Essex CHAMBERS

MENTAL CAPACITY REPORT: COMPENDIUM

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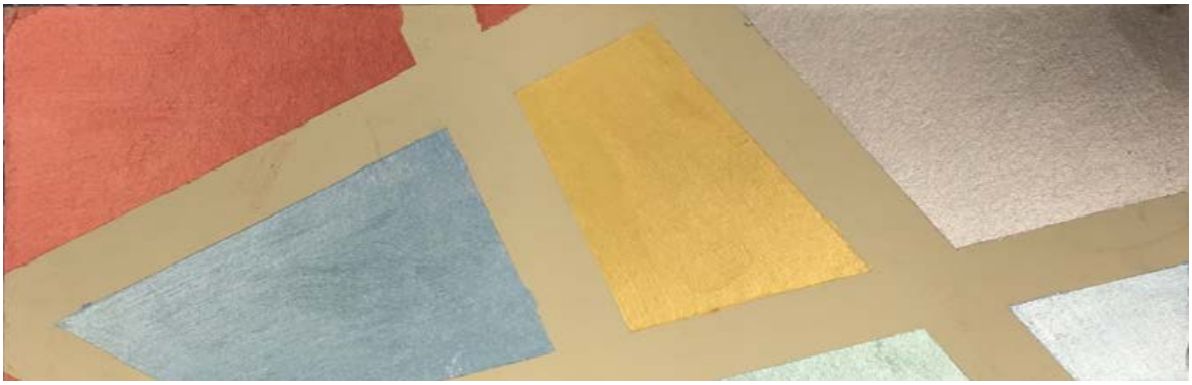

Welcome to the April 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Appeal overturns the conventional understanding of deprivation of liberty under the MHA; children, consent and deprivation of liberty, changes to inquest requirements in relation to DoLS/*Re X* orders;

(2) In the Property and Affairs Report: new guidance on access to and disclosure of the wills of those lacking capacity, the OPG's good practice guide for professional attorneys and new fixed fees for deputies;

(3) In the Practice and Procedure Report: the Supreme Court pronounces on best interests, available options and case management, a new Senior Judge for the Court of Protection, and updates on case-law relating to funding and HRA damages;

(4) In the Wider Context Report: a new approach to advance care planning and the European Court of Human Rights grapples with Article 12 CRPD;

(5) In the Scotland Report: Scottish powers and English banks, the Scottish OPG cracks down and a review of the second edition of a leading textbook.

We have also published a special report upon the Law Commission's Mental Capacity and Deprivation of Liberty project, with a detailed summary and responses from a range of perspectives. And remember, you can find all our past issues, our case summaries, and more on our dedicated sub-site here, and our one-pagers of key cases on the SCIE website.

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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.

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HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Law Commission *Mental Capacity and Deprivation of Liberty* project report published

The long-awaited report was published on 13 March. We provide full coverage of it in a special report available here, including a detailed summary of the report by Tim Spencer-Lane, lead lawyer at the Law Commission working on the project, and responses from a range of perspectives. The slides and audio from Alex's breakfast briefing are also available here.

Turning the MHA on its head?

Secretary of State for Justice v MM; Welsh Ministers v PJ [2017] EWCA Civ 194 (Court of Appeal (Sir James Munby P, Gloster LJ V-P, Sir Ernest Ryder, SP))

Article 5 ECHR – DOLS authorisations – Mental Health Act 1983 – conditional discharge – interface with MCA

Summary

This long-awaited decision considers the fall-out of *Cheshire West* in relation to conditional discharges ('MM') and community treatment orders ('PJ') under the Mental Health Act 1983. The appeals proceeded on the basis that both MM and PJ had capacity to consent to the care arrangements in the community that gave rise to their confinement. The principal issues concerned the jurisdiction of the tribunal and the effect of consent in the context of article 5 ECHR.

(a) Necessary implication

In relation to the conditional discharge of MHA s.37/41 restricted patients, the Court of Appeal held that neither the Secretary of State nor the tribunal has a power to deprive liberty outside hospital. Such a power "*would have to be prescribed by law and it is not*" (para 17). Nor was it necessary to imply such a power. To do so would create a power that was "*unconstrained, without criteria, time limits or analogous protections*", with inferior review rights in the community when compared with those in hospital, which would be discriminatory (para 20).

The position was very different for those on Community Treatment Orders. The court was prepared to hold by necessary implication that a responsible clinician (but not the tribunal) has "*a power to provide for a lesser restriction of movement than detention in hospital which may nevertheless be an objective deprivation of liberty provided it is used for the specific purposes set out in the CTO scheme*" (para 51). The court went on to observe:

> *52. There are limits to what can be provided for in a CTO, for example, it would be wrong in principle for the responsible clinician to make a CTO which has the effect of increasing the levels of restriction to which a patient is subject beyond those applicable in hospital detention. Deprivation of liberty under a CTO is intended to be a lesser restriction on freedom of movement than detention for treatment in hospital.*
>
> *…*
>
> *64 … there is a distinction to be drawn between deprivation of liberty consequent upon compulsory detention in hospital for treatment and a lesser restriction on a patient's freedom of movement that nevertheless amounts to an objective deprivation of liberty. The latter circumstance is a statutory alternative to compulsory detention for a clear purpose as long as the patient is not exposed to a greater restriction than would be the case if s/he were to be compulsorily detained in hospital.*

(b) Relevance of consent for those with capacity

To be "*valid and effective*", "*consent would have to be unequivocal, voluntary and untainted by constraint*" (para 9), with the freedom to change one's mind (para 25). In relation to the role of consent with regard to article 5 ECHR:

> *27. Further, both domestic and Convention jurisprudence strongly doubt the hypothesis that valid consent can prevent a compulsory confinement from being a deprivation of liberty…*
>
> *28 … Where conditions amounting to a deprivation of liberty are compulsorily imposed by law, the agreement of an individual cannot prevent that compulsory confinement from constituting a deprivation of liberty: De Wilde and Ors v Belgium (1979-80) 1 EHRR 373 at [64] and [65].*
>
> *29 … The most common condition that might be a deprivation of liberty is continuous supervision including the lack of availability of any unescorted leave. Even if the question of consent were to be hypothetically relevant, the patient cannot consent in any irrevocable way. He cannot be taken to have waived or have had his right to withdraw his consent removed. There is no scope for consent in a case such as this.*
>
> *30. Accordingly, whether a capacitated patient can consent to a deprivation of liberty is not a decisive issue. A purported consent, even if valid, could arguably go no further than to provide for the subjective element of the article 5 test, it cannot create in the FtT / MHRTW a jurisdiction it does not possess to impose a condition that is an objective deprivation of liberty. Article 5 ECHR does not*

> *provide any free standing jurisdiction in a tribunal to impose conditions that have the effect of authorising a deprivation of liberty. A purported consent would also be ineffective in fact. It cannot be an irrevocable consent and it could not act to bind the patient or waive his right to withdraw or rely on, inter alia, articles 5 and 6 ECHR at any time thereafter. A deprivation of liberty is an imposition by the state so that examples of enforceable agreements in other contexts are not analogous.*

Accordingly, if a tribunal is satisfied that a restricted patient is validly consenting to community supervision, and that will protect the patient and the public, then "*it is open to the tribunal to grant an absolute discharge or a conditional discharge on conditions that do not involve an objective deprivation of liberty. The tribunal is well used to identifying cases where there will or will not be compliance with a necessary regime of treatment.*" (para 31).

(c) Restricted patients lacking capacity to consent

The Court of Appeal accepted that where a restricted patient lacks capacity to consent to their community confinement, the Mental Capacity Act 2005 can be invoked to authorise it:

> *35. The power of deferment to permit arrangements to be made for discharge could be used in an appropriate case to invoke the separate jurisdiction of the CoP to authorise a deprivation of liberty if the patient is incapacitated. That might provide free standing deprivation of liberty safeguards in certain factual circumstances but does not provide a basis for a condition of conditional discharge under section 73 that is outside the jurisdiction of the tribunal.*
>
> *36. Accordingly, it cannot be said that it was Parliament's intention to authorise detention outside hospital when a patient is conditionally discharged. If that conclusion presents practical difficulty then it is a matter for Parliament to consider.*

Comment

This is a significant decision in many respects. The court sees the tribunal as performing a narrow role but has identified a more expansive role for responsible clinicians. The judgment means that (a) restricted patients with capacity cannot be lawfully discharged from hospital if the necessary care arrangements satisfy the *Cheshire West* acid test; and (b) responsible clinicians have an implied power to deprive liberty under community treatment orders. Both conclusions are likely to prove contentious.

Consent

Consent is a question of fact and there is no deprivation of liberty where a person with capacity consents to their confinement. Of course we must be careful to ensure that people do not lose the benefit of Article 5 safeguards for the single reason that they have given themselves up to be taken into detention. That is why the threat of detention must not be used to coerce. But an unpleasant choice remains a choice. The ward door may be locked. The nurses and doctors may have holding

powers available under s.5 MHA 1983. But if a person with capacity is aware of these measures and nevertheless agrees to be there, then we would suggest that they cannot be said to be deprived of liberty. Indeed, the ECHR jurisprudence even recognises that a person who is said to lack capacity to consent according to domestic law may not be deprived of liberty if they tacitly agree to their confinement: *Mihailovs v Latvia* [2013] ECHR 65, [135]-[140].

If the person with capacity subsequently changes their mind and decides to leave, risk will need to be assessed and a decision taken as to whether to invoke the compulsory powers. The possibility of compulsion is there, whether the person is in a mental health hospital, on a conditional discharge, or on a community treatment order. In all three scenarios, the person can ultimately be detained in hospital if the corresponding criteria are met. It would therefore be peculiar if consent 'works' for voluntary patients but not for conditionally discharged patients.

It should also be noted that any patient admitted to any hospital is potentially liable to be held there under the powers contained in s.5 MHA 1983 – including any patient in a general hospital receiving physical healthcare. The spectre of compulsion therefore in principle looms large over such patients in circumstances where a different constitution of the Court of Appeal have very recently been at pains to exclude the routine operation of Article 5 ECHR.

In the circumstances, it may well be that the question of what constitutes "valid consent" to confinement will need to be examined further in due course, and it may also be that this will ultimately unlock the key to the *Cheshire West* conundrum. If the true meaning of deprivation of liberty is coercive confinement against the will of the individual concerned, then, by definition, no-one can ever consent to the same. Conversely, if we can sufficiently reliably identify that a person – MEG, say – is seeking to manifest their consent to arrangements which on their face amount to a confinement, should we really say that they are deprived of their liberty?

The Court of Appeal's recognition that the separate jurisdiction of the Mental Capacity Act 2005 can be invoked to authorise the deprivation of liberty of restricted patients lacking capacity to consent is, however, welcome. On a practical level, the court notes that a judge authorised in a tribunal jurisdiction can, with the appropriate judicial ticket, also sit in the Court of Protection and vice versa "*so that in an appropriate circumstance the judge might exercise both jurisdictions concurrently or separately on the facts of a particular case*" (para 32).

CTOs

In relation to CTOs, it is striking that so senior a court (including as it did the heads of the two judicial bodies charged with overseeing the Mental Capacity and Mental Health Acts) set its face so expressly against the conventional understanding of these instruments.

Parliament never intended for community treatment orders to be used to deprive liberty, and the Codes of Practice to both the MHA and DoLS reiterate this (no reference is made to the relevant paragraphs in either by the court). The purpose of CTOs is to reduce readmissions to hospital; not to detain people in the community. Further, if Parliament had intended for CTOs to be used in this way, some of Schedule 1A to the Mental Capacity Act 2005 would have been otiose. For it provides a legal procedure to authorise the deprivation of liberty of incapacitated patients on CTOs (as well, for that matter, as conditional discharges, guardianship, and s.17 leave). It also renders unnecessary the Law Commission's consultation on the issue (Consultation paper, para 10.25) and at least part of its recommendations in its recent *Mental Capacity and Deprivation of Liberty* report (paras 13.26 and 13.27, predicated upon the long-standing understanding that the 'community' provisions of the MHA 1983 do not provide free-standing authority to authorise deprivation of liberty.

The Court of Appeal's approach also renders unnecessary the Department of Health's consultation (Government Response to No Voice Unheard, No Right Ignored – A Consultation for People with Learning Disabilities, Autism and Mental Health Conditions (2015) Cm 9142, para 87), to which the Law Commission consultation and report made reference.

For the Court of Appeal to decide that this detention power can be necessarily implied is therefore a substantial step. But were they wrong to do so? The court rightly notes that there are safeguards for CTOs:

> *54. The CTO scheme is provided for in a statutory framework that is a procedure prescribed by law. The criteria for the imposition of conditions that may deprive a patient of his liberty are specified in sections 17A(4) to (5) and 17B(2) MHA. They are limited to the purposes of the legislation, for example, for medical treatment. They are time limited by section 17C and they are subject to regular rights of review by sections 20A and 66 which are equivalent to the rights enjoyed by a patient detained in hospital so that there is no incoherence or lack of equivalence in the safeguards provided by the scheme. The conditions in a CTO have to be in writing: see, for example sections 17A(1) and 17B(4). The responsible clinician has the power of recall (sections 17E(1) and (2)) and the powers of suspension and variation (sections 17B(4) and (5)). Accordingly, in our judgment, the framework provides both practical and effective protection of a patient's Convention rights.*

Applying the Court of Appeal's rationale in relation to tribunals and conditional discharges, one might have thought that such a power to detain on a CTO "*has to be prescribed by law and it is not*". Crucially, of course, the safeguard of the AMHP is therefore at the outset of a CTO and at the end if the responsible clinician proposes to revoke it. But fundamentally the tribunal is not reviewing the legality of such community detention. The Court of Appeal incorrectly stated at para 55 of their judgment that "*The power exercisable by the tribunal is to discharge the patient from detention not to 'discharge the CTO'*." This error may have resulted from the incorrect version of s.72(c)(i) MHA 1983 which is appended to the judgment. It refers to one of the CTO criteria as being whether it is "*appropriate for him to be liable*

to be detained in a hospital for medical treatment" when in fact the legislation actually requires the tribunal to consider whether it is "*appropriate for him to receive medical treatment*".

Accordingly, and fundamentally, the tribunal is not performing an Article 5(4) ECHR reviewing function for CTOs. A patient could satisfy the statutory criteria for a CTO whilst being subject to an unnecessary deprivation of liberty. The tribunal could do nothing to rectify this: its powers are limited to discharging or not discharging the CTO and the Court of Appeal has narrowed the remit of the tribunal *vis-à-vis* article 5. Discretionary conditions cannot be enforced but the threat of recall looms large. And it seems the patient's only recourse to challenging an unjustified deprivation of liberty in these circumstances would now be through judicial review. This may have left a gap in human rights protection.

Finally, using the logic of this decision, if a responsible clinician has by necessary implication a power to detain on a CTO, so too will they have a power to detain patients on leave under s.17 MHA 1983. This is for two reasons. First, the analogy between the hospital detention power and s.17 leave is tighter than it is for s.17A CTOs. Secondly, and unlike for CTOs, s.17(3) MHA 1983 contains an express power to grant leave into another's custody. Again, if this is correct, it is difficult to see why Parliament would have included express provision for DOLS to be operated alongside s.17 leave in Schedule 1A to the MCA 2005. It is further difficult to see why it was considered necessary by Hayden J to emphasise in *NHS Trust v FG* the importance of having in place a standard authorisation when a patient is given s.17 leave from a psychiatric hospital to be deprived of their liberty in a general hospital for purposes of receiving physical healthcare. We note in this regard that *NHS Trust v FG* of course recently has been endorsed by a different constitution of the Court of Appeal in the *Ferreira* case as exemplifying precisely the sort of situation in which a deprivation of liberty can arise in the context of the delivery of physical healthcare.

Children, consent and Article 5

A Local Authority v D & Ors [2016] EWHC 3473 (Fam) (Keehan J)

Article 5 ECHR – children and young persons

Summary[1]

This case concerned C, a 15 year old man who had been made the subject of a care order in favour of the local authority. The local authority brought this application to obtain the court's authorisation of what it contended was a deprivation of C's liberty in a residential unit.

[1] In line with standard editorial practice, this being a case in which Tor is currently involved, she has not been involved in the production of this note.

Under the arrangements, staff knew the whereabouts of C at all times; he was never left alone in the unit; he was never left alone with other residents; he was subject to 1:1 staffing including during breaks at school; he was subject to constant observations by staff and has no free time when he is not observed; the external doors of the unit were locked at night; the bedroom doors were alarmed at night to ensure privacy and to ensure that the whereabouts of all residents were known; the internal doors were locked if C's behaviour necessitated it; C could not leave the unit unsupervised and could not leave unaccompanied without permission; he was monitored at all activities outside of the unit and was accompanied on all recreational and social events; he was not permitted any internet access and the use of his mobile telephone was restricted to four telephone numbers; and C could not travel alone on public transport. The court concluded that C was deprived of his liberty as he was confined, supervised and controlled 24 hours a day.

A key question was whether C could, in law, consent to the deprivation of his liberty. Keehan J accepted the opinion of C's guardian that C was of sufficient understanding and intelligence to enable him to understand fully what was involved in him living in the unit and the restrictions which were imposed on him. The judge was satisfied on the evidence that C not only understood those matters but he understood why they were necessary and why and how they benefited him. Following the decision of *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] UKHL7, [1986] 1 FLR224, Keehan J found that C was *Gillick* competent and was capable, in law, of consenting to his confinement at the unit.

Keehan J accepted that C had and would continue to seek the push the boundaries of the restrictions placed upon him and to seek to object or complain about some elements of them, as well as occasionally breach the house the rules. However, he held that, on the facts, C did in fact consent to his confinement and therefore the issue of the court authorising his confinement under the inherent jurisdiction did not arise.

Comment

The court's conclusion that C was confined (i.e. that the objective limb of the Article 5 test for deprivation of liberty was satisfied) is unsurprising one, despite arguments made on behalf of C that he was not being deprived of his liberty. It was submitted on behalf of C that no child who was subject to a care order is free to leave and live with whom they want to, and that this case had the prospect of bringing within the purview of the non-statutory DOLS regime all children who live in care homes or are in foster care. However, this is not the first time that this prospect has been raised. It should not be forgotten that the Supreme Court in *Cheshire West and Chester Council v P; Surrey County Council v P & Q* [2014] UKSC 19 considered that the arrangements for two sisters in foster care amounted to a deprivation of liberty, MEG being 17 at the time that the case began before Parker J.

Keehan J's conclusion that D was able – in law – to consent to that confinement is surely correct, although sits oddly (on one view) with the very different view of consent expressed by the Court of

Appeal in the *MM* case discussed elsewhere in this report. His conclusion that, on the facts, C was consenting is more questionable, even if perhaps understandable at a pragmatic level given the legal complexities that would arise in the event that he did not consent.

We still await, of course, the determination by the Court of Appeal of the question of whether a parent can consent to the confinement of a child (whether of any age, or solely aged 15 and below, and whether only where the child lacks capacity to consent or in all situations all being questions that arose during the course of the hearing before the Court of Appeal in February 2017 of the appeal against the decision of Keehan J in *Birmingham CC v D*).

Finally, although the issue did not arise on the facts of the case (and the court's comments are strictly obiter), it is of interest to note that the court did consider whether it could exercise its powers under the inherent jurisdiction to authorise a deprivation of C's liberty if C did not consent to his confinement. The Official Solicitor, who acted on behalf of C's mother (known as D) argued that the use of the inherent jurisdiction to authorise a deprivation of liberty was not compliant with Article 5. Keehan J called this a "bold submission". It was submitted hat the use of the inherent jurisdiction was not accessible – there is no statute, no statutory or non-statutory governmental guidance, and there is no way to find out the basis on the out the basis on which the inherent jurisdiction would be invoked other than through a decision of the court. It was not precise and not foreseeable as there were no definitive criteria for its use. Keehan J rejected the Official Solicitor's submission and was satisfied that the use of the inherent jurisdiction to authorise the deprivation of liberty of a child or young person was compliant with the procedural requirements of Article 5. However, as the issue did not need to be determined in this case, no further guidance or criteria were provided that could be helpful in future inherent jurisdiction cases.

'Death under DOLS': changes to inquest requirements

From Monday 3 April 2017 coroners no longer have a duty to undertake an inquest into the death of every person who was subject to a DoLS authorisation under the Mental Capacity Act 2005 (or where an order of the Court of Protection authorises the deprivation of the liberty).

In the words of the Ministry of Justice:

> *In these cases an inquest will still be required if the person died before Monday 3 April 2017. However, for any person subject to a DoLS authorisation who dies on the 3rd, or any time after, their death need not be reported to the coroner unless the cause of death is unknown or where there are concerns that the cause of death was unnatural or violent, including where there is any concern about the care given having contributed to the persons death.*
>
> *Any person with any concerns about how or why someone has come to their death can contact the coroner directly. This will not change where a person subject to a DoLS authorisation. What will*

change is that the coroner will no longer be duty bound to investigate every death where the deceased had a DoLS in place.

Guidance has been issued by the Chief Coroner, available here. A Home Office Circular has also been issued which covers (at pages 11 ff) the relevant changes. Both the Circular and the Chief Coroner's Guidance leave open the apparent paradox that a result of the changes introduced on 3 April may be that inquests are required on "state detention" grounds because a person is deprived of their liberty and an authorisation is awaited but not yet granted (at which point, they would have ceased to be considered to be under state detention). That would appear to be an entirely perverse result, and we would strongly suspect that a court would find a way to hold that an inquest is not required on "state detention" grounds alone in such circumstances.

LAA funding for s21A applications

Peter Edwards Law has posted online a letter received from the Legal Aid Agency which confirms that for any period within s.21A proceedings during which a DOLS authorisation is not in place, non-means tested funding will not be provided. If there is a gap between authorisations, funding will be suspended for that period.

This has been the position since at least the decision in *Re UF* (2013) when Charles J explained that the solution was for the court to continue in force the relevant authorisation, or otherwise bring about the result that a standard authorisation is in existence, to ensure that funding is in place. The usual approach in the editors' experience is to obtain an order which extends the standard authorisation's duration pending further hearing, and if this should extend beyond the 12 month limit, require the supervisory body to ensure that a new authorisation is put in place without any gap. If the court has not identified the need of its own motion, then ensuring that either such an extension or a fresh authorisation is required is therefore a critical aspect of the duty of any publically funded Counsel or solicitor involved in such cases.

"Vulnerable adults" call for evidence

Together with two partners (the Association for Real Change, a learning disability charity and Autism Together), Alex[2] is seeking to persuade the Law Commission to include within its 13th programme of law reform a project to look at the criminal and civil measures to support and protect those who fall outside the scope of the Mental Capacity Act 2005 and domestic violence legislation. His proposal has made it through the first sift; to maximise the chances that it is taken forward he is seeking further evidence and support to forward on to the Law Commission to add to the very considerable body that he has been provided with so far following posts on his website, in chronological order here, here

[2] In a private capacity; whilst he remains on secondment to the Law Commission as a consultant to the Mental Capacity and Deprivation of Liberty project, this is a separate venture.

and here. To address one immediate terminological elephant, he emphasises that he is well aware of the potential problems with the term "vulnerable adults," (which is nonetheless used by the High Court for purposes of identifying those in respect of whom it can deploy the inherent jurisdiction), and would see part of the Law Commission's project as being to identify the correct term for the cohort of individuals in question.

PROPERTY AND AFFAIRS

New Law Society Guidance on Access and Disclosure of an Incapacitated Person's Will

On 1 March 2017, the Law Society issued new guidance on when solicitors who have acted for and hold the will of a person who has lost capacity and in respect of whom there is a property and financial affairs attorney or deputy, should disclose that will to such attorney or deputy.

The Court of Protection has made it clear that attorneys and deputies owe a duty when making financial decisions, so far as is reasonably possible, not to interfere with P's succession plans (see *Re Joan Treadwell* [2013] EWHC 2409 (COP); paragraphs 81 to 88 in the judgment of Senior Judge Lush).

It follows from this that, generally speaking, it will be the duty of the attorney or deputy to discover what, if any, testamentary dispositions P has made. Thus, if at the time of making the will, the testator has provided no contrary instructions, the deputy or attorney is entitled to a copy of the will. The guidance suggests that it is best practice for the solicitor to discuss this issue and record any decision made at the time the will is made. Ideally, this should also be confirmed when any LPA is made.

The guidance then states that if the instructions are not to disclose the will in such circumstances, then the solicitor should not disclose the will without a specific court order. The solicitor could oppose such an order (or seek its variation if already made) if the solicitor thought that disclosure was not in P's best interests. The guidance suggests that the solicitor should do so by making a witness statement in form COP24, seeking authority for his costs to come out of P's estate.

The guidance deals with what the solicitor ought to do if he has concerns about whether the attorney or deputy is acting in P's best interests, referring to the safeguarding role of the OPG.

The guidance ends with a reminder that the attorney or deputy ought to, so far as practicable, engage P in this, like any other, best interests decision.

New OPG Good Practice Guide for Professional Attorneys

On 3 March 2017, the OPG published a new good practice guide for professional attorneys. It covers everything from taking instructions from donors, preparing to act under the LPA, what happens after the LPA is created to record-keeping. It ends with a helpful checklist which summarizes the guidance in the four main categories, choice of attorney, capacity and execution of the LPA, fees and relationship management. With greater emphasis on the need for proportionality in relation to fees for the work of attorneys (and deputies), the guidance in relation to fees is especially welcome.

New Fixed Fes for Deputies

From 1 April 2017, there are new (increased) fixed fees for deputies. They apply when the deputy is a solicitor or office holder of a public authority and the court can apply them to other deputies as well.

The fees are fixed by PD19B, and a handy comparison table can be found here.

Short Note: Testamentary Capacity and the Effect of Medication

In *White v Philips* [2017] EWHC (Ch) 386 HHJ Saffman, sitting as a Judge of the Chancery Division, heard a somewhat unusual challenge to a will. The deceased was the husband of the claimant who sought an order against the deceased's will. The will was professionally drawn whilst the deceased was in the last stages of terminal cancer taking strong opiates and other drugs. The will left the deceased's share of the main asset (the former matrimonial home) in trust for his daughter from a previous marriage giving the widow the right to live there whilst she remained single. The home had been bought in joint names and at the same time as making the will, the deceased severed the joint tenancy.

The widow challenged the will on the basis of capacity and want of knowledge and approval. So far as the former was concerned, her case essentially was that the deceased was suffering from drug induced delusions that made him believe that his wife had turned against him and, indeed, the social services had been involved pursuant to their safeguarding responsibilities and the deceased had moved to live with his daughter cutting off all contact with his wife.

The wife denied any wrong doing and at one stage alleged undue influence (presumably on the part of the daughter).

There was no dispute as to the law, nor the effect of the shifting burden of proof. The Judge heard from lay witnesses, together with the lawyer who took the will instructions and a social worker who had been involved. Experts were called.

In the end, the Judge pronounced in favour of the will. The evidence suggested that the deceased was clear about his intentions, knew and approved of the contents of the will so the only real question was whether a delusion about his wife had robbed him of capacity to make the will in the form he did.

The Judge preferred the expert evidence of the daughter's consultant psychiatrist. The widow's expert had been unable to say that the chances of the deceased not having capacity were better than 50:50. He did not, however, make any finding about the evidence that the widow had given to the effect that she was innocent of all the claims of misbehaviour (some quite serious) that the deceased had made against her. In the end, the effect of the judgment was that whatever the rights and wrongs of the deceased's beliefs, the will had not been brought about by an *"insane delusion".*

Short Note: SCCO follows *Blankley*

In *Mole v Parkdean Holiday Parks Limited* [2017] EWHC B10 (Costs) the SCCO (Master Brown) applied *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust* [2015] EWCA Civ 18.

The claimant suffered severe brain injuries and lacked capacity to litigate. Initially his mother was litigation friend but she found it too much and the Official Solicitor took over.

The case was run on a conditional fee agreement which stated that the mother was the client. When the OS took over, he and the solicitor entered into a deed of affirmation and ratification.

An issue arose as to the recoverability of the success fee thereafter as that deed was entered into after 31st March 2013 and the coming into force of LASPO which stopped the recovery of success fees.

The Master held that the proper analysis was that the claimant was the client throughout with the litigation friend in effect the claimant's agent. Thus the deed was unnecessary and the original CFA simply continued and the success fee was recoverable.

PRACTICE AND PROCEDURE

Best interests, available options, and case management before the Court of Protection – the Supreme Court pronounces

N v ACCG [2017] UKSC 22 (Supreme Court (Lady Hale, Deputy President, Wilson, Reed, Carnwath and Hughes SCJJ))

Article 5 ECHR – DOLS authorisations – Mental Health Act 1983 – conditional discharge – interface with MCA

Summary[3]

The Supreme Court has now pronounced definitively upon what the Court of Protection should do where is a dispute between the providers or funders of health or social services for a person lacking the capacity to make the decision for himself as to what services should be provided to him either between the person's family or, by analogy, by those acting on behalf of the person.

The facts

The appeal arose from the decision taken in 2013 in relation to a young man, MN, with profound disabilities who lacked capacity to make decisions about his care. He was made the subject of a care order when he was 8 years old and placed in residential accommodation. On turning 18, he was moved to an adult residential placement and the clinical commissioning group took over funding for his placement, the local authority remaining involved in the proceedings. MN's parents accepted that he should live at the placement for the time being, but wished to assist in providing intimate care to MN at the placement, and to have contact with MN at their home. The CCG did not agree that intimate care should be provided, and was not willing to provide the necessary funding for additional carers to facilitate home contact. At first instance, MN's parents contended that the court should nevertheless determine MN's best interests in respect of both matters. The local authority and the CCG submitted that the court was only able to choose between available options.

At first instance, Eleanor King J held that the court should not embark upon a best interests analysis of hypothetical possibilities in relation to home contact and that it would be only in exceptional cases that an argument founded on the Human Rights Act 1998 would require the court to consider options that were not available. Both parents appealed to the Court of Appeal, which **upheld** Eleanor King's judgment. Mr N appealed to the Supreme Court, and was supported in his appeal by Mrs N. The CCG and the Official Solicitor, on behalf of MN, sought to uphold the decision of the Court of Appeal.

[3] This draws upon a post written for the Court of Protection Handbook website by Alex, Neil and Sophy Miles, respectively junior counsel for the Official Solicitor, Mr N and Mrs N before the Supreme Court.

The issue

Lady Hale, giving the sole judgment of the Supreme Court, considered that the true issue was not the jurisdiction of the Court of Protection (as it had been put by both Eleanor King J and Sir James Munby P in the Court of Appeal), but rather the approach it should take in light of its limited powers.

The proper approach to the determination of the issue

As she had done in *Aintree v James*, Lady Hale took matters back to first principles, by reference to the legislative history of the MCA (and, indeed, its pre-history, including – in essence – a potted narrative of the development of the doctrine of necessity and its ultimate codification). She is, of course, uniquely placed to do so, given her role at the Law Commission in the 1990s in the formulation of what ultimately became the MCA 2005. For present purposes, the most important points to be drawn from that history are the following:

1. Lady Hale's emphasis that the jurisdiction of the Court of Protection is limited to decisions that a person is unable to take for himself. There is no such thing as a care order for adults and the jurisdiction is not to be equated with the jurisdiction of family courts under the Children Act 1989 or the wardship jurisdiction of the High Court (para 24). By reference to the wording of s.16 MCA 2005, unlike the Children Act 1989 the MCA 2005 does not contemplate the grant of "*the full gamut of decision-making power, let alone parental responsibility, over an adult who lacks capacity*" (para 27);

2. Lady Hale's 'respectful' agreement (at para 26) with the observations of Sir James Munby P in the Court of Appeal that, unless the desired order clearly falls within the ambit of s.15 (i.e. a declaration as to capacity and/or lawfulness, which may have a narrower ambit than can be made in the High Court), orders are better framed in terms of relief under s.16 MCA 2005. As she noted, an order under s.16(2)(a) simply makes the decision on behalf of the person, with no need to declare that the decision made is in P's best interests;

3. The weight placed by Lady Hale upon the fact that s.17 MCA 2005 – giving examples of the powers under s.16 as respects P's personal welfare – did not extend to such matters as deciding that a named care home must accommodate P or that a person providing healthcare must provide a particular treatment for P was consistent with (1) the original Law Commission report in 1995, which provided that the role of the court it envisaged was to stand in the shoes of the person concerned, but that, if that person had no power under the community care legislation to demand the provision of particular services, then neither could the court on their behalf; (2) the approach then adopted in the Government's White Paper preceding the then-Mental Incapacity Bill; and (3) the approach laid down by the Supreme Court itself in *Aintree v James* (paras 29-32); and

4. Lady Hale's conclusion that courts and people taking decisions on behalf of those who lack capacity to do so have to do so in their best interests, and, following s.4 MCA 2005, a conclusion as to what is in a person's best interests "*is a decision about what would be best for this particular*

> *individual, taking into account, so far as practicable, his individual characteristics, likes and dislikes, values and approach to life*" (para 34).

How, then, should the court reconcile its duty to decide what is in the best interests of the person with the fact that it only had the power to take a decision that P himself could have taken? As Lady Hale made clear (para 35) this meant that it had to choose between the available options, and its powers were (in this respect) similar to the family court's powers in relation to children, as the House of Lords had previously explained in *Holmes-Moorhouse v Richmond upon Thames Borough Council* [2009] UKHL 7. As Lady Hale outlined (at para 37), service-providing powers and duties – including those under the Care Act 2014 (not relevant in MN's case, but relevant in many others) – have their own principles and criteria which do not depend upon what is best for the service user, although such would no doubt be a relevant consideration. She noted, in particular, that whilst decisions on health or social care services may engage the right to respect for private (or family) life under Article 8 ECHR, decisions about the allocation of limited resources may well be justified as necessary in the interests of the economic well-being.

In light of the analysis above, and the limited powers of the court, Lady Hale noted (at para 39) that where a case is brought to court:

> What may often follow such an application will be a process of independent investigation, as also happened in this case, coupled with negotiation and sometimes mediation, in which modifications are made to the care plan and areas of dispute are narrowed, again as happened in this case. But it does not follow that the court is obliged to hold a hearing to resolve every dispute where it will serve no useful purpose to do so.

Lady Hale outlined the extensive case management powers of the Court of Protection, noting (at para 41) that the court was therefore clearly entitled to take the view that no useful purpose would be served by holding a hearing to resolve a particular issue. She continued:

> In reaching such a decision, many factors might be relevant. In a case such as this, for example: the nature of the issues; their importance for MN; the cogency of the parents' demands; the reasons why the CCG opposed those demands and their cogency; any relevant and indisputable fact in the history; the views of MN's litigation friend; the consequence of further investigation in terms of costs and court time; the likelihood that it might bring about further modifications to the care plan or consensus between the parties; and generally whether further investigation would serve any useful purpose.

Lady Hale concluded that, on the facts of the case before Eleanor King J, consideration upon the lines set out immediately above would have led to the conclusion that it was unlikely that investigation would bring about further modifications or consensus and that it would have been disproportionate to devote any more of the court's scarce resources to resolve matters. As she put it at para 44, this was "*a case in which the court did not have power to order the CCG to fund what the parents wanted. Nor did it have power to order the actual care providers to do that which they were unwilling or unable to do. In those*

circumstances, the court was entitled to conclude that, in the exercise of its case management powers, no useful purpose would be served by continuing the hearing." Lady Hale accepted that Eleanor King J had not put matters in quite those terms, but that was the substance of what she was doing and she was entitled in the circumstances to do so, such that the appeal fell to be dismissed.

It is important to note, however, that, as Lady Hale emphasised at para 43:

> Case management along these lines does not mean that a care provider or funder can pre-empt the court's proceedings by refusing to contemplate changes to the care plan. The court can always ask itself what useful purpose continuing the proceedings, or taking a particular step in them, will serve but that is for the court, not the parties, to decide.

Comment

This decision puts beyond doubt the limits of both the Court of Protection and, more broadly, what can be done in the name of best interests. As Lady Hale has made so starkly clear, a decision as to what is in the person's best interests is a choice between available options. This means in practice, and all too, often a constrained choice where a person is wholly or partially reliant upon public funding to meet their care needs. However, Lady Hale made clear that the approach that she was setting out was one that had always been intended from the very earliest work of the Law Commission.

Many people may regret this decision as the "hollowing out" of the concept of best interests, as Beverley Clough memorably put it in a post prior to the hearing. Further, some may contend that the result is inconsistent with the CRPD, which had a cameo role in the hearing. However, for our part, we would suggest that our energies should be devoted more to ensuring that those mechanisms which exist to facilitate the involvement of those with impaired capacity in service provision decisions made for them under the relevant legislation (for instance advocacy under the Care Act) are made meaningful. This is an area where real supports are required for the exercise of legal capacity under Article 12 CRPD (and also to make real the right to independent living under Article 19).

As regards the role of the Court of Protection, it is now clear beyond peradventure that the court should be in the driving seat as regards the management of cases that come before it, and we hope also that this judgment fortifies the court in taking the robust case management steps set down in the Case Management Pilot. We will certainly not be changing our advice that any person, and in particular any public body, appearing before the court can expect to have their decision-making probed robustly, especially where the consequences of those decisions are such as to remove from the table options which it is clear P would wish to be able to choose.

The Supreme Court did not comment upon whether the Court of Protection is able to hear claims brought under s.7 Human Rights Act 1998; both Eleanor King J and the Court of Appeal had held that, exceptionally, the court is able to consider a claim that a public body is acting unlawfully in the steps that it is taking towards P by reference to the ECHR, and we suggest that the Supreme Court's silence

on this point should be taken as endorsement of this position. We note that this is different to the question of whether the Court of Protection should be able to make declarations and/or damages to reflect a public body's past actions breach the ECHR – there is no doubt that the court has the jurisdiction to do this, but, as is becoming increasingly clear the approach of the LAA, in particular, would seem to suggest that the much better course of action will normally be to bring separate proceedings in the county or High Courts.

We note, finally, Lady Hale's observations at para 38 as to the limits of s.5 MCA 2005. It is no little interest in light of the rumbling issue Alex has discussed elsewhere as to when judicial sanction is required before steps can be taken by public authorities that Lady Hale clearly takes an expansive view of s.5.

> Section 5 of the 2005 Act gives a general authority, to act in relation to the care or treatment of P, to those caring for him who reasonably believe both that P lacks capacity in relation to the matter and that it will be in P's best interests for the act to be done. This will usually suffice, unless the decision is so serious that the court itself has said it must be taken to court. But if there is a dispute (or if what is to be done amounts to a deprivation of liberty for which there is no authorisation under the deprivation of liberty safeguards in the 2005 Act) then it may be necessary to bring the case to court, as the authorities did in this case.

If the Law Commission recommendations are taken forward, then this "general authority" (a phrase which harks very much back to the wording of the original 1995 report) would be significantly constrained in any case involving significant interference with the Article 8 rights of the individual. For our part, though, we consider that the issues at the heart of MN's case would always require resolution by the court – albeit we would sincerely hope at very much greater speed.

Senior Judge Hilder

(Now) HHJ Carolyn Hilder has been appointed Senior Judge of the Court of Protection with effect from 4 April 2017. We congratulate her on her appointment and wish her all the best as she takes the Court of Protection into its second decade.

Court User Group meeting 26 April

The next Court User Group will be held on Wednesday 26 April at 14:00 in court 23 at First Avenue House in London. If you would like to attend, please email courtofprotectionenquiries@hmcts.gsi.gov.uk ensuring you put 'Court User Group' in the subject field.

Court of Protection (Amendment) Rules 2017

Further to our article last month on the amendments, a composite version of the Rules as they now standing (including the Pilot rules) and the amendments introduced with effect from 6 April can be found on the Court of the Protection Handbook website here.

Mental Welfare Accreditation Scheme

The Law Society's Mental Welfare Accreditation scheme has now launched, designed both to enable to produce a cohort of individuals able to act as Accredited Legal Representatives (i.e. able to represent P directly without a litigation friend when P is joined to Court of Protection proceedings) and also, more broadly, to enable the accreditation of legal practitioners with specific expertise in welfare matters before the Court of Protection. For more details, see further here.

Short note: HRA damages and costs in the Court of Protection

In *Re TL* [2017] EWCOP 1, Baker J dealt with an application for permission to appeal arising from a case in which P's parents had in the course of COP proceedings brought HRA claims in their own names and in P's name alleging a failure to effect contact between P and her parents in breach of Articles 5, 8 and 14 ECHR. The Circuit Judge decided that the claims really related to P's parents, not P, and that it would be disproportionate for them to be pursued within the CoP, with the involvement of the Official Solicitor for P. The Circuit Judge also refused the parents' application for P's IMCA to be removed as paid RPR under Schedule A1. Both decision were appealed by the parents. Baker J refused permission to appeal. In the course of his judgment he held that:

1. It was not appropriate for someone other than P's litigation friend to bring an HRA claim on P's behalf within proceedings. The proper course was to apply for removal of the litigation friend on the basis that he had wrongly failed to pursue such a claim.

2. There was no disadvantage to P's parents of having to pursue their own claims in the County Court. The costs implications were the same in both courts, since the usual rule as to costs in welfare cases in the Court of Protection did not apply to HRA claims. It was reasonable for the Circuit Judge to have taken the view that P should be shielded from the claims and should not be a party to them.

3. It was appropriate for the Circuit Judge to refuse to dismiss the RPR in the context of a case concerning contact arrangements. The RPR's role was limited to the DOLS authorisation, and was not a wider advocacy role. The judge went on to say in obiter remarks that his view was that the CoP had no power to dismiss an RPR – the correct remedy if a supervisory body failed to do so upon request was judicial review.

It is worth also noting here the decision in *Re SW & Re TW* [2017] EWHC 450 (Fam)) which can be added to the other cases concerning the interaction between care cases and HRA claim covered in our March Report, making it increasingly obvious that it will only rarely be appropriate to bring such HRA cases

within the four walls of the CoP. Rather, separate County Court (or High Court proceedings) should be brought – or at least intimated, with settlement or other ADR being infinitely preferable.

Short note – limits of compulsory funding

HB v A Local Authority [2017] EWHC 524 (Fam) concerned an application by a mother in wardship proceedings for an order that the local authority pay for her legal representation. She was not eligible for legal aid because the proceedings were under the wardship jurisdiction not the Children Act 1989. The court held that there was no power under the inherent jurisdiction to require a local authority to fund legal representation in wardship proceedings where public funding had been lawfully refused in accordance with the statutory scheme put in place by Parliament. Articles 6 and 8 ECHR did not assist – such arguments were an attempt to circumvent the jurisdiction of the Administrative Court, which was the correct place to argue that the lack of public funding violated the ECHR.

The reasoning in this case is likely to apply to any application within the Court of Protection or the High Court for funding for legal representation where legal aid is not available. In the editors' experience, local authorities have on occasion agreed to fund representation for P and sometimes for family members, but this is rare, and on the basis of this decision, not something that the court could require a statutory body to agree to.

On a (slightly) more positive note, the Court of Appeal in *Re Z (A Child)* [2017] EWCA Civ 157 held (in reasoning that would apply by analogy in the Court of Protection) that the question of which party should bear the cost of translating documents in public family law proceedings would depend on the circumstances, and declined to give general guidance as to what the court's usual practice should be. The court noted that there may be situations in which documents are produced by a party against their own interest but in the public interest of disclosure in proceedings concerning the welfare of a child. There may also be some documents which support one party (for instance the public authority) in one respect but another in one, and hence in which both have a "shared forensic interest" as identified in *Calderdale Metropolitan Borough Council v S and the Legal Services Commission* [2005] 1 FLR 751. As with the costs of expert evidence, the Court of Appeal held, there should be a discretion to be exercised as to who should bear the costs of translating documents:

> *There can be no criticism of any judge who determines that, bearing in mind the circumstances of a particular case, the party bearing the burden of proof shall be responsible for translation costs of a relevant document. The circumstances of other cases may reasonably inform a view that the party which requires the translation should bear the cost. Both of these views may be reasonable in the context of the case in hand, but cannot be considered as determinative of the issue across all cases.*

The Court of Appeal emphasised that the relevant procedural rules (there, the FPR, but in our context the COPR) "*require collaboration between parties to avoid the prospect of time consuming satellite litigation on the issue of identification of which documents, or parts of the same, it is necessary to translate and in*

summary or full, together with a non-partisan appraisal of which party it would be reasonable to invite the judge to order to pay, or contribute towards, the costs of the same."

Court of Protection Mediation Study

The initial results of a fascinating study on mediation in the Court of Protection being conducted by Charlotte May are now available here. They are not only fascinating but also very important in terms of getting together an evidence base to support the wider use of mediation and ADR in welfare proceedings.

Court of Protection statistics

The annual statistics for 2016 including October to December are now available here. Highlights include the following nuggets.

In 2016, there were 29,711 applications made under the Mental Capacity Act 2005, up 11% on 2015 and continuing the long term upward trend. The majority of these (54%) related to applications for appointment of a property and affairs deputy.

There were 26,494 orders made under the MCA in 2016, which in contrast to the number of applications was a drop of 10% from 2015. Half of the orders in 2016 related to the appointment of a deputy for property and affairs.

Applications relating to deprivation of liberty increased from 109 in 2013 to 525 in 2014 to 1,497 in 2015. Latest figures show another large increase, more than doubling to 3,143 applications in 2016. Similarly, orders made for deprivation of liberty increased between 2015 and 2016, more than doubling from 644 to 1,366. Of the 3,143 applications in 2016, 2,175 (69%) came from a Local Authority, 799 (25%) from solicitors and 27 (5%) from others including clinical commission groups, other professionals or applicants in person. Half of applications for deprivation of liberty were made under the Re X process. As before (and somewhat annoyingly) the statistics do not reveal how many applications were made under s.21A MCA 2005.

The number of LPA received for registration by the OPG per year has reached 590,593 in 2016 (up from 52,494 in 2008). It is not surprising in this context, but nonetheless welcome, that the fee for registration of an LPA (and also an EPA) has gone down with effect from 1 April 2017 from £110 to £82, with the fee for resubmitting an LPA for registration reducing from £55 to £41.

Family Court transparency report

A new report from our friends at the Cardiff University's School of Law and Politics suggests that guidance given to family judges to routinely publish their judgments is not being consistently followed, leaving the public with a patchy understanding of the family justice system in England and Wales. The

report is relevant by analogy – we would suggest – to the Court of Protection given the almost identical wording of the guidance issued in 2014 in respect of family proceedings and those in the CoP (and the extremely patchy publication of CoP cases thereafter – note the many 'missing' cases from the neutral citations given on Bailii, reflecting cases which have been allocated a citation but which have, for one reason or another, not been published).

THE WIDER CONTEXT

ENGLAND AND WALES

ReSPECT – a new approach to advance care planning

It is a truth (almost) universally acknowledged that DNACPR/DNR notices are not working.[4] Cases such as *Tracey* and *Winspear* show that the conversations that need to take place before decisions are taken to place such notices in medical records are not happening. Cases such as that of Andrew Waters show that determinations as to when CPR may be appropriate are – at least in some cases – made on the basis of unjustified assumptions as to disability.

In our view just as important – if not more importantly – questions as to when CPR should be attempted have assumed a prominence which arguably detracts from the bigger picture. A fixation on one specific intervention (which may, in many cases, not work) has led to a loss of focus upon the wider issue of the overall priorities for the individual patient in circumstances where they may not be able to give specific consent. Importantly, those priorities are just about what sort of care the patient may want as well as specific interventions they may not want. Identifying these priorities are just as important for patients who lack the capacity to participate in such discussions as they are for those with it.

It is for this reason that the ReSPECT process that has recently been unveiled for use by clinical bodies is so welcome. Short for "Recommended Summary Plan for Emergency Care and Treatment," the process is designed to lead to the completion of a form setting out recommendations for clinical care in emergency situations where obtaining the necessary consent will not be possible. Importantly, the process, and the form, starts not from the identification of specific interventions, but rather the personal preferences of the individual, to outline whether their priority is to sustain life or prioritise comfort. Against that spectrum, it is possible then to develop the requisite recommendations for care and treatment and (where necessary) outline specific interventions that may or may not be wanted or be clinically appropriate.

A full explanation of the process can be found at http://respectprocess.org.uk/, and articles about it in the BMJ here and here.

The process, and the form, is the subject of ongoing research as it is implemented in different localities across the United Kingdom, but for our part it is a vital first step in enabling a culture change to ensure that emergency care and treatment is properly personalised.

[4] Note, Alex was involved in providing informal legal input to the ReSPECT working party. A longer version of this article, together with observations on how it sits within the framework of the MCA 2005, can be found here.

FURTHER AFIELD

A clash of rights (models)?

AM-V v Finland [2017] ECHR 273 European Court of Human Rights (First Section)

Article 8 ECHR – residence – CRPD

In *A-MV v Finland*, (Application no. 53251/13, decision of 23 March 2017), the European Court of Human Rights considered carefully but rejected a central tenet of the interpretation of Article 12 of the Convention of the Rights of Persons with Disabilities advanced by the Committee on that Convention, namely that the will and preferences of an individual should always be determinative of any decision taken in their name.

A-MV was a man with intellectual disabilities, who had been taken into public care when he was 11 and placed with a foster family. When turned 18, a mentor was appointed for AM-V; A-MV had not complained about this appointment, he also accepted, in principle, that he needed the assistance of one. In February 2011, however, the mentor took a decision concerning A-MV's place of residence which, according to him, was against his own will, preventing him from moving from his home town in the south of Finland to live in a remote town in the north of the country with his former foster parents. He brought proceedings asking to replace the mentor by another person insofar as matters concerning the choice of his place of residence and education were concerned. This request was ultimately refused in 2013 by the domestic courts. Having considered evidence include expert testimony from a psychologist and from A-MV in person, the Finnish courts took the view that he was unable to understand the significance of the planned move to a remote part of the country. It took into account, in particular, the level of his intellectual disability (it being said he functioned at the level of a six to nine year old child) and the fact that he had no particular complaints about his current situation in his home town where he lived in a special unit for intellectually disabled adults, went to work, had hobbies and a support network of relatives, friends and staff from the social welfare authorities. The Finnish court lastly expressed doubts as to whether his opinion was genuinely his own or his foster parents. The Finnish courts therefore refused to replace the mentor.

A-MV applied to the Strasbourg court, and was supported in his application by the Mental Disability Advocacy Centre, which placed particular emphasis upon Article 12 CRPD. MDAC, which has played a pivotal role in cases involving Eastern European guardianship systems (for instance the case brought by the late Rusi Stanev against Bulgaria), argued that:

> *66.* […] states were required to ensure that the will and preferences of persons with disabilities were respected at all times and could not be overridden or ignored by paternalistic "best interests" decision-making. The will and preferences expressed by persons with disabilities in respect of their family relationships and their right to choose their place of residence had to be respected and protected as these issues were an inherent part of a person's autonomy, independence, dignity and self-development and central to a person's independent living in a

> wider community. In order to ensure that persons with disabilities were both protected from violations and that they had the ability to obtain effective remedies when violations occurred, States had a positive obligation to apply stringent and effective safeguards in order to ensure that their rights to exercise legal capacity were "practical and effective" rather than "theoretical and illusory*".*
>
> 67. The starting point, based on the current international standards, was that the will and preferences of a person with disabilities should take precedence over other considerations when it came to decisions affecting that person. This was clear from the text of the United Nations Convention on the Rights of Persons with Disabilities. Even in jurisdictions with a former reliance on the "best interests" approach, there was an emerging trend towards placing more emphasis on the will and preferences of the person. There was a clear move from a "best-interests" model to a "supported decision-making" approach*." (emphasis added)*

The court accepted – contrary to the arguments advanced by the Finnish Government – that AM-V's right to private life under Article 8 was interfered with by the fact that the domestic courts had refused to change his mentor.

The question, therefore, was whether the interference was justified. The court identified that critical legal contention advanced by the applicant was that "*there was a measure in place under which the mentor was required not to abide by the applicant's wishes and instead to give precedence to his best interests, if and where the applicant was deemed unable to understand the significance of a specific matter*." The court reminded itself that, in order to determine the proportionality of a general measure, it had primarily to assess the legislative choices underlying it, and further reminded itself of the (variable) margin of appreciation left to national authorities. It noted (at para 84) that "[t]h*e procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8*."

The court then turned to the case before it, starting by noting that under Finnish law, the appointment of a mentor does not entail a deprivation or restriction of the legal capacity of the person for whom the mentor is designated:

> The powers of the mentor to represent the ward cover the latter's property and financial affairs to the extent set out in the appointing court's order, but these powers do not exclude the ward's capacity to act for him- or herself. If, like in the present case, the court has specifically ordered that the mentor's function shall also cover matters pertaining to the ward's person, the mentor is competent to represent the ward in such a matter only where the latter is unable to understand its significance […]. In a context such as the present one, the interference with the applicant's freedom to choose where and with whom to live that resulted from the appointment and retention of a mentor for him was therefore solely contingent on the determination that the applicant was unable to understand the significance of that particular issue. This determination in turn depended on the assessment of the applicant's intellectual capacity in conjunction with

> and in relation to all the aspects of that specific issue. The Court also notes that Finland, having recently ratified the UNCRPD, has done so while expressly considering that there was no need or cause to amend the current legislation in these respects (see Government Bill HE 284/2014 vp., p. 45).

The ECtHR then analysed the quality of the domestic process leading to the conclusion both that the applicant was unable to understand the significance of the underlying issue, and also the doubts expressed to whether the wishes he were expressing were his own will. Reminding itself of the review nature of its jurisdiction, the Strasbourg court saw no reason to call into question the factual findings of the domestic courts. Its conclusions were therefore – perhaps – not surprising, but fly sufficiently in face of the arguments advanced reliant upon Article 12 CRPD as to merit setting out in full:

> 89. In the light of the above mentioned findings, the Court is satisfied that the impugned decision was taken in the context of a mentor arrangement that had been based on, and tailored to, the specific individual circumstances of the applicant, and that the impugned decision was reached on the basis of a concrete and careful consideration of all the relevant aspects of the particular situation. In essence, the decision was not based on a qualification of the applicant as a person with a disability. Instead, the decision was based on the finding that, in this particular case, the disability was of a kind that, in terms of its effects on the applicant's cognitive skills, rendered the applicant unable to adequately understand the significance and the implications of the specific decision he wished to take, and that therefore, the applicant's well-being and interests required that the mentor arrangement be maintained.
>
> 90. The Court is mindful of the need for the domestic authorities to reach, in each particular case, a balance between the respect for the dignity and self-determination of the individual and the need to protect the individual and safeguard his or her interests, especially under circumstances where his or her individual qualities or situation place the person in a particularly vulnerable position. The Court considers that a proper balance was struck in the present case: there were effective safeguards in the domestic proceedings to prevent abuse, as required by the standards of international human rights law, ensuring that the applicant's rights, will and preferences were taken into account. The applicant was involved at all stages of the proceedings: he was heard in person and he could put forward his wishes. The interference was proportional and tailored to the applicant's circumstances, and was subject to review by competent, independent and impartial domestic courts. The measure taken was also consonant with the legitimate aim of protecting the applicant's health, in a broader sense of his well-being.
>
> 91. For the above mentioned reasons, the Court considers that, in the light of the findings of the domestic courts in this particular case, the impugned decision was based on relevant and sufficient reasons and that the refusal to make changes in the mentor arrangements concerning the applicant was not disproportionate to the legitimate aim pursued.

The court therefore found that there had been no violation of Article 8 ECHR. It also found that there was no violation of AM-V's right to freedom of movement under Article 2 of Protocol 4 to the Convention.

Comment

It is certainly possible to highlight the facts that (1) A-MV had agreed initially to the appointment of his mentor, and continued to acknowledge the need for his support; and (2) his stated wishes and feelings appeared on one view to be the potential fruit of (improper?) influence from his former foster parents. Both of these could be seen as in some way indicating that this was not a situation where there was a clash between A-MV's "actual" or "authentic" will and preferences and the decision that was made for him by his mentor and upheld by the ECtHR.

In reality, however, it is difficult to see this decision as anything other than a rebuttal of the position advanced by the MDAC, based squarely on that of the Committee on the Rights of Persons with Disabilities, as to the import of Article 12 CRPD. The approach of the Strasbourg court is in conflict with that of the Committee in two ways.

The first is that the court proceeded quite explicitly on the basis that it was acceptable for steps to be taken on the basis of impaired mental capacity. This did not, the court considered, lead to a removal of AM-V's legal capacity but rather responded to AM-V's cognitive impairment. Although paying lip-service to the fact that AM-V's legal capacity was unchallenged, this is a very different approach to that set out in paragraph 15 of the General Comment on Article 12, in which the Committee challenged the "conflation" of mental and legal capacity and the denial of legal capacity to make a particular decision on the basis of a cognitive or psychosocial disability.

The second is that the effect of the Strasbourg court's decision is that, for so long as it is considered that AM-V does not have the mental capacity to understand the significance of a move he has expressed a desire to make, his ability to do so will effectively be blocked by the mentor appointed to act for him, and the mentor will be supported in this by the courts. It difficult to see the approach taken by the court as anything other than the exercise of the model of "substitute decision-making" defined by the Committee in paragraph 27 of the General Comment as being incompatible with the CRPD, because the court's approach was expressly predicated on an consideration of what was believed to be in the objective (best) interests of AM-V, as opposed to being based on AM-V's will and preferences.

As noted at the outset, that is difficult not to see this decision as a direct rebuff by the longest established regional human rights court to the approach urged by the Committee. In this, it seems to us particularly telling that the ECtHR in paragraph 90 analysed the measures taken by the Finnish court through the language of Article 12 CRPD, including, in particular, emphasis on A-MV's rights, will and preferences. It is extremely difficult – if not impossible – to imagine that the Committee looking at A-MV's situation would have reached the same conclusion.

When combined with the detailed analysis of the requirements of Article 12 (juxtaposed with those outlined in the General Comment) by the German Federal Constitutional Court in the decision reported in our November 2016 newsletter, some concrete answers are starting to emerge to the previously academic questions posed as to the direction of travel to be taken in this field. They may be country-, or region-specific, and there is no doubt they reflect the views of those operating within human rights mechanisms drawn up many years ago.

Some may, further, dismiss them as answers given by legal dinosaurs blindly wedded to an old paradigm.

For our part, however, we would suggest that this shows that, at the level of rhetoric and argument, the view propounded by the Committee is one that has to find traction amongst experienced judges attuned to human rights issues – or, put another way, they consider more convincing reasons are required to take the leap of faith demanded by the Committee. Alternatively, and more optimistically, one can see from the fact that the ECtHR in this decision rigorously sought to apply Article 12 CRPD in its determination of whether the interference with Article 8 ECHR was proportionate that the Convention, and the Committee, have already succeeded in reframing the debate at the highest regional level of human rights protection within Europe.

As a coda, and at the risk of self-aggrandisement, Alex would note that the approach of the ECtHR here is almost exactly that advocated for in the Essex Autonomy Project Three Jurisdiction Report which he co-authored, and which has, to his mind, produced much fruitful room for dialogue and discussion as regards making real the concept of support for the exercise of legal capacity.

United Nations High Commissioner for Human Rights report on Mental Health and Human Rights

The High Commissioner published a detailed report on 31 January 2017 on Mental Health and Human Rights, adopted at the 34th session of the Human Rights Council on 27 Feb-4 March 2017. It is uncompromisingly rigorous in its explanation of the demands of a human rights approach to mental health (as amplified by the CRPD). It also includes a set of recommendations for implementing the changes needed to bring about a human rights approach to mental health. We will leave readers to judge the extent (and the likelihood in the current climate) of the changes required (in all countries) to achieve the recommendation set out at paragraph 42:

> *42. Regarding mental health and disability specifically, mental health laws, where they exist, should avoid the separate regulation of legal capacity, the right to liberty and security, or other aspects of the law which are amenable to being mainstreamed into general legislation. In all cases, laws and regulations should be compliant with articles 5, 12, 13, 14, 15, 16, 17 and 25 of the Convention on the Rights of Persons with Disabilities, among other provisions, and should: (a) prohibit the arbitrary deprivation of liberty on the basis of impairment, irrespective of any purported justification based on the need to provide "care" or on account of "posing a danger to him or herself or to others"; (b) ensure*

> *the individual's right to free and informed consent in all cases for all treatment and decisions related to health care, including the availability and accessibility of diverse modes and means of communication, information and support to exercise this right; and (c) in accordance with the standards of the Convention, develop, adopt and integrate into the legal framework the practice of supported decision-making, advance directives and the principle of "the best interpretation of the will and preferences" of the person concerned as a last resort.*

Law Commission of Ontario Final Report on Legal Capacity, Supported Decision-Making and Guardianship

Demonstrating both the extent to which the area of legal capacity remains a field of concentrated study in the law reform arena (and the extent to which it is operating on different tracks depending upon the environment), the Law Commission of Ontario has just published a detailed report on legal capacity, supported decision-making capacity and guardianship. Much of the detailed report is specific to the particular (and in many ways very innovative) legal mechanisms already in place in Ontario to support the exercise of legal capacity. Of broader interest, however, is Chapter IV, in which the Commission notes early on (with masterly understatement) that:

> *Issues related to concepts of legal capacity and supported decision-making are among the most controversial in this area of the law, as well as the most difficult. They raise profound conceptual and ethical questions, as well as considerable practical challenges.*

The Commission further notes that the UN Committee's

> *General Comment* [which it later specifically notes is 'non-binding'] *sets out a program of immediate and profound law reform, with enormous personal, social and legal ramifications not only for individuals themselves, but also for governments, family members and third parties. The Comment raises a host of practical questions and implementation issues, for which States Parties are expected to develop solutions.*

The Commission drily notes that this view of Article 12 appears to be "*radically different*" to that of Canada (which entered a specific reservation and declaration to the effect that Article 12 permits substitute decision-making arrangements as well as those based on the provision of supports "in appropriate circumstances and in accordance with the law", and reserved the right for Canada "to continue their use in appropriate circumstances and subject to appropriate and effective safeguards").

SCOTLAND

Scottish powers and English banks

The editors and the respective Law Societies of the two jurisdictions are regularly made aware of the difficulties encountered by those seeking to make use of Scottish powers of attorney in England and Wales. We are pleased to confirm, though, that with the assistance of the Scottish Public Guardian, confirmation has been obtained that the Cooperative Bank, which had a period of not accepting Scottish powers, is now firmly back "on message."

This gives us the occasion to remind Scottish attorneys that they are now able to make use (if they encounter difficulties in England and Wales) of a dedicated procedure under the amended Court of Protection Rules to obtain a declaration that they are acting under a valid "foreign" power. Before making any such application, we strongly suggest that they put the recalcitrant institution (be it public or private) on notice that they will seek their costs of so doing.

OPG scrutiny of PoA certificates

Scotland's OPG is tightening up its scrutiny procedures in relation to PoA certificates. Deeds will not be registered if they contain minor typographical errors or inconsistencies in granter or attorney names, or where section 3 or the signature and date are incomplete. Full details of the changes and the underlying rationale can be found here. Further, and from 3 April 2017, and following guidance issued by the Law Society of Scotland, the OPG will no longer accept a prescribed PoA certificate signed by a trainee solicitor: see further here.

Book Review: *Mental Health, Incapacity and the Law in Scotland*, Hilary Patrick, 2nd edition by Jill Stavert

When I reviewed the 1st edition of Hilary Patrick's "Mental Health, Incapacity and the Law in Scotland" I predicted that, within much of its extended area of coverage, "This book will be the authoritative starting-point for lawyers and non-lawyers alike for some years to come". I was right. This 2nd edition, a decade later, is to be welcomed for several principal reasons. It has been thoroughly updated. It displays the same encyclopaedic mastery of a huge area of law, and the same clear exposition – accessible to a wide intended readership. Above all, it answers concerns about the huge gap left when the apparently irreplaceable Hilary Patrick supposedly retired from mental health law in 2011. The irreplaceable has been replaced. Hilary's decision to invite Professor Jill Stavert to write this 2nd edition, and Jill's generous acknowledgement of Hilary's contribution to some parts of the new volume and her "wholesale editing" of the book, confirm that this has been a smooth transition. Jill's own contribution to her chosen subject has been massive, characterised by her founding and leadership of the Centre for Mental Health and Incapacity Law, Rights and Policy at Edinburgh Napier University, and the excellent ongoing work of the Centre.

The scope of the 2nd edition is substantially the same as of the first, if changes in the meantime are taken into account. A full and authoritative exposition of mental health law, and a somewhat shorter but fully adequate account of the Adults with Incapacity (Scotland) Act 2000, take up about half of the text. These are followed by a multi-dimensional coverage of an impressively wide range of topics. As a generalisation, lawyers will find that topics for which substantial other modern coverage is already available receive relatively brief treatment. Thus the arrival upon the scene of the Adult Support and Protection (Scotland) Act 2007 is covered mainly by reference to Nicola Smith and Nairn Young's "Adult Protection and the Law in Scotland", now also in its 2nd edition, a "younger sister" volume from the same publishers. However, for many topics where there is not any other modern coverage, or at least any coordinated coverage such as is offered here, this book as now updated will continue to be authoritative. It also remains multi-dimensional in not only addressing the interactions between different areas of law, but also in that as well as addressing the law topic-by-topic, it approaches its subject-matter from the point of view of people with dementia, people with learning disabilities, refugees and asylum seekers, children and young people, and carers.

Also to be welcomed is that Jill has, where appropriate, adopted the same collaborative team approach as did Hilary. The team is new, ranging from the highly experienced Nicola Smith to an impressive first venture into authorship at this level by Rebecca McGregor, research assistant at Edinburgh Napier University. Nicola covered financial management, and Rebecca refugees and asylum seekers, as well as providing research assistance. Also recruited from Jill's University was Douglas Maule, to cover consumer rights. May Dunsmuir's unique status as President of the Additional Support Needs Tribunal for Scotland and an in-house convener at the Mental Health Tribunal for Scotland allowed her to contribute on representation at the (Mental Health) Tribunal and tribunal procedure, and to provide input also on children and young people. Katherine Bolt, solicitor and mediator, covered protection against discrimination and respect for diversity. Hilary returned in the role of team member in updating the chapters on patients' rights, consent to treatment and people at risk, as well as in the editing role mentioned above. That such a team has been brought together is tribute to the impressively growing quality of Scotland's leading-edge capability in this whole field. Pride of place must go to Jill's own massive contribution. For a flavour of it, read Chapter 1 – then put the book on a nearby shelf for ready reference, if you can manage to put it down at that point!

It is remarkable that this substantially revised and updated edition is almost exactly the same length as its predecessor, and that the structure devised by Hilary has stood the test of time and is only minimally changed. Examples of change range from a significant new section on "Human Rights and Community Care" to subtle but significant changes such as "access to justice" in place of "civil rights", and "financial powers of attorney" in place of the often confusing statutory description "continuing powers of attorney" (the latter having now entered the European vocabulary for any power of attorney, welfare or financial, that continues in force or enters into force in the event of the granter's incapacity).

The tables in the 1st edition were poor, and are much improved in the 2nd. Criticisms of the indexing remain: for example, the entry for trusts refers only to paragraph 42.23, not mentioning the principal section on wills and trusts in paragraphs 34.10 – 34.13, the section on "establishing a trust" in paragraph 38.5, the section on discretionary trusts in paragraphs 42.24 – 42.25 and the description of liferents in the last paragraph of 42.26. Beyond that, I have struggled to fulfil a reviewer's duty to find other blemishes: one is that none of the sections on advocacy, even in the coverage of the Adults with Incapacity (Scotland) Act 2000, mention the specific role allocated under section 3(5A) of that Act. Also worthy of mention might have been the unique limitation upon the responsibilities of attorneys under section 17 of that Act. To counter-balance those criticisms, while reading for review I found an answer that had previously evaded me to a question that had hitherto niggled.

It is significant that this new edition states the law at 31st March 2016. That was the closing date for responses to the Scottish Government Consultation which has led to current major coordinated review of mental health, incapacity and adult protection law, which will in course of time be likely to lead to significant reform. Implementation will be some years ahead. This volume covers the position thoroughly in the meantime.

Adrian D Ward

[Note, this review is reproduced from the online version of the Journal of the the Law Society of Scotland by kind permission of the editor]

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Conferences

Conferences at which editors/contributors are speaking

Seminar on Childbirth and the Court of Protection

39 Essex Chambers is hosting a seminar in conjunction with the charity Birthrights about caesarean-section cases in the Court of Protection. The seminar aims to take a critical look at these cases, with a distinguished multi-disciplinary panel. The seminar is at 5pm-7pm on 8 March 2017, and places can be reserved by emailing beth.williams@39essex.com.

Hugh James Brain Injury conference

Alex will be speaking at this conference aimed at healthcare professionals working with individuals with brain injuries and their families on 14 March 2017. For more details, and to book, see here.

Scottish Paralegal Association Conference

Adrian will be speaking on adults with incapacity this conference in Glasgow on 20 April 2017. For more 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 Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

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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