third party can claim damages, an injunction or specific performance. In particular, if the contract between the local authority and the accommodation provider contained terms that restrict the accommodation provider's rights to terminate the occupant's licence, then the occupant could enforce those terms.
9. Even if a person lacks capacity to enter into a basic contract, such as discussed above, that does not mean that any contract that he does agree to, whether by signing or otherwise, is void. The contract is voidable at his option, see paragraph 8-068 op cit. Furthermore, it would be up to the occupant to prove that the other contracting party knew that he was so lacking in capacity as not to be capable of understanding what he was doing.
10. The effect of that is that until the contract is avoided, a contract made by a person without capacity is binding upon him. If proceedings were taken to enforce that contract, then the person lacking capacity (or his representatives if he still lacked capacity) could avoid the contract and successfully defend a claim based on that contract.

Housing Benefit

11. Regulation 12, Housing Benefit Regulations 2006 provides that the payments in respect of which housing benefit is payable in the form of a rent, rebate or allowance are periodical payments which a person is liable to make in respect of the dwelling which he occupies as his home and that includes payments by way of rent, payments in respect of a licence or permission to occupy the dwelling and payment in respect of or in consequence of use and occupation of the dwelling. Thus, even if the occupant lacks capacity to enter into a licence or a tenancy, until the contract is avoided, the occupant is still "liable" to make the payments and entitled to housing benefit.
12. If the occupant were thought to be so obviously incapable of understanding the nature of what he was being asked to sign that it was inappropriate so to do, then the agreement could be made on behalf of the occupant by the Court of Protection. There would be no need to appoint a deputy, and the application could be a paper exercise. Clearly, he would be liable to pay in those circumstances and entitled to housing benefit.

13. Furthermore, it may be that the occupant has such severe incapacity that he cannot give assent to the tenancy or licence in any meaningful way. In those circumstances, there might be no agreement at all. The occupant could be liable to pay for his occupation on the basis that the supply of the accommodation was necessary. Section 7, Mental Capacity Act 2005 provides that if necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them. "Necessary" is defined as meaning suitable to a person's condition in life and to his actual requirements at the time when the goods or services are supplied. The common law relating to the provision of necessary goods and services is to similar effect.
14. Accommodation is likely to be seen to be necessary so long as it is no more lavish than the occupant needs for his "condition in life". The words "he must pay a reasonable price" make the person to whom the service has been supplied "liable" for such a reasonable price. Going back to regulation 12 of the Housing Benefit Regulations 2006, housing benefit is payable in respect of periodical payments which a person is liable to make in respect of the dwelling which he occupies as his home if the payment is in respect of or in consequence of the occupant's use and occupation of the dwelling.
15. That definition covers the liability created by section 7, Mental Capacity Act 2005 or the common law and, therefore, even if there is no contract of tenancy or licence between the occupant and the provider of accommodation, so long as the provision of that accommodation was no more than necessary, the occupant is liable to pay a reasonable sum for the accommodation and that liability is "in respect of or in consequence of use and occupation of the dwelling", thus giving rise to the right to payment of housing benefit.
16. This was the situation that arose in *Wychaven District Council v EM* [2012] UKUT 12 (AAC). The tribunal held that a purported tenancy agreement was a nullity as the occupant was so severely disabled as not to be capable of indicating any assent thereto but went on to hold that she was entitled to housing benefit because the supply of the accommodation had been necessary.

Is the accommodation a care home?
17. Housing benefit is not payable, however, where the person liable to make payments is in residential accommodation. In such circumstances, pursuant to regulation 9(1)(k) of the Regulations, the person is treated as not liable to make payments in respect of a dwelling. The term "residential accommodation" is defined as meaning accommodation which is provided in a care home. Regulation 2 of the Regulations defines a care home as having the meaning assigned to it by section 3 of the Care Standards Act 2000. Section 3 of that Act provides that an establishment is a care home if it provides accommodation, together with nursing or personal care for (amongst others) persons who have or have had a mental disorder.
18. This provision was considered in *G v E* [2010] EWHC 621 (Fam), [2010] 2 FLR 294.
19. In that case, Baker J considered various questions arising out of the placement of a person with severe incapacity in accommodation that had some of the hallmarks of a care home but was not registered as such. The court decided first that the document that purported to grant to the occupant a tenancy was a nullity because it had been signed on his behalf by someone who was an employee of the accommodation provider. It was also clear, on the facts, that the occupant had no exclusive possession of any part of the premises.
20. A particular problem arose in that case because of the fact that the so-called tenancy agreement was signed by an employee of the accommodation provider who had no authority to act on behalf of the occupant. To that extent, therefore, the case was clearly correct in holding that the document that purported to be a tenancy was a nullity. If, however, the occupant had assented to the document himself, then it would not

necessarily have been a nullity. If it had not created a tenancy, it would have created a licence that would have been voidable at his instance.

21. The judgment then went on to consider whether the establishment was a care home within the meaning of section 3, Care Standards Act 2000. At paragraph 108, Baker J stated:

> "The crucial question whether the establishment provides the accommodation, together with nursing or personal care, is essentially a question of fact."

22. He then, at paragraph 110 of the judgment, having determined that there was no tenancy, recorded the submissions of counsel for the patient's sister to the effect that as a consequence the patient occupied the establishment by permission of the establishment and that, therefore, the establishment provided both accommodation and personal care to the patient so that, it was submitted, the establishment should have been registered as a care home under the Care Standards Act.

23. Baker J did not decide whether that submission was correct or not, partly because the establishment was not represented in the proceedings and the effect of a ruling that the establishment was a care home but not registered would have had very significant consequences, one of which was that there might have been illegal receipt of housing benefit.

24. It is not the purpose of this article to go deeply into the question of the definition of a care home but, on the face of it, the definition requires the establishment in question to provide accommodation and nursing or personal care. If the establishment simply provides accommodation, then it is not a care home. Furthermore, the question whether the accommodation is provided by way of a tenancy or licence does not determine the issue. See *R (on the application of Moore) v Care Standards Tribunal* [2005] 1 WLR 2979.

25. The Care Quality Commission has issued guidance [http://www.cqc.org.uk/sites/default/files/media/documents/rp_poc_100001_20110803_v3.01_amended_scope_guidance_updated_gp_text_final.pdf] as to whether supported living schemes need to be registered as care homes. The Guidance suggests that in certain circumstances, although personal care and accommodation are provided by the same company, the personal care or nursing is not provided "together with" the accommodation. The Guidance states that the existence of a tenancy agreement is not conclusive and that would appear to be entirely correct.

26. The Guidance goes on to state that in the Commission's view, although accommodation and care have to be provided together, that does not mean that the providers have to be the same company or individual. There may be different legal entities involved, for example different companies within the same group or organisations that are otherwise unrelated but work together in some way to provide the service given.

27. For that to apply, either the notionally separate providers of the accommodation and care would have to form together the"establishment" or they together or jointly "provide" the accommodation and care so that each is providing accommodation together with care.

28. If there is a genuine tenancy where the occupant has exclusive occupation of, at least, a bedroom, it may be easier to say that the establishment is not a care home because then it will be more possible to argue that the provision of the accommodation is independent and not "together with" the provision of care.

29. To be borne in mind is the fact that if a tenancy is granted, then the tenancy might qualify as an assured tenancy because section 3, Housing Act 1988 provides that where a tenant has exclusive accommodation of any accommodation and uses other accommodation in common with others, not including the landlord, then the accommodation of which the tenant has exclusive occupation is deemed to be a dwelling

house let on an assured tenancy. Such a tenancy would be an assured short hold tenancy pursuant to section 19A, Housing Act 1988 and, therefore, with limited security of tenure. The granting of a tenancy also has consequences for the determination of the issue of ordinary residence, see Guidance on the identification of the ordinary residence of people in need of community care services in England issued by the Department of Health [http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_131705.pdf] (outside the scope of this article).

ISSUE 22 JUNE 2012 COURT OF PROTECTION UPDATE

RE HA [2012] EWHC 1068 (COP)

Procedure; Public funding; Legal Services Commission

This matter came before the Court by way of two applications, a section 21A challenge brought by P, and a separate application by P's daughter to be appointed P's property and affairs, and welfare deputy. P was being accommodated in a care home by the Local Authority in circumstances which the parties agreed amounted to a deprivation of P's liberty on account of P's continued expressed wish to return to her home. Charles J described the central issue for the court to determine being whether or not the restrictions in a care home best promote P's welfare in the least restrictive way, and whether there is a support package that could warrant her return home in her best interests. The Court noted that those welfare issues can fall for consideration under a number of sections of the MCA and are important to the consideration of the best interests assessment under the DOLS regime and s. 21A.

The issue for the Court on this interim application was what if any interim declarations should be made by the Court on a section 21A application pending the final hearing. In particular whether they should be declarations made pursuant to section 21A (ie to extend the statutory scheme if that is possible) or pursuant to section 16 of the MCA. The Court acknowledged the importance as a matter of practice in this distinction as a result of the different funding available from the Legal Services Commission in respect of an application under s.21A, and other applications before the court, albeit that they can often raise the same central issues.

Charles J took the view that the court should exercise its own powers to hold the ring whilst it determines the application and therefore give appropriate interim authorisations of any deprivation of liberty and make appropriate interim orders pursuant to section 16. If, when it determines the application, the court concludes that the relevant person should live in a care home, or be in a hospital, it should generally direct that the statutory DOLS scheme should apply again to any deprivation of liberty. That regime has checks and balances that generally should be preferred to review by the court.

Despite making the declarations under section 16, his Lordship stated that the application remained one under s. 21A MCA. Even though the court is exercising powers conferred by other sections and the central issue is what available regime of care will best promote P's best interests, the proceedings remain s21A proceedings because they were issued under s. 21A and, in the exercise of the jurisdiction conferred by that section, the court has to consider amongst other things the best interests of P.

Comment

This important judgment provides some assistance for anyone who has had to grapple with the Legal Services Commission in a s.21A challenge which persists beyond a first

hearing. Mr Justice Charles was clear that the proceedings should be seen as s.21A proceedings, notwithstanding that the court may, as an interim measure, make declarations under its general welfare jurisdiction. It is to be hoped that the LSC will accept this analysis, and will not continue to withdraw non-means-tested funding in cases where a standard authorisation lapses during the course of proceedings and is not renewed, and/or where interim declarations are made by the court.

RE G [2012] EWCA CIV 431
Inherent jurisdiction; Interim injunctions; Court of Appeal

This case concerned interim injunctions and case management directions made by the High Court in respect of a young adult with Down's Syndrome. The local authority with responsibility for G had applied to the court to prevent the publication of confidential information about G. Interim orders had been made under the inherent jurisdiction which included injunctions against named individuals, and provision for an assessment of G's capacity to be conducted. G's mother had repeatedly failed to facilitate that assessment or to file evidence in support of her position, and a considerable period of time had therefore elapsed during which the interim injunctions remained in place. The mother sought permission to appeal on the basis that the orders were paternalistic and were not underpinned by adequate evidence that G lacked capacity or was a vulnerable adult. The Court of Appeal refused permission to appeal, observing that:

'In situations like this, where on three specific occasions invitations or orders for the production of a contrary case have been ignored, the trial judge is entitled to draw inferences that there may be an ever increasing need for judicial investigation into the reality. The greater the need for investigation the greater the need for caution in the interim. Not to impose protection, in perhaps regard for assumptions which would otherwise be made as to capacity and as to good faith, only expose the admittedly vulnerable adult to an unnecessary risk.'

Comment
The publication of the Court of Appeal's reasons for refusal of permission is of interest because of the robust approach taken to the powers of the court to investigate capacity and undue influence where an issue is raised.

RE DS & ORS (CHILDREN) [2012] EWHC 1442 (FAM)
Procedure; Public funding; Legal Services Commission

This case, in the Family Division, is nonetheless relevant to practitioners in the Court of Protection because the guidance given by the President regarding the appropriate wording to adopt in orders in which permission for expert evidence is given has some applicability in the Court of Protection.

The original wording that had been used in the family proceedings was the familiar 'the the court deems this expert report to be a reasonable and necessary disbursement on the certificates of the publicly funded parties…..'.

The President considered Schedule 5 of the Community Legal Services (Funding) Order 2007 which contains the relevant provisions on the funding of expert reports, and the imminent change in approach in family proceedings which will mean that expert evidence must be 'necessary' rather than 'reasonably required', and gave the following guidance (which has been paraphrased and modified to focus on issues relevant to the Court of Protection):

(i). The standard wording cited above should not be used. It does not bind the LSC. Instead, wording such as the following should be adopted:

(a) The proposed assessment and report by X are vital to the resolution of this case.

(b) The costs to be incurred in the preparation of the report are wholly necessary, reasonable and proportionate disbursements on the funding certificates of the publicly funded parties in this case.

(ii). If the court takes the view that the expert's report is necessary for the resolution of the case it should say so, and give its reasons, either in a preamble or short judgment, even where the order is by consent.

Comment

Although at present the test for the commissioning of expert evidence in the Court of Protection remains one of 'reasonably required' (COPR r.121), it would be as well to follow the President's guidance in order to minimise problems with securing public funding for expert reports. This will require the parties seeking expert evidence to persuade the court that additional evidence is required, beyond that available from the relevant statutory bodies involved and/or P's treating psychiatrist, in order that the court can satisfactorily explain why permission has been given. While this process no doubt occurs in most cases already, it may be that having to give reasons for the decision might focus the court's mind more sharply on the need for, and scope of expert evidence, as well as the stage at which it should be obtained.

SEDGE V PRIME (UNREPORTED, 25 APRIL 2012)

Best interests; Personal injury proceedings

Comment

We mention this case in passing as an example of the interface between personal injury proceedings and the Court of Protection's welfare jurisdiction. It concerned a man who had suffered substantial injuries in a road traffic accident, and who was likely to receive significant damages. An application for an interim payment was made, to fund a trial of community living, instead of continued placement in residential care. The Defendants opposed the application in part on the basis that it was not in S's best interests to live (at greater cost) in the community, according to experts instructed by them in the personal injury proceedings. There was clearly a dispute as to S's best interests, and the QBD judge noted that he was not the person to resolve the dispute, which was a matter for those caring for S, subject to the supervision of the Court of Protection. Applying the relevant case-law on the issue of interim payments, and not having regard to best interests considerations, the judge ordered the interim payment but observed that 'Claimant's solicitors should not regard by decision as in any way encouraging trial runs of community living at insurers' expense'.

THE X PRIMARY CARE TRUST V XB AND YB [2012] EWHC 1390 (FAM)

Medical treatment; Treatment withdrawal

This is the first reported case upon the validity of advance decisions.

Theis J was asked to consider an application by XPCT for declarations under s.26(4) MCA 2005 as to the validity of an advance decision made by XB on 2 November 2011 that he wished, amongst other things, to have his ventilation removed in certain defined circumstances.

XB suffered from Motor Neurone Disease. In 2003 he had a tracheotomy and was fitted with an invasive ventilation device. He subsequently returned home where his care was delivered through his GP, agency care workers and YB, his wife. Although he was unable to talk, XB could communicate through a variety of means, including through use of a communication board. Latterly, he communicated by moving his eyes to the right to indicate that he agreed with the question being asked. XB's nutrition was provided via a PEG. The question of what life sustaining treatment SB wished to receive had been discussed with him since 2010 and although at various points in 2010 and 2011 he had indicated a wish to have that treatment withdrawn, he had not expressed that wish in what was considered to be a sufficiently consistent form.

On 2 November 2011, he made an advance decision to refuse treatment. The document, which was based on a pro forma advance decision which had been downloaded from the internet, stated that he would wish to have life sustaining treatment withdrawn in the event that his disease progressed to a stage where he was unable to communicate his needs or have control over decisions as to his care and management. The advance decision included a date for review of 2 May 2012 and the date 2 May 2012 had also been entered in the box marked "valid until."

The document was agreed to by XB, with his wife YB, his GP (XW) who had been treating him since 1993 and a mental capacity coordinator (AW).

In 2012, concerns were raised by one of XB's carers as to the circumstances under which the advance decision had been made. In particular, the carer asserted that she had not seen XB express consent to the decision by movements of his eyes. It took over a month to convene a meeting to discuss the issues raised by the carer. The meeting eventually took place on 23 April 2012.

In light both of the concern raised by the carer and also the fact that the advance decision appeared potentially to be limited in time, the PCT brought proceedings for declarations under s.26(4) MCA 2005. By the time those proceedings were brought, there was a very great deal of urgency to the matter, the first hearing being on Friday 27 April, and the final hearing before Theis J being on Monday 30 April and Tuesday 1st May so as to cater for the possibility that the advance decision was, in fact, time limited.

In her judgment, Theis J noted that there were three principal issues for determination:

(a) XB's current capacity to communicate his decision as to the continuation of life saving treatment;

(b) Whether the advance decision of 2 November 2011 was entered in to by XB and if so whether it was valid and applicable; and

(c) Whether the advance decision of 2 November 2011 was intended to be time limited to 2 May 2012.

In respect of the first issue, there was no dispute as between the experts (a neurologist and a speech and language therapist, both of whom had visited over the weekend prior to the hearing to conduct an assessment) or the parties that XB lacked the capacity to communicate. It was also accepted by Theis J on the basis of the evidence before her that this lack of capacity was permanent. This meant, therefore, that (1) the condition that XB had indicated that was to be satisfied for his advance decision to take effect was met; but also (2) XB could no longer make a new advance decision in the event that the November 2011 decision was invalid.

In relation to the second issue (which arose as a consequence of the concerns raised by the carer), detailed statements were submitted to the Court. XW made a statement and gave oral evidence as to the circumstances in which the document came to be drafted and the steps that had been taken to ensure that it correlated to XB's wishes. In particular, XW gave evidence that each section had been read out to XB who had communicated consent by movements of his eyes. Theis J noted that this evidence revealed three key points:

(a) first, the carer in question had, in fact, not been present on 2 November 2011;

(b) second, the events in question were unlikely to have occurred after the 2 November 2011;

(c) third, the carer accepted that when she had been present she would not have been in a position to see XB's eye movements as she was on the left hand side of the bed.

On that basis, Theis J accepted XW's evidence, as supported by the evidence of YB and that AW. Accordingly, the judge concluded that XB had had capacity to make the decision on 2 November 2011 and that it was validly made.

In relation to the third issue, the evidence from AW was that the time limitation referred to in the document had not been discussed with XB or consented to by him. Theis J accepted this evidence and granted a declaration that the advance direction of 2 November 2011 was not time limited.

Theis J made a number of further comments relevant to advance decisions more generally:

(a) in the event that an issue is raised as to the circumstances in which an advance decision has been made, this should be investigated as a matter of urgency by the PCT;

(b) there is no set form for an advance decision which will necessarily vary in each case. She expressly referred, though, to the guidance in the Mental Capacity Code at paragraphs 9.10 to 9.23 as to what should be included;

(c) there are a number of pro forma advance decisions on the internet. She noted that organisations responsible for producing such pro forma documents might wish to look again at the merits of including a 'valid until' date.

Comment

This case stands as a cautionary tale in a number of respects. Through the concatenation of circumstances outlined above, the parties and Theis J were confronted with a situation in which XB's family and treating team could not act upon XB's wishes as he had sought to enshrine them in an advance decision, XB could no longer remedy that position because he no longer had the capacity to communicate a fresh decision, and XB would have been aware of the position (there being no suggestion that XB had ceased to be conscious by the time of the final hearing). Alternatively, that advance decision could have been valid but limited in time until only a matter of hours after the parties had finished in Court on 1st May 2012, such that XB's family would have had to act almost immediately upon it; a prospect that does not bear easy contemplation.

Luckily (if that is the correct word in this tragic situation), the evidence before Theis J allowed her properly to conclude both that the carer's concerns did not invalidate the decision and that XB had not inadvertently time limited his decision.

However, and as Theis J noted, the case stands as a clear warning both that concerns as to the validity of advance decisions need to be aired and – if necessary – resolved before the Court in very good time, and also (and perhaps more importantly) pro forma advance decisions must be scrutinised very carefully so as to ensure that they do not inadvertently serve to frustrate the wishes of those using them.

The case also stands, perhaps more positively, as an example of the Court of Protection acting as its best, from a standing start of a hearing on a Friday (attended, fortunately, by the Official Solicitor, notified the day before) to a two-day hearing on the Monday and Tuesday, with the benefit of expert reports, witness statements, and representation by experienced solicitors and Counsel. It therefore shows what can happen when, as Theis J noted, 'heaven and earth' really does need to be moved.

A LOCAL AUTHORITY V E AND OTHERS [2012] EWHC 1639 (COP)

Mental capacity; Medical treatment; Advance decisions; Right to life; Deprivation of liberty; Interface with the Mental Health Act 1983

E was a 32-year-old intelligent and articulate woman who had studied to be a doctor. Suffering from severe anorexia nervosa, emotionally unstable borderline personality disorder, alcohol and prescribed opiate dependency, she had not eaten any solid food for over a year and had not taken any calories for the last two months. She had previously been detained under the Mental Health Act 1983 ('MHA') on around 10 occasions in the past 6 years, and had twice attempted to make an advance decision to end her life. The care team and her parents unanimously decided that all treatment options had been exhausted and that it was in E's best interests to die in comfort under a palliative care regime:

> "It upsets us greatly to advocate for our daughter's right to die. We love her dearly but feel that our role should now be to fight for her best interests, which, at this time, we strongly feel should be the right to choose her own pathway, free from restraint and fear of enforced re-feed. We feel that she has suffered enough. She stands no hope of achieving the things that she would value in her life and shows no signs of revising these aspirations. We would plead for E to have some

control over what would be the last phase of her life, something she has been denied for many years. For us it is the quality of her life and not the quantity. We want her to be able to die with dignity in safe, warm surroundings with those that love her." (paragraph 80)

Five weeks along E's end of life pathway, the matter was suddenly brought before the Court of Protection. A week before the hearing, upon discovering that legal proceedings were underway, E tried to hang herself from an emergency cord in a bathroom. With a body mass index ('BMI') of just 11.3, her death was imminent. The hearing began on a Friday. A request for an interim Order to force feed her over the weekend to ensure that she did not die was refused as insufficient information about the longer-term proposals was available. Still alive on the Monday, whether E was to be forced to live or allowed to die was in the hands of Mr Justice Peter Jackson. His Lordship had to determine three questions:

(a) Did E currently have the mental capacity to make decisions about her treatment?

(b) If not, did she have mental capacity when she made an advance decision in October 2011, and was that decision valid and applicable?

(c) If she currently lacked capacity and had not made a valid advance decision, was it in her best interests to receive life-sustaining treatment in the form of forcible feeding with all necessary associated measures?

A. Currently Lacked Capacity

Peter Jackson J found that E did not seek death but saw her life as pointless and wanted to be allowed to refuse food in the knowledge that death would result. Although she could understand, retain relevant information and communicate her decision to refuse to eat, her obsessive fear of gaining weight made her incapable of meaningfully weighing the advantages and disadvantages of eating: 'the compulsion to prevent calories entering her system has become the card that trumps all others. The need not to gain weight overpowers all other thoughts' (para 49). Her incapacity also derived from the strongly sedating 'drug haze' that was being prescribed as part of her end of life care pathway, together with her severely weakened condition.

B. Formerly Lacked Capacity

E's first purported advance decision in July 2011 was made at a time when at least one doctor believed that she had capacity. Signed by E and countersigned by her mother it stated: "I do not want to be resuscitated or given any medical intervention to prolong my life". Days later E was detained for treatment under s.3 of the 1983 Act and PEG fed. Given the confusion amongst the medical, social work and legal professionals as to her capacity, together with her parents' expressed doubts as to her true intentions at that time, the Judge decided that she lacked capacity to make a valid advance end of life decision.

Over the coming months, to maximise her chances of being found to have capacity, E reluctantly complied with the PEG feeding and her BMI peaked at 15 by October 2011. This time with legal advice, she signed another advance decision witnessed by her mother and an independent mental health advocate. It stated that, if close to death, she did not want tube feeding or life support but would accept pain relief and palliative care. It also read: "If I exhibit behaviour seemingly contrary to this advanced directive this should not be viewed as a change of decision." That day, E was again detained for treatment under s.3 of the MHA.

The Judge held that this October advance decision satisfied all of the legal formalities required by s.25 of the Mental Capacity Act 2005 ('MCA'). His Lordship also noted that the general medical view at the time was that she had capacity to make it. However, no 'formal' capacity assessment had been undertaken and the 1983 Act had been invoked that same day:

> "Against such an alerting background, a full, reasoned and contemporaneous assessment evidencing mental capacity to make such a momentous decision would in my view be necessary." (paragraph 65)

Peter Jackson J held that it was at best doubtful whether a thorough investigation at the time would have reached the conclusion that E had capacity. Moreover, she may also have lacked capacity in relation to the associated treatments, such as mechanical ventilation, which might be necessary. As a result, both currently and at the time of her advance decision in October 2011, E was held to lack capacity to accept or refuse treatment in relation to any interventions that were necessary in conjunction with forcible feeding.

C. Best interests

The Court had two extreme options from which to choose. At one extreme, the professionals could continue to provide care and pain relief until E died of starvation. At the other extreme was an immediate transfer to the country's leading eating disorder facility where E would be stabilised, fed via nasogastric tube or a PEG tube inserted through her stomach wall. Any resistance would be overcome by physical restraint or chemical sedation. It was envisaged that such a process of re-feeding was likely to take a year or longer, after which E would be offered therapy.

His Lordship sensitively addressed the best interests considerations, noting the risks of re-feeding syndrome and immediate mortality resulting from the insertion of the PEG line; only a 20% chance of recovery; and E's past and present wishes and feelings, beliefs and values. Her loving parents had grave misgivings about, but not fierce resistance to, the intervention, stating that they could only support it if appropriate treatment for both her anorexia and alcoholism was available. E's consultant gastroenterologist told the Court: 'Re-feeding E takes a prolonged period of time with significant mental distress to her. She has told me it feels like reliving the abuse she suffered as a child approximately four times every hour." (para 107). The Court-appointed expert reiterated this:

> "Treatment regimes enforcing weight gain appear, to the outsider, somewhat barbaric. The categorical refusal to ingest calories can only be met with forcible feeding either under physical or chemical restraint. This is harrowing for any patient, but particularly for one who was subjected to extensive childhood sexual abuse." (paragraph 87)

The expert felt that E's statements were ambivalent; "E does not want to eat. I don't think she wants to die." And his instinct was that she was detainable for treatment under the Mental Health Act 1983. Her consultant psychiatrist confirmed that he would abide by the Court's decision and would participate in placing E under section to ensure the treatment was carried out.

Carefully weighing the respective advantages and disadvantages of the two options, the Court noted that, 'At its simplest, the balance to be struck places the value of E's life in one scale and the value of her personal independence in the other…' (para 118).

Moreover, 'All human life is of value and our law contains the strong presumption that all steps will be taken to preserve it, unless the circumstances are exceptional.' (para 119). But this principle was not absolute and his Lordship did not accept the proposition 'that one can only be certain about E's best interests if every possible solution has been tried and shown to fail.' To do so would risk discriminating against incapacitated persons by depriving them of options available to the capacitous (para 134). However, on balance, the Court decided that it was in E's best interests to be fed, by force if necessary, and that the resulting interferences with her Article 8 and 3 rights were proportionate and necessary to protect her right to life under Article 2 (para 141).

Comment

The ethical and legal issues arising from this tragic case will no doubt be widely debated for some time to come. And it is difficult to do justice to that debate in this brief comment. With respect to his Lordship, the judgment does not contain any significant legal developments, although the requirement for 'a full, reasoned and contemporaneous assessment evidencing mental capacity to make such a momentous decision' – in addition to the legal formalities required by MCA s.25 – is noteworthy.

Although E's right to life was discussed, no express reference was made to *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2. The positive operational duty to save life, which would most likely have been triggered on the facts, would require the professionals involved and the Court to do all that could reasonably be expected to minimise the real and immediate risk to E's life. In deciding what would be reasonable, however, consideration would have to be given to the ease or difficulty of saving her life, the resources available, and, 'There is a difficult balance to be struck between the right of the individual patient to freedom and self-determination and her right to be prevented from taking her own life' (*Rabone* at para 117). A careful balance clearly was struck which differed from that of the care team and E's parents.

It is also interesting to compare the saving of E's life with the death of Kerrie Wooltorton. For those unfamiliar with her case, Kerrie was 26-years-old, diagnosed with borderline personality disorder and would typically attempt suicide by ingesting antifreeze before accepting life-sustaining treatment. Three days after preparing an advance decision, which incidentally would have fallen foul of MCA s.25, she swallowed antifreeze for the final time, called an ambulance and, on the hospital ward, accepted pain relief but refused renal dialysis. Assessed as having capacity, her decision was respected and she died.

Both E and Kerrie had made fatal decisions which their health professionals considered to be capacitous. Both had a history of being compulsorily detained and treated under the 1983 Act. But E's case was referred to Court and her life was compulsorily saved; whilst in Kerrie's case no legal proceedings were initiated and death resulted.

Finally, we should note a matter of some importance that is not referred to in the judgment. We are grateful to Richard Jones for pointing this apparent omission out, Paul Bowen QC for providing the following details and to his Lordship for permitting us to refer to them publicly. On the face of the judgment, there is no reference to the fact that the steps required would almost inevitably lead to a deprivation of E's liberty, but we can confirm this was considered, and steps taken to authorise it.

It was understood by those before the Court that, once the initial steps had been taken to re-feed and stabilise E, the professionals involved would apply to detain her under the

Mental Health Act 1983. Until such provision for detention could be put in place, the Court made the following Order:

> "Any reasonable and proportionate measures used in relation to the provision of artificial nutrition and hydration which have the effect of depriving E of her liberty shall be authorised by the Court pursuant to MCA 2005 s 16 and s 48."

If E was not compulsorily detained under the MHA within a limited period of time, the matter was to be brought back to the Court of Protection for a further hearing. At the time of writing, it is not known whether or not E is under section.

Ineligibility anoraks will immediately recognise the potential problem: if E is not detained under the MHA, she risks falling into the amended Bournewood gap. By virtue of MCA s.16A, the Court of Protection cannot authorise a person to be deprived of their liberty if they are, or they become, ineligible. At the risk of overly simplifying MCA Schedule 1A, E would be ineligible for DOLS and a s.16 Order if she was an objecting mental health patient who "could" be detained under ss.2 or 3 of the MHA (for a more detailed analysis see Allen, 'The Bournewood Gap (as amended?)' (2010) 18 *Medical Law Review* 78). Assuming, as one must, that treatment cannot be provided under the MCA, it would appear that an application "could" be made to detain E under MHA s.2 or, depending on the views of her nearest relative, under s.3. In deciding then whether she "could" be detained in hospital in pursuance of such an application, we must assume that two medical recommendations under the MHA have been given. So, in short, it appears likely that E will be within the scope of the MHA.

The next issue is whether she is an objecting mental health patient. Naso-gastric feeding has been held to amount to 'medical treatment for mental disorder' in respect of those with anorexia (*Re KB (Adult)(Mental Patient: Medical Treatment)* (1994) 19 BMLR 144), personality disorder (*B v Croydon Health Authority* [1995] 1 FLR 470, *R v Collins and another, ex parte Brady* (2001) 58 BMLR 173), and depression (*Re VS (Adult: Mental Disorder)* (1995) 3 *Medical Law Review* 292). The same could surely be said of PEG feeding. Applying the 'but for' test (*GJ v Foundation Trust* [2009] EWHC 2972 (Fam)), it seems clear that the only effective reason for E's hospital detention will be to provide medical treatment for her mental disorder to which she evidently objects.

It follows that if, as appears likely, E is detained under the MHA, no jurisdictional issue arises and the Court's interim DOL Order will cease at that point to have effect. But if, for example, an approved mental health professional were to decide that an MHA application ought not to be made, E will fall between the two regimes of detention, as she will be ineligible under the MCA. We would suggest that this would be an area where (even if there is, in general, parity between the MHA and MCA), the MHA should take primacy, and in areas of doubt, assessors must 'take all practical steps to ensure that that primacy is recognised and given effect to' (GJ at para 65).

SC v BS and A Local Authority (unreported, 7 October 2011)
COP jurisdiction and powers; Experts

These proceedings concerned BS, the 17 year old daughter of SC who was due to turn 18 shortly after the date of the hearing. BS had been accommodated pursuant to section 20 of the Children Act for a number of years and was admitted to a psychiatric unit for a period between October 2009 and March 2010 during which time she was diagnosed with Aspergers and post-traumatic stress disorder. Following that she had spent several

periods in a psychiatric hospital following suicide attempts. A diagnosis of a autism had also been advanced.

The primary issue before the Court of Protection was the adequacy of the expert evidence as to whether or not BS lacked capacity in certain relevant regards including to litigate, to make decisions as to her residence, whether to accept care and support, contact with others and to take prescribed medication.

On 5 May 2011 an interim declaration that BS lacked capacity had been made by Mostyn J. On 26 May 2011, permission was given to the parties by Roderic Wood J to jointly instruct a psychiatrist to report on her capacity and an independent social worker to report on BS's best interests. However, as BS was at that time subject to orders under section 3 of the Mental Health Act, the instruction of the experts was suspended. By August 2011, consideration was being given to discharging BS should be discharged from the young people's psychiatric unit where she was accommodated but a dispute arose as between SC and the local authority as to her proposed placement. At a further hearing in September 2011, the local authority indicated that they did not consider that BS lacked capacity and effectively contended that SC exaggerated BS's symptoms. The suspended directions for expert reports were renewed. The Official Solicitor reserved their position as to BS's capacity pending the expert report.

By the time of the hearing before Baker J, the psychiatrist, a Professor T, had prepared an interim report and his preliminary conclusion was that BS did not lack capacity. The expert attended court to give evidence and acknowledged that he had not had the opportunity to examine the extensive social worker and medical records relating to BS prior to writing that report, had only spoken to BS in reaching his conclusion and had advised BS of his provisional view that she had capacity. The expert also acknowledged that he had not given evidence in the Court of Protection previously and had no experience of applying the act in practice although he had considered capacity in the context of criminal proceedings.

The local authority accepted that the issue of capacity remained hotly disputed, notwithstanding the preliminary conclusion reached by the expert, given the evidence base on which he relied. It was agreed that the question of capacity could not be definitively resolved until the final report was produced. However, both SC and the Official Solicitor (for different reasons) no longer considered the psychiatrist to be an appropriate expert. In particular, both SC and the Official Solicitor expressed concern that the expert had communicated his preliminary view to BS. Other concerns raised were principally addressed at the expert's lack of experience in applying the MCA 2005 in practice, particularly in the context of proceedings where the determination of this issue was of such significance. The local authority resisted the instruction of a new expert and noted that the alternative experts proposed would not be able to report immediately and their instruction would lead to a further delay of 6 to 7 weeks in circumstances where BS was subject to a deprivation of her liberty and was expressing a strong desire to change accommodation. The original expert wrote to the Court identifying that he could attend MCA training the week after the hearing and prior to preparing his final report.

Baker J concluded that it was appropriate to instruct a different expert. In reaching this conclusion he noted the competing interests of resolving the issues swiftly such as to ensure the minimum restrictions on BS, and the need to ensure the appropriate degree of expertise in a case where the issue of capacity was both complex and fundamental. In particular, Baker J expressed concern that the expert had communicated his provisional views to BS and held that no expert should give a patient a "provisional" view of their

capacity without reading the patient's history. Equally, whilst acknowledging the original expert's expertise in autism, Baker J considered that he lacked sufficient experience in applying the test under the Act and it could not be satisfactory to seek the expert opinion from someone who perceives the need to undergo training before he can give that opinion.

Comment
As Baker J acknowledged, it is unusual for the appointment of an expert to generate such a degree of controversy in COP proceedings. Whilst relatively extreme on the facts, this case serves to highlight that when appointing an expert to report on capacity, care should be taken to ensure that the expert has sufficient experience of considering capacity in the specific context of the MCA 2005 rather than in a more general sense, even where, as in the present case, the expert has experience of giving evidence for the purpose of other types of legal proceedings. The editors note, however, that whilst the Court and the parties emphasised the fundamental nature of the issue as to BS's capacity, in reality, capacity is a fundamental issue in all proceedings before the COP given that it forms the basis of the Court's jurisdiction. It follows that this judgment is of potentially far wider relevance.

R (ON THE APPLICATION OF KM) (BY HIS MOTHER AND LITIGATION FRIEND JM) (FC) V CAMBRIDGESHIRE COUNTY COUNCIL [2012] UKSC 23
Practice and procedure; Other

We make brief reference to this community care case, in particular because of the approach taken by the Supreme Court to the adequacy of the reasons given by the defendant local authority.

In these proceedings before the Supreme Court, the applicant sought judicial review of a determination by Cambridgeshire County Council to pay him £85,000 by way of a direct payment in discharge of their duties under the Chronically Sick and Disabled Persons Act 1970. The Court of Appeal had granted permission for the judicial review proceedings but had dismissed the substantive application.

In their application to the Supreme Court, the Applicant had sought to challenge whether the Court of Appeal had erred in finding that the local authority had been "entitled and obliged to moderate the assessed needs to take account of the relative severity of all those with community care needs in their area..." In particular, the Applicant challenged the earlier decision of the House of Lords in *R v Gloucestershire County Council ex p Barry* [1997] AC 584.

The Supreme Court concluded that the legitimacy of resource based decisions did not arise as an issue in these proceedings where, in fact, the local authority had not sought to rely on any resourcing argument when computing the level of direct payments to the Claimant. Accordingly, the Court declined to review the decision in *R v Gloucestershire County Council ex p Barry* [1997] AC 584. Nevertheless, both Lord Wilson and Lady Hale took the opportunity to reiterate that when analysing its duties under s.2(1) of the Chronically Sick and Disabled Persons Act 1970, a local authority is not entitled to take in to account any limitation on its resources at the first stage, namely when assessing the needs of the disabled person.

The Court also considered the twin grounds on which the applicant had made the initial application for judicial review, namely adequacy of reasons and irrationality and upheld the decision of the Court of Appeal that neither was made out on the facts.

In relation to the duty to provide reasons, Lord Wilson endorsed the decision of the Court of Appeal in *R (Savva) v Kensington and Chelsea Royal London Borough Council* [2010] EWCA Civ 1209, [2011] PTSR 761 and concluded that whilst there were deficiencies in the reasoning given by the local authority of the facts in the present case, this was not sufficient to warrant quashing the determination. Nor could the decision be said to be irrational as the local authority had been entitled to rely on its Resource Allocation Support tool and an Upper Banding Calculator.

Comment
This case had been anticipated to be one of very greater significance, as a revisiting of *Barry*. However, for reasons not material here, the Supreme Court (having lined up a hearing for that purpose, and allowed intervenors on the issue) decided not to revisit it, and therefore the decision was much more limited in its scope. For present purposes, though, the case is of some importance to those in the CoP field as a reminder of the latitude that may be granted to statutory authorities in analysing the adequacy of the reasons they have given. It will also be of some – tangential – importance in any case in which a local authority has not put an option on the table in CoP proceedings and an individual wishes to challenge that decision by way of judicial review proceedings, as an indicator of the likely approach that the Administrative Court will take where the decision has been taken on the basis of resources.

HSE IRELAND V SF (A MINOR) [2012] EWHC 1640 (FAM)
Article 5; Deprivation of liberty

We make mention of this case in which Alex appeared because, although it is a case involving a child falling outside the scope of the MCA 2005, it is a companion piece to the *Re M* decision ([2011] EWHC 3590 (COP)) discussed in our February newsletter, relating to the placement of a young adult from the Republic of Ireland in an English psychiatric institution. It also raises some of the same complex issues as to the safeguarding of the rights of the vulnerable when they are placed across borders.

In *SF* Mr Justice Baker considered an ex parte application made by the Health Service Executive of Ireland ("the HSE") for an urgent order under Article 20 of Council Regulation (EC) 2201/2003 ("Brussels II Revised") concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility in respect of SF.

SF, aged 17, was diagnosed with an emotionally unstable personality disorder, severe depression with suicidal ideation and post-traumatic stress disorder. When SF was 3 years old, she was received into the voluntary care of the authority responsible for child protection in the part of Ireland where she lived. A full care order was granted on 10 January 2006. In 2008, after a break down in a foster placement, she was placed in a high support unit. However, SF's behaviour deteriorated further and the staff at that unit reached the conclusion that they could not keep her safe. On 5 January 2012, the HSE applied for and was granted an order permitting SF to be detained at a special care unit. Those responsible for her care reached the conclusion that there was no suitable unit in the Republic of Ireland and approached an English unit. Initially, SF was opposed to any move to the English Unit but by March 2012 was consenting to a move to the English Unit for a three month period of assessment and treatment, and indeed, became anxious to leave the Irish unit as soon as possible. There was some delay whilst the authorities sought to obtain consent in accordance with Regulation 56 of the Brussels II revised regulation to transfer SF to the English Unit. In this period, SF's behaviours became the

source of considerable concern and two medical experts reported on the urgent need to move her.

The relevant consent was obtained in April 2012 and the HSE applied to the English Courts for the recognition and enforcement of the Irish Order permitting SF to be detained. In the interim they made an application for urgent relief under the provisions of Article 20 Brussels II Revised in the form of an (English) order:

(a) that SF do reside at the English Unit for purposes of such care and treatment as may in the opinion of the Director of the English Unit be necessary;

(b) that there be leave to the staff of the English Unit to detain at or return SF to the English Unit and to use reasonable force (if necessary) in so detaining her or returning her; and

(c) that there be leave generally to Director of the English Unit and those under his direction (to include all or any of the multi-disciplinary team including clinical, care or similar professional and/or ancillary health care staff) to furnish such treatment and care to SF as in their opinion may be necessary.

A central issue before Mr Justice Baker was whether the use of Article 20 for these purposes was permissible.

The Judge considered the case law concerning the interpretation of the Brussels II revised regulation, including the recent preliminary ruling of the CJEU in HSE for Ireland v SC (C-92/12 PPU) in which the Irish Court had referred questions to the CJEU in relation to the lawfulness of using Article 20 in what were very similar factual circumstances.

Mr Justice Baker concluded that the CJEU judgment, whilst emphasising the need for expedition on all parts, implicitly approved the use of Article 20 in circumstances such as those arising in the present case, namely where emergency protective measures were required pending registration and enforcement of the Irish Order. The other pre-conditions for reliance on Article 20, as set out in *Re A (Area of Freedom, Security and Justice* (C-523/07) [2009] 2 FLR 1 and *Deticek v Sgueglia* (C-403/09) [2010] 1 FLR 1381, namely that relief is urgent, is in respect of persons in the Member State concerned and is provision, were also met on the facts. Equally, the further requirement that the Member State have the relevant powers (provided for in Article 20 itself), was met as it had long been recognised that the powers under the inherent jurisdiction extent to making orders for the detention of children for therapeutic purposes: *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180.

Accordingly Mr Justice Baker granted the interim order sought. The Judge further noted that all cases should be considered on their facts and emphasised the need for judicial cooperation as between different Member States.

Comment

The compulsory placement of foreign patients in English psychiatric institutions (other than under the provisions of the MHA 1983) is something that we would anticipate that very few of our readers would have thought took place; we would also anticipate that even fewer would have given a thought to how such could be lawfully achieved. However, this case, along with Re M, shows the English courts grappling with the issues involved in a creative and pragmatic fashion. At some point, whether with a child under

the provisions of Brussels II, or an adult under the provisions of Schedule 3 to the MCA 2005 (an amendment to Schedule 3 due to come into force shortly making it clear that a 16-17 year old could only come under one regime), the Courts will have to test whether the mechanisms adopted to date properly protect their ECHR rights. The views of the editors (or, at least, of Alex, who has spent months thinking about little else) is that the mechanisms do, but we are aware that very strong views to the contrary are held, and a contested hearing will ultimately be the only way in which to resolve the question.

THE LOCAL GOVERNMENT OMBUDSMAN AND DOLS

The indefatigable Lucy Series (author of The Small Places blog, which is indispensable reading for all those concerned with health and welfare matters under the MCA: http://thesmallplaces.blogspot.co.uk/) has recently taken up with the LGO the question of whether the body can consider complaints arising out of deprivations of liberty. We understand that both Lucy and the LGO are happy for us to relay the material parts of the LGO's response.

In terms of jurisdiction, the LGO's approach is that cannot generally pursue a complaint where a remedy exists by way of an alternative remedy. Someone arguing that they are being unlawfully deprived of their liberty would have a right to approach the Court of Protection and the availability of that "legal remedy" would take the matter outside the jurisdiction of the Ombudsman. The Ombudsman cannot direct that a Deprivation of Liberty authorisation is flawed and should be terminated; only the Court can do this. If the Court makes such a determination, but awards no compensation (either because it cannot, will not or just forgot to address the issue) it would not be right for someone to ask the Ombudsman to address the alleged shortcomings in the Court of Protection procedures.

That said, the LGO considers that the deprivation of liberty issues do fall within the jurisdiction of the LGO and while the Ombudsmen is not able to bring a deprivation of liberty to an end they are able to consider complaints about how deprivation of liberty has been handled and there is no reason why recommendations should not include payments of compensation although any such recommendations are unlikely to be at the kind of levels courts would operate to.

We understand that the LGO's London office is soon to issue a public report upon a DOL issue, which will be on the LGO website. We also reproduce details of two complaint addressed so far so as to give a flavour of how the LGO has approached matters to date.

Case 1 – 10 013 715:

A case where a DoL application was not made promptly and the care home's/council's approach to restrictions placed on the complainant and her mother was flawed.

Dorothy was admitted to a care home in February 2005. Her daughter Melinda kept in touch with her regularly. In May 2008, Melinda raised concerns about Dorothy's care and a safeguarding investigation resulted. The allegations Melinda made centred around poor manual handling, poor care and bullying by staff. The safeguarding investigation took into account all of the issues around Dorothy's care which included concerns the care home had about Melinda's disruptive behaviour when visiting – she would often shout and get angry.

In June 2008, Melinda's visits to her mother were restricted. This was because the home felt Melinda's behaviour distressed staff and residents and was detrimental to her mother's wellbeing. A variety of conditions were imposed at different times (Deprivation of Liberty Safeguards did not come into effect until April 2009).

In April 2009, Melinda raised more complaints with the council about her mother's care. Another safeguarding investigation ensued which was inconclusive. It was clear the relationship between the staff and Melinda had broken down. In June 2009, Melinda's solicitors wrote to the council and asked on what basis, in light of the new DOLS legislation and associated Code of Practice, the Council believed it had the authority to prevent Dorothy from moving to a new care home. No response was received. In July 2009, a safeguarding meeting was held in the home and, following that meeting, Melinda said she was prevented from leaving the home by the home manager who was threatening and harassing her. No safeguarding investigation was launched as Melinda was not a vulnerable adult.

In August 2009, the council's safeguarding advocate raised the possibility that a deprivation of liberty might be occurring in respect of Dorothy. He advised that the council should carry out a mental capacity assessment. A further meeting was held in September 2009 where it was again suggested that a DoL authorisation was required. In October 2009, the home sought a standard DoL authorisation and granted themselves an urgent authorisation. A standard authorisation was granted in November 2009.

The LGO decided that the original restrictions should have been managed by a suitable risk assessment demonstrating the need for controls and the reasons why. This risk assessment should have been periodically reviewed to ensure the actions were both required and justified as time passed. The home was also criticised for not issuing a formal warning to Melinda before curtailing her visits.

In June 2009, Melinda's solicitors wrote to the supervisory body (the local authority) raising the issue of DoLS but they should have written to the managing authority – the care home – who was responsible for seeking the authorisation. It was a further four months before the local authority advised the manager to seek an authorisation and a further five months before the appropriate request was made.

We concluded the approach taken between June 2008 and October 2009 was flawed. We found fault with both the care home and the council. The council has ultimate responsibility for the care provided to Dorothy as it was funding the placement. It was decided that it should have done more to ensure its own staff and the staff in its contracted services were better trained in such matters. We went on to criticise how the DoL assessments were conducted in this case. This criticism included the best interests assessor determining who would be the most appropriate person to act as the 'relevant persons representative'. However, DoL guidance states that the best interests assessor should first establish whether the relevant person (ie Dorothy) has the capacity to select a representative and, if so, ask her to do so. If the relevant person selects an eligible person, the best interests assessor must recommend that person to the supervisory body for appointment.

It was concluded that certain actions would follow to ensure a robust assessment and proper periodic monitoring of the arrangements in place.

Case 2 – 10 010 739:

A case where the DoL decision taken was not the 'least restrictive' option.

Mrs Jones complained to the LGO about the fact that her sister, Mrs Davies, was not allowed to return home after an admission to hospital. Additionally the council prevented her from moving her sister to another care home of her choosing.

Mrs Davies has a degenerative and congenital condition called Huntingdon's Disease. She was living with and being cared for by her sister until October 2006 when she was admitted to hospital. The admission was triggered by the district nurse finding her on the floor. She was covered in bruises from other falls and had an infection. Mrs Davies told staff on the hospital ward she did not want to return to the care of her sister Mrs Jones. She told others, however, that she did want to return. A multidisciplinary discharge meeting was held. Mrs Davies' other sister Mrs Weston was asked to attend the meeting as she has power of attorney. It was decided that the flat Mrs Jones lived in was unsuitable and that she was unable to give the level of care required. The option of Mrs Davies returning to the flat with a care package was explored but thought to not be viable. Mrs Davies was admitted to a nursing home.

In early 2007 Mrs Jones was also diagnosed as having Huntingdon's Disease. She was suffering from common complications such as poor grip, reduced mobility, slurred speech and memory difficulties. Doctors also had concerns about impulsivity and lack of judgement. Mrs Jones never accepted that she could not care for her sister Mrs Davies. She was unhappy with the care Mrs Davies received in the nursing home at times. Mrs Jones continued to deteriorate and had problems swallowing. She was reluctant to accept help from social services. The records show that Mrs Davies and Mrs Jones missed each other's company a lot. In 2009 the care home placed restrictions on Mrs Jones visiting following some difficulties between her and the carers. After this she was told she could not visit unaccompanied. Some meetings were held at which Mrs Jones stated that she wanted to live in a care home with her sister.

Mrs Jones moved from her small flat to sheltered accommodation and Mrs Davies was able to visit her there. At this time Mrs Davies began asking to go back and live with Mrs Jones. This resulted in an application for a Deprivation of Liberty authorisation. It was granted as Mrs Davies lacked capacity and Mrs Jones was not up to the challenge of providing the level of care required. In addition, Mrs Davies' needs could not have been met in sheltered and supported living accommodation. Both sisters were upset about the authorisation. An IMCA and People's Voice advocacy group was involved.

Eventually Mrs Jones made a formal complaint to the council about the detention. In its response the council said Mrs Davies needed expert care and Mrs Jones would not be able to provide that. The council also said Mrs Davies was settled now and her consultant's view was that her needs were best met at the care home. The authorisation expired after six months and another was made and granted. In the second authorisation it is noted that both sisters voiced a preference for being together. It was however deemed in Mrs Davies's best interests to remain where she was. The council said it would support the sisters spending as much time together as possible. Mrs Jones condition continued to deteriorate and records indicate that she may need residential care very soon.

The LGO decided that we would have expected the council to assess whether the sisters could live together in a home that could cater for the needs of both. In not exploring that option the arrangements may not be the least restrictive. The council agreed to a

multi-stakeholder meeting to begin the process of dealing with the sisters' assessments and begin planning to accommodate them together for as long as they wish.

ISSUE 24 AUGUST 2012 COURT OF PROTECTION UPDATE

MUNJAZ V UNITED KINGDOM (APPLICATION NO. 2913/06) ECTHR (17.7.12)

"Deprivation of liberty"; Residual liberty; Articles 3, 5, 8, and 14 ECHR

Colonel Munjaz challenged the legality of Ashworth Hospital's seclusion policy – which departed from the Mental Health Act's Code of Practice by reducing the number and frequency of medical reviews – on the grounds that it violated Articles 3, 5, 8 and 14 ECHR. The House of Lords had previously held by a majority that the Code could be departed from if there were cogent reasons for doing so and rejected the human rights arguments.

Article 3

The European Court of Human Rights ('ECtHR') found no evidence to support the argument that the less intensive frequency of medical reviews placed the patient at real risk of ill-treatment.

Article 5

Already detained under the Mental Health Act 1983, Munjaz contended that his seclusion amounted to a further deprivation of liberty that was not prescribed by law, with no right of review or appeal to an independent body. Significantly, the Court held that whether there was a further deprivation in respect of someone who was already detained would depend on the circumstances (paragraph 65). The criteria for determining their concrete situation (eg the measures' type, duration, effects, and manner of implementation) "must apply with greater force" when the person was already detained (paragraph 67).

However, on the facts there was no further deprivation of liberty because:

(a) Munjaz was a long-term patient in a high security hospital: even when he was not in seclusion, he was already subjected to greater restrictions on his liberty than would normally be the case for a mental health patient.
(b) Seclusion, though coercive, was not imposed as a punishment but to contain severely disturbed behaviour likely to harm others.
(c) While its duration, notably of 9, 14 and 18 days, would point towards a further deprivation of liberty, duration alone was not determinative and the length of seclusion was foremost a matter of clinical judgment.
(d) The manner of implementing the seclusion policy carried the greatest weight: the hospital's approach was to allow secluded patients the most liberal regime that was compatible with their presentation, and seclusion was being flexibly applied.

Article 8

The patient argued that the policy also interfered with his Article 8 rights and was not in accordance with the law as it lacked the necessary foreseeability and procedural safeguards. The ECtHR reiterated the presumption that those deprived of their liberty continue to enjoy all of the other fundamental rights and freedoms guaranteed by the Convention. Disagreeing with the House of Lords, it held that compulsory seclusion did interfere with his right to respect for private life:

> "80. … Moreover, the importance of the notion of personal autonomy to Article 8 and the need for a practical and effective interpretation of private life demand that, when a person's personal autonomy is already restricted, greater scrutiny be given to measures which remove the little personal autonomy that is left."

However, on the facts the seclusion policy was adequately accessible and sufficiently foreseeable as to be in accordance with the law and the discretion enjoyed by the hospital was exercised with sufficient clarity to protect Munjaz against arbitrary interference with his Article 8 rights.

Article 14

Whether permitting each hospital to seclude according to its own procedures resulted in unjustifiable discriminatory treatment was not an argument previously raised in domestic proceedings and was not therefore entertained by the ECtHR.

Comment

English law has hitherto rejected the concept of 'residual liberty', that is the idea that there can be a prison within a prison: *R v Deputy Governor of Parkhurst Prison, ex parte Hague and Weldon* [1992] 1 AC 58. Whether or not it can exist in law is significant: if it does, and a detained person is deprived of their residual liberty, arguably such a residual deprivation must also be in accordance with a prescribed legal procedure and on lawful grounds. Lord Steyn dissented when *Munjaz* was before the Law Lords and described the majority as "wrong to assume that under the jurisprudence of the ECHR residual liberty is not protected", and their decision as "a set-back for a modern and just mental health law".

The ECtHR's confirmation that there can be a further deprivation of one's liberty for Article 5 purposes is clearly significant. As a matter of legal principle, there is no obvious reason why the concept should not be equally recognised in respect of deprivations of liberty occurring in settings other than prison and high security hospitals. For example, it is not unknown for detained care home residents to be compulsorily kept in their own room to manage their disturbed behaviour.

It is also worth noting that, in considering whether there was a deprivation of liberty, the ECtHR took into account both the context of *Munjaz's* circumstances (paragraph 69) and, perhaps contrary to *Austin v United Kingdom*, the purpose and aim of the seclusion measures (paragraph 70). The relevance of these factors to the 'DOL question' will no doubt feature in the conjoined appeals in *Cheshire West* and *P and Q* which are now heading to the Supreme Court with permission to appeal having been given.

Finally, the *Munjaz* decision illustrates how Article 8 protects what might be referred to as 'residual privacy'. The decision recognises that the Article 8 interference that results from being deprived of liberty by the State is distinct from any further interferences with one's right to respect for private life. Indeed, moving from a 'familial care' setting into a 'public care' setting may have a bearing on a person's personal autonomy. But their right to respect for private life remains and, following Munjaz, a greater degree of scrutiny must be given to measures taken by public authorities which impact upon one's residual privacy.

XCC v AA AND OTHERS [2012] EWHC 2183 (COP)
Interface with the inherent jurisdiction; Forced marriage; Sexual relations

DD, a British citizen, had severe learning disabilities, little language, very little comprehension of anything other than simple matters, and required assistance with almost every aspect of daily living. In 2003 she entered into an arranged marriage in Bangladesh with her cousin, AA. During the ceremony she was slumped in a chair, almost comatose and barely able to repeat the words of consent to marriage; words which she did not understand. The marriage would not have taken place were it not for the fact that AA wanted to live and work in England, gaining immigration entry clearance in reliance upon it.

Owing to very significant concerns surrounding DD's welfare, the police obtained a Forced Marriage Protection order pending an application being made to the Court of Protection. Interim declarations of incapacity were made to protect DD. Her husband was warned that sexual relations with his wife were likely to be criminal and he was not permitted to live or have any contact with her.

The main issue for Parker J. was whether she had the power to declare that the marriage was not recognised in this jurisdiction. A gap in the law arose because a person's invalid consent to marriage rendered it voidable, rather than void, under s.12(c) of the Matrimonial Causes Act 1973 and s.58(5) of the Family Law Act 1986 prevented the Court from declaring it to be void from its inception. All parties initially opposed a declaration of non-recognition. With interim declarations made and undertakings by the parties given, neither the local authority nor the Official Solicitor considered it to be in DD's interests to end the marriage. Her parents and husband also asserted that non-recognition would shame the family in the community.

In relation to the Court of Protection's statutory jurisdiction, Parker J. accepted that the power to make declarations were expressly limited by MCA s.15 and the Court could not develop its "own inherent jurisdiction" which went beyond its statutory powers (paragraph 49). Thus, for example, under the MCA the Court could declare that it was unlawful for DD to be married in this jurisdiction but not that it was unlawful for her to be married in Bangladesh. But, in any event, the MCA did not confer any jurisdiction to make a non-recognition declaration as this was not a personal welfare decision for, or on behalf of, DD.

Relying upon *KC v City of Westminster* [2008] EWCA Civ 198, her Ladyship held that the High Court could exercise its inherent jurisdiction of its own motion to refuse to recognise a marriage where one party was unable to consent. This jurisdiction was flexible and able to respond to social needs and, in this instance, was able to fill the gap left behind by the lack of statutory power to grant a declaration of non-recognition. Insofar as the interface between the two jurisdictions is concerned:

> "54… The protection or intervention of the inherent jurisdiction of the High Court is available to those lacking capacity within the meaning of the MCA 2005 as it is to capacitous but vulnerable adults who have had their will overborne, and on the same basis, where the remedy sought does not fall within the repertoire of remedies provided for in the MCA 2005. It would be unjustifiable and discriminatory not to grant the same relief to incapacitated adults who cannot consent as to capacitous adults whose will has been overborne.

…
85… I am satisfied that once a matter is before the Court of Protection, the High Court may make orders of its own motion, particularly if such orders are ancillary to, or in support of, orders made on application. Since the inherent jurisdiction of the High Court in relation to adults is an aspect of the parens patriae jurisdiction, the court has particularly wide powers to act on its own motion."

In broad terms, the Court held that the MCA provisions were not to be imported into the inherent jurisdiction evaluation of non-welfare matters. Hence, DD's beliefs and values did not have to be taken into account. Nor did the attitudes, wishes and beliefs of her family. Although it was appropriate, on general principles, to consider whether a declaration was necessary and proportionate, the Court did not have to apply the principle of least restriction in MCA s.1(6). Welfare considerations may be relevant to the Court's decision as to whether to make the declaration, but not in the present case.

Public policy considerations were relevant and "In my view a marriage with an incapacitated person who is unable to consent is a forced marriage within the meaning of the Forced Marriage Act 2007…". Citing her earlier judgment, ""Force" in the context of a person who lacks capacity must include inducing or arranging for a person who lacks capacity to undergo a ceremony of marriage, even if no compulsion or coercion is required as it would be with a person with capacity" (paragraph 30). Such a marriage was a gross interference with the incapacitated person's autonomy:

"72… Its concomitants, sexual relations and, as a foreseeable consequence, pregnancy, constitute not only a breach of autonomy but also bodily integrity, perhaps one of the most severe that can be imagined, and the consequences may be lifelong. Marriage creates status from which many consequences flow which affect third parties and the public at large including the admission of persons who would not otherwise be entitled to admission. Thus questions of public policy generally as well as those that affect the individual concerned are relevant. There is also a public policy interest in the Court stating openly that such marriages should not be recognised."

In conclusion, invoking the inherent jurisdiction, the Court declared that the marriage celebrated in and valid according to the law of Bangladesh was not recognised as a valid marriage in this jurisdiction. Using the statutory jurisdiction, Parker J. declared that it was in DD's best interests for an application to be made to annul the marriage and for the Official Solicitor to be authorised to act as litigation friend to do so. As a postscript, stark guidance to health and social care professionals was repeated from the earlier judgment:

"184… in my view it is the duty of a doctor or other health or social work professional who becomes aware that an incapacitated person may undergo a marriage abroad, to notify the learning disabilities team of Social Services and/or the Forced Marriage Unit if information comes to light that there are plans for an overseas marriage of a patient who has or may lack capacity. The communities where this is likely to happen also need to be told, loud and clear, that if a person, whether male or female, enters into a marriage when they do not have the capacity to understand what marriage is, its nature and duties, or its consequences, or to understand sexual relations, that that marriage may not be recognised, that sexual relations will constitute a criminal offence, and that the courts have the power to intervene."

Comment

This judgment contains a useful and detailed discussion of the interface between the Court of Protection's MCA jurisdiction and the High Court's inherent jurisdiction. It serves as a reminder of the limitations imposed by Parliament and the corresponding flexibility afforded by the parens patriae powers. Although it is apparent that the judiciary has little hesitation in reverting to 'the great safety net' to fill legislative gaps, the principles which guide the exercise of those powers in this jurisdictional hinterland may well come under increasing scrutiny as the law develops. Although the approach should be facilitative rather than dictatorial, it is interesting to note the Court's rejection of the MCA considerations, particularly those relating to the person's own wishes and feelings, merely requiring orders to be "necessary and proportionate".

Describing the arranging of a marriage between an incapacitated person, who is unable to consent, and another as a "forced marriage" for the purposes of the 2007 Act is noteworthy, particularly in an era when the Government are in the process of criminalising forced marriages from 2013. Although it was referred to in the context of an arranged marriage abroad, time will tell whether these comments have a broader application to domestic incapacitated marriages: they certainly serve to reinforce the importance of assessing marital capacity. Indeed, it is reported that 50 English Councils are due to issue guidance to raise awareness of the issues and to identify potential victims.

RE SK [2012] EWHC 1990

Interface between welfare and personal injury proceedings

This decision of Mr Justice Bodey concerned the interface between welfare proceedings in the Court of Protection and concurrent personal injury proceedings. SK had suffered a brain injury in an accident and was represented in a personal injury claim through his brother CK as litigation friend. Part of his claim related to the future costs of his care. At the same time, welfare proceedings were underway in the Court of Protection, concerning the validity of SK's marriage and his care and place of residence, where the Official Solicitor acted as his litigation friend. The expert in neuro-rehabilitation instructed for the purposes of the personal injury claim had recommended different arrangements for SK's care and residence than the joint expert in the Court of Protection proceedings. SK's wife wished to put forward the recommendations of the 'personal injury expert', but the local authority and PCT had already refused to commission that option because they considered it would not meet SK's assessed needs, and was likely to be more expensive.

Various reports from the 'personal injury expert' had already been disclosed to the parties in the Court of Protection proceedings, but not the reports obtained by the Defendants in the personal injury proceedings.

An application was issued by the solicitors acting for SK in his personal injury claim which sought, in various alternative formulations, to allow them to represent SK in the Court of Protection to put forward the views of the 'personal injury expert'. As a result, the Defendants in the personal injury proceedings also applied to have the two sets of proceedings consolidated, so that the court would have the benefit of all the relevant expert views, and so that the Defendants would not effectively be prevented from arguing subsequently that the option favoured by the 'personal injury expert' was unreasonable, in the event that the Court of Protection declared that option to be in SK's best interests.

The Official Solicitor opposed both applications, arguing that SK could only have one voice in the Court of Protection, and that Defendant insurance companies had no right to be involved in best interests decisions.

At the hearing, the original application was altered so that it became an application for SK's brother CK (his litigation friend in the personal injury proceedings) to be joined as a party. That application was not opposed by the Official Solicitor.

The court determined that CK should be joined as a party, and refused the Defendants permission to play any role in the best interests decision, while directing that there should be a joint meeting between the single joint expert in the Court of Protection proceedings and the 'personal injury expert'. The court held:

(a) The tests to be decided in each court were different – 'best interests' was not the same as whether a particular form of care was a 'reasonable need'.
(b) The Defendants in the personal injury proceedings, and the Queen's Bench Division judge, would not be bound by any declaration made in the Court of Protection.
(c) The Defendants did not have 'sufficient interest' in the words of COP Rule 75 to be joined as a party. Their financial liability would not be determined by the Court of Protection proceedings. A commercial interest in the outcome was not enough.

The judge also noted that where possible and unless otherwise contra-indicated, it would generally make sense to have the same litigation friend in concurrent Court of Protection and personal injury proceedings to avoid some of the problems that had arisen in this case, where two different representatives of SK had adopted different positions on the same issue.

The earlier applications made by SK's solicitors in the personal injury proceedings would have been refused, since it was not possible for SK himself to have two sets of representatives in one set of proceedings.

Comment
This decision is likely to be of interest to personal injury solicitors involved in cases where the claimant lacks capacity and where best interests decisions need to be taken which may overlap with decisions about the quantum of future care. It is of interest for the general statement of principle that Defendants who have a commercial interest in best interests decisions are not thereby able to satisfy the test of sufficient interest to be joined as a party to Court of Protection proceedings. No doubt Defendant insurance companies will be sceptical about the suggestion that a declaration of the Court of Protection that option X is in P's best interests does not close the door to an argument that option X is not a reasonable need. On the other hand, as the judge observed, there are plenty of public policy arguments against allowing those with a purely commercial interest a role in Court of Protection proceedings and best interests decision making generally.

NHS TRUST V BABY X AND OTHERS [2012] EWHC 2188 (FAM)
Withdrawal of medical treatment

Following a catastrophic accident which resulted in chronic, profound and irreversible brain damage, baby X was incapable of breathing on his own and was ventilated and fed by nasal gastric tube. The Trust sought a declaration that it was in his best interests to be removed from the ventilator and treated with palliative care during the minutes, or at best hours, that would remain. His parents opposed this on the basis that their son should be

given every chance to improve, however unlikely that presently looked; they believed they saw discernible signs of improvement; and the tenets of their faith prevented them consenting.

Although this case was decided under the inherent jurisdiction, some of the observations of Mr Justice Hedley may be equally applicable to treatment withdrawal cases in the Court of Protection:

> "24. That assessment [of X's welfare] must be the court's independent assessment but it must be one that looks at all relevant issues from the assumed point of view of the patient; a necessary but necessarily artificial exercise in some ways it may be thought. Yet it is rightly so required for X is a human being of unique value: body, mind and spirit expressed in the unique personality that is X. It is important that 'quality of life' judgments are not made through other eyes for 'quality of life' may weigh very differently with different people depending on their individual views and aspirations. A life from which others may recoil can yet be precious.
> 25. At the same time preservation of life, however important, cannot be everything. No understanding of life is complete unless it has in it a place for death which comes to each and every human with unfailing inevitability. There is unsurprisingly deep in the human psyche a yearning that, when the end comes, it does so as a 'good death'. It is often easier to say what that is not rather than what it is but in this case the contrast is between a death in the arms and presence of parents and a death wired up to machinery and so isolated from all human contact in the course of futile treatment."

In concluding that X's welfare required his removal from ventilation and that it was lawful to treat him on the basis of palliative care, his Lordship's reasoning was as follows:

> "28… First, I recognise the desire to preserve life as the proper starting point to which I add that X is very probably unaware of any burden in his continued existence. Against that, secondly, I have set both his unconsciousness or unawareness of self, others or surroundings and the evidence that any discernible improvement is an unrealistic aspiration. Thirdly, I have acknowledged his ability to continue for some time yet on ventilation but have balanced that with the risk of infection or other deterioration and the desire to avoid death in isolation from human contact. Fourthly, having accepted that treatment serves no purpose in terms of improvement and has no chance of effecting it, I have taken into account its persistent, intense and invasive nature. Fifthly, I have noted the treating consultant's view that X shows no desire to live or capacity to struggle to survive which are the conventional marks of a sick child; although I think that observation as such is correct, I would not want that to have significant let alone decisive weight in this balance."

IN PASSING….

We mention the decision of the Supreme Court in *Re T (children)* [2012] UKSC 36 which considered whether a local authority who had properly brought allegations of abuse before the court in respect of young children should be required to pay the costs of parties or intervenors in circumstances where those allegations were found not proved at a fact-finding hearing. Although the decision relates to costs in proceedings about children, some of the public policy arguments relied on are equally relevant to the Court

of Protection. The Supreme Court concluded that in the absence of unreasonable conduct, local authorities should not be liable to pay the costs of 'successful' parties.

Readers may also be interested in the report prepared by Mr Justice Ryder concerning modernisation of the family justice system. Again, some of the issues considered have resonance in the Court of Protection. In particular, the authors suggest that "requiring consideration to be given as to how the voice of the child is heard in family proceedings" is something which could usefully be addressed within the Court of Protection, where it is comparatively rare for P to address the court, or for judges to hear directly from P about the matters in issue. The report is available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/ryderj_recommendations_final.pdf

Lastly, we note that the LGO has recently published two reports critical of Kent County Council, which had relied on two unlawful sets of internal guidance – one preventing funding for residential care home placements which were not in Council-owned homes or pre-purchased placements; and the other restricting respite care for adults to Council-run residential homes, rather than allowing users to receive direct payments to choose their own provider. The reports are a helpful reminder that where collateral public law issues such as these crop up within Court of Protection proceedings, the Ombudsman may prove a proportionate and helpful route to resolution.

DOLS Third Report on annual data 2011/12 (England)

On 17 July 2012, the NHS Health and Social Care Information Centre released its third report which looks at DOLS activity in England between 1.4.11 and 31.3.12, with the following highlights:

1. 27% increase in requests compared with 2010/11 (contrary to Government predictions);
2. Number of DOLS authorisations have increased every quarter since April 2009, rising to 1,976 in December 2011. However, there was a 16% decrease between the end of December 2011 and March 2012;
3. 56% of requests led to authorisations;
4. There continues to be wide regional variations.

Neary Settlement

It is reported that Hillingdon Borough Council have agreed to pay £35,000 in damages to Steven Neary in respect of their illegality in 2010.

ISSUE 25 SEPTEMBER 2012 COURT OF PROTECTION UPDATE

LB HAMMERSMITH V MW (UNREPORTED, 29TH JULY 2012)

Best interests; Contact

This decision (of HHJ Horowitz QC) is a relatively straightforward welfare decision, concerning an application by a local authority for relief preventing an individual, JC, having contact with MW and, in particular, visiting, staying or residing at MW's house. JC was a childhood friend of MW who in the difficult and complicated circumstances of MW's life was considered to have a baleful impact upon MW's wellbeing. It bears brief notice for the following reasons:

1. as a – relatively – rare example of a decision relating purely to contact, and therefore as an example of a court considering issues relating to contact in isolation. We note in this regard that HHJ Horowitz QC proceeded on the basis that MW lacked the capacity "to make his own decision as to the boundaries of contact with an important person in his life […] that is JC" (paragraph 63). This suggests that the Court proceeded on the basis that capacity to decide upon contact is person specific, rather than issue specific and, as such, might be thought to feed into what we know is an ongoing debate upon this thorny question;

2. as an example of a case in which P did not attend the final hearing on the basis that it would be adverse to his interests. It is not clear from the judgment whether MW in fact wished to attend the hearing, so it is unclear whether the direction to this end (at paragraph 29) was made in the face of MW's wishes; it was, though, supported by the experts and the Official Solicitor;

3. as an example of a case in which the Court (and – it would appear – the local authority and the Official Solicitor) had access to more material than was disclosed to the other parties and, specifically, JC. HHJ Horowitz QC expressed some – understandable – relief (at paragraph 30) that he was not required in fact to stray beyond material to which all before the Court had access; this may explain the fact that he gave no specific ground upon which the redaction of the material in question was permissible and compatible with JC's Article 6 rights.

COVENTRY CITY COUNCIL V C, B, CA AND CH [2012] EWHC 2190 (FAM)

Assessing mental capacity; Article 8 duty to consult; Article 6 duty to inform and act fairly

A 27-year-old woman with significant learning disabilities was pregnant with her fourth child. Her previous children had been placed for adoption and the local authority planned to similarly accommodate the newborn under a voluntary agreement with the mother pursuant to section 20 of the Children Act 1989. For such an agreement to be lawful, the parent must have the requisite capacity to decide whether to consent in the light of the Mental Capacity Act 2005.

On the day of her emergency hospital admission, the mother was confronted with three key decisions: (1) whether to consent to life sustaining surgery; (2) whether to accept pain relief (including morphine to which she thought she was allergic); and (3) whether to consent to the accommodation of her child in local authority care. She consented to the first, belatedly agreed to the second, but initially refused to consent to the third. But when the social worker returned later that same day, the mother – by then on morphine – consented and the child was removed. Mr Justice Hedley agreed that the child's welfare required her to be taken into care and approved the local authority's concessions that the Article 8 rights of both mother and child had been breached because consent should not have been sought that day in the aftermath of birth, and the removal was a disproportionate response to the risks that then existed.

So far as the section 20 agreement was concerned, if the mother lacked capacity when she consented it would have been invalid and the removal unlawful. His Lordship reiterated that capacity was issue and situation specific, so being able to decide about surgery and pain relief did not indicate that she could decide about the removal of her child. The fact that she might be able to make that decision before the birth or sometime after did not mean she could do so on the day of birth. Moreover:

> "39. Capacity is not always an easy judgment to make, and it is usually to be made by the person seeking to rely on the decision so obtained. Sometimes it will be necessary to seek advice from carers and family; occasionally a formal medical assessment may be required; always it will be necessary to have regard to Chapter 4 of the Code of Practice under the 2005 Act…"

Even where there was capacity, "it is essential that any consent so obtained is properly informed and, at least where it results in detriment to the giver's personal interest, is fairly obtained. That is implicit in a due regard for the giver's rights under Articles 6 and 8 of the European Convention on Human Rights" (paragraph 28). In this case, the mother's consent may not have been properly informed because (a) she was never told that a continued refusal of consent would result in the child staying in hospital with her for another day or two and (b) she was told that the removal was only a temporary arrangement, despite everyone else knowing that this was highly unlikely (paragraph 43). In relation to fairness, his Lordship added:

> "44. I am not sure that the court can say much about fairness on the facts of this case in the light of the local authority's concessions. Clearly a social worker must have regard to the vulnerability of the parent, her previously expressed willingness or otherwise to consent, the magnitude of the decision and its consequences for the mother and the actual circumstances of the mother as and when consent is sought. In this case the failure to encourage the mother to speak to her solicitor may also have affected fairness. It is important to emphasise that whilst the mother should know the plan of the local authority, willingness to consent cannot be inferred from silence, submission or even acquiescence. It is a positive stance."

At paragraph 46, his Lordship then gave guidance, approved by the President of the Family Division, to social workers in respect of obtaining consent for section 20 agreements.

Comment
Although this was not a Court of Protection case, his Lordship's comments on assessing mental capacity are of more general application and therefore transferable. That a person's capacity is both decision and time specific and the need to identify who should assess capacity serve as important reminders. Moreover, amongst the guidance given, it was stated that "[e]very social worker obtaining [consent under a section 20 agreement] is under a personal duty (the outcome of which may not be dictated to them by others) to be satisfied that the person giving the consent does not lack the capacity to do so." Again, such a duty may be equally applicable to all those responsible for assessing others' capacity.

The Article 6 requirement for fairness in the seeking of a person's consent is also of interest and would seem relevant to, for example, best interests decisions taken to remove someone lacking capacity from the care of others. It is also likely to be further explored in Court of Protection proceedings.

DAVIS & DAVIS V WEST SUSSEX COUNTY COUNCIL [2012] EWHC 2152 (QB)
Practice and procedure

Comment
This judicial review decision does not specifically relate to the MCA. However, it arose out of a case conference convened by a local authority in December 2010 concerning

allegations of abuse at a care home, and therefore provides some important guidance upon a matter that that is – sadly – very much in the news at the moment.

The Claimants owned two care homes, and applied to quash decisions of WSCC taken at a safeguarding vulnerable adults care conference that (inter alia) allegations of abuse against members of the staff at one of the homes were substantiated, individual actions should be taken by the care home, and that three members of staff should be referred to the appropriate professional body for possible disciplinary action.

For present purposes, the main thrust of the Claimants' challenge to the process adopted by WSCC was (as set out at paragraph 3):

1. they were not given adequate notice of the allegations made against them so as to allow them a fair opportunity to present their case at the Case Conference. They were only provided with a copy of the very substantial Investigation Report – which set out the allegations for the first time, albeit in unclear form – one working day before the Case Conference;

2. they were not shown the evidence against them;

3. the Case Conference was not shown relevant evidence generated by the investigation, both for and against them.

4. they were not permitted, or given an adequate opportunity, to produce relevant evidence to the Case Conference, whether through witnesses or otherwise.

HHJ Mackie QC (sitting as a High Court Judge) noted a number of significant failures in the process:

> "45. The [case conference] meeting lasted more than 8 hours. It is unclear what documents were available to the panel. Mr McGuire emphasises the extent of the discussion at Mrs Hillary-Warnett's interview with the police, at which all matters complained of were apparently covered. However there is nothing to suggest that the record of the interview was disclosed or discussed with the panel despite the fact that it must have been one of the factors leading the police to decide to take no action. It does not appear from the record that notes of other interviews were available to the panel either. West Sussex, surprisingly, relies on the fact that Mrs Davis did not herself at the conference ask to have the matter adjourned. But it was or should have been obvious that she wanted it adjourned because her solicitors had written to say so and Mrs Davis had reminded the meeting of the letter. Ms Attwood points to the fact that Mrs Davis started by making it clear that she was going to follow her solicitors" advice to make no comment but then chose to go on and comment on a number of occasions. There was no indication that West Sussex saw anything amiss in relying on what this elderly lady went on to say, despite knowing of her solicitors' advice. During the lunch break which according to Ms Attwood was 'relaxed' Mrs Davis made a remark to her informally. Ms Attwood 'suggested … that she share these comments with other attendees when the meeting reconvened and she agreed and … repeated this statement towards the end of the meeting.' This was unfair.
> 46. West Sussex was aware of Mrs Davis's limited role as owner not manager of Nyton House. The chair refused an adjournment, gave Mrs Davis no proper opportunity to prepare for the meeting, refused even to consider her solicitors' letter, continued for eight hours knowing that she was an elderly lady, where the

meeting was ten on one side and one on the other and where even the informality of a brief lunch break was abused. Nevertheless conclusions were drawn about Mrs Davis's credibility and her fitness to own a care home. These were in part based on detailed matters relating to individual carers and patients (see paragraph 18 of Ms Attwood's statement) which West Sussex knew or should have known were outside Mrs Davis's knowledge given the impossibility of looking into all these allegations in such an absurdly short time and its decision (for reasons which were of themselves legitimate) to exclude from the meeting those who would have had the answers. West Sussex, as Mr McGuire put it, considered that Mrs Davis had 'made a long series of admissions'.

47. I again remind myself that the prime object of the investigation was to protect vulnerable adults and to prevent abuse not to give particular consideration to Mrs Davis. But her treatment at and around the meeting was deplorable."

Reminding himself that WSCC had stated in an earlier letter sent in June 2010 that the relevant investigation report would be shared with Mrs Davis prior to the case conference "and time given for Mrs Davis to provide a detailed response" (paragraph 32), HHJ Mackie QC concluded at paragraphs 70-1 that:

> "70. The conference was not a trial of Mr and Mrs Davis but the process of investigation and the taking of decisions had potentially serious consequences for their business, for their residents and for their staff. The Claimants were given an assurance in June on which they were entitled to rely. Nothing relevant occurred between the giving of that assurance and the Case Conference. The length, importance and content of the report was such that Mrs Davis could not reasonably have absorbed it so as to respond in the short time that she was given, the circumstances of the conference itself and the consequences were unfair and unjust to Mrs Davis in the ways I have explained.
>
> 71. The procedure adopted and carried out was unfair. It did not follow fully the guidance in the Multi-Agency Policy. The policy did not comply with the legitimate expectations of the Claimants created by the letter of 14 June. There was no good reason for the commitment made in that letter not to be carried out. It follows that subject to the two further arguments which West Sussex were given permission to bring when this case was first listed for trial before Mrs Justice Nicola Davies on 27 March 2012, and to questions of remedy, the application would be granted."

The first of these arguments advanced was that the Claimants could not derive any public law assistance from either the "No Secrets Guidance" or the local protocol under which WSCC argued. In this, it relied upon the analysis of the former in Part 9 of the Law Commission Report on Adult Social Care. At paragraph 75, HHJ Mackie QC noted:

> "As Mr McGuire and the Law Commission point out there is a lack of precision because "No Secrets" contains guidance for local authorities in the exercise of existing statutory functions but no freestanding justification for an investigation. Quite rightly this has not deterred West Sussex, like other authorities, from carrying out investigations and Mr McGuire does not go as far as suggesting that that is a defence to judicial review where the public body did not have statutory power to do what it did. It seems to me that this defence is closely linked to the whole question of natural justice. While there may well be situations where the obligation to protect vulnerable adults justifiably permits a local authority to infringe what might otherwise be the rights to natural justice of third parties no

> question of this arises here. There was, by December 2010, no respect in which the duty to protect vulnerable adults conflicted with the less pressing obligation to treat other parties affected in a just manner."

The second of the arguments was as to whether the decisions were amenable to judicial review at all, or whether they represented allegations of breach of contract entered into by WSCC in a private capacity. This argument was rejected, in essence on the basis that the investigation would have taken place whether or not there was a contract in place, because WSCC "was rightly and primarily concerned with investigating allegations of abuse under its legal powers." (paragraph 87). The process of investigation and decision was therefore a public function distinct from the contractual relationship (paragraph 89).

HHJ Mackie QC quashed the adverse determinations made at the case conference in December 2010 (and a further conference convened in July 2011), and declared that the determinations and the recommendations made pursuant to the review were unlawful.

It is perhaps only fair to conclude this summary by highlighting HHJ Mackie QC's comments at paragraph 101:

> "As I have been critical of West Sussex I repeat my view that the professionals in this case acted throughout in good faith and having in mind the best interests of those whom they are engaged to protect. There are obviously great pressures on local authority employees carrying out this important and stressful work. The consequences of a failure to intervene can be grave. Those working in this area face criticism for allegedly interfering when they intervene and for alleged neglect or worse when they do not. These factors need to be borne in mind by anyone making a further issue of the matters I have identified."

Comment

What happened in this case was undoubtedly extremely unfortunate; whilst in retrospect it would appear easy to identify the basic failings in procedural fairness that took place, the judgment also stands as a salutary reminder of the difficulty of balancing the interests of the protection of the vulnerable with the rights of those involved in delivering care to them. Whilst there may well be occasions on which the interests of the former prevail over the latter, especially in urgent situations, it must always be good practice to ensure that the trampling is as delicate and as documented as possible.

FUNDING

Funding continues to be a vexed issue in CoP proceedings. We have heard anecdotally that in cases where interim welfare orders have been made and no order for costs have been made, the LSC has then declined to make payments on account. This would therefore suggest that orders should provide that costs are reserved (even if this is a fiction in almost all welfare cases given the provisions of the COP Rules).

MCA LITERATURE REVIEW

With thanks to Lucy Series to bringing this to our attention, we note that the Mental Health Foundation have recently produced an extensive review of the literature upon the implementation of the MCA (although not DOLS), available at http://www.mentalhealth.org.uk/publications/mca-lit-review/.

CONSULTATION ON NEW SAFEGUARDING POWER

As you are no doubt aware, the DoH has published a draft Care and Support Bill (http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_134740.pdf). That Bill (responding to a proposal in the Law Commission's Report on Adult Social Care) includes a proposed duty upon local authorities to make enquiries whenever there is a safeguarding concern. It also includes a proposal to repeal s.47 National Assistance Act 1948 (the power to remove a person from his/her home in specific circumstances).

The DoH is therefore consulting as to whether local authorities have sufficient power to gain access to a person who may be at risk of abuse where this is appropriate and not already provided for in existing legislation (in the case of an adult without capacity, this would be within the MCA 2005). The consultation can be found at: http://www.dh.gov.uk/health/files/2012/07/Consultation-on-New-Safeguarding-Power.pdf

The proposal on which the DoH is consulting applies where a local authority has reasonable cause for concern that a person with capacity is experiencing abuse or neglect, and someone else in the property is preventing the local authority from speaking with that person. The DoH is seeking views as to whether the local authority should be able to apply for a warrant to enter the premises and speak with that person alone. In its consultation document, the DoH noted the approval of the Court of Appeal of the survival of the inherent jurisdiction in DL v Local Authority [2012] EWCA Civ 253, but commented that leaving matters to be resolved on a case-by-case basis is not satisfactory.

The DoH is not proposing that there be any new statutory power granted to local authorities to remove or detain the vulnerable adult.

The suggestion is that the application be made to a Circuit Judge (e.g. a nominated judge of the Court of Protection), with evidence. It is not clear whether such applications would be made on notice, but the suggestion is that there be a process by which a complaint can be made about the way in which the power granted by the warrant has been exercised.

The consultation runs until 12 October 2012 (the wider consultation upon the Care and Support Bill runs until 19 October).

CC v KK AND STCC [2012] EWHC 2136 (COP)

Mental capacity; Assessing capacity; Residence; Article 5 ECHR; "Deprivation of liberty"

KK was an 82-year old woman with Parkinson's Disease, vascular dementia, and paralysis down her left side. Following the death of her husband, she moved and settled in a rented bungalow. However, incapacity and best interests determinations had resulted in her being placed in a nursing home between July and October 2010 and from July 2011. Her deprivation of liberty was authorised under Schedule A1 of the MCA from 12 August 2011 which she challenged under MCA s.21A on 2 September 2011.

Trial home visits commenced in November 2011 and subsequent requests for a DOL authorisation under Schedule A1 were refused on the basis that there was no deprivation of liberty. The s.21A challenge was dismissed and interim declarations granted as to her incapacity and best interests. By the time of the final hearing in May 2012, she was having daily home visits.

Mr Justice Baker was called upon to determine: (1) whether KK had capacity to make decisions about her residence and care, and (2) whether she had been, and or was being, deprived of her liberty. His Lordship concluded that she had residential capacity and had not been, and was not being, deprived of her liberty.

(1) Capacity?

In the face of the unanimous views of both the independent expert psychiatrist and all of the professionals, KK asserted that she had capacity to make decisions concerning her residence. The court received evidence from her, not only in a written statement but also orally in court. Before weighing the competing evidence, his Lordship helpfully set out the approach to be taken by the Court when addressing questions of capacity (paras 17-25). The following summarises some of the key points arising from the judgment (including the citations thereto):

(a) Para 24: The roles of the court and the expert are distinct and it is the court that makes the final decision as to the person's functional ability after considering all of the evidence, and not merely the views of the independent expert (*A County Council v KD and L* [2005] EWHC 144 (Fam) paras 39, 44).

(b) Para 25: Professionals and the court must not be unduly influenced by the "protection imperative"; that is, the perceived need to protect the vulnerable adult (*Oldham MBC v GW and PW* [2007] EWHC 136 (Fam); *PH v A Local Authority, Z Ltd and R* [2011] EWHC 1704 (Fam)).

> "25…[T]here is a risk that all professionals involved with treating and helping that person – including, of course, a judge in the Court of Protection – may feel drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to carry out an assessment of capacity that is detached and objective. On the other hand, the court must be equally careful not to be influenced by sympathy for a person's wholly understandable wish to return home."

(c) Para 22: The person need only comprehend and weigh the salient details relevant to the decision and not all the peripheral detail. Moreover, different individuals may give

different weight to different factors (*LBL v RYJ* [2010] EWHC 2664 (Fam) paras 24, 58). At para 65 Baker J held:

> "…There is, I perceive, a danger that professionals, including judges, may objectively conflate a capacity assessment with a best interests analysis and conclude that the person under review should attach greater weight to the physical security and comfort of a residential home and less importance to the emotional security and comfort that the person derives from being in their own home. I remind myself again of the danger of the "protection imperative" identified by Ryder J in *Oldham MBC v GW and PW* (supra). These considerations underpin the cardinal rule, enshrined in statute, that a person is not to be treated as unable to make a decision merely because she makes what is perceived as being an unwise one."

(d) Para 68: Capacity assessors should not start with a blank canvas: "The person under evaluation must be presented with detailed options so that their capacity to weigh up those options can be fairly assessed" (para 68).

KK was found to be clear, articulate, and betrayed relatively few signs of the dementia which afflicted her. She understood that she needed total support and carers visiting four times a day. Whilst she may have underestimated or minimised some of her needs, she did not do so to an extent that suggests that she lacked capacity to weigh up information (para 64). After citing passages from Munby LJ's lecture, 'Safeguarding and Dignity: Protecting Liberties – When is Safeguarding Abuse?' (including "[w]hat good is it making someone safer if it merely makes them miserable?" – Baker J held (in passages sufficiently important to merit reproduction almost in full):

> "67. In this case, I perceive a real danger that in assessing KK's capacity professionals and the court may consciously or subconsciously attach excessive weight to their own views of how her physical safety may be best protected and insufficient weight to her own views of how her emotional needs may best be met.
> 68. This danger is linked, in my view, to a further problem with the local authority's approach in this case…. I find that the local authority has not identified a complete package of support that would or might be available should KK return home, and that this has undermined the experts' assessment of her capacity. The statute requires that, before a person can be treated as lacking capacity to make a decision, it must be shown that all practicable steps have been taken to help her to do so. As the Code of Practice makes clear, each person whose capacity is under scrutiny must be given 'relevant information' including 'what the likely consequences of a decision would be (the possible effects of deciding one way or another)'. That requires a detailed analysis of the effects of the decision either way, which in turn necessitates identifying the best ways in which option would be supported. In order to understand the likely consequences of deciding to return home, KK should be given full details of the care package that would or might be available. The choice which KK should be asked to weigh up is not between the nursing home and a return to the bungalow with no or limited support, but rather between staying in the nursing home and a return home with all practicable support. I am not satisfied that KK was given full details of all practicable support that would or might be available should she return home to her bungalow.
> 69. When considering KK's capacity to weigh up the options for her future residence, I adopt the approach of Macur J in *LBJ v RYJ* (supra), namely that it is

not necessary for a person to demonstrate a capacity to understand and weigh up every detail of the respective options, but merely the salient factors. In this case, KK may lack the capacity to understand and weigh up every nuance or detail. In my judgment, however, she does understand the salient features, and I do not agree that her understanding is 'superficial.' She understands that she needs carers four times a day and that is dependent on them for supporting all activities in daily living. She understands that she needs to eat and drink, although she has views about what she likes and dislikes, and sometimes needs to be prompted. She understands that she may be lonely at home and that it would not be appropriate to use the lifeline merely to have a chat with someone. She understands that if she is on her own at night there may be a greater risk to her physical safety.

70. In weighing up the options, she is taking account of her needs and her vulnerabilities. On the other side of the scales, however, there is the immeasurable benefit of being in her own home. There is, truly, no place like home, and the emotional strength and succour which an elderly person derives from being at home, surrounded by familiar reminders of past life, must not be underestimated. When KK speaks disparagingly of the food in the nursing home, she is expressing a reasonable preference for the personalised care that she receives at home. When she talks of being disturbed by the noise from a distressed resident in an adjoining room, she is reasonably contrasting it with the peace and quiet of her own home."

The fact that KK had used the lifeline emergency call service no fewer than 1097 times between January and July 2011 had been an important factor in the decision to move her back into the nursing home and remained a significant factor in the professionals' assessment of her capacity:

"71. … To my mind, however, the local authority has not demonstrated that it has fully considered ways in which this issue could be addressed, for example by written notes or reminders, or even by employing night sitters in the initial stage of a return home. I also note that during KK's daily home visits it has not been reported that she has used the telephone in ways similar to her previous use of the lifeline, although in the latter stages of her period at home prior to admission to care in July 2011 she was apparently using the lifeline excessively during the day as well as at night. Ultimately, however, I am not persuaded that calling an emergency service because one feels the need to speak to someone in the middle of the night, without fully understanding that one has that need or the full implications of making the call, is indicative of a lack of capacity to decide where one lives.

72. Another factor which features strongly in the local authority's thinking is KK's failure to eat and drink. Here again, however, I conclude that more could be done to address this issue by written notes and reminders, and by paying greater attention to KK's likes and dislikes. KK is not the only older person who is fussy about what she eats and drinks.

73. I do not consider the fact that KK needs to be helped about overusing the lifeline, or reminded to eat and drink regularly, carry much weight in the assessment of her capacity. Overall, I found in her oral testimony clear evidence that she has a degree of discernment and that she is not simply saying that she wants to go home without thinking about the consequences. I note in particular that for a period earlier this year she elected not to go on her daily visits to the bungalow because of the inclement weather. This is, to my mind, clear evidence that she has the capacity to understand and weigh up information and make a

> decision. Likewise, I consider her frank observation that 'if I fall over and die on the floor, then I die on the floor' demonstrates to me that she is aware of, and has weighed up, the greater risk of physical harm if she goes home. I venture to think that many and probably most people in her position would take a similar view. It is not an unreasonable view to hold. It does not show that a lack of capacity to weigh up information. Rather it is an example of how different individuals may give different weight to different factors.
> 74. This case illustrates the importance of the fundamental principle enshrined in s. 1(2) of the 2005 Act – that a person must be assumed to have capacity unless it is demonstrated that she lacks it. The burden lies on the local authority to prove that KK lacks capacity to make decisions as to where she lives. A disabled person, and a person with a degenerative condition, is as entitled as anyone else to the protection of this presumption of capacity. The assessment is issue-specific and time specific. In due course, her capacity may deteriorate. Indeed that is likely to happen given her diagnosis. At this hearing, however, the local authority has failed to prove that KK lacks capacity to make decisions as to where she should live."

(2) Deprivation of liberty?

His Lordship noted that, pending the determination by the Supreme Court of the Official Solicitor's appeals in *P and Q v Surrey County Council* [2011] EWCA Civ 190 and *Cheshire West and Chester Council v P* [2011] EWCA Civ 1257, there was "some uncertainty on the future interpretation of the deprivation of liberty provisions under the 2005 Act. It is obviously of great importance to all professionals practising in this field that this uncertainty is resolved promptly" (para 81). A summary of the present law is then provided at paras 83-96. In relation to the comparator approach adopted by the Court of Appeal in Cheshire West, his Lordship noted:

> "95. I anticipate that this aspect of the decision in Cheshire West will receive particular scrutiny in the Supreme Court. It has been the subject of academic criticism on the grounds that, insofar as it may permit some people to be denied a declaration of deprivation of liberty in circumstances where others would be entitled to such a declaration, it may be discriminatory. The decision of the Court of Appeal is, of course, binding on this court."

Insofar as the relevance of purpose is concerned, Baker J cited the European Court of Human Rights' decision in *Austin and others v United Kingdom* [2012] ECHR 459 and the following passage from Munby LJ's lecture (supra):

> "Where does this leave us? And where in particular does it leave the decisions in *P and Q* and *Cheshire West*? It is early days and you will understand that I must be careful what I say. A provisional and very tentative view might be that questions of reason, purpose, aim, motive and intention are wholly irrelevant to the question of whether there is a deprivation of liberty; that anything in the domestic authorities (and particular in *Cheshire West*) which suggests otherwise needs to be reconsidered; that in all other respects *P and Q* and *Cheshire West* stand as good law; that none of this affects the correctness of the actual decisions in the two cases; and that none of this is likely to have any decisive effect on the outcome in the general run of cases of the kind with which we are concerned."

Pending the appeals to the Supreme Court, Baker J. held (at para 96) that "the right course is to have regard to the purpose for a decision as part of the overall circumstances

and context, but to focus on the concrete situation in determining whether the objective element is satisfied". In deciding that KK had not been and was not deprived of her liberty, his Lordship's reasoning merits full citation:

> "98. On any view, staff at STCC exercise a large measure of control over KK's care and movements. The fact that she is disabled means that she is completely dependent on others for her care and treatment. When one considers the "relevant comparator", it is clear that anybody with KK's disability would experience a significant physical restriction on the life that they are able to lead. In this case, however, there is no suggestion that the manner in which KK is looked after at STCC is significantly more restrictive than it would be were she to live at home in her bungalow. As in all nursing homes, KK's needs have to be accommodated alongside the needs of other residents. No doubt she sometimes has to wait before her care needs are attended to. But the evidence suggests that staff are appropriately attentive to her as far as possible given the other demands on their time. KK has a number of grumbles about the food, and the level of noise in the nursing home. Overall, however, I do not detect any significant level of complaint by KK about the way in which she is treated at STCC.
> 99. There is, of course, no doubt that KK does object strongly to her residence at STCC. As Wilson LJ observed in *P and Q* (supra) her objections are a factor pointing towards deprivation of liberty. KK has a strong wish to live at home and the fact that this wish is frustrated undoubtedly causes her a degree of stress and distress. On at least one occasion, when she said that she did not wish to return home after a visit, her wishes were ignored. Clearly that was an example of her objections being overridden. Earlier difficult behaviour has subsided and there is now little evidence that her overruled objections lead to a significant degree of conflict. I have not been told of a pattern of regular or significant arguments between KK and the staff at the care home. On the contrary, the evidence suggests that KK does not repeatedly raise the topic of returning home in everyday conversations with staff. In my judgment, staff at STCC are dealing with KK's wish to go home with tact and sensitivity.
> 100. On the other side of the scale, there are a number of factors pointing away from a finding of deprivation of liberty. There is no suggestion that restraint is ever used. Equally, there is no suggestion that sedation is used. KK's door is not locked. With the assistance of members of staff, she is able to go elsewhere in the nursing home, in particular to the lounge, if she so chooses. She is consulted about her day to day care and treatment. There are no restrictions placed on her contacts with other people. Overall, the arrangements for her care could not, in my view, be described as one of "continuous control". I do not, therefore, consider that KK has lost a significant level of personal autonomy as a result of her residence at the nursing home.
> 101. I turn finally to the question of the 'relative normality' of KK's life. She is in what some might describe as 'an institution' rather than her own home, but on the spectrum identified by Wilson LJ [in] *P and Q*, it seems to me to be far removed from type of institution associated with a deprivation of liberty. It is, in the words of McFarlane J (as he then was) in *LLBC v TG, JG and KR* [2007] EWHC 2640 [2009] 1 FLR 414 'an ordinary care home where only ordinary restrictions of liberty apply'. By all accounts, it is a well run nursing home which puts the needs of its residents first. I bear in mind that KK's disability itself imposes a degree of restriction on her life. I do not consider that the circumstances of her placement at STCC significantly add to that restriction.
> 102. KK is now spending part of everyday at home at her bungalow. In my experience, this is unusual compared to most other residents of nursing homes.

Considerable time and effort is devoted to enabling KK to experience a greater degree of freedom by returning home. Just as Wilson LJ in *P and Q* considered the fact that a child or young adult attends school or college or a day centre or other form of occupation to be a sign of normality which would indicate that the circumstances do not amount to a deprivation of liberty, so I find the fact that KK, with a degree of planning and notice, goes home on most days is a sign of normality indicating that her circumstances do not amount to a deprivation of liberty. In addition, she is also able to leave the nursing home on other occasions accompanied by her friend EB and her IMCA, JM.

103. I therefore conclude that KK's circumstances do not amount to a breach of her rights under Article 5. In my judgment, she was not being deprived of her liberty before the introduction of the home visits in November 2011. Now that KK is able to go home on a daily basis, I find that the circumstances in this case fall well short of a deprivation of liberty."

Comment

Capacity

This judgment provides a very useful and detailed analysis of the approach to be taken to determining the functional limb of the capacity test. It is no doubt one of the relatively few cases in which the Court has disagreed with the consensus of expert and professional opinion. Had KK not been enabled to provide written and oral testimony, matters might have been very different. Indeed, we would suggest that taking all practicable steps to involve the subject of the proceedings conforms with the philosophy of the MCA and their right to a fair trial under Article 6. The particular steps will of course differ in each case. Examples we have come across include attendance notes, videos of P, IMCA reports, supporting the person to attend court, and judicial visits to the person's place of residence.

Identifying both the relevant decision and the information relevant to it can be a somewhat subjective exercise, with a real danger of capacity assessments being conflated with the assessor's views on best interests. Detachment and objectivity is key. Approaching matters on the basis that the closer the person's views are to those of the assessor the more likely they are to have capacity has always been a forbidden line of reasoning which this judgment has reinforced. The wisdom and practicable steps principles in MCA s.1 are designed to guard against this danger. And Baker J's emphasis on the need to take such steps – in this case, identifying the full details of the domiciliary care package that would or might be available to KK – is extremely important. For nobody can make an informed decision without being made aware of the salient details.

Deprivation of liberty

As noted by Baker J, the situation is at present deeply unsatisfactory. The indication that we have at present is that the (joined) appeals in *Cheshire West* and *P and Q* will not be heard by the Supreme Court until well into next year, such that we are unlikely to have a judgment for (at least) a year's time. Subsequent to the decision in *Cheshire West*, the ECHR has had cause to consider the questions of deprivation of liberty not just in *Austin* but also in *Stanev v Bulgaria* (Application No. 3760/06, decision of the Grand Chamber of 17.1.12); and *DD v Lithuania* (Application No. 13469/06, decision of 14.2.12).

As indicated by Baker J – and apparently accepted by Munby LJ – there is a mismatch in at least one fundamental respect between the approach taken in *Cheshire West* and the approach now taken by Strasbourg. As Alex is exploring in work being done on his

sabbatical, the decisions in both *Stanev* and *DD* would also appear to cast further doubt upon the approach taken in *Cheshire West*, and might – indeed – to suggest that (at least as regards the objective element) we have entangled ourselves in unnecessary Gordian knots by moving away from what may have been a very simple question posed in Bournewood: namely whether Mr L was free to leave.

Especially given the terms of s.64(5) MCA 2005 (linking the definition of a deprivation of liberty for purposes of the Act to Article 5(1) ECHR, suggesting that linkage is to the Article as interpreted by Strasbourg, rather than our courts), any mismatch between the approach taken in the two jurisdictions makes it extremely difficult for those advising upon what is or is not a deprivation of liberty, as well as for those seeking to implement the provisions of Schedule A1 upon the ground.

Whilst it arguably would be possible for a first instance judge to use s.64(5) to proceed on the basis that: (a) the Strasbourg court has now further pronounced upon the definition of a deprivation of liberty; (b) that definition (binding for purposes of s.64(5) MCA 2005) is materially different to that given in *Cheshire West*; and hence (c) *Cheshire West* is on that basis not good law and does not need to be followed, it is fair to say that this would represent an extremely bold break with conventional principles. The approach adopted by Baker J in *KK* is therefore undoubtedly the one that is more likely to be adopted in the interim pending the determination by the Supreme Court of the appeals.

Against this backdrop, it is therefore particularly interesting that that the Scottish Law Commission has recently published a discussion paper upon Adults with Incapacity (available at http://www.scotlawcom.gov.uk/news/discussion-paper-on-adults-with-incapacity/). This paper presents a number of provisional views upon possible options for the Scottish Government to create a statutory regime to close the Bournewood gap north of the border (the consultation period upon the discussion paper closing on 31st October 2012). The paper makes required reading for anyone interested in deprivation of liberty matters, not least because it contains a clear-eyed and detached dissection of the jurisprudence in England, Scotland and Strasbourg, as well as a tour d'horizon of the approach taken in other jurisdictions.

One of the most interesting – provisional – conclusions of the paper is that Scotland should not seek to follow the route adopted by Parliament in Westminster by enacting s. 64(5) MCA 2005, but should rather seek to enact a statutory definition of what constitutes (and does not constitute) a deprivation of liberty. This would avoid what the Scottish Law Commission provisionally identify as two of the main problems with the DOLS regime arising out of s.64(5):

> "First, the result is a lack of guidance to those working in the area and, secondly, individual case-by-case assessment appears necessary, with lengthy hearings of evidence and consequent demands on resources." (paragraph 6.41)

Quite what that statutory definition should include is the subject of some detailed consideration, outside the scope of this newsletter. It is, perhaps, worth noting that it would appear clear the Commission harbours some – polite – doubts about the approach that has been taken recently in England. As it drily notes:

> "6.60 Were Scots law to develop provisions concerning deprivation of liberty which relied directly on concepts such as the purpose of a measure and the effect of a comparison with another person with similar disabilities in distinguishing

deprivation of liberty from the provision of care, there would be a risk that such measures might not accord with Strasbourg case-law on Article 5."

The paper is also of interest for suggesting that the ECtHR may have recognised in Stanev the principle that "valid replacement" of the wishes of the person with incapacity would prevent the regime under which he or she is living from being a deprivation of liberty at all (see the discussion at paragraph 6.73). If correct (and we – or least Alex – would respectfully suggest that it is doubtful that this is correct), this would undoubtedly put a very substantial cat amongst the DOLS pigeons and potentially would require a complete reworking of the statutory regime of Schedule A1 to identify when, how and by whom such "valid replacement" could take place. It would also give rise to questions as to how the 'non-DOL' could be reviewed to ensure that a once-for-all replacement of wishes could not lead to the incapacitated adult being deprived of any regular statutory oversight of their position going forward (and hence the Bournewood gap yawning open again in different form). Yet another reason why we entirely echo Baker J's plea that the questions arising upon the appeals to the Supreme Court in *Cheshire West* and *P and Q* are resolved speedily…

Jurisdiction
As a final point, the judgment is also worth noting for the pragmatic (and we would suggest entirely correct) approach taken to s.21A in this case. Baker J noted that, prima facie, the Court's powers under s.21A extend to determining the questions arising under that section and, if appropriate depending on its determination, making an order varying or terminating a standard authorisation. However,

> "16…. But once an application is made to the Court under s. 21A, the Court's powers are not confined simply to determining that question. Once its jurisdiction is invoked, the court has a discretionary power under s. 15 to make declarations as to (a) whether a person has or lacks capacity to make a decision specified in the declaration; (b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration, and (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person. Where P lacks capacity, the court has wide powers under s. 16 to make decisions on P's behalf in relation to matters concerning his personal welfare or property or affairs."

Whilst it is clear (on this approach) that the Court will not consider itself narrowly bound by the confines of s.21A upon an application under its provisions, it is necessary to recall that the Legal Services Commission continues to take a very narrow view of the scope of s.21A for purposes of the non means-tested public funding available for such applications.

RE J (A CHILD: DISCLOSURE) [2012] EWCA CIV 1204
Practice and procedure

Whilst not a COP case, this case merits mention because of the approach adopted by the Court of Appeal to the difficult question of the management of disclosure of sensitive information and, in particular, to the question of when a judge who has had sight of key material which has not been disclosed to all the parties should then go on to make substantive determinations.

In 2009, a father obtained an order providing for contact with his daughter. In 2010, social workers employed by the local authority with statutory responsibility for the

daughter contacted the mother and informed her that a young person had made series allegations of sexual abuse against the father. The mother was not told any details of the allegations and was also told that the young person did not wish her identity to be revealed to any person. The social workers did, however, tell the mother that the local authority considered that the allegations were 'credible' and advised the mother that she should not allow the daughter to have unsupervised contact with her father. The mother therefore applied to vary the contact order, the sole basis for her application being the limited information given to her by the social workers. In that application, the local authority sought to establish Public Interest Immunity attached in respect of certain documents, in particular (it appears) the identity of the young person, X, who had made the allegations, and the detail of those allegations.

In advance of the first substantive hearing, Peter Jackson J had received the documents in respect of which the local authority wished to establish PII. The father's position was that he denied sexually abusing anyone, had not been informed of X's identity and knew nothing about the substance of the allegations. He asserted that the mother had colluded with X to generate the allegations for purposes of obstructing contact with his daughter. He sought further information about X and her allegations. The daughter's guardian asserted that she was unable to represent the daughter's interests in the proceedings without knowing the detail of the allegations and forming an assessment of them. X strongly resisted disclosure of her identity and of the substance of her allegations; she as acutely distressed by the effect of the proceedings on her already fragile state of health. All parties save for the father knew X's identity (in the case of both the mother and the guardian thanks to accidental disclosure by the local authority); the mother knew nothing about the allegations save that they were serious and that the local authority considered them credible.

Peter Jackson dismissed the application for disclosure of further information about X and her allegations. In so doing, he proceeded on the basis that it was unrealistic to decide the application without considering the consequences were the application to succeed. In particular, he considered that it was inevitable that, once her identity was disclosed, a witness summons would be issued and the Court would promptly be considering whether or not X should be compelled to give evidence. He therefore considered himself justified in looking beyond the immediate issue and asking the question "where is this going?"

The guardian appealed. On appeal, McFarlane LJ (giving the lead judgment) considered as a first question the decision taken by Peter Jackson J to proceed as the trial judge on the issue of contact. In so doing, he observed that the nature and extent of X's allegations mean that they could not readily be proved or disproved by reference to third parties or independent sources. They were said to be unlikely to provide a solid foundation for future arrangements for the daughter, A. Although these allegations are the only new material in the case that might justify a departure from the regime of unsupervised contact, the judge went on to say that nondisclosure of the material 'will not automatically lead to the court making an order for unsupervised contact.'

McFarlane LJ declared himself fully satisfied that Peter Jackson J in the passages set out above had no intention of relying directly upon the undisclosed material to support some finding of the issue of sexual abuse, and that his comment about the outcome not automatically leading to unsupervised contact being no more than a proper judicial indication that all substantive welfare options remained open as he had done no more than decide the disclosure application. However, McFarlane LJ continued,

"there is a need to step back to consider how a fair final hearing can be seen to take place if it is conducted by a judge who has read the detail of X's undisclosed allegations. This is not a topic that is addressed expressly in the judgment, yet to my mind it justifies careful consideration. From the perspective of an insider within the family justice system, I have no difficulty in accepting that any judge of the High Court Family Division would have the necessary intellectual and professional rigour to conduct the final hearing by putting the undisclosed material out of his or her contemplation when considering A's welfare. That, however, is not the test, or, at least, not the complete test. Justice not only has to be done, but it must be manifestly and undoubtedly seen to be done. How is the final hearing to be viewed by the father if his contact to A is reduced from its pre-2010 level or terminated, when he knows that the judge who has determined the case has read details of serious, but untried and untested allegations against him? The father has already referred to 'a kangaroo court' and such a characterisation could only gain prominence in his mind were the case to proceed in the manner contemplated by the current orders.

38. Often when Public Interest Immunity ('PII') is raised the matter to which the PII relates may not be directly relevant to the primary issue in the case and there can be a fair trial of the central issue notwithstanding the fact that material known to the judge remains undisclosed to some or all of the parties. Here the undisclosed information is at the core of the case and represents the entirety of the material relating to the only issue that has generated the mother's application to vary the contact regime. The father, or an impartial bystander, is entitled to question how there could be a fair trial of the contact issue when the judge is privy to this core material yet the father and those representing A are not. I stress again that I readily accept that if Peter Jackson J were the trial judge he would have approached the matters before him with intellectual and judicial rigour; my concern relates to how matters are, or may be, perceived by the parties and others.

39. Drawing these observations together, in my view an outcome on the facts of this case whereby the key material has been read in full by the judge but is not to be disclosed to the parties, yet the same judge is going on to preside over the welfare determination is an untenable one in terms of justice being seen to be done. In failing both to consider this aspect of the case and in arriving at that outcome the judge was plainly wrong.

40. In the light of the conclusion that I have just described, the option of non-disclosure but the case remaining with the judge was not one that was properly open to the court in this case. I repeat and stress that this conclusion is specific to the facts of this case where the PII material relates entirely to the core issue in the case. It is not my intention to lay down a blanket approach to all cases, which will fall to be determined by the application of general principles to the individual facts that are in play."

McFarlane LJ therefore indicated that the two options going forward were that the sensitive material (or a significant part of it) be disclosed to the parties and the case continuing in front of the judge who had heard the disclosure application or the sensitive material was not disclosed and the welfare determination not be disclosed and the welfare determination be conducted by a judge in a similar state of ignorance to that of the father.

McFarlane LJ then went on to conduct a review of the authorities relating to PII before turning to the decision taken by Peter Jackson J upon the disclosure application itself. He held that the approach adopted by the judge in linking the question of whether or

not X could ever give oral evidence with the issue of disclosure was not only unsupported by previous authority but appeared to be contrary to previous case law (paragraph 73). He also found that Peter Jackson J's characterisation of the probative value of the allegations as being unlikely to lead to resolution of the issue that they raise might be correct, that characterisation was based solely upon what X was reported to have said. No investigation having been conducted, McFarlane LJ could not therefore accept "Peter Jackson J's assertion that 'the nature and extent of X's allegations mean that they could not readily be proved or disproved by reference to third parties or independent sources'; the position is that, unless or until the relevant adults are told of the allegations, it is simply too early to come to a conclusion on that issue. There is merit in the disclosure of this core material, so that it may properly be evaluated by A's mother, A's father and A's professional representatives, that merit is freestanding and has value irrespective of whether or not in due course X could be called to give oral evidence" (paragraph 74).

Having found that Peter Jackson J fell into error, McFarlane LJ found that the Court of Appeal had to undertake the disclosure application itself. He found that the impact of disclosure upon X was the only substantial factor against disclosure, but that it was a very significant factor, both in terms of its importance in principle but also because of the serious consequences that might follow disclosure for X's well-being. In terms of characterisation of the impact upon X in terms of the ECHR, McFarlane J agreed with "that the act of disclosure falls short of engaging Art 3 and does not amount to inhuman or degrading treatment. X's right to a private life, which includes not only confidentiality of information relating to her life but also her ability to live that life as she would wish, is, however, plainly engaged. The state, in this context that is the court, may only act in breach of those rights in a manner which is compatible with Art 8(2), that is because it is necessary to do so and that what is proposed is proportionate to the identified need" (paragraph 80).

McFarlane LJ then went through and examined each of reasons given by Peter Jackson J for non-disclosure, before at paragraphs 91 ff concluding thus:

> "91. Drawing matters together, the balance that has to be struck must accord due respect to X's Art 8 rights on the one hand and the Art 6 and 8 rights of A and her parents, and the marginal impact of A's Art 3 rights, on the other. In conducting the balance no one right attracts automatic precedence over another, however Art 8 rights are qualified whereas those under Art 6 are not qualified. The presence of A's Art 3 rights is to be highlighted; they are of marginal impact on this issue, but their presence flags up the importance of the issue (serious sexual abuse) to which the disclosure relates. The evaluation of necessity and proportionality is to be conducted on the basis of the current situation, taking account of the fact that the state has already seen fit to breach X's Art 8 rights by making the disclosure that has taken place to the mother and the state has effectively required the mother to commence these proceedings with a view to achieving orders that protect A from a risk that the local authority has described as credible. In terms of A's interests and those of her parents, the undisclosed material is absolutely central to the issue of contact that has been brought before the court.
>
> 92. For the purposes of this evaluation it must be assumed that the local authority was justified in acting as it did in relation to A's mother. Where the state has decided to breach X's Art 8 rights to that degree, and where the fallout from that disclosure leaves the mother in the difficult position that she so clearly describes, only very exceptional circumstances are likely to justify the court, also

acting as an arm of the state, in refusing full disclosure of the material to the mother and in turn to the father and A's representatives.

93. Adopting the words of Munby J in *Re B (Disclosure to Other Parties)* [[2001] 2 FLR 1017], which were endorsed by this court in *Re B, R and C* [[2002] EWCA Civ 1825], the case for non-disclosure must be 'convincingly and compellingly demonstrated' and will only be sanctioned where 'the situation imperatively demands it'.

94. This is a hard and difficult decision. It is made so by the fact that the stakes are high on both sides of the equation. The description of X's mental and physical health difficulties are towards the top end of the spectrum. The issues for A and her family arising from what X has said are similarly of great magnitude.

95. In answer to the questions posed within structure established by Lord Mustill in *Re D* [[1996] AC 593]:

a) there is a real possibility that disclosure will cause significant harm to X's mental and physical health;

b) the interests of X would benefit from non-disclosure, but the interests of A favour disclosure. It is in A's interests that the material is known to her parents and is properly tested. There is a balance to be struck between the adverse impact on X's interest and the benefit to be gained by A;

c) If that balance favoured non-disclosure, I would in any event evaluate the importance of the undisclosed material as being central to the whole issue of contact and the life-long structure of the relationships within A's family. In fact, X's allegations represent the entirety of the 'issue' in the family proceedings. There is therefore a high priority to be put upon both parents having the opportunity to see and respond to this material.

96. For the reasons that I have given, and approaching the matter in way that I have described, I am clear that the balance of rights comes down in favour of the disclosure of X's identity and of the records of the substance of her sexual abuse allegations to the mother, the father and A's children's guardian."

Hallett and Thorpe LJJ agreed.

Comment

It is – sadly – not uncommon that very serious allegations are made in the context of (in particular) welfare applications in the COP. It is also not uncommon that contentions are advanced by a party holding information that disclosure of that information be withheld from another party on the basis of its adverse impact upon another (most frequently P). We would suggest that the guidance given in this case applies with equal force in the COP as it does in the Family Division (there being no material differences in the regimes that apply – cf the provisions of the First Tier Tribunal (Mental Health) Rules allowing for disclosure to legal representatives alone). In particular, we would echo the clear steer of the Court of Appeal that the dicta that justice must not just be done but be seen to be done applies with particular force where (for proper reasons) much of what happens can seem to happen behind closed doors.

AMENDMENT OF SCHEDULE 3 TO THE MCA 2005

On 27 July 2012, the United Kingdom ratified (finally) the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. The Convention will enter into force for the United Kingdom on 1 November 2012. By virtue of the operation of Paragraph 10 of Schedule to the Parental

Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations (SI 2010/1898), the definition of 'adult' for purposes of Schedule 3 to the MCA 2005 will be amended, so that paragraph 4 will read:

> "(1) Adult" means (subject to sub-paragraph (2)) a person who –
>
> as a result of an impairment or insufficiency of his personal faculties, cannot protect his interests, and
>
> has reached 16.
>
> (2) But "adult" does not include a child to whom either of the following applies —
>
> the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children that was signed at The Hague on 19 October 1996;
>
> Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility."

The effect of this amendment is – in essence – to ensure that (at least for purposes of the Court considering cross-border matters) a person without capacity to take decisions regarding their health and welfare/property and affairs who is aged 16 or 17 will now fall to be considered in one of three ways:

(a) Under the 1996 Hague Convention (the counterpart to the 2000 Hague Convention as regards international cooperation and resolution of conflicts of laws issues);

(b) Under Council Regulation (EC) No. 2201/2003 ('Brussels IIR'), covering EU countries (and discussed in our July newsletter in relation to the case of *HSE Ireland v SF (A Minor)* [2012] EWHC 1640 (Fam));

(c) As an adult without capacity.

SERIOUS CASE REVIEW INTO THE MURDER OF MARTIN HYDE

With thanks to Helen Clift at the Official Solicitor's office for bringing this to attention, we note the conclusions of the serious case review commissioned by Stockport Safeguarding Adults Board into the murder of Martin Hyde, who was killed in November 2009, aged 22, following months of violence at the hands of his eventual murderers and others. For present purposes, we note the criticisms levelled of the approach taken by Stockport's Children services to the MCA 2005 (as reported at http://www.communitycare.co.uk/Articles/14/09/2012/118526/scr-murdered-care-leaver-wrongly-denied-adult-care-assessment.htm). In particular, we note that Mr Hyde's capacity to take decisions (it would appear regarding both health and welfare and property and affairs) had never been assessed under the Act, despite the fact that he used alcohol and cannabis, and made a number of objectively unwise decisions which placed him at risk of harm. Whilst the Serious Case Review noted the presumption of capacity in the MCA 2005, it concluded on the facts of Mr Hyde's case that it was "questionable" whether agencies' assumption of capacity was reasonable, adding: "[t]he presumption of

capacity does not exempt authorities and services from undertaking robust assessments where a person's apparent decision is manifestly contrary to his wellbeing."

DRAFT INDIAN RIGHTS OF PERSONS WITH DISABILITIES BILL

And now for something completely different: with thanks to Lucy Series, we wanted to draw to your attention the recent publication of a Rights of Persons with Disabilities Bill in India (http://socialjustice.nic.in/pwd2011.php). It (and the 2011 report prepared by the Committee charged with drafting the legislation) makes interesting reading, especially alongside the debates taking place in the Republic of Ireland surrounding the introduction of a bill to address the position of those without capacity to take decisions for themselves. For those seeking to bring comparative perspectives to their understanding of the MCA 2005, valuable insights can be found from the experiences in both countries in seeking to implement the provisions of Article 12 of the UN Convention on the Rights of Persons with Disabilities and the emphasis there upon the support to be offered to those with disabilities to exercise an equal legal capacity to those without disabilities.

ISSUE 27 NOVEMBER 2012 COURT OF PROTECTION UPDATE

NYC V PC AND NC (UNREPORTED, 20.7.12)

Capacity; Contact

This case concerned a 48 year old woman with mild learning disabilities called PC. She lived independently in the community, and had previously formed a relationship with NC. NC was then convicted and imprisoned for sexual offences. While he was in prison, PC and NC married. PC did not accept that NC was guilty of the offences for which he was convicted and wanted him to live with her on his release. As NC's release date approached, the local authority applied to the court for a declaration that it was in PC's best interests that she resumed her married life with NC when he was released from prison, on the basis that the risk he posed to her was outweighed by the likely distress that would be caused were they to be prevented from continuing their relationship. The court was asked to determine whether PC had capacity to decide to have contact with NC and to live with him, and if she did not, whether it was in her best interests to resume her married life with him.

Hedley J was confronted with legal submissions as to whether a decision about contact should be viewed as person-specific or not – perhaps PC lacked capacity to decide whether to spend time with NC, but had capacity to make decisions about contact with other people. Hedley J set out his approach to the issue in the following way:

> "19. There has been considerable debate as to whether the issue of capacity to decide on contact should or should not be person specific, that is to say whether it should or should not in this case focus on NC. This is in part derived from the terms of section 17 of the Act. However, it seems to me that what the statute requires is the fixing of attention upon the actual decision in hand. It is the capacity to take a specific decision, or a decision of a specific nature, with which the Act is concerned. Sometimes that will most certainly be generic. Can this person make any decision as to residence or contact or care by reason of, for example, their dementia? Or does this person have any capacity to consent to sexual relations by reason of an impairment of mind which appears to withdraw all the usual restraints that are in place? Such generic assessments will often be

necessary in order to devise effective protective measures for the benefit of the protected person, but it will not always be so. There will be cases, for example, in relation to medical treatment where attention is centred not only on a specific treatment or action but on the specific circumstances prevailing at the time of the person whose decision making capacity is in question. The hysteric resisting treatment in the course of delivering a child is an example from my own experience. Accordingly, I see no reason why in the construction of the statute in any particular case the question of capacity should not arise in relation to an individual or in relation to specific decision making relating to a specific person. In my judgment, given the presumption of capacity in section 1(2) this may indeed be very necessary to prevent the powers of the Court of Protection, which can be both invasive and draconian, being defined or exercised more widely than is strictly necessary in each particular case.

20. It follows that in my judgment, rather than making a general finding about whether the question to be considered should or should not involve in it any particular individual, my task, as I understand it, is to articulate the question actually under discussion in the case and to apply the statutory capacity test to that decision. The question in this case surely is this: should PC take up married life with NC now that, in terms of imprisonment and licence, he is free to do so? It is a decision which any wife in her position would be required to take and it is a decision that does not admit only of one answer. Thus, the question of capacity is important. All the other issues raised, care, residence and contact, are peripheral, save insofar as they bear on the question of the resumption of the long interrupted cohabitation of PC and NC. Although that is a narrow issue it is, in my judgment, a seriously justiciable issue to which the court should give its proper attention and make a decision."

Applying that approach, the court concluded that PC lacked capacity to make the relevant decision. Because of her mental impairment, she was "unable to weigh the information underpinning that potential risk so as to determine whether or not such a risk either exists or should be run, and should, therefore, be part of her decision to resume cohabitation."

PC's social worker considered that, notwithstanding the risks that NC posed to PC in light of his offending history, it was in PC's best interests for them to resume their married life. The alternative, of restraining PC from seeing NC, would have been seriously distressing for PC.

The court agreed, observing that it would be impractical and effectively unenforceable because of PC's strongly held wishes. Hedley J expressed the view that "faithfulness to the policy behind section 4(4), and potentially behind section 4(6), is that it may be necessary from time to time to leave open to the protected person the option of taking an unwise decision which others, who are fully capacitous in her position, may themselves have taken."

Comment

This is an illuminating and instructive judgment which, in our view sets out in clear terms the correct approach to the assessment of capacity under the MCA. Capacity is decision-specific, not issue-specific, situation-specific or person-specific, although factors such as the situation in which a decision falls to be made, and the identity of people involved in the decision may well be relevant. It must be correct that a person could have capacity to decide to see A but not B where the information relevant to each decision is different

because of the different risks posed by A and B, provided that the reason why the person cannot understand or weigh that information is their mental impairment.

The acceptance by the court that it can be in P's best interests for an unwise or risky decision to be made is similarly welcome, and could usefully be applied to decisions about the return home of elderly people whose physical care needs would be better met in a residential setting, but who have a strong desire to live in their own homes.

A, B AND C V X, Y AND Z [2012] EWHC 2400 (COP)
Mental capacity; Marriage; Finance; Litigation

In this important case, Hedley J was required in respect of an elderly gentleman called X to consider his capacity to: (1) marry; (2) make a will; (3) revoke or grant an enduring or lasting power of attorney; (4) manage his affairs; (5) litigate; and (6) litigate. Hedley J was also required to consider whether he had capacity to decide with whom he had contact, although that last issue was not for immediate determination.

Whilst the judgment is of importance for the approach taken to the questions of capacity, they can only properly be understood against the (Tolstoyan) background set out by Hedley J.

The first of two key events in the case occurred in April 2008, when X's former wife died. They had been married for 56 years. It is clear that her death was not only a great shock to X and to the whole family, but it forced into the open a state of affairs which had hitherto been managed within the family. The immediate family consisted of three adult children known as A, B and C, all of whom were themselves married with children. Hedley J found that, even making all allowances for family loyalty and respect, it was quite clear that this was a close and trusting family, in which X held a revered role as a loved and respected husband, parent and grandfather. It is also the case that he was a man of significant means deriving from the family business. X was clearly a skilled and highly intelligent man. However, he was bored by, and therefore not very effective at, routine business administration, which he usually entrusted to others, whether a secretary, a professional or a family member. However, by 2007, the family were becoming anxious because of X's increasing tendency to forget things and to get lost; so much so that, in November 2007, Mrs B took over the running of his affairs. However, personal relations within the family appeared to be unaffected by these matters. In May 2008, after the death of his wife, X was diagnosed with dementia. In September 2008, he executed lasting powers of attorney in favour of A, B and C.

In 2010, Z came on the scene. Hedley J found that this marked the second key shift in events in this case. In July 2010, she was employed as a full-time carer. In October 2010, X said that he would like to marry Z. From that point on, relationships within the family deteriorated badly quite rapidly and ultimately found expression in litigation brought by A, B and C.

Hedley J was quite satisfied that all three of A, B and C were wholly honourable in their intentions towards X, and sought his best interests in all matters. Unfortunately, that had not always been recognised by X. He was also satisfied that Z was honourably disposed towards X; however, she was "a persistent, effective and somewhat strident woman with a style that the others have come to resent. She and A were designed to clash, and clash they did; a clash made more toxic by each entertaining serious doubts about the good faith of the other towards X.

X was therefore put in an impossible position. He clearly believed himself to be in love with Z, and indeed they were cohabiting. He looked to her to help him, and became (in Hedley J's view) highly influenced by her and increasingly dependent upon her, taking in consequence her side on many issues. In consequence of a conflict which he could neither understand nor control, he apparently became estranged from his children (albeit, in the absence of Z, Hedley J accepted that he enjoyed a warm and close relationship with his family, as he did with Z in the absence of A, B and C; "[r]emove the conflict and you remove many of X's problems" (para 15).

Hedley J had medical evidence before him from three experts, one instructed by each of the sides, and the other (whose instruction had been recommended by the other two) jointly instructed. Hedley J expressed his regret that (in part because of the differences in the practice of the two psychiatrists), "each appeared as one instructed by the side whose views they supported" (para 16), albeit that he emphasised that he recognised that this was not in fact so. He had no such reservations about the impression given by the evidence of the neuropsychiatrist. He made clear, however, that in reaching his views, he had not relied upon the conclusions expressed by the experts, but "only on the steps of reasoning and the factual basis which led them to their views" (para 20).

Having analysed the evidence in some detail, Hedley J declared himself satisfied – by way of general background – that "in respect of some issues of capacity the areas of complex thought abilities may play a more significant role than in others. Moreover, I am satisfied that in some respects X's capacity may fluctuate. That explains differences in experience that are, as I find, accurately reported and assessed by the three forensic experts" (para 27).

Hedley J then turned to the specific issues in respect of which he had to determine X's capacity to take decisions, and found thus:

Marriage
As regards the capacity to marry, Hedley J expressed himself in complete and respectful agreement with the approach taken by Munby J (as he then was) in the (pre MCA 2005) case of *Sheffield City Council v E & Anr* [2005] 2 WLR 953, and specifically associated himself with the final observation made by Munby J (at paragraph 144) that:

> "There are many people in our society who may be of limited or borderline capacity but whose lives are immensely enriched by marriage. We must be careful not to set the test of capacity to marry too high, lest it operate as an unfair, unnecessary and indeed discriminatory bar against the mentally disabled."

Asking himself whether A, B and C had satisfied him that X lacked the capacity to marry (i.e. to give effect to the presumption of capacity in s.1(2) MCA 2005), he found that they had not:

> "32. … Although I accept that X has suffered a significant decline in executive function, he retains many aspects of his intelligence in the fundamental level and it is at that point that it is important to have in mind that the requirements of capacity to marry are comparatively modest. I actually think it highly probable that he retains an understanding of the marriage contract and that his 56 years of beneficent experience of marriage has firmly etched upon his understanding the duties and responsibilities that go with it. Certainly I am not satisfied to the reverse and I decline to make any declaration that he lacks capacity to marry. I add only this, inevitably. Whether any decision that he might take to marry is

wise or unwise, whether it leads to happiness or regret, is simply none of my business and I am simply unable to take into account any specific plans he might have in that direction."

Capacity to make a will

Turning to X's capacity to make a will, Hedley J reminded himself that the law was long-established, derived from the decision in *Banks v Goodfellow* [1870] LR 5 QB 549. Applying the principles to the facts before him, he confessed that he had found answering the question whether the Applicants had discharged the burden upon them "quite difficult." He continued:

> "36. On the one hand, if one looks at X's statement, he demonstrates an understanding of his obligations and makes perfectly sensible and proper proposals as to what should be in his will. On the other hand, I am impressed by the medical evidence, which points out a dramatic decline in executing functioning in the context of further inevitable deterioration, and that seems to me to raise serious concerns as X's own affairs are relatively complicated. I have also borne in mind the differing impressions of the doctors in relation to this question of testamentary capacity and the factors that I set out earlier in this judgment which may have the affect of retarding on the one hand or accelerating on the other the deteriorating progress of this disease.

Hedley J came to the conclusion that he could not make a general declaration that X lacks testamentary capacity, "but that [conclusion] needs to be strongly qualified. "There will undoubtedly be times when he does lack testamentary capacity. There will be many times when he does not do so. The times when he does lack such capacity are likely to become more frequent. It follows that, in my judgment, any will now made by X, if unaccompanied by contemporary medical evidence asserting capacity, may be seriously open to challenge. I draw attention, if I may, to a helpful passage in Heywood & Massey, provided by Counsel for the Applicants, at paragraph 4046, which deals with borderline capacity. It seems to me that the advice contained in that is very much applicable to this case" (para 37).

Capacity to revoke or create enduring or lasting powers of attorney

Hedley J found with relative ease that the Applicants had not satisfied him that X lacked capacity to revoke a power of attorney in their favour (if, indeed, that was a live issue as the revocation had been accepted and the registration cancelled). The question of whether X had the power to create an EPA much more difficult for the same reasons as applied in relation to testamentary capacity. Unsurprisingly, perhaps, he reached the same conclusion, namely that he could not make a general declaration that X lacked the capacity, but that this was qualified "the exercise of such a power, unless accompanied by contemporary medical evidence of capacity, would give rise to a serious risk of challenge or of refusal to register. It seems to me, for exactly the same reasons as I endeavoured to set out in relation to testamentary capacity, that X's capacity is likely to diminish in the future and there will be times when undoubtedly he lacks capacity, just as there will be times when he retains it" (para 38)

The management of affairs

Applying, in particular, the approached adopted by Kennedy LJ in *Masterman-Lister v Brutton & Co & Ors* [2003] 1 WLR 1511 (paragraph 18-20), Hedley J found (on the basis of the evidence of the neuropsychiatrist) that, on balance, X lacked the capacity to manage his own affairs. However,

> "41… In so finding, I acknowledge, as I have done in relation to the other matters, that there would be times when a snapshot of his condition would reveal an ability to manage his affairs, but the general concept of managing affairs is an ongoing act and, therefore, quite unlike the specific act of making a will or making an enduring power of attorney. The management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent. In the context of the evidence that I have, I am not satisfied that he has capacity to manage his affairs."

Litigation capacity

Hedley J identified the heart of the test as being that formulated by Chadwick LJ in Masterman-Lister at paragraph 75, as being whether:

> "… the party to the legal proceedings is capable of understanding, with the assistance of proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a next friend."

Importantly, Hedley J noted that, whilst the question of capacity to litigate "inevitably follows closely" on the question of the management of one's own affairs, it required (at least on the facts of the case before him) separate consideration because "it does operate in a separate and more restricted time frame, but a time frame quite different to the decision to make a will or to grant a power of attorney" (para 44).

Hedley J noted, but discounted, X's hearing difficulties, because they were irrelevant to the question of capacity (the hearing difficulties having been addressed and X in consequence having been able to "hear the essence of what has gone on in this hearing" (para 44). However, he found that, on balance, and looked at in the round, X lacked the capacity to conduct the litigation, made in light of the factors identified already in the judgment.

Hedley J noted that he would not have wished to make any decision upon X's capacity to decide with whom he should have contact if a finding had been sought, emphasising that "[t]he idea that this distinguished elderly gentleman's life should be circumscribed by contact provisions as though he was a child in a separated family is, I have to say, deeply unattractive. I believe that, on reflection, the parties may be inclined to think so too" (para 46). He concluded with an injunction to the parties to take stock of the fact that the greatest gift that anyone could bestow upon X would be to bring the conflict between them to an end so as to allow the time that was left to X to be one that could be enjoyed by family old and "if circumstances so decide" new as well (para 48).

Practice points

At the outset of his judgment (para 3), Hedley J identified two case management lessons which he believed the case taught: "[t]he first is the need in the Court of Protection for a much greater emphasis on the importance of judicial continuity and, secondly, for the need for a pre-hearing review in respect of any case which is estimated to last three days or more. Either or both of those matters may have had the effect of avoiding the rather bruising experience of the first afternoon, when it seemed at least to me, rightly or wrongly, that there was a lack of clear direction in terms of the trial." In the event, the parties conducted themselves in such a way that it was possible to overcome the

difficulties caused by late filing of quite substantial amounts of evidence and bring about a focused and relatively expeditious hearing.

Comment

It is slightly ironic that we have reported previously the judgment of Hedley J in *LB Haringey v FG & Ors* (No. 1) [2011] EWHC 3932 (COP) in which he decried undue citation of first instance judgments upon questions of capacity, because (at the risk of sounding unduly deferential), the judgments given in both this case and that of *NYC v PC and NC* (discussed elsewhere in this newsletter) represent paradigms of the approaches that should be taken to the assessment of capacity. It is, further, of particular significance for the following reasons:

1. Its confirmation that the approach adopted by Munby J in *Sheffield City Council v E* to the capacity to consent to marry remains the right one, and its endorsement of the clear principle that the bar must not be set too high (to similar effect in the latter regard, see also the judgment of Baker J in *PH v A Local Authority and Z Limited and another* [2011] EWHC 1704;

2. The 'qualified' declarations made by Hedley J regarding X's capacity both to make a will and to create an EPA. Such declarations (which really amount to declarations which must be read together with the accompanying passage of the judgment) may not find an express place in the scheme of the MCA 2005, but they represent a way in which the immensely complicated questions of borderline/fluctuating capacity can pragmatically be answered in such a way as to preserve P's autonomy to the maximum extent possible compatible with the protection of their interests;

3. The approach taken to the question of managing X's affairs, and the distinction drawn there between an ongoing state of affairs and the doing of a specific act (or acts). We might also suggest that this distinction could appropriately be drawn in respect of other ongoing states of affairs – for instance, as to whom X wishes to have living in their house – where, at times, a snapshot of their condition would suggest that they had the capacity to take the decision, but otherwise they lacked the capacity to do so. As such, it potentially provides a further way in which to cut the otherwise philosophically Gordian knot of fluctuating capacity;

4. The approach to the expert evidence, and the (re)emphasis upon the point – made also by Baker J in *PH and CC v KK* [2012] EWHC 2136 (COP) – that it is for the Court, and not for the experts, to determine whether the individual in question has the material capacity;

5. The case management points made at the outset of the judgment – lack of judicial continuity, in particular, being a matter which plagues applications before the Court of Protection given the length of time they can take to resolve. Whether Hedley J's plea for greater emphasis to be placed upon such continuity will be capable of being addressed remains to be seen.

AN NHS TRUST V (1) K AND (2) ANOTHER FOUNDATION TRUST [2012] EWHC 2922 (COP)

Best interests; Medical treatment

K had cancer of the uterus. She could be cured by a potentially life-saving operation. However, because of other co-morbidities (in particular her obesity) and other factors there was a considerable risk that she could die during the operation or in the post-

operative recovery period. Because of chronic and long-standing mental illness, she lacked the capacity to make an informed decision, denying that she had cancer at all. She opposed and was resistant to the operation. The medical team at the hospital considered that she would benefit from the operation and would like to perform it. K's three adult sons (who were not formally represented, but from the Court heard) all strongly desired that she should have the operation and felt that the potential benefit outweighs the risk. The Official Solicitor, relying upon the evidence of an independent intensivist/ anaesthetic expert, considered that the operation was too risky because of the risk that she would die during the overall operative period, in particular during the recovery phase, a risk that the expert placed at some 40-50%.

Holman J was therefore asked to determine whether it was in K's overall best interests to have the operation or not. Having set out in detail the evidence as to risk during the post-operative period, he noted (paragraph 36) that the operation had previously been scheduled for a date in July 2012, but on that occasion she had become so agitated and resistant while in the ward prior to anaesthesia that it had to be abandoned (this being the event that triggered the application to the Court of Protection). This raised the "very serious issue and concern as to how, even if the court determines that the operation is in her best interests, it can actually be achieved without her pre-operative compliance…" Holman J accepted that it would be objectively in K's best interests to be "less than frank" with her so as to achieve her admission to hospital; and that whilst such a course of action "might appear to offend the legal requirement of section 4(4) of the Mental Capacity Act 2005 [that the person be permitted and encouraged to participate in the relevant decision/act] but that is qualified by the words 'so far as reasonably practicable" (paragraph 37). However,

> "38. Greater difficulties arise… once she is at the hospital and the operation is scheduled to begin. She must be told in sympathetic and straightforward language what is proposed. Mr. J himself would not be willing to operate without having first told her. The sons and others predict, however, that no sooner is she told this than, just as in July, she would become physically resistant. This has led to much discussion during the evidence and the hearing as to the legality, ethics and medical impact of the use at that point of physical restraint so that she could be sedated and later anaesthetised.
> 39. I can, however, cut through it. There is medical evidence, to which I have already referred, to the effect that it could be very risky to apply physical restraint to Mrs. K in view, in particular, of her prolonged QT interval. It would be particularly risky immediately prior to anaesthesia. No one now advocates the use of physical restraint and it would not be employed at any stage pre-operatively.
> 40. A separate and discrete issue is, however, whether she might first be lightly sedated before being told, so that, it is hoped, she is compliant and not resistant as in July. This, too, has been the subject of considerable discussion and evidence. In the upshot, the declaration which the applicant Trust invite me to make on this issue (if I consider that the operation as a whole may take place) is that 'it shall be lawful for sedation to be administered by, and thereafter continuously monitored by, a qualified anaesthetist before Mrs. K is informed that it is proposed to carry out the [proposed] surgery and anaesthesia'.
> 41. Again, the sons have pressed upon me the logical argument that if it is in her overall best interests to have the operation, it must be in her best interests to have the sedation, unless medically contraindicated at the time, to enable the operation to take place. If I do decide to make an order permissive of the operation, the Official Solicitor does not oppose a consequential declaration in the above terms.

> 42. As to the lawfulness of doing so, my attention has been drawn to a decision of Sir Nicholas Wall, President, in *DH NHS Foundation Trust v PS* [2010] EWHC 1217 (Fam). In that case a hysterectomy was in the best interests of a patient who had agreed on previous occasions to undergo the operation, but had been overcome on the day by fear and needle phobia. The President made an order which approved a plan which included provision for covert sedation at the patient's home with a sedative drug mixed with a soft drink such as Ribena. (In that case there was provision also for the use of force if necessary to sedate her and convey her to hospital - see paragraph 19 of the judgment - but there were not the medical risks associated with co-morbidities that there are in this case.)
> 43. Although there are many factual differences between that case and this one, that authority does satisfy me that if it is in Mrs. K's overall best interests to have the operation, it can be lawful, and in her best interests, to sedate her to enable it to take place, and lawful to do so before she is told, after sedation but before anaesthesia, what is planned. There must be a qualified anaesthetist (not necessarily at that stage Dr. VB herself) throughout.
> 44. I do consider that an ethical issue may arise as to the degree of sedation and whether the surgeon can ethically proceed to operate unless he has given to the patient an adequate account of what he proposes to do while she retains sufficient awareness to hear it and take it in. But that is an ethical matter for him. I am satisfied that a declaration in the terms I have just quoted would, on the issue of sedation, be in her best interests and is lawful."

Turning to the question of K's overall best interests, Holman J found that the only really significant countervailing factor to place in the balance sheet against the benefits of carrying out the operation was the risk of death in the overall operative period. Having reviewed the evidence on this point, he concluded (paragraph 50) that, viewing the evidence as a whole, the independent expert whose views were relied upon by the Official Solicitor "may have been unduly pessimistic. The evidence as a whole supports that the actual risk of mortality peri-operatively for this patient, if there is no attempt at lymphnodectomy, is closer to 5% than to 40 or 50%. Even if the risk is of the order not of 5% but of 10%, it seems to me to be a risk worth taking. I differ, therefore, from the Official Solicitor not because I would regard a 40 to 50% risk as acceptable, but because it seems to me, on all the available evidence, that although the risk of post-operative mortality is high, it is not so high as the assessment and position of the Official Solicitor assumes." Given the considerably more speculative benefit to be derived from a lymphnodectomy, the Trust was ultimately not pressing for a declaration to extend to authorising such a procedure.

Holman J then turned to who should have a power of 'veto,' discussing the question thus:

> "52. No one, nor any court, can order or require any doctor to take any step. The court can only permit it. It follows, of course, as I wish to make crystal clear, that my intended order will permit and render lawful the procedures described, notwithstanding the lack of consent of the patient. Right up to the last moment, however, it must remain a matter for the individual professional judgement of Dr. VB [the consultant anaesthetist] and Mr. J [the consultant gynaecological surgeon] whether they think it justifiable to embark on the sedation, the anaesthesia and the surgery. Each of them has, therefore, a practical power of veto. I intend, nevertheless, to make it express on the face of the order that the proposed declaration ceases until further order to be of any effect if at any stage

prior to the actual sedation, anaesthesia or surgery either Dr. VB or Mr. J notifies her/his colleagues that she/he considers it should not take place."

Given the particular nature of Mrs K's case and of her multiple co-morbidities, together with the high risks of post-operative complications and of post-operative mortality Holman J considered that a temporary power of veto should also extend to Dr W, the intensivist (paragraph 54) if she considered that the risk of post-operative mortality had simply become too great; because of her particular psychiatric complications and needs, he also considered that the professor of psychological medicine who would be in charge of her psychological wellbeing whilst she was at the hospital should also be given an effective power of veto (paragraph 55). Turning to the position of the sons, Holman J had this to say:

> "56. I wish to stress very clearly that the power and duty to make the best interests decision and consequential declarations is vested in the court alone. It is my duty to take responsibility for my decision, and although it is a heavy burden I, and I alone, do so. But in reaching that decision I have paid considerable regard to the position and views of the three sons, which I respect. They are not doctors but they know their mother well and each of them would be heavily involved during her recovery and convalescence. I do not make the declarations because they ask me to do so; but I might well have refused to make the declarations if they had raised any reasoned opposition to them.
> 57. Circumstances may change. They may reassess issues, such as the mental state of their mother or her likely post-operative compliance. For that reason, although the operation does not require their consent, there must be a temporary brake upon it if any of them notifies the doctors, making reference to the relevant part of the court order, that he no longer considers that the operation should take place. I stress that all these powers of veto or brakes are temporary, not absolute. They would halt the process but would not preclude further consideration by the court (myself if possible) in the light of the changed circumstances."

Comment

This case could properly stand as a case study of a medical treatment application in the COP, because it shows the careful application of the provisions of the MCA 2005 to the very particular facts before the Court, and, in particular, the close analysis of the evidence of the risks that would present themselves if the operation went ahead. Section 4 does not prescribe an outcome in any given case, but s.4 (and the 'balance sheet' approach) allows the Court to take a structured approach to identifying what outcome can properly be said to be in P's best interests.

That having been said, it would be interesting to learn the basis upon which the NHS Trust had not sought the authorisation of the Court prior to making the abortive attempt to undertake the operation in July 2012. Whilst Holman J made no criticism at all of the Trust in this regard, it would seem from the face of the judgment to have been a case in which the Practice Direction 9E would have mandated an application to be made, not least given the fine balance between the benefits to Mrs K of the operation and the burdens and risks that it was likely to entail.

AN NHS TRUST V MR AND MRS H & ORS [2012] EWHC B18 (FAM)

Medical treatment; Treatment withdrawal

In these proceedings the Court was asked to consider an application by an NHS Trust for best interests declarations approving a medical treatment plan relating to KH.

KH was a three and a half year old boy. When he was just over a month old he contracted a Herpes virus infection which caused viral encephalitis. As a result, he sustained a serious brain injury and now functions below the level of a new born baby. He had a number of complex additional medical complications, is unable to communicate and was entirely dependent on his foster carer.

The medical treatment plan at issue provided that life sustaining treatment should be withheld from KH when (as inevitably it would), his medical condition deteriorated on the basis that it would not be in his best interests aggressively to treat him in those circumstances. The plan was supported by the Trust and his foster carer. His parents lacked capacity to make decisions about his medical treatment and were represented in the proceedings by the Official Solicitor. They were unable to support the plan fully. The plan was opposed by the Children's Guardian and the Local Authority who were unable to support a medical treatment plan which proposed to withhold life sustaining treatment.

The NHS Trust invited the Court to declare that it was lawful and in KH's best interests "to have medical treatment withheld in the circumstances as described in the attached Advanced Care Plan."

In his judgment, Peter Jackson J summarised the state of the law in relation to the withdrawal of or withholding of medical treatment from children, endorsing in so doing the guidance produced by the Royal College of Paediatrics and Child Health upon "Withholding or Withdrawing Life Sustaining Treatment in Children: A Framework for Practice" (Second Edition) May 2004. He also indicated that he found some guidance as to how best to approach the question of the "best interests" test applicable by reference to s.4 MCA 2005 (although it had no legal application with regard to the Court's inherent jurisdiction in this regard).

As regards the fact that KH's parents lacked litigation capacity, he had this to say:

> "10. In this case, KH's parents have been found to lack litigation capacity and it is understood that they are to be represented by the Official Solicitor as next friend. In these circumstances it is submitted that to be consistent with the Mental Capacity Act 2005 as amended, and in particular section 4(6) of that Act, regard should be had to the parents' wishes and feelings, but only to the extent that these relate to KH's best interests, which are for the Court to assess objectively. As stated by Holman J at 8x) above, 'Their own wishes, however understandable in human terms, are wholly irrelevant to consideration of the objective best interests of the child save to the extent in any given case that they may illuminate the quality and value to the child of the child/parent relationship'. A fortiori, this caveat must apply more forcefully to the views or wishes of parents without capacity who are not themselves looking after the child in question. The Official Solicitor, acting as litigation friend for KH's parents, should of course seek to advance a position in the 'best interests' of KH's parents rather than KH himself. It is important to note, therefore, that whilst the Official Solicitor's views in this regard may well elide with the 'best interests' of KH, there is this distinction to be made. This contrasts with the Official Solicitor's usual role in Court of Protection proceedings, where he seeks to advance P's best interests (rather than those of other Respondents to such proceedings).
> […]

> 16. My only other comment relates to the statement in paragraph 10 of Mr Hallin's summary that: 'A fortiori, this caveat [i.e. the irrelevance of the wishes of others, save to the extent that they cast light on objective best interests] must apply more forcefully to the views or wishes of parents without capacity who are not themselves looking after the child in question.' I readily accept that an involved and capacitous parent may be better placed to express views that assist in assessing best interests than one who is less involved or capacitous, but that is a matter of evidence and not one of principle. Parents who lack capacity may still make telling points about welfare and it would be wrong to discount the weight to be attached to their views simply because of incapacity. It is the validity of the views that matter, not the capacity of the person that holds them. In the present case, I have not discounted the views of the mother on the ground that she is represented by a litigation friend (the Official Solicitor) who does not oppose the declarations sought by the Trust, but have tried to approach her views on their merits."

Peter Jackson J held that it was appropriate that the matter had been brought to Court whilst KH was in relatively good health such that the issues could be fully explored in a way which would not have been possible if the parties had waited until he had deteriorated and been forced to make an urgent application. However, the corollary of that approach was that the medical issues had not fully crystallised. He went on to hold that there were difficulties with the request that the Trust had made, as the Court's function was to make decisions about specific issues on the basis of a factual substrata. Accordingly, open ended declarations should be avoided by Judges as they might need to be revisited in the future: *Wyatt v Portsmouth Hospital NHS Trust* [2005] EWCA Civ 1181 at paragraphs 117 and 188 per Wall LJ. Accordingly, his approach was to identify the treatment issues that needed to be determined and that were not likely to change over time and in respect of which declarations can be made.

On the facts of KH's case, those treatment issues were clear as his condition was well understood, the scope for improvement was almost nil, and the prospect and manner of deterioration was inevitable. Had there been a major issue over which there was uncertainty, it would not have been possible to resolve it in theory ahead of it crystallising in reality.

Comment

This case provides a useful overview of the current state of the law in relation to withholding life sustaining medical treatment from children, as well as a careful analysis of the approach to be adopted where one or more parent is (because of their own difficulties) unable to act for themselves in such proceedings. As such, it serves as an interesting counterpart to the Strasbourg decision in *RP*, discussed elsewhere in this newsletter. We would also suggest that the dicta "[i]t is the validity of the views that matter, not the capacity of the person that holds them" are dicta that are of general application, rather than confined to the specific instance of the case before Peter Jackson J.

The case also serves to highlight the difficulties in ensuring an appropriate balance between bringing an application before the Court timeously and waiting until such time as the medical issues have crystallised. In this regard, practitioners should note the approach the Court took to the declarations that were sought and, specifically, the focus on treatment options as opposed to the granting of an open ended declaration.

RE AS (UNREPORTED, 7.12.11)
Deputies; Financial and property affairs

With the permission of Senior Judge Lush, we can reproduce here the background to and the material passages from a judgment given in December 2011 upon an objection to the application for the appointment of a panel deputy, to which our attention has recently been drawn.

The Court summarised the background to the application, brought by a solicitor, SH (on the approved panel), that she be appointed property and affairs deputy for an elderly lady suffering from dementia, with specific authority to undertake the sale of a property. AS' niece, LC, objected to the appointment of the solicitor, proposing instead that she be appointed deputy. Before addressing the specific application before it, the Court set out the following as regards the appointment of a deputy:

> "**The law relating to the appointment of a deputy**
>
> Sections 1, 2, 3 and 4 of the Mental Capacity Act 2005 provide that, once it has been established that a person lacks capacity to make a particular decision at a particular time (such a person is referred to as "P" in the Act), then any act done or decision made by someone else on P's behalf must be done or made in her best interests.
>
> The Act does not define "best interests", but section 4 provides a checklist of factors that anyone making the decision must consider when deciding what is in P's best interests. These are:
>
> - whether they are likely to have capacity in relation to the matter in question in the future;
> - the need to permit and encourage them to participate, or to improve their ability to participate in the decision-making process;
> - their past and present wishes and feelings (and, in particular, any relevant written statement they made when they had capacity), the beliefs and values that would be likely to influence their decision, and any other factors they would consider if they were able to do so;
> - if it is practicable and appropriate to consult them, the views of others, such as family members, carers, and anyone else who has an interest in their welfare; and
> - whether the purpose for which any act or decision is needed can be as effectively achieved in a manner less restrictive of their freedom of action.
>
> If a person lacks capacity in relation to a matter or matters concerning his or her property and affairs or personal welfare, the Court of Protection may make any decision on her behalf, or may appoint a deputy to make decisions on her behalf in relation to the matter or matters (section 16(2)).
>
> Section 16(4) provides that, when deciding whether it is in P's best interests to appoint a deputy, the court must have regard to the principles that:
>
> a. a decision by the court is to be preferred to the appointment of a deputy to make a decision; and
> b. the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

Section 19 contains further provisions relating to the appointment of deputies, concluding at section 19(9) as follows:

> 'The court may require a deputy –
>
> (a) To give to the Public Guardian such security as the court thinks fit for the due discharge of his functions, and
> (b) To submit to the Public Guardians such reports at such times or at such intervals as the court may direct.'

When it appoints a deputy, the Court of Protection exercises its discretion. It has to exercise this discretion judicially, and in P's best interests. Many of the old authorities that used to govern the appointment of a receiver under Part VII of the Mental Health Act 1983 are probably still relevant with regard to the appointment of deputies.

These authorities generally acknowledged that there was an order of preference of persons who might be considered suitable for appointment as a receiver. I have called it an order of preference, rather than an order of priority, to avoid giving an erroneous impression that certain people were in the past automatically entitled to be appointed as receiver, or are automatically entitled now to be appointed as a deputy. They aren't. The Court of Protection has discretion as to whom it appoints. However, in the past, when appointing a receiver, it traditionally preferred relatives to strangers.

Generally speaking, the order of preference is:

- P's spouse or partner;
- any other relative who takes a personal interest in P's affairs
- a close friend;
- a professional adviser, such as the family's solicitor or accountant;
- a local authority's Social Services Department; and finally
- a panel deputy, as deputy of last resort.

To some extent this is borne out by the statistics. The Office of the Public Guardian supervises 34,000 deputies, 99% of whom are deputies for property and affairs. There are only 342 personal welfare deputies. 53% of deputies are family members; 26% are local authorities, and 21% are professional deputies, though not necessarily panel deputies of last resort.

The court prefers to appoint a family member or close friend, if is possible. This is because a relative or friend will already be familiar with P's affairs, and wishes and methods of communication. Someone who already has a close personal knowledge of P is also likely to be better able to meet the obligation of a deputy to consult with P, and to permit and encourage him to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him. And, because professionals charge for their services, the appointment of a relative or friend is generally preferred for reasons of economy.

In an unreported case, *In the matter of B* (No. 11579443), in which I handed down judgment on 15 August 2011, I made the following observations about the idea of deputyship of last resort:

'There is, however, another reason why I am allowing this application, which neither side really touched on at the hearing. It involves the whole concept of deputyship of last resort, and in this respect the history of these proceedings is relevant. Originally, IB applied to be appointed as his mother's deputy for property and affairs. His brother JB opposed the application and there were mutual allegations of financial abuse. A hearing date was set, but shortly before the hearing was due to take place, the brothers agreed a compromise and invited the court to appoint a panel deputy - or deputy of last resort – which court eventually did.

There is no longer any dispute between IB and JB and, as I understand it, the entire family unanimously supports IB's application to be appointed as deputy in place of Mr C. The question arises, therefore, whether there is still really a need for a deputy of last resort.

In *Re P* [2010] EWHC 1592 (COP) Mr Justice Hedley suggested that 'the court ought to start from the position that, where family members offer themselves as deputies, then, in the absence of family dispute or other evidence that raises queries as to their willingness or capacity to carry out those functions, the court ought to approach such an application with considerable openness and sympathy.' Michael Kirby, the President of the Court of Appeal in New South Wales, said much the same thing in *Holt v. The Protective Commissioner* (1993) 31 NSWLR 227. His remarks are even more pertinent because, whereas Hedley J was commenting on the court's discretion on an initial application for the appointment of a deputy, Kirby P was considering the somewhat different discretion that arises on an application to remove a deputy.

In some Common Law jurisdictions there is even an obligation on a deputy of last resort to seek a less restrictive alternative to his or her own appointment. For example section 744.704 of the 2010 Florida Code, in which the deputy of last resort is referred to as a 'public guardian', provides as follows:

(1) A public guardian may serve as a guardian of a person adjudicated incapacitated under this chapter if there is no family member or friend, other person, bank, or corporation willing and qualified to serve as guardian. ….

(6) The public guardian, when appointed guardian of an incapacitated person, shall seek a family member or friend, other person, bank, or corporation who is qualified and willing to serve as guardian. Upon determining that there is someone qualified and willing to serve as guardian, either the public guardian or the qualified person shall petition the court for appointment of a successor guardian.

I would not go so far as to suggest that a similar positive obligation arises in English Law, but there is a general principle in section 1(6) of the Mental Capacity Act 2005, which states that:

'Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved

in a way that is less restrictive of the person's rights and freedom of action.'

Generally speaking, from P's point of view, the appointment of a family member as a deputy will be a less restrictive alternative to the appointment of a panel deputy, though the question remains as to whether the appointment of a family member will achieve the desired objective as effectively as the appointment of a panel deputy.

There are, of course, cases in which the court would not countenance appointing a family member as deputy. For example, if there has been financial abuse or some other kind of abuse; if there is a conflict of interests; if the proposed deputy has an unsatisfactory track record in managing his own financial affairs; and if there is ongoing friction between various family members. This list is not exhaustive."

Upon the evidence before the Court, the Court considered that the application of SH would be "one of last resort, and there is simply no need in this case for an appointment of that nature," and accordingly appointed LC as AS's property and affairs deputy. As regards the question of costs, the Court did not depart from the general rule laid down in rule 156 of the Court of Protection Rules 2007.

Comment
There is still a paucity of decisions upon the appointment of deputies, and it is therefore very useful to have another indication of how applications are being considered in practice. This judgment is of particular interest as an indication of the order of preference that is likely to be adopted when the Court has decided to appoint a deputy. The question of whether to appoint a deputy (discussed in both *G v E* and *SBC v PBA* as well as *Re P*) is quite a different one, and the total figure of 342 for health and welfare deputies perhaps speaks for itself.

RE CLARKE [2012] EWHC 2256 (COP), [2012] EWHC 2714 (COP), [2012] EWHC 2974 (COP)
Deputies; Financial and property affairs; Capacity; Finance; Costs

These three cases are reported together. They bear note not so much for any principles to be derived from them, but as a (relatively rare) insight into the management by the Court of a contested property and affairs application, an insight granted by virtue (if such is the word) of the fact that, whilst the proceedings took place in private, "the manner in which [the applicant] Mr Michael Clarke has breached his mother's entitlement to privacy has been so comprehensive and long-standing that nothing is now to be gained by delivering the judgments in private for Mrs Clarke's benefit. On the contrary, in the light of Mr Michael Clarke's conduct, it is better that the court's reasons are made known" (judgment of 9.10.12 at paragraph 4).

Mr Clarke sought to discharge the property and affairs deputy appointed on behalf of his mother, who had received some time previously a substantial sum of damages in compensation for injuries sustained in road traffic accident (including brain injuries). By the time the matter came before the Court, she had one substantial asset, a property in Blackpool, and her remaining free capital had in effect run out; her income consisted of a state pension and DLA, together with payment of a household allowance and living expenses from her capital fund. Her son, with whom she lived for most of the time in Spain in rented accommodation, was receiving c. £60,000 p.a. for care he was providing

to her, although this sum was reduced in late 2011 because the current level of expenditure was deemed to be unsustainable by the Deputy. This led (Peter Jackson J drily noted) to an 'escalation' in the internet campaign that Mr Clarke had started to wage against the Deputy, the Office of the Public Guardian and the Court of Protection, and (it appears). Subsequent to the issue of proceedings, Mr Clarke's activities had escalated to the point where the Deputy had obtained an injunction restraining him from further harassment of the Deputy or his firm. The application to discharge the Deputy was resisted by Mr Clarke's other children on the basis that if she were not protected, he would spend her money on himself. He filed counter allegations against his siblings and the Deputy.

Expert evidence was directed by way of a s.49 MCA 2005 report as to Mrs Clarke's capacity (inter alia) to (1) manage her benefits; (2) make a will; and (3) decide whether to retain or sell the property in Blackpool. That evidence tallied with earlier evidence obtained (it is not clear by whom) by a consultant clinical psychologist to the effect that Mrs Clarke had the ability to make a will; there was apparent divergence on other matters.

At the hearing in July 2012, Peter Jackson J declined to embark upon a wide-ranging investigation of the issues between the family members or between Mr Clarke and the Deputy as being inconsistent with the overriding objective in Rule 3 COPR 2007. He also declined to embark an attempt to narrow the issues in dispute between the doctors by way of requiring a meeting between them and/or putting further questions to them; rather, he moved straight to a consideration of whether Mrs Clarke had the capacity to take the three decisions which arose at that stage.

At paragraph 35 of his July judgment, Peter Jackson J declined to find whether or not Mrs Clarke had capacity to manage her benefits, because he considered that it was in any event clear that it was in her best interests that they be managed on her behalf by her carer, who happened to be Mr Clarke. He found that she did have capacity to make a will, albeit that (as with the s.49 expert) he could "not exclude the possibility that Michael Clarke exerts influence on Mrs Clarke, but I do not find that this currently invalidates her general testamentary capacity. Whether any particular will that she may make could subsequently be challenged is not a matter for this court at this time" (paragraph 36). He found, by contrast, that she lacked the ability to weigh up the financial and welfare risks involved in each of the courses of action implicit in the decision whether or not to sell the property in Blackpool (paragraph 38). He found that he could not decide at that point whether to order a sale of the property in Blackpool because he did not have sufficient information before him. He therefore directed further evidence to be filed upon Mrs Clarke's best interests as regards the sale of the property and how her future income and housing needs were to be met.

Peter Jackson J considered the matter further in early October 2012. In the interim, a will had been prepared which (as he noted at paragraph 21) "[bore] the hallmarks of having been prepared by Mr Michael Clarke," contained provisions "designed to prevent the sale of the property during Mrs Clarke's lifetime and to ensure that it comes into the hands of Mr Michael Clarke upon her death" (paragraph 21). The Deputy and the other children wished the property to be sold (placing reliance upon observations made by Senior Judge Lush in *Re JDS* to the effect that it is not the function of the Court to "anticipate, ring fence or maximise any potential inheritance for the benefit of family members upon the death of the protected party." Mr Clarke firmly opposed the sale of the property.

Peter Jackson J noted that there was no satisfactory solution to the present situation, in which "the difficulty of identifying where Mrs Clarke's best interests lie is compounded by the family situation. For better or for worse, Mrs Clarke's future is inextricably bound up with Mr Michael Clarke, whose strident voice threatens to drown out all others" (paragraph 30). He noted that, if it were a purely financial question, the case for the sale of the property would be unanswerable. However, because the property was not merely an asset but was also (even if for only part of the time) a home for Mrs Clarke and Mr Clarke, as her carer, a sale would lead to the loss of their home. That outcome could not be justified from Mrs Clarke's perspective unless it was apparent that her daily needs were not in fact being met. Whilst Peter Jackson J found that the figures before him were not encouraging as regards the making up of a gap between her income and her outgoings, he did not consider that it was right at the present time to order her to sell her home to make up an income shortfall which could be made up in other ways. He noted that Mr Clarke would have the opportunity to manage her finances and to support her, but that if her way of life were to be deteriorating unacceptably as a result of inadequate income, a fresh application could be made for the sale of the property. He noted, though, that:

> "38. Whatever the side-effects of my decision, it is no part of my purpose to 'anticipate, ring-fence or maximise any potential inheritance for the benefit of family members'. Not can my decision be influenced by the dismay of the other family members that Mr Michael Clarke's questionable sense of entitlement to his mother's property has, at least at this stage, prevailed. I have been guided only by my assessment of Mrs Clarke's best interests at the present time."

In light of his conclusion as to Mrs Clarke's best interests, Peter Jackson J directed that the Blackpool property not be sold or charged during her lifetime without an order of the Court; the deputyship being redundant in the circumstances, he therefore discharged it.

The family members other than Mr Clarke and the Deputy then made an application that their costs be charged to Mrs Clarke's estate. Mr Clarke asked the court to postpone a decision and in the interim to make orders for disclosure and for the production of further accounts by the Deputy and the Office of the Public Guardian. He opposed the other parties' applications.

Declining to depart from the general rule in property and affairs cases (Rule 156), Peter Jackson J noted that:

> "5. In this case there is no basis for departure from the general rule. My overall conclusions in relation to Mrs Clarke's capacity did not favour any party. While a sale of the Blackpool property has not been ordered at this time, the manner in which Mr Michael Clarke has conducted the proceedings more than wipes out any weight that might be attached to that factor. I identify his use of his mother's case as a vehicle for his political views, his aggressive disrespect towards anyone with whom he disagrees, and his complete lack of regard for his mother and family's right to privacy.
> 6. In contrast, the conduct of the proceedings by the family members and the Deputy has been entirely reasonable in trying circumstances. Their costs shall be charged to Mrs Clarke's estate and become payable upon her death."

<u>Comment</u>

As noted above, this case is of interest not because of its outcome, but rather as an insight into the management of an application which (regrettably) is not entirely unusual in either the issues raised or in the attitude adopted by a litigant in person. Reading between the lines of the three judgments, it is clear that this was a case in which the patience of the Court was sorely tried, and that it was not without a very considerable degree of reluctance that Peter Jackson J came to the conclusion that he did as to where Mrs Clarke's best interests lay as regards the sale of the property in Blackpool.

One minor point to note in passing is that Peter Jackson J presumably did not approach questions of the management of Mrs Clarke's benefits on the basis that he had any jurisdiction to decide who should be her appointee to receive them on her behalf. Contrary to something of an urban myth, the Court of Protection has no jurisdiction to make such a decision, which lies solely in the gift of the DWP (whose guidance upon the question of appointeeship can be found at: http://www.dwp.gov.uk/docs/part-05.pdf).

SCC v JM & Ors (unreported, 31.8.12)
COP jurisdiction and powers; Contempt of court

To the best of our knowledge, this case is the first judgment in the public domain recording the sentencing of someone to prison for breaches of orders made by the Court of Protection (*PM v KH and HM* [2010] EWHC 2739 concerning breaches of orders made under the inherent jurisdiction).

The facts of the underlying case are not relevant to the contempt proceedings; suffice it to say that they related to the residence of JM, an elderly man suffering from Alzheimers and a degree of vascular dementia. The conduct of one of JM's children, WM, had given rise to substantial concern on the part of the Court during the course of the proceedings, albeit that HHJ Cardinal was at pains to point out (paragraph 2) that the way in which she had behaved in that litigation was in no way reflected in the judgment to which he came upon the committal application.

In 2011, injunctive relief had been granted by first a District Judge and then HHJ Cardinal:

(a) to the effect that the respondents should not encourage JM to leave or to ask to leave his placement, or discuss with him the possibility of moving back home, or remove him from the jurisdiction of the court. The reason why that order was made was because there was a history on one occasion of JM being removed from the care home where he was situated and, indeed, taken to Turkey for a short period;

(b) restraining WM from using or threatening violence against her father or any employee of the applicant or the AH home, or instructing, encouraging or in any way suggesting any other person should do so. She was further forbidden from intimidating, harassing or pestering her father or any employee of the applicant Local Authority or the AH home.

Notwithstanding these injunctions, which had been served upon WM (who had attended nearly every hearing), WM took the following steps which HHJ Cardinal found to constitute contempt of court:

(a) WM and IM (her brother) took JM to see a solicitor in Birmingham to discuss his placement. They did so by WM persuading or causing IM and his partner to collect

JM for what was initially reportedly a contact visit and to bring him from the Local Authority home to Birmingham to see a solicitor;

(b) WM produced and distributed a leaflet prior to and during the final hearing giving details of the case, containing a photograph of her father and other information so as to identify him and that is in breach of rule 90/91 of the Court of Protection Rules;

(c) speaking to her father on numerous occasions about the proceedings, even though she has been told that in doing so she has caused him distress. She also gave her father a wooden cross at a visit, saying that he should keep it with him at all times to prevent the evil in the home hurting him;

(d) abusing and threatening Ms LW (the practice lead social worker of the older person's mental health team for the local authority), contrary to the court's orders (the abuse including abusive emails and voicemails);

(e) bringing her father to Court on the day of the judgment upon the welfare application, a journey of some 50-60 miles, in circumstances where it was necessary for the clerk to HHJ Cardinal and court security to be involved to remove JM from her and IM, and where it was found that JM was unwell upon his return to the care home "thanks in no small part to the stress involved in attending court unnecessarily" (paragraph 3).

HHJ Cardinal found, perhaps not surprisingly, there had been a considerable number of breaches, and that WM had no intention, "unless restrained by a severe measure by this court, of obeying the orders herself" (paragraph 12). He also found that she had been seeking to evade service of the application for committal for contempt and in the circumstances considered it appropriate to proceed to sentence her in her absence. In light of the paucity of consideration by the Court of contempt applications, the relevant paragraphs of his judgment merit setting out in full:

> "15. … I look at the terms of punishment. Miss Khalique has properly reminded me that the court's purpose is not to express outrage, but simply to express the court's concern as to breach of its orders and not in fact to punish unnecessarily, it is not a criminal court. I bear in mind the guidance given by the leading case of *Hale v Tanner* [[2000] 1 W.L.R. 2377], but in the circumstances it seems to me that there is no alternative other than to commit this lady to prison. I realise, of course, that in doing so I would be punishing JM to a degree because in some small way he still appreciates visits from his daughter, although she seems to ruin part or all of most of the visits and telephone calls, but the court cannot allow this situation to continue whereby she abuses LW, she abuses staff at AH Home and she defies the court order by bringing her father to court. She is causing him very considerable grief. In those circumstances it seems to be only right she should go to prison.
> 16. I have thought very carefully about the punishment. Last time I proposed imprisonment for five months. There have been other incidents, but I am satisfied that those incidents took place simply because she had not appreciated that I was going to send her to prison for breaches and she just continued her behaviour. I do not think it is a case for increasing the punishment so in the circumstances for each and every one of the breaches I will send her to prison for a further period of five months to be served concurrently. I am not sure I have said so clearly, but I make it clear that the telephone calls by WM have been

not just to LW, but, of course, also to staff at AH Home and I want to make it clear that this order is made to protect them just as much as it is to protect staff of the Local Authority direct."

Comment
It is, unfortunately, not uncommon for those before the Court of Protection to show themselves (by word or deed) reluctant to heed the declarations or decisions of the Court; this judgment is helpful confirmation that the standard principles applicable to contempt in civil proceedings will apply if and when their reluctance reaches the level of contempt.

R (SUNDERLAND CITY COUNCIL) V SOUTH TYNESIDE COUNCIL [2012] EWCA CIV 1232
Mental Health Act 1983; Interface with MCA

Although this concerns the free after-care provisions of s.117 of the Mental Health Act 1983, it provides an opportunity to mention the ordinary residence provisions surrounding the identity of the relevant supervisory body for DOLS.

The main issue for the Court of Appeal was whether patient SF was "resident" in a Sunderland hall of residence or a South Tyneside hospital for the purposes of determining which authority was responsible for paying for her after-care services. The parties agreed that SF was resident in Sunderland at the time when she was informally admitted to the South Tyneside hospital on 7 October 2009 having attempted suicide. She suffered from atypical Asperger's and a borderline personality disorder and consented to the admission, "but it is likely that if she had not given her consent, compulsory powers would have been used" (para 6). However, just over two weeks into her two-month informal hospital stay, her licence to live in the Sunderland hall of residence was terminated, along with her college placement. After absconding from the hospital on 9 December 2009, she was detained for assessment and then for treatment under the Mental Health Act.

At first instance, Langstaff J had applied the test for ordinary residence in *R (Shah) v Barnet LBC* [1983] 2 AC 309 (adopting a place voluntarily and for settled purposes as part of the regular order of one's life for the time being), and noted that the informal admission was not a voluntary surrender: it was closely analogous to a compulsory admission, with the powers to detain in the background. Moreover it was not for a settled purpose; nor was it part of the regular order of her life. Accordingly SF remained resident in Sunderland.

Allowing the appeal, the Court of Appeal held that Shah was not a helpful guide and *Mohamed v Hammersmith and Fulham LBC* [2001] UKHL 57 was to be preferred. Although the period of hospital detention must be disregarded, regard could be had to the preceding two-month informal stay. The question "is not only that of physical presence" and "it may be relevant to consider why the person is where he or she is, and to what extent his or her presence there is voluntary" (para 31). Crucially, once the Sunderland hall of residence had ceased to be available to her, there was no place where SF could be said to be "resident" other than the hospital. It followed that South Tyneside was responsible for her after-care.

Comment
It is important to emphasise that where someone "resides" for MHA 1983 s.117 purposes involves a different test to deciding where they "ordinarily reside" for the

purposes of the National Assistance Act 1948. Section 117 is freestanding and contains none of the deeming provisions referred to in the 1948 Act. When identifying which supervisory body is responsible for dealing with a DOLS application, the Mental Capacity Act 2005 relies upon the "ordinarily resident" approach of the 1948 Act, and not the "resident" approach of the 1983 Act. Thus, the fact that a person can be said to "reside" in hospital for s.117 purposes, between losing their community placement and being detained under the MHA, may not impact greatly in non-MHA situations.

No mention is made in the judgment of SF's capacity to consent to the informal admission and the deprivation of liberty safeguards were not used. However, let us imagine an incapacitated person is ordinarily resident in area A where they are accommodated by local authority A under Part 3 of the National Assistance Act 1948. If they are placed in a care home in local authority B, s.24(5) of the 1948 Act deems that person to still be "ordinarily resident" in area A. Thus, local authority A remains the supervisory body for any DOLS application.

If the person is admitted to hospital in area B under a DOLS authorisation, s.24(6) of the 1948 Act similarly deems them to be "ordinarily resident" in area A and so the Primary Care Trust in area A will be the supervisory body. If, however, they were detained in that hospital under MHA s.3, PCT B and local authority B will be responsible for their s.117 after-care because area B is where they were "resident" prior to the detention. That was the position prior to this decision and does not appear to be altered by it.

What remains to be seen is the extent to which the *Shah* test will continue to be used when determining ordinary residence for the purposes of the 1948 Act (and therefore DOLS). Indeed, clause 32 of the draft Care and Support Bill retains the term "ordinarily resident" so the issue seems set to continue.

KEDZIOR V POLAND [2012] ECHR 1809, APPLICATION NO. 45026/07)
Article 5 ECHR; Deprivation of liberty

The (relative) flurry of decisions from Strasbourg upon deprivation of liberty in the context of care homes continues apace.

This case (as with *Stanev v Bulgaria* and *DD v Lithuania*) concerned the placement of a person in 'an adult social care home.' Mr K's brother, in his role as Court-appointed guardian, asked that he be placed in a social care home, where he remained for a decade from 2002. It would appear that, under Polish law, his admission was considered voluntary and did not require approval by a court. He made repeated attempts both to challenge the lawfulness of his detention, and also to have his capacity restored, the latter it would seem primarily so that he would be allowed to leave the home. His attempts proving fruitless, he made an application to Strasbourg. Upon the application, the ECtHR had cause to consider the following:

1. whether he was deprived of his liberty at the care home;

2. if so, whether the deprivation of his liberty was lawful for purposes of Article 5(1)(e) ECHR;

3. whether he had at his disposal a procedure complying with the requirements of Article 5(4) ECHR to challenge the necessity for his continued stay in the social care home and to obtain his release;

4. whether his right of access to a court had been breached contrary to Article 6(1) ECHR.

The application also raised an issue under Article 8, but the Court did not consider it separately.

We address each of the four main issues in turn.

1. Whether Mr K deprived of his liberty

The submissions of the parties (including an intervention from the admirable Mental Disability Advocacy Centre) took a form that is now familiar, in particular in the reliance by the Polish Government upon the decision in *HM v Switzerland* ((2002) 38 E.H.R.R. 314).

At paragraphs 54-6, the Court noted the general principles at play in a form very similar to that set out in DD, noting that it had in that case and in *Stanev* "had the opportunity to examine placements in social care homes of mentally incapacitated individuals, and to find that it amounted to deprivation of liberty within the meaning of Article 5 § 1 of the Convention." Applying those principles, the Court held thus as regards the objective element:

> "57. As concerns the circumstances of the present case, the Court considers that the key factor in determining whether Article 5 § 1 applies to the applicant's situation is whether the care home's management has exercised complete and effective control over his treatment, care, residence and movement from February 2002, when he was admitted to that institution, to the present day (see paragraph 44 above and *D.D. v. Lithuania*, cited above, § 149). The applicant was not free to leave the institution without the management's permission. Nor could the applicant himself request leave of absence from the home, as such requests had to be made by the applicant's official guardian. Accordingly, and as in the Stanev case, although the applicant was able to undertake certain journeys and to spend time with his family the factors mentioned above lead the Court to consider that the applicant was under constant supervision and was not free to leave the home without permission whenever he wished (see *Stanev*, cited above, § 128). Moreover the Court notes that it would appear that the applicant's extended visits to his family were only authorised during the last few years of his stay in the Ruda Różaniecka Home. Finally, the management of the care home controlled the remaining 30% of the applicant's disability pension. The Court observes in this respect that the facts of the applicant's situation at the home were largely undisputed."

As regards the subjective element, the Court adopted a similar approach to that in *Stanev* and *DD*, concluding that:

> "58… In sum, even though the applicant had been deprived of his legal capacity, he was still able to express an opinion on his situation, and in the present circumstances the Court finds that the applicant had never agreed to being placed in the social care home."

The Court found that, although the applicant's admission was requested by his guardian, a private individual, it was implemented by a state-run institution (the care home), and hence the responsibility of the authorities for the situation complained of was engaged;

and that he was deprived of his liberty for purposes of Article 5(1) with effect from February 2002 (paragraph 60).

2. Whether deprivation of liberty lawful for purposes of Article 5(1)(e)
Taking a very similar approach to that adopted in *DD*, the Court reiterated the need to go beyond a mere compliance with formal compatibility with the procedural requirements of the domestic law in question to examine whether those procedures provided sufficient guarantees against arbitrariness. The Court therefore examined the procedures in Poland to see whether they complied with the criteria set down in *Winterwerp v Netherlands* (1979) 2 E.H.R.R. 387 at 39. It reiterated in so doing that the mental condition of a person must have been established at the time of the deprivation of liberty (paragraph 66); in the case before it, an assessment conducted a little over a month previously could be considered sufficiently current (paragraph 67). However, the Court found that the assessment had been solely for purpose of determining the issue of his legal protection, rather than to decide whether his state of health required his detention, such that it could not stand as evidence that the mental disorder in question warranted detention (paragraph 68), and that there had been a "total lack" of continued assessment of his disorder (paragraph 71), such that his placement in the home was not ordered in compliance with a procedure prescribed by law and was hence not justified by reference to Article 5(1)(e)(*ibid*).

3. Article 5(4)
Turning to the applicant's complaint under Article 5(4) ECHR, the Court reiterated the 'mantra' from DD as to the relevant principles in the context of those detained as being of unsound mind thus:

> "75. Among the principles emerging from the Court's case-law on Article 5 § 4 concerning "persons of unsound mind" are the following:
> (a) a person detained for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to bring proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention;
> (b) Article 5 § 4 requires the procedure followed to have a judicial character and to afford the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether proceedings provide adequate guarantees, regard must be had to the particular nature of the circumstances in which they take place;
> (c) the judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237A; see also *Stanev*, cited above, § 171).
> 76. This is so in cases where the original detention was initially authorised by a judicial authority (see *X v. the United Kingdom*, 5 November 1981, § 52, Series A no. 46), and it is all the more true in the circumstances where the applicant's placement in the care home has been instigated by a private individual, namely the applicant's guardian, and decided upon by the municipal and social care authorities without any involvement by the courts (see *D.D. v. Lithuania*, cited above, § 164)."

The Court noted that the framework in place in Poland fell notably short of the requirements of Article 5(4), in particular because there was no provision for automatic judicial review of the lawfulness of admitting a person to, and keeping him in, an institution such as a social care home, and a review could not be initiated by the person concerned if that person has been deprived of his legal capacity, such that Mr K was prevented from independently pursuing any legal remedy of a judicial nature to challenge his continued involuntary institutionalisation.

4. Article 6

The Court noted that it had, in *Stanev*, in respect of partially incapacitated individuals, that given the trends emerging in national legislation and the relevant international instruments, Article 6(1) of the Convention must be interpreted as guaranteeing a person, in principle, direct access to a court to seek restoration of his or her legal capacity. It reiterated (paragraph 89) that "the Court reiterates that the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned, since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity, not least in relation to any restrictions that may be placed on the person's liberty." On the facts before it, and in particular given that there had been a judgment from the Polish Constitutional Court to the effect that lower courts should not limit procedural rights of incapacitated adults even before legislation to that end had been completed, a judgment which had been signally ignored prior to the enactment of the legislation in question, the Court concluded that there had been a breach of Article 6(1).

The Court awarded Mr K the sum of €10,000 in respect of non-pecuniary damage to reflect the breaches of his rights under the Convention.

Comment

Even if it could be said previously that the English Courts were required to deduce the relevant principles applicable to the deprivation of liberty of incapacitated adults in care homes from Strasbourg jurisprudence which was not directly on point (for instance, *HL v United Kingdom*, concerned with informal admission to psychiatric hospital), that cannot be the case now. In *Stanev, DD* and now *Kedzior*, we have a trinity of cases which are expressly concerned with the placement of those without the relevant capacity in care homes. Unsurprisingly, perhaps, the approach adopted in each of the cases to the determination of the objective element of the deprivation of liberty is both internally consistent and consistent with that adopted in HL. None of the cases (with the possible but ambiguous exception of dicta in *Stanev*) rely upon questions of purpose, reason or motive; none proceed by reference to a comparator in the way adopted by the Court of Appeal in *Cheshire West*.

The divergence between the path adopted in England and Wales and that set down by Strasbourg would seem only to be widening. The need for the Supreme Court to grapple with the question of what constitutes a deprivation of liberty for purposes of the MCA 2005 only becomes more urgent; it is therefore all the more regrettable that we understand that the case is not listed until the autumn of 2013.

Kedzior is also of significance for confirming – if such confirmation was required – that the *Winterwerp* criteria are directly in play when it comes to consideration of those to be deprived of their liberty under the DOLS regime. To that extent, therefore, *Kedzior* (and *DD* before it, which addressed the matter more briefly) therefore answers the Court of Appeal's complaint in *G v E* [2010] EWCA Civ 822 [2010] COPLR Con Vol 431 that the "European jurisprudence derives exclusively from the fact that in the cases which have

reached the ECtHR, the issue has involved alleged mental illness and detention in a psychiatric hospital" (paragraph 59). The steps required to ensure that a person satisfies the mental health requirement of Schedule A1 would appear to meet the requirements set down by Strasbourg, albeit that Kedzior does sound as a powerful reminder that it is necessary that (save in the case of emergency) the evidence upon which reliance is placed to justify detention must be (1) current at the point of detention; (2) prepared with a view to identifying why the disorder warrants detention; and (3) kept under regular review.

BUREŠ V THE CZECH REPUBLIC [2012] ECHR 1819 (APPLICATION NO. 37679/08)
Restraint

The European Court of Human Rights was asked to consider a claim brought against the Government of the Czech Republic alleging that the Applicant (Mr Bureš) had been ill-treated in a sobering-up centre in violation of Article 3 of the Convention and further had been detained in a psychiatric hospital in violation of Article 5 of the Convention.

The applicant had been diagnosed as having a psycho-social disability. He had previously been treated in Italian psychiatric hospitals as a voluntary patient and was using psychiatric medication. On 9 February 2007 he inadvertently overdosed on his medication and left his home wearing only a sweater. He was picked up by a police patrol who took him to a hospital. He was then transferred to a sobering up centre. The precise events which then occurred at the sobering up centre were in dispute. The Applicant's case was that he had been strapped tightly and left unchecked overnight causing a reduction in blood circulation to his arms. The Government alleged that he had been initially restrained for two hours as he was restless but was checked. Subsequently his behaviour had become destructive requiring further restraint.

On 10 February 2007 the applicant was transferred to the Intensive Psychiatric Care Unit where, according to the admission record, he had visible abrasions on the front of his neck, both wrists and both ankles, caused probably by friction against textile, and abrasions of an unspecified different type on his knees. He complained about his treatment in the sobering-up centre to the hospital authorities, but they did not take any action. On 15 February 2007 the applicant was examined by a neurologist, who stated that as a result of the use of straps the applicant suffered severe paresis of the left arm and medium to severe paresis of the right arm. He began a course of intensive treatment at the Rehabilitation Unit. The applicant remained in the hospital involuntarily until released on 13 April 2007. However, because of his two-month hospitalisation, he was confused and was not able to fully take care of himself. He voluntarily returned to the hospital on 14 April 2007 and remained there until 1 July 2007.

The Claimant subsequently made a complaint to the police which was investigated but no prosecution was brought. He challenged his detention in civil proceedings but the Constitutional Court rejected his appeal on the ground that he had not exhausted all remedies before the Regional Court.

The European Court of Human Rights noted that whilst they had doubts as to the Government's version of events at the sobering up centre, the Applicant's description was also not fully supported by the evidence. Accordingly, they proceeded to consider the claim on the basis that the Government's account was accurate.

The Court nevertheless proceeded to uphold the claims of both a violation of the substantive rights protected by Article 3, and also a violation of the procedural right to an effective investigation. In particular, the Court held the following:

(1) The medical staff in the sobering up centre should be regarded as agents of the State such that their actions could be attributed to the State – the Centre was a public body and the applicant was subject to the complete control of the Centre's staff. Further, the key issue was not the applicant's injury as an unintended negative consequence of medical treatment, as submitted by the Government, but rather the use of the restraints itself. The applicant's injury was only incidental to the intentional treatment. Accordingly, medical negligence case precedent relied upon by the Government was not relevant but cases concerning the use of restraints on persons in detention, which the Court has always considered from the point of view of negative obligations, were;

(2) The Court had previously recognised the special vulnerability of mentally ill persons in its case-law and the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in particular, to take into consideration this vulnerability (see *Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001 III, *Rohde v. Denmark*, no. 69332/01, § 99, 21 July 2005 and *Renolde v. France*, no. 5608/05, § 120, ECHR 2008 (extracts));

(3) In respect of persons deprived of their liberty, recourse to physical force which has not been made strictly necessary by their own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention (see *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004). In the context of detention in a sobering-up centre, it is up to the Government to justify the use of restraints on a detained person. Aggressive behaviour on the part of an intoxicated individual may require recourse to the use of restraining belts, provided of course that checks are periodically carried out on the welfare of the immobilised individual. The application of such restraints must, however, be necessary under the circumstances and its length must not be excessive (see paragraph 86);

(4) The position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. Nevertheless, it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible. The established principles of medicine are in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist (see *Herczegfalvy v. Austria*, 24 September 1992, § 82, Series A no. 244) (see paragraph 87).

On the facts, the Court found that the strapping of the Applicant reached the minimum degree of severity required to engage Article 3. As to the justification for the use of restraint, in line with domestic and international guidance, the Court found that strapping a patient to a bed for two hours could not be justified by "mere restlessness." Whilst aggressive behaviour could justify restraint in principle, strapping should be a mechanism of last resort. Patients who are restrained must be kept under close supervision. Further, European and national standards require proper recording of every use of restraints, which, among other things, facilitates any subsequent review of whether their

use was justified. In the applicant's case, restraint had been applied as a matter of routine and the Government had not justified its use as proportionate in the circumstances of the case. There was therefore a substantive breach of the Applicant's Article 3 rights. The Court also found that there was a breach of the procedural aspect of Article 3, for reasons which need not detain us here.

The complaints of alleged breaches of Article 5 of the Convention were rejected as inadmissible on the grounds that the Applicant had not exhausted domestic remedies.

Comment
This case provides a useful synopsis of the jurisprudence of the European Court of Human Rights in relation to the treatment of mentally ill patients whilst they are being deprived of their liberty. Whilst the judgment focuses on the use of restraint, which on the facts resulted in a significant and permanent injury to the applicant, it serves equally as a reminder that additional attention should be paid by state authorities to ensure that the Article 3 rights of mentally ill individuals are upheld in hospital settings where they are particularly vulnerable. As such, it serves as a useful parallel to the case of Col Munjaz, discussed in a previous edition of the newsletter, in which the ECtHR emphasised the importance of Article 8 rights to those who are deprived of their liberty and in consequence the greater part of their autonomy.

RP v UK [2012] ECHR 1796 (APPLICATION NO. 38245/08)
Practice and procedure

This case arose from family proceedings in which the Official Solicitor was appointed to act as litigation friend to a mother who lacked litigation capacity. The points of principle raised upon the application to Strasbourg were identical to those which arise in Court of Protection proceedings, and thus the case merits consideration in some detail.

The mother argued, among other points, that her rights under Article 6 ECHR had been breached because:

(1) There had been no determination by the court of her litigation capacity – the Official Solicitor had accepted an expert report on the issue, and had not put the matter before the court for resolution.

(2) The Official Solicitor had taken the view that he could not challenge the local authority's argument that the mother's children should be taken into care, as the merits of the mother's case were too weak. As a result, the outcome she wished for was not argued.

The Court started its examination of the issue by recalling that the right of access to the courts guaranteed by Article 6(1) was not absolute, but may be subject to limitations. Whilst a certain margin of appreciation was left to member states in this regard, the Court recalled that: (1) the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right was impaired; and (2) a limitation would not be compatible with Article 6(1) if it did not pursue a legitimate aim and if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

As regards those with disabilities, the Court recalled that it had permitted domestic courts

> "a certain margin of appreciation to enable them to make the relevant procedural arrangements to secure the good administration of justice and protect the health of the person concerned (see, for example, *Shtukaturov v. Russia*, no. 44009/05, § 68, 27 March 2008). This is in keeping with the United Nations Convention on the Rights of Persons with Disabilities, which requires States to provide appropriate accommodation to facilitate the role of disabled persons in legal proceedings. However, the Court has held that such measures should not affect the very essence of an applicant's right to a fair trial as guaranteed by Article 6 § 1 of the Convention. In assessing whether or not a particular measure was necessary, the Court will take into account all relevant factors, including the nature and complexity of the issue before the domestic courts and what was at stake for the applicant (see, for example, *Shtukaturov v. Russia*, cited above, § 68)" (paragraph 65).

In the instant case, the Court accepted that the proceedings were of the utmost importance to the mother, who stood to lose both custody of and access to her only child. Moreover, "while the issue at stake was relatively straightforward - whether or not R.P. had the skills necessary to enable her successfully to parent K.P. - the evidence which would have to be considered before the issue could be addressed was not. In particular, the Court notes the significant quantity of expert reports, including expert medical and psychiatric reports, parenting assessment reports, and reports from contact sessions and observes the obvious difficulty an applicant with a learning disability would have in understanding both the content of these reports and the implications of the experts' findings" (paragraph 66).

"In light of the above," the Court continued "and bearing in mind the requirement in the UN Convention that State parties provide appropriate accommodation to facilitate disabled persons' effective role in legal proceedings, the Court considers that it was not only appropriate but also necessary for the United Kingdom to take measures to ensure that R.P.'s best interests were represented in the childcare proceedings. Indeed, in view of its existing case-law the Court considers that a failure to take measures to protect R.P.'s interests might in itself have amounted to a violation of Article 6 § 1 of the Convention (see, mutatis mutandis, *T. v. the United Kingdom* [GC], no. 24724/94, §§ 79 - 89, 16 December 1999)" (paragraph 67).

The Court therefore examined the appointment of the OS in the case before it to see whether it was proportionate to the legitimate aim pursued or whether it impaired the very essence of RP's right of access to a court. It found as follows:

(1) The OS was only invited to act following the commissioning of expert evidence from a clinical psychologist as to RP's capacity to conduct the litigation in question, and that, whilst there was no formal review, in practice further assessments were made of her litigation capacity during the course of the proceedings (paragraph 69);

(2) Whilst there was no formal right of appeal against the appointment of the OS, RP was informed of her ability to contact either her solicitor or the Official Solicitor (or a complaint's officer) if she was unhappy with the conduct of the litigation; the OS also gave evidence to the domestic courts that "R.P. could have applied to the court at any time to have him discharged. Alternatively, he indicated that if it had come to his attention that R.P. was asserting capacity, then he would have invited her to undergo further assessment." These, the Court considered, constituted an "appropriate and effective means by which to challenge the appointment or the continued need for the appointment of the Official Solicitor" (paragraph 70);

(3) It would not have been appropriate for the domestic courts to conduct periodic reviews of RP's litigation capacity, as this would have caused unnecessary delay and would have been prejudicial to the welfare of her daughter. There would also have been no purpose served in encouraging her to seek separate legal advice at this juncture (paragraph 71);

(4) Any means of challenging the appointment of the OS, however effective in theory, would only be effective in practice and thus satisfy the requirements of Article 6(1) of the Convention if the fact of his appointment, the implications of his appointment, the existence of a means of challenging his appointment and the procedure for exercising it were clearly explained to the protected person in language appropriate to his or her level of understanding. On the facts of the case, her solicitor had taken proper steps to ensure that she was aware of the nature of the involvement of the OS and of his role (and she had only complained some 10 months after his appointment and two days before the final hearing), such that adequate safeguards were in place to explain the nature of proceedings to her and to enable her to challenge the appointment of the OS (paragraphs 72-4);

(5) As regards the conduct by the OS of the proceedings, the Court noted RP's concerns that the OS had focussed 'on what was best' for RP's daughter. However, it accepted that the best interests of the daughter were the touchstone by which the domestic courts would assess the case, such that in determining whether a case was arguable or not, it was necessary for the OS to consider what was in K.P.'s best interests. Bearing in mind what was best for the daughter did not therefore constitute a breach of the mother's Article 6(1) rights (paragraph 76).

Furthermore, and in a passage which will resonate with those appearing before the Court of Protection, the Court noted that it did "not consider that 'acting in R.P.'s best interests' required the Official Solicitor to advance any argument R.P. wished. On the contrary, it would not have been in R.P.'s - or in any party's - best interests for the Official Solicitor to have delayed proceedings by advancing an unarguable case. Nevertheless, in view of what was at stake for R.P., the Court considers that in order to safeguard her rights under Article 6 § 1 of the Convention, it was imperative that her views regarding K.P.'s future be made known to the domestic court. It is clear that this did, in fact, occur as R.P.'s views were referenced both by the Official Solicitor in his statement to the court and by R.P.'s counsel at the hearing itself" (paragraph 76).

Noting finally that RP had appealed to the Court of Appeal (refusing the assistance of pro bono Counsel which the OS had secured for her) and that during the course of her appeal she was afforded ample opportunity to put her views before the Court, the Court concluded that the very essence of her right of access to a Court was impaired, and therefore found there to have been no breach of Article 6(1).

The Court further found manifestly ill-founded allegations of breaches of Articles 8 and 13 for reasons which need not trouble us here.

Comment

The outcome in this case is perhaps not hugely surprising. If it had been otherwise, the system of representation in England and Wales for those lacking litigation capacity and who do not otherwise have the benefit of a litigation friend would have collapsed. However, three points of significance arise:

(1) This is only the most recent of the cases involving incapacitated adults discussed in our newsletter in which the Court has construed the ECHR by reference to the UN Convention on the Rights of Disabled Persons;

(2) The Court placed considerable emphasis upon the steps taken to explain to RP the ways in which she could seek to challenge the appointment of the Official Solicitor; it therefore left open the possibility that a failure on the part of the particular individuals appointed to act on the part of the protected party (whether that be P or another party to the litigation) to convey the necessary information in an appropriate form would give rise to a breach of Article 6(1);

(3) The endorsement of the proposition that 'acting in the best interests' of a protected party does not require advancing every argument that party wishes to be relayed to the Court is of assistance, although it is necessary to ensure that where the protected party has a particularly important stake in the outcome of the proceedings that their views are appropriately conveyed to the Court. This is particularly so where the protected party is P him or herself (rather than, as in RP's case, a protected party other than the subject of the litigation). In such circumstances, it is suggested that, even if not formally advanced by way of argument to the Court, P's views must clearly and fully put before the Court so as to comply the duty to safeguard their rights under Article 6(1) ECHR.

PRACTICE AND PROCEDURE – LIAISON WITH THE HOME OFFICE

With thanks to Helen Clift at the Official Solicitor's Office for bringing this to our attention, we can confirm that the Home Office's Liaison Office takes the following position as regards liaison with the COP:

(1) The Home Office accepts orders from the COP in the same way as it would from the Family Division;

(2) The process for liaising with the Home Office during the currency of COP proceedings is the same as that directed in Family Proceedings, i.e. that contained in the President's Guidance of March 2012, Communicating with the Home Office in Family Proceedings.

There can on occasion be a need to inquire of the Home Office as to (for instance) a person's immigration status or the consequence of a decision within the COP upon their status, and use of this procedure can therefore be of importance in ensuring that this information is obtained as quickly as possible.

GUIDE FOR SOCIAL WORKERS UPON WHEN TO CONSIDER MAKING AN APPLICATION TO THE COURT OF PROTECTION

Tor (with the assistance of Alex) has prepared a handy one-page guide to when consideration should be given to making an application to the Court of Protection, covering the scenarios that we have found to arise most often in practice, and summarising in bullet point form the key information that will be required by the legal department.

This guide can be yours in return for a donation of £25 to Action on Elder Abuse, a charity which does sterling work highlighting abuse, challenging, training, educating and influencing politicians and others. Details of the charity can be found at: http://

www.elderabuse.org.uk, and their Justgiving page here: http://www.justgiving.com/elderabuse/Donate/.

Please drop an email either to one of us or to our marketing team if you are interested in receiving a copy of the guide. We will not require proof of donation, rather operating a virtual honesty box.

ISSUE 28 DECEMBER 2012 COURT OF PROTECTION UPDATE

We are delighted to announce that, with effect from next month, the Editorial Board will be swelled by the addition of Michelle Pratley, late of 4-5 Gray's Inn Square. As some of you may be aware, we have recently taken on a considerable number of tenants from 4-5, including a number of excellent COP practitioners. You will no doubt be hearing more in due course, both of this development and from Michelle.

Finally in this introductory section, we would like to pay tribute to Mr Justice Hedley, who is retiring at the end of this term. Regular readers of this newsletter will have noted quite how frequently we have reported his judgments, and how frequently we have held them up as examples of the approach that Courts should take to some of the most difficult issues raised by the MCA. Perhaps most importantly, and as we have always been reminded when we have heard him speak at seminars, Hedley J has never allowed himself to be distracted from the central fact that at heart of all COP proceedings are those who are amongst the most vulnerable in society but who are, above all, individuals whose particularities and idiosyncrasies are properly worthy of respect. We wish him very well in his retirement.

WBC v CP [2012] EWHC 1944 (FAM)

COP jurisdiction and powers - Costs

With thanks to Sam Karim of Kings Chambers for bringing this to our attention, this costs decision relates to the case of *Re C* [2011] EWHC 1539 (Admin), which readers may recall involved the use of a 'blue room' to restrain a young man who displayed challenging behaviour. The Court of Protection and judicial review proceedings resulted in the local authority admitting to have breached its community care obligations in respect of C, and declarations that C's rights under Articles 3, 5 and 8 had been violated. Ryder J gave important guidance about the use of seclusion in residential schools.

C's brother, who became a party to the proceedings shortly after they were instituted, sought an order that the local authority responsible for C should pay his costs. Granting C's brother the order sought, Ryder J relied on the local authority's misconduct, the fact that, had the local authority complied with the MCA 2005, C's brother would not have needed to play such an extensive role in the proceedings, and the fact that C's brother had made a useful contribution to the proceedings. Ryder J concluded that a departure from the usual rule that there be no order for costs in Court of Protection proceedings was appropriate, since:

(a) the local authority's actions were tainted with illegality;

(b) the local authority's decision making was impoverished and disorganised;

(c) the local authority was responsible for the delay in referring C's circumstances to the Court of Protection and/or the High Court in its children and inherent jurisdictions;

(d) the local authority could have arrived at the position concluded by the court many months earlier.

Comment
This decision reaffirms that adverse costs orders may well be made in welfare proceedings where public bodies have failed to comply with their statutory responsibilities, even where there has been no bad faith, and that public bodies who do not accept the strength of the case against them and make appropriate concessions and apologies at an early stage cannot rely on the general rule as to costs in welfare proceedings. It can therefore be read alongside VA v Hertfordshire PCT and Others [2011] EWHC 3524 (COP) as a health warning for public authorities.

RE HARCOURT; THE PUBLIC GUARDIAN V A (UNREPORTED, 31.7.12)
Lasting Powers of Attorney – best interests – revocation

Two months after her husband passed away, Mrs Harcourt appointed her younger daughter ('donee') to manage her property and financial affairs under a Lasting Power of Attorney ('LPA'). Care home arrears, questionable borrowing, unaccountable financial transfers, and frequent cash withdrawals resulted in an investigation being conducted by the Office of the Public Guardian ('OPG').

For those unfamiliar, the functions of the Public Guardian are contained in s.58(1) of the Mental Capacity Act 2005 and include:

- establishing and maintaining a register of LPAs;
- directing a Court of Protection Visitor to visit the donee;
- directing a Court of Protection Visitor to visit the person granting the power of attorney;
- receiving reports from donees;
- reporting to the Court of Protection on such matters relating to proceedings under the Act as the court requires; and
- dealing with representations (including complaints) about the way in which a donee is exercising his powers.

By virtue of Regulation 46 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007 No. 1253), the OPG is able to require the donee to provide information and produce documents where there are circumstances suggesting that the donee may be behaving in contravention of his authority or not in the donor's best interests or has failed to comply with a court order or directions. However, the OPG has no powers of enforcement: in order to freeze the donor's accounts or suspend the attorney's powers, or revoke the LPA, it must apply to the Court of Protection for an order.

With their inquiries into Mrs Harcourt's financial affairs having been impeded by her daughter, the Public Guardian therefore had to apply to have the LPA revoked. Senior Judge Lush noted:

> "39. Essentially, the Lasting Powers of Attorney scheme is based on trust and envisages minimal intervention by public authorities. Even where a donor lacks the capacity to ask the attorney to provide accounts and records, the court would not normally exercise its supervisory powers under section 23, unless it had reason to do so, possibly because of concerns raised by the OPG. The court's powers in this respect simply duplicate those of a capable donor."

Mrs Harcourt had chronic schizophrenia and probable vascular dementia. By the time of the hearing she was unable to explain her income, thought the care home manager was managing her money, and was unaware of her expenses. She did not know whether she had any savings or what a power of attorney was, and was unaware that she had given the power to her daughter. With the benefit of reports from a Court of Protection Visitor and a Consultant Psychiatrist, Senior Judge Lush concluded that she lacked capacity to give directions to the attorney with regard to the production of reports, accounts, records and any other information relating to the management of her property and financial affairs (paragraph 50). She also lacked the capacity to examine or instruct others to examine any financial records and raise requisitions on them (paragraph 51). Hence, the court had a discretion to intervene on her behalf.

Section 22 of the MCA enabled the court to revoke Mrs Harcourt's LPA if she lacked capacity to do so and, inter alia, her daughter was behaving in a way that either contravened her authority or was not in her mother's best interests. Senior Judge Lush noted that applying the statutory checklist in cases of this kind was "never particularly easy" (paragraph 53). In considering the s.4 factors, the court took into account the fact that the daughter was an auditor, whose job involves checking the accuracy of financial records: so it would be reasonable to expect a higher standard of care from her in terms of an awareness of her fiduciary duties and the need for exactitude in presenting accounts and promptness in delivering them (paragraph 59). Moreover, her mother's finances were relatively straightforward. Senior Judge Lush continued:

> "60. The factor of magnetic importance in determining what is in Mrs Harcourt's best interests is that her property and financial affairs should be managed competently, honestly and for her benefit."

It was clear that her daughter had not managed the finances well and her refusal to co-operate with the court and the OPG meant she was not behaving in her best interests.

After making reference to the Article 6 ECHR rights of both mother and daughter, Senior Judge Lush went on to consider their Article 8 rights:

> "71. In the absence of appropriate safeguards, the revocation by the court of a Lasting Power of Attorney, which a donor executed when they had capacity and in which they chose a family member to be their attorney, would be a violation of their Article 8 rights. For this reason the Mental Capacity Act has been drafted in a labyrinthine manner to ensure that any decision by the court to revoke an LPA cannot be taken lightly.
> 72. In this case, I believe that the revocation of the LPA in order to facilitate the appointment of a deputy is a necessary and proportionate response for the protection of Mrs Harcourt's right to have her financial affairs managed competently, honestly and for her benefit, and for the possible prevention of crime."

Accordingly, the LPA was revoked and a deputy appointed.

Comment
This decision is of particular interest for three reasons.

First, the court's power to revoke an LPA under s.22 contains no explicit reference to best interests, unlike s.16 MCA. A literal reading might suggest that if P lacks capacity to revoke it, the court may do so if simply satisfied that, inter alia, the donee has not acted in P's best interests. However, this judgment makes it clear that the court's decision to revoke must in any event be in P's best interests. In that way, s.22 is supplemented by s.4. In this regard, the judgment is entirely consistent with the earlier decision of HHJ Marshall QC in Re J (to which Senior Judge Lush did not refer), in which HHJ Marshall considered the question of what conduct of the attorney would be of relevance to the question of revocation, holding (at paragraph 13) that:

> "on a proper construction of s 22(3), the Court can consider any past behaviour or apparent prospective behaviour by the attorney, [and], depending on the circumstances and apparent gravity of any offending behaviour found, it can then take whatever steps it regards as appropriate in P's best interests (this only arises if P lacks capacity), to deal with the situation, whether by revoking the power or by taking some other course."

Secondly, any revocation of an LPA will interfere with Article 8 ECHR. Appointment of a non-family member will presumably engage "private life;" appointment of a family member will additionally engage "family life." And both the donor and the donee's Article 8 rights have been expressly acknowledged.

Finally, this is another example of the Court's increasing willingness to recognise the right to a fair trial of those involved in proceedings. Although the relevance of Article 6 is obvious (and has been emphasised in recent Strasbourg jurisprudence relating to decisions depriving individuals of capacity – see further the case of Sýkora below), in Court of Protection terms it is still somewhat uncharted territory. In this case it was referred to in the context of the donee having opportunities to respond to court directions, hearings, and the need to avoid undue delay (para 58). Its potential application in other cases remains to be seen.

LIGAYA NURSING V R [2012] EWCA CRIM 2521
Criminal offences; Ill treatment / wilful neglect

With thanks to Jonny Landau of Ridouts for bringing this decision to our attention, the Court of Appeal has very recently handed down a further significant case upon the vexed question of the interpretation of s.44 MCA 2005.

The appellant was a trained mental health nurse who, with her husband, ran a care home for many years until it closed in the early 1990s. Ms Gill, an elderly lady with significant learning disabilities, was resident in the care home from 1987 until it closed. She then went on to live at a property owned by the Nursings where she was provided with care by the appellant. The Court of Appeal found that Mrs Gill's learning disabilities meant that she functioned at or around the level of a 7 year old child, although (at paragraph 4), the Court of Appeal noted that:

> "It is perhaps important at the outset to underline that Miss Gill was never in a vegetative state, and she was certainly able to make simple choices, for example, about what she wished to wear. At the same time she did not understand the

> need to keep her clothes clean, and although she could, for example, bath herself, she needed encouragement to wash regularly. Without assistance she would inevitably neglect herself. In effect someone was needed to prompt her to do the things that she could manage for herself and to carry out the tasks which she could not. She had a number of problems with communication, but she was well able to convey her wishes and preferences. Special measures were needed for her evidence to be given at trial through an intermediary, but it emerged that for some periods during her evidence, at any rate, she was able to speak for herself."

After a police investigation into the quality of the care given by the appellant to Ms Gill, she was charged under s.44 MCA 2005, the relevant course of conduct said to constitute neglect taking several different forms (see paragraph 5):

> "Thus, the lack of adequate care included inattention to Miss Gill's personal hygiene and failing to maintain her rooms in a clean condition and replace dirty bed linen. It also extended to failing to administer medication correctly and at the right time, or to the provision of food and a balanced diet and making sure that Miss Gill's personal habits did not create problems with food hygiene. In relation to many of these issues the appellant maintained that she would try and help Miss Gill who would sometimes refuse to accept her help, and in circumstances like these, she felt it was wrong to override her wishes. By way of practical example, Miss Gill expressed a strong dislike for having her toe nails cut until the point they became painful…"

At the close of the prosecution, a submission was made that there was no case to answer, based upon the contention that the provisions in the MCA 2005 were complex, and in the context of the criminal offence created in s.44 of the Act, irremediably uncertain in their ambit. The submission was rejected, and she appealed to the Court of Appeal.

Having set out the provisions of ss.1-3 MCA 2005, the Lord Chief Justice (giving the judgment of the Court of Appeal) noted at paragraph 13 that:

> "[in] the context of the criminal offence created by s.44 of the Act, this is difficult legislation. Lack of capacity in s.44 is defined by reference to s.2, and this definition is supplemented in s.3 which provides a complicated series of tests which identify the circumstances in which an individual is to be found to be unable to make decisions for himself."

The Lord Chief Justice expressly endorsed the analysis by HHJ Marshall QC in *Re S* [2010] 1 WLR 1082 (at paragraph 51 ff) of the purpose of the MCA 2005 and of the "singular feature" of the MCA, namely the:

> "… official recognition that capacity is not a blunt "all or nothing" condition, but is more complex, and is to be treated as being issue-specific. A person may not have sufficient capacity to be able to make complex, refined or major decisions but may still have the capacity to make simpler or less momentous ones, or to hold genuine views as to what he wants to be the outcome of more complex decisions or situations." (*Re S* at paragraph 53)

This feature, the Lord Chief Justice held, provided an "apposite summary" (paragraph 14) of the situation in which Ms Gill found herself and the ambit of the statutory regime in which those responsible for her care were required to act, continuing that "no one doubts that the purpose of s.44 of the Act is to provide those in need of care with

protection against ill-treatment or wilful neglect by those responsible for caring for them." The problem lay in the complexity of the way in which lack of capacity fell to be analysed for purposes of s.44.

The essence of the submissions made on behalf of the appellant was that "in an Act which covered both criminal and civil proceedings relating to those who lacked capacity, yet without making any apparent distinction between them in that context, the absence of capacity in respect of one area of decision could not be used to found an assessment of general lack of capacity at the same time, or indeed for the future" (paragraph 15) and (at paragraph 16) "[r]hetorically, Miss Jones asked, by whom and how is capacity to be established for it to be proper for criminal liability to flow from a failure by the defendant to act to an extent which amounts to neglect? And how is the defendant who comes to a different conclusion about a person's capacity to protect herself from potential liability on the one hand for an invasion of autonomy and on the other against a potential prosecution for neglect? This is all much too uncertain. Indeed she relies on the observation in *R v Hopkins and Priest* [2011] EWCA Crim. 1513:

> "Unconstrained by authority this court would be minded to accept the submission made on behalf of the appellants. Section 44(1)(a), read together with s.2(1) of the Mental Capacity Act 2005 is so vague that it failed the test of sufficient certainty at common law and under Article 7.1."

At paragraph 17, the Lord Chief Justice acknowledged the force of the submissions made on behalf of the appellant, underlining as they did "some of the difficulties facing those with caring responsibilities," although he continued "[a]lthough the principles governing offences of ill-treatment and wilful neglect are identical, cases involving alleged ill-treatment do not appear to raise quite the same difficulties as cases of alleged wilful neglect, perhaps not least because evidence of ill-treatment is generally less elusive than evidence purporting to establish wilful neglect."

However, the Court of Appeal nonetheless went on to hold that s.44 was not improperly vague, concluding at paragraph 18 that:

> "The purpose of s.44 of the Act is clear. Those who are in need of care are entitled to protection against ill-treatment or wilful neglect. The question whether they have been so neglected must be examined in the context of the statutory provisions which provide that, to the greatest extent possible, their autonomy should be respected. The evidential difficulties which may arise when this offence is charged do not make it legally uncertain within the principles in *Mirsa* [2005] 1 Cr. App. R 328 and *R v Rimmington: R v Goldstein* [2006] 1 AC 459. On analysis, the offence created by s.44 is not vague. It makes it an offence for an individual responsible for the care of someone who lacks the capacity to care for himself to ill-treat or wilfully to neglect that person. Those in care who still enjoy some level of capacity for making their own decisions are entitled to be protected from wilful neglect which impacts on the areas of their lives over which they lack capacity. However s.44 did not create an absolute offence. Therefore, actions or omissions, or a combination of both, which reflect or are believed to reflect the protected autonomy of the individual needing care do not constitute wilful neglect. Within these clear principles, the issue in an individual prosecution is fact specific."

The Court did, however, go on to find that the appeal had to succeed because of a material misdirection by the trial judge, to the effect that, if the appellant had been

motivated by the autonomy principle, then any neglect which was proved "would not… necessarily have been proved to be wilful." At paragraph 20, the Lord Chief Justice noted that it seemed to the Court that "if the jury were to conclude that the defendant may have been motivated by the wish or sense of obligation to respect Miss Gill's autonomy any area of apparent neglect so motivated would not be wilful for the purposes of this offence" (emphasis added) and that this misdirection undermined the safety of the conviction.

Comment
Section 44 is, on any view, not a well-drafted provision; if it were, it would not already have been the subject of three 'technical' appeals to the Court of Appeal, including two determined by a constitution of the Court of Appeal presided over by the Lord Chief Justice. This decision, however, especially given the constitution of the Court of Appeal which delivered it, would seem to stand as an indication that further appeals based upon its poor drafting are unlikely to succeed.

The purposive interpretation of s.44 MCA 2005 given at paragraph 18 of the judgment is undoubtedly helpful albeit – as Jonny Landau notes (and we agree) – the phrase "capacity to care for himself" used therein is problematic. Many people lack the capacity to care for themselves in the sense that they are unable to do so, but the Court of Appeal presumably – in fact – intended to confine this otherwise very broad category to those who lack the capacity to take decisions regarding their care arrangements, a very much narrower class of individuals. This would be consistent with the ratio of *R v Dunn* [2010] EWCA Crim 2395 (by a constitution of the Court of Appeal also including the Lord Chief Judge), which the Divisional Court in *Hopkins and Priest* held to have been to the effect "the matter in respect of which capacity was required to be lacking for the purposes of Section 44 was the person's ability to make decisions concerning his or her own care" (paragraph 43 of *Hopkins*, citing paragraph 22 of *Dunn*).

JOANNE DUNHILL (A PROTECTED PARTY BY HER LITIGATION FRIEND, PAUL TASKER) V SHAUN BURGIN [2012] EWHC 3163 (QB)
Mental capacity; Litigation

This case represents the third in a series of judgments arising out of the attempts by a Claimant to have put aside a compromise agreement into which she had entered on the basis that she lacked litigation capacity at the time that it was entered into.

Joanne Dunhill was struck by a motor cycle ridden by the Defendant as she crossed a dual carriageway on foot. She sustained a fractured skull. Proceedings were issued in her name in 2002. Both parties were represented by Counsel and the Claimant was accompanied by a Mental Health Advocate. The matter was settled in the sum of £12,500 outside Court on 7 January 2003. Subsequently doubts emerged as to whether the Claimant had capacity to enter in to the compromise agreement and, by her litigation friend, she issued proceedings in negligence against her legal representatives. Further, the Claimant (again by her litigation friend) issued an application in the original 2002 proceedings seeking a declaration that she did not have capacity at the time of the purported settlement of her claim on 7th January 2003 and, on that basis, applying for the 2003 order to be set aside and directions given for the future conduct of the claim.

The issue of the Claimant's litigation capacity was resolved (for the time being) by the Court of Appeal on 3.4.12 (Ward and Lewison LJJ and Sir Mark Potter) [2012] EWCA 397; [2012] PIQR P15 when the court granted "a declaration that the claimant did not have capacity at the time of the purported settlement on 7 January 2003." The claim was

referred back to the High Court for 'case management.' The preliminary issue that came before Bean J was formulated as follows:

> "The Court having declared that the Claimant lacked capacity to enter into the compromise agreement of 7th January 2003 and the Defendant declining to ask this Court to approve the compromise retrospectively, does CPR Part 21.10 have any application where the Claimant brought a claim in contravention of CPR Part 21.2 so that in the eyes of the Defendant and the Court she appeared to be asserting that she was not under a disability?"

In material part, CPR Part [in fact, Rule] 21.10 provides that

> "Where a claim is made –
>
> (a) by or on behalf of a …. protected party; or
> (b) against a ……protected party,
>
> no settlement, compromise or payment…..and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the…. protected party, without the approval of the court."

In his judgment, Bean J first considered whether there was any binding precedent on the issue before him. In particular, he considered the Court of Appeal decisions in *Masterman-Lister v Brutton and Co* [2003] 1 WLR 1511 and *Bailey v Warren* [2005] PIQR P15, both of which referred to the principle established in *Imperial Loan Co v Stone* [1892] 1 QB 599, namely that when a person enters into a contract, and afterwards alleges and proves that he was so insane at the time that he did not know what he was doing, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.

In *Masterman-Lister*, the Court of Appeal upheld a decision that the Claimant had not lacked capacity at the time when he compromised a personal injury claim and therefore, the effect of any lack of capacity on the validity of the settlement did not need to be decided. Nevertheless, Chadwick LJ held obiter that it was not self-evident that the protection offered to Claimants lacking capacity (then under rules rr 10 and 12 OSC Ord 80) have any application where the Claimant brings a claim in contravention of the procedural rules (r.2) which provided that that a person under disability might not bring proceedings except by his next friend and might not defend proceedings except by his guardian ad litem.

In *Warren v Bailey*, the Claimant was found to have lacked capacity when entering an agreement compromising liability at 50/50. Arden LJ and Ward LJ reached the opposite conclusion to that expressed by Chadwick LJ. Arden LJ reasoned (again obiter) that the starting point was that a compromise of proceedings is not valid unless approved by the Court and there was nothing in the CPR which suggested that this should be disapplied by virtue of the fact that the Defendant was not aware of the Claimant's lack of capacity at the material time.

Bean J held that none of these cases had decided the issue before him in the present proceedings. Nevertheless, he considered it highly significant that obiter dicta of the

Court of Appeal in one case were fully considered, and disapproved, by the obiter dicta of a majority in a later case.

Bean J went on to conclude that, on the basis of statutory interpretation alone, CPR Part 21 applies to invalidate a consent judgment involving a protected party reached without the appointment of a litigation friend and the approval of the court, even where the individual's lack of capacity was unknown to anyone acting for either party at the time of the compromise. In reaching this conclusion he held (paragraph 28) that:

> "It is significant that CPR 21.10 applies to claims made 'by' as well as 'on behalf of' a protected party; and that 'protected party' is defined by CPR 21.1(2) as 'a party, or an intended party, who lacks capacity to conduct the proceedings.' In other words, a party who in fact lacks capacity to conduct the proceedings is protected (or, in 2003 terminology, was a patient) even though he or she has not been officially declared to be such and is not acting by a litigation friend. It should also be noted that the rule applies whether or not the party in question is legally represented."

The Judge went on to hold that policy considerations would support the same conclusion. Whilst there is a public interest in certainty and finality in litigation, he noted that there is also a public interest in the protection of vulnerable people who lack the mental capacity to conduct litigation, holding (at paragraph 30) that:

> "If Chadwick LJ's Imperial Loan point is right it must apply equally to unrepresented parties, of whom there are likely to be more in the future. It is not difficult to imagine the case of a claimant who is capable of signing and posting an acceptance form sent by a loss adjuster, but who (unknown to the defendant or the loss adjuster) is incapable of managing his affairs. It would be disturbing if the 'compromise' reached by such a person could not be reopened."

Comment

We have noted both the previous decisions in this case in previous issues of our newsletters. Bean J has followed the robust approach adopted by Ward LJ in the Court of Appeal and this judgment further emphasises the need to provide direct redress to the Claimant although she could (and indeed has) issued proceedings against her legal representatives in negligence. This decision is therefore highly relevant to both Court of Protection and also Personal Injury Practitioners and underscores the need to consider the issue of capacity when entering in to any consent order, particularly if the proposed settlement appears to be under value.

The decision is not, however, the final word, as the Supreme Court will be hearing in due course the Defendant's appeal against both the decision of the Court of Appeal as to Ms Burgin's capacity to enter into the compromise agreement and (thanks to the grant of permission by Bean J for a 'leapfrog' appeal) the appeal against Bean J's conclusions as to the effect of CPR 21.10.

RE X & Y (CHILDREN) [2012] EWCA CIV 1500

Media; Private hearings

This case merits brief mention because, although it is not a COP case, it sheds light by analogy upon the approach that should be taken to the reporting of sensitive information relating to the subject of proceedings. It also contains important obiter dicta as to the form of words that should be used in reporting restrictions orders.

The Court of Appeal was asked to consider the appropriate balance between Article 8 and Article 10 ECHR in the context of a local authority's duties to redact a report that it had prepared pursuant to its statutory duties under the Children Act 2004 and the Local Safeguarding Children Boards (Wales) Regulations 2006.

A parent had been convicted of a serious offence relating to X. The local authority had prepared an overview report and Executive Summary. The Executive Summary would, in accordance with Guidance published by the Welsh Assembly Government, be available publicly. However, it referred to the criminal proceedings in such a way that the family was readily identifiable. Further, it referred to matters relevant to Y which had not be disclosed as part of the criminal proceedings and which had not previously been in the public domain. An order imposing reporting restrictions in respect of the Executive Summary had been granted and the Local Authority applied for a variation. At first instance, Peter Jackson J had referred to the balance between Article 8 and Article 10 but allowed publication of the Executive Summary (with the local authority's proposed redactions).

On appeal, the Court of Appeal criticised the approach taken to the balancing of the competing Article 8 and Article 10 ECHR rights in play. Munby LJ (giving the lead judgment) reiterated that the rights and welfare of the child are of particular importance and must be protected (*In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593; *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166 considered). He noted that the statutory scheme at issue expressly envisaged a balancing act between Article 8 and 10 as, whilst there was a presumption of publication, it was subject to a requirement that any report was anonymised as necessary. There could in principle be situations in which the necessary form of anonymisation was such that no publication could be allowed.

On the facts of these proceedings, Munby LJ held that the redactions proposed by the Local Authority (names, ages and gender of X and Y) were not sufficient to meet the objective of protecting their identities and thus, whilst Peter Jackson J had correctly identified the relevant law, he had not grappled with this fundamental issue. A more drastic form of redaction than that approved by the judge was "necessary" in the Strasbourg sense if the balance between the public interest in the publication of the Executive Summary and the private interests of the children were to be struck properly and appropriately.

Munby LJ also made obiter comments in relation to the shortcomings of the wording of the reporting restrictions order which it held was insufficiently clear as to enable a layman to readily ascertain which documents might lawfully be published. The comments that he made were intended to be of wider import, and the principles apply equally to COP proceedings. They therefore merit setting out in (almost) full:

> "60. …The relevant paragraph for present purposes provided, by way of exception to the injunctions contained in the order, that:
>
> > Nothing in this Order shall prevent any person from … publishing the anonymised Executive Summary of the Serious Case Review carried out in relation to [name] and dated July 2012 (this Court having secured assurances from the [local authority] in relation to the form of the Summary and its date of publication)

61. It is an elementary principle of justice and fairness that no order will be enforced by committal unless it is expressed in clear, certain and unambiguous language. So far as this is possible, the person affected should know with complete precision what it is that he is required to do or to abstain from doing. The authorities setting out this sometimes overlooked principle are legion. In *Harris v Harris, Attorney-General v Harris* [2001] EWHC 231 (Fam), [2001] 2 FLR 895, [288], I set out what I said was a no doubt selective anthology. Here I can content myself with what Lord Westbury LC said in *Low v Innes* (1864) 4 DeGJ&S 286, 295–296: the order must:

> 'lay down a clear and definite rule … The Court … should, in granting an injunction, see that the language of its order is such as to render quite plain what it permits and what it prohibits.'

The principle has been endlessly repeated down the years since.

62. A related principle is that an order should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation. In *Ellerman Lines Ltd v Read* [1928] 2 KB 144, 157, Atkin LJ said:

> 'That judgment when drawn up, instead of reciting what the order of the Court was and what the defendants were restrained from doing, only refers to continuing an injunction granted by Rowlatt J, varied by Roche J, and continued by Greer J, without stating what it is that the Court was ordering the defendants to abstain from doing. That appears to me to be very bad practice … It is a matter of very great importance that the orders of the Court … should make it quite clear what the Court is ordering to be done. There is considerable laxity in this matter … Practitioners and the officers of the Court should see that orders are not passed unless they are in proper form.'

In *Rudkin-Jones v Trustee of the Property of the Bankrupt* (1965) 109 Sol Jo 334 the order as drawn read "It is ordered that an injunction be granted in the terms of Notice of Motion for Injunction". Lord Upjohn said:

> 'I do want to protest as strongly as I can at the granting of injunctions in that form. It means then that the person against whom the injunction is granted … has to look at another document in order to see what it is that he is enjoined from doing … It cannot be too clearly understood … that a person is entitled to look and look only at the order to see what it is that he is enjoined from doing. He looks at that order and finds out from the four walls of it and from no other document exactly what it is that he must not do.'

63. In the present case matters were even worse. When we inquired of counsel which was the authentic text of the document referred to in the order they were unable to give us any very confident response…

64. I appreciate that all this was happening on the last day of term, but the upshot is that even now, even the lawyers immersed in the litigation are unable to state with confidence what precisely it is that is permitted by the order. It is, in my judgment, a wholly unacceptable state of affairs. It is intolerable that a layman who risks imprisonment – a reporter, perhaps, or a newspaper editor wishing to publish some document which he may think is of public interest and importance – should be left to decipher an order of the court in this way, especially if, when seeking enlightenment, he turns to the local authority who obtained it only to be told that even they are not sure.

65. There is a perfectly simple remedy. If the order, having referred to the document, then contains words to the following effect

> 'being the document entitled [etc] marked 'X' and initialled by the judge a copy of which is annexed to this order'

there will be no doubt as to what it is that the order prohibits and permits. Nor, importantly, will there be any doubt that the document annexed to the order is indeed in the form approved by the judge."

Comment
The judgment highlights the centrality of children's welfare in the assessment of whether a document can be sufficiently anonymised for publication to proceed. Given the emphasis placed by the Court on the fragility and vulnerability of X and Y, the approach of the Court of Appeal is potentially relevant to vulnerable adults.

Munby LJ's obiter comments regarding the RRO are also an important reminder of the need for clarity in any order restricting publication of documents, particularly in circumstances where there is a penal notice attached.

SÝKORA V CZECH REPUBLIC [2012] ECHR 1960 (APPLICATION NO. 23419/07)
Article 5 ECHR; Deprivation of liberty; Practice and procedure

This case – rightly described by the Mental Disability Advocacy Centre as 'Kafkaesque' – concerned inter alia: (1) the removal of the applicant's legal capacity; and (2) his detention in a psychiatric hospital. It merits mention in both regards.

Detention
The applicant – who had previously (but without his knowledge) been deprived of his legal capacity – was confined to a psychiatric hospital for 20 days without his consent. After 5 days, his confinement was confirmed by his guardian, the City of Brno. Relying on *Stanev v Bulgaria, DD v Lithuania* and *Shtukaturov v Russia*, the Court found that the entirety of the period (unsurprisingly) constituted a deprivation of liberty within the meaning of Article 5(1) (paragraph 47), such that the question for the Court was whether the deprivation of liberty was lawful.

Whilst the Court accepted that there was sufficient medical evidence of the applicant's mental disorder to satisfy the first *Winterwerp* criteria, the Court found that the detention could not be considered lawful because there were insufficient safeguards against arbitrariness. The relevant Czech law deemed his admission to be voluntary as his guardian had consented, such that none of the protections against involuntary hospitalisation applied. In the circumstances, the Court observed that

> "the only possible safeguard against arbitrariness in respect of the applicant's detention was the requirement that his guardian, which was the City of Brno, consent to the detention. However, the guardian consented to the applicant's detention without ever meeting or even consulting the applicant. Moreover, it has never been explained why it would have been impossible or inappropriate for the guardian to consult the applicant before taking this decision, as referred to in the relevant international standards (see Principle 9 [of Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults (adopted on 23 February 1999)]. Accordingly, the guardian's consent did not constitute a sufficient safeguard against arbitrariness." (paragraph 68).

The Court went on to find that the applicant's rights under Article 5(4) ECHR had been breached because (by virtue of the relevant Czech law) the domestic courts could not intervene in his confinement as he was deemed to be present there voluntarily given the consent given by his guardian.

Determination of incapacity

The applicant complained that the total removal of his legal capacity had interfered with his right to private and family life and that the proceedings depriving him of legal capacity suffered from procedural deficiencies. He relied on Articles 6 and 8 of the ECHR. The Court considered the complaint under Article 8, noting that it was common ground that the deprivation of his legal capacity constituted an interference with his private life within the meaning of Article 8 (paragraph 101).

The Court went on to set out the principles that governed the determination of mental capacity, thus:

> "102. In such a complex matter as determining somebody's mental capacity the authorities should enjoy a wide margin of appreciation. This is mostly explained by the fact that the national authorities have the benefit of direct contact with those concerned, and are therefore particularly well placed to determine such issues. However, whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8. The extent of the State's margin of appreciation thus depends on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism (see *Shtukaturov*, cited above, § 87-89). Regarding the procedural guarantees, the Court considers that there is a close affinity between the principles established under Articles 5 § 1 (e), 5 § 4, 6, and 8 of the Convention (see *Shtukaturov*, cited above, §§ 66 and 91).
> 103. Any deprivation or limitation of legal capacity must be based on sufficiently reliable and conclusive evidence. An expert medical report should explain what kind of actions the applicant is unable to understand or control and what the consequences of his illness are for his social life, health, pecuniary interests, and so on. The degree of the applicant's incapacity should be addressed in sufficient detail by the medical reports (see *Shtukaturov*, cited above, §§ 93-94).

The Court held that the removal of the applicant's capacity was disproportionate to the legitimate aim invoked by the Government (paragraph 104), but for our purposes, more relevant are the views expressed by the Court as to the procedure adopted, thus:

> "107. The Court observes that the Municipal Court did not hear the applicant, either in the first round or the second round of proceedings, and indeed he was not even notified formally that the proceedings had been instituted (see *Shtukaturov*, cited above, §§ 69-73 and 91). The Court does not accept the Government's argument that the applicant's place of residence was unknown to the authorities and therefore it was difficult to deliver official mail to him. Nowhere in the case file is there anything to indicate that the Municipal Court made an attempt to inform the applicant of the proceedings and summon him to the hearings. In such circumstances it cannot be said that the judge had "had the benefit of direct contact with those concerned", which would normally call for judicial restraint on the part of this Court. The judge had no personal contact with the applicant (see *X and Y v. Croatia*, no. 5193/09, § 84, 3 November 2011).
> 108. As to the way in which the applicant was represented in the legal capacity proceedings, the Court is of the opinion that given what was at stake for him proper legal representation, including contact between the representative and the applicant, was necessary or even crucial in order to ensure that the proceedings

would be really adversarial and the applicant's legitimate interests protected (see *D.D. v. Lithuania*, cited above, § 122; *Salontaji-Drobnjak v. Serbia*, no. 36500/05, §§ 127 and 144, 13 October 2009; and *Beiere v. Latvia*, no. 30954/05, § 52, 29 November 2011). In the present case, however, the representative never met the applicant, did not make any submissions on his behalf and did not even participate at the hearings. She effectively took no part in the proceedings.

109. Moreover, the judgments were not served on the applicant (see *X and Y v. Croatia*, cited above, § 89). The judgments expressly stated that they would not be delivered to the applicant, with a simple reference to the opinion of the court-appointed expert, even though in her second report the expert in fact stated that a judgment could be sent to the applicant. Even at the hearing she did not give any warnings about adverse effects if the applicant received the judgment, but merely recommended not sending it because he would not understand it.

110. The Court, however, considers that being aware of a judgment depriving oneself of legal capacity is essential for effective access to remedies against such a serious interference with private life. Whilst there may be circumstances in which it is appropriate not to serve a judgment on the person whose capacity is being limited or removed, no such reasons were given in the present case and, indeed, in the present case, when the applicant was aware of the judgment and was able to appeal, his appeal was successful. Therefore, had the Municipal Court respected the applicant's right to receive the judgments, the interference would not have happened at all as the judgments would not have become final.

111. Finally, the Court observes that the 2004 decision was based only on the opinion of an expert who last examined the applicant in 1998 (see paragraph 9 above). In this context the Court cannot lose sight of the fact that development takes place in mental illness, as is also evidenced in the present case by the expert report on the applicant drawn up in 2007, on the basis of which the request to deprive the applicant of legal capacity was refused. Consequently, relying to a considerable extent on the medical examination of the applicant conducted six years earlier cannot form sufficiently reliable and conclusive evidence justifying such a serious interference with the applicant's rights (see, mutatis mutandis, *Stanev*, cited above, § 156). The Court notes that the expert attempted to examine the applicant between 2002 and 2004, but he refused to cooperate. Nevertheless, in the absence of strong countervailing considerations, this fact alone is not enough to dispense with a recent medical report involving direct contact with the person concerned.

112. Overall, the Court considers that the procedure on the basis of which the Municipal Court deprived the applicant of legal capacity suffered from serious deficiencies, and that the evidence on which the decision was based was not sufficiently reliable and conclusive."

Comment

Deprivation of liberty

This case is perhaps of some assistance in teasing out the implications of a curious remark made by the European Court of Human Rights in the judgment in *Stanev* where the Grand Chamber – considering the subjective element of deprivation of liberty – noted (at paragraph 110) that "there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned."

In its June 2012 discussion paper upon closing the Bournewood gap in Scotland, the Scottish Law Commission alighted upon this sentence:

"6.73 The relevance of consent to whether there is a deprivation of liberty at all has not featured to a great extent in any decision of the European Court. But the Court has commented on the possible role of a substitute decision-maker in this context:

> 'The Court observes in this connection that there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned'.

It would appear that 'valid replacement' of the wishes of the person with incapacity would prevent the regime under which he or she is living from being a deprivation of liberty at all. It may therefore be that Scots law could make specific provision for the giving of consent by substitute decision-makers to care of a person with incapacity in conditions which, absent such consent, would amount to deprivation of liberty."

This suggestion is – frankly – somewhat alarming, not least because it would remove from the protection of Article 5 (and Article 5(4)) whole categories of people who are, objectively, deprived of their liberty. Whilst there is no equivalent move to introduce such a step into the MCA 2005 in England and Wales, we are aware of judicial mooting of the question of whether Courts could give such 'substituted' consent. The decision in *Sýkora* does not sit easily with the proposition that any substituted consent can serve to remove a deprivation of liberty from the scope of Article 5(1): if it had done so, the Court would have been considering the exercise by the guardian of their consent by reference to the question of whether there was a deprivation of liberty at all, rather than whether it could be justified.

The decision also shows that the exercise of any such substituted consent (whether exercised by a public body or, we would suggest, by a Court) would have to be surrounded by procedural safeguards to secure against the risk of arbitrariness.

Determination of incapacity

There have now been a series of cases (summarised in the extracts set out above) in which the Strasbourg Court has emphasised the importance of hearing from P in the context of determination of incapacity. All the cases have been decided in the context of legislative systems in which capacity is status based, rather than (as under the MCA) functional. The consequences of a declaration of partial or complete incapacity by a Court are therefore sweeping. However, the reality is that the consequence of a declaration by the Court of Protection that P lacks capacity to take one or more decisions establishes the basis for potentially serious (if justified) interferences with P's autonomy. In the circumstances, it may well be that the Courts should consider hearing from P not just on an "occasional" basis (as Baker J recorded the position in *CC v KK and STCC* [2012] EWHC 2136 (COP), but whenever P's capacity to take material decisions or to litigate is in issue.

CHANGES TO THE MCA (1) DEBT RELIEF ORDERS

In a development that we did not have space to report upon in the last issue, the MCA was amended with effect from 1.10.12 (with transitional provisions) by paragraph 53 of Schedule 2 to the Tribunals, Courts and Enforcement Act 2007 (Consequential Amendments) Order SI 2012/2404. The material effect of the amendments is:

(a) to provide for a further exclusion from the category of persons eligible to be donors of lasting powers of attorney those made subject to a debt relief order under Part 7A of the Insolvency Act 1986: s.10(2).

(b) if P is made subject to such an order, then this will revoke an LPA so far as it relates to his property and affairs (although it will only suspend it if the order is an interim one): ss.13(3) and (4).

(c) likewise, the making of a debt relief order in respect of a donee of a power of attorney will terminate his appointment and revoke the power in so far as it relates to P's property and affairs (or suspend it if the order is an interim one): ss.13(6) and (8);

References to debt relief orders within the Act also include references to debt relief restrictions orders: s.64(3A).

As explained in the Explanatory Memorandum accompanying SI 2012/2404 The Tribunals, Courts and Enforcement Act 2007 introduced debt relief orders and debt relief restrictions orders into the Insolvency Act 1986. There are strict qualifying conditions placed on a debtor before he/she can enter into a debt relief order and they include having total debts of less than £15,000, minimal assets and disposable income of less than £50 per calendar month. Once he/she has entered into a debt relief order, the debtor is subject to a number of restrictions that are similar to those imposed on persons who have entered bankruptcy.

CHANGES TO THE MCA (2) TRANSFER OF SUPERVISORY BODY RESPONSIBILITIES FROM PCTS TO LOCAL AUTHORITIES

In a development that our local authority readers will already be aware of, but which has not yet had wide currency, with effect from 1.4.13 with the abolition of Primary Care Trusts in England, local authorities will assume the role of supervisory bodies for those deprived of their liberty in hospital, by virtue of the amendments to MCA 2005 contained in paragraphs 133-136 of Schedule 5 to the Health and Social Care Act 2012. As at the time of writing, no order has been made by the Secretary of State under s.306 of that Act identifying the date of 1.4.13, but the Department of Health has confirmed that this will be the material date. Secondary legislation making further consequential amendments will be laid before Parliament in advance of that date.

The identity of the local authority will be determined in similar fashion to that in respect of care homes, i.e. the local authority for the area in which the person is ordinarily resident or where the hospital is resident.

As explained in a fact sheet issued by the Department of Health, it will be affording limited additional funding to local authorities to support them in the extension of their statutory role, emphasising in so doing that '[h]ospitals will remain responsible as managing authorities for compliance with the DOLS legislation, for understanding DOLS and knowing when and how to make referrals. Hospitals remain responsible for ensuring that all staff in hospitals are Mental Capacity Act (MCA) compliant. Clinical Commissioning Groups (CCGs) will oversee these responsibilities; and be responsible for training and MCA compliance. All CCGs must have a named MCA lead and MCA policies to support their responsibilities.' SCIE has also issued detailed guidance upon best practice in the transitional period running up to 1.4.13.

REGULATORY REVIEW

The Cabinet Office is currently running the so-called 'Red Tape Challenge,' grouping regulations into themes across a wide variety of areas, and putting them on a website for people and businesses to comment on: asking which ones should be kept, improved or scrapped. It would appear that the results are then to be used to challenge departments to get rid of regulations that are not needed, or look for alternatives where appropriate. One of the current themes, open for comment until 11.12.12, are regulations relating to Quality of Care and Mental Health. A significant number of provisions contained in secondary legislation relating to the MCA 2005 are included for consideration, including (for instance), the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008, SI 2008/1315. We would suggest that any concerned readers take the opportunity – with some speed – to make any comments upon the wisdom or otherwise of dispensing with all or part of the regulations up for consideration.

HOME CARE AND HUMAN RIGHTS

The Equality and Human Rights Commission has published a guide called 'Your Home Care and Human Rights'. It explains the community care and HRA obligations of local authorities and the standards required of care providers very simply and clearly, and will be of great value to advocates and social workers in helping people understand how the system of home care works and what their rights are.

'THE STATE OF HEALTH CARE AND ADULT SOCIAL CARE IN ENGLAND: AN OVERVIEW OF KEY THEMES IN CARE IN 2011/12' CQC, NOVEMBER 2012

This comprehensive report contains a wealth of facts, figures, analysis, and examples of good and bad practice in health and social care. By way of example, we note:

- More than 400,000 people in England live in residential care, 1.1 million receive care at home, and around 5 million care for a relative or friend.
- As at 31 March 2012, there were 13,134 residential care homes with 247,824 beds registered in England and 4672 nursing homes with 215,463 beds.
- An estimated 45% of care home places are self-funded.
- 83% of councils have set their threshold for eligibility for state-funded care at 'substantial' (compared to 70% in 2008/9). 2% set it at 'critical'.

The CQC provide a special focus on restrictive practices in mental health and mental capacity from at p.102ff of the report. In relation to the deprivation of liberty safeguards, it states (at p.103) that:

> "All care homes and hospitals in England must apply for authorisation if they propose to deprive someone of their liberty by, for example: keeping them locked in; physically restraining them; placing them under high levels of supervision; forcibly giving them medicines; or preventing them from seeing relatives and friends.

A number of concerns about restrictive practices were identified, including:

- Restraint: Inspectors found it difficult to identify from patient records how often, and for how long, restraint was used and what actually happened during the restraint, which raised questions about such decisions are accounted for and monitored.

- Seclusion and segregation: Safeguards were not always implemented and an interesting range of terms was used to describe circumstances in which people might effectively be detained in seclusion: "Nursed in his room", "Placed in the low-stimulus area for a sustained period" or "Chose to be in the safe-care suite."

- Blanket rules: Typically, blanket rules related to access to communal rooms, kitchens, the person's own bedroom (whether locking them out of their bedroom during the day, or insisting on a general and often early bedtime), and gardens and outdoor space. There were also rules in some settings about when a patient or resident might have a drink or a snack, or go for a cigarette. This happened in all types of care setting. In some settings, staff members told people that their takeaway meal, or outing, would not be allowed as a punishment for certain behaviour.

- Lack of understanding of the Mental Health Act 1983: for example, informal or voluntary patients were subject to de facto detention with little consideration whether their deprived was deprived.

ECtHR Guide to Article 5

With thanks to Lucy Series for bringing this to our attention, the research division at the European Court Human of Rights has just produced a guide to Article 5 which summarises the jurisprudence upon Article 5 up to and including the *DD v Lithuania* case.

Tying ourselves into (Gordian) knots article

At the risk of it appearing that the COP Newsletter is imminently to be re-titled the COP Deprivation of Liberty newsletter, those who have not yet got their fill of matters DOL related may care to satiate their appetite by turning to one of the fruits of Alex's sabbatical, the article on the meaning of deprivation of liberty in the context of the MCA 2005 to be found here. That it runs to some 81 pages may – one might possibly think – speak for itself as regards the ongoing debate as to the law in this area is sufficiently accessible to satisfy the requirements of Article 5(1) ECHR.

ISSUE 29 JANUARY 2013 Court of Protection update

In this newsletter, we discuss an important COP case upon Article 8 and deprivation of liberty, as well as a rare example of a Court declaring that force-feeding is not in P's best interests. We also discuss a number of recent judicial review decisions which shed light (directly or indirectly) upon the approach that public bodies and the Courts should take to decisions relating to care and support for the incapacitated, as well as the important decision of the Supreme Court in *Re A* on disclosure.

The New Year brings with it a number of changes, together with resolutions. At the end of this newsletter, we set out our COP resolutions for the year. At its outset, we mark with due congratulations the appointment of Lord Justice Munby as President of the Family Division and (in consequence) of the Court of Protection. We are confident he will continue to maintain his keen interest in matters MCA-related, and very much

hope that as part of his remit he will continue to press for the introduction of the reforms accepted by his predecessor but one so as so ensure that the COP can work as smoothly as possible.

THE NHS TRUST V L AND OTHERS [2012] EWHC 2741 (COP)
Medical treatment; Mental capacity; Treatment withdrawal

Ms L was a highly intelligent 29 year old who, because of severe anorexia nervosa, had spent 90% of her previous 16 years in inpatient units, often under the Mental Health Act 1983. She also suffered from severe obsessive compulsive disorder. In January 2012, her detention under s.3 of the Act was rescinded after all treatment options had been exhausted and compulsory treatment had been shown only to reinforce her mental disorder and to increase her disability. The NHS Trust sought a declaration that it was not in her best interests to be the subject of forcible feeding or medical treatment, notwithstanding that she would inevitably die without it.

In early 2012, Ms L had hoped to move to a nursing home,

> "… but, for reasons no one has been able to fathom, (but seem likely to relate to the nursing home having second thoughts as to whether they were willing to accept the responsibility of looking after Ms L), the nursing home in question withdrew their offer of a bed. Ms L was devastated and reacted by reducing her food intake; this resulted in her becoming profoundly and dangerously hypoglycaemic."

Having been transferred to a different hospital in March 2012 for emergency treatment, a 'do not resuscitate' decision was taken and attempts to engage Ms L in a re-feeding programme continued. Her struggling attempts to engage with the naso-gastric tube and liquid nutrients are vividly detailed at paragraphs 26-27 of the judgment.

Defying the odds, but still critically ill, by mid-July 2012 she was refusing all food by mouth and wanted to make an advance decision to refuse treatment for hypoglycaemia, although it was felt she lacked capacity. She told her mother that she did not want to die and still hoped to become strong enough to move to a nursing home. Her wish to move was also recorded in writing and if funding was in place she felt she would then have the motivation to move forward. She said:

> "I feel the best option for me to successfully do this would be to get stronger on the NG tube. Currently I feel an oral diet would be too much for me and also create too much anxiety for me. The NG tube could be short term to get me back on my feet and in a stronger position to move forward. Thank you for taking time to read my wishes. I appreciate your acknowledging my wishes/ thoughts."

By the time of the hearing in August 2012, Ms L was willing to receive 25mls per hour of nutrients by naso-gastric tube, but not a millilitre more (see paragraphs 37-41). This dramatically reduced the number of hypoglaemic episodes but at least 30mls was necessary for her to put on weight. Weighing about 3 stone, with a body mass index (BMI) of around 7.7, her liver function was impaired, she had end stage organ damage and MRSA, her bone marrow was completely compromised and she was in significant pain from serious pressure sores. She had weeks to live. According to the expert opinion, she would have to be sedated to be forcibly fed by naso-gastric tube or PEG feeding with close to a 100% likelihood of death. No patient with this BMI was reported to have

survived such an enforced re-feeding regime. Thus, the only remote possibility of survival would be if she agreed to increase her calorific intake, although even this would be too late to save her given the organ damage.

Capacity

Mrs Justice Eleanor King first had to determine the extent to which Ms L was capable of deciding for herself. Intellectually, Ms L knew that she was close to death but showed an "inappropriate indifference to matters of life and death and it seems as if it has not entirely hit home." She wanted to go to a second nursing home that had agreed to take her if she was well enough:

> "50 … [I]n the past it may have been hoped that the prospect may have provided the incentive she needs to start putting on weight but, as Dr Glover points out, her illness won't even let her increase her intake by 1ml an hour in order to help her towards that goal. Even if there was a 1% chance of her agreeing to increase her input, Dr Glover is of the view that there is a 0.1% chance of her being able to stick to it and consistently to work to her recovery."

She could not contemplate any calorific increase until she was walking around and able to "use some of them up." Moreover, her fear of gaining weight increased as her BMI fell. She was held to lack capacity to make decisions in relation to serious medical treatment, in particular nutrition and hydration and the administration of dextrose for hypoglycaemic episodes, because her profound and illogical fear of weight gain prevented her from being able to weigh up the risks and benefits. However, she had capacity to decide on antibiotic treatment and analgesia and treatment for pressures sores. These treatments were not calorific "so she is able to make a perfectly rational decisions that she needs antibiotics to fight off the infection which would otherwise, in all likelihood, kill her" (paragraph 54).

Best interests

The Judge noted that Ms L's seemingly rational desire to get stronger and to move to a nursing home was "completely overwhelmed by her terror of gaining weight and by her fear of 'calories'" (paragraph 59). Her mother did not consider compulsory feeding to be in her best interests. And the expert concluded, "…there comes a point in the treatment of any patient where, regardless of the diagnosis, the slavish pursuit of life at any cost becomes unconscionable. I believe, sadly, that this point has been reached in Ms L's treatment." After noted that the strong presumption to preserve life is not absolute, her Ladyship held:

> "68. In my judgment this is one of those few cases where the only possible treatment, namely force feeding under sedation, is not to be countenanced in Ms L's best interests: to do so would be futile, carrying with it a near certainty that it would cause her death in any event. Such a course would be overly burdensome in that every calorie that enters her body is an enemy to Ms L.
> 69. Ms L would I am satisfied be appallingly distressed and resistant to any suggestion that she was to be force fed and to what purpose? Her poor body is closing down, organ failure has begun, she can no longer resist infection and she is, at all times in imminent danger of cardiac arrest. Even if she could, by some miracle, agree to some miniscule increase in her nutrient intake her organ failure is nevertheless irreversible and her anorexia so severe and deep rooted that there could be no real possibility of her maintaining her co-operation. Ms L on occasion shows some small spark of insight – she said on the 1st August that she was frightened as she cannot help herself from 'messing with the tube'."

In the circumstances, the Court declared (to paraphrase) that it was in Ms L's best interests for clinicians (a) to provide nutrition, hydration and medical treatment where she complied with its administration; (b) to administer dextrose to immediately save life, with minimal force if necessary; (c) not to provide nutrition and hydration if she resisted after all reasonable steps had been taken to gain her co-operation; and (d) to provide palliative care should she enter the terminal stage of her illness.

Comment
This decision is of interest, not because it provides any new legal principle, but simply because it is one of the exceptionally rare occasions when the Courts have sanctioned the possible withdrawal of nutrition and hydration from a patient with anorexia nervosa. Here there was believed to be a virtually 0% prospect of recovery. This can be contrasted with *A Local Authority v E and others* [2012] EWHC 1639, in which enforced re-feeding was authorised where the prospects were considered to be 20%. Clearly there does come a point where the sanctity of life must give way to the concept of dignity; where Article 2 ECHR gives way to Articles 3 and 8. That point is evidently fact-specific but, now that Jane Nicklinson has been granted permission to appeal the decision in *R (Nicklinson) v Ministry of Justice* [2012] EWHC 2381 (Admin), the forthcoming decision(s) of the appellate Court(s) on the "right to die" will no doubt explore the "give way" point further.

J COUNCIL V GU & ORS [2012] EWHC 3531 (COP)
Article 5; Deprivation of Liberty; Article 8; Contact

This judgment considers the right to respect for private life in the context of a deprivation of liberty. Although the final order in the case was agreed between the parties, the court was invited to make an unambiguous declaration that the relevant restrictions were compliant with Article 8 ECHR.

"George" suffered from a number of mental disorders, including paedophilia. One of the ways this was manifested was through compulsive letter writing about his fantasies of sex with children. Some of these letters had been left in public places. All parties agreed that it was in George's best interests to remain living in a privately-owned care home and to be subjected to restrictions including strip-searching and monitoring of his correspondence and telephone conversations. There was no dispute that he was deprived of his liberty.

Mostyn J held that the restrictions amounted to an interference with George's private life. He went on to consider the requirements of Article 8 (at paragraphs 11-12) and, in particular, the need for the interference to have a basis in national law. Mostyn J lamented the absence of detailed procedures and safeguards for persons detained pursuant to the MCA, in contrast to the primary and secondary legislation that governs restrictions on those detained under the Mental Health Act 1983 (paragraphs 13-14).

The Official Solicitor raised concerns as to whether the restrictions in this case were compliant with Article 8 on the basis that they were insufficiently prescriptive, carried insufficient safeguards, and lacked validation and oversight by a public body. To address these concerns the parties agreed a 52-page policy document that included specific policies governing searches of George and his room, as well as monitoring of his telephone calls and correspondence.

Additional layers of scrutiny were also agreed between the parties, including provision for the NHS Trust to periodically review each separate policy and receive monthly reports, and for the CQC to seek expert advice as to the care of George and specifically case track George during the course of any compliance review.

The Official Solicitor submitted that the agreed policies and procedures put beyond doubt any question of compliance with Article 8. The care home, which was said to have agreed the policies out of benign concern for George, argued that the policies were not in fact necessary to legitimise the restrictions. This was not accepted by Mostyn J, who held (at paragraphs 20-21):

> "... not every case where there is some interference with Art 8 rights in the context of a deprivation of liberty authorised under the 2005 Act needs to have in place detailed policies with oversight by a public authority. Sometimes, particularly where the issue is one-off (such as authorising an operation), an order from the Court of Protection will suffice and will provide a sufficient basis in law. But where there is going to be a long-term restrictive regime accompanied by invasive monitoring of the kind with which I am concerned, it seems to me that policies overseen by the applicable NHS Trust and the CQC akin to those which have been agreed here are likely to be necessary if serious doubts as to Article 8 compliance are to be avoided.
> 21. Of course all this debate would become empty were Parliament or the Executive or the CQC to promulgate rules or guidance to cover the situation which I have here. It is hard to understand why there are detailed statutory provisions relating to personal searches and telephone and correspondence monitoring for high security mental hospitals but none at all for private care homes."

On a separate note, Mostyn J described the standard practice of referring to parties by their initials as confusing and dehumanising. In light of the general rule that proceedings are to be heard in private, he opined that all court documents should bear the parties' actual names and that anonymised names should only be used when the court's judgment is published.

Comment

This is, in some ways, an unexpected development in the case-law on restrictions associated with deprivation of liberty. Whilst the relatively intrusive restrictions in this case go well beyond those in many other cases, it is likely that an interference with the right to respect for private life may be found in many (if not all) cases where an individual is deprived of their liberty.

The wide implications of this judgment mean that it was perhaps unfortunate that Mostyn J was not required to adjudicate (at least at this stage) upon the extent to which Schedule A1 provides authorisation for restrictions upon contact/private life ancillary to the deprivation of liberty to which it is addressed. The question of the extent to which standard authorisations can serve as a proper basis to restrict contact arrangements is a vexed one:

1. If restrictions upon private life (including contact arrangements) are seen as a factor going to establish whether a person is deprived of their liberty, then it does not strain logic or principle to suggest that they can then be authorised by virtue of a standard authorisation. If this is so, then the grant of a standard authorisation together with sufficiently detailed requirements covering contract restrictions would have served to

meet the concerns raised by the Official Solicitor in the case before Mostyn J, and there would have been no need for the elaborate overlay of 'ownership' requirements endorsed by the Court;

2. If, however, the question of the additional restrictions upon private life upon those deprived of their liberty are to be viewed separately to the question of whether they are deprived of their liberty (an approach which finds support not just in the cases cited by Mostyn J but also in the decision of the Strasbourg Court in *Munjaz v United Kingdom* (Application No. 2913/06, decision of 17.7.12)), then as a matter of logic, it becomes difficult to say that a standard authorisation can serve as sufficient authority to impose restrictions upon those 'surviving' Article 8 rights. These must find a basis in accordance with the law from some other source.

It is perhaps not going to be possible to untangle the complications set out immediately above until the Supreme Court has decided precisely how one is to approach the definition of 'deprivation of liberty,' but the decision in GU adds a further layer of complexity.

In light of the implications of the judgment, it is also perhaps unfortunate that Mostyn J was not required to determine precisely what Article 8 demanded in the circumstances that arose in the case before him. This is particularly so because the logic of his conclusion is not confined to the position where a person is deprived of their liberty, because any interference with Article 8 rights can only be justified if it satisfies the criteria contained within Article 8(2). There are likely to be many who are subject to such interferences by way of restrictions upon contact who are not subject to a deprivation of liberty (especially given its currently circumscribed definition). Is a policy 'owned' by a public authority required in each such case? And what is required before it can have the requisite qualities of accessibility, foreseeability and predictability?

Finally, it is perhaps unfortunate that there is a degree of ambiguity in the judgment as to the circumstances under which a judicial imprimatur is necessary before an ongoing interference with Article 8 in a care home (or hospital) can be said to be in accordance with the law. The tenor of the judgment was undoubtedly to the effect that the primary consideration was the 'ownership' by a public authority of a policy governing the interference. However, the material policy in the case before Mostyn J had been placed before the Court, and would be reviewed again by the Court at least once more (and possibly on an ongoing annual basis). Mostyn J did not, in terms, identify whether – absent this review – he would have been satisfied that doubts as to Article 8 compliance would not have arisen.

As Mostyn J identified, none of the complexities in the case before him would have arisen had rules or guidance been promulgated from a suitably authoritative source governing monitoring and searching in private care homes. We suspect that the prospect of such rules/guidance being forthcoming in the near future is unfortunately remote, as welcome as they would be to provide certainty for both providers and individuals.

IN THE MATTER OF A (A CHILD) [2012] UKSC 60
Practice and procedure; Disclosure

The Supreme Court considered an appeal against the decision of the Court of Appeal ([2012] EWCA Civ 1204) in which McFarlane, Thorpe and Hallett LJJ had held that the identity of an individual (X), the mother of a little girl (A), who had made serious allegations of sexual abuse against A's father and the records relating to those allegations

should be disclosed to A's mother, A's father and A's children's guardian. The question of disclosure arose in the context of family proceedings concerning contact between A and A's father which had been suspended in light of the allegations made by X. The Local Authority claimed Public Interest Immunity in respect of the records at issue and disclosure was further resisted by X.

Unlike the Court of Appeal and the High Court, the Supreme Court did not have sight of the records at issue. X continued to resist disclosure on the grounds that it would violate her Article 3 ECHR rights as further exposure to psychological stress risked causing her medical complications. Alternatively, she contended that disclosure would amount to a disproportionate invasion in to her private life. The mother, father and A's children's guardian supported disclosure and the Local Authority adopted a neutral stance.

The Supreme Court (Lady Hale giving the lead judgment) reviewed the common law principles relating to PII as claimed by the Local Authority and noted that immunity is not absolute in nature; where appropriate, the Court must strike the balance between the right to a fair trial and the interest in maintaining confidentiality. Whilst the existing authorities did not address the question at issue, namely the circumstances in which disclosure could be refused in the interests of a third party (X), were this a case in which common law principles alone fell to be considered, Lady Hale noted that it was clear that the public interest would weigh in favour of disclosure. The allegations could not be properly investigated in the absence of disclosure being granted.

Lady Hale went on to consider the effect of the Human Rights Act 1998. In relation to the submission that disclosure would amount to a violation of X's Article 3 rights, the Supreme Court accepted that it was possible in principle that the revelation of an individual's identity could have a sufficiently detrimental impact on their well-being so as to amount to inhuman or degrading treatment. However, the legitimate interests of the State in subjecting an individual to such treatment are also relevant and on the facts of the particular case, X was receiving specialist treatment which would mitigate the severity of the impact upon her. Accordingly, the claim based on Article 3 failed.

As to the question of X's right to privacy and the submission (advanced on behalf of X) that the material could be handled through some closed procedure, the inroads in to the rights to a fair trial and to a family life of the parties to the proceedings that would ensue were such that X's rights were not sufficient justification for refusing disclosure. In reaching this conclusion, the Supreme Court emphasised the difficulties associated with a ruling that a closed procedure could be adopted in this type of proceedings and the deficiencies that would be associated with evaluating the closed material on the specific facts.

The Court went on to hold that whilst it would uphold the decision of the Court of Appeal to grant disclosure, this did not equate to ruling that X would be required to give evidence in person. It would only be sensible in a case such as this to proceed one step at a time. In the event that a party wished to call X to give oral evidence, it would be necessary to assess the competing rights at they evolved. It would be very unlikely that it would ever be appropriate for the father to question X if he remained a litigant in person.

Comment
This decision confirms the approach adopted by the Court of Appeal in favour of disclosure of allegations of abuse notwithstanding the potentially serious impact of such disclosure on the third party (alleged) victim.

The issues that arose in this case have clear parallels with issues that arise not infrequently in welfare proceedings in the COP. We would welcome the emphasis on the need to ensure that a proper investigation of such allegations can been undertaken and the recognition that there is a strong link between the adequacy of such an investigation and the extent to which the parties concerned have been informed of the case they must meet.

Equally, the conclusion that it is necessary to separate the question of disclosure from the question of whether the alleged victim should be required to give oral evidence is to be welcomed, as is the explicit recognition that the balance of competing rights can and often will evolve and it may not be appropriate to resolve the two issues simultaneously. Finally, the decision stands as a clear endorsement of the cardinal importance of judges only determining cases upon the basis of evidence which has been seen by all parties. This is a factor which carries particular weight, we might suggest, in the context of Court of Protection in the face of the continuing (if unjustified) charge that it is a 'secret' Court.

R (ET) v (1) Islington LBC (2) Essex CC [2012] EWHC 3228 (Admin)
COP jurisdiction and powers; Interface with public law jurisdiction

This judicial review decision in the context of the assessment of a risk posed to children by a sexual offender merits brief mention as shedding a light (by analogy) upon the approach that the Administrative Court might take in relation to similar issues in respect of incapacitated adults.

The Claimants (three children) challenged an assessment of the risk posed to them by a man about to be released from imprisonment for sexual offending. The claim failed, but for present purposes, the relevant part of the judgment is that in which Cranston J analysed the approach that he was required to take to assessing the lawfulness of the risk assessment. At paragraphs 24 ff he noted as follows:

> "24. In community care cases the Wednesbury test is normally applicable (see *R (Ireneschild) v Lambeth LBC* [2007] EWCA Civ 234, (2007) 10 CCLR 234 and *Pulhofer v Hillingdon LBC* [1986] AC 484). *R (L) v Leeds City Council* [2010] EWHC 3324 was a community care case involving the needs of a 14-year-old girl suffering from cystic fibrosis. The council had refused a request to provide a treatment room in her home. Langstaff J held that the intensity of review in that case, given the profoundness of the impact, would be judged objectively and would be heightened.
> 25. That approach was recently adopted by the Supreme Court in *R (KM) v Cambridgeshire County Council, National Autistic Society and others intervening* [2012] UKSC 23 [2012] PTSR 1189. That was a community care case where the issues were the local authority's method of calculating the claimant's personal budget under the Chronically Sick and Disabled Persons Act 1970 and whether the council's reasoning in reaching its conclusion was sound. In the course of the judgment, Lord Wilson (with whom Lords Phillips, Walker, Brown, Kerr and Dyson agreed) said this:

> '36. I return at last to the appellant's twin challenges to the lawfulness of Cambridgeshire's determination to offer him £85k. I agree with Langstaff J in *R (L) v Leeds City Council*, [2010] EWHC 3324 (Admin), at para 59, that in community care cases the intensity of review will depend on the profundity of the impact of the determination. By reference to that yardstick, the necessary intensity of review in a case of this sort is high. Mr Wise also validly suggests that a local authority's failure to meet eligible needs may prove to be far less visible in circumstances in which it has provided the service-user with a global sum of money than in those in Page 15 which it has provided him with services in kind. That point fortifies the need for close scrutiny of the lawfulness of a monetary offer. On the other hand respect must be afforded to the distance between the functions of the decision-maker and of the reviewing court; and some regard must be had to the court's ignorance of the effect upon the ability of an authority to perform its other functions of any exacting demands made in relation to the manner of its presentation of its determination in a particular type of case. So the court has to strike a difficult, judicious, balance.'
>
> 26. In my view, the intensity of *Wednesbury* review is also heightened under the Children Act 1989 in circumstances like the present, where the consequences of the council falling into error is the possible sexual abuse of children and young people. The profundity of the impact, to use that phrase, is equivalent, indeed potentially greater, than in community care cases such as *R (KM) v Cambridgeshire County Council*. In my view, a notion of heightened review does not undermine the *Wednesbury* test. The court is simply saying that the public authority must exercise its discretion with a due appreciation of its responsibilities. In effect, given the context, the public authority must tread more carefully than usual. Heightened review calibrates *Wednesbury* unreasonableness to the matter at issue."

Comment

The precise delineation between the Court of Protection and the Administrative Court remains difficult. As ET makes clear, there is no rule that merely because the individual at the heart of the challenge is a child the Court will exercise a heightened degree of scrutiny. The same applies in respect of incapacitated adults. However, because (as with children, albeit not necessarily for the same reasons) incapacitated adults are likely to be particularly vulnerable to the consequences of decisions taken by authorities in the discharge of their public law obligations, it may very well be – at least in situations analogous to those arising in ET – the Administrative Court will be open to arguments that the gravity of the consequences give rise to a heightened standard of review as to whether the authority in question has acted lawfully.

R (CHATTING) V (1) VIRIDIAN HOUSING (2) LB WANDSWORTH [2012] EWHC 3595 (ADMIN)

COP jurisdiction and powers; Interface with public law jurisdiction

This community care judicial review is of considerable importance for the very clear statement it contains as to the interaction between the MCA 2005 and public law.

An elderly lady suffered from a number of physical and mental impediments which, together with her age, put her in need of care. Viridian Housing, the charity which owned the premises, reorganised the arrangements for the provision of care to residents of the building in which the woman lived. The woman and her niece were anxious about

the effect of the reorganisation upon the woman's continued occupation of her flat in the building. Her niece as her litigation friend brought a claim for judicial review.

The Claimant sought declarations that in transferring responsibility for her care to another organisation Viridian were in breach of a compromise agreement made in earlier litigation and had infringed Article 8 EHCR. She also sought a declaration that Wandsworth Borough Council had acted unlawfully in its management of the transfer of her care, in that it had failed to ensure that care was provided to her in a way that meets her assessed needs and takes into account her best interests.

The claim failed. However, for our purposes, the case is of importance because of the emphasis placed at the hearing upon the contention that the Council had failed to act in the Claimant's best interests contrary to s.4 MCA 2005. The Claimant contended that the Council was under duties, both as part of the discharge of their duties under the National Assistance Act and pursuant to binding guidance issued under the Mental Capacity Act 2005, to meet her community care needs and to take into account her best interests as a mentally incapacitated person. Specifically, the contention was advanced (paragraph 91) that the Council acted unlawfully in not taking the Claimant's best interests into account; faced with a report from an ISW saying that accommodation in a residential unit of one was consistent with her best interests, the Council ought to have taken a decision according to where her best interests lay. The Council disputed the suggestion that the Claimant's best interests were not regarded as a material consideration, but submitted that they were not the yardstick by which it fell to the Council to take decisions about her.

The Claimant contended that the MCA was binding upon the local authority in the exercise of its social services functions by virtue of the operation of s.7(1) Local Authority Social Services Act 1970, which in turn required local authorities to have regard to the SoS's guidance "Prioritising need in the context of Putting People First: A whole system approach to eligibility for social care." This guidance contains reference to the MCA and to the five principles contained in s.1. The Claimant also relied upon the decision of Ouseley J in *R (W) v Croydon BC* [2011] EWHC 696 (Admin), in which a decision was quashed on the basis that there had been inadequate consultation, in circumstances where (the service user lacking capacity), the MCA 2005 was said to have been of "particular importance."

Having set out the rival arguments, Nicholas Paines QC concluded that there had been no unlawfulness in the approach taken by the Council, primarily because he could identify no basis for saying that the Council were under a legal duty, enforceable by way of judicial review, to make arrangements under s.26 NAA 1948 for the Claimant to receive accommodation and care in a residential unit of one person at a specific location. He then addressed the question of the MCA 2005 thus:

> "99. As regards the Mental Capacity Act 2005 and the Guidance, I have to decide whether the Council made a legal error in failing to decide what arrangements should be made for Miss Chatting by reference to the question of what was in her best interests. I agree with Ms Laing that they did not err in law in this regard. Plainly they would have erred in law if they had regarded Miss Chatting's best interests as an irrelevance, because they would have been in breach of their duty under section 21(2) of the 1948 Act to have regard for her welfare. But the fact that Miss Chatting is mentally incapacitated does not import the test of 'what is in her best interests?' as the yardstick by which all care decisions are to be made.

100. Section 1(5) of the Act applies to 'an act done, or decision made ... for or on behalf of a person who lacks capacity'. Its decision-making criteria and procedures are designed to be a substitute for the lack of independent capacity of the person to act or take decisions for him or herself. They come into play in circumstances where a person with capacity would take, or participate in the taking of, a decision. In deciding not to press for the registration of Miss Chatting's flat as a residential home for one person and in deciding (as they appear to have done) to agree to a novation of their section 26 arrangements for Miss Chatting so as to substitute Gold Care for Viridian, Wandsworth Borough Council were taking decisions that fell to them to take, with due regard for her welfare. They could rationally conclude that the decisions were compatible with her welfare. They did not as a matter of law require Miss Chatting's assent to these decisions; no decision, or participation in a decision was involved on her part."

Comment

Paragraphs 99 and 100 of this decision stand as an extremely clear (and we would suggest materially correct) statement of the discharge of the duties imposed upon local authorities by both their statutory community care obligations and the MCA 2005.

We found that an error frequently infects public-law decision-making as regards the incapacitated: whilst a best interests meeting seeking to comply with s.4 MCA 2005 can be an extremely important part of the decision-making process, a decision as to the delivery of community care (or indeed healthcare) is ultimately a decision based upon the assessment of (1) what the person's needs are; and (2) whether what is to be offered properly meets those needs. This is not, strictly, a 'best interests' decision, but rather a public law decision.

The public authority must take into account the person's interests and – crucially – such of their wishes and feelings and/or the views of those properly interested in their welfare as the particular situation requires/allows. However, the views of a capacitous service user will not (in the majority of community care decisions) ultimately be decisive; the person lacking capacity is not put in any better position by virtue of their lack of capacity. By the same token, the Court of Protection cannot then (by taking a decision for on behalf of the person) seek to dictate to the public authority what options should be placed before it for consideration: see *A Local Authority v PB and P* [2011] EWHC 502 (COP) and *Re SK* [2012] EWHC 1990 (COP) as well as the pre-MCA 2005 cases of *A v A Health Authority* [2002] Fam 213, *Re S (Vulnerable Adult)* [2007] 2 FLR 1095 and the Children Act 1989 case of *Holmes-Moorhouse v Richmond-upon-Thames London Borough Council* [2009] 1 WLR 413.

One wrinkle that we should perhaps mention in conclusion in this regard is the position where a person refuses an option advanced by a public authority. Where the person has capacity, it is established that a refusal can discharge the public authority's obligation (at least in respect of the provision of residential accommodation under the provisions of the NAA 1948) so long as the refusal is maintained: *R v Kensington and Chelsea RLBC ex p Kujtim* [1999] 4 All ER 161; *R (Khana) v LB Southwark* [2001] EWCA Civ 999. On the facts of an individual case, a refusal might give rise to three possibilities:

1. the refusal is an unwise but capacitous one, falling within *Kujtim* and *Khana*;

2. the refusal is in fact one made without capacity, but that it is in the person's best interests that they receive the care package in question;

3. the refusal is one made without capacity but it is in fact in the person's best interests notwithstanding its lack of wisdom.

At least where option (3) is concerned, we would anticipate that the public authority would be giving very serious consideration to seeking the endorsement of the Court of Protection to its decision (which would, we note, be a best interests decision, because the authority is not seeking to withhold an option based on any consideration other than those falling within s.4 MCA 2005).

R (CORNWALL COUNCIL) V SOS FOR HEALTH & ORS [2012] EWHC 3379 (ADMIN)
COP jurisdiction and powers; Interface with public law jurisdiction

This community care case, a judicial review of a decision of the SoS for Health as to the ordinary residence of an adult lacking the capacity to decide where they wished to live, merits a note for its consideration of the test set down in *R v Waltham Forest LBC, ex p. Vale*, 25 February 1985 and the guidance issued by the DoH upon the determination of ordinary residence for purposes of the National Assistance Act 1948. In Vale, Taylor J set out two approaches, which are referred to as "test 1" and "test 2" in the Departmental Guidance. "Test 1" applies where the person is so severely handicapped as to be totally dependent upon a parent or guardian. Taylor J had stated that such a person is in the same position as a small child and her ordinary residence is that of her parents or guardian "because that is her base." The second approach, "test 2," considers the question as if the person is of normal mental capacity, taking account of all the facts of the person's case, including physical presence in a particular place and the nature and purpose of that presence as outlined in *Barnet LBC v Shah* [1983] AC 309, but without requiring the person himself or herself to have adopted the residence voluntarily.

The facts of the case are not relevant for present purposes, nor are the grounds of the judicial review challenge other than ground 4, the contention that the approach in *Vale* was inconsistent with House of Lords authority and the approach to mental incapacity set out in the MCA 2005. Cornwall's case was that primacy should be given to physical presence in determining where a person was ordinarily resident for the purposes of the NAA 1948.

Analysing and rejecting the contention, Beatson J held as follows:

1. distinguishing *Barnet LBC v Shah* [1983] AC 309 (in which Lord Scarman formulated the well-known test that residence must be voluntarily adopted for settled purposes), Beatson J noted that a test which accords a central role to the intention of the person whose ordinary residence is to be determined cannot be applied without adaptation when considering the position of a person who does not have capacity to decide where to live (paragraph 68);

2. distinguishing *Mohammed v Hammersmith and Fulham LBC* [2001] UKHL 57, Beatson J noted that this was not a case concerned with a person lacking capacity, and also that it was concerned with "normal" not "ordinary" residence (paragraph 69). In any event, the concept of "normal" residence also accorded an important role to intention, and the approach adopted by the House of Lords to the definition proceeded on the basis that physical presence was insufficient in itself, and that was is required is an underlying attachment (paragraph 71);

3. cases upon the meaning of "resident" in s.117 MHA 1983 were not of assistance in construing the term "ordinary residence" in the NAA 1948 (paragraph 72);

4. the *Vale* case did not set out rules of law, but two approaches to the circumstances of a particular case, both of which involved questions of fact and degree (paragraph 74). It had been the subject of subsequent judicial endorsement, and significant reliance had been placed upon it by central and local government in formulating guidance, such that there needed to be a good reason to replace it and a satisfactory alternative approach (paragraphs 78-9);

5. whilst Cornwall contended that primacy should be given to physical presence, it was important not to accord insufficient weight to the fact that Parliament chose the concept of "ordinary residence" as opposed to "residence," to the difference between those concepts, and to the other factors which are of relevance in determining ordinary residence (paragraph 79);

6. it was clear from the decided cases (including *Shah* and *Mohamed*) that physical presence is not sufficient to constitute ordinary residence (paragraph 80), and drawing the threads together, "ordinary residence" is a question of fact and degree, and if the SoS gets the law right, the determination of a person's ordinary residence is for the SoS, subject only to *Wednesbury* unreasonableness (paragraph 85).

Applying these principles, Beatson J found (at paragraph 87) that the SoS had been entitled to examine whether there was a real relationship between the adult in question and his natural parents, and whether they were in fact making relevant decisions. As part of that, he was entitled to take account of the time spent by the adult with them in Cornwall. Although he did not expressly rule as to the relationship between the MCA 2005 and the determination of ordinary residence, Beatson J concluded (paragraph 88) that the SoS had taken account of the approach in s.4 MCA 2005, and that, in considering the approach of the adult's family, the SoS had concluded that they viewed contact with the adult in terms of what was in his best interests.

Comment

This case stands as an endorsement both of *Vale* and of the DoH's guidance upon the determination of ordinary residence in the case of those lacking capacity to decide upon questions of residence. It is also suggested that Beatson J was clearly right to reject a test based upon physical presence alone.

However, it is perhaps unfortunate that Beatson J did not pick up the gauntlet laid down by Cornwall and did not consider in any detail how *Vale* now reads in light of the passage of the MCA 2005. Whilst "test 1" in *Vale* undoubtedly serves a pragmatic purpose, viewed in the abstract it does not sit very easily with the principle of autonomy enshrined in the MCA. In its direct equation of the position of an incapacitated adult with that of a small child, it also stands at odds with the clear thrust of COP case-law, which is to the effect that the two can and should be treated as conceptually distinct (note, for instance, the clear rejection by the Court of Appeal in *K v LBX & Ors* [2012] EWCA Civ 79 that there is any presumption when determining the best interests of an incapacitated adult that they should reside at home with their family). "Test 2," by contrast, does not give rise to the same problems.

In this regard (and for the truly nerdy), it is instructive also to have regard to the consideration given by the Court of Protection to the definition of "habitual residence" in *Re MN (Recognition and Enforcement of Foreign Protective Measures)* [2010] EWHC 1926.

This question arose in the context of the jurisdictional provisions contained in Schedule 3 to the MCA 2005, which depend upon the concept of 'habitual residence' (a concept contained in the 2000 Hague Convention on the Protection of Adults but deliberately not defined therein). Hedley J held (at paragraph 22) that "[h]abitual residence is an undefined term and in English authorities it is regarded as a question of fact to be determined in the individual circumstances of the case." Habitual and ordinary residence contain very strong similarities, and two important consequences of the approach adopted by Hedley J (and encapsulated in test 2 but not test 1 of Vale) is that:

1. an incapacitated adult's habitual/ordinary residence is to be assessed primarily through a scrutiny of their position, not that their parents; and

2. an incapacitated adult can change their habitual/ordinary residence even if their parents do not.

The draft Care and Support Bill relies upon the concept of "ordinary residence" but does not in clause 32 address the question of how the phrase is to be interpreted in the context of those without capacity to decide where they wish to live. It may well be, therefore, that the Cornwall case is not the final word upon the subject.

NEON ROBERTS

Many of you will no doubt have been following case of Neon Roberts over the Christmas period. We do not provide a case report upon it here as it falls outside the scope of the newsletter, but we do note that Bodey J followed the approach in *AVS v NHS Foundation Trust* [2011] COPR Con. Vol. 219, holding thus (at paragraph 25 of the judgment upon whether Neon should be given radiotherapy against the wishes of her mother):

> "25. I have to keep firmly in mind what is required for there to be any realistic prospect of the court's preferring some complementary alternative to the standard mainstream treatment for N's condition. It is not just a question of demonstrating that there is research and experimentation going on out there; nor that there are ideas and possibilities being floated, nor even that there are reported success stories of cures occurring without the use of radiotherapy and / or chemotherapy. What is required is the identification of a clinician experienced in treating children aged about 7 having this kind of brain cancer; a clinician with the access to the necessary equipment and infrastructure to put the suggested treatment into effect and able and willing to take over the medical care of and responsibility for N. As Ward LJ said at paragraph 38 of A*VS v NHS Foundation Trust* [2011] COPR Con. VOL. 219: "… if there is no one available to undertake the necessary operation, the question of whether or not it would be in the patient's best interests for that to happen is wholly academic...". The treatment proposed by any such clinician would have to be (or should preferably be) properly studied, tested, reported on and peer-reviewed. To have any realistic prospect of becoming selected by the court (and I repeat that this is not a decision to be made by an adult for himself, but for a child) the proposed plan would have to have a prognosis as to probable survival rate not much less than (and preferably equal to) the sort of survival rate achievable through the use of the orthodox treatment universally applied at present by oncologists in this country."

RE DJ [2012] EWHC 3524 (COP)

The astute amongst you will no doubt have noted that we have not in this issue covered the decision of Peter Jackson J in this important medical treatment case. This is because the Court of Appeal reversed the decision on the final day of term, but has yet to hand down its reasons in writing. We hope to be able to give you a case report upon this in the next issue, as it represents the first time that the Court of Appeal has grappled with the approach to be taken to the determination of best interests in the medical treatment sphere under the MCA.

APPEALS

By way of update, we understand that the following cases that we have covered in our previous newsletters are the subject of appeals (in addition to Cheshire West/P and Q), so watch this space:

ZH v Commissioner of the Police for the Metropolis [2012] EWHC 604 (Admin);

NYC v PC and NC (unreported, 20.7.12);

A, B and C v X, Y and Z [2012] EWHC 2400 (COP);

Dunhill v Burgin [2012] EWCA Civ 397 and – linked [2012] EWHC 3163 (QB)

Any other cases that we have missed which are on their way upstairs, do please let us know.

NEW YEAR'S RESOLUTIONS

Our combined resolutions are as follows:

1. be careful about expert reports on capacity, especially in dementia cases, and remember that it is always for the Court and the expert to decide whether P has or lacks capacity;

2. in cases of fluctuating capacity, consider whether a qualified declaration might offer a pragmatic solution;

3. be aware that the requirements for capacity to marry are comparatively modest and the fact that an individual has a mental disability should not be unduly relied upon to preclude marriage;

4. be open to the possibility that an unwise decision might be in P's best interests if that is what P wants; and

5. do not even try and figure out whether something is a deprivation of liberty until we have heard what the Supreme Court has to say about it.