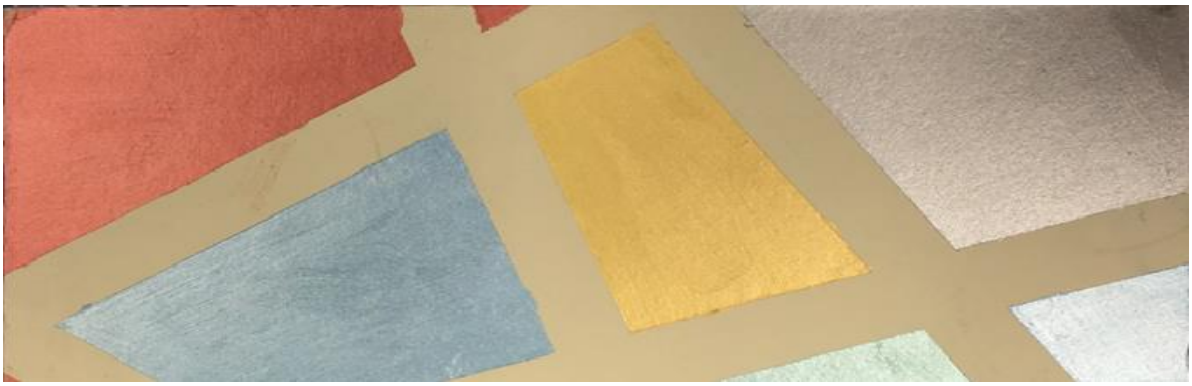

Welcome to the October 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill, a further appreciation of Alastair Pitblado and a report on a seminar on the new law at the end of life;

(2) In the Property and Affairs Report: deputies, costs and security bonds, and dealing with impermissible directives in powers of attorney;

(3) In the Practice and Procedure Report: two important decisions on costs and a seminar on improving participation in the Court of Protection;

(4) In the Wider Context Report: the new NICE guideline on decision-making and capacity, capacity and the Mental Health Tribunal, coverage of developments relating to learning disability and an CRPD update;

There is no Scotland report this month as our Scottish contributors are entirely tied up with projects both domestic and foreign, about which we hope to bring you news in the next Report.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here.

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

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

Contents

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Mental Capacity (Amendment) Bill update

The Bill had its second day of Committee stage in the Lords on 15 October. Although no amendments were made, the Government has indicated an intention to make a number of changes. The Government announced that it will be bringing forward amendments to:

1. extend the scheme to 16 and 17 year olds (which will no doubt be of interest to the Supreme Court as it considers its judgment in the *Re D* case heard at the start of October);
2. replace the term "unsound mind;"
3. confirm that consultation must take place with the person, and wishes and feelings must be considered;
4. introduce a statutory definition of deprivation of liberty.

The Government confirmed that the LPS would cover situations where deprivation of liberty is justified on the basis of risk of harm to others, exclude care home managers from undertaking pre-authorisation reviews, and use the code to ensure that cases involving acquired brain injury, mental health treatment in private hospitals and harm to others are referred to an AMCP.

Further details can be found here.

Alastair Pitblado – an appreciation

[*We are very grateful to Jim Beck of the Office of the Official Solicitor, and his colleagues, for preparing this much fuller appreciation of Alastair Pitblado than the very short one from Alex that appeared in the immediate aftermath of his death*]

Alastair Pitblado was the Official Solicitor to the Senior Courts from the date of his appointment in 2006 until his death on 24 June 2018. Alastair's tenure therefore covered all the period from the commencement of the MCA 2005 until a few weeks before the judgment was given by the Supreme Court in the landmark case of *An NHS Trust and Ors v Y and Anor* [2018] UKSC 46.

Alastair also held the office of Public Trustee (appointed under the Public Trustee Act 1906) from October 2016 until his death.

During his tenure as Official Solicitor, Alastair made a very significant contribution to the development of mental capacity law; he was very involved in many of the key issues and debates. His influence can be found in many of the leading judgments made in relation to personal welfare cases in the Court of Protection.

Alastair studied law at Oxford and was called to the bar in 1974. He was in private practice as a barrister for some 14 years, largely undertaking family work as well as mixed common law, crime and general chancery practice. He then joined the Government Legal Service ('GLS') in 1988 where he served in various departments including the Department of Trade and Industry, the Office of Director General of Telecommunications and at the Treasury Solicitor's Department where he worked on loan to the Registry of Friendly Societies. Those who worked with Alastair would undoubtedly recognise the experience and insight that he brought from those roles which was evident in the clarity of his analysis and construction of statute.

In 2006 Alastair was appointed as Official Solicitor to the Supreme Court (now Official Solicitor to the Senior Courts) by the Lord Chancellor under section 90 Senior Courts Act 1981, becoming the 11th Official Solicitor since the creation of the office in 1875.

Although he was a permanent civil servant of the state, as both Official Solicitor and Public Trustee he was an independent statutory officer holder. As such he was not accountable to ministers in the decisions he made on behalf of the individuals whose interests he was appointed to protect, although he remained accountable to ministers and the Ministry of Justice for the efficient and effective conduct of his office. Given Alastair's record in office, few could have been left with any doubt about his independence and throughout his tenure he was both an advocate for the rights of his vulnerable clients and a fierce guardian of the independence of his statutory offices.

In his appreciation of Alastair in the July 2018 edition of the newsletter, Alex alluded to the fact that Alastair was not frightened to adopt positions which were sometimes controversial and not always popular with practitioners. This was particularly true in respect of the legal test for capacity to make decisions about contact, and to consent to marriage and or sexual relations where Alastair opposed a person-specific approach. It was also true in respect of the position he took in relation to the role of the courts in making decisions regarding the continuance of treatment for individuals in Prolonged Disorders of Consciousness (PDOC).

Alastair will however, perhaps be best remembered within the legal community for his role in the development of mental capacity law in relation to the deprivation of liberty.

I would suggest that the common thread to Alastair's approach to his work is to be found in the statement he made *R (on the application of S) v Director of Legal Aid Casework [2015] EWHC 1965 (Admin)* in which he quoted the following words of Baroness Hale of Richmond in her 2004 Paul Sieghart Memorial Lecture '*What can the Human Rights Act do for my Mental Health?*'

> *human dignity is all the more important for people whose freedom of action and choice is curtailed, whether by law or by circumstances such as disability. The Convention is a living instrument … We need to be able to use it to promote respect for the inherent dignity of all human beings but especially those who are most vulnerable to having that dignity ignored.*

The protection of the most vulnerable members of society, particularly those who were unable to communicate their wishes and feelings, was undoubtedly a major concern for Alastair, reflected in both his approach to deprivation of liberty and to the treatment of people in PDOC.

In relation to Deprivation of Liberty cases he was particularly concerned that the adoption of the 'comparator test' applied by the Court of Appeal in *Cheshire West and Chester Council v* P [2011] EWCA Civ 1257 and *P and Q* [2011] EWCA Civ 190 removed protection for the most profoundly incapacitated and vulnerable individuals and left them without the safeguards of Article 5 of the ECHR. Alastair was successful in his appeals to the Supreme Court, and reported *as P v Cheshire West & Chester Council; P & Q v Surrey County Council* [2014] UKSC 19, which established what is often referred to as the *Cheshire West* test.

This decision created significant logistical problems for local authorities, NHS bodies and the courts which has recently led to draft legislation being introduced in Parliament. None of these resulting consequences would have deterred Alastair from taking a course of action which he considered necessary to protect the rights of those who lacked capacity and to safeguard their welfare.

I heard Alastair on a number of occasions comment upon his experience of visiting the Royal Hospital for Neuro-disability in Putney. I believe the experience impressed upon him the importance of guarding against discrimination which can arise from viewing the lives of those with profound physical and mental disability from the perspective of a person without such disabilities. He was concerned that decisions around the withdrawal of treatment from this vulnerable group of patients could be influenced by considerations of resources rather than the individual's best interests. He felt that it was necessary to maintain the involvement of the court in such decisions to ensure both safety of diagnosis and the scrutiny of best interests' decision making leading to the withdrawal of life sustaining treatment. In this regard, Alastair was ultimately unsuccessful, with the Supreme Court handing down its judgment in Y less than 2 months after his death. Only time will tell if his concerns in this regard were unfounded.

Alastair placed great weight on the importance of upholding an individual's right to autonomy and to make decisions which the state and its public bodies might consider unwise decisions. He opposed a person-specific test in relation to capacity for consent to sexual relations as he saw it as a threat to both individual autonomy and to the correct assessment of capacity in this domain. His position was vindicated by the Court of appeal in *IM v LM & Ors* [2014] EWCA Civ 37. For similar reasons he opposed a person-specific approach to the assessment of capacity to make decisions as to contact with others. His disagreement with the views expressed by the Court of Appeal relating to capacity to make decisions over contact in the judgment handed down in *PC and Anor v City of York Council* [2013] EWCA Civ 478 are well known. Unusually he commented upon the judgment in an article which was published in August 2013 by this Newsletter *"The decision of the Court of Appeal in (1) PC and (2) NC v City of York [2013] EWCA Civ 478"*. In that article he argued that the approach advocated by the Court of Appeal risked encouraging *'paternalistic attempts to deprive the disabled with capacity of their autonomy*'.

Notwithstanding the debilitating impact of his own illness and the discomfort he must have endured, Alastair continued to be involved in the work of the office right up to the date of his final admission to hospital. His attendance at the Supreme Court during the *Y* hearing, was a testimony to his commitment to his work. He leaves behind a valuable legacy of case law for which he can rightly be given credit.

Alastair went about his work in an understated and quiet way and gave little away about his private self, other than his very wry sense of humour. It was only after his death that many of us became aware of his many individual acts of kindness and support for current and former work colleagues at difficult or critical times in their careers. Zena Soormally, who worked at the OS but who is now a solicitor with Simpson Millar, commented:

> *When I was starting out he was supportive and kind to me, and he was one hell of a fighter for his team.' Alastair is remembered by colleagues across the OSPT (the joint office of the Official Solicitor and Public Trustee) as a leader who fought strongly for his staff and supported them to deliver the best possible service for his vulnerable clients. He led from the front, always. His legacy at OSPT is the commitment and passion that all his staff demonstrate daily.*

I will conclude with Alastair's views about the role of the litigation friend set out in his statement to the Court in *R (on the application of S) v Director of Legal Aid Casework* [2015] EWHC 1965 (Admin):

> *The task of a litigation friend is difficult, sensitive and burdensome. It appears to me that all too often those impatient with the vindication of the rights of those who lack capacity seek to minimise what is entailed in being litigation friend. The individual is likely to be difficult to engage with and may lack understanding as to why, and resent that, they have a litigation friend and what is the role of their litigation friend. A person's ability to engage at all often depends upon establishing a relationship of trust and it often takes time to establish that relationship.*
>
> *The duty of a litigation friend is 'fairly and competently' to conduct the proceedings in the best interests of the adult or child concerned…*
>
> *Once a person accepts appointment as litigation friend they are responsible for giving instructions to the protected party's solicitors …… and for making the decisions about the conduct of the proceedings. They rely on the solicitor retained for the protected party (and counsel where instructed) for legal advice in order to inform themselves fully of the nature of the case, but it is the litigation friend who must instruct the solicitors of the course to be taken on behalf of the protected party. The litigation friend "steps into the shoes" of the protected party and is charged with making often very important decisions for the protected party, in the protected party's best interests. ……*
>
> *A litigation friend is under a duty as a matter of law to make an assessment of the protected party's or child's best interests in the litigation, and to give instructions to the solicitor accordingly. Inevitably therefore in many cases the litigation friend is not able realistically and properly to advance the case which the protected party or child would wish the litigation friend to instruct the solicitors to advance.*

> *Although the litigation friend must take account of the protected party's or child's views they may not abrogate their duties as litigation friend, and therefore those views cannot be determinative of the instructions given the solicitor. The touchstone is the litigation friend's assessment, with the benefit of appropriate advice, of the protected party's best interests in that regard.*
>
> *The litigation friend should always ensure that those views are put before the court. The correct course for a litigation friend is to instruct the presentation of any realistic arguments and relevant evidence in relation to the issues before the court. The criterion is whether the point is reasonably arguable, not whether it is likely to succeed. It is not in the interests of the protected party or child, or in the interests of justice, for arguments that do not meet that criterion to be made. Considerable care must be taken in making judgements, with the benefit of sound legal advice, about how to conduct individual cases.*
>
> *…If the litigation friend does not have the moral courage to advance only realistic arguments rather than those arguments which the protected party wishes advanced, an important purpose of interposing a litigation friend between the protected party and both the court and the other party or parties is lost.*

Which for those that worked with him reflects both his experience as Official Solicitor and his approach to his work, and his commitment to this for which he will be much missed.

Jim Beck

Healthcare and Welfare Lawyer at the Office of the Official Solicitor

I am grateful to the assistance given by colleagues in the office who contributed to the preparation and drafting of this appreciation.

Short note: fluctuating capacity

The Court of Appeal has granted permission to the Official Solicitor to challenge aspects of the order of Cohen J in the *CDM* case reported here, and has listed the case with commendable speed, to be heard on 6 November 2018, specifically to consider the approach to be taken to cases of fluctuating capacity.

End of life: the new law

On the evening of 1st October 2018, 39 Essex Chambers convened a panel of experts, chaired by Lord Justice Peter Jackson, to discuss the implications of the recent ground-breaking Supreme Court decision in *An NHS Trust v Y* [2018] UKSC 46, in which the unanimous decision of the court, with Lady Black delivering the only judgment, was that a court order does not always need to be obtained before clinically assisted nutrition and hydration (CANH), which is keeping alive a person with a prolonged disorder of consciousness (PDOC), can be withdrawn in circumstances where medical professionals and families are in agreement that such withdrawal would be in the best interests of the patient.

The eminent speakers consisted of Professor Lynne Turner-Stokes, who leads the Northwick Park Hospital Department of Palliative Care, Policy and Rehabilitation, Veronica English, the Head of Medical Ethics and Human Rights for the BMA, together with our very own Vikram Sachdeva QC and Victoria Butler-Cole.

Vikram Sachdeva, who had acted for the applicant NHS bodies in the case, kicked the evening off with a summary of the arguments deployed before the court relating to domestic law, ECHR arguments and professional guidance. He concluded by highlighting the significance of the decision in respect of the continuing need for treating clinicians to following the relevant Code of Practice and formal professional guidance (current joint GMC/MBA/RCP Interim Guidance issued in 2017) concerning best interest decision making in this area; doubt as to whether other categories of serious medical treatment listed in COP Practice Direction PD9E, such as organ/bone marrow donation, and non-therapeutic sterilisation, will continue to require court applications; and the level of disagreement between family and, say a single clinician, which should trigger a court application. He suggested that where any dispute existed, clinicians should not hesitate to approach the court, as where the decision may be finely balanced.

Professor Turner-Stokes then ably deployed her 25 years of frontline medical experience to provide a clinician's insight into the long, slow progression of judicial guidance over two decades dating back to the House of Lords decision concerning Hillsborough victim in PVS, Tony Bland [1993] A.C. 789 , culminating in the decision in *Re Y*, which was broadly supported by the clinical community caring for this category of patients.

Veronica English then provided an update on the progress being made towards finalising joint MBA/GMC/RCP guidance, following a very broad process of consultation and engagement with relevant stakeholders, including clinical experts and families and patient support groups. Interim guidance, issued in December 2017, is already available online. The aim is to issue the final guidance within the next month or so, which will be much broader in scope, relating to decisions to start and continue CANH as well as decisions to withdraw and will address a much wider group of patients, not just those with PDOC but also those suffering multiple co-morbidities. The purpose of the new guidance will be ambitious: to improve the overall quality of best interest decision-making processes at a systemic level.

Tor Butler-Cole followed with a thought-provoking discussion about the continuing applicability of PD9E and the current question-marks about what types of case still required, as a legal obligation, an application to be made to the Court of Protection. She pointed out that Lady Black endorsed the broad statement by King LJ in the earlier *Briggs* case [2017] EWCA Civ 1169, that "*if the medical treatment is not in dispute then, regardless of whether it involves the withdrawal of treatment of a person who is* [MCS] *or in* [PVS] *it is a decision as to what treatment is in P's best interests and can be taken by the treating doctors…*". She suggested that one area of continuing doubt is in relation to the forced sterilisation of those lacking capacity to consent to the same, where the ECHR may mandate a court application to

be made and could possibly constitute an inevitable violation of ECHR article 3 and/or 8, in particular where the person was objecting to such a step being taken.

The evening finished with a lively Q & A session, at the conclusion of which Peter Jackson LJ left the packed room with the suggestion that the next seminar may wish to address the humanity of allowing patients in PDOC to die from withdrawal of CANH over a 2-3 week period and pondering whether society is ready to discuss this thorny moral issue.

Mungo Wenban-Smith

CTOs and the Court of Protection

In two unreported cases heard in July of this year, in which consent orders were made but no accompanying judgments, Keehan J has endorsed the provision of psychiatric treatment via the Mental Capacity Act to patients discharged into the community under s.17A Mental Health Act (i.e. subject to Community Treatment Orders ("CTOs")). We are very grateful to Ed Pollard and Rebecca Fitzpatrick of Browne Jacobson LLP for bringing these cases, and the summaries of the judgments, to our attention. We reproduce the summaries below; the comment that then follows is our own.

Background

AB and RC were based at separate units but both had been long term stays under S.3 Mental Health Act 1983 and had been detained in hospital for many years. The clinical team had determined that both were ready for discharge into the community and a suitable residential placement had been identified, but their conditions could only be appropriately managed in the community if they continued to be given their depot medication as prescribed, which on occasion required restraint.

The Issues

The plan was for both individuals to be discharged onto a Community Treatment Order ('CTO') which following the judgment of the Court of Appeal in *Welsh Ministers v PJ* [2017] EWCA Civ 194 would also serve to authorise the deprivation of their respective liberties. However, both individuals required regular medication given by depot injection; both were intermittently resistant / objecting to the injections meaning that appropriate physical restraint needed to be used. Both lacked capacity to make decisions about their care and treatment. The medication could not be given in the community under the MHA due to the resistance of both patients; accordingly it was decided that an application to the Court of Protection was necessary to obtain authorisation for the depot injections to be administered under the MCA in their best interests.

The application to the Court of Protection was made on the basis that whilst the request for the Court to authorise the administration of medication by force in the community alongside a CTO was unusual, this was the least restrictive option available in these cases and in the best interests of AB and RC; the alternative was that they would effectively spend the rest of their lives detained in institutions which

the applicant Trust argued would not be in their best interests where a potentially less restrictive option was available with the approval of the Court.

Initially, the Official Solicitor, who was appointed to act on behalf of AB and RC, challenged the suggested approach; the OS expressed concern that the application was attempting to fill a lacuna between the MHA and the MCA which would, in effect, place those without capacity in a better position than those with capacity (who refused treatment).

The Final Orders

The matter was escalated to the High Court and heard before Mr Justice Keehan; he strongly came out in favour of the approach set out in the application. Following discussions in court about this, the OS revised their position and did not oppose the application.

Following the production of further evidence regarding the Care Plan and logistics of the ongoing care of AB and RC, Mr Justice Keehan ordered that the depot injections could be given under the MCA authorised by way of an order of the Court of Protection, with all remaining facets of AC and RC's care being provided under the MHA. Mr Justice Keehan also authorised a 'residual DoL' under the MCA, limited to the occasions on which the depot injection was administered and the necessary use of holds was required.

Particular reference was made to S.64B (3)(b)(ii) Mental Health Act 1983 throughout the hearing which specifically provides for a situation whereby a patient can receive treatment whilst subject to a Community Treatment Order following consent being provided on their behalf by the Court of Protection.

No formal judgment was given in this case, as by the conclusion of the final hearing the parties were in agreement regarding the terms of the order sought.

Comment

These cases highlight yet more issues with CTOs, who are the (mostly) unloved cousin of detention under the MHA 1983, and which are under serious scrutiny by the independent review of the MHA 1983.

On one view, the Trust in this case are to be praised for bringing the case to the Court of Protection to seek specific authority for the individual acts required to secure compliance with medication, rather than relying upon the deeply questionable observations of the Court of Appeal in *PJ* to the effect that CTOs can provide authority to deprive a person of their liberty in the community. The decision reached in this case could therefore be seen as a pragmatic and sensible response to a situation in which AB and RC would otherwise be destined to remain in hospital under MHA detention for years at a time.

On the other, that the specific authority of the Court of Protection had to be sought to authorise acts amounting to a deprivation of liberty of two patients in the community might be thought rather to put the lie to the fact that CTOs were only envisaged (in England, at least) as being a measure agreed as

between the patient and their RC, as per para 29.17 of the 2015 iteration of the Mental Health Act Code of Practice:

> *Patients do not have to give formal consent to a CTO. But in practice, patients should be involved in decisions about the treatment to be provided in the community and how and where it is to be given, and be prepared to co-operate with the proposed treatment.*

The Supreme Court will hear the appeal in *PJ* on 22 October 2018 from which more guidance on this crucial area of law can be expected.

Court of Protection Statistics

The MOJ has published the latest Family court statistics, which include those of the Court of Protection for the period April to June 2018. They demonstrate the continued growth of this area of the law, orders made by the Court of Protection made over the last year numbering just short of 40,000 compared to around 16,000 a decade ago.

Property and affairs continues to remain the mainstay of the COP work, and we note that the number of orders appointing property and affairs deputies – 3,069 – continuing to dwarf the 420 orders for appointment of a personal welfare deputy (we still await progress in the test case brought to determine whether personal welfare deputies should be appointed more frequently than at present). Interestingly no orders at all have been made for the appointment of a hybrid deputy in 2018 to date.

When it comes to the registration of LPAs, the statistics suggest that it will not be long before the OPG is receiving 200,000 LPAs for registration per quarter (the most recent quarter showing registration of 197,836).

The Court of Protection continues to make orders authorising deprivations of liberty in the community (so-called *Re X* orders). The dent in the number of unauthorised deprivations of liberty remains small, though, as only 728 applications for such orders were made in the second quarter of 2018 (down from 769 in the first quarter).

PROPERTY AND AFFAIRS

Office holders as deputies

Re SH [2018] EWCOP 21 (Senior Judge Hilder)

Deputies – financial and property affairs

Senior Judge Hilder in this case reviewed the appointment of office holder deputies in the case of a company set up by a local authority to take over parts of its social work functions, including its deputyship role.

She considered 3 issues. One, the most important, was whether the appointment should be of the office holder for the time being rather than a named person holding such office, another was whether the company had the power to act as deputy and the last was as to its insurance cover.

At paragraph 24, she held that the court had the power to appoint an unnamed holder for the time being of an office (assisted by section 12 of the Interpretation Act 1978). At paragraph 27, she further held that to protect P, the person holding the office should be directed to inform the Public Guardian when they cease to hold the office so that the Public Guardian can review the position and bring the matter to court if concerned.

So far as powers were concerned, the judge held that COP was not the appropriate venue to decide matters of company law and was content to rely on the statement of truth to the effect that deputyship was within the company's powers and the Public Guardian's acceptance of that statement.

She was not, however, satisfied with the company's insurance arrangements so ordered £10,000 security, see paragraph 42.

Deputies, costs and security bonds

London Borough of Enfield v Matrix Deputies Limited, DW, OM and the Public Guardian [2018] EWCOP 22 (Senior Judge Hilder)

Deputies – financial and property affairs

Summary

Senior Judge Hilder in this case decided various further issues arising from the discharge of a large number of deputyships held by Matrix Deputies Limited and its former employees on various grounds, including excess fee charging, see *The Public Guardian v Matrix Deputies and the London Borough of Enfield and others* [2017] EWCOP 17.

The first issue to be decided was the proper procedure for calling in security bonds where the deputy disputed liability. At paragraph 11, she considered *Re Meek* [2014] EWCOP 1 where HHJ Hodge QC had held that the calling in of a bond should be "*a matter of course*". At paragraph 14, she considered *Re M* [2017] EWCOP 24 where HHJ Purle QC held that calling in of a bond was inappropriate at the behest of a third party (a local authority owed care home fees) which the deputy had refused to pay.

The judge held that neither considered the position where the application was made against a former deputy who disputed liability (as Matrix did in this case). See paragraph 16.

At paragraph 20, she set out the procedure to be followed:

a. The person bringing the application (usually the new deputy but potentially the Public Guardian or the personal representatives of P's estate after P's death) should be required to provide a report identifying the alleged loss, with documentary evidence in support exhibited as appropriate. That report must be served on the deputy alleged to have caused the loss (but need not be served on the bond provider);

b. The allegedly defaulting deputy should have opportunity to consider that report and to file a written response;

c. The court will make a summary determination, with or without oral submissions as the court sees fit. The burden of establishing the loss is on the person bringing the application, on a balance of probabilities. The determination will 'summary,' not in the sense of 'summary judgment' but rather in the sense of 'summary assessment of costs' and as opposed to a full forensic examination;

d. The summary assessment must quantify the loss sufficiently for all parties and the bond provider to be clear about how much money is to be paid under the bond. If the loss is less than the full amount of the bond, then quantification should be in the form of a specific amount ("£x") or by reference to an ascertainable amount (eg "the new deputy's costs of the investigation and call-in proceedings as assessed by the SCCO.") If the assessment is that the loss exceeds the full amount of the bond, it will be sufficient to state that and provide for the bond to be called in for its full amount.

Finally, at paragraph 22, she held that the COP decision to call in the bond did not amount to a final determination of the former deputy's liability. The bond provider would have to pursue the former deputy in civil proceedings and establish liability in the usual way.

The next set of issues the judge dealt with concerned the rates Matrix could charge.

At paragraph 44 she held that where an order appointing a deputy who is not a solicitor simply authorises fixed costs, the starting point is the public authority rate.

At paragraph 59, she held that where an order authorises fixed costs but also authorises the non-solicitor deputy to seek a SCCO assessment, that order does not necessarily imply fixed costs at the higher rate.

At paragraph 66, she held that if a non-solicitor deputy holds multiple appointments some of which authorise remuneration at higher fixed rates, there is no implication that all appointments carry those higher rates.

At paragraph 69, she held that where the appointment order does not authorise a SCCO assessment but one is obtained anyway, such an assessment gives no authority to charge the higher assessed amount.

Lastly, at paragraph 78, she held where a deputy has an order authorising a SCCO assessment but the value of the estate falls below the PD19B £16,000 threshold, the deputy must apply to COP for authority to seek the assessment.

Comment

The ruling on the procedure to be adopted concerning the calling in of bonds is useful as it underlines that the bond is an on demand bond, paid for by P so that it would be stripped of much of its utility if COP had to adjudicate on the former deputy's liability in every case where the former deputy disputed liability.

It remains to be seen, however, how this would work in a case where the former deputy is alleged to have negligently mishandled P's affairs, eg by poor investments.

It also remains to be seen what would happen if in the later bond holder proceedings against the former deputy, it was established that P had suffered no loss. It is, further, not altogether clear whether Senior Judge Hilder can have been correct to have held that an order calling in the bond does not amount to a final determination of civil liability on the part of the deputy, given that the terms of bonds entered into between deputy and bond provider are that the bond provider guarantees that it will pay the amount of any loss or losses as determined by the Court of Protection. In the circumstances, it may very well be that in the proceedings to enforce recovery in the civil courts that the bond provider can proceed on the basis that this is equivalent to a judgment debt which the bond holder cannot then challenge on the basis that some other sum is owing.

Euthanasia and other impermissible directions

The Public Guardian v DA and others [2018] EWCOP 26 (Baker LJ)

Lasting powers of attorney – registration

In this case Baker LJ considered a number of different issues that arise seemingly frequently concerning the registration of lasting powers of attorney.

Of general interest are those that concern the inclusion in a power of preferences or instructions that direct or encourage assisted suicide or euthanasia.

Schedule 1 of the MCA is concerned with the registration of LPAs. Paragraph 11 requires the Public Guardian to apply to the court for a determination under section 23(1) if it appears that the power contains a provision that would be ineffective as part of a lasting power of attorney.

Sub paragraph (4) and (5) of paragraph 11 enables the court to sever any provision that would be ineffective or would prevent the instrument acting as a valid LPA.

The LPAs in question either contained instructions or preferences to the effect that in certain circumstances the attorney is to take or encourage steps to be taken that would bring about the donor's death. At paragraph 27, Baker LJ held:

> *I agree with the combined view of the Public Guardian and the Official Solicitor that an instruction or preference in an LPA directing or expressing a wish that an attorney takes steps to bring about the donor's death is instructing or encouraging someone to commit an unlawful act and therefore ineffective.*

Incidentally, at paragraph 28, the judge determined an issue of general relevance, namely how the court should interpret a preference set out in the instructions box on the form and vice versa. He held:

> *On the first issue between the parties, I prefer Mr Rees' argument. Applying Nugee J's approach requiring flexibility to ensure that the donor's autonomy is fully respected, I agree that an instruction is a direction in mandatory terms wherever it appears on the form. Thus, a stipulation in the "preferences" box that is clearly mandatory should be interpreted as an instruction. Equally, a provision in the "instructions" box may be couched in terms that make it clear that it is intended to be a preference.*

In some of the LPAs instructions or preferences had been given that would only come into effect if the law changed to make assisted suicide lawful. Baker LJ held at paragraph 29:

> *On the second point, however, I accept Mr Entwistle's submission that instructions and preferences predicated on a change in the law are ineffective. It seems to me that the ways in which the law could be changed in this field are so many and varied that permitting an LPA to be registered when containing an instruction or preference as to the attorney's actions should the law change would lead to uncertainty and confusion. Towards the end of oral submissions, Mr Rees suggested that a clause which stipulated that "if at any point it becomes permitted as a matter of English law for my attorney to make a decision that my life should be terminated in certain circumstances and those circumstances arise, then I express a wish for my attorney to make a decision that terminates my life" would meet the objections raised on behalf of the Public Guardian. But in the event that Parliament at some future point permits an attorney to take steps to terminate the donor's life, any change in the law is likely to be subject to detailed statutory provisions and guidance in a Code of Practice, the terms of which cannot at this stage be predicted. In those circumstances, for this court*

> *to give the green light to the inclusion in LPAs of any such provision at this stage would be likely to cause uncertainty and confusion. In those circumstances, the right course is to declare all such provisions, whether they be instructions or preferences, ineffective.*

In the result, all the provisions under review were held ineffective and severed, see paragraph 42.

The second batch of cases concerned more mundane matters.

Section 10(4) of the Act requires a power to appoint attorneys to act:

> *(a) jointly,*
>
> *(b) jointly and severally, or*
>
> *(c) jointly in respect of some matters and jointly and severally in respect of others.*

These are the only ways attorneys can be appointed and section 9 (3) provides that an instrument that does not comply with section 10 confers no authority.

In one set of cases, the power contained the following words:

> *If my spouse is capable of acting, my attorneys other than my spouse shall not act in any manner unless my spouse is unable to act on their own in that matter.*

The court held that these words were inconsistent with a joint and several power and should be severed, see paragraph 52.

In another case, these words occurred:

> *The Primary Power of Attorney is Mrs [JR] should she survive her husband and be of sound mind and will be the decision-maker. [The other two attorneys] are secondary PAs should Mrs [JR] not be of sound mind or deceased.*

Again, this was held inconsistent with a joint and several appointment and were severed (see paragraph 55). The appropriate result could have been achieved by the donor appointing his spouse as sole attorney and the others as replacement attorneys.

In the last case, the power required the consent of a third party before certain powers could be exercised. This was held to be unobjectionable, see paragraph 58.

It is worth mentioning that Baker LJ at paragraph 9 specifically approved of what District Judge Eldergill had said as follows:

In The Public Guardian's Severance Applications [2017] EWCOP 10 at paragraphs 45 to 47, District Judge Eldergill compared and contrasted the new terminology in the latest versions of the prescribed forms with the statutory language in s.9(4). He observed:

> *"45. It is always risky to depart from the statutory language when drafting forms and the adoption of the headings 'Preferences' and 'Instructions' in the forms introduced by the Amendment Regulations is potentially misleading.*
>
> *46. The term 'instructions' is not synonymous with 'conditions or restrictions'.*
>
> *47. Equally, the term 'preferences' is not synonymous with 'best interests' or a donee's duty when deciding what is in the donor's best interests to consider anything written in section 7 of the form concerning the donor's wishes, feelings, beliefs and values, and the other factors to be considered by their donee(s): see s.4(6) of the 2005 Act."*

I respectfully agree with the district judge's observations. It may be that those responsible for drafting forms will wish to reconsider these changes in the light of his comments.

Lastly in paragraph 46 of the judgement, Baker J considered a dictum of DJ Eldergill in the above case. He said:

In The Public Guardian's Severance Application (supra), District Judge Eldergill suggested that there was nothing objectionable in an arrangement which provided that two of the attorneys must always agree on any decision jointly whereas the third could act independently and that it should not be necessary to create two instruments in order to achieve such an objective. Mr Rees acknowledges that the District Judge's view is consistent with the principle of flexibility but submits that it is contrary to the clear wording of the statute. Although I have not heard a full-contested argument on that point, it seems to me that Mr Rees' submission is well-founded.

PRACTICE AND PROCEDURE

Deprivation of liberty, court review and costs

LB Harrow and AT & DT [2017] EWCOP 37 (Senior Judge Hilder)[1]

CoP jurisdiction and powers – costs

Summary

This judgment was handed down on 14 May 2018, but only appeared on Bailii some months thereafter. They relate to proceedings were issued to seek court authorisation of the deprivation of liberty of a man called AT (it is not entirely clear whether this because the arrangements for AT were being carried out in the community). An authorisation was given by the court in 2016 with a requirement for the local authority to apply for a review no later than 12 months later. The matter was not however returned to the court by the local authority for more than 15 months and even then, the application made was not for a review.

The Official Solicitor brought an application for his costs to be paid by the local authority on the basis that:

(i) the local authority had been late in returning the matter to court in circumstances where the family had been raising concerns about the placement for almost a year.

(ii) having brought the matter before the court, it failed to ask for a review of the deprivation of liberty, and no evidence was filed.

(iii) The local authority then failed to serve the case papers on the Official Solicitor as required by the court, leading to a directions hearing having to be vacated.

(iv) the local authority had acted unreasonably in failing to agree the terms of a court order following a hearing and had tried to re-open issues that had been determined at the hearing by the judge.

HHJ Hilder held that (i) a failure to apply for a review of the DOLS authorisation within the requisite period and (ii) (having belatedly made an application) making the wrong application, were sufficient reasons to depart from the general rule as to costs in welfare costs of no order being made. She considered that the explanations for the failures – namely human error and 'holiday season' – were wholly inadequate. HHJ Hilder further held that the conduct of the local authority in failing to serve case papers in a timely manner, and then its approach to finalising an order did have a negative effect on the efficiency of the proceedings. She ordered that the local authority should pay half of the Official Solicitor's costs.

[1] Note, it would appear that the [2017] citation is incorrect, as it is clear that the judgment was handed down on 14 May 2018.

Comment

The most significant aspect of this judgment is what the Senior Judge had to say about public bodies failing to bring cases back to the court for review of orders authorising deprivation of liberty in a timely fashion. She rightly emphasised that the purpose of the review requirement is to provide procedural safeguards against arbitrary deprivation of liberty and so avoid a violation of the State's positive obligation under the ECHR, and that the failure to apply for a review seriously undermines the effectiveness of any safeguards. Of significance is the sentence "*Such conduct on the part of a public body cannot be overlooked*." This is particularly significant given the (growing) number of cases where public bodies are reliant upon a court order to render lawful a deprivation of liberty for which they are directly and indirectly responsible. It is likely that this case is going to be relied upon in future to justify departures from the general rule where those public bodies have not taken timely steps to ensure that those orders are reviewed.

Costs out of all proportion – and the problem for litigants in person

LB Hounslow v A Father and A Mother [2018] EWCOP 23 (District Judge Eldergill)

CoP jurisdiction and powers – costs

Summary

The sound of toys leaving the judicial pram at high speed can be heard when reading the judgment in this decision on costs from DJ Eldergill, arising out of an application that the LB Hounslow made in February 2017 to be appointed property and affairs deputy for a young man, arising out of financial safeguarding concerns relating to his parents. The father was legally represented, the mother acting as a litigant in person. As is – depressingly – often the way, things then got out of hand before, ultimately, the mother provided bank statements and notes regarding withdrawals and items of expenditure, and a final hearing took place on 2 February 2018 at the commencement of which the local authority withdrew its application without oral evidence being heard. That only left the matter of costs to be determined.

As DJ Eldergill asked:

> *24. Why didn't the matter settle at an earlier stage? The substantive application was founded on alleged misuse of benefits but the prolonged and wholly disproportionate nature of the litigation increasingly turned not on this issue but on costs. The son had no savings and so the usual rule regarding costs — that the costs be paid from his estate — was not an option unless his solicitor and counsel were willing to waive their by then substantial costs. Despite the father's solicitor's attempt to persuade me otherwise, costs was the stumbling block and became the reason why the case did not settle. The correspondence recently copied to me makes that crystal clear. On 10 August 2017, Scott-Moncrieff & Associates Ltd wrote to the local authority stating, 'We will seek payment of our costs by Hounslow as a condition of the application being withdrawn'. On 22 September 2017, the local authority stated that, 'The LA has indicated that it may be willing to withdraw the application, on*

the basis the respondents are in agreement to another [sic, presumed to be 'a number'] of conditions'. The first condition was financial monitoring. 'The second condition is that the application [sic] will not agree to pay the first respondents costs'. Thus, the litigation continued and the litigation costs continued to rise.

25. I am not going to write a lengthy judgment, or give lengthy reasons, because in my view these proceedings have already taken up a wholly disproportionate amount of court time and been conducted with insufficient proportionality. The initial allegation was misuse of DLA by the partner of the DWP appointee. All that was required was that the mother provide the local authority with the relevant bank statements showing payments of DLA and out-going expenditure on the account. The local authority could then ask questions about particular items of expenditure and, if appropriate, question the mother on the expenditure at a short hearing. The outcome would either be that the applicant could prove misuse of funds on the balance of probabilities or it could not do so. If there was no evidence in the bank statements and no oral evidence to support misuse of funds then the local authority case failed, regardless of whether or not the identity of their informant was known.

26. What happened instead was that the local authority's legal department and Scott-Moncrieff & Associates Limited on behalf of the father bombarded each other with hundreds of pages of unnecessary and often tetchy or bad-tempered correspondence, witness statements, position statements and emails into which the court was often copied. By the time they had finished litigating an alleged misuse of Disability Living Allowance benefit that could have been resolved by looking at bank statements and asking questions, the amount of claimed costs incurred amounted to approximately £50,000 + VAT in respect of Scott-Moncrieff's costs and £15,000 in respect of the local authority's costs. That is an astronomical figure and in my view wholly out of step with the following provisions of the Court of Protection Rules 2007 and 2017.

Directing himself to the question of the conduct of the parties, DJ Eldergill noted:

31. In terms of the conduct of the applicant, an allegation of dishonesty was made based on an anonymous report. In my view, the respondents did not have a fair opportunity to deal with that allegation at the time, within the safeguarding investigation. The local authority was so concerned to protect the identity of its anonymous informant that it decided not to share the minutes and 'aspects' of the safeguarding investigation with the respondents (Local Authority Position Statement, 7 July 2017, para 5). This made it difficult for them to provide a satisfactory response or explanation. The local authority then sought to rely on Public Interest Immunity in the proceedings, which was incorrect. When the bank statements were made available, the local authority was bound to conclude that it could not prove the alleged dishonesty and withdrew its application.

32. The local authority therefore did not succeed with its case and, for the reasons given, the manner in which the application and pursued was unsatisfactory.

33. Having regard to the fact that an allegation of dishonesty was made, which in my view a citizen is entitled to defend vigorously if unsubstantiated, the manner in which the application was pursued and the fact that the application was only withdrawn at the beginning of the hearing, my starting point would be that the local authority should pay all of the reasonable costs of the application.

> *34. However, I also find that the way in which the litigation was conducted on behalf of the First Respondent was unsatisfactory. In my view, the litigation was conducted disproportionately by both sides and there was a failure to focus on the simple central issue of whether the bank statements into which the DLA was paid evidenced any misuse of funds. The amount of claimed costs incurred of approximately £50,000 + VAT is, to my mind, a staggering sum given the relative simplicity of the central issue and the son's lack of means. Counsel's position statement dated 27 September 2017 on behalf of the First Respondent is in general terms, in particular the financial tables at (internal) pp.10-12, and involved giving evidence rather than merely setting out a position based on evidence. The correspondence is full of generalised assertions, of applications being misconceived, requests for summary judgment, etc, and both legally-represented parties made basic procedural errors (filing lengthy documents electronically despite what the rules say and including references to discussions at a DRH).*

DJ Eldergill initially had in mind that the local authority be ordered to pay two-thirds of the respondent's assessed costs, but ultimately considered it necessary to separate a reduction intended to reflect conduct issues and the proportionality issue, directing the detailed assessment of the father's costs by the Supreme Court Costs Office, the local authority then being required to 90% of those costs, the 10% reduction reflecting the court's finding on the litigation conduct of the other party.

DJ Eldergill also had to consider the difficult question of the costs recoverable by the mother as litigation friend. Having examined relevant (and, he found in some cases, irrelevant) statutory provisions he reached the conclusion that:

> *52.* [t]*he intention of the* [Court of Protection Rules] *is that a litigant in person is entitled to be reimbursed for their reasonable expenses but is not entitled to a fee or to remuneration. The intention of the rules seems to be that expenses but not fees, charges and remuneration are permitted and this is consistent with the disapplication of both CPR Rule 46.5 and the Litigants in Person (Costs and Expenses) Act 1975.*
>
> *53. Given a general rule in financial proceedings that costs are payable from the incapacitated person's estate, the intention underlying the rules seems to be that litigants in person such as family members who have not incurred any legal costs should not charge a fee for assisting an incapacitated person and the court, for example to cover loss of earnings for attending court, reading documents and preparation. In many cases, such as statutory Will, LPA and disputed deputyship applications, several family members may wish to participate and join the proceedings as parties without being represented. The record I have seen, in a statutory Will case, is nineteen. If all of them were entitled to, for example, loss of earnings for attending and preparing for court, the additional costs would be significant.*

He noted, however, that

> *54.* [This is an] *unfortunate finding in the mother's case and one which, in my view, leads to an injustice. A serious allegation was made against her which necessarily she was bound to defend. It*

proved to be an unfounded allegation. Her conduct has been reasonable and I have no reason to doubt that her loss of earnings in defending her reputation is real. Naturally I am tempted to hold that section 55(1) is sufficiently broad that I have a discretion to award her costs but the section is subject to the rules and in my view the intention of Rule 19(1) is that litigants in person, like family member deputies, cannot charge or recover loss of earnings or hourly fees.

55. I would invite the mother to seek to agree with the local authority a sum covering her reasonable expenses. I would also invite the local authority to consider making an ex gratia payment to her and, if that cannot be agreed or done, that she gives consideration to whether the Ombudsman might provide a remedy. The rules also need to be reviewed and revised so that the court can award a litigant in person costs in a case such as this.

Comment

The disproportionality between the costs and the substantive issues at stake in this case is depressing but not entirely unfamiliar (although more striking, perhaps because it is in a publicly funded case – in our experience, the truly astronomical disproportion mostly comes in family feuds with wealthy individuals working out their grievances using P as a pawn). More important, perhaps, is the gap identified by DJ Eldergill in this case in relation to the ability for the mother to be recompensed for the financial costs she had incurred in defending herself. Hopefully, with a new Vice-President, the Rules Committee can be brought back to life and can add this to its task list.

Improving participation in Court of Protection proceedings

[*We are very pleased to publish here a guest article by Dr Jaime Lindsey on the recent event she coordinated at Essex Law School*]

In September 2018, Essex Law School hosted an event on 'Improving participation in Court of Protection (CoP) proceedings'. This ESRC funded workshop aimed to bring academics, practitioners and policy makers together to think about the ways that participation (particularly of P) could be improved in CoP proceedings. The one-day workshop was timely given current debates around the Mental Capacity (Amendment) bill and the recent Joint Committee on Human Rights report stating that the right to participate in proceedings should be codified[2] The day was split into themed sessions and provoked stimulating debate about the ways in which we might improve P's participation. These discussions will hopefully lead to a number of suggestions being taken forward to improve participation in CoP proceedings.

The themed sessions

The event was split into four sessions, each with individual presentations followed by discussion. The first session focused on the current position with regards to P's participation in CoP proceedings. Key

[2] para 61, Joint Committee on Human Rights report (2018) The right to freedom and safety: Reform of the deprivation of liberty safeguards.

issues discussed included P's limited presence at court or participation in proceedings, as well as the ways that participation might be facilitated. Dr Jaime Lindsey (University of Essex) started the discussion off with a presentation about her qualitative research on the CoP, exploring some of the assumptions that underpin the lack of participation and how those assumptions can be addressed to encourage P to give evidence more often.[3] This was followed by Helen Curtis (Garden Court chambers) speaking about the practicalities of P's participation, specifically her own experiences of taking steps to facilitate participation and the role of special measures. The session concluded with Dr Lucy Series discussing her quantitative research into participation,[4] particularly focusing on the importance of P's ability to bring a case to court as a key aspect of participation. A number of important points raised by the speakers were picked up in the discussions. First, the assumptions that underpin P's lack of participation. For example, the assumption that P would not make a good or credible witness can create tensions for lawyers (particularly those representing P) who may feel conflicted at putting P before the judge. Second, the length of time that CoP cases take to reach a resolution can impact on P's ability to participate, particularly for Ps who might have degenerative conditions. Finally, concerns were raised that P's limited participation in the CoP simply reflected the troubling reality that disabled people face in accessing justice more broadly.

In the second session of the day, we were given a judicial perspective on participation from Professor Anselm Eldergill, District Judge of the Court of Protection. His judicial insights into the issue of participation were fascinating, particularly in light of his mental health tribunal experience. Professor Eldergill noted how slow progress in this area can appear but, when put in context, many important improvements have been made. One issue he noted as a future area of interest was participation in relation to property and affairs applications given that a deputy order deprives the individual of their property rights and often authorises a third-party to sell their house, dispose of their possessions and make gifts of their property. There is also a potential for financial abuse if the person is not sufficiently involved in the decision-making process. Given that the focus of discussions so far had been on welfare cases, it was an important reminder of the wide-ranging nature of mental capacity law. He also emphasised that it is not only P's participation that is an important issue but the ability of family members and others to participate. In fact, anybody whose rights are affected by the decision should have some involvement in the process, albeit he noted that securing representation for them is not always easy.

Participation as justice for disabled people was the theme for the next session. Gillian Loomes (University of Leeds) started with an engaging presentation on voice and mental capacity based on her mixed methods research at the CoP. Gillian emphasised the role that the court room has in giving voice to certain people as well as her own experiences of being an observer of CoP proceedings. The session concluded with a joint presentation from Andrew Lee (People First Self Advocacy) and Svetlana Kotova

[3] J Lindsey, (Forthcoming, 2018), 'Testimonial injustice and vulnerability: A qualitative analysis of participation in the Court of Protection', *Social and Legal Studies*.
[4] L Series, P Fennell and J Doughty, The participation of P in welfare cases in the Court of Protection (Cardiff 2017).

(Inclusion London) discussing access to justice for disabled people. A key message that came through, reinforcing something highlighted by Dr Lucy Series earlier, was the importance of accessible information. They emphasised that most people will not know what the CoP is or does, unless or until they are in court themselves. Furthermore, the inaccessibility of the system for disabled people can lead to confusion about who is making the decision and why. The personal experiences of those speaking in this session came through powerfully and reminded us why participation is such an important issue.

Finally, the day concluded with a session on the relationship between mediation and participation. First up Dr Timea Tallodi (University of Essex) provided a detailed account of the international research on mediation. She highlighted that whilst mediation will not solve the problem of participation, it can provide important insights and be a learning exercise for those involved, which can have positive effects on their ongoing relationship. Katie Scott (39 Essex Chambers) provided a useful overview of the proposed new CoP mediation scheme, which is intended to make mediation available to everybody who has issued a welfare or property and affairs case in the CoP. On the issue of participation, Katie emphasised that if there is no way of securing P's participation in the mediation then it is not a matter that should be mediated. Concluding the presentations for the day was Charlotte May (Wiltshire Council) who presented on her research into mediation in the CoP.[5] Her 25 mediation case studies provided insights into the ways that mediation can facilitate agreement as well as the cost savings of mediation contrasted with proceedings. In the discussion that followed, concerns were raised about what 'agreement' really means in mediation and the extent to which P would agree with a mediated outcome. However, many of the benefits of mediation were also highlighted such as the flexibility it provides in terms of timing and venue and the wider scope of issues that can be addressed through mediation.

Discussion

The workshop brought together a range of participants and provided a valuable opportunity to discuss ways of improving participation. Potential issues to take forward following the workshop include: improving the accessibility of information about mental capacity law and the CoP; ensuring funding is available for improving participation; expanding the use of measures to support P's participation (such as familiarisation visits to court and other special measures); and changes to statute and/or the CoP rules to codify P's right to participate. These issues will not be easily resolved, particularly given that two reoccurring themes were the perceived cost implications of improving participation and the inaccessibility of justice in this area. However, the workshop allowed for important conversations to develop with the aim of improving P's participation in CoP proceedings.

Dr Jaime Lindsey

[5] See C May, (2012), Elder and guardianship mediation: A review of the Canadian EGM report and its relevance in the UK, 4(2) *Elder Law Journal*, available at: http://www.adultcaremediation.co.uk/profile.html (accessed: 14 September 2018).

University of Essex

THE WIDER CONTEXT

NICE guideline on decision-making and mental capacity: very good try but only two thirds of a banana.

[*What follows is a personal view by Alex, with which his fellow editors may or may not agree!*]

To some extent, those responsible for pulling together the NICE guideline (NG108 on decision-making and mental capacity published on 3 October were in an impossible position. They could not rewrite the Code of Practice, despite the fact that real life has caught up with and substantially overtaken the Code. To do so would lead to inevitable problems as to which practitioners were required to follow, given that the Code is statutory, but NICE guidelines provide an important part of the regulatory framework for health bodies, in particular. They were also caught between the need to provide recommendations for organisations and recommendations for individual practitioners: the demands of both are not the same.

The guideline contains a useful summary of key points, and has some really important and helpful aspects, including, in particular, seeking to place support for decision-making in its context by including recommendations about both advance care planning and best interests decision-making. Both of these latter aspects constitute equally important parts of the framework for the support of the exercise of legal capacity mandated by Article 12 CRPD, and it is very helpful that the guideline recognises this – although it is perhaps a telling irony that it does so without any reference to the CRPD at all.

The guideline contains the helpful encapsulation of the *Aintree* approach to best interests that:

> *Carers and practitioners must, wherever possible, find out the person's wishes and feelings in order to ensure any best interests decision made reflects those wishes and feelings unless it is not possible/appropriate to do so. Where the best interests decision ultimately made does not accord with the person's wishes and feelings, the reasons for this should be clearly documented and an explanation given. The documentation of the assessment should also make clear what steps have been taken to ascertain the person's wishes and feelings and where it has not been possible to do this, the reasons for this should be explained. (paragraph 1.5.13)*

It also contains the very helpful reminder that

> *Practitioners should be aware that a person may have decision-making capacity even if they are described as lacking 'insight' into their condition. Capacity and insight are 2 distinct concepts. If a practitioner believes a person's insight/lack of insight is relevant to their assessment of the person's capacity, they must clearly record what they mean by insight/lack of insight in this context and how they believe it affects/does not affect the person's capacity (paragraph 1.4.24)*

However, the guideline does not – perhaps because it could not – get into the really gritty difficulties that arise in relation to assessment of mental capacity. It is all very well, for instance, saying that

> *To lack capacity within the meaning of the Mental Capacity Act 2005, a person must be unable to make a decision because of an impairment or disturbance in the functioning of the mind or brain. That is, the impairment or disturbance must be the reason why the person is unable to make the decision, for the person to lack capacity within the meaning of the Mental Capacity Act 2005. The inability to make a decision must not be due to other factors, for example because of undue influence, coercion or pressure, or feeling overwhelmed by the suddenness and seriousness of a decision (paragraph 1.4)*

That is a statement of the law. It does not provide assistance to a practitioner who is faced with a case such as Mrs G's where a person with a mild impairment and is caught in a complex social situation (or a 'spider's web' as Mrs G described herself). What are they to do?

The guideline is also silent on the 'translation' gap that is increasingly obvious as between the words of the MCA and realities on the ground. What, for instance, do the words 'use and weigh' actually mean? And do you need to ask different questions to assess whether a person is able to 'understand' information depending upon whether they have dementia, schizophrenia or learning disability (spoiler alert, the answer must be 'yes.'). In fairness, the authors recognise that a key area for further research is in relation to using mental capacity assessment tools to assess capacity. They also do touch on the really gritty stuff relation to one area, acquired brain injury, where they note that:

> *Practitioners should be aware that it may be more difficult to assess capacity in people with executive dysfunction– for example people with traumatic brain injury. Structured assessments of capacity for individuals in this group (for example, by way of interview) may therefore need to be supplemented by real world observation of the person's functioning and decision-making ability in order to provide the assessor with a complete picture of an individual's decision-making ability. In all cases, it is necessary for the legal test for capacity as set out in section2 and section3 of the Mental Capacity Act2005 to be applied.*

However, the concept of 'executive dysfunction' is not one that appears in the MCA, nor has it been the subject of detailed judicial scrutiny. Precisely how does it fit with the time-specific nature of capacity? Is what is being said here that the person should be said currently (for instance) to be unable to use and weigh the information that they are unable to turn decisions into actions (in lay parlance, to walk the walk even if they can talk the talk)? For what it's worth, I would suggest that this is entirely legitimate, but it would have been helpful had the guideline actually said this.

More broadly, the guideline is also silent as to how fluctuating capacity is to be approached (save by reference to the – obvious – desirability of seeking to undertake advance care planning). The thorniness of these issues and the real practical difficulties they cause on the ground are exemplified in the CDM case, and the fact that – too late for the drafters to take into account – permission has been granted by the Court of Appeal in the case so that the approach can be considered.

I am acutely aware that the guideline reflects a lot of very hard work by many very committed people, and that the criticisms above might be said to be designed to show off the hobby-horses that I want to ride. But to me, the guideline can only stand as a partial substitute for what is really needed:

(1) An updated Code of Practice (which should, we understand, be a lot closer than it had been before given the introduction of the Mental Capacity Amendment Bill); and

(2) Grainy, multi-disciplinary, guidance as to how, actually, to assess capacity in difficult cases (with, as a crucial pre-requisite, consideration as to what constitutes a satisfactory assessment of capacity). By way of trailer, this is precisely what the Mental Health and Justice project on contested capacity assessment is seeking to achieve.

New guidance for anaesthetists (and others) about Jehovah's Witnesses and patients who refuse blood

The Association of Anaesthetists of Great Britain and Ireland have published guidance on anaesthesia and peri-operative care for Jehovah's Witnesses and patients who refuse blood. Although some of the technical and clinical, relating to the specific consequences for anaesthetists of a refusal to accept blood, its principles are of broader application. Importantly, the guidance was drafted in conjunction with Witnesses so sets the relevant decision-making in its necessary context.

Deprivation of liberty: when is consent irrelevant?

Re T (A Child) [2018] EWCA Civ 2136 (Court of Appeal (Sir Andrew McFarlane P, Moylan and Jackson LJJ))

Article 5 ECHR – deprivation of liberty – children and young persons

Summary

The issue in this appeal was whether a lack of valid consent was a pre-requisite to the exercise of the inherent jurisdiction authorising the restriction of the liberty of a young person in the equivalent of secure accommodation. The inherent jurisdiction is being increasingly used because of a lack of secure placements approved by the Secretary of State. As a result, there are two parallel processes for authorisation: one being s.25 of the Children Act 1989 ('CA'); the other the inherent jurisdiction. In that regard, the Court of Appeal expressed its real concern that so many applications under the latter are having to be made outside the statutory scheme and safeguards laid down by Parliament under the former (paras 5, 88-90).

The young person (aged 15 at the time of the first instance decision; now 16) was considered to be both *Gillick* competent to and actually consenting to the proposed care regime. The degree of restrictions on her liberty were such that, if the placement was in a unit registered as a secure children's home, it would have required authorisation under CA 1989 s.25. At first instance Mostyn J accepted that a lack of valid consent had to be established for the purposes of the subjective element of *Storck*.

And that such consent had to be authentic and enduring which, on the facts, it was not.

After reviewing the Strasbourg and domestic authorities, the President (giving the sole reasoned judgment of the court) held that a lack of valid consent was not a jurisdictional pre-requisite either for making a statutory secure accommodation order or for the High Court to exercise its inherent jurisdiction to authorise a local authority to restrict a young person's liberty. This was because:

(i) The consent, or otherwise, of the young person is not a relevant factor in the statutory scheme. Section 25 and Article 5 ECHR involves different processes. The former *authorises* the local authority to keep the child in secure accommodation. It means the person in charge of that accommodation *may* restrict the child's liberty.

(ii) There is no domestic authority to the effect that it is necessary to find an absence of valid consent before the court may authorise a local authority to restrict the liberty of a young person. The inherent jurisdiction order does not *itself* deprive liberty; it *merely authorises* the same.

(iii) To hold otherwise would be to confuse the distinct temporal perspectives of Art 5 and an application for authorisation. Whether a person is deprived in breach of Article 5 is often a *retrospective* evaluation of their current and past circumstances. Consent in that contest is therefore likely to be an important element: "*one cannot normally be said to be deprived of liberty when one has freely agreed to the relevant regime*" (para 78). Whereas the court's role under the statutory and inherent jurisdiction processes is normally *prospective*.

(iv) It would mistake the purpose of an order under the inherent jurisdiction authorising the placement of a child in the equivalent of secure accommodation. Neither the local authority nor a child/young person can authorise what Parliament has decided only the court can authorise.

So, in summary:

> *81. Drawing these matters together, once it is seen that the court's power under s 25 / s 119 is not dependent upon any question of consent, the difficulties that arose in this case, as it was presented to the judge and, initially, to this court, disappear. The fact that any consent may or may not be 'valid' or 'enduring' on the day the order is sought, or at any subsequent point, or that a 'valid' consent is later withdrawn, is irrelevant to the scope of the court's powers, whether they are exercised under statute or under the inherent jurisdiction of the High Court. The existence or absence of consent may be relevant to whether the circumstances will or will not amount to a deprivation of liberty under Art 5. But that assessment is independent of the decision that the court must make when faced with an application for an order authorising placement in secure accommodation, registered or otherwise.*

Comment

This decision is a significant one for children services. And it will be relevant to *In the matter of D (A Child)* which was heard in the Supreme Court on 3-4 October 2018. The issue there was whether the

confinement of D, a young person aged 16, who lacked capacity or competence to make decisions about his residence and care, amounted to a deprivation of his liberty in circumstances where his parents were consenting to the confinement. The role of consent also lies at the core of the appeal in conditional discharge case of *MM v Secretary of State for Justice*, heard on 26 July 2018. Judgments in both cases are awaited.

It is no doubt true that a person can be deprived of liberty even where they are consenting to their confinement. An obvious example is the Mental Health Act 1983 where risk may warrant detention even where the person agrees to be confined. To that end, the "lack of valid consent" requirement of *Storck* could be characterised as a sufficient, but not a conclusive, element of the deprivation of liberty equation, at least within a framework which expressly provides for the exercise of coercive state power.

The judgment raises many interesting issues. For example, the emphasis on the permissive nature of court orders in the present context does resonate with DoLS authorisations and Court of Protection orders in the sense that they permit – but do not demand – a deprivation of liberty. And that must be right; there must be room to adjust the intensity of the care arrangements on the ground.

The court's distinction between prospective and retrospective approaches to deprivations of liberty is also of interest. There may however be an important jurisdictional distinction here. The powers of the court under the Children Act and inherent jurisdiction are not dependent upon the child or young person's consent. Whereas the Court of Protection's jurisdiction only exists if the person lacks the capacity to make the relevant decisions: in other words, is unable to give any relevant consent.

Even though there is reference in case law to the prospective or "forward looking focus of the Court of Protection", consent – and therefore the capacity to consent – is time specific. Authorisations to deprive liberty in this jurisdiction must be contingent upon a lack of capacity to consent as it is important that the permissive nature of DoLS and judicial authorisations are not used inappropriately where people are able to make their own decisions.

Short note: capacity and the Mental Health Tribunal

On 23 July 2018 the Upper Tribunal (Administrative Appeals Chamber) handed down its judgment in *VS v St Andrew's Healthcare* [2018] UKUT 250 (AAC) in which the nature of the capacity required by a patient to bring proceedings before the First-tier Tribunal in its mental health jurisdiction was determined on the papers.

Upper Tribunal Judge Jacobs rehearsed the relevant legal background, making it clear that he accepted that the test for capacity in the Mental Capacity Act 2005 codified or confirmed the pre-existing common law principles and the FTT should now apply the principles and approach set out in the MCA and its Code of Practice. On the test required by a patient to bring proceedings before the FTT, Judge Jacobs held that the:

patient must understand that they are being detained against their wishes and that the First-tier Tribunal is a body that will be able to decide whether they should be released.'

As noted by Judge Jacobs, this test means that "*the capacity required to bring proceedings is less demanding that the capacity required to conduct them*." The reasons for this stem largely from the wording of rule 11 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699) which provides that a FTT may appoint a legal representative for a patient where the patient lacks the capacity to appoint a representative but the Tribunal believes that it is in the patient's best interests for the patient to be represented. If "*the same test of capacity were applied to bringing proceedings as applies to conducting proceedings, any decision by the First-tier Tribunal to appoint a representative under rule 11(7) for a patient whose capacity was not fluctuating would have the inevitable result that the proceedings had not been properly brought. Given that the existence of an application is the foundation of the tribunal's jurisdiction, that case would then have to be struck out.*" The Judge noted that this approach is consistent with Barker J's decision in *Re RD* [2016] EWCOP 49 in which Baker J held that the capacity to bring proceedings in the Court of Protection required '*P to understand that the court has the power to decide that he/she should not be subject to his/her current care arrangements.'.* This is of course a lower threshold than the capacity to conduct proceedings.

Learning from suicide: a thematic review

NHS Resolution has published its report, "*Learning from suicide related claims: A thematic review*," written by Dr Alice Oates. As is noted in the foreword to this 148 page report, "*NHS Resolution is in a unique position in that it holds information about every personal injury claim made against NHS trusts in England over the past 23 years. This information, when correctly distilled, can be used to identify national themes about potential problems associated with NHS care. These themes can then be used to focus improvement work to reduce the likelihood of similar problems in the future. The learning generated from reviewing claims could then be used to improve care, improve safety, reduce avoidable harm and decrease future litigation costs.*"

The review analysed claims made to the NHS between 2015 and 2017 after an individual has attempted to take their life, (where member organisations received funding to provide legal representation at inquest via NHS Resolution's inquest scheme) with the aim of:

- Identifying the clinical and non-clinical themes in care from both completed suicide and assisted suicide that resulted in a claim for compensation.
- Disseminating the shared learning and using this as a driver for change and quality improvement.
- Highlighting evidence of good practice that could address areas for improvement, signpost potential solutions and make recommendations for change.

The review forms part of the ambition of the former Secretary of State for Health and Social Care, Jeremy Hunt, to "*aim for nothing less than zero inpatient suicides*." The review comes against against the

background of 4,575 suicides registered in 2016 in England (continuing a year-on-year decreasing trend) with approximately 25% of people who go on to take their lives having been in contact with mental health services in the year before their death.

101 claims between 2015 and 2017 that were reviewed. Admissions of liability were made in 46% of the claims reviewed.

There were some examples of good practice in relation to a number of trusts that had a proactive approach to engaging families, staff and patients in improvement work. However:

- Those with an active diagnosis of substance misuse were referred to specialist services less than 10% of the time.
- Risk assessments were often inaccurate, poorly documented and not updated regularly enough. There was little account taken of historical risk.
- Observation processes were inconsistent.
- Communication with families was poor.
- Support offered to families and staff was variable.
- There was evidence of poor quality serious incident investigations at a local level:
    - The family were involved in only 20% of investigations
    - Only 2% of investigations had an external investigator and 32% of incidents were investigated by a single investigator
    - The recommendations were unlikely to stop similar events happening in the future

The review makes 9 recommendations:

- A referral to specialist substance misuse services should be considered for all individuals presenting to either mental health or acute services with an active diagnosis of substance misuse. If referral is decided against, reasons for this should be documented clearly.
- There needs to be a systemic and systematic approach to communication, which ensures that important information regarding an individual is shared with appropriate parties, in order to best support that individual.
- Risk assessment should not occur in isolation – it should always occur as part of a wider needs assessment of individual wellbeing. Risk assessment training should enable high quality clinical assessments, which include input from the individual being assessed, the wider multi-disciplinary team and any involved families or carers.

- The head of nursing in every mental health trust should ensure that all staff including: (1) mental health nursing staff (including bank staff and student nurses who may be attached to the ward); (2) health care assistants who may be required to complete observations; and (3) medical staff who may 'prescribe' observation levels undergo specific training in therapeutic observation when they are inducted into a trust or changing wards. Staff should not be assigned the job of conducting observations on a ward or as an escort until they have been assessed on that ward as being competent in this skill. Agency staff should not be expected to complete observations unless they have completed this training.
- NHS Resolution should continue to support both local and national strategies for learning from deaths in custody.
- The Department of Health and Social Care should discuss work with the Healthcare Safety Investigation Branch (HSIB), NHS Improvement, Health Education England and others to consider creating a standardised and accredited training programme for all staff conducting SI investigations.
- Family members and carers offer invaluable insight into the care their loved ones have received. Commissioners should take responsibility for ensuring that this is included in all SI investigations by not 'closing' any SI investigations unless the family or carers have been actively involved throughout the investigation process.
- Trust boards should ensure that those involved in arranging inquests for staff have an awareness of the impact inquests and investigations can have on individuals and teams. Every trust should provide written information to staff at the outset of an investigation following a death, including information about the inquest process.
- NHS Resolution supports the stated wish of the Chief Coroner to address the inconsistencies of the PFD process nationally. NHS Resolution recommends that this should include training for all coroners around the PFD process.

Short note: Advocacy Toolkit for those with learning difficulties

The Justice for LB Toolkit produced by Advocacy Focus is a valuable resource kit aimed at giving professionals the tools to help those with learning difficulties become more involved with their care assessments. It also provides important information and guidelines about working with people who have learning disabilities, community or cognitive issues. The Toolkit links to various Easy Read documents produced by Advocacy Focus to support assessments and to enable people who may have trouble communicating become more involved in decisions around their care. There is a dedicated Easy Read document for Mental Capacity Assessments which gives information around why an assessment is happening and how a decision is made.

Learning disabilities and autism – troubling BBC reports

In a disturbing report by the BBC on 2 October 2018, it was reported that the use of restraint on adults with learning disabilities in hospital units in England rose by 50% between 2016 and 2017. According to information obtained by the BBC, patient on patient assaults rose from 3,600 to more than 9,000 over the same period and figures from this year suggest that assaults are continuing to rise, and that instances of face-down or prone restraint (which should no longer be used) also increased from more than 2,200 to 3,100 incidents.

The number of people who still remain in in-patient hospital units because of a shortage of community services is also alarming. According to figures obtained by the BBC, the number of adults in inpatient units has reduced slightly from about 2,600 to 2,400 but the number of children in such units has almost doubled. The case of Bethany – a 17 year old girl with autism – being detained in a Treatment and Assessment Unit is discussed in the BBC Radio 4 programme "Transforming Care – Is it Working?" which is available here.

Care home registration refusal

In an unusual case reported on the CQC website, the FTT tribunal has upheld the refusal by CQC of registration of a provider of services to those with learning disabilities on the basis that it did not demonstrate it would comply with CQC's policy 'Registering the Right Support' – as well as the underpinning national guidance – that states new services and variations to registrations within a campus and congregate setting should not be developed due to this model of care not being in the best interests of people with a learning disability.

Learning Disabilities Mortality Review Programme Second Annual Report: Government Response

The deaths reviewed by the Learning Disabilities Mortality Review (LeDeR) showed that, compared with the general population, the median age of death is 23 years younger for men with a learning disability and 29 years young for women, often for entirely avoidable reasons. The second annual LeDeR report was published in May 2018 and made nine key recommendations, all of which have been accepted by the Government. In the Government response to the Learning Disabilities Mortality Review (LeDeR) Programme Second Annual Report (available here, the Department of Health and Social Care (DHSC) and NHS England jointly set out their formal response to each of the recommendations. The recommendations are:

(1) Strengthen collaboration and information sharing, and effective communication, between different care providers or agencies.

(2) Put forward the electronic integration (with appropriate security controls) of health and social care records to ensure that agencies can communicate effectively, and share relevant information in a timely way.

(3) Health Action Plans developed as part of the Learning Disabilities Annual Health Check should be shared with relevant health and social care agencies involved in supporting the person (either with consent or following the appropriate Mental Capacity Act decision-making process).

(4) All people with learning disabilities with two or more long-term conditions (related to either physical or mental health) should have a local, named health care coordinator.

(5) Providers should early identify people requiring the provision of reasonable adjustments, record the adjustments that are required, and regularly audit their provision.

(6) Mandatory learning disability awareness training should be provided to all staff, delivered in conjunction with people with learning disabilities and their families.

(7) There should be a national focus on pneumonia and sepsis in people with learning disabilities, to raise awareness about their prevention, identification and early treatment.

(8) Local services strengthen their governance in relation to adherence to the MCA, and provide training and audit of compliance 'on the ground' so that professionals fully appreciate the requirements of the Act in relation to their own role.

(9) A strategic approach be taken nationally for training of those conducting mortality reviews or investigations, with a core module about the principles of undertaking reviews or investigations, and additional tailored modules for the different mortality review or investigation methodologies.

DHSC and NHS England have set out a number of actions in response to the recommendations which are to be implemented at various stages over the next few years. A LeDeR oversight group will be established and meet regularly to monitor progress against the recommendations. We will keep readers updated with any major developments.

Rightfullives exhibition

The wonderful Rightfullives online exhibition (http://www.rightfullives.net/) is an extraordinary exhibition, curated by Julie Newcombe, Mark Neary and Mark Brown, that explores the theme of Human Rights and people with autism and/or learning disabilities. It started in May 2018 when a call to arms was put out for contributions from anyone interested in human rights for learning disabled people. The resulting exhibition contains a range of powerful and moving exhibits from learning disabled people and their supporters which are rich in diversity. We would encourage all our readers to take a look online.

SCIE supported decision-making film

The often neglected principle of not treating a person as incapable of making a decision unless all practicable steps have been tried to help them is the focus of a short film that has been published on the Social Care Institute for Excellence (SCIE) website. In it, Lorraine Currie (MCA and DoLS Manager

at Shropshire Council) explains that "taking all practicable steps" is much more than just facilitating communication with the person, but crucially, taking the steps to help the person make the decision. It is only if there are no practicable steps left (because they've all been unsuccessful) that practitioners should then move to carry out the capacity assessment.

As Lorraine points out, this places a real responsibility on practitioners to help people make the decision and will require practitioners to "front-load" the work. Not only could this actually save time for professionals in the long run (as there would be no need for best interests meetings) but this is fundamentally part of the cultural shift towards empowerment of individuals encapsulated by the MCA.

CRPD update

The Committee has published an important General Comment, 7, on the participation of persons with disabilities, including children with disabilities, through their representative organisations, in the implementation and monitoring of the Convention. A very useful blog post by Neil Crowther as to what it says, and does not say (in particular in relation to organisations representing, rather than being led by disabled persons) can be found here.

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Conferences

Centre for Mental Health and Capacity Law CRPD events

Jill Stavert's Centre at Edinburgh Napier is holding three events around the CRPD in October and November: a workshop on CRPD, mental health and capacity: overcoming obstacles to implementation; a seminar by Dr Shih-Ning Then: *An Antipodean Perspective: Supported Decision-making in Law and Practice* and a lecture by Professor Penelope Weller on *Advance decision-making and the Convention on the Rights of Persons with Disabilities: a cross-jurisdictional discussion*. For details and to book, see here.

Taking Stock

Neil and Alex are speaking at the annual Approved Mental Health Professionals Association/University of Manchester taking stock conference on 16 November. For more details, and to book, see here.

Other events of interest

The London branch of the Court of Protection Practitioners Association is holding a seminar on care home fees on 8 November. For details, and to book, see here.

Advertising conferences and training events

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

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

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