Essex CHAMBERS

MENTAL CAPACITY REPORT: COMPENDIUM

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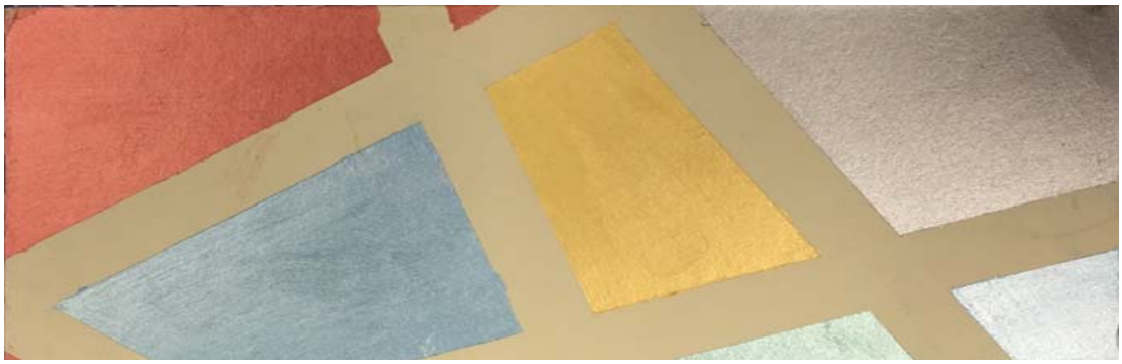

Welcome to the July 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: important decisions grappling with the meaning of best interests in the contexts of religious practices and delusional beliefs, and (finally) detailed statistics about s.21A/*Re X* cases;

(2) In the Property and Affairs Report: a new approach to severance and gifts;

(2) In the Practice and Procedure Report: changes to – and extension of the scope of – the Transparency Pilot and comments sought on a mediation pilot project;

(3) In the Wider Context Report: post-*PJ* problems, problems with care homes and capacity assessments and are moves really under way to change mental health laws?;

(4) In the Scotland Report: draft rules from Strathclyde Sheriff's Court concerning AWI applications.

We are taking a break over summer, but will be back in early September. In the interim, 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. Alex will also provide updates on truly critical matters on his own website (where you can also find the talk that he gave about the big issues facing the MCA 2005 at our recent 10th birthday party for the Act – thank you to all those who attended and made it such a success).

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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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Treading carefully: best interests and religious practices

Re IH (Observance of Muslim Practice) [2017] EWCOP 9 (Cobb J)

Best interests – other

Summary

In this significant case, Cobb J had to decide two questions in relation to a 39 year old Muslim man with profound learning disabilities, namely whether it was in his best interests (1) to fast during the daylight hours of Ramadan; and (2) for his axillary (i.e. underarm) and pubic hair to be trimmed, in accordance with Islamic cultural and religious practice insofar as it was safe and reasonable to do so.

IH spent the first 35 years of his life in a Punjabi speaking home within a Muslim community in West Yorkshire before moving to a supported living placement arranged by his local authority and funded by the CCG. His parents were of the Sunni denomination of Islam, and were described in the court papers as 'devout'. When IH was living at home, he participated in, to the extent he was able, and was certainly exposed to the routine religious practices and observances of the family. Cobb J accepted the expert evidence of the psychiatric expert, Dr. Carpenter, "*that he would have had no real appreciation of the religious significance of these rituals even if he enjoyed the regularity with which they were performed, and appreciated an increasing familiarity with them.*" IH had never been expected to fast during Ramadan. His father had personally shaved his pubic and axillary hair whilst he was living at home and for one year beyond (i.e. until 2014).

According to the evidence summarised by Cobb J, IH's impairments meant that he did not have any understanding of religious matters nor of the consequences of hair removal or fasting, nor was he capable of meaningful communication over abstract issues.

The local authority recognised the importance of facilitating the religious observances even of those who lack capacity. They provided, for instance, IH with a Halal diet even though IH himself would not know that the food he ate was Halal, or the significance of the source and/or preparation of the food. As an aspect of this, they decided in 2015 (apparently in agreement with TH) that staff members would carry out the "hair removal" on IH every two weeks though this in fact did not happen.

IH, through the Official Solicitor, made the application for a declaration that it was not in his best interests to fast during Ramadan. His father, TH, applied for a declaration in relation to the trimming/removal of his hair. This was initially couched on the basis that this was a religious duty, although ultimately this ended up being refined into the version set out at the outset.

Capacity

Although there was no dispute as to IH's lack of capacity, Cobb J outlined the information relevant to the two decisions in terms which are of more general use.

Fasting

In order to have capacity to make the decision to fast for Ramadan, Cobb J held a person would be expected to understand (and presumably also retain, use and weigh):

1. What fasting is; the lack of food and liquid, eating and drinking;
2. The length of the fast;
3. If for religion, for custom (family or otherwise), for health-associated reasons, or for other reasons;
4. If for religion reasons, which religion and why;
5. The effect of fasting on the body;
6. What the consequences would be of making a choice to fast and the risks of choosing to not fast or of postponing the decision.

Trimming/removal of pubic or axillary hair

To have the capacity to make a decision in relation to the trimming or removal of pubic or axillary hair for religious or cultural reasons, Cobb J held that a person would be expected to be able to understand:

1. Which parts of the hair are being removed – pubic, axillary, perianal, trunk, beard, leg, torso, or head;
2. Whether the reason for the hair trimming/removal is religious, for the maintenance of good hygiene, custom, or some other;
3. If for a religious reason, which religion and why;
4. What the consequences would be of making a choice to have hair trimmed/removed, and of not trimming/removing the hair.

The requirements of Islam

Cobb J expressly directed himself by reference to the Supreme Court's guidance as to the meaning of best interests in *Aintree*, and heard from a lecturer in Arabic and Islamic Studies (Dr Mansur Ali, from Cardiff University) so as to be able to gain a true picture of the importance of the place of fasting and the trimming/removal of pubic/axillary hair for IH.

Cobb J outlined in some detail what he had been advised by Dr Ali:

> *Islamic religious observance for those without capacity.*
>
> *26. The Five Pillars of Islam ('shahada' [faith], 'salat' [prayer], 'zakat' [charity], 'sawm' [fasting] and 'hajj' [pilgrimage]) are the foundation and framework of Muslim life, and are regarded as obligatory for Muslims. Not all actions or observances within Islam, however, are obligatory; some are recommended, others optional, some actions are reprehensible, and others prohibited. In Islam, a Muslim will commit a sin if he/she violates something which is obligatory or prohibited, will be rewarded for carrying out something which is recommended; a minor sin is committed for not doing something which is recommended, and for doing something which is reprehensible.*

27. Significantly for present purposes, Islam stipulates different arrangements for those who lack 'legal competence'. 'Legal competence' in Islamic terms is defined by Dr. Ali as "a capacity or a potential for mental functioning, required in a decision-specific manner, to understand and carry out decision-making. Competence is always presumed; its absence or inactivity has to be affirmed by a court." It is normal (per Dr. Ali) to defer to medical practitioners or experts on the issue of legal (mental) competence; their opinion would be likely to be deemed valid and authoritative in the Shari'a. The evidence filed in these proceedings, most notably from Dr. Carpenter, would be sufficient, I was advised, to form the basis in Islamic law to declare IH to be "legally incompetent"; all parties agree that IH is not legally competent under Islamic law.

28. Dr. Ali advises that the legally incompetent person (along with the terminally ill, the disabled and minors) is perpetually in a heightened state of spirituality, hence he or she is exempt from practising the major rituals of Islam including adherence to the Five Pillars.

29. On the specific issues engaged in this application, Dr. Ali advises as follows:

Fasting in Ramadan

i) Fasting during the daylight hours of Ramadan is one of the Qur'anically mandated obligations for all Muslims who are legally competent, and who are not exempt. Certain groups are exempt from fasting; they include the incapacitous, minors, the ill, pregnant women, those who are travelling. Those who are exempt are not morally culpable for not keeping the daylight fast.

Trimming or shaving of pubic and axillary hair

ii) Cleaning pubic or axillary hair is a religiously sanctioned practice deemed in Islam to be a normal human 'right' ('fitrah');

iii) The rationale is founded in a quest for ritual purity and cleanliness; (the aphorism 'cleanliness is next to godliness' is of course familiar to many religions);

iv) The removal of pubic and axillary hair for the legally competent Muslim is 'mustahab' or 'recommended practice'; while it is not obligatory ('wajib') it would be viewed as a 'minor sin' if unattended (see [26] above);

v) As IH does not have 'legal competence' it is not even recommended practice for him (see [28] above); there is no obligation on his carers to carry out the removal of IH's pubic or axillary hair, and his religious rights are not being violated by not attending to this;

vi) It is highly recommended and praiseworthy for carers (of whatever religion) to shave or shorten a patient's pubic or axillary hair, in the same way as it is for them to assist the incapacitous in other routine care tasks;

vii) There are differences of opinion between Islamic commentators as to the preferred manner of hair removal; any method would be deemed acceptable;

viii) The time limit within which the hair needs to be cleaned or trimmed or removed is also a matter of assorted opinion, though the majority of commentators favour a 40-day limit;

> *ix) While it would be not permissible for a competent Muslim to expose their genitals, it would not be contrary to the Shari'a for a Muslim without capacity who requires assistance with his care, for his carers to clean his genitals or shave them; that said, "carers must be sensitive that the client's dignity is not violated";*
>
> *x) 'No hurt no harm' is a cardinal principle of Islamic bioethics; avoidance of harm has priority over the pursuit of a benefit of equal or lesser worth. Therefore it would be wrong to create a situation in which observance of Islamic custom would, or would be likely to, cause harm to the person (i.e. IH) or his carers; if there is a risk of harm, then this principle would absolve even the capacitated person from performing an obligatory requirement.*

Best interests: fasting

It was uncontentious that it was not in IH's best interests to fast:

> *30. As indicated above ([29](i)) there is no Islamic obligation on IH to fast given his lack of capacity. IH has never been required to fast by his family, and has not fasted while in their care. He has not, thus far, fasted while in the care of the Local Authority.*
>
> *31. If this had been a case in which IH had some appreciation of the religious significance of fasting in Ramadan (as a means to attaining taqwa, i.e. the essence of piety, protecting one's self from evil) there may be said to be some benefit in him doing so. But he has no such appreciation.*
>
> *32. IH, I am satisfied, would not in fact understand why food and water was being withheld for the daylight hours in the month of Ramadan; the absence of food/water would be likely to cause him stress, or distress; this may cause him to become irritable and/or aggressive in the ways described above ([13]) increasing the risks to staff and himself. There is some minor anxiety that fasting and/or mild dehydration would increase the side effects of any one of his multiple medications. It is plainly not in his interests that he should fast, and the declaration will be granted.*

Best interests: trimming/removal of pubic/axillary hair

Cobb J started with some important general observations concerning religion and disability:

> *33. Health or social care bodies who make the arrangements for the care for adults who lack capacity owe an obligation, so far as is reasonably practicable and in the interests of the individual, to create a care environment and routine which is supportive of the religion of P, and to facilitate P's access to, or observance of religious custom and ritual. All forms of liturgy should, where practicable, be accessible to persons with disabilities. This view is consistent with Article 9 of the European Convention on Human Rights, and the right enjoyed by those who lack capacity as for those who have capacity, to freedom of religion and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. While no specific protection in this regard appears to be offered by the UNHR Convention on the Rights of*

> *Persons with Disability,[1] the rights enshrined in the ECHR (above) "are for everyone, including the most disabled members of our community" (Baroness Hale in P (by his Litigation Friend, OS) v Cheshire West & Others [2014] UKSC 19).*
>
> *34. The duty outlined above is consistent with the expectation that in best interests decision-making for someone who lacks capacity, the court will take account, so far as is reasonably ascertainable "the beliefs and values" of that person which would be likely to influence his decision if he had capacity (section 4(6)(b)); these must include, where relevant, religious beliefs and values.*

As noted above, TH initially proceeded on the basis that there was a duty to remove public/axillary hair. However, Cobb J made clear that there was in fact no such duty or obligation on a person who lacks capacity ('legal competence' in Islam) to trim or shave his or her pubic and axillary hair, or on his carer to do so for them. He emphasised that IH, himself, derived no religious 'benefit' by having the procedure undertaken, as he would not understand its religious significance. He also noted that it was of no consequence to him, in the consideration of these facts, that the "carers may be blessed in the eyes of Islam in undertaking a 'praiseworthy' activity by trimming the hair; their interests are not my concern."

Into the balance, Cobb J put the following further factors:

1. That if IH had capacity he probably would have observed this custom. However, this factor carries little weight in his overall reckoning given that he found that, in progressive Islamic religious teaching, as an incapacitous person IH was exempt from observing the Islam rituals because he was already in a heightened state of spirituality;

2. That IH was not, and had never been able, to express a reliable view on the issue;

3. That it was to IH's benefit that his family felt he was being enabled to follow Muslim custom to the fullest possible extent. However, Cobb J held that this was not "*a case in which I believe that IH will be viewed any less favourably or affectionately by his family or wider community if the hair trimming is not carried out; he is, within the family and community, much loved. He has not had the hair trimming carried out for three years to date, with no discernible change in family attitude to him. He is, as I have emphasised already, in a superior not an inferior state of spirituality to the rest of his family*;"

4. The potential risk to IH from the way in which removal would be carried out, which would require the possible

[1] In fact, religion is specifically mentioned in preamble (p) to the CRPD as regards the position of persons with disabilities who are also subject to discrimination on the basis of religion. Further, the CRPD is intended to ensure with persons with disabilities are entitled to enjoy "all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability" (Article 4), and the equivalent to Article 9 ECHR is to be found in Article 18 of both the UN Declaration on Human Rights and the International Covenant on Civil and Political Rights.

intervention of up to three people, two of whom would be positioned with IH in the relatively small bathroom, where it was planned to take place following IH's bath in circumstances IH might find overcrowded, claustrophobic, and anxiety-inducing;

5. IH's dignity. Even though Cobb J noted that IH was said not to have any sense of personal modesty, in that he was not concerned about exposing his genitals in front of staff, he considered that the procedure contemplated carries with it "compromises to the preservation of dignity."

Cobb J concluded:

> *47. I have faithfully endeavoured to consider these issues from IH's point of view, while ultimately applying a best interests evaluation. IH has a life-long developmental condition and has never had the capacity to understand the tenets of Islam; the benefits of adherence to such rituals do not obtain for him, but for others. The fact is that by reason of his disability IH is absolved of the expectation of performing this recommended procedure, and there is no other clear benefit to him. The trimming of the pubic and axillary hair would serve no other purpose. I am anxious that IH should be spared additional stresses in his life, and wish to protect him and the staff from the risk of harm – an approach which itself has the endorsement of Islamic teaching (see [29](x) above).*

Comment

Cobb J was at pains to inform himself of the actual requirements of Islam, as opposed to the requirements that were (mis)understood by IH's social workers and, it appears, to some extent by TH himself. In so doing, and in calling upon the expertise of a cultural expert, he was in unusual, but not unprecedented territory. Similar expertise seems to have been called upon (albeit referred to in passing) in *A Local Authority v ED & others* [2013] EWCOP 3069, concerning an apparent "duty" to remove the pubic hair of a Muslim woman, with an exception for the incapacitous. The court also called upon a cultural expert in *Re BB*, in which the court heard from a cultural expert on the implications of the marriage of a Banglad\eshi woman and the ways in which it might be brought to an end, albeit in that case finding that the expert provided no actual assistance.

As in so many other of the new wave of *Aintree*-compliant cases now being determined, this case serves as a useful test to see whether applying the CRPD would produce a different substantive answer (and, if is contended that it would, on what basis). For our part, it seems the very model of a decision complying with Article 12(4) CRPD, constructed from the person outwards and respecting not just the best interpretation of their will and preferences but also their rights (noting, in this, that to inflict hair removal on an individual with disabilities in potentially stressful circumstances in the name of a – projected – religious belief could well constitute both violence and abuse for purposes of Article 16 CRPD). It therefore serves, we suggest, as evidence that notwithstanding the toxic brand of 'best interests' for CRPD purposes, the model of decision-making under the MCA 2005 is capable of producing outcomes that are CRPD-compliant. The fact, in practice, it can all too often fail to do so is a significant factor

underpinning the proposed amendments to s.4 MCA suggested by the Law Commission.[2]

We do note one passing comment, though. At paragraph 38, Cobb J noted that it was "*progressive*" Islamic belief that as an incapacitous person IH was exempt from observing the Islam rituals because he was already in a heightened state of spirituality. This raises the question of whether (a) there is another school of Islamic belief and, if so, what it provides; and (b) more generally, whether – and how – the courts will be required to adjudicate between different schools of belief, whether within Islam or within other faith structures. Such would be to enter into very deep waters indeed.

Wishes, feelings and delusions

NHS Foundation Trust v QZ [2017] EWCOP 11 (Hayden J)

Best interests – Medical treatment

Summary

This was an application by an NHS Foundation Trust for an order permitting a hysteroscopy and endometrial biopsy under general anaesthetic, with the objective of identifying the cause of a patient's postmenopausal bleeding which had first been detected over 12 months previously. The procedures were essentially intended to check whether there was any cancer present. Further authorisations were sought, should there be a cancerous tumour or other significantly abnormal pathology, to authorise a keyhole hysterectomy under general anaesthetic.

The patient was a woman in her 60s (QZ) with a longstanding diagnosis of chronic, treatment resistant, paranoid schizophrenia which was chiefly characterised by disordered thought patterns, paranoid behaviour and a 'grandiose belief structure'. The most pervasive of QZ's delusions was that she was a young Roman Catholic virgin. She also had a deep seated long standing delusional belief that she as being poisoned by her carers or doctors and that she was at risk of being raped by them.

The proposed medical interventions in this case set up a conflict between the potential benefits to QZ's physical health of having the interventions (detecting and getting rid of cancer if present) and the inevitable significant deterioration in her mental health which would result.

Hayden J heard from two experts in respect of QZ's mental health, a Consultant Forensic Psychiatrist instructed by the Official Solicitor and QZ's treating psychiatrist. The Consultant Forensic Psychiatrist concluded that the inevitability of a serious and potentially prolonged collapse in QZ's general mental wellbeing ultimately weighed more heavily in the balance than the potential benefits involved in investigating the possibility of cancer. QZ's treating psychiatrist took the view that, whilst it

[2] We note in this regard the specific references to the Law Commission's work in the response by the Office of the Disability Issues to the Committee on the Rights of Persons with Disabilities to the list of issues identified by the Committee ahead of its inspection of the UK later this year (see para 49). Adrian Ward will consider this – otherwise distinctly underwhelming – response further from a Scottish perspective in the next issue.

was important not to underestimate the enormity of the impact that the intrusive medical process would have, he was far more positive about her resilience and her ability to regain trust and learn to work with professionals again.

In directing himself as to the approach to take Hayden J cited the cases of *Aintree University Hospitals NHS Foundation Trust v James and others* [2013] UKSC 67, *Wye Valley Trust v B* [2015] EWCOP 60, *M v Mrs N* [2015] EWCOP 76 (Fam), and *Briggs v Briggs & Ors* [2016] EWCOP 53.

Hayden J considered that this was a case where the 'balance sheet' approach was not helpful as it did not "*really accommodate the enormity of the conflicting principles which are conceptually divergent*."

Counsel for the Official Solicitor submitted that this case was analogous to the *Wye Valley* case where the wishes, feelings, beliefs and values of a person with a mental illness were said to be of such long-standing that they had become inextricably a facet of who that person was. In this case, readers will recall Peter Jackson J had rejected the submission of the Trust that wishes and feelings where they are "*intimately connected with the causes of lack of capacity*" would always be outweighed by the presumption in favour of life or alternatively would attract "*very little weight*."

Hayden J stated in response to this submission that:

> *The wishes and feelings of those who suffer from delusional beliefs are not automatically, in my judgement, to be afforded the same weight as the beliefs articulated by an individual who has had the fortune to possess the powers of objective reasoning and analysis. There is nothing in Wye Valley v B which supports anything to the contrary. The kernel of the issue is that delusional beliefs should never be discounted merely because they are irrational. They are real to the individual concerned. The weight they are to be afforded will differ from case to case and, as always, will fall to be considered within the broader context of the evidence as a whole.*

The judge held that the QZ's case was very different from that of Mr B:

> *The circumstances of QZ's life are very different. She has the prospect of many years ahead. The contemplated medical intervention is, objectively, of limited intrusion. She has shown the capacity to forge bonds of trust with professionals. She has developed resilience 'to fight back at some point in the future' and she has managed to live life in circumstances where she has a level of privacy, independence and dignity. Each of these factors reveal facets of her personality. They are just as much a part of who she is as are her paranoid and delusional beliefs which must not be permitted to eclipse them. The prospect that following medical investigation and or treatment and a period of profound mental distress QZ may recover a life which has both happiness and dignity incorporated into it, is one which is very real. Permitting the treatment here is, to adopt Peter Jackson J's careful terminology, not fighting QZ but fighting on her behalf.*

The judge authorised the treatment in the terms of the draft order put forward by the NHS Trust.

Comment

This is a useful further instalment in the line of cases which consider the wishes and feelings of those who have delusional beliefs. Hayden J made clear that he considered that the right answer is not black and white. In other words, there should not be full acquiescence to wishes and feelings based on delusional beliefs, but nor should there be an outright rejection. Rather, Hayden J identified the need for a rounded consideration where the beliefs are never discounted merely because they are irrational, but rather their weight differs from case to case when considered in the context of the evidence as a whole. As with *IH*, considered elsewhere in this Report, the case also serves as a Rorshach test for the application of the 'new paradigm' of the CRPD: in other words: ask yourself what you consider respecting QZ's right, will and preferences dictates in the circumstances set down by Hayden J.

As a final procedural point, we note – and entirely understand why Hayden J "*was profoundly troubl*[ed]" that he was *"being asked to consider the issues here over 12 months after the serious health concerns became known. I record that I have been provided with no satisfactory explanation for the delay. I re-emphasise that I am concerned with a vulnerable and incapacitous woman*."

Section 21A/*Re X* statistics

The most recent quarterly figures for the Court of Protection have now been published. Of no little interest is the fact, for the first time, they break down "deprivation of liberty applications" into, inter alia, s.21A and *Re X* applications (under Table 21 of the Family Court Tables). The headline figure is that there were 969 applications relating to deprivation of liberty made in the most recent quarter, up 43% on the number made in January to March 2016. These broke down as follows:

1. 104 orders made under s.16 MCA 2005;
2. 265 orders made under s.21A MCA 2005 (precisely what sort of order is not clear);
3. 600 *Re X* orders.

PROPERTY AND AFFAIRS

Important Guidance on Severance and Gifts

The Public Guardian's Severance Applications [2017] EWCOP 10 (District Judge Eldergill)

Lasting powers of attorney – revocation – severance – gifts

Summary

In a series of cases noted on Bailli as *The Public Guardian's Severance Applications* [2017] EWCOP 10, District Judge Eldergill made various rulings on applications made by the Public Guardian for severance of various provisions made in lasting powers of attorney. Although each of the persons affected by the applications were notified that there would be a final hearing in April 2017, it does not appear from the judgment that any of those persons appeared either in person or by a legal representative, and it does not appear either that any of those persons made any representations. The court, therefore, heard from in-house counsel for the Public Guardian and also in writing from the Public Guardian.

The judgment, from paragraphs 8 to 41, sets out the relevant law and background to these applications. All of the applications were for severance under paragraph 19 of Schedule 1, Mental Capacity Act 2005. That provides as follows:

> *(1) Sub-paragraph (2) applies if the court determines, under section 23(1), that a lasting power of attorney contains a provision which –*
>
> *(a) is ineffective as part of a lasting power of attorney, or*
>
> *(b) prevents the instrument from operating as a valid lasting power of attorney.*
>
> *(2) the court must –*
>
> *(a) notify the Public Guardian that it has severed the provision, or*
>
> *(b) direct him to cancel the registration of the instrument as a lasting power of attorney.*

Section 23(1) MCA 2005 gives the court a power to determine any question as to the meaning or effect of a lasting power of attorney, or an instrument purporting to create one.

These provisions give the Court of Protection power to sever a provision in a lasting power of attorney that offends s.9(2) MCA 2005. That provides as follows:

> *A lasting power of attorney is not created unless –*
>
> *(a) section 10 is complied with;*
>
> *(b) an instrument conferring authority of the kind mentioned in sub-section (1) is made and registered in accordance with Schedule 1.*

So far as Schedule 1 is concerned, paragraph 1 requires a lasting power of attorney to be in the prescribed form, comply with paragraph 2 (requirements as to content of instruments) and that the prescribed requirements in connection with its execution are satisfied. Separately from the severance provisions, paragraph 3 of Schedule 1 allows the Public Guardian to ignore

immaterial differences between an instrument in respect of form or mode of expression from the prescribed form and paragraph 3(2) allows the court to declare that an instrument which is not in the prescribed form is to be treated as if it were, if it is satisfied that the persons executing the instrument intended it to create a lasting power of attorney.

The judgment, at paragraphs 30 – 37, includes a helpful summary of the scope of 3(1) and (2) of Schedule 1. All the judgments, however, were in relation to severance under paragraph 19.

Section 10(4) MCA 2005, most importantly for these purposes, states that a lasting power of attorney may appoint attorneys to act:

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

The prescribed form follows s.10(4) MCA 2005 in giving the donor those three choices. The sting in the tail in relation to lasting powers of attorney is that, pursuant to s.9(3) MCA 2005, an instrument which (a) purports to create a lasting power of attorney, but (b) does not comply with this section, section 10 or Schedule 1, confers no authority. In other words, it is invalid even as a power of attorney.

At paragraph 41, before turning to the individual cases, District Judge Eldergill cited what Nugee J said in Miles & Beattie v The Public Guardian [2015] EWHC 2960 (Ch) at paragraph 19:

> *… It does seem to me that it is right that the Act should be construed in a way which gives as much flexibility to donors to set out how they wish their affairs to be dealt with as possible, the Act being intended to give autonomy to those who are in a position where they can foresee that they may in the future lack capacity to specify who it is that they wish to act for their affairs.*

The Individual Cases

There is a degree of similarity between the cases determined in the judgment and, therefore, not every case is summarised. Where relevant, comments are made on a running basis in relation to each judgment, with a general comment at the end.

MC (paragraphs 43 to 53)

In this case, the donor had ticked the box that she wanted her attorneys to act jointly and severally, rather than the box to the effect that some decisions were to be made jointly and some jointly and severally. In section 7, however, (instructions) she said:

> *Any financial decisions up to the value of £150* can *be made independently by my attorneys. However, any financial decisions over this amount must be agreed upon by both my attorneys.*

The Public Guardian said that that had to be severed because it was inconsistent with the joint and several appointment. District Judge Eldergill held, however, that greater weight had to be given to the specific instruction than to the tick box exercise. He held, therefore, that the donor had simply ticked the wrong box and, therefore, it was not necessary to excise the

condition or restriction in Section 7. He made a declaration to that effect.

This can be seen as the application of the general rule of interpretation that where specific words deal with a matter, then those specific words take priority over general words that might be inconsistent with the specific words.

JG (paragraphs 54 to 59)

In this case, the donor, in the preferences box of section 7 of the prescribed form, had said:

> *I would like my attorneys to consider Thomas G (my son) as my main priority when making decisions.*

The Public Guardian considered that that wording had to be severed because it was incompatible with the requirement of s.1(5) MCA 2005 that any act done or decision made must be done or made in the donor's best interests.

District Judge Eldergill held that this was a simple expression of preferences which did not in any way bind the donee when considering what decision to be made in her best interests, but which the donee would have to take into account when so doing and which the Act entitled her to make (see s.4(6)(a) MCA 2005).

District Judge Eldergill, therefore, held that there was no need to sever anything and went on to point out that, in any event, it was a misunderstanding of the Act to take the view that acting in an incapacitated person's best interests in some way precludes giving any weight to the interests of other persons dear to them, such as providing for children, spouses and other dependants (see paragraph 58).

DH (paragraphs 60 to 70)

This was a similar case to the last one, where the donor had expressed a preference that the donor would like grandchildren each to be given £1,000 and any funds left over to be shared equally by children.

Again, District Judge Eldergill held that this was a preference, not a binding condition and, therefore, did not interfere with the Act's restrictions on gift making powers of attorneys. District Judge Eldergill, however, did state that there were concerns in relation to some home-made powers that donors and donees will be unaware of the general restrictions on gifts and at paragraph 68, recommended that the Public Guardian could remind donors and donees on registration in cases similar to this that a court application is necessary to give effect to wishes expressed that would exceed statutory gifting powers.

SH (paragraphs 71 to 73) and JF (paragraphs 120 to 125)

In each of these cases, the donor had appointed a number of attorneys jointly and severally. In *SH*, the donor, in section 7 in the instructions box, stated:

> *While my attorneys are authorised to act jointly and severally, I specifically direct that all decisions must be made by at least two of my attorneys and that no attorney has the power to make decisions individually.*

District Judge Eldergill severed that provision because he agreed with the submission of the Public Guardian that the instruction was incompatible with an appointment of attorneys to act jointly and severally.

In the case of *JF*, there were three attorneys and the instruction in section 7 was:

> *My two daughters (if surviving) must always agree on any decision jointly before any actions regarding my estate can be implemented. OM may act as an attorney independently of my daughters.*

District Judge Eldergill stated, at paragraph 124, that he could not see anything objectionable in the arrangement that the donor had devised, and that it should not be necessary to create two instruments (one appointing her daughters jointly and the other her husband or partner solely) to achieve that object. He said that the aim of the statutory scheme should be to give as much flexibility to donors as possible.

The donor had consented to severance of the instruction and, at paragraph 125, therefore, District Judge Eldergill stated that he was bound by current case law to make one of two decisions: either not to sever and to direct the Public Guardian not to register or to sever and direct registration. Severance, however, created a situation that the donor did not want. He said that with considerable reluctance he had decided to order severance.

Comment

In these cases, it would appear that the objection was that that the instruction did not comply with s.10(4) MCA 2005, which does not appear on its face to permit an instrument to appoint two attorneys to act jointly and a third attorney to act jointly and severally. This, if it is the case, is, as District Judge Eldergill states, unfortunate.

District Judge Eldergill stated that he was bound by authority to take this view (he did not say what his view would have been if not so bound). It is understood that the binding case law to which he refers are decisions of Senior Judge Lush to similar effect and one of Arden J (as she then was) in relation to enduring powers of attorney (*Re E (Enduring Power of Attorney)* [2001] Ch 346).

In that case Master Lush (as he then was) had ruled that a similar provision in a EPA prevented it operating as an EPA because s.11(1) Enduring Powers of Attorneys Act 1985 provided *"An instrument which appoints more than one person to be an attorney cannot create an enduring power unless the attorneys are appointed to act jointly or jointly and severally"*. There was an appeal against other aspects of that decision but not that one. Arden J simply recorded the decision without comment.

Section 10(4) MCA 2005 is in different terms to s.11(1) EPAA 1985. Its intention is to allow more flexibility. Notwithstanding the continued practice of Senior Judge Lush, it may be that it could be argued that there is in fact no binding authority on this matter and that the wording of s.10(4) MCA 2005 can be interpreted (following *Miles and Beattie*) so as to permit this type of arrangements. This could be done by asking the question whether the power appoints the attorneys jointly, jointly and severally or jointly in respect of some matters and jointly and severally in respect of others as one conjunctive question rather than as a series of disjunctive options. The result could be that the answer in case such as this would, therefore, be *"yes"* and severance not necessary.

SHH (paragraphs 74 to 80)

In this case, the donor had not properly executed option A in relation to life sustaining treatment,

which is necessary if the attorneys are to give or refuse consent to life sustaining treatment on the donor's behalf.

In section 7, however, the donor had completed the preference box that gave instructions to her attorneys in relation to life sustaining treatment.

Because option A had not been properly completed, the Public Guardian submitted that option B (no life sustaining treatment authority) applied and, therefore, the words in section 7 had to be severed because incompatible with option B.

District Judge Eldergill, however, used his power under paragraph 3(2) of Schedule 1 to declare that the instrument should be treated as if it had been in the prescribed form and declared that although option A had not been properly completed, the meaning and effect of the instrument was that the attorneys were authorised in relation to life-sustaining treatment and, therefore, severance was not necessary.

SG (paragraphs 81 to 90)

The donor appointed her son as sole attorney with his wife as a replacement attorney and in the instructions box at section 7 wrote:

> *Whereas I have appointed VVVE to be my replacement attorney in the event of my son, TWG, being unable to continue to act as my attorney, I direct that my replacement attorney, VVVE, shall only act as my replacement attorney if she remains legally married to my son, TWG, at the point he becomes unable to act as my attorney.*

District Judge Eldergill held that this was a perfectly valid condition and stated that he could see nothing objectionable in inserting a condition that one's daughter-in-law must retain a family relationship through marriage with the donor for the replacement Order to take effect, citing Nugee J's remarks in *Miles & Beattie*.

SR (paragraphs 91 to 95)

This was another case of a preference being expressed in relation to the powers of joint and several attorneys. Again, District Judge Eldergill held that there was no need to sever as it was merely a preference.

MN (paragraphs 96 to 100)

This was another preference case in relation to gifts. Again, District Judge Eldergill held that there was no need to sever.

RH (paragraphs 102 to 108)

This was another case where District Judge Eldergill, in relation to difficulties with execution, used his powers under paragraph 3(2) of Schedule 1 and then determined that severance was not necessary.

JG2 (paragraphs 109 to 114)

This was another case where the donor had ticked the wrong box as to whether the attorneys were to act jointly and severally on all matters or jointly on some and jointly and severally on others, and in section 7 had given instructions compatible only with the latter. Again, District Judge Eldergill interpreted the instrument so that it provided for the donors to act jointly and severally in relation to all matters, save for where specifically the donor had instructed them to act jointly (in relation to any sale of the donor's home).

JR (paragraphs 115 to 119)

This was a similar case in relation to health and welfare.

PG (paragraphs 126 to 154)

In this case, in section 7, the donor had given an instruction to this effect:

> *My attorneys must ensure that IBG* [the donor's daughter, it seems]*, who is unable to make decisions for herself because of her disabilities that her needs are met.*

The Public Guardian argued for severance because that was incompatible with the attorney's obligation to act in the donor's best interests. This case is similar to JG, except that in JG's case, the words were in the preferences box rather than the instructions box. Did that make a difference? District Judge Eldergill held that it did not. At paragraph 132, he stated:

> *I disagree that PG's condition is on its face contrary to the requirements of section 1(5)… it is not per se contrary to PG's best interests that she exercises her right to impose a condition on her attorneys that they must ensure that her incapacitated child's needs continued to be met from her estate. That her daughter is cared for appears to be her most important wish and feeling, and no doubt her core personal belief and value.*

Having decided that, District Judge Eldergill went on from paragraph 134 onwards to consider the different treatment of making gifts and providing for the needs of others. He held that there was an important distinction between the two. At paragraph 146, he said:

> *If the payment is not a gift for the purposes of section 12, but the meeting of a need, and there is no condition or restriction in the instrument which prevents such payments, then the attorney must apply the principles in section 1 and the best interest considerations in section 4. The attorney must consider matters such as the donor's past and present wishes and feelings, their beliefs and values, any written statements made by them including statements in the LPA itself and all other relevant considerations such as the donor's own needs and the nature of their relationship with the potential recipient, and decide whether such a payment is in the donor's best interests.*

At paragraph 147, District Judge Eldergill then considered whether all payments from a donor's estate, other than those for consideration, including those made to meet, for example, a child's needs are by definition "*gifts*" and, therefore, caught by section 12. He held that that was not the case. He gave, at paragraph 149, the example of a couple who had been married for, say, 60 years appointing each other as attorneys and one of them becomes incapacitated by dementia. He posed the question whether the spouse exercising the attorney role would need to apply for a court order in order to continue regular and historic contributions from the donor's pension and assets to their partner, and the running expenses of the household. He stated that if that were the case, it would be wholly impracticable and undesirable. He said that it would be a nightmare.

At paragraph 152(g), he said:

> *Where a spouse or partner of the attorney applies part of the donor's funds to meet their own continuing needs and those of other dependents in a way which – allowing for any reduction in family income and assets caused by care home fees or loss of earnings and any increase in the donor's own needs – is consistent with the donor's historical expenditure prior to the onset of incapacity, then this is likely to be an indicator that it is a need that is being met, not a gift.*

Clearly, there will be instances where the line is not easy to draw and an application for authorisation or directions would be sensible. Equally clearly, however, these principles can be applied to many such situations so as to avoid the need for such applications.

GO (paragraphs 155 to 158)

This was a *JF* type of case and the result was the same (that is to say reluctant severance).

GB (paragraphs 159 to 165)

This was another case where there was ambiguity in the instrument between the joint and several appointment, and a preference given in section 7, which restricted powers to act in relation to sale or rental of properties and investments to joint only. Again, District Judge Eldergill declared that the specific words prevailed over the general words and, therefore, severance was not necessary.

JB (paragraphs 166 to 171)

This case was the mirror image of GB, they being spouses.

GD (paragraphs 172 to 176)

In this case, there was incompatibility between the ticked box which was for the attorneys to be able to act as soon as the power had been registered and a preference in section 7 to the effect that the power should only come into effect when the attorneys had reason to believe the donor was becoming or had become incapable of making decisions and managing her affairs.

District Judge Eldergill agreed that there was an inconsistency and one section required correction. The Public Guardian had enquired of the donor, who stated that her intention was that the instrument should take effect immediately and, therefore, he severed section 7. It would have been more difficult if, by the time the matter was investigated, the donor had lost capacity.

CW (177 to 182)

This was another case where the donor had used the preferences box in section 7 to state her wishes concerning the use of her money, namely to benefit her mother and daughter. The case was similar to that of *JG* and the result the same, in other words no severance.

General comment

Although strictly of no precedent value, being judgments of a District Judge, it is clear that these judgments, taken together, mark a significant shift in approach to powers of attorney in favour of a more purposive and less literal approach both to severance and also to the circumstances in which payments from a donor's estate can sensibly be regarded as meeting the needs of others as opposed to gifts. We note in this regard that District Judge Eldergill made a particular point of noting at the end of the judgment (para 183) that the Public

Guardian himself had had the opportunity to consider the judgment before it was handed down, and that he agreed with it.

PRACTICE AND PROCEDURE

Transparency – the new approach

The Transparency Pilot approach and that previously provided for in Serious Medical Treatment cases has now been merged (in fact, the merging took place in March but the new order was only published towards the end of June).

The new order – to be used in all cases in the COP save for committal cases – can be found here, with an unofficial Word version here.

The Vice-President has published an explanatory note, which we reproduce below:

> This note is a public document.
>
> In the schedule to my judgment in V v ANL [2016] EWCOP 21 I set out a number of points relating to the Transparency Pilot (and so the order made under it restricting reporting – the Pilot Order) and the reporting restrictions orders made in serious medical cases to which Practice Directions 9E and 13A continued to apply (RROs).
>
> Since then the ad hoc Committee on the COP Rules has considered the amalgamation of the two approaches and as a result has recommended that a further amendment should be made to the Transparency Pilot to achieve the result that it applies to all proceedings in the COP apart from applications for committal. I am very grateful to those who gave up their time to do this work.
>
> This recommendation has been accepted and means that further changes will be made to the standard Pilot Order. The new version is attached.

It is hoped that the changes make it clearer by the use of headings.

The amended Pilot Order:

1. is still directed to those who attend or find out what happened at an attended public COP hearing, and so is not directed to the world at large which the RROs were,

2. still does not contain a schedule identifying those who cannot be identified,

3. contains alternatives relating to its duration (which reflect the old Pilot Order and the RROs) for selection by the judge,

4. now does contain a list of what is not restricted by the order, which is modelled on, but does not replicate, the list in the RROs, and

5. provides that the injunction does not apply to a public hearing of, or the listing for hearing of, any application for committal.

A change for serious medical cases is that prior notice of the making of a Pilot Order will not be given to the media. On that topic in the Schedule to my judgment in V v ANL I said:

> "To my mind proper notification to the media of the existence of the proceedings and of the date of the public hearing of a case relating to serious medical treatment and the terms of any reporting restrictions

order made when a public hearing is directed is what really matters. And when that order follows a standard process referred to in a practice direction or rules it seems to me that:

1. there are compelling reasons why the parties bound by the reporting restrictions order need not be notified of the application (see s. 12(2) of the HRA 1998), particularly if they are defined by reference ato those who attend the public hearing (or get information from those that do), and

2. this view is supported by the approach of the Court of Appeal in X v Dartford and Gravesend NHS Trust (Personal Injury Bar Association and another intervening) [2015] 1WLR 3647 in particular at paragraphs 25 to 35.

If those bound by the order (and so the media) have such notification they can then attend the hearing knowing, in general terms, what the case is about and the terms of the reporting restrictions order and they can challenge that order then or at another time."

The accepted recommendation reflects those comments and other points in that Schedule relating to notification and the old Pilot Order and RROs.

This change to the Transparency Pilot is part of an important exercise that is directed to finding the best approach to achieving the result that, on a case by case basis, the COP identifies and directs the correct balance between Articles 8 and 10 and thereby correctly promotes the powerful public interests they engage and reflect.

It is recognised that it is important that cases are appropriately described when they are listed to provide information to the public at large of what they are about and when and where they will be heard. Comment on how this should be and is being done is welcomed. As is more general comment on how the public and the media can make themselves aware, or should be made aware, that certain types of case are due to be heard and a Pilot Order has been made in them. Such comments should be directed to *joan.goulbourn@justice.gsi.gov.uk* as The Secretariat for The Court of Protection Ad Hoc Rules Committee or to me or the President of the COP.

The Hon Mr Justice Charles
Vice President of the Court of Protection

Date: March 2017

Mediation Pilot

A working group in the South West is developing a COP mediation pilot, and we link here to the working draft of the document setting out both the aims of the pilot, and detailed guidance as to how it might be implemented. The working group would very much welcome comments on the guidance, to be sent to Katie Scott at 39

Essex Chambers, as they work towards drafting a potential Practice Direction in September and taking further steps towards implementation.

THE WIDER CONTEXT

The post-*PJ* problems persist

Djaba v West London MH Trust and others [2017] EWCA Civ 436 (Court of Appeal (Arden, Sales, and McCombe LJJ))

Article 5 – Deprivation of liberty – Article 8 – contact – Mental Health Act 1983 – Interface with MCA

Summary

Since 2014, Mr Djaba had been accommodated in a "super seclusion suite" at Broadmoor under a restricted hospital order (Mental Health Act 1983 ss37/41). Built entirely for his confinement, it was a small room divided into two parts with a secure partition between them. Except to review his health, no one was permitted to enter the room without the partition being in place. Diagnosed with paranoid schizophrenia, he was highly resistant to receiving depot medication which had to be given forcibly by treating staff wearing protective equipment, including shields, helmets, and visors. The central issue was whether the First-Tier Tribunal (Mental Health) ('FTT') was required to conduct a proportionality assessment pursuant to articles 5 and/or 8 ECHR taking into account the conditions of his detention. In short, it was not.

The Court of Appeal decided that the decision in *Secretary of State for Justice and Welsh Ministers v MM and PJ* [2017] EWCA Civ 194 was "*properly to be carried over directly into that part of the legislation applicable in this case.*" Giving the leading judgment, Lord Justice McCombe held:

> *42. If, as the court said in PJ at [55], the tribunal's power is a "distinct and separate" one, namely that of discharge, and does not provide for intervention to regulate the conditions under a CTO made by the responsible clinician, then the same must, I think, apply under ss.72 and 73 which also confer a power of discharge. It seems to me that, applying this court's decision, that power cannot also include power to regulate the conditions of detention. In the material part of the PJ judgment the court was considering directly the extent of the power under s.72.*
>
> *43. It is perhaps unfortunate that the court did not address the passages from the speech of Baroness Hale in H and I confess that I had some difficulty in understanding why it had not done so. I can see force in Ms Bretherton's point that it might be thought that specialist tribunals, rather than courts, were better suited to assessing conditions of a patient's detention in a human rights context for the reasons expressed by Baroness Hale in her speech. It seems to me, however, that in the light of the court's decision on the jurisdiction issue in PJ, it did not need to do so…* (emphasis added)

Thus, McCombe LJ concluded, the tribunal lacked the jurisdiction to conduct as assessment beyond that dictated by the detention criteria in MHA ss72-73. Any challenge to the conditions of detention would have to be brought in the civil courts. Agreeing with McCombe LJ, Lord Justice Sales added:

> *49. The matters identified in section 72(1)(b)(i), (ii) and (iia) and requiring to be considered by the Tribunal pursuant to section 73(1) do not include the conditions of detention of a restricted patient or things such as the availability of visiting rights for members of a*

> *patient's family. These are aspects of the care of a restricted patient which are within the control of the hospital authorities, who will have to take account of a range of matters in organising his detention in their facility, including the resources available, the Convention rights of the patient and others and the safety of staff and visitors. The governing NHS Trust for Broadmoor Hospital is a public authority and is amenable to judicial review in the High Court in relation to any legal challenge which a restricted patient might wish to bring in relation to these matters. If a restricted patient needs access to a litigation friend in order to mount such a legal challenge, arrangements can be made to facilitate that. That is an appropriate and effective avenue for legal protection for a restricted patient who wishes to challenge what the hospital authorities have done in relation to his conditions of detention.*

Parallels were drawn with the imprisonment of convicted criminals whereby legal remedies in respect of some detention issues are determined by the Parole Board while remedies in respect of other detention issues are determined by the High Court in judicial review proceedings: see, e.g., *R (Hassett and Price) v Secretary of State for Justice* [2017] EWCA Civ 331. His Lordship specifically rejected the submission that the reference to 'appropriate' in the detention criteria included conditions of detention and other ECHR issues (para 51). For good measure, Lady Justice Arden agreed with both judgments and reinforced that the Administrative Court "*is able to carry out a sufficient review on the merits to meet the requirements of the Convention.*"

Comment

Both *PJ* and *Djaba* concentrate on the jurisdiction of the Mental Health Tribunal/MHRT for Wales and are therefore hugely significant. As we have noted previously, it is concerning that the Court of Appeal in PJ started from a false premise, holding at para 55 that: "[t]*he power exercisable by the tribunal is to discharge the patient from detention not to 'discharge the CTO.'*" This is wrong because MHA s72(1)(c) contains no reference to detention. A patient on a CTO is not liable to be detained in hospital; they are merely liable to be recalled to hospital which is very different. Accordingly, the tribunal has no power to review the legality of detention of community patients.

There is an interesting contrast between tribunals and the Court of Protection. Following *Djaba*, a tribunal has no jurisdiction to review the conditions of detention or, for example, access to family members. And it has long been established that the tribunal lacks jurisdiction to review the legality of psychiatric treatment. These are all matters for judicial review. Whereas the Court of Protection can, albeit within certain parameters, conduct a proportionality assessment pursuant to articles 5 and 8 ECHR which take the detention conditions (eg see *North Yorkshire County Council v MAG*). Indeed, that the court has the jurisdiction to determine HRA claims was not disapproved of by the Supreme Court in *N v ACCG*.

Mr Djaba now finds himself in a similar position to *Colonel Munjaz*. Challenging his seclusion – which could conceptually be a deprivation of his residual liberty – will be a matter for the Administrative Court, not the Tribunal.

Short note: ordinary residence and capacity

The Department of Health has now published anonymised determinations of ordinary residence disputes from 2016. Readers may be interested in two examples which concerned adults lacking the capacity to decide upon residence:

1. OR3/2016: P was a 41 year old woman with a learning disability. In March 2012, she moved to a supported living placement in the area of Council B. Prior to that date, she lived with her mother in a family home in the area of Council A. Although a Supported Self-Assessment Questionnaire completed in October 2011 indicated that a formal capacity assessment was required, no capacity assessment was in fact carried out at the time. The main issue between the parties was whether the deeming provision under section 24(5) of the National Assistance Act 1948 applied, which provides that a person who is provided with residential accommodation is deemed to continue to be ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided. Having regard to the nature of the placement that was provided to P, the Secretary of State decided that the deeming provision did not apply. P had her own tenancy agreement and her rent was met through housing benefit. Council A had no responsibility to pay or make up any shortfall in rent. Therefore, P's accommodation was not provided by Council A under Part 3 and Council A was not under a duty to provide accommodation to P. P was therefore ordinarily resident in the area of Council B. Although P lacked capacity to make decisions about her residence, the Secretary of State made clear that he reached this conclusion irrespective of whether or not P had capacity to decide where to live and/or enter a tenancy agreement.

2. OR 5/2016: P was a 55 year old woman with Down's Syndrome and early-onset dementia. She previously resided with her mother in the area of Council B. After her mother died in April 1994, an assessment was undertaken by Council A which recorded that P wished to move to suitable accommodation in the area of Council B. P moved to an address in Council B to live with her brother in September 1994. Council A continued to fund P's package of care. In May 2015, Council A wrote to Council B setting out its position that, applying the test in *Shah v London Borough of Barnet* (1983) 1 All ER 226, X was ordinarily resident in Council B's area. Council B responded to the effect that it considered that P had fluctuating capacity and P's ordinary residence should remain with Council A in light of the Supreme Court's decision in *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46. The Secretary of State concluded that P had been ordinarily resident in Council B since she moved there in September 1994. There was no evidence that P lacked capacity to make decisions as to where she should live at the time that the decision to move to Council B was made. Whilst there was some more recent evidence of fluctuating capacity, it related to a point in time at which P had already been

residing in the area of Council B for some 20 years. The appropriate test was the one set down in *Shah*.

Short Note: Care Home Concerns (1)

The Competition and Markets Authority has published the initial findings of its care homes market study which are concerning. The market study was launched by the CMA in December 2016 to examine whether the residential care home sectors is working well for elderly people and their families. Having reached the halfway point, on 14 June 2017, the CMA published its initial findings which highlight wider concerns about the sector, including:

- People finding it difficult to get the information; confusion about the social care system and funding options; and a lack of clarity over finding and choosing a care home;
- A lack of information about prices on care home websites; and care homes' contracts giving homes wide-ranging discretion to ask residents to leave at short notice;
- Complaints procedures not functioning well; and residents finding it very challenging to make complaints.

As a result of its initial findings, the CMA has now opened a consumer protection case to investigate its concerns that some care homes may be breaking consumer law.

These concerns come alongside the widely reported concerns of the CQC as to the quality of care being delivered in care homes outlined in its State of Adult Social Care 2014-2017 Report.

Short Note: Care Home Concerns (2)

A recent report from the Local Government Ombudsman reported on the Local Government Lawyer website (and available in full here) highlighted a problem that may well be more widespread. Mrs C lacked capacity to make decisions about her finances. She was discharged from hospital to a residential care home. The local authority, Worcestershire County Council, funded Mrs C's care home placement of £500 per week for about four weeks. Thereafter, the local authority treated Mrs C as self-funding her care. However, Mrs C's son was unable to pay the care provider as he did not have access to her funds. The care provider then increased the price of care from £500 to £1200 per week i.e. an increase of £700 per week. A significant debt accrued to Mrs C before she passed away. Mrs C's son had attempted to become a court-appointed deputy to manage her financial affairs. However, his mother died before this was completed. He then had to gain probate. Before probate was granted, the care provider sent Mrs C's son a letter saying that it would refer the outstanding debt to its solicitors.

The LGO found that there had been a series of failings on the part of the local authority including:

- Failing to obtain relevant information about Mrs C's capacity and failing to consider Mrs C's capacity to make choices about her finances;
- Stopping funding for Mrs C's care even though it seemed unlikely that Mrs C had capacity to manage her own finances and the local authority was aware that she had no attorney or deputy;

- Failing to take adequate steps to ensure that Mrs C's care was paid for and leaving Mrs C unsupported.

The LGO was also critical of the care provider and, in particular, found that there only a weak justification for significantly increasing the charges to Mrs C. In particular, there was no evidence that the care provider had difficulty caring for Mrs C or that Mrs C required such an exceptional level of care. The LGO recommended that the invoices should be reissued removing the additional £700 charge and for the local authority to apologise and pay £1,000 for distress.

Capacity failings: (1)

In a further report from the Local Government Ombudsman reported on the Local Government Lawyer website (and available in full here), Warwickshire County Council agreed to pay a man over £2,000 for delays in carrying out mental capacity assessments and not considering fully all the options available to him.

Mr X was admitted to hospital following a stroke. He was keen to leave hospital and to live as independently as possible. He agreed to be discharged to a residential care home but the social worker and care home believed this would be a long term placement. Mr X submitted a housing application to Nuneaton and Bedford Borough Council as he wanted to live more independently with carer support. There were delays by the Borough Council progressing Mr X's housing application. Mr X's psychologist asked whether a move to his own properly was an option but the social worker said that Mr X lacked mental capacity regarding his care needs and accommodation. However, no formal capacity assessment was carried out.

Mr X was later admitted to hospital and refused to return to the care home when he was ready for discharge, still wanting to live independently. However, his social worker continued to believe that he lacked capacity to make decisions about his care and residence although no formal capacity assessment had been carried out. A second social worker became involved and assessed Mr X as having capacity to the relevant decisions. This was backed by Mr X's consultant. Mr X agreed to move to a different care home as a temporary measure but continued his bid for accommodation through the borough council. He eventually secured a tenancy in self-contained accommodation in the area of his choice.

Amongst other things, the LGO found that Warwickshire County Council had failed to consider all the options available to meet Mr X's needs and failed to undertake decision specific mental capacity assessments in relation to where he should live. Warwickshire County council agreed to apologise to Mr X, pay him £2,000 for the frustration and distress caused by the delays in carrying out mental capacity assessments and to review its practice to ensure that mental capacity assessments are carried out at the correct times and documented appropriately.

Capacity failings: (2)

We highlight here a tragic Serious Case Review in relation to a man, "Tom," who took his own life in 2014, which raises a number of complex questions as to the assessment of capacity in relation to those with an acquired brain injury, in

particular where the individual is then "situationally incapacitated" by others – in his case exploitative and drug using peers. As the author, Margaret Flynn, highlights: "Tom's circumstances highlight the fraught boundaries between personal responsibility, public obligation and the assumption of mental capacity." We also highlight the fact that his circumstances, and the wider issues raised, are also addressed in a powerful article in the *Journal of Adult Protection* (available here), from a person with a unique perspective, Alyson Norman, who is both a trained psychologist and also Tom's sister.

MENTAL HEALTH ACT REFORM?

The remainder of this section is dedicated to recent developments, both domestically and on the international plane, regarding the potential for reform of mental health laws, which will impact both directly and indirectly upon the field of mental capacity law.

The Government speaks

The Government announced its intention to reform mental health legislation in England and Wales in the Queen's Speech on 21 June. So far, very little detail has been provided about precisely how the Government intends to reform the Mental Health Act 1983, but the broad intention has been set out as follows:

> *As we set out in our manifesto, our considerations will considerations will include:*
>
> - *Looking at why rates of detention are increasing and taking the necessary action to improve service responses;*
> - *Examining the disproportionate number of those from certain ethnic backgrounds, in particular black people, who are detained under the Act;*
> - *Reviewing the use of Community Treatment Orders, to see if they remain fit for purpose in helping people leaving hospital to receive better care and support in the community;*
> - *Considering how the rights of family members to get information about the mental health and treatment of their loved ones can be improved;*
> - *Ensuring that those with mental ill health are treated fairly, protected from discrimination, and employers fulfil their responsibilities effectively."*
> - *The Government also announced that it proposes to consult on the future of social care.*

We will be following these developments very closely and with great interest.

Mental Health Alliance Survey Report: A Mental Health Act Fit for Tomorrow

In a report published at the end of June, the Mental Health Alliance published: "*A Mental Health Act fit for tomorrow: An agenda for reform*." The Alliance, a coalition of more than 65 organisations that originally came together in 2000 to provide a focus for campaigning on common concerns about reform of the Mental Health Act, carried out the first wide-scale survey of 8,631 individuals (including those with lived experience, families, carers, and loved ones and

mental health professionals[3]), to examine the underlying principles of the MHA 1983 and how people's rights are currently protected, where it is working well and what could be changed and improved.

We reproduce here the executive summary, but suggest that the report bears careful reading, not least because it sits at an interesting angle to the report of the UN Special Rapporteur covered elsewhere in this issue, which is very firmly predicated upon the abolition of any form of compulsory treatment. It also sits an interesting angle to fusion debates, highlighting a desire for advance decisions to be treated equally under the MHA 1983 and MCA 2005 but otherwise not addressing wider issues of capacity based mental health legislation

Executive Summary

- *Respondents told us that people are denied opportunities to be involved in their care, along with their family, friends and carers. It is clear that 'Advance Decisions' are not promoted and respected.*

- *A majority of respondents agreed that compulsory treatment in hospital is sometimes necessary when people pose harm to themselves or others.[4] However, they were clear that important principles are currently flouted, that genuine parity between physical and mental health is needed. They gave strong support to the prospect of Advance Decisions being respected under the Mental Health Act.*

- *The survey showed that legislation is needed urgently to address unintended consequences of the Act. The outmoded 'nearest relative' allocation system, for example, causes intolerable misery and delay for people at their most vulnerable.*

- *The Government must deliver a fundamental review of the Mental Health Act. The Act is now over 30 years old and not fit for purpose.*

- *The sheer scale and range of responses to our survey shows the demand for reform. The questions not fully answered also underline the urgency for more research to be carried out with the people whose voices are too-often ignored.*

- *The Mental Health Alliance believes reform is urgently needed and is*

[3] The report records that the survey received 8,631 responses from a wide range of groups: 46% were currently receiving treatment for mental illness (4,017 people); 14% had previously been detained under the Mental Health Act (1,218 people); 0.5% were currently detained under the Mental Health Act (44 people); 44% were carers, family or friends of someone with a mental illness (3,803 people); 26% were professionals (2,281 people). The report – fairly – reports limitations in the survey: "[o]*verall, the Alliance engaged well with some groups who are often underrepresented in mental health research (particularly respondents who are LGBTQ+). However, we did not succeed in engaging all of the groups of respondents we intended to. For example, we struggled to engage with BME respondents and men. Respondents based in Wales were not proportionally represented in the response*."

[4] This includes, the report notes (page 12) 64% of previously-detained respondents. When the question was reframed to ask "[a]*re there circumstances in which someone should be treated against their wishes if they have the capacity to make decisions about mental health treatment but refuse it?*" 50% of respondents agreed overall; 48% of previously-detained respondents agreed and 54% of professionals agreed.

committed to helping the Government to conduct a review of the Act.

If the Government does undertake the promised review of the MHA 1983 outlined above, then as has already been highlighted, it is crucial it does so on the basis of independent research as to what is actually (a) happening; and (b) needed, in particular from the perspective of service users. This survey provides a very useful starting point (and we suspect that the raw data may prove even more useful), and also an indication of some of the difficulties that may be encountered in the process.

Report of Special Rapporteur on Right to Mental Health and Human Rights

In an important report published on 6 June, the United Nations Special Rapporteur on the right to health, Dainius Pūras, has set out a call for a "sea change" in mental health care around the world. His report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health represents the latest, and by some margin the most detailed, critique of traditional conceptions of mental health and models of psychiatric treatment. Our other commitments mean that we do not have time at present to do more than reproduce the summary, but we do (a) lay down a marker that we will be returning to this report and the debates that it raises in the coming months; and (b) invite readers to follow the progress of the Wellcome Trust funded "Mental Health and Justice" project that is looking, from many different perspectives, at aspects of the debate.

Abstract summary:

This report challenges the dominant biomedical paradigm and the role of unequal power relationships that characterizes and treats mental distress for people around the globe today. Importantly, the report elaborates how the dominant biomedical narrative of mental health, closely guarded by biomedical gatekeepers, contributes to a global burden of obstacles the fuels systemic and widespread human rights violations and impedes the paradigmatic change needed to respect, protect, and fulfill the right to mental health of everyone. The report provides guidance to stakeholders on how the right to health is threatened by the existing mental health paradigm and how rights---based change is possible, affordable, and occurring in communities across income settings around the world. Critically, the report characterizes the global state of mental health not as a crisis of chemical imbalances but a crisis of power imbalances, requiring urgent policy responses to address the social determinants of mental health as well as the inward reflection of powerful stakeholders on their role in perpetuating a corrosive status quo. Care and support in the community must replace outdated models of excessive biomedical treatment and institutionalization including the use of coercion and the gratuitous, first line use of psychotropic medicines.

Key messages: There is no health without mental health:

- *Mental health is grossly neglected within health systems around the world. Where mental health systems exist, they do so in isolation, segregated from regular healthcare, despite the intimate*

relationship between physical and mental health.

• To address the grossly unmet need for rights-based mental health care and support, an assessment of the global burden of obstacles that has maintained the status quo is required, these include: the dominance of the biomedical paradigm; power asymmetries in policymaking, medical education and research, and care relationships; and, the biased use of evidence in mental health

• There is unequivocal evidence that the dominance of and the overreliance upon the biomedical paradigm, including the front-line and excessive use of psychotropic medicines, is a failure. Yet, around the world, biomedical interventions dominate mental health investment and services. This is not only a failure to integrate evidence and the voices of those most affected into policy, it is a failure to respect, protect, and fulfill the right to health. When resources appear to scale up mental health services, particularly in low and middle income countries, investments must not be dominated by medicalized service models.

• Power and decision-making in mental health policy, services, and care relationships is concentrated in the hands of biomedical gatekeepers, particularly biological psychiatry. These gatekeepers, backed by the pharmaceutical industry, consolidate this power based on two outdated medical myths: that people experiencing mental distress and diagnosed with "mental disorders" are dangerous and that biomedical interventions in many cases are medically necessary. These concepts and other "conventional wisdoms" perpetuate stigma, discrimination, and the unacceptable practice of coercion and violence that is widespread in mental health systems today.

• The biased use of evidence has corrupted our knowledge about mental health and is a serious human rights issue. Power and the dominance of the biomedical paradigm distorts how evidence is used in policy making and service delivery, affecting progress towards rights---based mental health services around the world today. A troubling example is the use of evidence to inform people with mild and moderate forms of depression that they should receive psychotropic medications (antidepressants), despite the clear evidence that any positive effect is because of placebo. The excessive use and misuse of psychotropic medications violates the right to health.

• The evolving normative framework ushered in by the Convention on the Rights of Persons with Disabilities around mental health requires a paradigm shift. There are many paths towards this change, but only one direction.

• A shift away from the dominance of the biomedical paradigm and vast power asymmetries requires mental health policymaking to scale across public sectors and integrate mental health throughout public policy. There is a human rights imperative to bring the social, psychosocial, and underlying determinants of mental health to the forefront of mental health promotion.

• The evidence and human rights imperative for a paradigmatic shift in

mental health policy and decision-making is a powerful external force for change. However, change also requires courageous action from within the corridors of power, specifically from within the psychiatric profession. The power and proximity the profession has to policymaking establishes a responsibility to use their influence to support the process of navigating mental health systems from isolated silos of mistrust and paternalism to integrated community models that foster empowerment, resilience, and inclusion.

- *Psychosocial distress will always be a part of the human experience, particularly in the face of growing inequality and discrimination. Outdated paternalistic concepts of treatment must be replaced with psychosocial care and support in the community and at the primary care level. Low cost, effective options are possible and being used around the world today.*

- *Champions of the paradigm shift in mental health are necessary to facilitate the rights-based change required. Key stakeholder champions include Member States, the leadership of organized medical professions, including psychiatry, academic centres working on mental health, and civil society.*

SCOTLAND

Draft Rules for North Strathclyde

The Sheriffdom of North Strathclyde has issued for comment a draft of a proposed Act of Court to deal with various procedural matters. Proposed Rules 3.01 and 3.02 deal with applications under the Adults with Incapacity (Scotland) Act 2000. They specify in helpful detail the information and averments required for various of the main types of application under Part 6 of the 2000 Act. However, proposed Rules 3.01 and 3.02 refer to all applications under the 2000 Act, but in fact address only applications under Part 6, and not the various other forms of application provided for by the 2000 Act. Of particular need for amendment is proposed Rule 3.02(e), which reads: "The Initial Writ must contain details of the names and addresses of all known next-of-kin of the adult, or, if there are no known next-of-kin, averments to that effect". The 2000 Act does not define "next-of-kin" nor refer to them. Applications should specify the "nearest relative", the "primary carer" and any "named person", all as defined in the Act. There are issues over definition and "where to draw the line" regarding relatives other than the nearest relative, as defined. There can be a close relative with little interest in the adult, and a more distant relative very much involved in the adult's life. The same can apply to people who are not relatives. A non-relative may be as important, or more important, in an adult's life than any relative. Any "tick-box" approach is likely to fail more often than it succeeds. To assist the court in exercising its responsibility to comply with the principles and other provisions of the 2000 Act in any one case, it may be better to continue to rely – as hitherto – on the professionalism of experienced solicitors who adequately inform themselves of the adult's whole circumstances and make a fair judgement about who should receive intimation. That includes anyone who might reasonably be expected to claim an interest in the matter.

Given the rising levels of criticism of great differences in practices and procedures across Scotland, there would be advantages in harmonising such Rules across the country except only for matters of a truly local nature.

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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click here.

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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click here.

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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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Conferences

Conferences at which editors/contributors are speaking

Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing and speaking at this conference in London on 14 July which looks both at the present and potential future state of the law in this area. For more details, see here.

The Legal Profession: Back to Basics

Adrian is a speaker and panellist on "The Legal Profession: Back to Basics" at the Annual Conference of the Law Society of Scotland at Edinburgh International Conference Centre on the afternoon of Tuesday 19th September 2017. For more details, and to book, see here.

JUSTICE Human Rights Law Conference

Tor is speaking on the panel providing the Equality and Human Rights Update at JUSTICE's Annual Human Rights Law Conference in London on 13 October. For more details, and to book, see here.

National IMCA Conferences

Alex is speaking on both litigation friends and a potential Vulnerable Adults Bill at the two National IMCA Conferences (North and South) organised by Empowerment Matters and sponsored by Irwin Mitchell. The northern conference is in Sheffield on 20 October; the southern is in London on 10 November.

National Advocacy Conference

Alex is speaking on advocacy as a support for legal capacity and doing a joint workshop with Jess Flanagan on advocacy and available options at the National Advocacy Conference in Birmingham on 19 October. For more details, and to book tickets see here.

Advertising conferences and training events

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

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

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