Mental Capacity Law Newsletter April 2014: Issue 45

Practice and Procedure

Introduction

Welcome to the April issue of the Mental Capacity Law Newsletter. The Newsletter has a new look this month, and, in a step upon which we would welcome feedback, we have decided to split the newsletter into five members of a family: (1) CoP: Health, Welfare and Deprivation of Liberty; (2) CoP Property and Affairs; (3) Practice and Procedure; (4) Capacity outside the CoP; and (5) Scotland. Each will be available separately, but it is always possible to read the entirety as one newsletter. The introduction will also always be the same across each of the members of the family.

The division comes at a vital time for the MCA 2005 – in one week in March we had first the report of the House of Lords Select Committee on the MCA 2005 (covered in more detail in the Capacity outside the CoP newsletter), and then the landmark decision of the Supreme Court in *Cheshire West* and *P and Q* (to which we devote almost the entirety of the Health, Welfare and Deprivation of Liberty newsletter). The Supreme Court also handed down an important decision in relation to litigation capacity and the settlement of civil proceedings, covered in detail in the Capacity outside the CoP newsletter, as are two important decisions on testamentary capacity. In the Property and Affairs newsletter, we cover important cases on gifts and the notification requirements in relation to statutory wills. In our Practice and Procedure newsletter we cover, amongst other things, the evidence given by the President and Vice-President of the Court of Protection to the Justice Select Committee. Last, by very much no means least, we cover in the Scottish newsletter the implications of the decision in *Cheshire West* for Scotland and also the consultation on draft proposals for a Mental Health (Scotland) Bill.

As if this were not enough, we also this month offer guidance notes: (1) on the implications of *Cheshire West*; and (2) on capacity assessments; the second part of Adrian's note on Scottish adult incapacity law; and an article by Simon Edwards on testamentary capacity and the MCA 2005.

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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

The Justice Select Committee: the judges speak

On 18 March 2014 the President and Vice-President of the Court of Protection, Sir James Munby and Mr Justice Charles, gave evidence to the Justice Select Committee in relation to the operation of the Court of Protection. The session relied on written evidence which had previously been submitted and which has since been added to the Justice Select Committee's website.

Written documentation

A number of interesting documents were provided to the Select Committee by the Government, summarised and discussed here. For present purposes, we concentrate on the evidence given by Sir James Munby P and Mr Justice Charles. In advance of the oral evidence session, they submitted a memorandum which made the following key points:

1. The jurisdiction of the CoP "*is conferred by statute and the court does not have an inherent jurisdiction or an administrative law jurisdiction. So it has no jurisdiction over a vulnerable adult who has the relevant capacity and, subject to some arguments under the Human Rights Act, no power to overturn or declare unlawful decisions of public authorities concerning the provision of care or support on administrative law (judicial review) grounds*" (paragraph 3)

2. There are "significant differences" between the issues that arise in the two types of work undertaken by the CoP (i.e. health and welfare/property and affairs) "*The policy directive at the time the CoP Rules were drafted was that one process should fit all. As identified by the ad hoc Rules Committee this caused, and is still causing, problems*" (paragraph 8).

3. "*In his first report to the President and Vice President in November 2011, the Judge in Charge recommended that as a matter of urgency a process for the transfer of cases to High Court Judges and to judges on the circuits be agreed and implemented. He reported that this recommendation related to the issues about which he had heard the most complaints. Since then attempts have been made to achieve this but they have not succeeded… There can be no doubt that ad hoc arrangements for transfer are unsatisfactory and are causing problems and justifiable annoyance to litigants, practitioners, judges and court staff*" (paragraphs 12-3)

4. The two main problems relating to the day to day performance of the CoP are the long running problems relating to the failure to make amendments to the CoP Rules and to introduce a process for transfer of cases to the circuits. "*The solution to these problems is not in the hands of the CoP*" (paragraph 14)

5. In the context of revisions to the COPR previously recommended, "*Issues relating to the appointment of a litigation friend, the representation of P and obtaining the views of P also need to be addressed in the context of amongst other things the resource and other difficulties faced by the Official Solicitor. New provisions need to be introduced relating to costs, to appeals to address the wider pool of judges who can now be nominated to sit and the disclosure of documents to defined people for defined purposes e.g. to researchers, regulators etc. The balance between the provision of a quick, convenient and inexpensive procedure for the honest and checks and balances and the provision*

of security to guard against the dishonest needs regular review" (paragraph 24).

6. In relation to the changes made to transparency:

"29. There are strongly held views on both sides of the debate on whether the default position should be that hearings are in private or in public and if in public what the general position should be on what can be reported and so on what restrictions on reporting should generally be imposed.

30. There is much to be said for there being general consistency between the Rules of the two courts. But there are differences between the arguments on the underlying issues. They flow from differences between the relevant factors concerning persons who lack capacity and children and so their respective families and carers. These differences and issues relating to size and resource could lead to the CoP taking a different course to the Family courts on the default position, or to the CoP holding a greater percentage of its hearings in open court.

31. The differences have founded a slightly different and wider approach being taken in respect of the CoP in the Guidance given by the President of the CoP and the Family Division on the reporting of judgments in the Family courts and the CoP (see [2014] 1 WLR 230 and 235) [...]. As can be seen from a comparison of the two, the CoP Guidance includes some cases relating to property and affairs, and for clarity includes the Senior Judge (who is treated for all purposes as if he were a circuit judge) and has a different provision on costs."

(7) Finally, in relation to steps being taken to address the two main problems identified above and transparency:

"39. Following his appointment in January 2014 the Vice President, with the full support of the President, had a helpful meeting with HMCTS and MoJ officials to discuss Rule change and transfer to the circuits. These issues are being addressed again and, hopefully, progress will be made in the near future. If not, the CoP will continue to do what it can to try to overcome these problems and the difficulties they cause.

40. The President's Guidance on the reporting of judgments sets out that he is adopting an incremental approach. If resource is provided to consider and to make changes to the CoP Rules, this exercise would provide an appropriate vehicle to further that approach. Nominated judges have been, and will continue to be, encouraged to report more judgments and to consider under the existing CoP Rules whether there is "good reason" to depart from the default position of the hearing being in private and duly accredited members of the media being excluded from it."

The oral evidence session

In the oral evidence session, Sir James Munby P and Mr Justice Charles elaborated upon the points made in their written memorandum. The following key points emerged:

1. In relation to transparency, Sir James Munby indicated that he considered that there had already been an impact as a result of the publication of his guidance in terms of the number of judgments published on Bailii and also the number of stories in the media relating to cases before the CoP. He indicated that he proposes to issue in the next month for discussion and consultation a draft document identifying categories of cases in which, subject to suitable restrictions and protections, documents could be made available to the media. He also contemplates that the categories of judgment which must rather than may be published may be

extended (subject always to the particular circumstances of the case dictating a different outcome), as well as including the judgments of District Judges within the scope of the guidance. He noted, though, that there will come a point in implementing his transparency agenda when he will come up against the Rules, and in particular the default position (unlike in family cases after the changes brought about by the FPR 2010) that there is no right of media access. He expressed his 'continuing concern' (in his words, "a diplomatic phrase") at the fact that the need for changes in rules identified as long ago as 2010 had thus far fallen on deaf ears;

2. Charles J indicated that he did not think that there was much scope for giving further work to authorised court officers. In relation to the regionalisation agenda, it appears that there may very recently have been progress (whether or not related to the hearing before the Justice Committee), such that the necessary actions required to bring about effective transfers of cases out of London should be able to be implemented by the end of May;

3. In relation to the position of the Official Solicitor, Sir James Munby P suggested that the Justice Committee might wish to care to probe the Official Solicitor as to the allocation of his resources between his different functions, in particular between the balance of resources dedicated to those cases involving children in which he was appointed to act as litigation friend for a parent, and welfare cases before the Court of Protection;

4. Both the President and Vice-President indicated a degree of scepticism that it would be possible for increased use of mediation (which both of them indicated that they saw as valuable in the right case) significantly to reduce the case-load of the Court of Protection;

5. As regards the dissemination of information relating to the Court, both indicated a degree of dissatisfaction with the use of the gov.uk portal as a route. Further (and most importantly) Sir James Munby P gave an (unsolicited) endorsement of the utility of this newsletter as a service for professionals, but indicated that the much bigger problem was engaging the public at large.

6. Both judges declined to answer substantive questions relating to the impact of legal aid which were, as the President noted, matters of policy of considerable controversy, but noted that there were cases in which – on the facts of those cases – judicial comment had been made as to the non-availability of legal aid (for example Re UF).

Comment

The evidence given to the Committee and summarised above is very important, and will hopefully be read alongside the strong recommendations of the House of Lords Select Committee. In particular, this evidence underlines the fact that the failure to implement all but one of the recommendations of the ad hoc Rules Committee is causing real problems. Further changes are now required to reflect the fact that the world has moved on since 2010 – not least in terms of the introduction of the Family Procedure Rules 2010. These rules set in place a very clear forensic framework for the determination of cases involving children which is, in many ways, a much better model for the determination of cases involving – in particular – the health and welfare of incapacitated adults than is the CPR upon which the COPR were in significant part modelled.

The above is not intended as a suggestion that the CoP should be part of the Family Division (despite its current location). Nor should it be read as

suggesting that incapacitated adults are to be equated with 'big children.' The law that Court of Protection judges have to apply and the factors to take into account when considering what substantive decision to take upon an application relating to an incapacitated adult is – and should be – very different from the law and factors that apply in relation to a child. However, the forensic processes in both types of proceedings are very similar, and for very good reason: they are designed to ensure that, as far as possible, a judge is put in a position to take the decision that is right for a person who is not a full player in the proceedings but their subject (see also Baker J ("R*eforming the Court of Protection: lessons to be learned from the Family Justice Reforms*"[2014] 4 Elder Law Journal 1, 45-50).

Domestic Violence Protection Orders

With effect from 8 March, by virtue of the enactment of the Crime and Security Act 2010 (Commencement No. 7) Order 2014/478, police officers across England and Wales of the superintendent or above can now issue a Domestic Violence Protection Notices (DVPN) under s.24 Crime and Security Act 2010. A DVPN can be issued to a person over 18 if that officer has reasonable grounds for believing that:

1. the person "*has been violent towards, or has threatened violence towards, an associated person*," i.e. person falling within the categories of associated person defined by s.62 Family Law Act 1996, which includes children, spouses, cohabitants, members of the same household (otherwise merely by reason of one of them being the other's employee, tenant, lodger or boarder); and that

2. the DVPN is necessary to protect that person from violence or a threat of violence. Such a notice can be issued even if the vulnerable adult does not agree.

A DVPN prohibits the suspected perpetrator from molesting the victim and, where they cohabit, may require the suspected perpetrator to leave those premises. The issue of a DVPN triggers an application for a Domestic Violence Protection Order (DVPO). This is a court order (issued by the magistrates' court) lasting between 14 and 28 days, which prohibits the perpetrator from molesting the victim and may also make provision about access to shared accommodation. The magistrates' court must hear the application within 48 hours to limit the length of time for which the suspected perpetrator can be excluded from his home without the chance to defend himself.

We would suggest that such notices and orders may provide an additional tool that may be of assistance for local authorities seeking to protect vulnerable adults who fall outside the scope of the MCA 2005.

Cross-border update

Readers may be interested to note that permission was refused by a single Lord Justice of Appeal at an oral hearing on 28 March 2014 to JO to appeal the important decision of the President in *JO v GO* on Schedule 3 to the MCA 2005.

The role of international judicial liaison

N v K (No 2) [2014] EWHC 507 (Fam) (Cobb J)

Practice and Procedure – Other

Summary

This case provides a useful summary of the role of international judicial liaison. It arises in the context of a private law case involving a child, but the principles of judicial liaison are equally applicable in the context of cases involving incapacitated adults. Cobb J took the opportunity to rehearse the principles that govern such liaison exercises, which we reproduce here:

> *"8. Many judgments and articles in international legal journals over the last fifteen years or so have identified, and paid tribute to, the value of international judicial liaison (from Re HB (Abduction) (Child's objections) [1998] 1 FLR 422 to HSE Ireland v SF (A minor) [2012] EWHC 1640 (Fam), and others). I intend to do no more than to add my own public recognition of its value, having engaged in collaboration usefully through the medium of Network Judges in Ireland (Re LM [2013] EWHC 646 (Fam)) and Spain (PB v SE Re S [2013] EWHC 647 (Fam)) in the last twelve months.*
>
> *9. The principles by which international judicial communications are achieved through the Hague Network Judges, together with practical advice, are authoritatively set out in the guidance 'Direct Judicial Communications' ('DJC') published by the Hague Conference on Private International Law (2013).*
>
> *10. While this is not the place to rehearse the regime in its entirety, it should be noted that it*
>
> *is common practice, where direct communication is indicated, for written questions to be prepared for consideration by the judges in the two jurisdictions. This guidance is specifically to be located in §7.5(f) of the DJC: the provision 'in writing' of 'any specific questions which the judge initiating the communication would like answered,' and corresponds with the more general expectation that 'a record is to be kept of communications' §6.4 (ibid.)*
>
> *11. The DJC publication illustrates the sort of matters which may be the subject of direct judicial communications; this is not an exhaustive list:-*
>
> *a. scheduling the case in the foreign jurisdiction:*
>
> *i. to make interim orders, e.g., support, measure of protection;*
>
> *ii. to ensure the availability of expedited hearings;*
>
> *b. establishing whether protective measures are available for the child or other parent in the State to which the child would be returned and, in an appropriate case, ensuring the available protective measures are in place in that State before a return is ordered;*
>
> *c. ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction;*
>
> *d. ascertaining whether the foreign court can issue a mirror order (i.e., same order in both jurisdictions);*
>
> *e. confirming whether orders were made by the foreign court;*
>
> *f. verifying whether findings about domestic violence were made by the foreign court;*

g. verifying whether a transfer of jurisdiction is appropriate.

12. For a wider review of the evolution of this important mechanism for achieving international communication and collaboration, and a digest of relevant case-law, reference should further and usefully be made to the article by Edward Bennett, formerly Legal Secretary to the Head of International Family Justice, at [2013] (July) Family Law 845. Mr. Bennett gives practical advice to practitioners, consistent with the DJC Guidance referred to above, which I respectfully endorse. Relevant to the problems which arose in this case, I draw attention to a particular passage from that article (at p.850):

> *'All requests [for direct judicial communication] should be accompanied by: (a) a (preferably agreed) concise case summary; and (b) a set of questions to be put to the network judge which: (i) ask for information of a practical and emphatically non-legal nature; and (ii) are in no way phrased in anything other than a neutral, non-tactical way. Direct judicial communication is not intended as a tool for practitioners to: (a) receive legal advice by the back door; (b) avoid having to seek expert evidence as to foreign law or procedure in circumstances where it is appropriate; or (c) use as a substitute for their own legal research into English family law and practice. Likewise it would be a grave abuse of process to attempt to use network judges as a means of making submissions to a foreign court, thus short-circuiting the relevant procedural rules for such matters in the jurisdiction concerned. This is not to say that sealed orders and judgments cannot be transmitted to judges in other jurisdictions quickly via network judges in certain circumstances, which is relatively common'.*

On the facts of the case before him Cobb J found that the representatives for the father in the proceedings had embarked upon an entirely different – and inappropriate – exercise, thus:

> *"21. The questions from the parties' solicitors were therefore received by the Office for IFJ on 30 October. I do not intend to set out the detailed narrative of the father's questions in this judgment, but can summarise them thus:*
>
> *a. The father first invited the judges to consider and determine the extent to which the mother could maintain that she was not bound by a judgment entered in the American court (Panama City, Florida) in August 2007;*
>
> *b. The second question referred to the father's agreement in 2009 (see §12 [2013] EWHC 2774 (Fam)) to extend the period of the mother's temporary relocation in the UK. After an exposition of the background history, the question posed was: 'To what extent, if any, should the fact that the extension was granted voluntarily detract from the validity of the final judgment in requiring [M]'s return to Florida by 1 September 2009?'*
>
> *c. Thirdly, the father asked whether the finding of habitual residence in England is 'incompatible with the recognition and enforcement of' the Florida order?*
>
> *d. The fourth question concerned the question of whether the English court would 'uphold' the 'visitation provisions' of the original Florida order;*
>
> *e. Finally, the father set out a detailed proposed time-table for future holiday staying contact over the ten-month*

> *period to September 2014, involving five separate visits to the USA during M's school holidays and half-terms. Specific dates were proposed. He invited the judges to 'discuss' these arrangements in the 'anticipated judicial liaison'.*
>
> *22. At least three of these five questions (§21 (a), (b) and (e)) were completely unsuited to judicial liaison, as contemplated by the International Hague Network; the first question was self-evidently not a matter on which an English Judge could or should contribute or 'liaise' effectively or at all. International judicial communication is not intended to be a substitute for obtaining legal advice, nor can it be used as a means to avoid having to seek expert evidence as to foreign law, or procedure. It cannot be deployed as a mechanism for judges to settle welfare disputes (§21(e) above), nor can it be used 'as a means of making submissions to a foreign court' (Bennett: p.850)."*

Comment

As noted at the outset, judicial liaison can be useful – indeed – essential in terms of ensuring that cross-border protection for incapacitated adults can be coordinated effectively between both judicial and administrative authorities. A good example is that of ***Re MN***, where Hedley J gave a decision that was strictly – academic so as to be able to assist the California courts as to what the English courts would and would not do, and what it would do of its own volition as opposed to only at the invitation of the California courts. This case serves as a helpful reminder of the core principles that apply together with the limits of liaison.

Law Society Practice Note on International Aspects of EPAs, LPAs and deputyships

The Law Society has recently published a useful practice note providing guidance on the international aspects of enduring powers of attorney (EPAs), lasting powers of attorney (LPAs) and deputyships. The note addresses the issues that arise in relation to the use of such powers abroad; the issues that arise in respect of the use of foreign powers of attorney are discussed in this article by Alex.

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Conferences at which editors/contributors are speaking

5th anniversary conference for the National Preventive Mechanism (Optional Protocol to the Convention against Torture)

Jill is chairing the session on de facto detention at this conference to mark this important anniversary, being held in Bristol on 8 April. Details are available here.

The Assisted Suicide Bill: Does Scotland Need to Legislate?

Adrian is speaking at a medico-legal seminar at the Mason Institute of the University of Edinburgh Law School on the subject of assisted dying on 24 April 2014 at the Royal College of Physicians in Edinburgh. Details can be found here and initial details can be found here.

A Deprivation of Liberty: Post Cheshire West and P and Q

Neil is speaking with Jenni Richards QC at the conference arranged by Langleys on 1 May on the *Cheshire West* judgment. Full details are available here.

Annual private law conference convened by the Royal Faculty of Procurators

Adrian will be speaking at the annual private law conference convened by the Royal Faculty of Procurators in Glasgow on 29 May 2014. Full details are available here.

Hot topics in adult incapacity law

Adrian will be speaking on hot topics in the incapacity field at the Solicitors' Group Wills, Trust & Tax conference in Edinburgh on 7 May 2014. Full details are available here.

The Deprivation of Liberty Procedures: Safeguards for Whom?

Neil is speaking at the conference arranged on 13 June by Cardiff University Centre for Health and Social Care Law and the Law Society's Mental Health and Disability Committee. The conference will focus on the implications of the ruling of the Supreme Court *Cheshire West* as well as the likely impact of the Report of the House of Lords Committee on the

Advertising conferences and training events

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

Mental Capacity Act. Other speakers include Richard Jones, Phil Fennell, Lucy Series, Professor Peter Bartlett, Sophy Miles and Mark Neary. Full details are available here.

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

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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Alex is frequently instructed before the Court of Protection by individuals (including on behalf of the Official Solicitor), NHS bodies and local authorities, in matters across the spectrum of the Court's jurisdiction. His extensive writing commitments include co-editing the Court of Protection Law Reports, and contributing to the 'Court of Protection Practice' (Jordans). He also contributed chapters to the second edition of 'Mental Capacity: Law and Practice' (Jordans 2012) and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). To view full CV click here.

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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

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

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